D. TRIAL

D.1. Fair trial

TITLE: Ellyson v. State
INDEX NO.: D.1.
CITE: (12/3/92), Ind. App, 603 N.E.2d 1369
SUBJECT: Fair trial - Ineffective Assistance of Counsel
HOLDING: Constitution guarantees fair trial via Due Process Clause but defines basic elements of fair trial largely through several provisions of 6th Amend. Fair trial is one in which evidence subject to adversarial testing is presented to impartial tribunal for resolution of issues defined in advance of trial. Fair trial is denied only when conviction results from breakdown in adversarial process which renders trial result unreliable Siglar, 541 N.E.2d 944. Here, D was denied fair trial due to ineffective assistance of counsel (See card at Y.4.b). To show trial result is unreliable, D must show that, but for counsel's unprofessional errors, result probably would have been different. Best, 566 N.E.2d 1027. Held, reversed & remanded for new trial.

TITLE: Holbrook v. Flynn
INDEX NO.: D.1.
CITE: 475 U.S. 560 (1986)
SUBJECT: Impartial Atmosphere - Presence of uniformed officers in courtroom
HOLDING: D was not denied right to fair trial when, at his trial with 5 Co-Ds, customary courtroom security force was supplemented by 4 uniformed state troopers sitting in 1st row of spectator section. There was no reason to believe that troopers' presence tended to brand D with guilt. Any D accused of crime is entitled to have his guilt or innocence determined solely on evidence introduced at trial, not on grounds of official suspicion, indictment, or continued custody. Conspicuous deployment of security personnel in courtroom during trial is not inherently prejudicial practice & must be examined on case-by-case basis. Sight of security force within courtroom might under certain conditions create impression in minds of jury that D is dangerous & untrustworthy. Whenever courtroom arrangement is challenged as inherently prejudicial, question is not whether jurors articulated a consciousness of some prejudicial effect, nor whether it might have been feasible for state to have employed less conspicuous security measures, but rather whether there was an unacceptable risk of prejudice. Held, conviction affirmed. Burger, C.J., concurring.

TITLE: Holifield v. State
INDEX NO.: D.1.
CITE: (6/3/91), Ind., 572 N.E.2d 490
SUBJECT: Impartial Atmosphere - Presence of uniformed officers
HOLDING: Presence of armed personnel in courtroom is not a practice that is inherently prejudicial & must be examined on case-by-case basis. Holbrook v. Flynn, 475 U.S. 560. Here, record did not show that presence of armed uniformed officers exceeded natural expectations of a reasonable person. Ds claimed Tr. Ct. erred in permitting excessive security personnel in courtroom & that presence of large number of uniformed officers conveyed to jury they were unusual security risk, thus prejudicing their defense. It was necessary to have armed guards present because four Ds were inmates of maximum-security prison. In addition to usual necessary guards, there were several new recruits of state police present to observe trial as part of their training. Tr. Ct. explained & admonished jury that they were to attach no significance to presence of these extra officers. Held, no error.

RELATED CASES: Meadows, App., 785 N.E.2d 1112 (D was not prejudiced by presence of uniformed officers in courtroom).

TITLE: People v. Blue
INDEX NO.: D.1.
CITE: 724 N.E.2d 920 (Ill. 2000)
SUBJECT: Prosecutorial Misconduct -- Fundamental Unfairness
HOLDING: Despite overwhelming evidence of guilt, Illinois Supreme Court reverses murder conviction due to prosecutorial misconduct which it said undermined the integrity of the judicial process. D was charged with shooting police officer, and during guilt phase of trial, as well as during jury deliberations, prosecutors displayed blood and brain-spattered uniform of officer on headless mannequin. State argued that uniform corroborated medical evidence concerning location and nature of officer's wounds. Because these facts were not seriously in issue, and because of the tremendous prejudicial impact of uniform covered with both blood and brains, display of uniform was improper. Prosecutors also made emotional argument to jury during guilt phase describing in great detail the loss suffered by the victim's parents, wife, and children, and telling jurors that victim's family, as well as other police officers, needed to hear from jury that you cannot shoot an officer and get away with it. This argument was inflammatory and prejudicial and had nothing to do with D's guilt or innocence. Finally, during both direct and cross-examination of D's girlfriend, prosecutor repeatedly objected by saying, "That's a lie," and in two instances, going on to state the prosecutor's version of events. These "objections" violated the prohibition against an advocate becoming a witness. The state argued that evidence of D's guilt was so overwhelming that any prosecutorial misconduct was harmless. The Illinois Supreme Court disagreed, pointing out that prejudice to the D was not its sole concern, and that even guilty Ds must be tried fairly in order to preserve the integrity of the judicial process. The Court found that the prosecutors' acts indeed cast doubt on the integrity of the judicial process, and taken together, they created a pervasive pattern of unfair prejudice, requiring reversal.

D. TRIAL

D.1. Fair trial

D.1.a. Publicity (see, also J.4)

TITLE: Bauer v. State
INDEX NO.: D.1.a.
CITE: (12/2/83) Ind., 456 N.E.2d 414
SUBJECT: Pretrial publicity - grounds for change of venue (COV)
HOLDING: Tr. Ct. did not err in denying D's motion for COV where D failed to prove community bias or prejudice. Here, D contends pretrial publicity (50 pre-arrest, 180 post-arrest articles) concerning "silver compact car rapist" created atmosphere which prevented selection of impartial jury. His prior trial & conviction in same county generated publicity which D argues prejudiced potential jurors in this trial. Phrase "silver compact car rapist" was connected with 13 incidents; D was charged with 3. D was not charged with rape in this case. Tr. Ct. postponed this trial 2 months when it found it could not select fair/impartial jury. Tr. Ct. has discretion re COV motions & must balance rights of news media, D & citizens. Comstock, 406 N.E.2d 1164. D has burden of showing local prejudice & corrupted trial atmosphere; amount of pretrial publicity does not automatically produce such an atmosphere. Murphy v. FL, (1975) 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589; Drollinger, 408 N.E.2d 1228; Haybron, 396 N.E.2d 891. D must show community bias-prejudice sufficient to convince Tr. Ct. D cannot obtain fair trial in that county. Mere possibility of prejudice does not entitle D to COV. Trevino, App., 428 N.E.2d 263. Mere knowledge of crime does not necessarily produce a venire that cannot fairly judge D based on evidence adduced at trial. Held, no abuse of discretion.

RELATED CASES: Hadley, 496 N.E.2d 67 (Crim L 1164(4); judge should have allowed D to present testimony of 3 witnesses re existence of community bias/prejudice, but in light of other evidence, error does not require reversal); Bixler, 471 N.E.2d 1093 (survey results discounted entirely): Kappos, 465 N.E.2d 1092 (survey results did not demonstrate pattern of deep/bitter resentment in community); Tabor, 461 N.E.2d 118; McReynolds, 460 N.E.2d 960.

TITLE: Boggs v. State
INDEX NO.: D.1.a.
CITE: 667 So.2d 765 (Fla. 1996)
SUBJECT: Pretrial Publicity - Individual Voir Dire
HOLDING: Where two newspapers published articles on eve of trial reporting allegations that capital murder D was faking mental illness, and that he had been convicted previously of charged offenses, it was abuse of discretion for Tr. Ct. to bar individual inquiry of venire persons who had read articles and could not say whether they could set aside their opinions and render verdict solely on evidence presented at trial. Timing and content of articles, together with statements made by venire persons, compelled individual voir dire on this issue.

TITLE: Jarvis v. State
INDEX NO.: D.1.a.
CITE: (10/26/82), Ind., 441 N.E.2d 1
SUBJECT: Publicity - Ct.'s duties
HOLDING: When advised of improper & prejudicial publicity, Tr. Ct. should make determination of likelihood of resulting prejudice, both upon basis of content of publication & likelihood of its having come to attention of any juror. If risk of prejudice appears substantial, Ct. should interrogate jury collectively to determine who might have been exposed. Lindsey, 295 N.E.2d 819. See Liddle, 297 N.E.2d 801. Here, on fifth & final day of trial, D introduced copy of articles published on 4 preceding days & requested Tr. Ct. interrogate jury to determine if any members had read articles. Ct. finds Tr. Ct. had already questioned jurors about some of the articles; the others did not contain objectionable matter. Held, D's motion not supported by showing of substantial peril & was properly denied.

RELATED CASES: Barnes, 693 N.E.2d 520 (media coverage did not unfairly portray D); Fisher, 468 N.E.2d 1365 (D failed to show risk of prejudice; held, no error in denial of motion to poll jury re publicity); Leavell, 455 N.E.2d 1110 (no error in denial of mistrial motion (predicated on publicity that co-Ds in joint trial with D pled guilty & would testify for state) where judge conducted individual interview with each juror & gave cautionary instruction).

TITLE: Jarvis v. State
INDEX NO.: D.1.a.
CITE: (10/26/82), Ind., 441 N.E.2d 1
SUBJECT: Publicity - burden on D
HOLDING: Burden is on D to show jurors, having seen publicity about case, cannot remain impartial. Irvin v. Dowd, (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751; Atkinson, App., 411 N.E.2d 651. Here, D moved for mistrial because prospective jurors had been exposed to publicity concerning case. When Tr. Ct. inquired whether panel members had formulated an opinion based on the publicity, one man said case seemed "cut & dried." He was dismissed. Two prospective jurors who heard his statement had not read same article. One asserted what he had read would not influence him, the other had only a vague recollection of what she'd read. Record indicates neither were influenced by statement of excused venire man. Held, no error in denying mistrial.

RELATED CASES: McKean, 500 N.E.2d 1184 (witness testified & news-related exhibits were introduced at hearing on motion for change of venue (COV); held, no error in denial of motion); Ashby, 486 N.E.2d 469 (denial of COV upheld despite burning cross & skinned raccoon outside jail where D, a black man, was held for kidnap & rape of white teenage girl & despite 100 occasions of media coverage; Ct. finds media coverage was factually based & lacked degree of sensationalism of Irvin); Gillie, 465 N.E.2d 1380 (articles did not sensationalize crime as in Irvin v. Dowd & Baniszewski, 261 N.E.2d 359; held, D failed to prove impartiality).

TITLE: Stroud v. State
INDEX NO.: D.1.a.
CITE: (3rd Dist., 4-30-03), Ind. App., 787 N.E.2d 430
SUBJECT: Pretrial publicity - denial of motion for mistrial; reversible error
HOLDING: In dealing in cocaine prosecution, Tr. Ct. abused its discretion in denying D's motion for mistrial, where jury was irreversibly tainted on first day of trial by exposure to newspaper article. Highly prejudicial article informed jury that D had already been convicted of committing similar offense, was currently charged with triple homicide, & that he exhibited egregious inappropriate & antisocial behavior during previous proceedings. When apprised of existence of article, Tr. Ct. failed to follow procedure prescribed in Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819 (1973) in two important respects. First, Tr. Ct. questioned initially exposed jurors about content of article in presence of other jurors who had not read article. That, in turn, contaminated those who had not read article. Second, Tr. Ct. did not specifically admonish jurors to disregard what they had read in article. In view of magnitude of taint, Tr. Ct. should have, at a minimum, affirmatively instructed jurors to disregard anything they read in article. Failure to do so rendered court's curative comments ineffectual. Held, conviction reversed; Sharpnack, J., dissenting, believed that error was cured by Tr. Ct.'s admonishments & that because evidence of guilt was overwhelming, probable persuasive effect of prejudicial article was relatively minor.

RELATED CASES: Morgan, 903 N.E.2d 1010 (Ind. Ct. App. 2009) (where Tr. Ct. questioned jurors who emphatically claimed they could be fair despite learning, at least in part, through publicity, that a state's witness had disappeared and Tr. Ct. admonished the jury, Tr. Ct. properly denied D's request to dismiss jurors and for a mistrial).

TITLE: Wilburn v. State
INDEX NO.: D.1.a.
CITE: (12/27/82), Ind., 442 N.E.2d 1098
SUBJECT: Publicity
HOLDING: In alleging that jury is tainted because of exposure to pre-trial publicity or other information about case, D must show which jurors were exposed, what the prejudicial publicity was, or how jurors were harmed. Owen, 381 N.E.2d 1235. Here, D maintains 14-day delay between selection of jury & start of trial created such a great possibility of taint that he was deprived of a fair trial & due process of law. Trial was continued following jury selection because of absence of 2 state's witnesses. Judge admonished jurors not to discuss case with anyone. When jurors returned for trial, judge questioned them to make certain they had not read or heard anything about the case that might affect their ability to be fair & impartial. Held, no error.

RELATED CASES: Green, App., 753 N.E.2d 52 (although D showed existence of prejudicial pretrial publicity, he failed to show that seated jurors were unable to set aside any preconceived notions of guilt, & decide case based upon evidence).

D. TRIAL

D.1. Fair trial

D.1.b. Gag orders

TITLE: Averhart v. State
INDEX NO.: D.1.b.
CITE: (10/29/84), Ind., 470 N.E.2d 666
SUBJECT: Violation of alleged gag order - no error
HOLDING: D claimed jury was tainted by pretrial publicity in violation of alleged "gag order" governing all parties against release of information to press. No evidence of gag order in record. Further, total lack of showing by D that jury was tainted by pretrial or in-trial publicity or that there was any prejudice in community that would prevent D from receiving fair trial by jurors in that community. Photograph from bank camera shown on T.V. was broadcast only one time & by one station; only one prospective juror had seen or heard any publicity about case & that juror was excluded for other reasons; & change of venue had been granted because of newspaper article in county in which offense occurred. Ct. rejected claim that violation of alleged gag order denied D fair trial by jurors. Held, no error.

TITLE: Gentile v. State Bar of Nevada
INDEX NO.: D.1.b.
CITE: 501 U.S. 1030 (1991)
SUBJECT: Gag orders - 1st Amendment
HOLDING: Nevada Supreme Court rule prohibiting lawyer from making extrajudicial statements to press that he knows or reasonably should know would have "substantial likelihood of materially prejudicing" adjudicative proceeding was void for vagueness as applied by state court, which held that attorney violated rule by making statements to press after client was indicted. Lawyer stated that State sought to indict & convict innocent man as "scapegoat" & had not been honest enough to indict "the people who did it; the police department, crooked cops." Safe harbor provision of rule misled attorney into thinking that he could give statements without fear of discipline. Given rule's grammatical structure & absence of clarification by state court, rule failed to give fair notice & was so imprecise that impermissible risk of discriminatory enforcement existed. Lawyers' rights to free speech are extremely circumscribed in courtroom & limited outside courtroom as well. Speech of lawyers in pending cases may be regulated under less demanding standard than "clear & present danger" of actual prejudice or "imminent threat" standard for regulation of press during pending proceedings. Where state regulation implicates 1st Amend. rights, S. Ct. must balance those rights against State's legitimate interest in regulating activity in question. Public awareness & criticism have great importance in protecting against miscarriages of justice by subjecting the government to extensive public scrutiny & criticism."Substantial likelihood" standard is designed to protect integrity & fairness of state's judicial system & imposes only narrow & necessary limitations on lawyer's speech, i.e., comments that are likely to influence actual outcome of trial, & comments that are likely to prejudice jury venire, even if impartial panel can ultimately be found. Although standard was unconstitutional as applied in this case, Court held the requisite showing that attorney knows or reasonably should know statements will have "substantial likelihood of materially prejudicing" proceeding satisfies 1st Amend. Held, judgment reversed, O'Connor, J., concurring. **Note:** Ind. Prof. Cond. Rule 3.6 contains substantial likelihood standard identical to Nevada rule. Among statements rebutably presumed to have substantial likelihood of materially prejudicing proceedings are references to: (1) character, credibility, reputation or criminal record of party, suspect, or identity of a witness, or expected testimony of witness; (2) possibility of plea of guilty or reference to any confession, admission, or refusal or failure to make statement by D or suspect; (3) any opinion as to guilt or innocence of D or suspect; & (4) information lawyer knows is likely inadmissible at trial.

TITLE: South Bend Tribune v. Elkhart Circuit Ct.
INDEX NO.: D.1.b.
CITE: (3rd Dist., 1-16-98), Ind. App., 691 N.E.2d 200
SUBJECT: Gag order imposed on parties - no prior restraint
HOLDING: Gag order placed upon participants in criminal trial was not prior restraint upon press because it did not apply to media & did not prevent them from covering trial. Application of Dow Jones & Co., Inc., 842 F.2d 603 (2nd Cir. 1988). Applying test used in Dow Jones, Ct. held that gag order was justified in light of surrounding facts. Tr. Ct. was in best position to determine that there was reasonable likelihood that pretrial publicity would prejudice fair trial & that only effective remedy was order restraining parties from discussing case with media. Held, denial of media's motion to quash & clarification of gag order affirmed.

D. TRIAL

D.3. Public trial/closure (1st and 6th Amend; IndConst Art 1, 13)

TITLE: Ex Parte Easterwood
INDEX NO.: D.3.
CITE: 980 So.2d 367 (Ala. 2007)
SUBJECT: Removal of spectators violated right to public trial
HOLDING: Alabama Supreme Court held D was denied his Sixth Amendment right to a public trial when the reluctance of an adult witness to testify about child sex abuse prompted the trial judge to remove all spectators except for D's mother from the courtroom. State had called an adult witness to testify about a sexual relationship he had with D when he was a child, in order to establish D's motive for the charged offense. However, upon taking the stand, the victim stated that the subject was so humiliating he might not be able to talk about it, prompting the Tr. Ct.'s action.Utilizing the four-part test in Waller v. Georgia, 467 U.S. 39 (1984), Court first determined that the closure of the trial was total, noting that if a D's mother is "the only person allowed to remain in the courtroom, it is doubtful that the constitutional considerations of the public-trial guarantee - promoting a fair trial, discouraging perjury, and ensuring that the prosecutor, judge, and jury act responsibly - could be adequately protected." After applying the Waller test, Court held that D was entitled to a new trial because no overriding interest was advanced that would justify the total closure of the courtroom.

TITLE: Hackett v. State
INDEX NO.: D.3.
CITE: (3/18/77), Ind., 360 N.E.2d 1000
SUBJECT: Closure of courtroom during testimony of single witness
HOLDING: Tr. Ct.'s removal of all spectators from courtroom during testimony of single witness to alleviate witness's fears & receive her testimony did not violate D's right to public trial. Defense counsel was permitted to depose surprise witness in courtroom prior to the court receiving her testimony. During deposition, witness repeatedly hesitated to respond to questions because of fear of D's relatives & friends. Limited restriction on right to public trial are within Tr. Ct.'s discretion where restriction is related to legitimate purpose which furthers integrity of judicial process, so long as there is sufficient record supporting judge's exercise of that discretion. Held, judgment affirmed.

TITLE: State etc. rel. Post-Tribune Pub. Co. v. Porter Superior Court
INDEX NO.: D.3.
CITE: (11/25/80), Ind., 412 N.E.2d 748
SUBJECT: Right to Public trial - Media's access to trial
HOLDING: Right to public trial is personal to accused & may be waived & does not carry with it right to trial from which public & press are barred. Tr. Ct.s' are required to give all appropriate deference to assumed First Amendment right of media access to trial, & hearing prior to ordering closure is favored & is norm. Objection to closure strongly supports necessity of hearing before ordering closure, but where holding of hearing will vitiate critical interests of ct. public, state, & rights of accused, closure without precedent hearing may be consistent with right to access of public & press. Where newspaper company & its reporter sought writ of mandate & prohibition requiring Tr. Ct. to expunge orders closing pretrial hearing, absence of hearing prior to closure was not inconsistent with assumed right of public & media to access to pre-trial hearing where D had given express waiver of any right to public trial & record showed judge was attentive of rights of D, of interest of public, of the witnesses, & of prospective jurors. Relators failed to sustain burden showing judge should not have ordered closure. Held, writ denied.

D. TRIAL

D.3. Public trial/closure (1st and 6th Amend; Ind. Const. Art 1, 13)

D.3.a. Pretrial proceedings

TITLE: Press-Enterprise Co. v. Superior Court of CA
INDEX NO.: D.3.a.
CITE: 464 U.S. 501 (1984)
SUBJECT: Closure - voir dire proceeding
HOLDING: Tr. Ct. erred in closing all but 3 days of 6 weeks of voir dire proceedings in capital murder (rape/murder of 15-year-old white by 26-year-old black). Guarantees of open public proceedings in criminal trials extends to voir dire. Presumption of openness may be overcome only by overriding interest based on specific findings that closure is essential to preserve higher values & is narrowly tailored to serve that interest. Here, Tr. Ct. concluded that D's 6th Amend right to fair trial & prospective jurors' privacy interests were sufficient. U.S. S. Ct. holds findings inadequate to show open proceedings threatened those interests; Tr. Ct. failed to consider alternatives to closure. "Absent consideration of alternatives to closure, the Tr. Ct. could not constitutionally close the voir dire." Court suggests burden to assert privacy interest should be on individual being questioned. Tr. Ct. sealed entire transcript of closed voir dire proceedings. U.S. S. Ct. suggests alternatives: seal only that part of transcript that raises valid privacy interest or withhold name of prospective juror.

D. TRIAL

D.3. Public trial/closure (1st and 6th Amend; IndConst Art 1, 13)

D.3.b. Trial Proceedings

TITLE: Compton v. State

INDEX NO.: D.3.b.

CITE: (8/24/2016), 58 N.E.3d 1006 (Ind. Ct. App. 2015)

SUBJECT: Media's use of Twitter in courtroom during trial was not inherently prejudicial "broadcasting"

HOLDING: D was not denied due process when the media was allowed to Tweet live updates of his felony murder trial from the courtroom. Rule 2.7 of the Code of Judicial Conduct provides that, absent prior approval of Indiana Supreme Court, "a judge shall prohibit broadcasting, televising, recording, or taking photographs in the courtroom...during sessions of court." Even assuming using Twitter is "broadcasting," broadcasting is not inherently prejudicial and D has shown no specific prejudice to him in this case. Willard v. State, 272 Ind. 589, 400 N.E.2d 151 (1980). Similar to Willard, the evidence against D, including his inculpatory statements, is overwhelming. Prior to trial, jury was instructed not to receive information about the case from any source, including internet sources; the jury was sequestered during the Twitter discussion; and Tr. Ct. instructed the media not to Tweet in a manner that would disrupt proceedings. Tr. Ct. instructed attorneys to notify their respective witnesses not to use Twitter until after they testified and there is no evidence any witness or jurors viewed any Tweets pertaining to the trial.

In footnote, Court expressed concern as to impact social media applications have on due process and trials, but declined to opine whether the use of Twitter should be permitted in the courtroom. Held, judgment affirmed.

TITLE: Kendrick v. State
INDEX NO.: D.3.b.
CITE: (3rd Dist., 2-27-96), Ind. App., 661 N.E.2d 1242
SUBJECT: Right to public trial - specific findings required to support closing courtroom
HOLDING: To protect D's right to public trial under Sixth Amendment & Article I, Sec. 13 of Ind. Constitution, Tr. Ct. is required to make specific findings concerning interests at issue, showing that closure is as narrow as possible or that alternatives to closure are considered. Here, prior to trial, State filed motion asking that Courtroom be closed to public during informant's testimony due to informant's fear for his life. Tr. Ct. granted motion but failed to enter specific findings in support of its order to close Courtroom. Ct. noted that public trials play important role in judicial system, but that public trials can be limited by D's right to fair trial or government's interest in inhibiting disclosure of sensitive information. Waller v. Georgia, 467 U.S. 39 (1984). Cts. should use following four-part analysis in determining whether to close proceedings to public: 1) party seeking to close hearing must advance overriding interest that is likely to be prejudiced, 2) closure must be no broader than necessary to protect that interest, 3) Tr. Ct. must consider reasonable alternatives to closing proceeding, & 4) it must make findings adequate to support closure. Held, remanded with instructions to enter specific findings in support of order; Hoffman, J., dissenting.

Note: See Kendrick, App., 670 N.E.2d 369 (on remand, Tr. Ct. properly determined that because D had history of violence, two of his friends should be excluded from Ct. room during confidential informant's testimony so that they would not be able to identify him later; protecting confidential informant is overriding interest which can limit D's right to public trial.)

TITLE: Lappin v. State

INDEX NO.: D.3.b.

CITE: (06/14/2021), Ind. Ct. App., 171 N.E.2d 702

SUBJECT: Limiting public seating in courtroom and audio streaming of voir dire due to Covid-19 restrictions did not violate right to public trial

HOLDING: Defendant was tried by jury, October 1, 2020, during the Covid-19 pandemic. Live stream of voir dire was audio only to the lobby of where the trial was being held due to covid-19 restrictions and where the public could hear the audio. Court of Appeals found no violation of Defendant's right to public trial and that trial court struck the right balance between Defendant's right to public trial and privacy of venire. Also, no violation in limiting number of spectators to four, due to pandemic-related restrictions. Applying the four-part test set out in Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215 (1984), the Court held that Defendant was not denied his right to a public trial and the trial court did incorporate reasonable alternatives.

TITLE: Williams v. State
INDEX NO.: D.3.b.
CITE: (12-11-97), Ind., 690 N.E.2d 162
SUBJECT: Right to public trial - identification procedures
HOLDING: Use of identification procedures at Ct. room door did not violate D's right to public trial as guaranteed by § 13 of Indiana Constitution & by Sixth Amendment to U.S. Constitution. During trial, members of public who sought access to Ct. room were required to pass through metal detector & wand. In addition, spectators who were unknown to Tr. Ct. were required to present identification to officer at door & sign in. Neither requirement actively excluded anyone, & D did not argue that procedures made it physically impossible for anyone to attend trial. Violation of right to public trial requires some showing that Tr. Ct. physically prevented public from attending, but right does not protect against constructive exclusion. Even if some of D's supporters decided not to attend trial because of security procedures, right to public trial was not implicated because there was no evidence, or even allegation, as to how this affected fairness of proceedings or objectives of Sixth Amendment.

However, Ct. required under its supervisory powers that Tr. Ct. make finding that specifically supports any measures taken beyond what is customarily permitted that are likely to affect unfettered access by press & public to Ct. room. Finding must provide reasons for action taken, & show that both burdens & benefits of action have been considered. Held, convictions for murder & conspiracy to commit murder affirmed; attempted murder conviction reversed.

D. TRIAL

D.3. Public trial/closure (1st and 6th Amend; IndConst Art 1, 13)

D.3.c. Cameras in courtroom

TITLE: Van Orden v. State
INDEX NO.: D.3.c.
CITE: (10/26/84), Ind., 469 N.E.2d 1153
SUBJECT: Cameras in Ct. room - D requests
HOLDING: Tr. Ct. did not err in denying D's motion to televise proceedings of her murder trial. Here, D wascharged with murder of Evansville mayor. She contends she was denied a fair & public trial by Ct.'s ruling. 6th Amend does not require trial be broadcast live or on tape to public. Requirements of public trial are satisfied by opportunity for public/press to attend/report what they observe. Nixon v. Warner Communications, Inc., (1978), 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570. Held, no error.

D. TRIAL

D.4. Presence/appearance of D

D.4.a. Presence of D and counsel

TITLE: Adams v. State
INDEX NO.: D.4.a
CITE: (6/29/87), Ind., 509 N.E.2d 812
SUBJECT: Presence of D at trial - waiver; competency
HOLDING: Tr. Ct. did not err in refusing to conduct competency hearing. Here, D filed 10 pro se motions despite fact he had public defender. D's counsel filed motion that D lacked comprehension to stand trial. Tr. Ct. appointed 2 doctors to examine D; one found him competent & one found him incompetent. Tr. Ct. appointed third doctor who found D competent. D continued to file pro se motions. His public defender withdrew; another was appointed. On day of voir dire, D refused to leave his jail cell. He claimed he was physically & mentally unable to attend his trial because of his mental condition. Tr. Ct conducted a hearing in D's cell, during which D was examined by nurse & found fit to attend trial. Tr. Ct. found D waived right to be present at trial. Ct. finds Tr. Ct. justifiably relied on finding of 2 doctors that D was competent; therefore, no competency hearing was required. 6th Amend. & Ind. Const. Art. 1, §13, guarantee right to be present during trial. Cape, 400 N.E.2d 161. D may waive right to be present at trial. Blatz, 486 N.E.2d 990; Martin, 457 N.E.2d 1085; Faison, 428 N.E.2d 784; Shepler, 412 N.E.2d 62. Waiver occurs where D fails to appear at his trial knowing he has obligation to appear. Blatz, Ct. finds D waived right to be present; therefore, it was not error for Tr. Ct. to proceed with trial absente reo. Held, conviction affirmed. DeBruler CONCURS IN RESULT without opinion.

RELATED CASES: Johnston, 126 N.E.3d 878 (Ind. Ct. App. 2019) (unruly D was properly removed from courtroom and tried in abstentia); Wilson, 30 N.E.3d 1264 (Ind. Ct. App. 2015) (Tr. Ct. did not abuse its discretion in removing D from courtroom during enhancement phase after his outburst with members of gallery; D used profanity, generally disrupted proceedings, became physical with bailiffs, "continued to exhibit contumacious behavior in the contempt hearing," and agreed with Tr. Ct.'s decision to exclude him; actions amounted to waiver of right to be present); Dodson, 502 N.E.2d 1333 (Ct. finds waiver of right to be present where D suffered epileptic seizure during testimony of former girlfriend & asked to be out of Courtroom when she testified because it was so upsetting; Ct. rejects D's argument that seizure rendered him unable to waive right); Fennell, 492 N.E.2d 297 (circumstantial evidence indicated D knew of trial date; therefore, D was properly tried in absentia); Perry 471 N.E.2d 270 (Ct. finds D waived right to be present by disruptive outbursts, citing IL v. Allen, (1970), 90 S. Ct. 1057, & Howard, 377 N.E.2d 628); Bullock, 451 N.E.2d 646 (although constitution & statutes provide D shall be present at trial, D can waive right in non-capital case [citations omitted]; here, evidence shows D knew of trial date & voluntarily absented herself from county); Jones, 449 N.E.2d 1060 (D, who requested to remain in jail cell during trial (because of dissatisfaction with counsel, was thoroughly advised of right to be present; held, waiver of presence voluntary); Hudson, App., 462 N.E.2d 1077; Walton, App., 454 N.E.2d 443 (D, who failed to appear on first day of trial, offered no explanation of his absence when he appeared on second day; held, Tr. Ct.'s presumption of waiver of presence may have been inappropriate, but D failed to preserve issue).

TITLE: Brown v. State
INDEX NO.: D.4.a
CITE: (5th Dist., 12-19-05), Ind. App., 839 N.E.2d 225
SUBJECT: Incarcerated D voluntarily absent from trial -- failure to notify
HOLDING: D voluntarily waived his right to be present for trial & was properly tried in absentia despite being incarcerated in another county at time of trial. At two pre-trial hearings, D was advised of his trial date & that he could be tried in absentia if he failed to appear. D failed to advise Tr .Ct. or his counsel of his incarceration despite having 45 days while incarcerated to inform either of his predicament. Neither did D present any evidence that he tried to contact anyone involved with his trial or was prevented from such communication. Ct. noted that the "best evidence" of knowledge is D's presence in Ct. on day matter is set for trial. Fennell v. State, 492 N.E.2d 297 (Ind.1986). If present, the burden shifts to D to "explain his absence & thereby rebut the initial presumption of waiver." Ellis v. State, 525 N.E.2d 610 (Ind. Ct. App.1987). Ct. distinguished several cases from other jurisdictions that granted new trials where a D was in police custody at time of trial & failed to attend, noting distinguishing factors in the amount of time D had to advise a Ct. of his situation & the sufficiency of the waiver of rights. Moreover, cases were interpreting Federal Rule of Criminal Procedure 43, which is inapplicable here. Held, judgment affirmed.

TITLE: Brown v. State
INDEX NO.: D.4.a
CITE: (2/15/83), Ind., 445 N.E.2d 82
SUBJECT: Presence of D at trial - presumptions
HOLDING: Where record does not indicate whether D was present when jury was discharged, D is presumed to have been present. Campbell, (1897) 148 Ind. 527. Here, D contended discharge of jury at 3 a.m. when neither he nor his attorney were present amounted to an acquittal, *citing* State v. Wilson, (1875) 50 Ind. 487, & thus his retrial violated double jeopardy. Ct. finds D did not meet burden of producing record to support his claim & to overcome presumption that he was present in Ct. room. In addition, D waived issue by failing to raise it in MCE. Held, no error.

TITLE: Correll v. State
INDEX NO.: D.4.a.
CITE: (4th Dist., 09-08-94), Ind. App., 639 N.E.2d 677
SUBJECT: D's right to testify
HOLDING: Where D did not prove his counsel prevented him from testifying, it was not error for Tr. Ct. to fail to determine knowing & voluntary waiver of right, & D was not denied constitutional right to testify on own behalf. Day before trial, D sent judge note expressing dissatisfaction with appointed counsel, including fact counsel didn't want him to testify. After hearing, Tr. Ct. denied D's various motions. D argued that Tr. Ct. had to insure he properly waived right to testify, relying on Winkelman, App., 498 N.E.2d 99, but Ct. distinguished Winkelman because there Ds were proceeding pro se, & Tr. Ct. was actively involved in their failure to testify. Ct. instead relied on Underwood v. Clark, (7th Cir., 1991), 939 N.E.2d 473, where Ct. found mere allegation that lawyer wouldn't let D testify was insufficient to require action on claim, & that some additional substantiation was necessary. Here, trial counsel testified at PCR hearing that he decided it was better if D didn't testify, & that he told him not to. Although D testified that he understood judge's ruling denying his motions to mean he couldn't take stand, Ct. found D's perceptions that he wouldn't be allowed to testify didn't rise to level of substantiation required to establish denial of right. Held, affirmed on this issue, remanded on another.

RELATED CASES: Fonner, 955 N.E. 2d 24 (Ind. Ct. App. 2011) (error in failing to explain to D that he had right to offer his own testimony at trial was harmless because D did not indicate what testimony he would have offered at trial had he received the proper advisement or what evidence was not rendered admissible because he did not know he could testify); Vanzandt, App., 730 N.E.2d 721 (although judge told D that he would be crazy to testify, D's decision not to testify was voluntarily made); Phillips, 673 N.E.2d 1200 (trial judge has no affirmative duty to insure that D represented by counsel knowingly & intelligently waived his right to testify at trial).

TITLE: Deck v. Missouri
INDEX NO.: D.4.a.
CITE: 544 U.S. 622, 125 S. Ct. 2007; 161 L.Ed. 2d 953 (2005)
SUBJECT: Capital penalty phase, shackling, due process
HOLDING: During the retrial of the capital penalty phase, over counsel's objection, D was shackled with leg irons, handcuffs and a belly chain. Held, the use of visible shackles during a capital penalty trial violates the 5th and 14th Amendments unless there is a state interest specific to the particular D on trial. Although the D had already been convicted, the use of shackles at his penalty trial threatened concerns related to the presumption of innocence; the D's appearance in shackles implies to a jury that authorities consider him a danger to the community (which is often a statutory aggravator) and undermines the jury's ability to weigh relevant considerations and determine whether the D deserves death.

TITLE: Diaz v. State
INDEX NO: D.4.a.
CITE: (10-7-02), Ind. App., 775 N.E.2d 1212
SUBJECT: Trial in absentia - inappropriate where D did not waive right to be present at trial
HOLDING: Tr. Ct. erred in trying & sentencing D in absentia because there was no determination that D had voluntarily, knowingly, & intelligently waived his right to be present at trial. Tr. Ct. may presume D voluntarily, knowingly, & intelligently waived right to be present & try D in absentia upon showing that D knew scheduled trial date but failed to appear. Ellis v. State, 525 N.E.2d 610 (Ind. Ct. App. 1987). Here, D appeared at pretrial conference at which trial date was set; however, record clearly indicates that D did not understand English & was silent as to whether he was assisted by an interpreter at pretrial conference or was otherwise able to understand proceedings. Fact that D was told scheduled trial date is far from dispositive as to whether he actually knew the date. Therefore, Ct. remanded case for hearing to determine whether D voluntarily, knowingly, & intelligently waived right to be present at trial.

RELATED CASES: Calvert, 14 N.E.3d 818 (Ind. Ct. App. 2014) (Tr. Ct. erroneously tried D in absentia while he was on active duty with U.S. Army in Afghanistan; see full review at D.5.a).

TITLE: Diekhoff v. State
INDEX NO.: D.4.a.
CITE: (6/21/90), Ind., 555 N.E.2d 477
SUBJECT: Trial in absentia – counsel's misconduct or mistake
HOLDING: Tr. Ct. erred in ordering trial to begin in absence of D & counsel where D was waiting in counsel's office on counsel's instructions. At end of first day of D's trial, Tr. Ct. adjourned & stated that trial would reconvene at 8:30 next morning. At 8:35, one of D's lawyers entered courtroom & expressed surprise that trial was ready to begin. He then called his office where D was awaiting arrival of other lawyer & told D to wait there until other lawyer arrived. Then, although Tr. Ct. told counsel that trial was beginning, he left to interview potential witness. Tr. Ct. then instructed prosecutor to call witness, & prosecutor called victim. Twenty minutes later, defense counsel arrived in courtroom together & expressed surprise that questioning of victim had proceeded in their absence. Their request for recess was denied. Prosecutor was directed to continue questioning of victim, & when he finished, D's counsel moved for mistrial, which was denied. On appeal, D argues that failure to grant mistrial was error. Ind. S. Ct. notes that counsel's failure to understand time that trial was to reconvene was strange, since everyone else concerned, including D, indicated that they knew correct time. Even if counsel's claim is true, conduct of counsel who was present & left when Tr. Ct. indicated trial would begin would have justified contempt finding. However, given that contempt & other avenues were available to Tr. Ct. for dealing with counsel's conduct, such conduct cannot justify Tr. Ct.'s ordering trial to proceed in D's absence. Held, reversed & remanded for new trial. DeBruler & Dickson, JJ. CONCUR IN RESULT.

TITLE: Dixon v. State
INDEX NO.: D.4.a.
CITE: (5th Dist., 9-16-97), Ind. App., 685 N.E.2d 715
SUBJECT: D's presence -- license suspension after sentencing hearing
HOLDING: Tr. Ct. did not err in entering mandatory recommendation of license suspension without presence of D after previously conducting full sentencing hearing. Because D was convicted of operating vehicle while intoxicated resulting in death & operating vehicle with .10% or more BAC resulting in death, Tr. Ct. was required to enter order recommending suspension of his license pursuant to Ind. Code 9-30-5-10. Statute does not provide for pre-deprivation hearing but requires that Tr. Ct. review evidence before recommending suspension. Here, Tr. Ct. had sufficient opportunity to weigh evidence presented at sentencing hearing before it made recommendation. Because license to drive is privilege & not right, subsequent hearing, in addition to full sentencing hearing, is not required by due process. Mitchell, 659 N.E.2d 112 (Ind. 1995). Held, judgment affirmed.

TITLE: Gary v. State
INDEX NO.: D.4.a.
CITE: (10/10/2018), 113 N.E.3d 237 (Ind. Ct. App. 2018)
SUBJECT: Sentence via video conference - no fundamental error even absent written waiver of right to be present
HOLDING: Court of Appeals states no fundamental error in Gary being sentenced via video conference without first obtaining a waiver of the right to be present. Court also states sentence is not inappropriate. Judge Pyle dissents and would find the failure to have defendant present at sentencing, absent a written waiver, a violation of due process.

Note: (David, J., jointed by Rush, C.J., dissenting from denial of transfer, at 2019 Ind. LEXIS 37, argued that defendants have a constitutional right to be physically present when a judge imposes a sentence for a crime).

RELATED CASES: Gary, 116 N.E.3d 455 (Ind. 2019) (David, J., joined by Rush, C.J., dissenting from denial of transfer, argued that the Ds have a constitutional right to be physically present when a judge imposes a sentence for a crime).

TITLE: Hawkins v. State
INDEX NO.: D.4.a.
CITE: (2/19/2013), 982 N.E.2d 997 (Ind. Ct. App. 2013)
SUBJECT: D's failure to appear at trial was not waiver of his right to counsel
HOLDING: A D's absence from trial does not constitute a waiver of the right to counsel in every case. Jackson v. State, 868 N.E.2d 494 (Ind. 2007). Here, unlike in Jackson, record did not support a finding that D's failure to appear at trial constituted a knowing, voluntary or intelligent waiver of his right to counsel. D's public defender sought to withdraw before his November 7, 2011 trial date. Tr. Ct. told D of his attorney's request, that there would be a hearing October 19 and his failure to appear will result in his arrest and withdrawal of the public defender. D, who lived in North Carolina, appeared by telephone. That hearing was rescheduled after technical difficulties, and Tr. Ct. did not tell him that the motion to withdraw would be granted if he didn't appear at the new hearing. D did not appear at the October 26 hearing, his attorney was allowed to withdraw, and he was not in court for his November 7 trial. A deputy prosecutor was alerted that D was on his way but his bus from North Carolina wasn't due in until the afternoon. Tr. Ct. proceeded with trial, where D was convicted. He later explained to the court from jail that he couldnt' afford transportation for both the October 26 hearing and his trial, so he chose to attend the trial and didn't think he would arrive after the trial started in the morning. Although Court did not approve of D's actions as a D facing criminal charges, his behavior did not rise to the "egregious misbehavior" that resulted in a trial in absentia in Jackson. Thus, it was inappropriate to trial him in absentia without representation. Held, transfer granted, Court of Appeals' opinion at 970 N.E.2d 762 vacated, conviction reversed.

RELATED CASE: C.S., 131 N.E.3d 592 (Ind. 2019) (Ind. Admin. Rule 14(B) permits remote participation in juvenile disposition-modification hearings where the parties have agreed or where the court issues a good cause order based on the factors listed in the rule including the child's best interest).

TITLE: Holtz, Jr. v. State

INDEX NO.: D.4.a.

CITE: (5th Dist., 12-28-06), Ind. App., 858 N.E.2d 1059

SUBJECT: Trial in absentia- must be given opportunity, but not sua sponte hearing, on reason for absence

HOLDING: Tr. Ct. did not err by failing to hold a hearing to allow D opportunity to explain his absence at trial. Although the Tr. Ct. must afford D the opportunity to present evidence that his absence from trial was not voluntary, this does not require a sua sponte inquiry. Rather, it simply means that D cannot be prevented from giving an explanation. Here, D was told twice the date of his trial, & warned that if he did not appear, the trial would still proceed in his absence. D did not appear for his trial. Over five years after D was tried in absentia, he was arrested & sentenced. At sentencing, D, appearing with counsel, was given the opportunity to speak, but declined. Because D was given the opportunity to explain why his absence from trial was not voluntary, Tr. Ct. did not err. Held, judgment affirmed.

TITLE: Jackson v. State
INDEX NO.: D.4.a.
CITE: (06-26-07), Ind., 868 N.E.2d 494
SUBJECT: Waiver of right to be present at trial & right to counsel
HOLDING: Tr. Ct. did not err in finding that D willfully & knowingly refused to appear at his jury trial & waived his right to counsel & to be present at trial. Record showed that D was informed of his trial date at pretrial conference, both orally & in writing. D never contacted the Ct. prior to his trial to address any confusion he might have had about trial date or indicate to Tr. Ct. that he was unable to hire counsel. Tr. Ct. did not have a duty to re-advise D of the right to counsel or perils of self-representation when it revoked D's attorney's pro hac vice status because there was no indication that D intended to proceed pro se or could not hire another attorney.

A D's intentional & inexcusable absence from trial can serve as a knowing, voluntary, & intelligent waiver of the right to counsel. A D cannot manipulate a Tr. Ct. to thinking that he or she will hire an attorney, fail to show up at trial or send an attorney, & then assert that right to counsel was not waived because Tr. Ct. did not admonish the D about proceeding pro se. Held, transfer granted, Ct. App.' memorandum opinion vacated, judgment affirmed; Rucker & Sullivan, JJ., dissenting, believe that D did not knowingly & intelligently waive his right to counsel, & did not waive his Faretta warnings by simply not appearing.

Note: Fed. R. Crim. P. 43 does not permit a D to be tried in absentia in federal Ct. if the D was not present at the beginning of trial; See Crosby v. United States, 506 U.S. 255 (1993).

TITLE: James v. State
INDEX NO.: D.4.a.
CITE: (4/29/93), Ind., 613 N.E.2d 15
SUBJECT: D's right to be present at every stage requiring jury's presence
HOLDING: Tr. Ct. erred in failing to have D present when jury reviewed videotape & other exhibits.

Sixth Amend. of U.S. Const. & Art. 1, §13 of Ind.Const. guarantee right of D to be present in courtroom at every stage of proceedings requiring presence of jury. Dodson, 502 N.E.2d 1333. Replaying testimony for jury without notice to D or counsel violates D's constitutional right to be present. Cape, 400 N.E.2d 161. Absent express personal waiver, D's absence from any stage of proceedings gives rise to rebuttable presumption that prejudicial error occurred. Denial of constitutional right is not automatically reversible error; focus is on whether D was deprived of fair trial as result of his absence. Harris, 231 N.E.2d 800. Presumption of error resulting from D's absence may be overcome where defense counsel failed to make timely objection. Though counsel was aware of Tr. Ct.'s intent to allow jury to view evidence outside D's presence, counsel failed to object on those grounds. Given evidence at trial, error was not so blatant that D was denied fair trial. Held, conviction affirmed; death penalty sentence reversed & remanded.

RELATED CASES: Hernandez, 761 N.E.2d 845 (Ct. was unable to determine from record whether jury's note requesting instruction on effect of hung jury triggered "critical stage" or whether defense was prejudiced); Robinson, 699 N.E.2d 1146 (failure to bring jurors into open Ct. to view photographs during deliberations did not violate D's federal & state constitutional rights to be present during trial); Ridley, 690 N.E.2d 177 (because D did not contend that he was absent from any critical proceeding, neither rebuttable inference of prejudice nor rule permitting only express waiver applied); Hagenmeyer, App., 683 N.E.2d 629 (Tr. Ct. committed reversible error by allowing jury to listen to tapes of victim's testimony without D present); Green, 470 N.E.2d 333 (voir dire); Stevenson, 656 N.E.2d 476 (opening); Brown, 445 N.E.2d 82 (preliminary instructions); Bedgood, 477 N.E.2d 869 (while testimony is being taken); Harden, 496 N.E.2d 35 (replaying of taped statement of co- conspirator); Kentucky v. Stincer, 482 U.S. 730 (final argument); Jenkins, 492 N.E.2d 666 (presence required at discharge); Gillespie, App., 634 N.E.2d 862 (sentencing); Poore, App., 660 N.E.2d 591 (habitual offender proceeding).

TITLE: Jenkins v. State
INDEX NO.: D.4.a.
CITE: (4th Dist. 07/29/92), Ind. App., 596 N.E.2d 283
SUBJECT: Trial in absentia - D intoxicated
HOLDING: It was not error to hold trial partially in D's absence, because by becoming intoxicated, he waived his right to be present on second day of trial. D was present on first day of his trial, but on second day he appeared intoxicated when he arrived at Ct. house. Defense counsel so informed Ct., & after viewing D's bloodshot eyes & inability to stand without weaving, judge indicated that it would do no good for jury to see him in that condition, & that by his physical appearance, D had disrupted proceedings. D was taken to jail where breathalyzer showed BAC of .17%. Defense counsel moved for continuance or mistrial, but Ct. denied both, because D had "`disrupt[ed] or obstruct[ed] the orderly process of justice.'" Ct. then ordered D to remain outside Ct. room where he could speak with counsel, & indicated he would grant recesses for counsel to confer with D. When trial reconvened after lunch, D could not be found, & hour later it was learned that D had altercation with officer & been arrested for public intoxication. Ct. questioned jurors about whether they had seen anything they should bring to attention of Ct., & when they responded negatively, trial resumed in D's absence. Next day, trial continued with D present. Although D has constitutional right to be present at trial, right can be waived if waiver is voluntarily, knowingly & intelligently made. Ct. found that by becoming intoxicated when he knew trial was scheduled, D had waived his right to present, relying on Gilbert, App., 395 N.E.2d 429, where Ct. found that alcoholic D had waived right to be present by not taking steps to insure his appearance at trial.

TITLE: Kentucky v. Stincer
INDEX NO.: D.4.a.
CITE: 482 U.S. 730 (1987)
SUBJECT: Due process - D's right to be present at competency hearing
HOLDING: Court assumes that, even in situations where D is not actually confronting witnesses or evidence against him, he has due process right "to be present in his own person whenever his presence has a relation, reasonably substantial to fullness of his opportunity to defend against the charge." Snyder v. MA, (1934), 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L.Ed. 674. Presence is not guaranteed "when presence would be useless, or the benefit but a shadow." Id. However, D is guaranteed right to be present at any stage of criminal proceeding that is critical to outcome if presence would contribute to fairness of procedure. Here, Court conducted in-chambers hearing to determine if 2 young girls were competent to testify. D, but not his counsel, was excluded from hearing. Court finds competency hearing in which witness is asked to discuss upcoming substantive testimony, might bear substantial relationship to D's opportunity to defend himself. Here, however, issue at competency hearing was whether witnesses were capable of observing & narrating facts & whether they had moral sense of obligation to tell truth. D has not shown that his presence would have been useful in ensuring more reliable determination as to competency. He presented no evidence indicating that his relationship with children or his knowledge of facts regarding their background could have been useful at competency hearing. Held, no violation of Due Process Clause in excluding D from competency hearing. Marshall, joined by Brennan, & Stevens, DISSENTS.

TITLE: M.H. v. State
INDEX NO.: D.4.a.
CITE: (12/01/2022), Ind. Ct. App., 199 N.E.3d 1240
SUBJECT: Remote proceedings in response to COVID-19 did not violate juvenile's due process rights
HOLDING: On appeal, M.H. challenged the juvenile court's use of technology to conduct court hearings without him being present in the courtroom, and the imposition of a DOC commitment.

M.H. challenged the use of Webex to have him remotely appear at the court hearings. M.H. argued that Admin. R. 14(A) and C.S. v. State, 131 N.E.3d 592 (Ind. 2019), controlled the use of remote technology for appearances in court, but the Court of Appeals disagreed, finding that the Supreme Court's orders permitting expanded remote proceedings in response to COVID-19 were still in effect. The order of May 7, 2021, extending that authority "until further order of the Court" has not been modified or rescinded. M.H. failed to make any argument under the standards established by the Supreme Court in response to the COVID-19 emergency, and therefore did not establish a due process violation.

The Court of Appeals also rejected M.H.'s challenge to the juvenile court ordering his commitment to the Department of Correction, finding no abuse of discretion. M.H. had been under supervision for nearly three years since prior adjudications for dangerous possession of a firearm, resisting law enforcement, and unauthorized use of a railroad right of way, but continued to use marijuana, skip school, and possess firearms. Additionally, M.H was involved in a physical altercation while in juvenile detention.

TITLE: Partee v. State
INDEX NO.: D.4.a.
CITE: (03/21/2022), Ind. Ct. App., 184 N.E.3d 1225
SUBJECT: No error in failing to advise defendant he could return to courtroom if he behaved
HOLDING: After being removed for the second time the first day of his trial following Defendant's repeated disruption of the proceedings, the trial court did not advise Defendant (a "sovereign citizen") that he could return if he conducted himself in an appropriate manner. Defense counsel objected to Defendant's removal for the record but said she understood why he was being removed. On appeal, Defendant did not challenge his removal. He argued that the error occurred when the trial court did not advise him, he may reclaim his constitutional right to be present and be afforded the opportunity to return to the courtroom if he promises to behave, citing language from the Supreme Court's decision in Illinois v. Allen, 397 U.S. 337, 338 (1970). The Court of Appeals acknowledged some courts have read the Supreme Court's opinion in Allen as requiring trial courts to advise defendants that they may return to the courtroom if they promise to behave. But the Court declined to read Allen as creating such a requirement. The Court pointed out that defense counsel did not raise an objection about the failure to advise at the trial, and Defendant gave no indication that he was willing to conform his behavior consistent with the decorum required in judicial proceedings. "Accordingly, we conclude that the trial court did not commit error, let alone fundamental error, by failing to explicitly advise Partee that he could return to the courtroom if he promised to behave. We instead commend the trial court for its patience with a defendant as difficult as Partee."

RELATED CASES: Partee, 189 N.E.3d 163 (Ind. 2022) (David, J., joined by Rush, C.J., dissenting from the denial of transfer, believes that Allen requires trial courts to inform disruptive defendants who have been removed from the courtroom that they can reclaim their right to be present); Illinois v. Allen, 397 U.S. 337 (1970); D.4.a; When a defendant is removed from the courtroom for disruptive behavior, a trial court is not required to advise the defendant that he may return to the courtroom if he promises to behave.

TITLE: Phillips v. State
INDEX NO.: D.4.a.
CITE: (1st Dist. 9/12/89), Ind. App., 543 N.E.2d 646
SUBJECT: Presence at trial - sufficiency of waiver
HOLDING: Testimony that copy of pretrial order showing trial date "would have been" mailed to address D provided Tr. Ct. was not sufficient to support finding that D waived right to be present. D, a Missouri attorney defending himself on charges of public intoxication & disorderly conduct, sought several continuances. Record reflects that Tr. Ct. reset pretrial 2nd time, with trial set for 1 week later, but there is no indication that copy was sent to D, as there was for other orders. D did not appear at pretrial hearing or at trial. After determining only that copy of order showing trial date would have been mailed to D, Tr. Ct. tried him in absentia. Because D was proceeding pro se, he was not represented at trial in any way, & learned that he had been tried in absentia only when he called prosecutor's office to inquire about trial date. He immediately filed motion to set aside judgment, offering affidavits that copy of order showing trial date had not been received. On appeal he argues that he did not waive right to be present at trial. State's cited cases in which waiver has been found are inapposite because they involved clear evidence that D knew trial date. Here, such evidence was circumstantial, consisting only of state's claim that notice had been mailed. State bears burden of proving that D knowingly & intelligently waived right to be present. [Citations omitted.] This determination is best made on record, indulging every reasonable presumption against waiver. [Citations omitted.] State provided no evidence of purposeful absence. Circumstantial evidence that D knew trial date is not sufficient, standing alone, to support finding of waiver. Fennell, 492 N.E.2d 297. Held, reversed & remanded for new trial.

RELATED CASES: Lampkins, 682 N.E.2d 1268 (D's explanation for his absence illustrates that his failure to appear was knowing & voluntary).

TITLE: Ozuna v. State
INDEX NO.: D.4.a.
CITE: (2nd Dist., 12-30-98), Ind. App., 703 N.E.2d 1093
SUBJECT: No right to be present or to assistance of counsel at pre-trial meeting
HOLDING: Tr. Ct. did not err by allowing interpreter, who met with State's witness & prosecutor during pre-trial conference at which D & his counsel were not present, to interpret that witness' testimony during trial. Interpreter attended consensual pre-trial meeting with State's witness & prosecutor to determine appropriate means of communication between witness, attorneys, jurors & judge. During meeting, interpreter asked witness questions about alleged incident & prosecutor took notes of witness's responses. Ct. held that D was not denied right to be present during pre-trial meeting, as his absence did not prevent him from defending against charges against him & meeting did not require or contemplate presence of jury. Moreover, D was not denied right to have counsel present at meeting, as counsel's presence would not have changed interpreter's translation of witness's testimony during trial. Finally, notice requirements of Ind. Trial Rules 30, 31, or 45 did not require prosecutor to provide notice to accused before interviewing prospective witnesses prior to trial. Held, denial of motion for mistrial affirmed.

Note: Notwithstanding interpreter's pre-trial meeting with prosecutor & witness, Ct. rejected D's claim that meeting created appearance of interest on interpreter's behalf & suspicion he was not neutral & impartial.

TITLE: Reel v. State
INDEX NO.: D.4.a.
CITE: (1st Dist. 03/12/91), Ind. App., 567 N.E.2d 845
SUBJECT: Trial in absentia, D's knowledge
HOLDING: Record showing that D was not present when final trial date was set, but that his attorney sent several certified letters to D at different addresses, one of which was returned & certified as being received by his roommate, was insufficient to show that D waived his right to be present at trial. Evidence revealed that D was last present in Ct. on 3 N.E.2d 2 N.E.2d 87, when trial date of 4/3/87, was set. That trial date was continued by D's attorney & several other continuances followed. On 1/13/88, Tr. Ct. set final trial date for 2/25/88, but D wasn't present at that time. At D's sentencing hearing he appeared & denied knowledge of trial date or receipt of any certified letters. Ct. App. found under these circumstances that state did not meet its burden of proving D's waiver of his right to be present at trial. Held, reversed & remanded for new trial.

RELATED CASES: Miller, App., 593 N.E.2d 1247 (evidence sufficient to show adequate waiver of right to be present); McCaffrey, App., 577 N.E.2d 617 (although D's FTA on earlier occasion arguably created inference that he was inclined not to appear, circumstantial evidence of his knowledge of trial date was no greater than that found insufficient in Fennell, 492 N.E.2d 297, & Reel, App., 567 N.E.2d 845, & therefore was insufficient to show knowing & voluntary absence).

TITLE: Roche v. Anderson
INDEX NO.: D.4.a.
CITE: 132 F.Supp.2d 688 (N.D. Ind. 2001)
SUBJECT: Failure to object to use of shackles during trial - ineffective assistance of counsel
HOLDING: Defense counsel's failure to object on record to use of shackles constituted deficient performance and prejudiced D. Although counsel may have been careful about preventing jury from seeing his client's ankle restraints, he was not careful in protecting his client from having to wear restraints in first place. Rule that prisoner brought into court for trial is entitled to appear free from all bonds or shackles is important component of fair and impartial trial. Walker v. State, 410 N.E.2d 1190 (Ind. 1980). Shackles should never be permitted except to prevent escape of accused, to protect everyone in courtroom, and to maintain order during trial. Use of shackles is extreme remedy which should be permitted only where justified by essential state interest specific to each trial. Holbrook v. Flynn, 475 U.S. 560 (1986). Held, petition for writ of habeas corpus granted.

RELATED CASES: Stephenson, 864 N.E.2d 1022 (reasoning in Roche is equally applicable to a stun belt; here, D failed to show prejudice); French, 778 N.E.2d 816 (D did not receive ineffective assistance of counsel where counsel allowed D to appear before entirely new jury for trial on HO charge in jail clothes, handcuffed, & shackled).

TITLE: Smith v. State

INDEX NO.: D.4.a.

CITE: 160 N.E.3d 1152 (Ind. Ct. App. 2021)

SUBJECT: In trial in absentia, no fundamental error for trial court to inform jurors that court personally advised Defendant of trial date a few weeks before trial

HOLDING: Trial court did not abuse is discretion by conducting jury trial in absentia, where record established that Defendant knew of court date, did not appear and clearly waived his right to be present. Court of Appeals held it was not fundamental error for trial court to advise potential jurors that the court had personally advised Defendant of the trial date a few weeks before trial. This was not a prohibited comment on defendant's refusal to testify but rather recognition of Defendant's absence. Also, jurors were appropriately instructed regarding presumption of innocence and State's burden of proof.

TITLE: United States v. Sepulveda-Contreras
INDEX NO.: D.4.a.
CITE: 466 F.3d 166 (1st Cir. 2006)
SUBJECT: Sentencing conditions not orally given violated D's right to be present
HOLDING: The First Circuit U.S. Court of Appeals held that a written judgment containing supervised release conditions that were not announced orally at sentencing, including a condition requiring D to submit to drug tests as required by the probation officer and conditions requiring him to provide access to financial information and to submit to searches, violated D's right to be present at sentencing. The Court so ruled because: (1) the conditions were non-mandatory, non-standard, and non-recommended conditions under U.S. Sentencing Guidelines Manual § 5D1.3, and (2) he was not put on constructive notice that the two conditions would be imposed in the written judgment. Under harmless error review, the conditions were vacated because the Government could not show that they would have been imposed even if D had been present. Under 18 U.S.C.S. § 3583(d), the district court abused its discretion by delegating to the probation officer the authority to determine the number of drug tests D had to undergo while on supervised release. The district court's sentencing order was vacated and the case was remanded for resentencing consistent with the Court's opinion.

TITLE: Warner v. State
INDEX NO.: D.4.a.
CITE: (3/17/83), Ind., 446 N.E.2d 949 at 964
SUBJECT: Presence of D at trial - judicial questioning
HOLDING: Tr. Ct. did not err in excluding D from Ct. room while witness was asked if she was testifying under intimidation. Questioning occurred outside presence of jury. Here, 17-year-old witness' testimony was extremely inconsistent with her prior statements. The Tr. Ct. perceived she might be testifying under intimidation. The jury was excused & the gallery & Ds required to leave the Ct. room. With all counsel present, Tr. Ct. interrogated witness concerning her emotional disarray & asked whether anyone in Ct. room had threatened her or was then intimidating her. D's constitutional right to be present does not apply with respect to proceedings that do not require jury's presence. Harris, 231 N.E.2d 800. Held, no error; murder conviction affirmed.

TITLE: Warren v. State

INDEX NO.: D.4.a.

CITE: (02/28/2022), 182 N.E.3d 925 (Ind. Ct. App.)

SUBJECT: New sentencing hearing ordered after trial court wrongly denied Defendant's request to be physically present.

HOLDING: A trial court may conduct a sentencing hearing at which the defendant appears by video, but only after obtaining a written waiver of his right to be present and the consent of the prosecution. Here, on December 29, 2020, Defendant filed a request to be physically present in the courtroom for his sentencing hearing on multiple convictions related to dealing and possessing methamphetamine. The trial court denied Defendant's request four days later without making findings. Instead, it merely stamped “DENIED” on the defendant's motion and then proceeded to hold a remote sentencing hearing. The Court of Appeals agreed with Defendant's argument that the trial court failed to comply with Administrative Rule 14 and the Supreme Court's May 13, 2020, emergency COVID-19 order. Under Administrative Rule 14, a trial court may conduct a sentencing hearing at which the defendant appears by video, but only after obtaining a written waiver of the right to be present and the consent of the prosecution. The Supreme Court's May 2020 COVID-19 order also provided that a trial court could conduct a remote sentencing hearing only where a defendant waived his right to be physically present in the courtroom for the hearing. The Court of Appeals held that the trial court erred in holding the sentencing hearing in which the defendant clearly did not waive his right to be present. In a footnote, the Court rejected the State's argument that Defendant waived the issue by not objecting at the outset of the sentencing hearing, citing the Supreme Court's May 2020 emergency order. The Court found his written motion requesting to be present at sentencing hearing preserved the issue for review.

TITLE: Wells v. State

INDEX NO.: D.4.a.

CITE: (Ind. Ct. App., 9-22-21), 176 N.E.2d 977

SUBJECT: Trial court committed fundamental error in excluding Defendant from his trial and trying him absentia for testing positive for THC.

HOLDING: Exclusion from trial for failing a drug test is improper. In such instances, a trial court should apply, and exhaust, lesser contempt penalties, before imposing the extreme sanction of the deprivation of fundamental rights.

After Defendant appeared in court for trial and exhibited worrisome behavior, trial court had him tested for drugs and he tested positive for THC. The trial court continued his case and imposed pre-trial release conditions including twice weekly drug testing and ordered "no weed smoking until you get tried." At the rescheduled trial, Defendant again tested positive for THC and the trial court excluded him from trial and tried him in absentia. Court of Appeals finds the exclusion from trial violated Defendant's right to be present under the Sixth Amendment rights and Article one section 13 of the Indiana constitution because there was no record that Defendant engaged in disruptive and contumacious conduct or interfered with the trial court's conduct on the date in question. The trial court failed to apply and exhaust lesser contempt remedies and foreclosed Defendant from assisting in his defense and hearing the evidence against him. Held, conviction reversed.

TITLE: Ziebell v. State

INDEX NO.: D.4.a.

CITE: (1st Dist., 5-27-03), Ind. App., 788 N.E.2d 902

SUBJECT: Denial of D's request to be absent from habitual offender proceedings affirmed - presence required for identification purposes

HOLDING: Tr. Ct. did not abuse its discretion by requiring D's presence during habitual phase of his trial, because his presence was necessary for identification purposes. Although D in criminal proceeding has right to be present at all stages of his or her trial, D does not have corollary right to be absent where he is otherwise available & his presence is required for legitimate purpose, such as identification. Consequently, Tr. Ct. could compel D to be present at habitual offender phase for identification purposes. Held, judgment affirmed.

D. TRIAL

D.4. Presence/appearance of D

D.4.b. Restraint of D

TITLE: Deck v. Missouri
INDEX NO.: D.4.b.
CITE: 544 U.S. 622 (2005)
SUBJECT: Capital penalty phase, shackling, due process
HOLDING: Deck was convicted of murdering an elderly couple and sentenced to death. The Missouri Supreme Court reversed his death sentence and remanded for a new sentencing trial before a new jury. During the second penalty trial, over counsel's objection, Deck was shackled with leg irons, handcuffs, and a belly chain. The U.S. Supreme Court reversed the sentence and remanded, holding that the use of visible shackles during a capital penalty trial violates the 5th and 14th Amendments unless there is a state interest specific to the particular D on trial. Although the D had already been convicted, the use of shackles at his penalty trial threatened concerns related to the presumption of innocence; the D's appearance in shackles implies to a jury that authorities consider him a danger to the community (which is often a statutory aggravator) and undermines the jury's ability to weigh relevant considerations and determine whether the D deserves death.

TITLE: Hawkins v. Comparet-Cassani

INDEX NO.: D.4.b.

CITE: 33 F.Supp.2d 1244 (D.C.C.Cal. 1999), abrogated in Vanderhey v. Vallairo, 2008 U.S. Dist. Lexis 33158

SUBJECT: Stun Belts -- Constitutional Concerns Warrant Preliminary Injunction

HOLDING: In federal class action suit, District Court grants preliminary injunction against use of stun belts to control potentially disruptive Ds during courtroom appearances. To obtain injunction, plaintiff class must show existence of pervasive patter n of misconduct amounting to intentional, concerted, and conspiratorial effort to deprive them of their rights. Because sheriff had policy of seeking placement of stun belts on Ds who, like named plaintiffs, have previously engaged in conduct perceived to be disruptive, plaintiffs sufficiently alleged pervasive and coordinated violation of rights. As to the merits, the Court finds that a pain infliction device like the stun belt has the potential to compromise the Ds' ability to participate in their own defense. Finally, looking at balancing of hardships, Court finds that the police and courts have a variety of options available to them to deal with disruptive Ds, so that deprivation of use of stun-belt would not substantially harm them. The plaintiff class, on the other hand, faces potential deprivation of constitutional rights if stun belts are used. Sheriff is enjoined from seeking to use stun-belts on Ds pending trial on merits.

TITLE: Holbrook v. Flynn
INDEX NO.: D.4.b.
CITE: 475 U.S. 560 (1986)
SUBJECT: Fair trial - presence of armed guards
HOLDING: D is entitled to have his/her guilt or innocence determined solely on basis of evidence introduced at trial & not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. Taylor v. KY, (1978), 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468. Whenever courtroom arrangement is challenged as inherently prejudicial, court must decide whether impermissible factors present unacceptable risk in guilt/innocence determination. Estelle v. Williams, (1976), 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126. If procedure employed by state involves such a probability that prejudice will result that it is deemed inherently lacking in due process, little stock need be placed in jurors' claims to contrary because jurors may not be fully conscious of effect on them. Here, Court finds presence of 4 uniformed, armed security officers sitting behind 6 Ds in spectator section of courtroom did not prejudice Ds' right to fair trial. Court notes sufficient cause for this level of security could be found in state's need to maintain custody over Ds, who had been denied bail after individualized determination that their presence at trial could not otherwise be ensured. Burger CONCURS.

TITLE: Pier v. State
INDEX NO.: D.4.b.
CITE: (3d Dist. 3/22/83), Ind. App., 446 N.E.2d 985
SUBJECT: Restraint of D at trial
HOLDING: Tr. Ct. did not commit reversible error in allowing D to be tried in shackles & handcuffs where trial was not before a jury & D failed to show prejudice. Here, D *cites* Walker, 410 N.E.2d 1190 (convictions reversed where Ds appeared before jury in handcuffs & leg irons without any apparent justification for restraints). Ct. distinguishes Walker: Trial judge, unlike lay jury, is presumed to retain impartiality. D was tried before a judge only & demonstrates no prejudice. Held, no error.

RELATED CASES: Corbin, App., 840 N.E.2d 424 (no error in restraining D with leg & waist shackles during trial where the defense table had skirting around it hiding D's lower body from the jury); Forte, 759 N.E.2d 206 (Ct. rejected D's argument that in determining whether to order restraints, Tr. Ct. may consider only in-court behavior of D); May, App., 578 N.E.2d 716 (No error for Tr. Ct. to order D to be restrained by leg shackles during trial because history of case revealed D to be escape risk, even though judge made no specific finding of threat of escape or violence in Ct. room. D was on trial for escape through violent means because while in handcuffs, he had previously assaulted transporting officer, stolen his gun, used his key to gain release from handcuffs, & forced officer to drive him to house where he allegedly raped & confined victim, & then engaged in 18 hour standoff with police. Ct. also noted there was no evidence jury saw leg irons, & that trial judge had tried to prevent such vision).

TITLE: Randall v. State
INDEX NO.: D.4.b.
CITE: (11/17/83), Ind., 455 N.E.2d 916
SUBJECT: Restraint of D at trial
HOLDING: Tr. Ct. did not err during D's jury trial in ordering D chained to his chair in Ct. room, given circumstances. IL v. Allen, (1970), 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 sets forth 3 constitutionally permissible ways of handling an obstreperous D: (1) bind & gag D; D remains in Ct. room; (2) *cite* D for contempt; (3) take D out of Ct.-room until he/she promises to behave. Here, D alternatively was represented by appointed counsel, himself & himself with appointed co-counsel. Tr. judge chose the least restrictive means of subduing D, given importance of his presence in Ct. room to aid in his defense. Ct. finds D created difficult situation by his own acts. D rejected counsel of attorney/Ct. to conduct himself in accord with Ct. room decorum. Chains were not required a second day. Held, no error.

RELATED CASES: Broadus, 487 N.E.2d 1298 (D demonstrated no harm caused by co-D being shackled); Smith, 475 N.E.2d 27 (no error in shackling D during trial, given his violent nature; D had held public defender hostage in jail until disarmed by SWAT team); Averhar, 470 N.E.2d 666 (Crim L 1166.11 (3); held, no prejudice to Ds who wore ankle locks during trial; evidence indicates locks were concealed by Ds' trouser legs); Walker, 410 N.E.2d 1190; Coates, App., 487 N.E.2d 167 (record devoid of factual basis necessitating belly chain & handcuffs; fact D was threatening/violent when arrested does not justify restraint at trial; held, conviction reversed because evidence of guilt not overwhelming; case includes excellent discussion of case law).

TITLE: Vaughn v. State
INDEX NO.: D.4.b.
CITE: (07-25-12), 971 N.E.2d 63 (Ind. 2012)
SUBJECT: Mistrial not required where bailiff placed hand over D's mouth
HOLDING: Because there was no actual harm from the bailiff restraining D in front of the jury, Tr. Ct. did not abuse its discretion by denying D's motion for mistrial. Tr. Ct. does not abuse its discretion in denying a mistrial motion where the D is placed in restraints in front of the jury unless the D demonstrates actual harm.

Here, D had vacillated between proceeding pro se and being represented by counsel. After jury selection, when D changed his mind again, Tr. Ct. denied his motion to proceed pro se. When D was called to testify, D was unresponsive to his first question and instead started complaining to the jury about the performance of counsel. After the judge repeatedly told him to stop talking and ordered the jury out of the courtroom, the court instructed the bailiff to cover D's mouth. The bailiff covered D's mouth while the jury was still in the courtroom. Although hindsight is twenty-twenty, the better practice would have been to warn the D that if he did not stop talking then he would be prevented from talking. Moreover, when an uncooperative D has been identified, it is better to have a bailiff in the courtroom at all times and to establish, outside the presence of the jury, the potential consequences the court is prepared to impose to control the D's conduct in the courtroom. While Tr. Ct. did not handle the situation in a manner as the Court would have liked it to be handled, there was no actual harm to D. The incident was brief, taking place in literally just a few moments. D did not even object until after his testimony was completed. Held, transfer granted, Court of Appeals' Opinion at 954 N.E.2d 482 vacated, judgment affirmed; Sullivan, J., dissenting.

TITLE: Wrinkles v. State
INDEX NO.: D.4.b.
CITE: (6-29-01), Ind., 749 N.E.2d 1179
SUBJECT: Use of "stun belts" in Courtrooms is forbidden
HOLDING: Stun belts, which are electric shocking devices secured around wearers' waists, may not be used on Ds in Ct. rooms of this State. When activated, belt's electrical emission causes most persons to shake uncontrollably & remain incapacitated for up to forty-five minutes. Even if not activated, stun-belt has potential of compromising defense & has chilling effect. Hawkins v. Comparet-Cassani, 33 F.Supp.2d 1244 (C.D. Cal. 1999). Other forms of restraint, including handcuffs, shackles, security chairs, & gagging, can sufficiently restrain D without inflicting mental anguish that results from simply wearing stun belt & physical pain that results if belt is activated. Held, denial of post-conviction relief affirmed; Boehm, J., concurring in result.

RELATED CASES: Dickens, 997 N.E.2d 56 (Ind. Ct. App. 2013) (in trial occurring before stun belt restraint was prohibited, trial counsel was not ineffective for failing to object to restraint because restraint was under D's clothes and not visible, preventing jurors from drawing adverse inferences about D because of the restraint); Stephenson, 864 N.E.2d 1022 (in absence of explanation, failure to object to stun belt that is readily visible is substandard performance).

D. TRIAL

D.4. Presence/appearance of D

D.4.c. Appearance/attire of D

TITLE: Forgey v. State
INDEX NO.: D.4.c.
CITE: (1st Dist., 05-16-08), Ind. App., 886 N.E.2d 16
SUBJECT: Denial of request to wear military uniform at trial - no error
HOLDING: In kidnapping and robbery prosecution, Tr. Ct. did not abuse its discretion by precluding D from wearing his United States Marine Corps uniform at trial. Distinguishing Johnson v. Commonwealth, 449 S.E.2d 819 (Va. Ct. App. 1994), Court noted that D was not on active duty but rather had been honorably discharged nearly fourteen years before trial. Further, had Tr. Ct. allowed D to wear his uniform at trial, it would have been a violation of federal law, specifically 10 U.S.C.A. § 771. Held, judgment affirmed.

TITLE: French v. State
INDEX NO.: D.4.c.
CITE: (11-22-02), Ind., 778 N.E.2d 816
SUBJECT: Appearing in jail garb at habitual offender (HO) trial - failure to object
HOLDING: D did not receive ineffective assistance of counsel where counsel allowed D to appear before entirely new jury for trial on HO charge in jail clothes, handcuffed, & shackled. Tr. Ct. determined that restraints were necessary based on physical altercation between D & law enforcement officers after his trial. As to jail clothes, defense attorney testified that she did not recall any conversations with D regarding his appearing in jail clothes, & denied D's allegation that she informed him that it did not matter if he was in jail clothes because it was only an HO proceeding. Ct. noted that although D was entitled to presumption of innocence as to HO charge, he was convicted of underlying charge of dealing cocaine & jury was informed of this. Prison clothing cannot be considered inherently prejudicial when jury already knows, based upon other facts, that D has been deprived of his liberty. Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995). However, if D objects, it is error to require D to appear in jail garb at HO phase. Held, conviction & denial of post-conviction relief affirmed; Sullivan & Rucker, JJ. concurring & dissenting, believed that Tr. Ct. committed fundamental error in permitting D to appear at HO proceeding in bright orange clothing with word "JAIL" on back.

RELATED CASES: Brown, App., 848 N.E.2d 699, vacated on other grounds, 868 N.E.2d 464 (Ct. rejected claim that D was compelled to wear jail bracelet; D did not object to wearing bracelet until witness identified it at trial, & thus waived issue).

TITLE: Gibbs v. State
INDEX NO.: D.4.c.
CITE: (3/12/84), Ind., 460 N.E.2d 1217
SUBJECT: Attire of D at trial - transported in handcuffs
HOLDING: Tr. Ct. did not err in denying D's request to ask jurors whether they had seen him wearing handcuffs while being transported to Ct. room. Here, Tr. judge ruled that there was less prejudice to D by not questioning jurors, given that during voir dire a prospective juror stated he visited D in jail, thus jury knew he was in custody & could infer sheriff might take such precautions as handcuffing D. Being seen by jurors while being transported in handcuffs is not grounds for reversal. Jessup, 269 N.E.2d 374 & subsequent cases. Held, conviction affirmed.

RELATED CASES: Perryman, 80 N.E.3d 234 (Ind. Ct. App. 2017) (denial of motion for mistrial affirmed where D was put in the presence of one to three jurors while standing handcuffed in the breezeway of the courthouse), Sweet, 498 N.E.2d 924 (D fails to show actual harm; held, conviction affirmed; case includes good discussion of case law); Davis, 770 N.E.2d 319; Malott, 485 N.E.2d 879 (no error in denial of mistrial made because prospective jurors observed D in handcuffs & leg irons; potential jurors would reasonably expect person in police custody to be restrained, regardless of precise nature of charge, *citing* Jessup); Walker, 410 N.E.2d 1190.

TITLE: Gibson v. McBride
INDEX NO.: D.4.c.
CITE: 663 S.E.2d 648 (W.Va. 2008)
SUBJECT: No fair trial - State's prison witnesses testify in street clothes; D's prison garb
HOLDING: West Virginia Supreme Court held a judge's decision in a prison-murder trial to allow inmates testifying for the prosecution to take the stand in street clothes but compel defense witnesses to appear in prison attire and shackles violated D's constitutional right to a fair trial. Court acknowledged that Ds in the state have no constitutional right to have witnesses appear without restraints. However, based on past precedent, Court noted "there may be occasions when forcing the D's witnesses to testify in physical restraints [or prison attire] may create sufficient prejudice that reversible error will occur." Court added that the case came down to a battle over the credibility of the prosecution's and the D's witnesses. "The drastic contrast in the physical appearance of the parties' incarcerated witnesses - each of whom provided crucial testimony at trial - unfairly influenced the jury's judgment of the witnesses' credibility."

TITLE: Howard v. State
INDEX NO.: D.4.c.
CITE: (2/8/84), Ind., 459 N.E.2d 29
SUBJECT: Attire of D at trial - waiver of right
HOLDING: Where there is no evidence in record that D was compelled to wear jail clothes in jury's presence & D made no objection, there is no error. Here, D contends he was denied right to a fair trial because he was required to appear in orange coveralls (Marion County jail uniform). Trial record shows D was identified by various witnesses as man in orange uniform/coveralls. Failure to object to being tried in prison clothes waives right to be tried in civilian clothes. Central issue for constitutional purposes is whether D was compelled to appear before jury in prison clothes. Estelle v. Williams (1976), 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126; Gregory, 412 N.E.2d 744; Bledsoe, 410 N.E.2d 1310; Williams, App., 451 N.E.2d 687. Held, no error.

RELATED CASES: Bronaugh,942 N.E.2d 826 (Ind. Ct. App. 2011) (D was not denied due process when he appeared for the first day of his jury trial wearing identifiable jail clothes, where counsel failed to object and D had ample time to arrange for civilian clothing but failed to do so); Southern, App., 878 N.E.2d 315 (showing polygraph video in which D was wearing jail uniform was not error); Sherwood, App., 784 N.E.2d 946 (D failed to demonstrate actual harm as result of 5 jurors seeing him in jail garb as he was being escorted to court); Richter, 598 N.E.2d 1060 (Not error for D to appear for trial in clothing which had identification indicating that it came from Westville Correctional Center, because there was nothing in record to indicate jurors were able to discern he was dressed in prison clothing, & counsel did not object to D's appearance until after jury was seated & instructed); Smith, 475 N.E.2d 27 (Ct. finds D remained in prison garb by choice); Green, 470 N.E.2d 333 (Ct. finds D voluntarily waived right to be present during voir dire, notwithstanding Tr. judge's statement that D could not be forced to appear before jury in jail garb, but that judge intended to proceed with jury selection regardless; Prentice DISSENTS without opinion); Smith, 396 N.E.2d 898 (D's appearance in jail clothes had pervasive influence on trial and trial counsel's failure to object showed lack of adequate preparation regarding rules of law favorable to D; conviction reversed and remanded for new trial).

TITLE: State v. Garcia-Contreras
INDEX NO.: D.4.c.
CITE: 953 P.2d 536 (Ariz. 1998)
SUBJECT: Forcing Choice Between Appearing in Jail Garb, Missing Voir Dire
HOLDING: Arizona Supreme Court holds that Tr. Ct.'s denial of continuance to D who, through no fault of his own, was awaiting delivery of civilian clothes to wear at jury selection, violated D's 6th Amendment right to be present. D was effectively forced to choose jeopardizing his due process right to the presumption of innocence by appearing before jury in jail uniform or sacrificing his 6th Amendment right to attend jury selection. Court found that forced absence from jury selection was "structural error," not subject to harmless error analysis, in part because presence at that time allows him to participate in selection process and protects effective exercise of challenges. Further, Court noted that there is immediate and continuous, albeit subtle, interplay between potential jurors and D, and D's absence may have damaged him in eyes of jurors. Court was not able to meaningfully quantify harm resulting from forced absence.

TITLE: Vazquez v. State
INDEX NO.: D.4.c.
CITE: (02-18-11), 944 N.E. 2d 10 (Ind. Ct. App. 2011)
SUBJECT: Due Process - jail clothes at bench trial
HOLDING: D's appearance in jail clothing at his bench trial for criminal confinement, stalking, and theft did not deny him due process. Under the Fourteenth Amendment a D cannot be compelled to appear before a jury in identifiable prison clothing because this may impair the presumption of innocence. The failure to object to being tried in jail clothes negates the compulsion necessary to establish a constitutional violation.

Here, there is no evidence that Tr. Ct. compelled D to wear jail clothes. In fact, during pretrial conference, Tr. Ct. instructed defense counsel to provide him with civilian clothes and gave D over two weeks to obtain clothing. D, however, subsequently waived his jury trial and at no point during bench trial did he object to wearing jail clothes. Moreover, D did not appear before a jury in the jail clothes; rather, he was tried by the Tr. Ct. Court presumes trial judges to be impartial, and D has not demonstrated otherwise. Rejecting D's fundamental error claim, Court agreed with State that the rationale for prohibiting Tr. Ct. from denying a D the right to wear civilian clothes during a jury trial does not apply, where his appearance in jail clothes did not impede his presumption of innocence. Held, judgment affirmed.

D. TRIAL

D.5. Continuances

TITLE: Zambrana v. State
INDEX NO.: D.5.
CITE: (10/3/85), Ind. 483 N.E.2d 59
SUBJECT: Continuance - requested by both parties
HOLDING: Tr. Ct. did not err in denying continuance, made by prosecutor & defense counsel jointly after completion of jury selection. Here, Ct. rejects D's contention that ruling denied him meaningful opportunity to plea bargain, given D was arrested in March & tried in August. It is true D assisted police & received no benefit. Ct. finds D's disappointment in not reaching plea bargain understandable, but not grounds for reversal. Held, no error.

D. TRIAL
D.5. Continuances
D.5.a. By D (Ind. Code 35-36-7-1)

TITLE: Barber v. State
INDEX NO.: D.5.a.
CITE: (2nd Dist., 08-17-09), 911 N.E.2d 641 (Ind. Ct. App. 2009)
SUBJECT: Denial of continuance - late-disclosed witnesses
HOLDING: In operating while intoxicated prosecution, Tr. Ct. erred in denying D's motion to continue filed on Monday morning of her bench trial. Defense counsel filed motion because she had located two witnesses that weekend who supported her defense of involuntary intoxication. Tr. Ct. denied her motion because the deadline to file the witness list had passed two weeks before. D argued that denial of her motion to continue prevented her from fully presenting her defense, thereby violating her due process rights. There is a strong presumption in favor of allowing the testimony of even late-disclosed witnesses and where a party fails to timely disclose a witness, courts generally remedy the situation by providing a continuance rather than disallowing the testimony. S.T. v. State, 764 N.E.2d 632 (Ind. 2002). Here, there is no evidence that defense counsel acted in bad faith in asking for a continuance and filing her updated witness list on morning of trial. The only prejudice the State alleged it would suffer was that had it known earlier it could have called off its witnesses who showed up for trial that morning. In light of D's right to present a defense, the strong presumption in favor of allowing the testimony of even late-disclosed witnesses, the lack of substantial prejudice to the State, and the resultant prejudice to D, Tr. Ct. abused its discretion in denying D's motion to continue. Held, judgment reversed and remanded for a new trial.

TITLE: Barnett v. State
INDEX NO.: D.5.a.
CITE: (1/23/2015), 24 N.E.3d 1013 (Ind. Ct. App. 2015)
SUBJECT: D's waiver in firearm enhancement phase did not violate Sixth Amendment right to jury
HOLDING: D's knowing and intelligent waiver of a trial by jury as to facts underlying firearm sentencing enhancement did not violate his Sixth Amendment right to jury trial. D argued that the language of the firearm enhancement statute, Ind. Code § 35-50-2-11, precluded his waiver of jury for the sentence enhancement. Court disagreed, concluding that D invited any possible statutory or constitutional violation that could have occurred. "Invited error" is a doctrine based in estoppel that prohibits a party from taking advantage of any error that patry committed or invited or that was the natural consequence of his own neglect or misconduct. Brewington v. State, 7 N.E.3d 946 (Ind. 2014). Held, judgment affirmed.

TITLE: Calvert v. State
INDEX NO: D.5.a.
CITE: (7/31/2014), 14 N.E.3d 818 (Ind. Ct. App. 2014)
SUBJECT: Erroneous trial in absentia of D deployed with U.S. Army; retrial not barred
HOLDING: Tr. Ct. erred when it denied D's motion for continuance and tried him in absentia while he was on active duty with U.S. Army in Afghanistan. D's deployment to Afghanistan justified continuance of his trial. The State of Indiana cannot compel a D's presence for a judicial proceeding while, at the same time, the United States compels his absence for active duty in military service overseas. Regardless of whether D had actual or constructive knowledge of his trial date, he has shown good cause why he was unable to attend the trial pursuant to Trial Rule 53.5. Tardiness of D's motion for continuance (filed the day before trial), does not obviate the fact that it was made for undeniable good cause.

D also argued that a retrial would violate Article 1, Section 14 of the Indiana Constitution, because the State advocated a position clearly in conflict of well-established law with willful disregard of the resulting reversal, and misrepresented to Tr. Ct. the timing of D's enlistment in the Army and his motion to continue prior trial date. But D did not move for mistrial, and the challenged misconduct occurred in argument prior to D's trial and cannot be construed to have been intended to goad D into moving for a mistrial. Thus, Court declined D's invitation to adopt rule in State v. Kennedy, 666 P.2d 1316 (Or. 1983), that retrial is barred if State knows its conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. Held, conviction reversed and remanded for retrial.

TITLE: Day v. State
INDEX NO.: D.5.a.
CITE: (1st Dist., 11-22-94), Ind. App., 643 N.E.2d 1
SUBJECT: Continuance by D - time to depose witnesses
HOLDING: Although State filed notice one day before trial of three witnesses that would provide F.R.E. 404(b) prior sexual misconduct evidence, denial of continuance did not prejudice D or deny him opportunity to interview witnesses before they testified. D was unofficially advised about one witness five days before trial & declined opportunity to depose witnesses on afternoon before trial. Ct. also rejected D's reliance on Ind. Code 35-37-4-15(b)(1), which requires 15 days notice before trial of intent to offer other acts of child molesting against different victims. Statute became effective after D's proceedings & conflicts with common law rules of evidence.

RELATED CASES: Williams, 29 N.E.3d 144 (Ind. Ct. App. 2015) (no abuse of discretion in denying D's motion for continuance on morning of trial to depose confidential informant (CI), where D knew identity of CI for almost a month before trial and neither requested a continuance nor attempted to depose CI; D was able to admit into evidence CI's purportedly favorable plea agreement and was permitted to impeach CI with a multitude of past forgery convictions).

TITLE: Drane v. State
INDEX NO.: D.5.a.
CITE: (12/17/82), Ind., 442 N.E.2d 1055
SUBJECT: Continuance by D - non-statutory grounds
HOLDING: Motion for continuance based on non-statutory grounds may be granted in Tr. Ct.'s discretion. TR 53.4; Minton, 378 N.E.2d 639; White, 330 N.E.2d 84. Abuse of discretion may be demonstrated only by showing, among other requirements, that D would be harmed by denial of continuance. King, 296 N.E.2d 113. Here, D moved for continuance & to have bench warrant issued for police officer whom he contended had interrupted attack by bartender & tavern owner upon D. D had subpoenaed officer, but subpoena served on wrong officer. Ct. found D failed to show abuse of discretion in that he never represented to Ct. what officer's testimony would be or how it would differ from his own. Held, no error in denial of continuance.

RELATED CASES: Ross, App., 844 N.E.2d 537 (no error in a denial of D's oral motion for continuance on the day of trial due to an unavailable witness; record did not reflect that D would be able to procure the witness's testimony within a reasonable time); Macklin, App., 701 N.E.2d 1247 (no abuse of discretion in denying D's oral motion for continuance on day of trial); Anderson, App., 695 N.E.2d 156 (D did not show prejudice from denial of motion for continuance to review medical records, as he had sufficient opportunity before day of hearing to discover & review medical records concerning his mental health; further, D produced no evidence that actual records exist, & he did not demonstrate what those reports would prove); Owensby, 467 N.E.2d 702 (denial of D's request for continuance not error where co-Ds pled guilty during trial & testified against D; Ct. distinguishes surprise witness cases of Hergenrother, (1939) 215 Ind. 89, & Johnson, App., 384 N.E.2d 1035; here, witnesses testified directly to crime charged & nature of D's defense was not materially changed by their testimony).

TITLE: Flowers v. State
INDEX NO.: D.5.a.
CITE: (8-28-95), Ind., 654 N.E.2d 1124
SUBJECT: Erroneous denial of D's motion for continuance
HOLDING: Tr. Ct. abused its discretion in denying D's motion for one-day continuance, where important interests of defense would have been satisfied, & nothing in record indicated that prosecution's interests would have been substantially undermined by delay. Approximately one week before trial, D's DNA expert withdrew from case because he had been prevented from obtaining necessary materials. Tr. Ct. denied D continuance that was needed for new expert to prepare for trial. Second motion for one-day continuance was made just prior to conclusion of defense's case. Ct. noted that in criminal cases where DNA evidence plays prominent role, testimony of experts can have dramatic effect on jury. Only opportunity D has to protect his presumption of innocence "is to offer an equally prominent expert who might be able to explain some of the limitations, nuances, complications, & inadequacies of the testing." Although motion for continuance did not comply with statutory requirements of Ind. Code 35-36-7-1, Tr. Ct.'s decision in this case to deny continuance made it impossible for D to vindicate his rights, & thus violated due process. Held, transfer granted, memorandum Ct. App. decision vacated, cause remanded.

RELATED CASES: Malloch, 980 N.E.2d 887 (Ind. Ct. App. 2012) (where there was no evidence when the defense expert was available to testify or whether he was ever properly subpoenaed, D failed to prove that the Tr. Ct.'s denial of his motion to continue due to the expert's unavailability was an abuse of discretion); Jackson, App., 758 N.E.2d 1030 (D's receipt, two weeks before trial, of formal report of DNA test results was not sufficient cause for grant of non-statutory continuance, because D was informed of results two weeks before he received official report & had same amount of time to analyze report as did State).

TITLE: Gingerich v. State
INDEX NO.: D.5.a.
CITE: (12/11/2012), 979 N. E. 2d 694 (Ind. Ct. App. 2012)
SUBJECT: Denial of Continuance for Juvenile Waiver Hearing - Abuse of Discretion
HOLDING: Tr. Ct. abused its discretion in denying a continuance and forcing 12-year-old charged with murder to waiver hearing only four business days after detention/probable cause hearing. Twelve-year-old D and friend were charged with shooting friend's step-father to death. Defense counsel moved to continue waiver hearing due to need to have client evaluated and to receive police report, autopsy report, client's statements and other discovery from state. Counsel renewed this motion at waiver hearing, noting that he had still not received discovery, had not had a chance to interview witnesses, and would have to wait another two to three weeks for mental health and competency evaluation, which he stated was important. Tr. Ct. denied continuance. The Defense presented witnesses who testified that this crime was out of character for Gingerich. The state presented testimony from a probation officer that there were no private residential juvenile facilities that would accept Gingerich, and that DOC could hold him only until his 18th birthday if he remained in the juvenile system. The Tr. Ct. waived Gingerich to adult court, and several months later, Gingerich pled guilty to conspiracy to commit murder as a Class A felony. This plea was pursuant to an agreement which required him to waive his right to challenge his waiver into adult court.

He later filed this appeal challenging the waiver as a denial of due process. The Court of Appeals restated this as wehther the juvenile court abused its discretion in denying Gingerich's request to continue the waiver hearing. The state counter-appealed, arguing that Gingerich had waived his right to challenge the waiver proceedings. However, because the Court of Appeals finds that the Tr. Ct. abused its discretion and jurisdiction was not properly transferred to adult court, the guilty plea and the required waiver were both void.

Ind. Code 31-30-1-1 vests exclusive original jurisdiction in juvenile court over a child under 18 alleged to have committed a delinquent act. Ind. Code 31-30-3-4 creates a presumption of waiver to adult court for children ten or older who are charged with an act that would be murder if committed by an adult. However, this statute also provides that such waiver occur "after full investigation and hearing," and that the presumption can be rebutted by proof that "it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system." In Vance v. State, 640 N.E.2d 51, 55 (Ind. 1994), the Indiana Supreme Court held that juvenile waiver hearings must afford juveniles the basic due process right to present evidence, noting that the statutes require full investigation and hearing. Vance, 15 and charged with murder, was given only 2 days before his waiver hearing, which the Court found to be an abuse of discretion. However, because he had a later waiver hearing on other charges, at which he was able to present evidence, the Court found that he was not prejudiced by the denial of his initial request for continuance, and the error was harmless.

Here, Gingerich made a specific showing that he was prejudiced by the Tr. Ct.'s denial of continuance. First, he pointed to a mental health evaluation conducted shortly before the guilty plea which raised questions about his competence to, due to developmental immaturity, to stand trial or plead guilty. Second, he argued that defense counsel was not adequately prepared to refute the testimony of the probation officer that there were no juvenile placements available. The Marion County PD Agency, as amicus, pointed out that there were 17 such facilities in Indiana, and also pointed out that in similar cases they are given as much as three months to prepare for the waiver hearing -- preparation

which includes a obtaining "a multitude of records", working with mental health experts, experts "who can testify regarding the negative impact of waiver on the juvenile and the community at large, and experts "who can speak regarding brain development in juveniles. This preparation also includes identifying suitable placements which will accept the client, as well as identifying programs and services available to juveniles sent to DOC's juvenile facility in Pendleton. The Court reversed Gingerich's conviction and remanded for a new waiver hearing.

TITLE: Ind. Code 35-36-7-1
INDEX NO.: D.5.a
CITE:
SUBJECT: Continuance by D - absent witness
HOLDING: STATE PROVIDES: D must by affidavit (1) show name & address of witness, if known; (2) indicate probability of procuring witness's testimony within reasonable time; (3) show absence of witness not procured by D's act; (4) state facts to which D believes witness will testify, including statement that D believes facts to be true; (5) state that D is unable to prove such facts via any other witness now procured. Timing: affidavit must be filed not later than 5 days before trial unless D establishes he is not at fault for failing to file affidavit at an earlier date.

TITLE: Ramirez v. State
INDEX NO.: D.5.a.
CITE: (4/27/2022), Ind., 186 N.E.3d 373
SUBJECT: Denial of continuance denied a fair trial; improper local discovery rule
HOLDING: In child molesting prosecution, trial court erroneously denied Defendant's motion for a continuance to review new evidence submitted one day before trial. After delving "into the facts of the case" with the complaining witness (C.W.) and her mother for the first time, the prosecutor sent defense counsel an email detailing the discussions that included several new allegations. Defense counsel, within four hours of receiving the new information, filed a motion requesting in part that the court grant a continuance because the new allegations materially changed his theory of defense and counsel needed time to complete additional discovery. The trial court denied the motion as untimely, and during trial, Defendant twice renewed his request for a continuance with no success. The Indiana Supreme Court found an abuse of discretion because the trial court failed to engage "in the appropriate balancing of interests when it denied the (continuance) request, and [Defendant] made specific showings as to why additional time was necessary and how it would have benefitted the defense." The Court further noted that there was no evidence that a continuance would have adversely impacted the State's interests or burdened the court. As in Vaughn v. State, 590 N.E.2d 134, 135–36 (Ind. 1992) and Flowers v. State, 654 N.E.2d 1124, 1125 (Ind. 1995), Defendant established prejudice from the trial court's denial of his motion for continuance. "Simply put, it is unrealistic to expect the defense, within a few hours, to investigate the new allegations, evaluate the evidence, adapt trial strategy, and complete final preparations."

The Court also found harmless error relating to defense counsel's inability to receive a copy of C.W.'s forensic interview. The prosecutor relied on Allen County Local Criminal Rule 13, which requires defense counsel to apply to the trial court "to obtain copies of audio or videotape" and "state in specific terms the necessity for such copies." The Court found the local rule void "because it imposes requirements not found in our trial rules for obtaining otherwise discoverable evidence." The trial court erred in relying on the impermissible local rule and issuing an improper protective order for the video. However, these erroneous discovery rulings did not require reversal because Defendant had over seven months to view the videos at the prosecutor's office. The Court could not say that Defendant's inability to receive a physical copy of the video was "inconsistent with substantial justice," thus reversal was not required on that issue. Held, transfer granted, Court of Appeals' memorandum opinion vacated, conviction reversed and remanded for new trial.

TITLE: Rhinehardt v. State
INDEX NO.: D.5.a.
CITE: (4/30/85), Ind., 477 N.E.2d 89
SUBJECT: Continuance by D - time for preparation
HOLDING: Tr. Ct. did not err in denying D's motion for continuance requesting additional time for preparation (attorney on case 2 weeks). Ct. notes because D's motion did not conform to requirements of Ind. Code 35-36-7-1, Tr. Ct. had discretion. Continuances to allow more time for preparation are disfavored & should be granted only upon showing good cause & in furtherance of justice. Downer, 429 N.E.2d 953; Keys, 390 N.E.2d 148. Although D made specific allegations re objects needing additional investigation, D failed to demonstrate that absence of such evidence establishes specific harm required to show abuse of discretion. Dillon, 448 N.E.2d 21. Held, no error.

RELATED CASES: G.N., App., 833 N.E.2d 1071 (no error in denial of continuance of juvenile's denial hearing, where counsel was appointed 30 days before hearing); Cox, 696 N.E.2d 853 (no abuse of discretion in denying request for more time for mitigation investigator to complete work that, at least in significant part, could have been done by counsel several months before trial); Carter, App., 632 N.E.2d 757 (Where D had raised defense of voluntary intoxication, & on rebuttal, State brought in expert to rebut proposition that Prozac would increase level of intoxication, Tr. Ct. did not err in denying continuance to D for purpose of preparing expert testimony on surrebuttal. Testimony related to D's own theory of defense, & he should have had time to investigate it thoroughly before trial. Additionally, Ct. noted lateness of motion worked against D in balancing need for continuance.); Hazelwood, App., 609 N.E.2d 10, (No error in denial of D's 3 requests for continuance due to newly appointed counsel, need to locate witnesses, & obtain additional evidence after close of State's case.).

TITLE: Silvers v. State
INDEX NO.: D.5.a.
CITE: (12/7/2018), 114 N.E.3d 931 (Ind. Ct. App. 2018)
SUBJECT: Denial of continuance to investigate phone call recordings did not violate due process
HOLDING: Jail authorities gave the prosecutor a CD containing D's jail telephone calls. When a deputy prosecutor listened to the CD, he recognized defense counsel's voice during one of the calls. However, he stopped listening and brought it to the attention of the Tr. Ct. D was not entitled to a continuance to investigate the calls, because the recordings did not prejudice him. Court noted that "the incident was explored on three separate occasions below and there is no indication that anyone listened to the substance on the CD." Held, judgment affirmed.

TITLE: Smith v. State
INDEX NO.: D.5.a.
CITE: (2/18/83), Ind., 445 N.E.2d 85
SUBJECT: Continuance by D - absent witness
HOLDING: Tr. Ct. did not abuse discretion by denying D's motion for overnight continuance made to secure attendance of absent witnesses where motion (1) was oral & did not inform Tr. Ct., with specificity, as to what absent witnesses' expected testimony would be; (Harrison, App., 337 N.E.2d 533; Kappes (1929), 89 Ind. App. 344) & (2) did not represent D would be able to locate witnesses overnight (McGraw 426 N.E.2d 1290; Orms, App., 330 N.E.2d 757). Here, D had subpoenas issued for both witnesses, but neither appeared. Upon D's request, Tr. Ct. issued bench warrant for one witness, but sheriff could not locate him. Before presenting evidence, D moved to continue trial until next day; motion denied. Held, armed robbery conviction affirmed.

RELATED CASES: Blackburn, 130 N.E.3d 1207 (Ind. Ct. App. 2019) (Tr. Ct. did not err in denying D's motion to continue even though D could not locate material witness; D failed to meet statutory requirement that there be some probability of procuring the witness's testimony within a reasonable time and D was not prejudiced by the denial of the motion to continue); Laster, 956 N.E.2d 187 (Ind. Ct. App. 2011) (no abuse of discretion in denying continuance request based on new potential witness where no apparent likelihood of locating the witness and due to inconvenience and expense of rescheduling the trial); Macklin, App., 701 N.E.2d 1247 (D's broad allegation that absent witness was material witness, without any identification of that witness or explanation of what witness would likely testify to, was insufficient to demonstrate to Tr. Ct. that he would be prejudiced by denial of his motion); Salone, App., 652 N.E.2d 552 (no error in denying D's oral motion for continuance to secure attendance of absent witnesses; anticipated testimony was not material & its absence did not prejudice D); Randall, 474 N.E.2d 76 (no error in denial of oral motion for continuance made during trial; Ind. Code 35-1-26-1 requires motion be accompanied by written affidavit; Ct. notes D also failed to comply with time requirements); Church, 471 N.E.2d 305 (where prosecutor stipulated that absent witness would testify facts alleged in D's affidavit, Tr. Ct. properly denied motion for continuance); Murphy, App., 475 N.E.2d 42 (D failed to comply with statute (Ind. Code 35-36-7-1), in requesting continuance for out-of-state witness).

TITLE: Smith v. State
INDEX NO.: D.5.a.
CITE: (1st Dist. 8/2/83), Ind. App., 452 N.E.2d 160
SUBJECT: Continuance by D - counsel of one's choice
HOLDING: Tr. Ct. did not violate non-indigent D's 6th Amend rights by denying continuance upon counsel's notification of schedule conflict where counsel should have advised Ct. of conflict at an earlier date, new counsel who tried D's case was co-counsel in case causing conflict, new counsel had 10 days to prepare for D's LSD-dealing trial & delay had been caused already by original trial which resulted in mistrial. Here, Colman represented D in first trial which resulted in a mistrial. On 10/16, D was arraigned; new trial date set for 12/8. On 12/1, Colman advised Ct. of conflict. Attorney Loftman, Colman's partner, represented D at voir dire on 12/8 & trial on 12/14. Ct. employs test set forth in US v. Burton, (D.C. Cir. 1978) 584 F.2d 485, to find D was not prejudiced in being denied counsel of his choice. Burton cites nine factors to be considered: (1) length of requested delay; (2) other continuances requested; (3) inconvenience to trial actors; (4) legitimate reason for delay; (5) D's contribution to circumstances giving rise to request for continuance; (6) co-counsel; (7) identifiable prejudice to D's case if continuance denied; (8) complexity of case; (9) other relevant factors. Held, no error.

RELATED CASES: Macklin, App., 701 N.E.2d 1247 (it is not error to refuse to allow D to replace his counsel during or immediately before trial, particularly where, as here, D gave no detailed explanation of why he wanted new counsel & Ct. took notice of D's counsel's competency).

TITLE: Suits v. State
INDEX NO.: D.5.a.
CITE: (2d Dist. 7/28/83), Ind. App., 451 N.E.2d 375
SUBJECT: Continuance by D - to secure counsel
HOLDING: Tr. Ct. abused discretion by denying D's motion for continuance to secure counsel made morning of trial, only 20 days after Ct. set trial date. Ungar v. Sarafite, (1964) 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921; Fitzgerald, 257 N.E.2d 305 (conviction reversed where Tr. Ct. forced D, who had made determined effort over one year period to not be tried, to trial; other means existed short of proceeding with trial). Here, D appeared by counsel 2/24 & moved for continuance of arraignment, which was granted. D failed to appear for arraignment on 3/10. On 3/12, D appeared without counsel & was arraigned on charges (misdemeanors) & advised of right to counsel. Trial was set for 3/30. On 3/30, D appeared without counsel & asked for continuance to secure counsel, detailing efforts he had made to obtain counsel. Tr. Ct. denied motion. Ct. finds D did not waive right to counsel by unreasonably delaying employing counsel of his choice or in repeatedly discharging retained counsel as occurred in Yager, 437 N.E.2d 454; Vacendak, 431 N.E.2d 100; Works, 362 N.E.2d 144; & Hardy, App., 436 N.E.2d 837. Held, convictions reversed.

TITLE: Timm v. State
INDEX NO.: D.5.a.
CITE: (12-28-94), Ind., 644 N.E.2d 1235
SUBJECT: Continuance - replacement of counsel
HOLDING: Tr. Ct. did not err in denying D's motion for continuance, where D changed counsel on Friday before trial. D was not abandoned by counsel & was in no danger of having to represent himself. Trial judge fully informed D of possible adverse consequences of changing representation so close to trial, indicating that new attorneys would not be well prepared for trial. Parties may not manipulate judicial process by using motion to withdraw as counsel to secure continuance at eleventh hour, Risner, App., 604 N.E.2d 13. Held, transfer granted, Ct. App. reversed & Tr. Ct. affirmed.

RELATED CASES: Hamilton, App., 864 N.E.2d 1104 (Tr. Ct. did not abuse discretion in denying continuance where D hired new counsel two days before trial & new counsel was unaware of all the pending charges against D); Robinson, App., 724 N.E.2d 628 (no error in allowing D's counsel to withdraw, at D's request, four days before trial, and by denying requests for continuances made before & after D's first counsel withdrew).

TITLE: Vaughn v. State
INDEX NO.: D.5.a.
CITE: (04/14/92), Ind., 590 N.E.2d 134
SUBJECT: Erroneous denial of D's Motion for Continuance
HOLDING: Even under highly deferential standard of review, it was error for Tr. Ct. to deny D's motion for continuance, because basis for motion clearly predominated over any prejudice to State. D's first trial for burglary, theft, & forgery resulted in hung jury. Significant issue at trial was eyewitness identification, & State alleged that D & his sister cashed traveler's checks which were taken in residential burglary. Cashier identified D & his sister as persons who cashed checks, but at first trial sister testified that she & D did not cash checks at store & that she was recognized because she frequently cashed her work checks there. At time of second trial, sister was unable to come to Ct. because she was in labor, & doctor informed Ct. that travel would be hazardous for her & baby's health. On day of trial, but before voir dire, D moved for continuance so her testimony could be presented live to jury. Ct. denied motion & audio tape of sister's testimony from first trial was admitted at second trial, where D was ultimately convicted. Motion was made late in process & didn't comply with requirements of Ind. Code 35-36-7-1. At time of motion, however, no investment in Ct. room jury selection process was lost, medical condition causing witness' unavailability would not likely result in long delay, & probability of her willingness & availability to testify at later date was high. Having witness' live testimony was crucially important to defense, as shown by hung jury in first trial, despite other evidence of guilt. Basis for motion to reschedule trial clearly predominated over basis for State's opposition to continuance, & sufficient prejudice to D was demonstrated to make denial of motion abuse of discretion. Held, transfer granted, convictions reversed, & new trial ordered, Givan, J., dissenting.

D. TRIAL

D.5. Continuances

D.5.b. By prosecutor (Ind. Code 35-36-7-2)

TITLE: Mengon v. State
INDEX NO.: D.5.b.
CITE: (3/30/87), Ind., 505 N.E.2d 788
SUBJECT: Continuance by state - absent witness
HOLDING: Tr. Ct. did not err by granting state's motion for continuance. Here, state filed verified motion for continuance stating that its witness (officer to whom D sold drugs) was hospitalized & would be unavailable for trial. At hearing on motion, defense counsel told Ct. 27 witnesses had been subpoenaed for anticipated trial date & that continuance would conflict with his other obligations. Granting of motion for continuance lies within sound discretion of Tr. Ct. Woods, 484 N.E.2d 3. Tr. Ct. reset trial to date agreed upon by both prosecutor & defense counsel & advised D he could recover his costs for service of subpoenas issued to witnesses. Held, no error.

RELATED CASES: Hill, App., 773 N.E.2d 336 (Tr. Ct. erred when it granted State's request for continuance because it did not have discretion to postpone trial when D agreed that State could present witness's stipulated testimony); Lynn, App., 625 N.E.2d 499 (In dicta, Ct. addressed tangential issue raised concerning using dismissal to circumvent continuance rules, saying in footnote: "A very forceful argument can be made that the prior Ct.'s dismissal with prejudice was within the inherent power of the Tr. Ct. as a means for the Ct. to deter the State from usurping the Ct.'s administrative power when the State attempts to dismiss a cause rather than to comply with the statutory requirements for a continuance found at Ind. Code 35-36-7-2 (1988)." Can be used to ask for dismissal with prejudice.); McIntyre, App., 460 N.E.2d 162 (Tr. Ct. did not err in granting state's motion for continuance because of victim's absence; Ct. rejects D's contention that Ind. Code 35-3.1-1-2(c) [now Ind. Code 35-34-1-2(c)] prohibits grant of continuance based on absence if witness' name is not endorsed on indictment/information; Akins, 429 N.E.2d 232 allows continuance if D was fully informed of witness' anticipated testimony & has adequate time to prepare).

D. TRIAL
D.5. Continuances
D.5.c. By court

TITLE: Bell v. State
INDEX NO.: D.5.c.
CITE: (7/16/86), Ind., 495 N.E.2d 526
SUBJECT: Recesses during trial - effect upon jury
HOLDING: Tr. Ct. did not err in ordering 4-day recess at conclusion of evidence. Here, D objected to continuance on grounds that delay would inhibit jury's memory & ability to evaluate evidence. Ct. finds contention "warrants careful consideration." Delay could be of such a magnitude that jury could not render reasoned/just verdict based upon accurate recollection of evidence. Whether delay is of such magnitude depends upon analysis of: (1) actual length of delay; (2) position of delay in progress of trial; (3) complexity of evidence; (4) complexity of legal issues; (5) reason for delay. Ct. discusses policy behind each factor. In D's murder case, Ct. finds evidence was not complex & final arguments would refresh jury's recollection. Reason for delay was Thanksgiving holiday. Ct. notes possibility of verdict influenced by jury animosity if required to deliberate on Thanksgiving Day. Ct. notes this reason fails to provide explanation for not completing case on Friday & Saturday after Thanksgiving. That delay falls within realm of convenience bearing little or no relationship to overall fairness of trial. Nonetheless, Ct. finds delay was not impermissibly excessive. Held, conviction affirmed.

D. TRIAL

D.5. Continuances

D.5.d. Adverse Impact on Certain Children (Ind. Code 35-36-7-3)

TITLE: Faulisi v. State
INDEX NO.: D.5.d.
CITE: (11/16/92), Ind.App, 602 N.E.2d 1032
SUBJECT: Continuances - Adverse impact on young witnesses
HOLDING: Tr. Ct. acted within its discretion to decline holding D's retrial in place of child molestation case. In rescheduling trial after Tr. Ct. granted State's motion for continuance, Tr. Ct. was limited by its own congested calendar & limited availability of defense counsel. D suggested continuing child molestation case that was on ct's calendar so that D's retrial could be held on that date. In rejecting D's proposal, Tr. Ct. noted that child molestation case had been continued several times & that post ponement might have adverse effects on the young witness. Ind. Code §35-36--7-3 requires Tr. Ct. to consider whether postponement will have adverse impact on child who is less than 10 yrs. old & who is alleged victim or will be witness at trial. Held, no error.

D. TRIAL

D.6. Severance/consolidation (Ind. Code 35-34-1-9 to 11)

D.6.a. Defendants

TITLE: Allen v. State
INDEX NO.: D.6.a.
CITE: (10/31/90), Ind. App., 562 N.E.2d 39
SUBJECT: Grounds for Severance of Ds - Co-D's hearsay statement
HOLDING: When 2 or more Ds are joined by same indictment or information & 1 or more Ds move for separate trial because another D has made hearsay statement which makes reference to moving D but is not admissible as evidence against him, Tr. Ct. shall require prosecutor to elect: (1) joint trial where statement is not admitted into evidence; (2) joint trial where statement is admitted after all references to D have been deleted; or (3) separate trial for moving D. Ind. Code 35-34-1-11. In all other cases, Tr. Ct. must order separate trial if necessary to protect D's right to speedy trial or to promote fair determination of guilt or innocence of D. Id. Contemplated mandatory election which statute provides is triggered only when co-D's out-of-court statement is inadmissible against moving D. Crenshaw, 439 N.E.2d 620 (statutory safeguards do not apply where co-D can be cross-examined). Here, D alleged error when Tr. Ct. *overruled* D's renewed motion for separate trials after finding co-D's entire unredacted statement to police was admissible despite Bruton v. U.S., 88 S.Ct. 1620. See J.9.b. Co-D's statements to witness & police were admissible against D; therefore, election contemplated by statute was not triggered & granting severance was matter of Tr. Ct.'s discretion. Held, no error. **Note:** See J.9.b for further discussion of Co-D's hearsay statements (Bruton issues).

RELATED CASES: Sims, 358 N.E.2d 746 (insertion of word "blank" or "X" for D's name not adequate redaction; where no showing that 2 co-Ds were engaged in conspiracy, Tr. Ct. erred when it denied D's motion for separate trials & when it admitted admissions of each D in their joint trial); Morrison, 516 N.E.2d 14 (order consolidating trial at most harmless error, notwithstanding co-D's statements implicating D in robbery & failure to take stand, where D's confession standing alone was sufficient to sustain conviction); Fox, 384 N.E.2d 1159 (statement may implicate co-D & be inadmissible in joint trial even if all references to co-D have been deleted); Castro, 580 N.E.2d 232.

TITLE: Cunningham v. State
INDEX NO.: D.6.a.
CITE: (9/27/84), Ind. App., 469 N.E.2d 1
SUBJECT: Grounds for Severance of Ds - Prejudice; Impossibility of fair trial
HOLDING: Where wife failed to show prejudice, Tr. Ct.'s refusal to grant separate trials did not deny her fair trial (jointly tried with husband for food stamp fraud). To compel severance, D must show impossibility of fair trial, not merely that separate trial offers better chance of acquittal. Drane, 442 N.E.2d 1055. See Ind. Code 35-34-1-11. Here, Ct. finds some overlapping conduct, but evidence generally demonstrated separate/distinct transactions involving husband & wife. See Johnson, App., 423 N.E.2d 623 (ct. may refuse to order separate trials on basis that D may be found guilty by association where evidence presents clearly defined & distinctive roles for each D & there is no confusion over who may have spoken certain words or may have done certain acts; Ct. rejected D's argument of imputed guilt by association). Held, no error.

RELATED CASES: Angulo, 191 N.E.3d 958 (Ind. Ct. App. 2022) (no error in joining D's trial with his co-defendant despite D's claim that doing so precluded him from being able to call the co-defendant as a witness, thereby violating his Sixth Amendment right to compel testimony; D had no basis to believe that the co-defendant would have waived his right against self-incrimination had he been tried separately); Smith, 474 N.E.2d 973 (ct. finds no confusion as to which co-D did what, thus no error in denial of severance motion, *citing* Johnson);Hopper, 539 N.E.2d 944 (D in drug dealing case failed to show prejudice by Tr. Ct.'s denial of severance motion, even though co-D's involvement in transactions was more extensive & co-D absented himself from trial; Tr. Ct. gave instructions concerning co- D's absence & separate consideration of each D); Holifield, 572 N.E.2d 490 (reversible error does not occur simply because 1 D gives testimony that incriminates other Ds); Adams, App., 490 N.E.2d 346 (no error in denial of separate trials where evidence of other crimes committed by co-Ds was presented, D was not implicated in any other criminal activity & no evidence of his prior criminal record was admitted; only evidence by co-D was favorable to D); Gordon, 609 N.E.2d 1085 (no error in denial of severance where co-D entered into plea agreement after trial had begun where judge gave jury proper instructions).

TITLE: Crenshaw v. State
INDEX NO.: D.6.a.
CITE: (9/14/82), Ind., 439 N.E.2d 620
SUBJECT: Severance - Ds; co-D testifies
HOLDING: Grant of separate trial is discretionary. When in joint trial co-D (declarant of extrajudicial statement implicating D) elects to take stand & can be cross-examined, D suffers no prejudice. Chandler, 419 N.E.2d 142; McChristian, 396 N.E.2d 356; Guttierrez, 386 N.E.2d 1207; Ortiz, 356 N.E.2d 1188; Johnson, App., 423 N.E.2d 629. Safeguards provided in Ind. Code 35-3.1-1-11 (now Ind. Code 35-34-1-11) do not apply where co-D/declarant can be cross-examined. Here, D moved for severance after learning co-D intended to interpose alibi defense & prior statement, implicating D, would be used to impeach co-D. Held, no error in denial of severance motion.

RELATED CASES: Castro, 580 N.E.2d 232 (Tr. Ct. did not abuse discretion, nor violate Ind. Code 35-34-1-11(B) or the proscriptions of Bruton v. US, (1968), 391 U.S. 123, 88 S.Ct. 1260, 20 L.Ed.2d 476, in denying severance of Ds because during course of trial, 2 Ds who had made prior statements entered into plea agreements in exchange for testimony against other Ds. They were therefore available for confrontation & cross-examination & appellants were unable to show prejudice from denial of severance); Averhart, 470 N.E.2d 666 (death penalty case; held, no error in denial of severance of 3 co-Ds).

TITLE: Johnson v. State
INDEX NO.: D.6.a.
CITE: (2/25/83), Ind., 445 N.E.2d 107
SUBJECT: Severance - Ds
HOLDING: Tr. Ct. did not err in denying severance motion where co-D's pretrial statement exculpating D was contradicted by a later statement claiming D was present on night of offenses, & D made no representation that co-D was likely to testify at a separate trial (in fact, in joint trial co-D refused to testify at a hearing outside jury's presence). Here, co-D told police that a man named Roger was with him the night the robberies & rape occurred. Later co-D told brother that D was with him that night. Police overheard statement. Ct. finds 3 federal cases cited by D inapposite. In all 3, co-Ds' testimony was completely exculpatory, contradicted state's evidence, & willingness of co-Ds to testify was demonstrated. Held, no error. **Note:** See Cruz v. NY, (1987), 107 S.Ct. 1714, 95 L.Ed.2d 162 & Richardson v. Marsh, (1987), 107 S.Ct. 1702, 95 L.Ed.2d 176 (cards at J.9.b), on admissibility of co-D's statement at joint trial.

TITLE: Peck v. State
INDEX NO.: D.6.a.
CITE: (12/5/90), Ind., 563 N.E.2d 554
SUBJECT: Consolidation of Ds
HOLDING: Ind. Code 35-34-1-9(b) allows State to charge 2 or more Ds in single information or indictment. Absent statutory provision for consolidated trials of separately charged Ds, it is within Tr. Ct.'s discretion to decide if Ds' trials should be joined. To show abuse of discretion, D must show that, in light of what occurred at trial, he was subjected to actual prejudice by denial of separate trial. Hicks, 536 N.E.2d 496. Here, D claimed that consolidated trial forced him to share peremptory challenges with co-D, that he was forced to allow jury to hear confusing instructions, & that consolidating cases led to admission of incriminating evidence which would not have been admissible if D were tried separately. Ct. held that D failed to establish actual prejudice as result of consolidation, & thus failed to show abuse of discretion; co-D used 2 strikes in manner D did not agree with, resulting in D being unable to strike juror, but incriminating statements by co-D were not as damaging to D as D's own admission that he thought he killed victim. Held, no error.

RELATED CASES: Sapp, 513 N.E.2d 178 (trials properly consolidated where each D charged with each offense included in charging document); Maynard, App., 508 N.E.2d 1346 (no error in consolidating trials of co-Ds charged with conspiracy and theft of some of vehicles which D was charged with stealing); Mauricio, 476 N.E.2d 88 (consolidation proper when conspiracy is not charged and not all Ds are charged in each count, if information alleges offenses charged were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of 1 charge from proof of others; felony murder and aiding felony murder properly consolidated); See Ind. Code 35-34-1-9 (b)(3)(A) (consolidation of Ds proper where indictment\information alleges offenses charged were part of common scheme or plan).

TITLE: Smith v. State
INDEX NO.: D.6.a.
CITE: (2/27/85), Ind., 474 N.E.2d 973
SUBJECT: Severance - Ds; waiver
HOLDING: Where co-Ds failed to renew pretrial severance motions during or at close of all evidence, any error in denial of severance motion was waived. Ind. Code 35-3.1-1-12(b) [now Ind. Code 35-34-1-12(b)]. See also Dorton, 419 N.E.2d 1289; Lee, App., 397 N.E.2d 1047. Here, Ct. examines Ds' challenges to denial of severance motion & finds no error. Held, convictions affirmed.

RELATED CASES: Hunter, 492 N.E.2d 1067 (Crim L 902; D waived any error by declining Tr. Ct.'s offer to sever trial from co-D; here, co-D moved for severance, D declined, but D later moved for "no adverse inference" instruction to which co-D objected; when co-D objected, Tr. Ct. asked D if D wanted severance, & D said no, but objected that instruction was not given; held, conviction affirmed).

TITLE: Townsend v. State
INDEX NO.: D.6.a.
CITE: (2/14/89), Ind., 533 N.E.2d 1215 *reh'g den., cert. den*. 110 S.Ct. 1020
SUBJECT: Separation of Ds - waiver; timeliness of motion
HOLDING: D's motion for separate trial must be made before commencement of trial, unless motion is based on ground not previously known. Right is waived by failure to timely make motion. Stovall, 477 N.E.2d 252; Ind. Code 35-34-1-12(a). Here, D alleged Tr. Ct. erred in not granting his motion for separate trials. Court found D waived right to severance because he failed to file motion for separate trials prior to commencement of trial & subsequent motions were not based on ground not previously known. Held, convictions affirmed. **Note:** If D's pretrial motion for separate trial is denied, right to separate trial is waived by failure to renew motion on same grounds before or at close of all evidence during trial. See Stevens (this section).

RELATED CASES: Hatchett, 503 N.E.2d 398 (D preserved issue for review despite failing to file written motion for severance); Rouster, 600 N.E.2d 1342 (D cannot rely on co-D's motion for severance to preserve error for appellate review; issue concerning right to severance waived on appeal where D failed to make pretrial motion & failed to make subsequent motion at close of evidence as statute requires); Shaffer v. U.S., 80 S.Ct. 94 ("trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear").

TITLE: Underwood v. State
INDEX NO.: D.6.a.
CITE: (3/10/89), Ind., 535 N.E.2d 507
SUBJECT: Grounds for Severance of Ds - Mutually Antagonistic Defenses
HOLDING: Mutually antagonistic defenses require severance only if acceptance on 1 D's mutually antagonistic defense precludes acquittal of the other. U.S. v. Ziperstein (7th Cir. 1979), 601 F.2d 281, *cert. den.*, 100 S.Ct. 701. Co-D Huffman stated he merely tapped victim & D beat him. Co-D Asbury stated Huffman & D stomped on him, & D picked him up by penis. Pathologist testified that any one of 3 methods of maiming was sufficient to cause death. Held, D was not entitled to separate trial on basis of co-Ds' statements that co-Ds merely tapped victim & that D beat victim with tire iron, in light of evidence that D maimed victim in other ways sufficient to cause his death.

RELATED CASES: Lee, 684 N.E.2d 709 (even if case involved mutually antagonistic defenses, testimony & arguments provided by co-Ds did not result in actual prejudice to D); Lampkins, 682 N.E.2d 1268 (because co-D did not assert any defense at trial that would have precluded acquittal of D if jury had accepted that defense, defenses were not mutually antagonistic such that separate trials would have been necessary); Hopper, 539 N.E.2d 944 (on review, Ct. looks at what actually happened at trial, not allegations in motion for severance); Kimbrough, App., 622 N.E.2d 230 (not error for Tr. Ct. to fail to sua sponte order separate trial of Ds charged with battery because of alleged mutually antagonistic defenses, where Tr. Ct. could have accepted Co-Ds' defense that they were not involved in fight & still have found D not guilty of battery); U.S. v. Zafiro, (7th Cir. 1991), 945 F.2d 881, *aff'd* 113 S.Ct. 933 (defenses must be not merely conflicting, but irreconcilable; acceptance by jury of 1 D's defense compels disbelief of other party's defense); Blacknell 502 N.E.2d 899 (ct. rejects D's contention that severance was required because co-D's testimony incriminated D or because D's defense was adverse/inconsistent with co-D's; D has no constitutional right to be protected from damaging evidence); See also Huffman, 543 N.E.2d 360, *cert. den.* 110 S.Ct. 933.

TITLE: U.S. v. Breinig
INDEX NO.: D.6.a.
CITE: 70 F.3d 850 (6th Cir. 1995)
SUBJECT: Severance - Impact of Prejudicial Evidence
HOLDING: In joint trial of formerly married couple for tax evasion, evidence presented by wife that husband was mentally abusive and manipulative, violated husband's due process rights. Under Zafiro v. U.S., (1993), 113 S.Ct. 933, standard for obtaining severance is existence of "serious risk that a joint trial would compromise a specific trial right of one of the Ds, or prevent the jury from making a reliable judgement about guilt or innocence." Here, jury heard highly inflammatory evidence of D's bad character which would not have been admissible in severed trial. Because D's credibility was in issue, this evidence was manifestly prejudicial.

TITLE: U.S. v. McVeigh
INDEX NO.: D.6.a.
CITE: 169 F.R.D. 362 (D.C. Colo. 1996)
SUBJECT: Severance -- Oklahoma City Bombing Trials
HOLDING: The government's intent to introduce statements made by Terry Nichols concerning his connections to Timothy McVeigh will require separate trials for the two Ds. In the statements, Nichols gave innocent explanations for his contacts with McVeigh, who is charged as the principal. The government wants to offer the statements and argue that they are false and show consciousness of guilt. If the statements are redacted to remove references to McVeigh, the government concedes they have no probative value. On the other hand, because they would not be offered against McVeigh, he could not cross-examine either Nichols or the FBI agents who took the statements. This would prejudice McVeigh to an extent that limiting instructions to the jury could not cure. The antagonistic defenses of the two, both at trial and at their jury penalty phases concerning the death penalty, also weigh in favor of separate trials. The court considered the possibility of joint trials with separate juries, but determined that this was impracticable and could not be used to cure the problem of antagonistic mitigation theories at the penalty phase.

D. TRIAL

D.6. Severance/consolidation (Ind. Code 35-34-1-9 to 11)

D.6.b. Charges

TITLE: Bowser v. State
INDEX NO.: D.6.b.
CITE: (3/14/2013), 984 N.E.2d 236 (Ind. Ct. App. 2013)
SUBJECT: Denial of motion for severance affirmed
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion for severance of his battery charges from criminal recklessness charges. D was angry that his ex-girlfriend was in a new relationship. The convictions stemmed from his ramming of the new boyfriend's car with his. Because all eight of charges against D arose out of the same conduct and not solely because they were of the same character, D was not entitled to severance as a matter of right.

Thus, in determining whether severance would promote a fair determination of D's guilt or innocence, Tr. Ct. should consider number of offenses charged, the complexity of evidence offered and whether the trier of fact will be able to distinguish evidence and apply the law intelligently as to each offense. Ind. Code. 35-34-1-11(a).

Here, there were a number of charged offenses but the evidence was not complex, consisting of testimony from five witnesses and twenty-one exhibits, primarily photographs. One of the testifying police officers described in detail his techniques for accident reconstruction, but scientific or specialized evidence does not necessarily require severance. Finally, it is reasonable to conclude that the jury was able to distinguish the evidence and apply the law intelligently because the charged offenses differed only in levels of mental culpability, whether a deadly weapon was used, and the level of harm inflicted upon the victims. The jury instructions clearly defined each offense, and the court instructed the jury to "consider each count independently based on the law and the evidence relating to that count." Under these circumstances, Tr. Ct. did not abuse its discretion by denying D's motion for severance. Held, judgment affirmed.

RELATED CASES: Vasquez, ___ N.E.3d ____ (Ind. Ct. App. 2021) (affirming discretionary denial of severance where although there were ten charges, eight of them involved one victim and only two of them involved another; the evidence regarding crimes against the second victim was straightforward, as there was only one incident, which made the evidence as to each victim easily distinguishable).

TITLE: Bradtmiller v. State
INDEX NO.: D.6.b.
CITE: (10/17/2018), 113 N.E.3d 255 (Ind. Ct. App. 2018)
SUBJECT: D did not personally waive his jury trial right for habitual-offender enhancement
HOLDING: D's personal waiver of jury trial on underlying felonies did not encompass a waiver on the yet-to-be-filed habitual-offender enhancement. After D rejected State's plea offer, State filed habitual and D's counsel told court "we're wanting.to waive jury" for the habitual. Court did not engage in any colloquy with D or advise him of rights. Because D was never advised of his right to a jury trial for the habitual-offender enhancement, his jury-trial waiver "was not made with sufficient awareness of the relevant circumstances and therefore did not apply to the later-filed habitual-offender enhancement." See also O'Connor v. State, 796 N.E.2d 1230 (Ind. Ct. App. 2003). Held, judgment reversed and remanded.

TITLE: Davidson v. State
INDEX NO.: D.6.b.
CITE: (8/29/90), Ind., 558 N.E.2d 1077
SUBJECT: Severance - similar murder charges
HOLDING: Tr. Ct. did not err in denying D's motion to sever trial on charges that she had drowned 2 of her children, when each was 14 months old, in order to obtain insurance benefits. Evidence showed that D received $5000 in benefits from life insurance policy on 14-month-old daughter who drowned in bathtub in December 1983. In January 1985, D purchased $20,000 policy on life of 14-month-old son, who drowned in bathtub one day later. D was charged with murdering both children, & death penalty count was filed. Charges were joined for trial, & Tr. Ct. denied D's motion to sever. Ind. Code 35-34-1-11(a) grants Ds absolute right to severance of offenses which have been joined solely on ground that they are of same or similar character, & D argues that offenses here were joined for this reason. However, facts reveal pattern of insuring infant's life prior to infant's suspicious drowning. Common modus operandi & motive serve to connect crimes sufficiently to place determination as to joinder within discretion of Tr. Ct. See Jameison, 377 N.E.2d 404; Ford, App., 506 N.E.2d 835. D argues that, since state's case regarding death of first child was so weak that no charges were filed until after death of second child, joining charges allowed state to accomplish, to D's undue prejudice, what it could not do in separate trials. It is true that evidence of second child's death casts that of first child in more culpable light & is undeniably prejudicial. However, facts of each drowning comprise germane & relevant evidence vis a vis the other, so that prejudice was not undue. See People v. Ruiz (Cal. 1988), 749 P.2d 854. Held, convictions affirmed.

RELATED CASES: Blanchard, App., 802 N.E.2d 14 (severance of murder & neglect charges was not mandated, because there was sufficient evidence of distinctive nature, common modus operandi & motive linking charges); Jester, 724 N.E.2d 235 (because conspiracy to murder wife & actual murder of wife involved single motive of D, D did not have right to sever charges).

TITLE: Douglas v. State
INDEX NO.: D.6.b.
CITE: (6/11/84), Ind., 464 N.E.2d 318
SUBJECT: Severance of offenses - test
HOLDING: Tr. Ct. did not err in denying D's motion to sever offenses. Here, D was convicted of involuntary manslaughter & attempted voluntary manslaughter. D argued with woman he lived with; her son intervened. D fatally shot son & wounded woman in house. D chased woman from house; they wrestled over weapon; police officer intervened. Ct. looks to severance statute, Ind. Code 35-34-1-11. Severance is available as matter of right only if offenses were joined solely because of same/similar character, or if severance is appropriate to promote fair determination of guilt/innocence (statute lists 3 considerations). Otherwise, severance is discretionary. Grimes, 454 N.E.2d 388; Duncan, 409 N.E.2d 597. Joined offenses were based on D's continuous series of acts. Offenses were closely connected, same evidence would be admissible whether offenses were joined/severed, & evidence was not too complex/would not confuse jury. Single trial on both counts did not deny D fair determination. Held, affirmed.

RELATED CASES: Grimes, 84 N.E.3d 635 (Ind. Ct. App. 2017) (Tr. Ct. did not abuse discretion in denying D's motion to sever obstruction of justice charge from his incest charges because obstruction charge was intertwined with the incest charges; see full review, this section), Heinzman, App., 895 N.E.2d 716 (common *modus operandi* linked D's crimes in that D abused his position as a caseworker to perpetuate his child molesting scheme); Booker, App., 790 N.E.2d 491 (Tr. Ct. did not err in denying D's request for severance of three child molesting charges. Evidence showed that victims were placed in D's care, molestations had occurred in victims' bedrooms, both victims testified that D used his hand to touch them, & both victims & D tested positive for gonorrhea. This was sufficient to show modus operandi, establishing that charges were joined because they were work of same person); Barajas, 627 N.E.2d 437 (Tr. Ct. did not err in denying motion for severance of charges for murder, dealing in cocaine, & corrupt business influence. Murder & drug charges were intricately connected because State's theory was that victim was murdered for nonpayment for drugs supplied by D. Corrupt business influence count was based on D's drug dealing & commerce with those who sold for him. D's drug dealing activities would also have been admissible in murder trial as exception to prohibition against other crimes evidence, & therefore D was not harmed by failure to sever charges. **Note**, also, pre-trial motions for severance must be renewed at trial to preserve error); Richter, 598 N.E.2d 1060 (Not error to deny D's motion to sever two counts of drug dealing. CI was working with police on continuing basis on surveillance of D, & it was on-going investigation over relatively short period of time. Under circumstances, charges were not joined "solely on the ground that they are of the same or similar character," & therefore pursuant to Ind. Code 35-34-1-11(a), Tr. Ct. had discretion to deny or grant motion for severance); Stovall, 477 N.E.2d 252 (no error in denial of Severance motion where motion was not timely filed & D failed to show harm; here, D filed motion in response to state's motion in limine enjoining D from violating rape shield law; D contended deviate conduct count should be separated from confinement & robbery counts so that he might introduce evidence of past sexual conduct as to latter counts); Ford, 506 N.E.2d 835 (D waived any error by failing to renew motion to sever offenses, as required by Ind. Code 35-34-1-12(b); nonetheless, D also fails on merits - 2 counts were interrelated although they occurred several days apart.)

TITLE: Garcia-Torres v. State

INDEX NO.: D.6.b.

CITE: (3rd Dist., 09-30-09), 914 N.E.2d 268 (Ind. Ct. App. 2009), *sum.aff'd*, 949 N.E.2d 1229 (Ind. 2011)

SUBJECT: Severance of charges not required where offenses are so similar they establish *a modus operandi*

HOLDING: Tr. Ct. did not abuse its discretion by refusing to sever an attempted rape and rape charge based on incidents separated by almost one year. Severance of offenses is required as a matter of right when the offenses are joined solely because they are of the same or similar character. Ind. Code 35-34-1-11. However, offenses may be sufficiently connected together to justify joinder if the State can establish that a common *modus operandi* linked the crimes and that the same motive induced that criminal behavior. Here, both offenses occurred within eleven months of one another, involved a home invasion and the attacker spoke English in a Spanish accent and fit the same general physical description. The totality of the evidence described above, along with the DNA recovered from the victim that matched that recovered from one victim's vagina that matched that recovered from the shoe found in the other victim's room, allows one to say with certainty that the two crimes were committed by the same person. Thus, D was not entitled to severance as a matter of right. Held, judgment affirmed; Crone, J., dissenting, believes D was entitled to severance of the charges against him as a matter of right because the offenses were joined solely on the fact they were of similar character and the similarities of the two offenses, separated by almost one year, did not rise to the level of *modus operandi*.

RELATED CASES: Jackson, 938 N.E. 2d 29 268 (Ind. Ct. App. 2010) (offenses showed a unique modus operandi, thus D was not entitled to severance of forgery and theft charges; D represented himself to be store employee, targeted elderly victims, and stole credit cards after convincing victims that he was offering a store discount and need their wallets to verify information).

TITLE: Goodman v. State
INDEX NO.: D.6.b.
CITE: (1st Dist., 4-19-99), Ind. App., 708 N.E.2d 901
SUBJECT: Improper joinder of offenses in single trial
HOLDING: Tr. Ct. improperly denied D's motion for severance of burglary, theft & receiving stolen property charges. When two or more offenses have been joined for trial in same indictment or information solely on ground they are of same or similar character, D has right to severance of offenses, Ind. Code 35-34-1-11(a), & Ct. has no discretion to deny D's motion for severance. Pardo, App., 585 N.E.2d 692. Offenses may be joined when they are based on same conduct or on series of acts which are connected together, or which are part of single scheme or plan. Ind. Code 35-34-1-9(a)(2). State erroneously characterized D's offenses as "same conduct" & as "single scheme for burglarizing & stealing" because D would arrive at crime scene in middle of night, via untraveled roads, & use gloves. As in Pardo, crimes were not connected together in any apparent manner, as all involved different victims, different property, & different locations over period of about one month; nor were they part of single scheme or plan to steal property. Held, conviction reversed & remanded.

TITLE: Grimes v. State
INDEX NO.: D.6.b.
CITE: (9/5/2017), 84 N.E.3d 635 (Ind. Ct. App. 2017)
SUBJECT: Severance of charge not required; obstruction charge intertwined with incest charges
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion to sever his obstruction of justice charge from his incest charges - even though the obstruction charge was not of the same or similar character (Ind. Code § 35-34-1-9(a)(1) - because the obstruction charge was intertwined with the incest charges. During a nine-week period, D had intercourse with his 14-year-old daughter ("S.G.") 18 times. While awaiting trial, he instructed his former girlfriend to use S.G.'s Facebook account to send a group message, which, at minimum, implied that S.G. fabricated the allegations against D. The message was sent to S.G.'s friend, her former boyfriend, and D's step-sister.

Because D's motive for the bogus Facebook message was intertwined with the incest charges, Tr. Ct. did not abuse its discretion in denying the motion to sever. See Pierce v. State, 29 N.E.3d 1258, 1264 (Ind. 2015). The Facebook message was meant to cast doubt on S.G.'s credibility. And this attack on S.G.'s credibility was the heart of D's trial strategy. Held, judgment affirmed.

Note: D actually waived this claim, but the Court chose to address it on the merits.

TITLE: Horton v. State

INDEX NO.: D.6.b.

CITE: (4/21/2016), 51 N.E.3d 1154 (Ind. 2016)

SUBJECT: Invalid waiver of right to jury trial for domestic battery enhancement - fundamental error

HOLDING: The Indiana Constitution guarantees the right to a jury trial, which can only be waived by the D. Unless the D personally communicates to the judge a desire to waive that right, he must receive a jury trial. Here, failure to confirm D's personal waiver of jury trial before proceeding to a bench trial on the second phase of a D-felony domestic battery charge based on a prior conviction was fundamental error. As in Kellems v. State, 849 N.E.2d 1110 (Ind. 2006), record is devoid of any personal waiver by D to the court--it shows waiver only by D's attorney. Court declined to carve out an exception to the personal waiver requirement of the Indiana Constitutional jury trial right in bifurcated cases where Ds have just experienced a jury trial and thus were probably aware of the right the attorneys waived on their behalf. The personal waiver requirement, rooted in Ind. Code § 35-37-1-2 and longstanding precedent, eliminates an intolerable risk. It ensures that felony prosecutions will not proceed to bench trials against Ds' will by demanding direct evidence that waiver is the Ds' choice. Held, transfer granted, Court of Appeals' memorandum opinion vacated, D-felony domestic battery conviction reversed and remanded for new trial.

RELATED CASES: Saylor, 55 N.E.3d 354 (Ind. Ct. App. 2016) (although Horton involved a bench trial rather than a guilty plea and there is a different statute that governs guilty pleas, Ct. found that same rationale applies when a defendant waives his right to a jury trial when pleading guilty).

TITLE: Martin v. State
INDEX NO.: D.6.b.
CITE: (3d Dist. 2/13/86), Ind. App., 488 N.E.2d 1160
SUBJECT: Joinder - charges; error
HOLDING: Tr. Ct. erred in joining failure to appear & escape charges with arson charges. Ind. Code 35-34-1-10(b)allows Tr. Ct. to join 2 or more charges for trial if offenses could have been joined in same charge pursuant to Ind. Code 35-34-1-9(a)(2). That statute allows joinder of offenses in same charge if based on same conduct or on series of acts connected together or constituting parts of single scheme or plan. IN Cts. have held escape & offense for which D was incarcerated at time of offense are separate/unrelated offenses for purposes of habitual offender statute. Butrum, 469 N.E.2d 1174; Harmer, 455 N.E.2d 1139. Held, remanded for separate trials.

RELATED CASES: Grimes, 84 N.E.3d 635 (Ind. Ct. App. 2017) (Tr. Ct. did not abuse discretion in denying D's motion to sever obstruction of justice charge from his incest charges because obstruction charge was intertwined with the incest charges; see full review, this section), Stevens, App., 580 N.E.2d 274 (even if D has absolute right to severance of offenses, failure to renew motion for severance at trial constituted waiver of right).#1991-4.

TITLE: Pardo v. State
INDEX NO.: D.6.b.
CITE: (1st Dist. 02/03/92), Ind. App., 585 N.E.2d 692
SUBJECT: D's right to severance of charges
HOLDING: Fact that 2 groups of theft charges at issue were committed by breaking into cars, & that they occurred within 22 months of each other was not sufficient to show that they constituted series of acts connected together or parts of single scheme or plan, & therefore D was entitled to have offenses tried separately. Pursuant to Ind. Code 35-34-1-11(a), D is entitled to severance of offenses as matter of right, if they have been joined solely because they are of same or similar character. If charges are based on same conduct or on series of acts connected together, or are parts of single scheme or plan, Ind. Code 35-34-1-9(b)(2), severance is discretionary.

Offenses alleged to have been committed in 9/89 & 11/89 were joined for trial, despite D's request for severance. State claimed joinder was proper under Ind. Code 35-34-1-9(b)(2), because it was obvious that D had again engaged in ongoing scheme to break into cars & steal property from them.

Ct. App. found it was obvious that September charges were of same or similar character to November charge, but found lack of evidence to show that September thefts & November attempted theft were connected together or part of single scheme or plan. D was not detected as result of continuous surveillance & was charged with September offenses before November incident even took place. September thefts were perpetrated with accomplices, & November incident was done alone, & additionally, one occasion involved breaking into cars, while other did not. Ct. found offenses were joined solely because they were of same or similar character, & therefore it was error to deny D's motion for severance. Hodges 524 N.E.2d 774. Held, judgment reversed.

RELATED CASES: Philson, App., 899 N.E.2d 14 (because D's rape and child molest charges are based on sexual acts against his siblings in the same house over the same time period, 2005-2006, and that the rapes surfaced in the course of the investigation into the molestations, the crimes were sufficiently linked together such that severance was not mandated); Waldon, App., 829 N.E.2d 168 (activities within a span of few days showed a common scheme or plan with motive to steal; thus, severance was not available as a matter of right).

TITLE: Pierce v. State
INDEX NO.: D.6.b.
CITE: (5/12/2015), 29 N.E.3d 1258 (Ind. 2015)
SUBJECT: D not entitled to separate trials for child molesting charges
HOLDING: D was not entitled to severance of charges for separate incidents of sexual molestation with his three grandchildren. Pursuant to Ind. Code § 35-34-1-11(a), D is entitled to severance of offenses as a matter of right if they have been joined solely because they are of the same or similar character. If the charges are based on the same conduct or on a series of acts connected together, or are parts of single scheme or plan, Ind. Code § 35-34-1-9(b)(2), severance is discretionary, not a matter of right.

Here, D committed the crimes in substantially the same way against similar victims, thus separate trials were not required. A common modus operandi and motive (i.e., to fulfull sexual desires) can sufficiently link crimes committed against different victims. Ben-Yisrayl v. State, 690 N.E.2d 1141 (Ind. 1997). D exploited his position of a trusted grandfather by molesting young female family members in his care, producing overlapping evidence. Because his criminal acts were sufficiently connected together, D was not entitled to severance. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment affirmed. Rucker, J., joined by Dickson, J., concurring, believe Court needs to provide "greater clarity to an area of the law that remains in a state of confusion."

RELATED CASES: Vasquez, 174 N.E.3d 623 (Ind. Ct. App. 2021) (like Pierce, D exploited his position as a trusted member of his girlfriend's household to sexually abuse young female family members who stayed in the house, which actions resulted in overlapping investigations; thus, trial court properly denied D's motion for severance as of right under IC 35-34-1-11); Ennick, 40 N.E.3d 868 (Ind. Ct. App. 2015) (D not entitled to severance as a matter of right where he exploited his position as a babysitter by molesting three young girls entrusted to his care, and his method was consistent).

TITLE: State v. Burke
INDEX NO.: D.6.b.
CITE: (3d Dist. 1/4/83) Ind. App., 443 N.E.2d 859
SUBJECT: Failure to join offense; dismissal of charge
HOLDING: Ind.'s joinder statute (Ind. Code 35-3.1-1-9(a), recodify as Ind. Code 35-34-1-9(a)) is permissive rather than mandatory; thus, neither Ind. Code 35-41-4-4 nor double jeopardy clause bars trial for offense which could have been joined to earlier adjudication of different offense arising from the same facts. Here, minor D was ticketed for possession of alcohol. Officer also discovered drugs in D's vehicle. On 7/22, D was arraigned, pled guilty & was fined on possession of alcohol charge. On 8/20, state filed information charging drug possession. D moved to dismiss, arguing prior prosecution barred present prosecution. Motion granted. State appeals. Cases cited by D (same transaction test; mandatory joinder) not applicable in Ind. Held, dismissal reversed.

RELATED CASES: See also B.10.b; Williams, 762 N.E.2d 1216 (because charges in two Cts. were based on series of acts so connected that they constituted part of single scheme or plan, they should have been charged in single prosecution); Wiggins, App., (because charges in two Ct's. were based on series of acts so connected that they constituted part of single scheme or plan, they should have been charged in single prosecution); 661 N.E.2d 878 (even if Tr. Ct. was not required to dismissal conspiracy charge under Ind. Code 35-41-4-4 on grounds it should have been joined in earlier prosecution, Tr. Ct. has discretionary authority under Ind. Code 35-34-1-10(c) to dismiss charges which could have been joined in earlier prosecution); Gregory, App., 596 N.E.2d 270 (followed Burke, finding no bar to prosecution for 1 count of drug dealing to CI which occurred during same time period as 4 counts previously charged & convicted on); Martakis, App., 450 N.E.2d 128 (Crim L 200(3); Ct. finds prosecution for burglary was not barred because of former prosecution for theft of items taken during burglary; burglary & theft are different offenses under Blockburger, *citing* Elmore, 382 N.E.2d 893; state is not prohibited from convicting D of both crimes in separate prosecutions).

TITLE: Stevens v. State
INDEX NO.: D.6.b.
CITE: (10/28/91), Ind. App., 580 N.E.2d 274
SUBJECT: Severance of offenses - waiver; must renew motion at trial
HOLDING: When Tr. Ct. denies pre-trial motion for severance, motion must be renewed on same grounds before or at close of all evidence during trial to preserve error & right to severance. Ind. Code 35-34-1-12(b). D waives right to have similar offenses tried separately where he fails to make timely motion for severance. Hodges, 524 N.E.2d 774. Although D made pre-trial motion for severance, he waived his right to have offenses tried separately by his failure to renew motion during trial. Held, judgment affirmed. **Note:** Motion for severance of offenses or motion for separate trial must be made before commencement of trial unless motion is based upon ground not previously known. See Townsend (this section).

RELATED CASES: Hatchett, 503 N.E.2d 398 (2 months before trial, Tr. Ct. granted State's motion for consolidation of 3 co-Ds, each of whom had been charged separately. 2 co-Ds were tried together after the 3rd co-D pled guilty before trial commenced. D objected: to joinder twice before trial, to being seated with other D, to sharing voir dire time & peremptory challenges; & renewed his objection at close of evidence. Although he filed no written motion for severance, D made his desire for separate trial clear & adequately preserved issue for review); Hobson, App., 495 N.E.2d 741 (D failed to preserve error by not renewing motion for severance even if renewed motion would have been futile); See also Spindler, 555 N.E.2d 1319; Smith, 474 N.E.2d 973; Dorton, 419 N.E.2d 128.

TITLE: Wells v. State
INDEX NO.: D.6.b.
CITE: (2/21/2013), 983 N.E.2d 132 (Ind. 2013)
SUBJECT: Severance - interplay with Rule 404(b)
HOLDING: A two-justice dissent to the denial of transfer would have granted transfer to provide guidance and clarity on the interplay between Indiana Rule of Evidence 404(b) and severance. Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character, the D shall have a right to severance of the offenses. Ind. Code 35-34-1-11(a). When offenses are joined solely due to their similar character, there is the danger that the jury hears all of the evidence concerning all of the offenses and could very well make the "forbidden inference" prohibited by Indiana Rule of Evidence 404(b) based on the weight of the accusations or the cumulative effect of the evidence. To avoid this problem, the dissent would take guidance from other jurisdictions and hold that if under Rule 4040b() relating to other crimes, the evidence of the crimes on trial would be inadmissible in a separate trial for the other, then the D is entitled to severance as of right under Ind. Code 35-34-1-11(a). Thus, the dissent would grant transfer and remand this cause to the Tr. Ct. for a hearing to determine (1) whether the offenses with respect to each alleged victim are of the same or similar character; (2) whether evidence of each of the offenses is relevant to some material issue at trial of all the other offenses under Ind. Evid. Rule 404(B); and (3) whether the evidence of the other offenses even though relevant should be excluded under Ind. Evid. Rule 403. If the hearing reveals that evidence of the offenses for which D is charged would be inadmissible in separate trials of the same offenses, then he would be entitled to severance as a matter of right. Held, order granting transfer vacated and D's Petition to Transfer denied; Rucker, J., joined by Dickson, C.J., dissenting.

TITLE: Wilkerson v. State
INDEX NO.: D.6.b.
CITE: (4th Dist., 5-19-00), Ind. App., 728 N.E.2d 239
SUBJECT: Failure to move for severance - ineffective assistance of counsel (IAC)
HOLDING: D received IAC due to his counsel's failure to move for severance of charges against him & as result suffered prejudice in sentencing. Although both crimes were sexual assaults that occurred in Anderson, Indiana, by perpetrator gaining entry to victim's home through window late at night, crimes were not so strikingly similar as to say that they were part of single scheme or plan. Instead, charges were joined because offenses were of same or similar character. Ind. Code 35-34-1-11(a). Thus, if D had moved to sever charges, Tr. Ct. would have lacked discretion to deny such motion in this case. Goodman, App., 708 N.E.2d 901.

D was prejudiced as result of counsel's failure to move for severance of charges because, had he been found guilty of all charges after separate trials, his sentences would have been ordered to be served concurrently rather than consecutively. Version of consecutive sentencing statute in effect at time of D's sentencing limited Tr. Ct.'s authority to impose consecutive sentences to instances when it was contemporaneously imposing two or more sentences. Kendrick, 529 N.E.2d 1311. Thus, if charges had been tried separately, & D was convicted in both cases, Tr. Ct. could not have ordered sentences to run consecutively. Here, however, because charges were tried together, D received consecutive sentences of forty years for each incident, for total sentence of eighty years. Post-conviction Ct.'s conclusion that counsel's performance did not fall below objective standard of reasonableness based on prevailing professional norms was erroneous. Trial counsel testified that he recalled no strategy reason for not seeking severance & that he was unaware of any sentencing repercussions as result of not severing charges. Held, judgment reversed & remanded with instructions to vacate order directing D to receive consecutive sentences & order sentences be served concurrently.

RELATED CASES: Maymon, App., 870 N.E.2d 523 (trial counsel was ineffective for failing to request a severance of his four burglary charges, which involved four separate victims over a span of almost three months); Maymon, App., 875 N.E.2d 375 (on rehearing, Ct. App. reversed for new trial on Class A felony burglaries rather than reduction of Class A felonies to residential entries; opinion affirmed in all other respects); Davidson, 763 N.E.2d 441 (D's trial counsel was not ineffective for failing to move for separate trials that, if granted, would have prevented imposition of consecutive sentences; post-conviction Ct. made no specific findings as to whether decision not to seek severance was product of strategy or oversight); Peace, 736 N.E.2d 1261 (although some of D's charges were subject to severance, D was not prejudiced by attorney's failure to move for severance where D pled guilty to charges not subject to severance & his ultimate sentence was same as maximum sentence if charges were severed).

D. TRIAL
D.7. Bifurcation
D.7.b. 30-year habitual (see E.9.d)

TITLE: Shelton v. State
INDEX NO.: D.7.b.
CITE: (11-13-92), Ind., 602 N.E.2d 1017
SUBJECT: Offenses enhanced by prior convictions plus habitual offender (HO) don't require trifurcated proceedings
HOLDING: When D is charged with felony & State relies on prior convictions to both elevate predicate felony & determine that D is HO, it is not necessary to hold trifurcated proceedings. D was charged with attempted murder, auto theft, auto theft with prior auto theft conviction (class C felony), possession of handgun without license (handgun license), & handgun license with prior felony conviction within 15 years (class D felony). D was also alleged to be HO. Trial on attempted murder, auto theft, & handgun license proceeded first, & D was found guilty on all counts. Ct. then proceeded to issue of elevation of auto theft & handgun license with prior convictions, & HO determination.

Reason for bifurcation of cases with prior felonies which elevate or enhance sentence is to make sure that consideration of prior convictions is removed from jury's guilt/innocence determination on predicate charge. In instant case, jury's guilt/innocence determinations were made without knowledge of prior convictions, & holding charge enhancement & HO determinations together in second phase did not harm interests of D. To extent that dicta of Sowell, App., 590 N.E.2d 1123, *trans. denied*, indicated need for trifurcated proceedings when State seeks both charge elevation & HO determination, it was incorrect. Held, Tr. Ct. affirmed.

Note: In concurrence DeBruler, J., noted question of whether use of same prior felony conviction for charge elevation, aggravation, & HO determination was proper, was unresolved in Ind., but not raised in case. He further indicated that his concurrence should not be viewed as sanctioning such use.

RELATED CASES: Ramsey, App, 853 N.E.2d 491 (D did not explain how HO evidence prejudiced him in eyes of jury, so combined HO/aggravated circumstances hearing did not deny D right to fair trial).

D. TRIAL
D.7. Bifurcation
D.7.f.3 Firearms (see E.8.d.4)

TITLE: Pickett v. State
INDEX NO.: D.7.f.3.
CITE: (8/30/2017), 83 N.E.3d 717 (Ind. Ct. App. 2017)
SUBJECT: Denial of motion to bifurcate reversed
HOLDING: On Interlocutory review, the Court of Appeals ruled the Tr. Ct. abused its discretion in denying D's motion to bifurcate his charge for possession of a firearm by a serious violent felon charge ("SVF") from his other six charges. The State's proposed changes to the language of the SVF charge and SVF jury instruction would not decrease the prejudice D would suffer from the State introducing evidence about the conviction that qualifies him for the SVF charge, a prior conviction for escape.

D was charged with seven counts, including murder and the SVF charge. In denying D's request to bifurcate, the Tr. Ct. adopted the State's proposal: remove the words "serious violent felon" from both the charging instrument and the jury instruction and replace them with a citation to the SVF statute, Ind. Code § 35-47-4-5. These changes would supposedly inoculate D from prejudice from the State introducing evidence about the escape conviction while the jury would be hearing evidence regarding D's alleged guilt on the non-SVF charges. The State's proposed changes will not reduce the risk of prejudice to D. The jury would still know about the escape conviction as it considers D's guilt on the non-SVF charges, which would allow the jury to draw an inference of guilt based on facts unrelated to the non-SVF charges. See Spearman v. State, 744 N.E.2d 545, 547 (Ind. Ct. App. 2001). Further, the escape conviction has no relevance under the Evidence Rule 404(b) exceptions for proof of motive, intent, or identify. Held, judgment reversed and remanded for proceedings consistent with Court's opinion.

RELATED CASES:

D. TRIAL

D.8. Bench trial

D.8.a. In general

TITLE: Lewis v. State
INDEX NO.: D.8.a.
CITE: (2nd Dist., 04-19-09), 911 N.E.2d 76 (Ind. Ct. App. 2009)
SUBJECT: Bench trials - prosecutor's policy to refuse bench trials constitutional
HOLDING: The Marion County Prosecutor's Office's policy to refuse to waive jury trials for Class D felonies in Court 8 did not deprive Ds of certain constitutional protections. The D and the prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury. Ind. Code 35-37-1-2. Here, Class D felony cases involving Ds with mental health problems or diagnoses are often transferred to Court 8. In Court 8, the State routinely agreed to waive juries until the Tr. Ct. held a series of bench trials resulting in acquittals. Thereafter, State refused to waive jury trials for Class D felony cases in Court 8. Ds filed motions to be transferred out of Court 8 to other Marion County Courts where the prosecutor's office will waive jury and argued that the policy was unconstitutional. However, the State's refusal to waive jury trials does not compromise defense counsel's effectiveness by preventing counsel from making a meaningful strategic decision regarding whether to pursue a jury trial or a bench trial. Because Ds do not have a right to a bench trial, they can be made to choose between a jury trial and pleading guilty. Although there are circumstances that may exist which render the denial of a bench trial constitutionally suspect, the fact that these Ds all suffer from mental illness does not. Although persons suffering from mental illness are subject to certain negative public perceptions, Court cannot assume the negative perceptions of mental illness necessarily place a mentally-ill D at risk or compromise his right to a fair trial when members of the public stand in his judgment. In fact, mental illness may arouse compassion for a D or nullify criminal culpability. Also, the prosecutor's policy does not violate the Equal Protection Clause of the Fourteenth Amendment or the privileges and immunities clause of the Indiana Constitution. The State's policy is rationally related to its goal of assuring convictions. Thus, Tr. Ct. did not err in denying Ds' motions to transfer. Held, judgment affirmed.

TITLE: Nickels v. State
INDEX NO.: D.8.a.
CITE: (8/3/2017), 81 N.E.3d 1092 (Ind. Ct. App. 2017)
SUBJECT: Error in denying right to closing argument in bench trial
HOLDING: The Tr. Ct. committed reversible error in preventing D from making a final argument in his bench trial. D was charged with domestic battery and interference with reporting a crime. At the close of evidence, the Tr. Ct. offered the State the opportunity to make an argument, interrupted the argument to announce it was finding for the State, and asked for argument from D only after it had already announced its intention to find against her. Defense counsel responded with a one-sentence statement that the State failed to meet its burden of proof. The Tr. Ct. then immediately asked for sentencing recommendations. The opportunity to make a closing argument is a basic element of the criminal process. See Herring v. New York, 422 U.S. 853, 864-65 (1975). The premise of the adversary system is that partisan advocacy will best promote the ultimate objective that the guilty be convicted and the innocent go free. King v. State, 467 N.E.2d 726, 728-29 (Ind. 1984).

The State is incorrect that the Tr. Ct. only "preliminarily" found for the State and then invited closing argument from D; the court asked for sentencing recommendations as soon as D's counsel finished his brief statement, and therefore, the Tr. Ct.'s "invitation" for defense counsel to give closing argument was at best an empty formality. Cf. U.S. v. King, 650 F.2d 534, 536-37 (4th Cir. 1981) (D was denied any real opportunity to present closing argument when Tr. Ct. immediately announced judgment but told defense counsel to "[g]o ahead if you want to argue it. I have already made my finding. It's not going to change anything."). Held, judgment reversed.

TITLE: State v. Bonds
INDEX NO.: D.8.a.
CITE: (2/6/2018), 94 N.E.3d 333 (Ind. Ct. App. 2018)
SUBJECT: State can't demand jury trial, and its consent to bench trial was not necessary
HOLDING: The State has no right to demand a jury trial in misdemeanor cases, and its consent is not necessary for a bench trial. After D waived her right to jury trial on two misdemeanor charges, the State filed a written demand for jury trial, which the Tr. Ct. denied. Both the federal and state constitutions vest the right to jury trial in the accused, not the State. Further, the State's consent is not needed for a misdemeanor bench trial, as *clarified* by the 2015 amendment to Ind. Code § 35-37-1-2. Before the amendment, the statute provided that "[t]he D and prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury." The Indiana Supreme Court interpreted this statute as meaning that "all criminal trials must be by jury except where [a bench trial is] consented to by both the parties and the court[.]" Alldredge v. State, 239 Ind. 256, 263, 156 N.E.2d 888, 891 (1959). However, as amended, the statute now provides that "[t]he D and prosecuting attorney, with the assent of the court, may submit the trial to the court. Unless a D waives the right to a jury trial under the Indiana Rules of Criminal Procedure, all other trials must be by jury." (Emphasis added). The highlighted language clarifies the procedure for waiving a jury trial in misdemeanor cases. It makes clear that a bench trial in a misdemeanor case is the sole prerogative of a D and does not state or even imply that the State's consent is necessary. Held, judgment affirmed and remanded for bench trial.

TITLE: State v. Vowels
INDEX NO.: D.8.a.
CITE: (4th Dist. 3/13/89), Ind. App., 535 N.E.2d 146
SUBJECT: Bench trial - TR 50 motion treated as TR 41(B) motion
HOLDING: In bench trial, when D seeks judgment on evidence at close of state's case, proper procedure is TR 41(B) motion for involuntary dismissal. Here, D filed TR 50 motion for judgment on evidence. Tr. Ct. determined that state had not met burden of proof beyond reasonable doubt & granted motion. State appealed on reserved question whether Tr. Ct. applied correct standard. State argues that Tr. Ct. must deny motion for judgment on evidence unless there is "total absence of evidence on some essential issue or where the evidence is without conflict & susceptible to only one inference... in favor or D. State v. Goodrich, 504 N.E.2d 1023. However, where Tr. Ct. sits as trier of fact, without jury, TR 50 does not apply. TR 41(B) applies, even in criminal cases. See State v. Seymour, App., 379 N.E.2d 535. Under this rule, Tr. Ct. is permitted to weigh evidence, believe or disbelieve testimony or other evidence, & find against party presenting it, even if there is no evidence to contrary. Ferdinand Furniture Co., Inc. v. Anderson, App., 399 N.E.2d 799; 3 Ind.Pract., Rules of Procedure Annot. (Harvey), Section 41.6, p. 147. Motion measures both quantity & quality of evidence, Benefit Trust Life Ins. Co. v. Waggoner, App., 473 N.E.2d 646, & establishment of prima facie case does not require Tr. Ct. to find in favor of party with burden of proof. Held, judgment affirmed. **Note:** See also State v. Mayfield (3/6/89).

D. TRIAL

D.9. Jury trial

D.9.a. Right to jury trial/number of jurors (6th Amend; Ind.Const. Art. 1, 13; CR 22; Ind. Code 35-37-1-1 and 2)

TITLE: Apprendi v. New Jersey
INDEX NO.: D.9.a.
CITE: 530 U.S. 466, 120 S.Ct. 2348 (2000)
SUBJECT: Right to jury trial, notice, standard of proof, sentence enhancement
HOLDING: The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Sentence enhancement scheme where, after D pled guilty to a charge carrying maximum penalty of 10 years, sentence was enhanced to 12 years because of facts found by judge at sentencing hearing, violated D's right to notice, to trial by jury, and to due process. After D pled guilty to shooting at his neighbor's house, prosecutor filed a motion to enhance his sentence, alleging that the crime was racially motivated. The sentencing judge found by a preponderance of the evidence that the crime was a hate crime and enhanced D's sentence beyond the statutory maximum for the underlying offense.

RELATED CASES: Almendarez-Torres v. U.S., 523 U.S. 224 (enhancement may be based on a judicial finding of the fact of a prior criminal conviction); Jones v. U.S, 526 U.S. 227; U.S. v. O'Brien, 130 S.Ct. 2169 (2010) (machine gun provision of 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a thirty-year mandatory minimum sentence when the firearm used in certain crimes is a machine gun, is an element of the offense that must be proved to a jury beyond a reasonable doubt, rather than a sentencing factor to be proved to the judge at sentencing).

TITLE: Averitte v. State
INDEX NO: D.9.a.
CITE: (5th Dist., 04-08-05), Ind. App., 824 N.E.2d 1283
SUBJECT: Waiver of right to jury determination of aggravating factors - harmless error
HOLDING: Jury trial waiver was not made knowingly, intelligently & voluntarily because D was not informed that she had right to have a jury determine, beyond a reasonable doubt, all facts legally essential to her sentence pursuant to Sixth Amendment & Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Prior to Blakely holding, D executed her jury trial waiver & was tried to the bench, convicted of murder, & sentenced to enhanced term of sixty years. D was never specifically advised of her right to have a jury determine facts legally essential to her sentence & Tr. Ct. did not procure from D any waiver of such right. Nevertheless, D was not entitled to a new sentencing hearing because error in Tr. Ct.'s denial of D's Sixth Amendment right in sentencing was harmless in this case. Evidence overwhelmingly supports Tr. Ct.'s findings of aggravating circumstances to point where a reasonable jury could not have found otherwise. United States v. Booker, 125 S. Ct. 738 (2005). Held, judgment affirmed.

RELATED CASES: McSchooler, 15 N.E.3d 678 (Ind. Ct. App. 2014) (waiver of jury trial knowing, intelligent, and voluntary where Tr. Ct. thrice advised D about right to jury trial and D twice waived the right; also, D was represented by counsel during waiver); Miller, App., 884 N.E.2d 922 (distinguishing Averitte, Ct. noted waiver provision in D's plea agreement clearly applied to D's Blakely rights; oral colloquy not required); Freeze, App., 827 N.E.2d 600 (Ct. could not conclude beyond reasonable doubt that Tr. Ct. would have imposed an identical sentence if it had not considered); Weis, App., 825 N.E.2d 896 (denial of a D's Sixth Amendment right to a jury determination is subject to harmless-error analysis & based upon D's testimony on cross-examination, no jury could have found D was not in a position of trust).

TITLE: Bex v. State
INDEX NO.: D.9.a.
CITE: (08-22-11), 952 N.E.2d 347 (Ind. Ct. App. 2011)
SUBJECT: Jury trial not waived where inadequate notice of trial date
HOLDING: D did not waive right to claim she was denied her constitutional right to jury trial, even though she did not timely file her demand for jury trial. See Ind. Criminal Rule 22. Nothing in the record establishes that D had at least 15 days of advance notice of scheduled trial date and the consequences of failing to demand a jury retrial, as both required by Criminal Rule 22. Held, judgment affirmed.

TITLE: Bex v. State
INDEX NO.: D.9.a.
CITE: (08-22-11), 952 N.E.2d 347 (Ind. Ct. App. 2011)
SUBJECT: D or counsel may waive right to six-person jury
HOLDING: A D may waive the statutory right to a six-person jury. D was charged with class A misdemeanor operating while intoxicated, endangering a person. At an unrecorded sidebar conference during voir dire, the Tr. Ct., State, and D (through her counsel) agreed that no alternate juror would be picked and that the trial would proceed with six jurors, and that if something happened to one of the jurors, the trial would proceed with five jurors. During trial, one juror had a medical emergency. Defense counsel stipulated that he had earlier agreed to proceed with a five-person jury if something happened to a juror. Later, D's counsel moved for a mistrial based on his uncertainty about whether D could waive the right to a six-person jury and proceed with a five-person jury. Tr. Ct. denied the motion, and D was convicted as charged.

A D may waive the statutory right under Ind. Code § 35-37-1-1(b) to a six-person jury. More than three decades ago, Court addressed a similar issue and held that a D may waive the statutory right to a twelve-person jury and consent to proceed with an eleven-person jury. See Smith v. State, 176 Ind. App. 37, 39, 373 N.E.2d 1112, 1113 (1978). In holding a five-person jury did not abridge the D's Sixth Amendment right to jury trial, the Florida Supreme Court noted that the five-person jury resulted from a mid-trial waiver by the D and was not a statutorily imposed. See Blair v. State, 698 So.2d 1210 (1997). In so finding, Blair distinguished Ballew v. Georgia, 435 U.S. 223 (1978), which held that a statutorily imposed five-person jury violated the Sixth Amendment right to jury trial. Court adopted this analysis and also Blair's holding that because a D has the right to waive the presence of an entire jury, it would be inconsistent to rule that a D could not waive the presence of one juror. Thus, the Sixth Amendment does not bar a D's waiver of the presence and participation of one of six jurors.

Court also held that a personal waiver by D is not necessary because although the right to jury trial is a fundamental right requiring a personal waiver, the right to a jury of a certain size is not. Thus, defense counsel may consent to a trial with fewer jurors than provided by statute. D's personal consent is not necessary. See Holliness v. State, 467 N.E.2d 4, 7 (Ind. 1994); Judy v. State, 470 N.E.2d 380, 381-82 (Ind. Ct. App. 1984). Counsel's waiver of the right is valid, unless the D objects to counsel's waiver. Held, judgment affirmed; Sullivan, Sr.Judge, dissenting, would reverse and remand for a new trial because the record did not show that D "knowingly, intelligently, and voluntarily waived her right to a trial by a jury of six members." D was "not privy to her counsel's stipulation of waiver of her right and not present in the courtroom in order to have the opportunity to object."

TITLE: Bunting v. State
INDEX NO.: D.9.a
CITE: (5th Dist., 10-05-06), Ind. App., 854 N.E.2d 921
SUBJECT: Right to jury trial - underlying conviction for OWI
HOLDING: In operating while intoxicated (OWI) with prior conviction prosecution, D was not denied his rights under U.S. & Indiana Constitutions to have a jury determine whether he had a prior conviction for OWI. State alleged the existence of a sentencing enhancement factor, not the commission of a separate crime with discrete elements. In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), Court held that other than a fact of prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury & proved beyond a reasonable doubt. Moreover, Apprendi declined to overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998), which rejected claim that recidivism must be treated as an element of the offense. Thus, D did not suffer deprivation of Sixth Amendment right to a jury trial because recidivist factor was not tried before his jury in the instant case.

As to claim under Indiana Constitution, D claimed that jury might have exercised its nullification power in determining whether he had a prior conviction for OWI. However, D waived his right to have a jury decide that he had a prior conviction by stipulating that he did in fact have a prior conviction. Moreover, D failed to object to dismissal of jury. Finally, even if there had been a remaining issue for jury's determination, a jury is not empowered to blatantly disregard the law or facts before it. Bivins v. State, 642 N.E.2d 928 (Ind. 1994). Held, judgment affirmed.

TITLE: Carson v. State
INDEX NO.: D.9.a.
CITE: (4th Dist., 8-20-04), Ind. App., 813 N.E.2d 1187
SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; criminal history aggravator
HOLDING: On petition for rehearing from unpublished memorandum opinion, D argued that his enhanced sentence for Class C felony battery violates his Sixth Amendment right to have facts supporting enhancement of his sentence tried to a jury, pursuant to the recently-decided U.S. S.Ct. decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Blakely applied rule set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000), that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury & proved beyond a reasonable doubt. The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in jury verdict or admitted by D. Blakely, 124 S. Ct. at 2537.

Because D did not challenge his sentence on direct appeal, Ct. found he waived review of this issue, & appropriate procedure would have been to challenge his sentence through post-conviction relief. Waiver notwithstanding, Ct. found that Blakely has no effect on his enhanced sentence. Aggravating circumstances in this case consisted of: 1) a history of criminal & delinquent activity, which includes multiple convictions; 2) a need for corrective or rehabilitative treatment that can best be provided by incarceration in a penal institution or in a work release facility; & 3) strong likelihood that, based on D's criminal history, he will commit battery again. Multiple convictions that extensive criminal history comprises have already been proven beyond reasonable doubt & are thus exempt from Apprendi rule as *clarified* by Blakely. The other two aggravators are simply derivative of that extensive criminal history & would seem also not to implicate the Blakely analysis. Moreover, a single aggravating circumstance is adequate to justify a sentence enhancement. Powell, 769 N.E.2d 1128 (Ind. 2002). Therefore, even if Indiana's sentencing scheme were to be found to run afoul of Sixth Amendment under Blakely, this finding would have no effect on D's sentence. Held, petition for rehearing denied.

RELATED CASES: Rembert, App., 832 N.E.2d 1130 (D's substantial criminal history consisting of violent misdemeanors justified enhanced sentence by Tr. Ct.); McCray, App., 823 N.E.2d 740 (D's criminal history, as contained in presentence investigation report & his acknowledgment, in open Ct., of a prior felony conviction were sufficient to support enhancement of his sentence above presumptive); Altes, App., 822 N.E.2d 1116 (because this was D's first conviction, Tr. Ct.'s speculation regarding his possible lack of future law abiding behavior cannot be derived from his past criminal conduct & this is an aggravator which should have been found by jury); Pennington, App., 821 N.E.2d 899 (while the preferred method is to recite specific incidents making up the criminal history & a conclusory statement of "criminal history" must be substantiated by specific facts, the D's criminal history here is clear from the sentencing transcript & Tr. Ct.'s sentencing statement); McNew, App., 822 N.E.2d 1078; Berry, App., 819 N.E.2d 443 (Blakely was not violated where Tr. Ct. based its assessment of likelihood that D would commit another crime on D's constant involvement in criminal justice system, an observation derived from D's criminal history, & DS admission that he was on probation); Traylor, App., 817 N.E.2d 611 (standing alone, one 5-year-old misdemeanor battery conviction was not a proper aggravator to enhance D's sentence, & any circumstances that may or may not derive from his prior criminal history also are not proper aggravators).

TITLE: Castro v. State
INDEX NO.: D.9.a.
CITE: (3d Dist. 12/16/82), Ind. App., 442 N.E.2d 1141
SUBJECT: Number of jurors - D felony
HOLDING: Person accused of Class D felony is entitled to be tried by 6-member jury in county Ct. & by12-member jury in circuit, superior & criminal Ct's. Ind. Code 33-10.5-3-1; Ind. Code 35-1-30-1 (repealed); O'Brien, App., 422 N.E.2d 1266 (no denial of equal protection). Here, D objected to impaneling of 6-member jury in Lake Superior Ct. Held, harmful error; reversed & remanded. **Note:** Present statute, Ind. Code 35-37-1-1, provides for 12-member jury in Class A, B, C felonies (unless D & prosecutor agree to lesser number) & for a 6-member jury in any other crime.

RELATED CASES: Iseton, App., 472 N.E.2d 643 (Jury 32(1); application of 1981 law re 6-person jury to D charged in 1980 & tried in 1982 was not ex post facto application; see card at V.3).

TITLE: Coleman v. State

INDEX NO.: D.9.a.

CITE: (9-30-22), Ind. Ct. App., 196 N.E.3d 281

SUBJECT: No right to have jury determine credit restricted felon status, but trial court violated Apprendi by finding fact that increased maximum penalty

HOLDING: Defendant was a teacher's aide at a school corporation when she initiated a sexual relationship with a fourth-grade student. The relationship carried on for several years until the school corporation discovered inappropriate emails between Defendant and the student. Defendant was convicted of Level 1 felony child molesting and two other offenses after a jury trial. At sentencing, the State requested that the trial court find Defendant was a credit-restricted felon, and Defendant objected to the trial court finding that the student was under the age of twelve at the time of the offense, which would change Defendant's credit time status. She argued that the victim's age had to be found by a jury beyond a reasonable doubt. Defendant also argued that the trial court had to sentence her under IC 35-50-2-4(b) rather than subsection 4(c)—the section that references the victim being under the age of twelve. The trial court rejected both arguments. On appeal, Defendant argued her Sixth Amendment right was violated because the trial court, and not the jury, found the fact in support of the credit-restricted felon status - that the victim was under age 12. The Court of Appeals held that Defendant's Sixth Amendment argument failed because her classification as a credit-restricted felon, and the resulting impact on her credit time, does not change her sentence. The Court further held that evidence was sufficient to support the trial court's determination that the victim was under age 12 when evidence at trial established the victim was age 10 when the sexual intercourse started. But the Court agreed with Defendant's argument that the trial court sentencing her under IC 35-50-2-4(c) violated her Sixth Amendment rights under Apprendi. Child molesting is a Level 1 felony when the victim is under age 14. Subsection (c) of the sentencing statute provides that a defendant convicted of Level 1 felony child molesting where the defendant is at least twenty-one years of age, and the victim is less than twelve may be sentenced according to a longer sentencing range - between 20 and 50 years. The Court said the statute appears to be an anomaly in Indiana's sentencing scheme because it provides different sentencing ranges for the same level of offense based on certain facts. At Defendant's trial, the jury unanimously determined the victim was under the age of 14 but was not asked to determine whether the victim was under the age of 12. The determination that the victim was under age 12 was based solely on the trial court's finding at sentencing, which violated Defendant's Sixth Amendment rights. The Court remanded for a new sentencing hearing in which either the State proves to a jury that the victim was under age 12 or has Defendant sentenced under the normal sentencing range for a Level 1 felony. Held: affirmed in part, reversed in part, remanded.

TITLE: Combs v. State
INDEX NO.: D.9.a.
CITE: (5th Dist., 08-04-06), Ind. App., 851 N.E.2d 1053
SUBJECT: Blakely applies to considerations by appellate Ct.'s as to appropriateness of sentence
HOLDING: When considering whether a D's sentence is inappropriate pursuant to Ind. App. Rule 7(B), the appellate ct. should not consider factors which violate Blakely v. Washington, 124 S.Ct. 2531 (2004). Appellate Ct.'s have the constitutional authority to revise a sentence if, after consideration of the Tr. Ct.'s decision, the ct. concludes the sentence is inappropriate in light of the nature of the offense & character of the offender. Here, after finding two aggravators & no mitigators, Tr. Ct. sentenced D to six years with two years suspended for a Class C felony possession of methamphetamine conviction. The aggravator that D tested positive twice while out on bond violated Blakely because D contested the test results & the State never proved beyond a reasonable doubt the positive test results. The fact that the D had a prior misdemeanor conviction for possession of marijuana eleven years ago was not sufficiently significant to justify the enhanced sentence. When considering the eleven-year-old prior misdemeanor & the extremely small amount of methamphetamine found on the D, the Tr. Ct. held that the six-year sentence was inappropriate. Held, judgment affirmed in part & reversed in part, & remanded with instructions to enter the presumptive sentence of four years; Vaidik, J., dissenting on basis that prior misdemeanor conviction was sufficient to support enhanced sentence because it was also a drug offense & that, if a D's sentence is statutorily proper, appellate cts. can consider all factors, including those that violate Blakely, in determining whether a sentence is appropriate under Appellate Rule 7(B) because there is no danger that the D's sentence will be increased.

Note: Tr. Ct. also held that chief of fire department's call that someone in a suspicious car may be stealing gas from fire department was sufficient to stop a car in area fitting the description.

TITLE: Cunningham v. State
INDEX NO.: D.9.a.
CITE: (4th Dist., 10-25-05), Ind. App., 835 N.E.2d 1075
SUBJECT: Jury trial allowed for traffic offense
HOLDING: D had right to a jury trial where he was charged with a speeding infraction. Tr. Ct. denied D's jury trial request under Art. I, Sec. 20 of the Indiana Constitution, which provides, "In all civil cases, the right of trial by jury shall remain inviolate." Ct. noted that prior to 1981 all traffic offenses were criminal in nature & carried with them the rights afforded to criminal Ds including the right to jury trial. The legislature changed this when it directed that infractions be treated as civil matters, causing this case to be governed by Art. I, Sec. 20 rather than Sec. 19 for criminal cases. Long-standing precedent in Indiana exists providing that our constitution protects one's right to a jury trial only in actions where the right existed at common law. Songer v. Civitas Bank, 771 N.E.2d 61 (Ind. 2002). Ind. Trial Rule 38(A) establishes that a party is not entitled to a jury trial on equitable claims. Relying on the analysis of Justice Boehm's concurrence in Midwest Sec. Life Ins. Co. v. Stroup, 730 N.E.2d 163 (Ind.2000), Ct. noted it could not determine whether the cause of action was equitable based on common law & history as the earliest speed zone statutes were codified in 1939. Ct. then analyzed whether a traffic infraction would be considered equitable if it existed in 1852. Ct. noted that from its time of inception to 1981 such infractions were criminal & thus not equitable in nature. Further, traffic offenses did not meet any equitable actions in 1852 as noted by Justice Boehm. However, they more closely mirrored an action for money damages as a fine is involved which Boehm listed as a legal action existing in 1852. Ct. also noted that speeding violations were quasi-criminal in nature as they are enforced by the police, litigated by the prosecutor for the State & fined by the government. Held, judgment reversed & remanded for further proceedings.

RELATED CASES: Gates, 999 N.E.2d 592 (Ind. Ct. App. 2013) (Ind. Cont. Art I, § 20 confers right to jury trial for alleged violations of pet-related ordinances because the nature of the action was legal, not equitable, and the action was quasi-criminal).

TITLE: Davis v. State

INDEX NO.: D.9.a.

CITE: (10-01-10), 937 N.E. 2d 8 (Ind. Ct. App. 2010)

SUBJECT: Right to jury B must advise D that waiver of jury on underlying offense waives jury on HO

HOLDING: D failed to prove that he was not advised of his right to a jury trial on the HO and auto theft enhancements phases of his trial. When an accused pleads guilty to an underlying offense but leaves an HO allegation pending, it is essential that he understand the ramifications of his guilty plea and be aware of the rights he is waiving. If the record does not show that the accused was advised or knew that his guilty plea to the underlying offense waived his right to a jury determination of a pending HO allegation, the conviction on the underlying offense must be vacated.

Here, D was charged with auto theft as a Class C felony, resisting law enforcement as a Class D felony and as a Class A misdemeanor and being an HO. D waived his right to a jury trial and proceeded to a bench trial, after which he was convicted and found to be an HO. On appeal, D failed to provide the court with the transcript of the hearing at which he waived his right to a jury trial. Thus, D failed in his duty to present an adequate record clearly showing the error. Moreover, the requirement that D be advised that waiver of a jury trial on the underlying offense also waives a jury trial on the HO allegation does not apply to the progressive enhancement of auto theft based on a previous conviction. D did not show that the Tr. Ct. failed to give him the required advisement. Held, judgment affirmed.

Note: Court also held that D's convictions for Class C felony auto theft and HO do not constitute an improper double enhancement because the convictions used to support the HO were different than the prior conviction of auto theft used to support the Class C felony auto theft.

TITLE: Earl v. State
INDEX NO.: D.9.a.
CITE: (6/23/83), Ind., 450 N.E.2d 49
SUBJECT: Right to jury trial - advisement of
HOLDING: Tr. Ct. did not err in failing to advise D on the record of his right to trial by jury & consequences of his waiver of that right. Kennedy, 393 N.E.2d 139. Here, D urges Ct. to adopt requirement similar to rule promulgated in US v. Scott, (CA7 1978) 583 F.2d 362. Ct. denies D's request finding that an advisement is not required by the U.S. or IN Constitution or by Ind. Code 35-1-34-1 (now Ind. Code 35-37-1-2). Kennedy; Kindle, App., 313 N.E.2d 721. Ct. notes it is preferable to so advise D. Ct. believes D voluntarily waived jury trial (signed express waiver after time to consult with attorney & after jury trial was scheduled; appeared in Ct. with counsel when waiver made; was familiar with system having 2 prior felonies). Held, no error.

TITLE: Fearman v. State
INDEX NO.: D.9.a.
CITE: (12/14/2017), 89 N.E.3d 435 (Ind. Ct. App. 2017)
SUBJECT: 910-day sentence for direct contempt violates right to jury trial
HOLDING: By sentencing Defendant to 910 days for direct criminal contempt, the trial court denied Defendant's 6th Amendment right to jury trial. Defendant was convicted of attempted murder and other offenses. The victim's family attended the sentencing hearing. When advised of their presence, Defendant said, "Who gives a f*ck if they're in the f*cking room." The judge told Defendant his behavior could affect his sentencing. Defendant rolled his eyes and said, "I'll be out long enough to walk. B*tch is [sic] still got to worry about me." When asked to repeat what he said, Defendant said, "Read my lips, when I get out I'm going to wring his f*cking neck."

The 910-day sentence violated Defendant's right to jury trial. "[I]n the absence of legislative authorization of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months." Taylor v. Hayes, 418 U.S. 488, 496 (1974). Sentences exceeding six months may not be imposed absent a jury trial or waiver thereof. Holly v. State, 681 N.E.2d 1176, 1177-78 (Ind. Ct. App. 1997).

The State argues the trial court could have been imposing sanctions for multiple counts of contempt. However, this assumes the trial court could have stacked multiple six-month sentences. Although a trial court may find a person in contempt multiple times arising out of a single proceeding, the sentence, without a jury trial, may not exceed six months. Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974); Mockbee v. State, 80 N.E.3d 917, 921 (Ind. Ct. App. 2017), *trans. denied*. Held, judgment reversed and remanded for trial court to enter a six-month sentence for criminal contempt, to run consecutive to Defendant's convictions.

TITLE: Gutermuth v. State
INDEX NO.: D.9.a.
CITE: 868 N.E.2d 427 (Ind. 2007)
SUBJECT: Blakely does not apply retroactively to belated appeals
HOLDING: Post-Conviction Rule 2 permits belated appeals for Ds found to be without fault & diligent in seeking relief. A belated appeal of a sentence entered before a new constitutional rule of criminal procedure was announced is not governed by the new rule but is subject to the law that would have governed a timely appeal. Specifically, belated appeals of sentences entered before Blakely v. Washington, 542 U.S. 296 (2004) are not subject to the holding in that case.

A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. Griffith v. Kentucky, 479 U.S. 314 (1987). Distinguishing/*overruling* Fosha v. State, 747 N.E.2d 549 (Ind. 2001), Ct. held that belated appeals, regardless of whether initiated before or after a new rule of criminal procedure is announced are neither "pending on direct review" nor "not yet final" for purposes of Griffith. The parties to a belated appeal should not receive a different result because new law has been handed down that would not have been available if a timely appeal had been taken. If they have been found faultless & diligent, they should not be penalized for filing a belated appeal. But they also should not be rewarded for their delay. Allowing a Blakely claim that would have been unavailable in a timely appeal would do just that.

Regarding issue of "finality," Ct. concluded that a D's case becomes "final" for purposes of retroactivity when the time for filing a timely direct appeal has expired. In Griffith, U.S. S.Ct. contemplated a conventional appeal in describing when a case becomes "final." Although Griffith permits anyone in appellate process to benefit from the new rule, it did not abolish standard requirements that the issue have been preserved at trial & raised on appeal. Held, transfer granted, Ct. App.' opinion on this issue at 848 N.E.2d 716 vacated, judgment affirmed. See also: Boyle, 868 N.E.2d 435.

RELATED CASES: Marbley-El, 929 N.E.2d 194 (Ind. 2010) (because D committed his crime after legislature enacted advisory sentencing statutes, Blakely does not apply & Tr. Ct. correctly did not advise him that he was entitled to a jury determination of factors that led to his six-year sentence); Ben-Yisrayl, 908 N.E.2d 1223 (Ind. Ct. App. 2009) (D's re-sentencing for an offense which occurred long before Indiana's advisory scheme must be held in accordance to Blakely requirements); Rogers, App., 878 N.E.2d 269 (Blakely is not retroactive for Post-Conviction Rule 2 belated appeals; this case involved Indiana Post-Conviction Rule 2(3) & a belated appeal of a sentence entered after Blakely. Even if Blakely applies to belated appeal of re-sentence entered after Blakely was decided, Tr. Ct. in this case would have imposed same sentence); Kline, App., 875 N.E.2d 435 (where D's resentencing was ordered through a belated appeal for reasons other than Blakely, Blakely applies at the resentencing).

TITLE: Harris v. State
INDEX NO.: D.9.a.
CITE: (3rd Dist., 03-28-05), Ind. App., 824 N.E.2d 432
SUBJECT: Blakely violation requires re-sentencing; no waiver of issue
HOLDING: D's enhanced sentence of 65 years for felony murder violated his Sixth Amendment right to have a jury determine facts upon which the enhancement was based, pursuant to Blakely v. Washington, 124 S.Ct. 2531 (2004). Based on Smylie v. State, No. 41S01-0409-CR-408 (Ind. 2005) & its directive to use "a rather liberal" approach to preserving Blakely issues, Ct. denied the State's motion to strike D's reply brief, which was the first time D raised the Blakely issue. Ct. noted the Appellant's brief had been filed prior to the Blakely decision.

Ct. remanded for resentencing, noting State could consider intervention of a jury for sentencing without addressing issues of whether jeopardy already attached or the lack of such a sentencing mechanism in the current criminal code. Ct. also determined that of the three aggravators cited by the sentencing Ct. -- the victims' age, the nature & circumstances of the crime; & the extraordinary impact on the victim's family & community -- the last aggravator was not appropriate in this case. Specifically, Tr. Ct. noted that the community was significantly affected because the killing of a market owner forced the market, a staple in the community, to close. Extraordinary impact can only be considered as an aggravator when it is not normally associated with the commission of the offense & it is foreseeable to the D. Bacher v. State, 686 N.E.2d 791 (Ind.1997). Ct. did not believe the impact to the community when a family-owned business closes is the type of incident contemplated by Bacher. Held, judgment affirmed in part, reversed & remanded in part for new sentencing.

TITLE: Henderson v. State
INDEX NO.: D.9.a.
CITE: (1-22-98), Ind., 690 N.E.2d 706
SUBJECT: Right to 12-member jury - Class C felony enhancement
HOLDING: When State's charging instrument charges D with Class C felony or higher, regardless of whether charge has been elevated by virtue of prior conviction, 12-person jury is required. Here, D was charged with carrying handgun without license as Class C felony, even though it would have been less serious offense without prior conviction. Unless D & prosecuting attorney agree to lesser number, Ind. Code 35-37-1-1 requires 12-member jury if D is charged with Class C felony or higher. Held, transfer granted, reversed & remanded for new trial.

Note: Ct. disapproved of conflicting Ct. App.' decision in Johnson, App., 654 N.E.2d 20.

RELATED CASES: Minor, App., 792 N.E.2d 59 (D's appellate counsel was ineffective in failing to raise as issue that D was not tried by 12-person jury); Croney, App., 710 N.E.2d 212 (D waived right to 12-member jury by not requesting or objecting to 6-member jury for C felony).

TITLE: Higginbotham v. State
INDEX NO.: D.9.a.
CITE: (2nd Dist., 03-10-05), Ind. App., 826 N.E.2d 5
SUBJECT: Blakely - waiver; effect of plea agreement
HOLDING: A D who enters into a plea agreement that calls for an enhanced sentence cannot claim that his Sixth Amendment right to a jury was violated when Tr. Ct. imposes the sentence he consented to in the plea agreement. Here, D pled guilty to Class C felony battery in exchange for dismissal of one count of Class D felony intimidation, one count of Class A misdemeanor domestic battery, & a habitual offender count. Plea agreement provided that State would recommend a fixed eight-year sentence, which Tr. Ct. imposed. Right to a jury trial guaranteed by Sixth Amendment is subject to knowing, intelligent, & voluntary waiver. Leone v. State, 797 N.E.2d 743 (Ind. 2003). By pleading guilty, D forfeited claimed entitlement to certain rights, including Sixth Amendment right to have facts supporting enhancement of his sentence tried to a jury, pursuant to Blakely v. Washington, 124 S.Ct. 2531 (2004). Held, judgment affirmed.

RELATED CASES: Stewart, App., 840 N.E.2d 859 (State & D clearly stipulated that Tr. C. could use any information from case in determining sentence); Williams, App., 836 N.E.2d 441 (Tr. Ct. properly enhanced sentence after D pled guilty; D waived Apprendi rights & consented to judicial factfinding).

TITLE: Hitch v. State
INDEX NO.: D.9.a.
CITE: (4/12/2016), 51 N.E.3d 216 (Ind. 2016)
SUBJECT: Domestic violence determination did not violate right to jury trial
HOLDING: Tr. Ct.'s determination at sentencing that D committed a crime of domestic violence, which rendered him ineligible to possess a firearm, did not violate his Sixth Amendment right to a jury trial. D argued that the firearm restriction amounted to additional punishment above the statutory maximum for misdemeanor battery, and because the facts supporting the enhancement were not submitted to a jury and proved beyond a reasonable doubt, the determination ran afoul of the Sixth Amendment in violation of Blakely v. Washington, 542 U.S. 296 (2004).

Weighing the seven factors outlined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554 (1963), Court concluded that the firearm prohibition statute is non-punitive. And even if the balancing of these factors indicated that the statute was slightly punitive, it is not so punitive in effect that Court can say with certainty the statute negates its assumption the legislature intended to create a civil, non-punitive regulatory scheme (i.e., ensuring firearms are kept out of hands of domestic abusers). Held, transfer granted, Court of Appeals' opinion at 24 N.E.3d 974 vacated, judgment affirmed. Massa, J., joined by Dickson, J., concurring in result with separate opinion, believes that applying the Mendoza-Martinez test to reach Majority's holding "injects unnecessary ambiguity into the court's decision-making process at sentencing."

TITLE: Holden v. State
INDEX NO.: D.9.a.
CITE: (5th Dist., 10-13-04), Ind. App., 815 N.E.2d 1049
SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; harmless error
HOLDING: Notwithstanding Tr. Ct.'s violation of Blakely v. Washington, 124 S. Ct. 2531 (2004), in sentencing D, error was harmless because there was no reasonable possibility that complained of aggravators contributed to sentence. Blakely applied rule set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000), that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury & proved beyond a reasonable doubt. The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in jury verdict or admitted by D. Blakely, 124 S. Ct. at 2537. Thus, the "statutory maximum" sentence equates with the presumptive sentence called for by the applicable Indiana statute.

Here, D was convicted of two counts of robbery as Class B felonies, & Tr. Ct. enhanced sentence based on following aggravating factors: 1) D's significant & consistent adult & juvenile criminal history; 2) nature & circumstances of robberies & what they demonstrated about D's character; & 3) D was in need of rehabilitative treatment best provided by commitment to a penal facility. Because Blakely is superficially applicable to a sentence greater than the presumptive, Ct. noted that "it would appear that the finding made with relation to the facts of the crime could be violative of the Blakely holding because it does not appear that jury made findings with regard to specific facts found & there is no allegation that D admitted to those facts." However, because Tr. Ct. relied upon three different aggravators, Ct. concluded that error was harmless. Held, judgment affirmed in part, & two conspiracy to commit robbery convictions reversed on double jeopardy grounds.

RELATED CASES: Davis, App., 835 N.E.2d 1087 (if a Tr. Ct. has improperly relied on non-criminal history aggravators neither found by jury nor admitted by a D, sentence may still be upheld if there are other valid aggravating factors from which appellate Ct. can discern that Tr. Ct. would have imposed same sentence); Padilla, App. 822 N.E.2d 288 (error in finding as aggravator fact D injured her infant daughter & ultimately caused her death was harmless because other facts considered by Tr. Ct. as part of nature & cirumstances of crime were sufficient in & of themselves to warrant enhanced sentence); Berry, App., 819 N.E.2d 443 (no reasonable probability that nature & circumstances of crime aggravator contributed to slight enhancement of D's sentence); Cowens, App., 812 N.E.2d 255 (Ct. declined to extend Blakely holding to consecutive sentences).

TITLE: Holliness v. State
INDEX NO.: D.9.a.
CITE: (8/16/84), Ind., 467 N.E.2d 4
SUBJECT: Number of jurors - D can agree to less than 12
HOLDING: Where D agreed to selection of 12 jurors & no alternate with understanding that if one juror became ill, trial would proceed with 11 & where D did not express objection to Tr. Ct. when juror became ill during deliberations & deliberations proceeded with 11 jurors, no error occurred. Neither constitution nor statutes prohibit D from agreeing to trial by jury of less than 12. In re Public Laws Nos., 305 & 309, 334 N.E.2d 659; Smith, App., 373 N.E.2d 1112. Here, D expressed objection to trial counsel when deliberations proceeded with 11 jurors but did not inform Ct. of objection. Ct. finds valid waiver of jury of 12. See People v. Mayden, (Ill. App. 1979), 389 N.E.2d 901. Held, no error.

RELATED CASES: Bex, 952 N.E.2d 347 (Ind. Ct. App. 2011) (D may waive statutory right to a six-person jury to proceed with a five-person jury; because D has the right to waive the presence of an entire jury, it would be inconsistent to rule that D could not waive the presence of one juror; see full review, this section); Johnson, 489 N.E.2d 65 (record indicates knowing & intelligent waiver of jury of 12 where alternate had already replaced juror who had death in family & D acquiesced to going on with 11 where another juror could not return to Ct. because of transportation problems; Judy, App., 470 N.E.2d 380 (under Ind. Code 35-37-1-1, D need not expressly consent to 6 member jury; Ct. finds consent by D's attorney sufficient).

TITLE: Holly v. State
INDEX NO.: D.9.a.
CITE: (5th Dist., 7-2-97), Ind. App., 681 N.E.2d 1176
SUBJECT: No right to jury trial for "petty offenses" not exceeding six months
HOLDING: While petty contempts like other petty crimes may be tried without jury, serious criminal contempts must be tried with jury if D insists on this mode of trial. Codispoti v. Pennsylvania, 94 S.Ct. 2687 (1974). Here, after trial judge sentenced D to serve 78 years, D referred to trial judge by using profanity. Judge found D in direct contempt of Ct. & sentenced him to additional one-year term of imprisonment. Where no legislative penalty is specified & sentencing is left to sound discretion of judge, as is often true in case of criminal contempt, pettiness or seriousness of contempt will be judged by penalty actually imposed. Id. There is fixed dividing line between petty & serious offenses: those crimes carrying sentence of more than six months are considered serious crimes & those carrying sentence of six months or less are considered petty crimes. Id. Thus, sentences up to six months may be imposed for criminal contempts without guilt or innocence being determined by jury. Id. One-year sentence imposed in this case exceeds by six months length of penalty characterizing "petty offense" for Sixth Amendment purposes. There is no question that Tr. Ct. properly found D in contempt of Ct. Only error here was sentence imposed. Held, conviction affirmed but cause remanded with instructions to impose sentence not exceeding six months.

RELATED CASES: Jones, App., 847 N.E.2d 190 (D had right to jury trial when Tr. Ct. sentenced her to 200 days for contempt); Reynolds, App., 698 N.E.2d 390 (Ct. rejected claim that Ind. & U.S. Constitution's guarantee D jury trial on his refusal to submit to chemical breath test).

TITLE: Howell v. State

INDEX NO.: D.9.a.

CITE: (1st Dist., 12-27-06), Ind. App., 859 N.E.2d 677

SUBJECT: Blakely violations- prior criminal history exception survives Shepard; fact used to offset mitigator not subject to Blakely

HOLDING: Tr. Ct. abused its discretion in ordering the maximum sentence for reckless homicide based, in part, on D's prior criminal history of four misdemeanor traffic offenses & one misdemeanor conversion. Although the viability of the prior conviction exception to the Sixth Amendment requirement of a sentencing jury was questioned in Shepard v. United States, 125 S. Ct. 1254 (2005), the Shepard Ct. did not explicitly overrule the prior conviction exception. Thus, the rule remains that facts, other than the fact of a prior conviction, supporting an enhanced sentence must be admitted by the D or found by a jury. Blakely v. Washington, 124 S. Ct. 2531 (2004).

Here, when sentencing D to the maximum sentence for reckless homicide for the death of her infant, Tr. Ct. found three aggravators: (1) her prior convictions; (2) fact victim was less than twelve years old; & (3) position of trust. Tr. Ct. further refused to find D's request for drug treatment a mitigator because fact that D was found with drugs in her possession while on bond shows her commitment to drug treatment is not sincere. Because Tr. Ct. used the subsequent drug possession to offset a mitigator rather than as an aggravator, the use of the subsequent alleged drug possession did not violate the Sixth Amendment. Because D never admitted the victim was an infant, the use of this aggravator violated the Sixth Amendment. Although the use of the prior convictions did not violate the Sixth Amendment, the five misdemeanors were not sufficiently weighty or similar to the current offense to justify enhancing the offense. Because two of the three aggravators used were improper, Ct. reversed sentence & remanded for proceedings consistent with this opinion.

Note: This case may conflict with Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002), which held that a factor which cannot be used to aggravate a sentence may also not be used to offset a mitigator.

TITLE: Huffman v. State
INDEX NO.: D.9.a.
CITE: (2nd Dist., 05-02-05), Ind. App., 825 N.E.2d 1274
SUBJECT: Waiver of right to jury determination - sentencing; life without parole or term of years
HOLDING: In murder prosecution, D waived his right to have jury hear evidence for sentencing purposes for any possible sentence he could receive (LWOP or term of years) & authorized Tr. Ct. to hear evidence without assistance of jury. This is precisely what U.S. S.Ct. stated was allowable in Blakely v. Washington, 124 S. Ct. 2531, 2541 (2004), when it acknowledged that Ds may consent to judicial factfinding. At guilty plea hearing before Blakely was decided, D & State agreed that Tr. Ct. would hear evidence with respect to aggravation & mitigation. D was informed of his right to have a jury hear evidence with respect to counts to which he was pleading guilty & for life without parole request. D stated he understood he was waiving his right to have jury determine whether he should receive punishment of life without parole.

D argued that he was informed only of the potential aggravating factor of lying in wait. Because that factor applied to request for life without parole, D opined that he waived his right to a jury finding only with respect to possibility of life without parole & not to standard term of year's sentence. Ct. did not read Blakely to require that a D be provided notice of every fact upon which State may rely to seek an enhanced sentence. Additionally, D's right to have a jury hear evidence for sentencing arose from request that he be sentenced to life without parole. D waived that right with respect to any sentence that he could receive. Held, judgment affirmed.

TITLE: Kincaid v. State
INDEX NO.: D.9.a.
CITE: (11-29-05), Ind., 837 N.E.2d 1008
SUBJECT: Preservation of Blakely claims on appeal
HOLDING: For Blakely v. Washington claims, S.Ct. has relaxed rule that a particular sentencing claim must be raised in an appellant's initial brief on direct appeal in order to receive review on the merits. Smylie v. State, 823 N.E.2d 679, 689-90 (Ind. 2005). For cases in which appellant's initial brief on direct appeal was filed prior to date of Smylie decision (March 9, 2005), an appellant who had contested his or her sentence in some respect in appellant's initial brief on direct appeal is entitled to review on merits of a subsequently-raised Blakely claim. The keys here are that (1) some sentencing claim must have been raised in appellant's initial brief on direct appeal & (2) appellant must have added a Blakely claim by amendment, on petition for rehearing, or on petition to transfer. For cases in which appellant's initial brief was filed after date of Smylie decision, a specific Blakely claim must be made in appellant's initial brief on direct appeal for it to be reviewed on merits. Here, D's initial brief was filed after date of Blakely decision &, as required for it to be reviewed on merits, a specific Blakely claim was made in initial brief on direct appeal. Held, transfer granted, memorandum decision of Ct. App. summarily affirmed in part & remanded to Ct. App. for consideration of & ruling on D's sentencing claims.

RELATED CASES: Knighten, 839 N.E.2d 1166.

TITLE: Krebs v. State
INDEX NO.: D.9.a.
CITE: (4th Dist., 10-20-04), Ind. App., 816 N.E.2d 469
SUBJECT: Child molesting - sufficiency; Blakely claim
HOLDING: Ct. sua sponte remanded for a new sentencing determination pursuant to Blakely v. Washington, 124 S.Ct. 2531 (2004), finding that a jury determination is necessary for aggravating factors other than prior convictions. "It appears our Tr. Ct's no longer have discretion to sentence a criminal D to more than the presumptive sentence unless the D waives his right to a jury at sentencing, a jury first determines the existence of aggravating factors, or the D has a criminal history." Ct. found it irrelevant that the portion in excess of the presumptive was suspended, as the suspended portion is still a definite sentence even though it is postponed. See Beck v. State, 790 N.E.2d 520 (Ind. Ct. App.2003). Held, judgment affirmed in part, reversed in part, & remanded for new sentencing consistent with Blakely.

TITLE: Lewis v. U.S.

INDEX NO.: D.9.a.

CITE: 518 U.S. 322, 116 S. Ct. 2163 (1996)

SUBJECT: Jury Trial -- Right Not Dependant on Aggregate Length of Possible Sentences for Multiple Offenses

HOLDING: Sixth Amendment right to jury trial does not apply to D who is charged with multiple petty offenses joined for purposes of trial, even though possible aggregate sentence exceeds six-month line that divides presumptively petty from serious offenses. Right to jury trial applies only to "serious" offenses, & best indicator of whether offense is serious or merely petty is maximum sentence legislature has authorized for it. Focus is on legislature's judgment about offense's severity, as indicated by length of sentence, not on potential consequences faced by particular D. Kennedy, J., CONCURS IN JUDGMENT, calling majority opinion "one of the most serious incursions on the right to jury trial in the Ct.'s history..." He concurs because trial judge indicated pretrial that sentence would not exceed six months. Stevens & Ginsburg, JJ., DISSENT. In contrast to Kennedy, they would not allow judge's promise of short sentence defeat right to jury trial.

TITLE: Morgan v. State
INDEX NO.: D.9.a.
CITE: (06-15-05), Ind., 829 N.E.2d 12
SUBJECT: Blakely - judicial statements about aggravators
HOLDING: Because D admitted to fact she was on probation at time of her arrest, it was permissible for Tr. Ct. to consider that fact as an aggravating circumstance without submitting it to a jury. However, Tr. Ct. cited as another aggravator that prior punishments had failed to rehabilitate D. Ct. held that such statements, which are "derivative" of criminal history, are legitimate observations about weight to be given to facts appropriately noted by a judge alone under Blakely, but they cannot serve as separate aggravating circumstances. Sixth Amendment is not implicated or endangered when language of an aggravator is meant to describe factual circumstances, not to serve as a fact itself. Precise language of an aggravator need not be submitted to a jury nor admitted by a D in order to pass Sixth Amendment requirements established in Blakely.

Ct. also held that while a sentence enhanced because it is based on fact of prior conviction does not violate Sixth Amendment, question of whether sentence should be enhanced & to what extent turns on weight of an individual's criminal history. This weight is measured by number of prior convictions & their seriousness, by their proximity or distance from present offense, & by any similarity or dissimilarity to present offense that might reflect on a D's culpability. Wooley v. State, 716 N.E.2d 919 (Ind. 1999). Need for clarity & careful weighing, made by reference to appropriate prior criminal convictions, is more pronounced than ever given increased importance prior criminal convictions play in sentencing process in a post-Blakely world. Held, transfer granted, memorandum opinion of Ct. App. vacated, sentence for dealing in methamphetamine reduced to thirty years.

RELATED CASES: Garland, App., 855 N.E.2d 703 (Tr. Ct.'s comment that victim was “of tender age” was a moral-penal observation, supported by verdict, not a separate aggravator); Green, App., 850 N.E.2d 977 (acts of "scoping out" victims' residence on two separate occasions & knowing that a weapon would be involved is adequate to support a conclusion that the crime was "heinous" in nature, & such is a permissible aggravator); Haas, 849 N.E.2d 550 (judicial statements that D was at risk to commit future crimes & the nature & circumstance of the crime was heinous were not properly supported by facts proven to a jury & thus could not be used as aggravators; further, these judicial statements & the underlying facts upon which they are based could not both serve as aggravators); Williams, 838 N.E.2d 1019 (*citing* police officer's trial testimony, Tr. Ct. improperly found that D's "blatant disregard for the safety of the citizens of this county must be considered as an aggravating circumstance"); Neff, App., 832 N.E.2d 1006 (aggravating circumstances that D failed to rehabilitate & risk that he will reoffend should not have been considered as separate aggravating circumstances; however, such statements are legitimate observations about weight to be given to D's criminal history).

TITLE: Neff v. State
INDEX NO.: D.9.a.
CITE: (06-27-06), Ind., 849 N.E.2d 556
SUBJECT: Sentencing jury -- Ct. can reduce sentence rather than remand after finding Blakely error
HOLDING: Appellate Cts. can revise a D's sentence rather than remand, thereby denying State opportunity to pursue Blakely trial on aggravators. Indiana S. Ct. has remanded to allow State the opportunity to prove aggravating facts when the State sought an enhanced sentence but did not seek to prove the aggravating facts beyond a reasonable doubt. On the other hand, Indiana S. Ct. has revised a sentence when some aggravators alleged by the State were improper for reasons other than violating D's right to jury trial. In such situations, in the interests of judicial economy, it is more efficient solution for the appellate Ct. simply to reweigh aggravators & mitigators. The State should not be afforded a second bite at the apple by being permitted to attempt to prove new aggravators beyond those initially presented to, & found by, the Tr. Ct. The Indiana S. Ct. has also revised a sentence to impose the same sentence reached by Tr. Ct. if constitutionally permitted. For instance, Indiana S. Ct. has reduced enhanced sentences to presumptive sentences but run the presumptive sentences consecutively to constitutionally impose Tr. Ct.'s sentence. Here, appellate Ct. properly reduced sentence from maximum to six years after finding Blakely error. Held, transfer granted, Ct. App.' decision at 832 N.E.2d 1006 is affirmed in all respects except its holding & reasoning regarding consideration of D's probationary status.

RELATED CASES: Davis, App., 851 N.E.2d 1264 (where Tr. Ct. improperly enhanced sentence, appellate Ct. reduced sentence to presumptive with remaining time on work release in light of D's character; see full review at G.1.c).

TITLE: Patrick v. State

INDEX NO.: D.9.a.

CITE: (05-10-05), Ind., 827 N.E.2d 30

SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; options on remand

HOLDING: After D pleaded guilty to murder, Class B felony battery, & Class C felony criminal confinement, Tr. Ct. sentenced him to the maximum term of ninety-three years. Ct. App. correctly decided D must be resentenced in light of Blakely v. Washington, 124 S. Ct. 2531 (2004), because some of aggravating circumstances found by Tr. Ct. were not based on facts found to exist by a jury. Ct. App. was incorrect, however, in ordering Tr. Ct. to resentence D only in light of aggravating factors that did not require a jury determination under Blakely. Those aggravating factors were invalid only because facts underlying them had not been found by a jury, a defect that can be cured by a new sentencing hearing at which a jury determines whether facts underlying those aggravating circumstances exist. Ct. remanded for a new sentencing hearing in which State may elect to prove adequate aggravating circumstances before a jury or accept the statutory fixed term. Smylie v. State, 823 N.E.2d 679 (Ind. 2005). As a third option, State may elect to forgo empaneling of a jury & stipulate to D's being resentenced by Tr. Ct. only in light of aggravating factors for which a jury determination is unnecessary under Blakely & Smylie. Ct. reserved for another day an explicit determination of unresolved issue of whether the fact that the D was on probation at time he committed instant offense is derivative of criminal history or implicates Blakely. Held, transfer granted, Ct. App.' opinion at 819 N.E.2d 840 summarily affirmed except as noted herein.

RELATED CASES: Edwards, App., 822 N.E.2d 1106 (although evidence tending to show planning & preparation was presented to jury, these facts were not necessarily reflected in the jury verdict).

TITLE: Pinkston v. State
INDEX NO.: D.9.a.
CITE: (2nd Dist., 10-31-05), Ind. App., 836 N.E.2d 453
SUBJECT: Blakely - juvenile adjudications
HOLDING: Tr. Ct.'s use of juvenile adjudications to enhance a D's sentence beyond statutorily prescribed presumptive sentence is improper & violates Sixth Amendment right to trial by jury unless: 1) the D was afforded the right to a trial by jury during juvenile proceedings; or 2) during an aggravator phase of D's criminal trial the D's juvenile adjudications are submitted to jury & proved beyond a reasonable doubt. Here, there was no evidence D was afforded right to jury trial during his juvenile proceedings or that his juvenile adjudications were submitted to jury & proved beyond a reasonable doubt during aggravator phase of his criminal trial.

Ct. also held that Tr. Ct. improperly relied upon two other aggravating factors found by jury to enhance his sentence, namely: 1) that imposition of reduced or suspended sentence would depreciate seriousness of offense; & 2) that D was in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility. "Need for corrective or rehabilitative treatment" aggravator is a legitimate observation about weight to be given to facts appropriately noted by a Tr. Ct. judge, but it cannot serve as a separate aggravating factor. Morgan, 829 N.E.2d 12. Finally, notwithstanding waiver of issue, Ct. held that aggravator phase of D's trial did not violate Distribution of Powers Clause of Indiana Constitution, because Indiana S. Ct. has specifically authorized such proceedings. See Smylie, 823 N.E.2d 679. Held, remanded for imposition of presumptive sentence of one & one-half years for both theft & auto theft convictions, to run concurrently. Friedlander, J., dissenting from holding that true findings of juvenile delinquency are not "criminal history" for purposes of Blakely v. Washington, 542 U.S. 296 (2004) & would follow analysis in Ryle, App., 819 N.E.2d 119, *trans. granted*.

TITLE: Pruitt v. State
INDEX NO.: D.9.a.
CITE: (5/16/2017), 78 N.E.3d 14 (Ind. Ct. App. 2017)
SUBJECT: Enhanced sentence does not violate Blakely v. Washington
HOLDING: Defendant forfeited his claim that his enhanced 65-year murder sentence violates Blakely v. Washington, but, nonetheless, the claim lacks merit because one aggravator – Defendant's criminal history – required no jury finding and the other aggravator – Defendant's killing of an on-duty police officer - was found beyond a reasonable doubt by a jury. And even though the trial court considered aggravating factors that did not comply with Blakely, it would have imposed the same sentence had it not considered those factors.

Defendant, who is intellectually disabled, was convicted of murdering a police officer and for other offenses arising out of the same incident, including the attempted murder of the officer's son, who was riding in the patrol car as part of a college internship. In recommending the death penalty, the jury found Defendant killed an officer who was acting in the line of duty. The trial court imposed the death penalty for the murder and 115 years for the other offenses. After exhausting his state remedies, Defendant obtained relief from the 7th Circuit, which vacated the death penalty because of Defendant's intellectual disability. On remand, the trial court imposed the maximum 65-year term, *citing* as aggravators Defendant's: 1) killing of the on-duty officer and 2) his criminal history. It *cited* Defendant's intellectual disability as the sole mitigator. It ordered Defendant to serve the sentence consecutively to the already-imposed 115-year sentence.

Defendant argued his enhanced sentence violated Blakely because the facts supporting his enhanced sentence were not found by a jury. Defendant forfeited this claim because he did not raise it at re-sentencing. Even so, the claim has no merit. No jury finding was required for Defendant's criminal history. See Blakely v. Washington, 542 U.S. 296, 301 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). And the jury did find that Defendant killed an on-duty officer. This satisfies Blakely because where a defendant is eligible for the death penalty, but instead is sentenced to a term of years, "the trial court may consider the aggravating factors enumerated in Indiana Code Section 35-50-2-9," such as killing an officer who was acting in the line of duty. Davies v. State, 758 N.E.2d 981, 986 (Ind. Ct. App. 2001), *trans. denied*. Thus, even though the 7th Circuit vacated the death penalty, that did not negate the fact that a jury found beyond a reasonable doubt that Defendant killed an officer acting in the line of duty.

Defendant also argued that the trial court considered aggravating factors that violated Blakely. However, "[w]here the use of some aggravators violates Blakely and others do not, we will remand for resentencing unless we can say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators." Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007). Here, the trial court would have imposed the same sentence absent consideration of improper aggravating factors. The trial court could have aggravated Defendant's sentence to sixty-five years and ordered his sentences to run consecutively based solely on a single aggravating factor. See Gleason v. State, 965 N.E.2d 702, 712 (Ind. Ct. App. 2012). It found two; both complied with Blakely. The trial court also gave due consideration to Defendant's intellectual disability but appropriately found that Defendant understood that what he did was wrong. Finally, Defendant's sentence was not inappropriate under Appellate Rule 7(B). Held, judgment affirmed.

TITLE: Ring v. Arizona
INDEX NO.: D.9.a.
CITE: 536 U.S. 584 (2002)
SUBJECT: Jury trial, Apprendi, death penalty, aggravating factors
HOLDING: Under Arizona's death penalty law, after a jury convicts a D of first- degree murder, the judge, sitting alone, determines the existence or absence of the aggravating factors required for the imposition of a death sentence. The Court held in Walton v. Arizona, 497 U.S. 639, 649 (1990), that Arizona's capital punishment scheme was constitutional because the additional facts found by the court were 'sentencing considerations' and not 'elements of the offense of capital murder.' However, the Court more recently held in Apprendi v. New Jersey, 530 U.S. 466 (2000) that the Sixth Amendment right to jury trial requires that any fact which increases the maximum sentence to which a D may be subjected is an 'element' of the offense and must be charged and proven beyond a reasonable doubt to a jury. The D argued that under Arizona law, the aggravating circumstance found by the judge were 'elements' of the crime and that his Sixth Amendment rights had been violated when he was sentenced to death based on the judicial fact-finding.

Held, in capital cases as well as non-capital cases, any fact which increases the maximum sentence to which a D may be subjected is an element of the offense, and the Sixth Amendment guarantees the D the right to have it charged and proven to a jury. The Apprendi rule applies to death penalty cases as well as to non-capital cases. To the extent Walton v. Arizona, holds to the contrary, it is *overruled*.

TITLE: Ryle v. State
INDEX NO.: D.9.a.
CITE: (12-13-05), Ind., 842 N.E.2d 320
SUBJECT: Blakely - probationary status & juvenile adjudications
HOLDING: A D's prior juvenile adjudications & fact that he was on probation when he committed the crime are proper sentencing considerations for a trial judge & need not be submitted to a jury under Blakely v. Washington, 542 U.S. 296 (2004), & Apprendi v. New Jersey, 530 U.S. 466 (2000). D challenged Tr. Ct.'s use of four prior juvenile adjudications to support enhancement of his voluntary manslaughter conviction. He argued that adjudications are not "prior convictions" for Apprendi purposes & whether they exist or not should be decided by jury. While Apprendi does specifically mention the right to a jury trial, Ct. has made it clear that decisions that it relied on in making prior convictions a sentencing exception turned heavily on fact that the additional sentences were based on recidivism, which may well be the most common basis for sentencing enhancements. Main concern was whether prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial. Like that of most states, Indiana's code does not afford trial by jury but regards juvenile adjudications as reliable enough to form basis for confinement of a juvenile delinquent or for ordering a wardship. A decision to require jury to determine "fact" of prior juvenile adjudications would result in an untold number of Ds clogging Tr. Ct's. on remand.

Tr. Ct. also enhanced D's sentence partly on basis that he was on probation when he committed present offense, a fact reflected in presentence investigation report prepared by probation officer. Minimum standards for presentence investigation reports are required by Ind. Code 11-13-1-8(b)(4), & board of Judicial Conference adopted a standard report that included all information specified in Ind. Code 35-38-1-9(b) - (c)(information about present crime, impact of crime on victim, D's criminal, social, & employment history, family information, economic status, education, personal habits, & any other matters the Ct. requires). These requirements governing probation officers & their presentation of information to sentencing Ct. ensure reliability of their work product. Thus, probation officers can properly contribute to character & outcome of prior convictions by researching judicial documents sanctioned in Shepard v. United States, 544 U.S., 125 S. Ct. 1254 (2005). "Disputed documents," i.e., police reports & complaint applications that run afoul of Apprendi, were not used here. Probation officer compiled information on D's criminal history & probation status for report in this case by referring to case files from Ct's. in which D was convicted. Held, transfer granted, Ct. App.' opinion at 819 N.E.2d 119 vacated, judgment affirmed.

TITLE: Smith v. State
INDEX NO.: D.9.a.
CITE: (1st Dist., 6-28-05), Ind. App., 829 N.E.2d 1021
SUBJECT: Blakely issues waived without objection; foreclosed by plea
HOLDING: D challenged his enhanced sentence on basis that State never filed a "notice of aggravating circumstances" & did not provide D with notice of aggravators. Ct. noted D did not specify how this violated Blakely v. Washington, 124 S. Ct. 2531 (2004), or what notice was required, & inferred D was not provided a copy of the presentence report as information regarding aggravators the State might assert would be included therein. Ct. found that sentencing Ct. could not have relied on aggravators in determining D's sentence as it was bound by the terms of the plea agreement & was obliged to impose a 20-year sentence pursuant to the agreement. Further, sentencing in this case occurred after Blakely was decided & D waived any error by failing to object to the delivery or content of the pre-sentence report.

Ct. also rejected D's argument that having probation officer, as an employee of the Ct., submit the report of aggravators to the sentencing Ct. violated the separation of powers clause of Art. 3, ' 1 of the Indiana Constitution. Similar arguments had been rejected in another jurisdiction prior to Blakely. See United States v. Boise, 916 F.2d 497 (9th Cir. 1990). While acknowledging Blakely might "call into question" the viability of Boise & the reliance on a report prepared by an employee of sentencing Ct., D waived issue. Moreover, Ct. would find no error in the lack of jury involvement since D's criminal history could justify his enhancement without a jury determination. Ct. also found that D's waiver & the Tr. Ct.'s obligation to impose the plea agreement precluded it from ruling on D's assertion that the rules of evidence apply to a determination of aggravators. Finally, Ct. rejected D's claim that his due process rights were violated by the cumulative effect of the circumstances asserted above even if most were not error. See Collins v. State, Ind. App., 321 N.E.2d 868 (1975). The outcome of D's sentence could be predicted with certainty by way of his plea agreement. Held, judgment affirmed.

TITLE: Smylie v. State
INDEX NO.: D.9.a.
CITE: (3-9-05), Ind., 823 N.E.2d 679
SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; retroactivity
HOLDING: Indiana's system for enhanced sentences contravenes Blakely v. Washington, 542 U.S., 124 S.Ct. 2531 (2004), which applied rule set forth in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury & proved beyond a reasonable doubt. The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in jury verdict or admitted by the D without any additional findings, i.e., the presumptive or standard sentence. Blakely, 124 S. Ct. at 2537.

Ct. could not see any grounds for sustaining Indiana's sentencing enhancement scheme given the Blakely holding. Indiana's scheme is not a "range" system but provides for a "fixed term" presumptive sentence as a mandatory starting point for each class of felonies, Ind. Code 35-50-2-3 to 7. The statutes also create upper & lower boundaries for each felony sentence, requiring judge to engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term is to be imposed. It is this type of judicial fact-finding that concerned the Ct. in Blakely & renders Indiana's sentencing system unconstitutional. A constitutional scheme akin to Indiana's could take on two forms: 1) our present arrangement of fixed presumptive terms, modified to require jury findings on facts in aggravation, or 2) an indeterminate sentencing system in which there is no stated "fixed term," where judges would impose sentences without a jury. Ct. also held that, because Indiana's statutes do not erect any target or presumption concerning concurrent or consecutive sentences, there is no constitutional problem with consecutive sentencing so long as Tr. Ct. does not exceed combined statutory maximums.

As a new rule of constitutional procedure, Ct. will apply Blakely retroactively to all cases on direct review at the time Blakely was announced. Ct. concluded that it is appropriate to be "rather liberal" in approaching whether an appellant & her lawyer have adequately preserved & raised a Blakely issue. Thus, a D need not have raised a Sixth Amendment objection at trial in order to raise a Blakely claim on appeal, as long as the D has contested his or her sentence on appeal. Those Ds who did not appeal their sentences at all will have forfeited any Blakely claim, & fundamental error doctrine will not be available to attempt retroactive application of Blakely through post-conviction relief. Held, D's enhanced sentence for Class D felony reversed & remanded for a new sentencing hearing in which State may elect to prove adequate aggravating circumstances before a jury or accept statutory fixed term; order for consecutive sentences affirmed. Dickson, J., dissenting.

RELATED CASES: Oregon v. Ice, 129 S. Ct. 711 (2009) (6th Amendment's jury trial right does not prohibit a judge from determining predicate facts necessary to impose consecutive, rather than concurrent, sentences); Miller, App., 891 N.E.2d 58 (Tr. Ct. improperly relied upon the following unproven facts: (1) the D's acts were part of an ongoing scheme or plan rather than an isolated incident of extremely poor judgment; (2) the negative emotional impact on the victim; (3) the D used gifts to foster the relationship; and (4) the D violated the position of trust he held with the victim); Kline, App., 875 N.E.2d 435 (Kline, App., 875 N.E.2d 435 (where D's resentencing was ordered through a belated appeal for reasons other than Blakely, Blakely applies at the resentencing); Gutermuth, 868 N.E.2d 427 (Blakely does not apply retroactively to belated appeals; see full review this section); Prickett, 856 N.E.2d 1203 (Blakely does not apply to restitution or sex offender registry orders); Mathews, 849 N.E.2d 578 (Smylie

& Blakely do not apply to sentence imposed in 1994); Henry, App., 848 N.E.2d 1124 (D forfeited his ability to appeal his sentence on Blakely grounds because he took no action to amend his brief to add Blakely in support of his argument that his sentence was erroneous; further, after Ct. App. issued its decision nearly three months after Blakely, D did not file a petition for rehearing/transfer & argue for application of Blakely); French, App., 839 N.E.2d 196 (Ct. declined D's invitation to reconsider Ind. S. Ct. holding in Smylie, that imposition of consecutive sentences does not implicate Blakely); Aguilar, App., 811 N.E.2d 476 (D is not entitled to relief under Smylie because he did not appeal his sentence, but challenged it only after Ct. App. issued its decision on single non-sentencing issue he raised); Clark, App., 829 N.E.2d 589 (because D failed to object to his sentence at any time to Tr. Ct., & because his case was not on direct review at time Blakely was announced, D forfeited his right to have this issue raised on appeal).

TITLE: Spurlock v. State

INDEX NO.: D.9.a.

CITE: (7/6/2018), 106 N.E.3d 1046 (Ind. Ct. App. 2018)

SUBJECT: Enhanced sentence did not violate right to jury trial -- aggravator based on facts implicit in jury's verdicts

HOLDING: D was convicted of four counts of murder and two counts of conspiracy in 2003. After several appeals, he had a resentencing hearing in 2017. The resentencing judge gave D an aggravated sentence because he had conspired with his friends to commit a second robbery even though he knew his friends had killed two people in the first robbery. On appeal, D argued that trial court erred in resentencing him for the conspiracy conviction because his enhanced sentence does not conform to the dictates of Blakely v. Washington, 542 U.S. 296 (2004). Blakely prohibits the reliance on facts not found by a jury or admitted by the D to enhance a sentence above the presumptive, with the exception of criminal history. Although D was entitled to the protections of Blakely at his resentencing hearing, he failed to raise a Blakely objection to the enhancement of one of his conspiracy convictions. Rejecting D's fundamental error claim, Court concluded that implicit in the jury's verdicts is the finding beyond a reasonable doubt that D embarked on a second effort to rob drug dealers with the full knowledge that a first robbery had resulted in murder of the victims. Thus, this fact could properly be relied on to enhance his sentence without violating Blakely. Held, judgment affirmed. Sentence for murder and conspiract to commit robbery affirmed.

TITLE: Strong v. State

INDEX NO.: D.9.a.

CITE: (2nd Dist., 11-5-04), Ind. App., 817 N.E.2d 256

SUBJECT: Sentencing - fundamental right to have facts supporting enhancement tried to jury; no waiver

HOLDING: In murder prosecution, D was denied his Sixth Amendment right to have a jury determine, beyond a reasonable doubt, all facts legally essential to his sentence when Tr. Ct. found certain aggravating circumstances & sentenced him to an enhanced term of sixty years. State argued that D waived any sentencing error with respect to Blakely, 124 S.Ct. 2531 (2004), because he failed to object at sentencing hearing pursuant to Apprendi, 530 U.S. 466 (2000), that he had right to jury determination of aggravating circumstances used to enhance his sentence beyond statutory maximum. However, Blakely redefined the "statutory maximum" for purposes of Apprendi as being the maximum sentence that a trial judge may impose without any additional findings, i.e., the presumptive or standard sentence. Thus, a D who challenges his enhanced sentence but fails to do so on grounds of Apprendi has not waived his argument pursuant to Blakely. Moreover, D's failure to object to his enhanced sentence at trial level, by itself, does not constitute waiver. Instead, the right to trial by jury, which is a fundamental right guaranteed by Sixth Amendment of federal constitution & by Art. 1, § 13 of Indiana Constitution, is subject to a knowing, intelligent, & voluntary waiver. Leone, 797 N.E.2d 743, 752. A D's failure to object is not tantamount to such an affirmative act of waiver.

Ct. also disagreed with State's assertion that the Blakely decision does not implicate Indiana's sentencing procedure. Inasmuch as Indiana's present sentencing procedure allows a Tr. Ct., without the aid of a jury, to enhance a sentence where certain factors are present, it violates a D's Sixth Amendment right to have a jury determine all facts legally essential to his or her sentence, pursuant to Blakely. Here, Tr. Ct. enhanced D's sentence five years above the presumptive after finding that victim was shot in his home & that fatal shooting was unprovoked. Because no aggravators were found by an independent fact finder & Tr. Ct. found criminal history to be a mitigating factor, Ct. remanded for a new sentencing order consistent with dictates of Blakely.

RELATED CASES: Strong, App., 820 N.E.2d 668 (on rehearing, Ct. noted D may waive Blakely argument by stipulating to the relevant facts supporting a sentence enhancement or consenting to judicial fact-finding); Williams, App., 818 N.E.2d 970, aff'd in part, 838 N.E.2d 1019 (D did not waive issue by failing to object under Apprendi, because it was reasonable for D to believe his sentence did not violate Apprendi based on existing case law).

TITLE: Suits v. State
INDEX NO.: D.9.a.
CITE: (2d Dist. 7/28/83), Ind. App., 451 N.E.2d 375
SUBJECT: Right to jury trial - misdemeanor
HOLDING: Tr. Ct. erred in denying D his right to jury trial upon misdemeanor charges where judge failed to advise D, unrepresented by counsel, at arraignment of consequences of his failure to demand trial by jury. Ind. Code 35-1-34-1 (now Ind. Code 35-37-1-2); CR 22. Here, at morning of trial, D, still unrepresented by counsel, requested jury trial. Judge denied request. CR 22 controls right to trial by jury in misdemeanor cases. CR 22 provides D must demand jury trial no later than 10 days before scheduled trial date; failure to so request results in waiver unless D has not had at least 15 days advance notice of scheduled trial date & of consequences of his failure to demand trial by jury. Tr. Ct. did not follow CR 22. Held, convictions reversed on other grounds.

RELATED CASES: Young, 973 N.E.2d 643 (Ind. Ct. App. 2012); Jackson, App., 644 N.E.2d 595 (written advisement & acknowledgement sufficiently advised D of his right to jury trial & of requirements of Crim. R. 22).

TITLE: Taylor v. State
INDEX NO.: D.9.a.
CITE: (3/11/2019), 120 N.E.3d 635 (Ind. Ct. App. 2019)
SUBJECT: Right to jury for trial de novo regardless of jury waiver in underlying city court trial
HOLDING: D can request a jury trial for a trial de novo in circuit or superior court regardless of whether he requested a jury in the city-court proceeding. Here, D was charged with speeding in a work zone, and the case was filed in city court. D did not request a jury trial in city court and was found guilty by the judge. However, D exercised his right to trial de novo in superior court and requested jury trial. The superior court erred in finding D waived his right to a jury in the trial de novo by failing to request a jury trial in city court.

TITLE: Tripp v. State
INDEX NO.: D.9.a.
CITE: (3rd Dist.; 6-19-00), Ind. App., 729 N.E.2d 1061
SUBJECT: Right to jury trial - misdemeanors; time extended when new charge is filed
HOLDING: Where Tr. Ct. approves substantive amendment that adds additional count & holds another initial hearing during which D is informed anew of his right to jury trial, D should be permitted to reevaluate his jury trial decision in light of newly added charge. D charged with misdemeanor may demand trial by jury by filing written demand therefor not later than ten days before his first scheduled trial date. Failure to do so shall constitute waiver by him of trial by jury unless D has not had at least fifteen days advance notice of his scheduled trial date & of consequences of this failure to demand trial by jury. C.R. 22. Because D needs time to examine his defenses, his perceived chances in jury trial versus bench trial, & any other relevant considerations before deciding whether he wants jury trial, C.R. 22 should be reset when additional charge is filed. Here, D did not request jury trial until June 1, 1999, which was long after first scheduled trial date. However, State did not add additional OWI count until May 13, 1999. So, because D made request for jury trial at first opportunity after new charge had been filed & he did not have fifteen-day notice of trial date with new charge, D's request was timely. Held, judgment affirmed in part & reversed in part & remanded for trial by jury.

TITLE: Trusley v. State
INDEX NO.: D.9.a.
CITE: (06-17-05), Ind., 829 N.E.2d 923
SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; D's admission to aggravator
HOLDING: Defense counsel's statement during guilty plea colloquy was sufficient to constitute an admission by D that victim was under twelve at time of his death. Moreover, in establishing factual basis for reckless homicide, D also admitted that she provided day care for victim. Tr. Ct. found that this admission was sufficient to establish that D was in a position of trust with victim. Judicial statements such as "in a position of trust" cannot serve as separate aggravating circumstances. Morgan v. State, 821 N.E.2d 12. However, here Tr. Ct. did not enhance sentence on grounds that D was both in a position of trust & victim's day care provider. Rather, it supported position of trust aggravator by reference to admitted fact that D was victim's day care provider. This was an appropriate legal observation about properly established facts & constituted a legitimate aggravating circumstance. Because three other aggravating circumstances were improperly considered, Ct. remanded with instructions to afford State an election to prove additional aggravators to a jury, or for Tr. Ct. to reconsider appropriate sentence based on two proper aggravators & three mitigators. Held, transfer granted, Ct. App.' opinion at 818 N.E.2d 110 vacated, judgment reversed & remanded.

RELATED CASES: Williams, App., 895 N.E.2d 377 (D's admission that she was victim's aunt, without more, did not constitute an admission that she was in a position of trust with the victim for Blakely purposes); Kazmier, App., 863 N.E.2d 912 (D's testimony that battery victim was his wife of 23 years constituted an admission, thus Tr. Ct.'s domestic violence determination did not implicate Blakely); Williams, App., 840 N.E.2d 433 (particular facts relied on by Tr. Ct. in assessing nature & circumstances of crime--that D hit his sister's car three times, eventually striking her & exposing her to serious injury--are not contained within the PSI; thus, D did not admit to them, & nature & circumstances aggravator violated Blakely & may not be used to enhance D's sentence); Thomas, App., 840 N.E.2d 893 (D's failure to challenge his marriage to CW's mother did not constitute an admission that he was in a position of trust); DeVries, App., 833 N.E.2d 511(where D stated that presentence investigation report had no factual errors that needed to be corrected, jury's verdict reflected finding that victim was five; D also admitted position of trust aggravator); Reyes, App., 828 N.E.2d 420 (D admitted to being victim's friend & was more than a person who "occasionally borrowed things" or "casually conversed" with victim; D used his relationship with victim to gain access to victim's home); Carmona, App., 827 N.E.2d 588 (although D admitted in his PSI he had been a gang member, this aggravator could not be used to justify imposition of enhanced sentence because D left gang over14 years before instant offense & his former gang membership was wholly unrelated to instant offense); Weis, App., 825 N.E.2d 896 (Ct. found D admitted a position of trust in answers to cross-examination when he said, "I consider her as my biological daughter, even though I did not conceive her. I was there from day one when she was born."); Altes, App., 822 N.E.2d 1116 (Tr. Ct.'s finding that D violated his position of trust with children & their parents was improper in light of Blakely); Padilla, App., 822 N.E.2d 288 (D admitted to banging her 16-month old daughter's head into a wall & implicit in her admission is that she was in a position of trust with victim); Milligan, App., 819 N.E.2d 115 (despite State's assertions to contrary, D did not admit to aggravating factors of age of victim & that altercation took place in presence of D's ten-year-old daughter); Wickliff, App., 816 N.E.2d 1165 ("depreciate seriousness of crime" aggravator was based

upon D's own testimony at sentencing hearing regarding nature & level of his addiction to alcohol & drugs).

TITLE: U.S. v. Booker

INDEX NO.: D.9.a.

CITE: 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005)

SUBJECT: Blakely rights, jury trial, Federal Sentencing Guidelines

HOLDING: Imposition of an enhanced sentence under the U.S. Sentencing Guidelines, based on a fact found by the judge but neither found by the jury nor admitted by the D, violates the 6th Amendment right to trial by jury. The provision of the federal sentencing statute that makes the Guidelines mandatory must be severed and excised. The Guidelines are effectively advisory. The Court also severed and excised the provision that sets forth standards of review on appeal. The remaining provisions of the statute imply that federal appellate courts are to review sentences for reasonableness. This holding is retroactive to all cases on direct review.

TITLE: United States v. Haymond

INDEX NO.: D.9.a.

CITE: (U.S. 2019) 139 S. Ct. 2369, (6/26/2019)

SUBJECT: Mandatory sentence based on new crime during supervised release unconstitutional

HOLDING: Under 18 USC § 3583(k), which governs supervised release, if the judge finds from a preponderance of the evidence that the defendant committed certain enumerated offenses including child pornography offenses while under supervised release, the judge is required to impose a mandatory minimum sentence of five years to life. Imposing a mandatory minimum sentence for what is effectively a new crime without providing the defendant his Fifth Amendment right to Due Process and Sixth Amendment right to jury trial is unconstitutional. Held, judgment reversed and remanded to determine the appropriate remedy. Breyer, J., CONCURRING on grounds that this specific statute was unconstitutional in its execution in that it behaved more like prosecution of a new crime than like an enhancement to the original. Unlike the plurality, he would not "transplant the the Apprendi line of cases to the supervised-release context" given the "potentially destabilizing consequences." Alito, J., joined by Roberts, C.J., Thomas, and Kavanaugh, JJ., DISSENTING, arguing that supervised release is not true freedom but instead conditional release, which may be revoked without full Due Process, and there is no Sixth Amendment right to jury trial for enhancement to a sentence already lawfully imposed by a jury.

[Ed. Note: In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.]

TITLE: Washington v. Recuenco
INDEX NO.: D.9.a.
CITE: 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006)
SUBJECT: Blakely error on firearm enhancement, harmless error
HOLDING: Court granted certiorari to review conclusion of Washington Supreme Court that Blakely violations can never be harmless, where it vacated a 3-year firearm enhancement based on Tr. Ct.'s factual findings after jury had convicted D of assault "with a deadly weapon." Nothing in the verdict form required the jury to find that D engaged in assault with a "firearm", although a firearm qualifies as a deadly weapon under Washington law. State sought 3-year enhancement for being armed with a firearm during sentencing rather than requesting the 1-year enhancement applicable to the jury's finding that D was armed with a deadly weapon. Apprendi and Blakely were decided prior to the Washington Supreme Court hearing D's appeal. The State conceded that a Sixth Amendment violation occurred under Blakely because the Tr. Ct. could not subject D to a firearm enhancement based on the jury's finding that D was armed with a deadly weapon, but argued the Blakely error was harmless. The Washington Supreme Court in a companion case held that Blakely error is always "structural error" which will also invalidate the conviction. Initially, Court rejected D's argument that it lacked jurisdiction because the Washington Supreme Court's decision rested on adequate and independent state law grounds. Court held that precedent in Washington was not as clear regarding whether it had a procedure to allow a jury to determine if a D was armed with a firearm as D claimed, and if not the Washington Supreme Court could address that on remand. That, however, is not determinative of the question the Washington Supreme Court decided and which Court granted review. Failure to submit a sentencing factor to a jury is not "structural" error. There is a strong presumption that most constitutional errors are subject to harmless-error analysis. Majority found case indistinguishable from Neder v. U.S., 527 U.S. 1 (1999) where it was held that the failure to submit an element of an offense to the jury is not structural, but is subject to the harmless error rule of Chapman v. California, 386 U.S. 18 (1967). Apprendi makes it clear that Aany possible distinction between an "element" of a felony and a "sentencing factor" was unknown during years surrounding our Nation's founding. Assigning the difference from Neder constitutional significance cannot be reconciled with this recognition that elements and sentencing factors must be treated the same. Held, judgment reversed and remanded; Kennedy, J. filed a concurring opinion; Stevens, J., dissenting, questioned accepting the case the question to him is whether the court even has jurisdiction over the Washington Supreme Court's chosen remedy for the admitted constitutional violation and if the Court does nothing should keep the Washington Supreme Court from reinstating the same judgment or adhere to its view under state law; Ginsburg, J., dissenting, in which Stevens, J. joined, would distinguish from Neder in that unlike that case the charge, jury instructions, and special verdict contained no omissions. In sum, Respondent, charged with one crime, was convicted of another, *sans* charge, jury instruction or jury verdict, which Ginsburg found incompatible with the Fifth and Sixth Amendments.

TITLE: Wiley v. State

INDEX NO.: D.9.a.

CITE: (07/20/20), Ind. Ct. App., 150 N.E.3d 710

SUBJECT: Implied waiver of right to misdemeanor jury trial was not knowing and is therefore invalid.

HOLDING: Defendant was charged with two misdemeanor offenses and advised regarding Crim. R. 22 of his right to a jury trial and the procedural effects if a request for a jury trial was not timely filed in writing. His counsel made an oral request for a jury and later indicated he had filed a written request for a jury trial. The trial court set the matter for a jury trial which was later continued. The statements of trial counsel and the actions of the trial court led Defendant to believe that the necessary steps had been taken to ensure a jury trial. Defendant appeared at the first setting of his jury trial and paid the costs associated with securing the jury pool in order to obtain a continuance. It was not until the State filed a motion to strike the jury trial five months later and just three weeks before the reset jury trial that Defendant was made aware that no written jury demand had been filed. Further, by the time the trial court struck the jury trial it was impossible for Defendant to comply with the requirements of Crim. R. 22 as the deadline for filing a written jury demand had already passed. The Court of Appeals held that under these circumstances, Defendant established that his implied waiver of his jury right was not knowing and therefore invalid. Reversed and remanded for a jury trial.

TITLE: Williams v. State
INDEX NO.: D.9.a.
CITE: (05-25-05), Ind., 827 N.E.2d 1127
SUBJECT: Blakely violation - consecutive sentencing remedy
HOLDING: Tr. Ct. ordered concurrent, enhanced sentences on two counts using aggravating circumstances that must be found by a jury under Blakely v. Washington, 124 S.Ct. 2531 (2004). Rather than remand for jury sentencing procedures, Ct. exercised its review & revise power under Article 7 Section 4 of Indiana Constitution & directed Tr. Ct. to enter consecutive presumptive terms. With aggravators previously found, i.e., brutality of beatings, Tr. Ct. could properly order presumptive sentences served consecutively. See Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (aggravators requiring jury finding to support enhancement may be found by Ct. for purposes of consecutive sentences). Held, transfer granted, enhanced sentences vacated & consecutive sentences of ten years for aggravated battery & one & a half years for criminal confinement ordered.

RELATED CASES: Young, 834 N.E.2d 1015 (to remedy Blakely violation, Ct. vacated enhanced sentences & ordered 10-year sentences on 3 of Class B robbery counts to run consecutive to one another & also consecutive to 4-year sentence on one Class C felony count); Johnson, App., 831 N.E.2d 163 (Blakely is not implicated when aggregate sentence imposed by Tr. Ct. does not exceed aggregate sentence Tr. Ct. could have imposed by ordering presumptive sentences for all crimes served consecutively).

D. TRIAL

D.9. Jury trial

D.9.b. Waiver of jury trial (Ind. Code 35-37-1-2))

TITLE: Arnold v. State
INDEX NO.: D.9.b.
CITE: (3/2/84), Ind., 460 N.E.2d 494
SUBJECT: Jury trial - waiver of; refusal
HOLDING: Tr. Ct. did not err in denying D's motion to waive jury trial made on morning trial was scheduled to start. Here, state did not object, but Tr. Ct. stated that because jury already was present, it would not assent to waiver. Ind. Code 35-37-1-2 provides that both prosecutor & Tr. Ct. must assent to D's waiver of jury trial. State ex rel. Helm v. Fraser, 298 N.E.2d 423; Alldredge, 156 N.E.2d 888. Held, no error.

TITLE: Carr v. State
INDEX NO.: D.9.b.
CITE: (1st Dist. 05/19/92), Ind. App., 591 N.E.2d 640
SUBJECT: No waiver of right to counsel or jury trial by D's absence from trial
HOLDING: D does not waive either his right to jury trial, nor his right to counsel, by failing to appear at trial. D originally requested jury trial, & trial was subsequently reset by Ct. on its own motion. When D failed to appear for new trial date, Ct. discharged jury & held bench trial after finding D had voluntarily absented himself. D was not represented by counsel at trial & was convicted of burglary. When D did appear, he was advised of his conviction, had counsel appointed, & Ct. proceeded with habitual offender proceedings, informing D that by his earlier absence he had waived his right to jury during habitual proceedings.

Right to be present & right to jury are both fundamental constitutional rights, & each must be waived knowingly, voluntarily, & intelligently, State v. Cannady, 127 Misc.2d 783, 487 N.Y.S.2d 294; Illinois, Arizona, & Maryland, in accord. Because record did not support Tr. Ct.'s finding that D adequately waived his right to jury, Tr. Ct. erred in holding both original trial & habitual offender proceeding without jury.

D's absence from trial also did not act as waiver of his constitutional right to counsel, guaranteed by U.S. & Ind. Consts. D was entitled both to counsel & jury in all proceedings.

RELATED CASES: Jackson, 868 N.E.2d 494 (a D's intentional & inexcusable absence from trial can serve as a knowing, voluntary & intelligent waiver of the right to counsel).

TITLE: Cheesman v. State

INDEX NO.: D.9.b.

CITE: (4/12/2018), 100 N.E.3d 263

SUBJECT: Signature on Acknowledgement of Rights form & subsequent failure to file timely demand waived Sixth Amendment misdemeanor jury trial right.

HOLDING: Defendant's Sixth Amendment jury trial right for a Class A misdemeanor theft charge was not violated when trial court denied her jury demand under Criminal Rule 22 as untimely. At her initial hearing and with the benefit of counsel, Defendant signed an Acknowledgement of Rights form explaining the timeline for a jury trial demand (i.e., that she had to file a written demand for jury trial within ten days of her first scheduled trial date). Defendant was aware of what she had to do and when she had to do it--she simply did not follow proper procedure by failing to file a timely demand for jury trial and missing the Rule 22 deadline by almost four months. Thus, Defendant's waiver of her Sixth Amendment right to jury trial was "express and intelligent." Court was "unconvinced" with Defendant's argument that she never expressly waived her right to jury trial. See also Martinez v. State, 82 N.E.3d 261 (Ind. Ct. App. 2017) and Horton v. State, 51 N.E.3d 1154, 1158, n.1 (Ind. 2016) (a personal waiver of jury trial right is required only in felony prosecutions). Held, judgment affirmed.

TITLE: Combs v. State
INDEX NO.: D.9.b.
CITE: (1st Dist. 1/23/88), Ind. App., 533 N.E.2d 1241
SUBJECT: Jury trial - time for demanding; first scheduled trial date
HOLDING: D's demand for jury trial, filed after first scheduled trial date but 10 days before actual trial date, was untimely. Ind. S. Ct. committee note to CR 22 indicated that it was intended to prevent last second demands for jury trial. In Belazzi, App., 525 N.E.2d 351 (*trans. pending*), Ct. App. held that demand filed 20 days before second scheduled trial date was untimely. D argues that this conflicts with Shady, App., 524 N.E.2d 44. In Shady, D's first attorney waived jury trial without D's consent. D's second attorney filed jury demand one month before actual trial date. Ct. App., in split decision, ruled that Shady had not waived jury trial. Ct. App. distinguishes Shady, reasoning that Shady was not advised of right to jury trial or consequences of failure to file timely demand. Ct. App. notes that CR 22 has been amended to specifically require filing 10 days before first scheduled trial date, but this opinion does not discuss why amendment was necessary if that was already required. Affirmed.

TITLE: Dadouch v. State

INDEX NO.: D.9.b.

CITE: (7-16-19), 126 N.E.3d 802 (Ind. S. Ct. 2019)

SUBJECT: In a misdemeanor case, waiver of right to jury trial must be made pursuant to Ind. Crim. Rule 22 which includes a timely written demand.

HOLDING: Ind. Crim. Rule 22 states: In a misdemeanor case, a defendant waives the right to a jury trial when the record does not contain a timely request for a jury trial and establishes that the defendant: (1) was advised of the right to a jury trial; (2) had at least fifteen days advance notice of the trial date; (3) was advised of the need to file a written demand for jury trial at least ten days before the first scheduled trial date and that failure to do so will result in waiver of the right; and (4) understood the advisements. A defendant may be advised at a hearing on the record or by written advisement. Here, the Indiana Supreme Court reversed the trial court's finding that Defendant had been properly advised because Defendant was never advised he had to file a demand for a jury trial within ten days before the first scheduled trial date or his failure to file a demand within that period would result in the waiver of his right.

TITLE: Davis v. State

INDEX NO.: D.9.b.

CITE: (10-01-10), 935 N.E.2d 1215 (Ind. Ct. App. 2010)

SUBJECT: Right to jury B must advise D that waiver of jury on underlying offense waives jury on HO

HOLDING: D failed to prove that he was not advised of his right to a jury trial on the HO and auto theft enhancements phases of his trial. When an accused pleads guilty to an underlying offense but leaves a HO allegation pending, it is essential that he understand the ramifications of his guilty plea and be aware of the rights he is waiving. If the record does not show that the accused was advised or knew that his guilty plea to the underlying offense waived his right to a jury determination of a pending HO allegation, the conviction on the underlying offense must be vacated.

Here, D was charged with auto theft as a Class C felony, resisting law enforcement as a Class D felony and as a Class A misdemeanor and being an HO. D waived his right to a jury trial and proceeded to a bench trial, after which he was convicted and found to be an HO. On appeal, D failed to provide the court with the transcript of the hearing at which he waived his right to a jury trial. Thus, D failed in his duty to present an adequate record clearly showing the error. Moreover, the requirement that D be advised that waiver of a jury trial on the underlying offense also waives a jury trial on the HO allegation does not apply to the progressive enhancement of auto theft based on a previous conviction. D did not show that the Tr. Ct. failed to give him the required advisement. Held, judgment affirmed.

Note: Court also held that D's convictions for Class C felony auto theft and HO do not constitute an improper double enhancement because the convictions used to support the HO were different than the prior conviction of auto theft used to support the Class C felony auto theft.

RELATED CASES: Hogan, 966 N.E.2d 738 (Ind. Ct. App. 2012) (although record does not include an advisement of D's waiver of his HO jury right, this did not constitute IAC of trial or appellate counsel; because D failed to present any evidence that he would have chosen to proceed with a jury trial had Tr. Ct. explicitly informed him of that right or that he lacks the felony convictions necessary to establish his HO status, D was not prejudiced by his attorneys' performance).

TITLE: Duncan v. State
INDEX NO: D.9.b.
CITE: (09-28-12), 975 N.E.2d 838 (Ind. Ct. App. 2012)
SUBJECT: Waiver of right to jury - no waiver even where D did not request jury
HOLDING: D did not knowingly waive his right to a jury trial because Tr. Ct. did not fully advise him of his rights and obligations. A D charged with a misdemeanor may demand trial by jury by filing a written demand therefor not later than ten (10) days before his first scheduled trial date. In order to establish a valid waiver in a misdemeanor case, the record is sufficient if: 1) it does not contain a request for a trial by jury; 2) it evidences that the D was fully advised of the right to a trial by jury and of the consequences for failing to timely request the right; and 3) it reflects that the D was able to understand the advice.

Here, D was charged with seven misdemeanors. At the initial hearing, D appeared pros se. In the advisement of rights, the judge noted D's right to a jury trial, but did not mention the requirement to timely request a jury trial if one was desired, or the consequences of failing to do so. However, D was represented by counsel well before a trial date was set, and never requested a jury trial, timely or otherwise. Having counsel is not itself a sufficient substitute for the D being expressly advised of his rights. Likewise, it does not matter whether the D requested a jury trial. Although it is possible that D is only raising the issue now because he simply wants a new trial, he did not waive his right to a jury trial because he was never properly advised. A violation of the right to trial by jury is a fundamental error and cannot be considered harmless. Held, judgment, affirmed in part, reversed in part and remanded.

TITLE: Eldridge v. State
INDEX NO.: D.9.b.
CITE: (2nd Dist., 1-27-94), Ind. App., 627 N.E.2d 844
SUBJECT: Waiver of jury trial - felony & misdemeanor charged together
HOLDING: For D charged with both felony & misdemeanor, execution of "Initial Hearing Rights" form was sufficient to find voluntary, intelligent, & knowing waiver of misdemeanor jury trial right, but not sufficient for waiver of felony jury. On day of initial hearing D was advised of right to jury trial & consequences of failure to assert right pursuant to Crim. R. 22 through use of "Initial Hearing Rights" form that he executed. He was also given no-contact order & responded affirmatively when asked if he read & understood it. Ct. found proper waiver of misdemeanor jury because in those cases, Ds must request jury no later than 10 days prior to trial or jury is deemed waived, so long as there is advisement of right, as on-the-record hearing is not required. Fact D read & understood no-contact order was sufficient to conclude he was capable of reading & understanding form. Personal nature of waiver in misdemeanor cases can be inferred from failure to assert right, coupled with basis for voluntary, knowing & intelligent waiver determination. Record of waiver is sufficient if: 1) there is no request for jury; 2) it shows D was fully informed of right to jury & consequences of failing to timely demand it; & 3) it shows D was able to understand right. As to felony waiver, however, Ct. found record insufficient to show adequate waiver, because form did not advise of right as pertained to felony & record was otherwise silent. Person charged with felony need not request jury to preserve right, & must personally, knowingly, voluntarily & intelligently waive right. Error was not harmless just because D was ultimately given alternative misdemeanor sentence. When fundamental error is due to violation of right to jury, concepts of "'fundamental error' & 'harmless error' are antithetical." Held, misdemeanor conviction affirmed, felony conviction charge reversed & remanded.

TITLE: Fiandt v. State
INDEX NO.: D.9.b.
CITE: (10/11/2013), 996 N.E.2d 421 (Ind. Ct. App. 2013)
SUBJECT: D waived his right to jury trial "by default"
HOLDING: Although Tr. Ct. did not personally secure a jury trial waiver from D on the record, D was not improperly denied his right to a jury trial. The right to a jury trial in misdemeanor cases is not self-executing, but is controlled by Indiana Criminal Rule 22, which requires that D demand a jury trial not later than 10 days before first trial date.

In this case, D had requested and Town Court granted a jury trial on July 31, 2012 (which was later reversed by Superior Court), within the 10-day limit for such a request since a bench trial had been continued to August 14. But D's original trial date had been scheduled for June 12 and he had not made a request for jury trial within 10 days of that date. D was required to file his request 10 days prior to his first scheduled trial date, June 12. By that time, D had already waived his right to a jury trial by operation of law, no later than June 2, 2012. D did not have to make a personal, express, on-the-record statement that he was knowingly, intelligently, and voluntarily waiving his right to jury trial. Held, conviction affirmed; Najam, J., dissenting on basis that there was not a constitutionally effective waiver because there was no evidence in record that D knowingly waived his right to jury trial. "I cannot agree with the majority that a D charged with a Class A misdemeanor can waive his right to jury trial by default."

TITLE: Gonzalez v. State
INDEX NO.: D.9.b.
CITE: (10-25-01), Ind. App., 757 N.E.2d 202
SUBJECT: Waiver of jury trial - possibility of jury nullification not likely consequence
HOLDING: To knowingly waive jury trial, D does not have to be made aware that jury nullification is consequence of choice to waive jury trial. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances & "likely" consequences. Brady v. U.S., 397 U.S. 742 (1970). In interpreting Brady, Indiana cases have omitted word "likely" before word "consequences." Kindle v. State, 313 N.E.2d 721 (Ind. Ct. App. 1974); Brown v. State, 495 N.E.2d 178 (Ind. 1986). Nevertheless, D who considers waiving his right to jury trial need be informed only of "likely" consequences. If Cts. were required to inform Ds of every conceivable consequence of waiving right to jury trial, wheels of justice would grind to proverbial halt. Reynolds v. State, 703 N.E.2d 701 (Ind. Ct. App. 1999). Here, D argued that he did not knowingly waive jury trial of habitual offender determination because trial Ct. failed to advise him of possibility of jury nullification i.e., jury's ability to find him not to be a habitual offender. Although jury is not bound to convict even in face of proof of guilt beyond reasonable doubt, notwithstanding Article I, Section 19 of Indiana Constitution, jury has no more right to ignore law than it has to ignore facts in case. Beavers v. State, 141 N.E.2d 118 (Ind. 1957). Further, Ct. did not conclude that degree of S.C t.'s receptiveness to jury nullification would significantly affect its prevalence in habitual offender proceedings. Womack v. State, 738 N.E.2d 320 (Ind. Ct. App. 2000). Ct. could not conclude that nullification is so likely to occur that D must be informed of this consequence before he can knowingly waive his right to jury trial. Held, judgment affirmed.

TITLE: Hadley v. State
INDEX NO.: D.9.b.
CITE: (5th Dist., 06-23-94), Ind. App., 636 N.E.2d 173
SUBJECT: Waiver of jury trial for misdemeanor
HOLDING: It was not necessary for Tr. Ct. to specifically question misdemeanor D about his reading ability & understanding of need to demand jury trial. At initial hearing D was given advisement of rights form that included procedure to demand jury trial & consequence of failure to do so. D signed & dated form beneath sentence saying he had read rights & believed he understood them. Because he made no jury trial request, he was tried to bench and convicted of battery.

Ct. rejected argument that it was error to fail to inquire as to whether he was literate & had opportunity to read form because waiver of jury cannot be presumed from silent record. Ct. found that principle applied only to guilty plea situations, where waiver of rights D gives up in pleading guilty cannot be considered knowing & voluntary unless there is independent determination that he fully understands them. In context of guilty plea, D's waiver is affirmative act, but misdeamenant's right to jury trial is not self executing, & act of omission will result in waiver of right where guilty plea is not involved.

Neither U.S. nor State Constitution imposes duty on Tr. Ct. to inquire as to misdemeanant's reason for failing to request jury. Misdemeanor Ds are deemed fully informed of right to jury & consequence of failure to exercise right when written advisement is given fully explaining right, & D has opportunity to raise any questions about it, Combs, App., 533 N.E.2d 1241, *trans. denied*, Liquori, App., 544 N.E.2d 199. Here D was adequately advised & never mentioned he couldn't read or didn't understand form. Held, conviction affirmed.

RELATED CASES: Greene, App., 670 N.E.2d 38 (Because D did not assert that he could not read or understand form, he failed to establish that he was not fully informed of his rights).

TITLE: Hanna-Womack v. State
INDEX NO.: D.9.b.
CITE: (3rd Dist., 11-15-93), Ind. App., 623 N.E.2d 439
SUBJECT: Insufficient waiver of jury trial right
HOLDING: Where record contained no written or verbal waiver of jury trial right, or advice by attorney regarding waiver, evidence was insufficient to show knowing & voluntary waiver. D was charged with two misdemeanor counts. Tr. Ct. briefly addressed right to jury trial on two occasions, once reading statement that D had right to speedy & public trial by Ct. or jury, & once where Ct. said it was setting matter for bench trial unless jury trial were demanded. There was nothing to indicate D personally waived right, or that she was advised by counsel of consequences of failure to demand. Because D was charged with misdemeanors, Crim.R. 22, requiring that D demand jury trial not later than 10 days before first trial date, applied. It is fundamental error to deny jury trial without valid waiver from D personally, & valid waiver under Crim.R. 22 cannot be made without advisement by Tr. Ct. of consequences of failure to demand jury, Vukadinovich, App., 529 N.E.2d 837. Under proper standard, D did not knowingly & voluntarily waive right. Held, reversed & remanded for new trial.

TITLE: Horton v. State

INDEX NO.: D.9.b.

CITE: (04/21/2016) 51 N.E.3d 1154, Supreme Court of Indiana

SUBJECT: Invalid waiver of right to jury trial for domestic battery enhancement - fundamental error

HOLDING: The Indiana Constitution guarantees the right to a jury trial, which can only be waived by the D. Unless the D personally communicates to the judge a desire to waive that right, he must receive a jury trial. Here, failure to confirm D's personal waiver of jury trial before proceeding to a bench trial on the second phase of a D-felony domestic battery charge based on a prior conviction was fundamental error. As in Kellums v. State, 849 N.E.2d 1110 (Ind. 2006) record is devoid of any personal waiver by D to the court--it shows waiver only by D's attorney. Court declined to carve out an exception to the personal waiver requirement of the Indiana Constitutional jury trial right in bifurcated cases where Ds have just experienced a jury trial and thus were probably aware of the right the attorneys waived on their behalf. The personal waiver requirement, rooted in Ind. Code § 35-37-1-2 and longstanding precedent, eliminates an intolerable risk. It ensures that felony prosecutions will not proceed to bench trials against Ds' will by demanding direct evidence that waiver is the Ds' choice. Held, transfer granted, Court of Appeals' memorandum opinion vacated, D-felony domestic battery conviction reversed and remanded for new trial.

RELATED CASES: McQuinn, 197 N.E.3d 348 (Ind. Ct. App.2022) (reversible error to instruct jury in attempted murder/SVF trial that "discharging a weapon in the direction of a victim can be substantial evidence from which the jury could infer intent to kill); Saylor, 55 N.E.3d 354 (Ind. Ct. App. 2016) (although Horton involved a bench trial rather than a guilty plea and there is a different statute that governs guilty pleas, Ct. found that same rationale applies when a defendant waives his right to a jury trial when pleading guilty).

TITLE: Kellems, Jr. v. State
INDEX NO.: D.9.b.
CITE: (06-29-06), Ind., 849 N.E.2d 1110
SUBJECT: Right to jury trial cannot be waived by trial counsel
HOLDING: Where D never personally waived his right to a jury trial, the record is insufficient to show a voluntary relinquishment of his right to a jury trial. A knowing, voluntary, & intelligent waiver of the right to a jury trial requires assent to a bench trial by D personally, reflected in the record before the trial begins either in writing or in open Ct. The record reflection must be direct & not merely implied. It must show the personal communication of the D to the Ct. that he chose to relinquish the right. Doughty v. State, 470 N.E.2d 69 (Ind. 1984). Here, D was advised of his right to a jury trial, personally indicated that he understood the right, & was in Ct. when his lawyer told the Judge that D assented to a bench trial. However, the judge never communicated personally with the D to determine whether he understood his right to a jury trial & that he was waiving the right. Nor did the D ever sign a waiver of his right to jury. Because the Tr. Ct. did not secure a waiver from the D personally, the record does not show that the waiver was voluntary & the D is entitled to a new trial. Held, petition for rehearing granted, judgment of Tr. Ct. reversed & remanded for new trial.

RELATED CASES: Garcia, 916 N.E.2d 219 (Ind. Ct. App. 2009) (D's attorney's representations that D wanted to proceed to a bench trial did not waive right to jury trial on enhancement phase of class D felony OWI trial and HSO phase); Anderson, App., 833 N.E.2d 119 (where trial counsel files a waiver of jury trial without D's signature, record is insufficient to show personal waiver of jury).

TITLE: Levels v. State
INDEX NO.: D.9.b.
CITE: (08-15-12), 972 N.E.2d 972 (Ind. Ct. App. 2012)
SUBJECT: Insufficient advisement of right to jury trial - invalid waiver
HOLDING: A waiver of the right to jury trial in misdemeanor cases is not valid unless Tr. Ct. advises a D of the consequences of his failure to demand a jury trial no later than ten days prior to the trial date. Vukadinovich v. State, 529 N.E.2d 837 (Ind. Ct. App. 1988). Where the D is not advised by Tr. Ct., his failure to request a jury trial cannot be deemed a waiver. Wilson v. State, 453 N.E.2d 340 (Ind. Ct. App. 1983).

Here, Tr. Ct. advised D at his initial hearing that he had a right to a jury trial. However, Tr. Ct. failed to adequately advise D of the consequences of failing to demand a jury trial. Tr. Ct. did not mention the necessity of making such a request no later than ten days prior to the scheduled trial date, and at no time did Tr. Ct. disclose that the failure to make the request would waive D's right to a jury trial. There is no indication that D knew that the demand had to be in writing. Because advisement was insufficient, there was no valid waiver of jury trial. Held, conviction reversed.

RELATED CASES: Livers, 994 N.E.2d 1251 (Ind. Ct. App. 2013) (record was insufficient to evaluate D's ineffective assistance of counsel claim on direct appeal regarding counsel's failure to timely file a demand for jury trial); Pryor, 973 N.E.2d 629 (Ind. Ct. App., 2012) (trial counsel's failure to preserve D's right to jury trial denied him effective assistance of counsel; failure to file timely demand for jury trial was a mistake and not a strategic choice, and prejudice is presumed where attorney's error deprives D of his fundamental right to jury trial); Young v. State, 973 N.E.2d 643 (Ind. Ct. App., 2012) (signed advisement form given to D during initial hearing sufficiently warned D of her right to jury trial and consequence of failing to make a timely request for jury trial results in waiver of the right).

TITLE: Marcum v. State
INDEX NO.: D.9.b.
CITE: (2d Dist. 7/7/87), Ind. App., 509 N.E.2d 895
SUBJECT: Waiver of jury trial
HOLDING: Tr. Ct. erred in denying D his right to a jury trial. Here, D appeared for initial hearing & requested jury trial. Neither D nor his counsel attended pretrial conference. When D appeared prepared for jury trial, Tr. Ct. proceeded to try & convict him without a jury, over D's objections. Although attorney general admits error & requests cause be remanded for new trial, Ct. finds it is obliged to decide law as applied to facts in order to determine whether reversal is required. Right to jury trial is essential element of D's right to due process. Williams, 307 N.E.2d 880. Although right may be waived, waiver must be made by D in knowing/intelligent/voluntary manner, with sufficient awareness of surrounding circumstances & consequences. Woodson, 501 N.E.2d 409. Ct. finds no indication in record that D waived right. Tr. Ct. erred in compelling D to be tried "by the bench" solely because he failed to attend pretrial conference. Held, reversed & remanded for new trial.

TITLE: Pier v. State
INDEX NO.: D.9.b.
CITE: (3d Dist. 3/22/83), Ind. App., 446 N.E.2d 985
SUBJECT: Jury trial - withdrawal of waiver
HOLDING: Waiver of right to trial by jury by D who seeks treatment in lieu of prosecution under IC16-13-6.1-17(a) is not involuntary even though D was later determined ineligible for treatment. Here, D was charged with DUI, attempted escape & battery. He sought treatment in lieu of prosecution & was found eligible by Tr. Ct. Department of Mental Health denied him admission to the program because he had committed a forcible felony (battery resulting in bodily injury). D was then tried before a judge & found guilty. D did not object to being tried by a judge or contend that his jury trial waiver was invalid. Held, issue is not preserved for appeal. DISSENT by Staton would reverse based on invalid waiver of jury trial. D executed waiver in expectation of treatment for which he was ineligible. See Williams, App., 307 N.E.2d 880 (D waived jury trial as part of plea bargain that was never completed; D's motion to withdraw waiver was denied; held, Tr. Ct. abused discretion in failing to consider whether waiver was predicated upon promise by prosecution).

RELATED CASES: Hutchins 493 N.E.2d 444 (Jury 29(7); Tr. Ct.'s refusal to allow D to withdraw waiver of jury trial upheld).

TITLE: Poore v. State
INDEX NO.: D.9.b.
CITE: (6-13-97), Ind., 681 N.E.2d 204
SUBJECT: Sufficient evidence of waiver of right to jury trial
HOLDING: D made intelligent & voluntary waiver of right to jury trial. First, thirteen days before D filed his waiver, Tr. Ct. informed him of his jury trial right through its "Initial Hearing Rights" form. Second, record provides multiple grounds for inferring that D understood proceedings & choices he made. Absent some question by D or some evidence of lack of understanding or inability to read, Tr. Ct. is warranted in finding, as here, that D who receives misdemeanor jury advisement & proceeds to file general waiver jury trial adequately understands that bench trial will lie ahead. Third, D's understanding may be inferred when he & his attorney both sign written waiver of jury trial right & file it in open Ct. Ct. rejected argument that record must explicitly show proof of D's ability to read, that he understood what jury trial right entailed, & proof that he knew that he was not required to demand jury as to his felony. As in Hadley, App., 636 N.E.2d 173, D did not plead guilty, but went forward with bench trial. Because of this substantial distinction, cases involving waiver of jury trial right arising out of guilty pleas are unavailing as precedent for Ds who merely waive right to jury trial & receive bench trial instead. While it is advantageous for trial judge to engage in colloquy concerning consequences of waiving trial by jury, such exchange is not required either by United States or Indiana constitutions, or by statute. Houchins, 493 N.E.2d 444. Held, transfer granted, judgment affirmed.

RELATED CASES: Nunez, 43 N.E.3d 680 (Ind. Ct. App. 2015) (D failed to meet burden to show that jury trial waiver not knowing, intelligent, and voluntary); Dixie, 726 N.E.2d 257 (record supported inference that D understood proceedings & choice he was making when he waived jury trial); Reynolds, App, 703 N.E.2d 701 (record supported finding of waiver of D's right to jury trial, despite fact that defense counsel rather than judge advised D of substance of right & D had been found only minimally competent to stand trial).

TITLE: State v. Bonds
INDEX NO.: D.9.b.
CITE: (2/6/2018), 94 N.E.3d 333 (Ind. Ct. App. 2018)
SUBJECT: State can't demand jury trial, and its consent to bench trial was not necessary
HOLDING: The State has no right to demand a jury trial in misdemeanor cases, and its consent is not necessary for a bench trial. After D waived her right to jury trial on two misdemeanor charges, the State filed a written demand for jury trial, which the Tr. Ct. denied. Both the federal and state constitutions vest the right to jury trial in the accused, not the State. Further, the State's consent is not needed for a misdemeanor bench trial, as *clarified* by the 2015 amendment to Ind. Code § 35-37-1-2. Before the amendment, the statute provided that "[t]he D and prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury." The Indiana Supreme Court interpreted this statute as meaning that "all criminal trials must be by jury except where [a bench trial is] consented to by both the parties and the court[.]" Alldredge v. State, 239 Ind. 256, 263, 156 N.E.2d 888, 891 (1959). However, as amended, the statute now provides that "[t]he D and prosecuting attorney, with the assent of the court, may submit the trial to the court. Unless a D waives the right to a jury trial under the Indiana Rules of Criminal Procedure, all other trials must be by jury." (Emphasis added). The highlighted language clarifies the procedure for waiving a jury trial in misdemeanor cases. It makes clear that a bench trial in a misdemeanor case is the sole prerogative of a D and does not state or even imply that the State's consent is necessary. Held, judgment affirmed and remanded for bench trial.

TITLE: State v. Payne
INDEX NO.: D.9.b.
CITE: 260 Conn. 446, 797 A.2d 108 (Conn. 2002)
SUBJECT: Prosecutorial misconduct - pattern of deliberate misconduct
HOLDING: Where prosecutor engaged in pattern of deliberate misconduct over several trials, repeating same error over and over in jury argument, Connecticut Supreme Court exercises supervisory power to reverse conviction as sanction. Court does not address whether misconduct deprived this D of due process right to fair trial. While costs of reversible are considerable, mere repeated reprimand of prosecutor does not convey court's strong disapproval of improper tactics.

TITLE: Vukadinovich v. State
INDEX NO.: D.9.b.
CITE: (3d Dist. 6/16/88), Ind. App., 529 N.E.2d 837
SUBJECT: Waiver of jury trial
HOLDING: Tr. Ct. committed fundamental error in denying pro se D right to jury trial. D appeared pro se at arraignment & pled not guilty to 2 charges. He executed form which, inter alia, advised him of right to jury trial. Tr. Ct. ascertained that D had read & understood form, advised him of right to jury trial, & scheduled "omnibus/bench hearing." At "omnibus/bench hearing," D again appeared pro se & submitted handwritten jury demand. Tr. Ct. denied jury demand, stating that statutory time limit had expired. D made no further jury demands. At bench trial, D was represented by counsel. On appeal, D argues Tr. Ct. committed fundamental error in denying his jury demand, because Tr. Ct. failed to advise him of consequences of failing to file demand not later than 10 days before trial date. CR 22 provides that failure to demand jury trial in timely manner constitutes waiver as long as D has had 15 days notice of trial date & of consequences of failure to file demand. Valid waiver cannot be made in absence of such advisement by Tr. Ct. See Casselman, 472 N.E.2d 1310; Suits 451 N.E.2d 375; Wilson, 453 N.E.2d 340. Here, written form & Tr. Ct. advised D generally of right to jury trial, but, neither advised him of time limits or of consequence of failure to meet them. Held, conviction reversed.

RELATED CASES: Bex, 952 N.E.2d 347 (Ind. Ct. App. 2011) (belated request for jury trial does not waive right to jury trial where nothing in record indicated D had at least fifteen days of advance notice of scheduled trial date and consequences of failing to demand jury retrial, as both required by Criminal Rule 22); Weidner, App., 530 N.E.2d 774 (Jury 29(6); where Tr. Ct. advised D only of time for request & not of consequences of untimely request, waiver was invalid); Liquori, App., 544 N.E.2d 199 (advisement that "to secure" jury right, D must request it, held sufficient; Shields, J., DISSENTS).

TITLE: Wilson v. State
INDEX NO.: D.9.b.
CITE: (1st Dist. 9/7/83), Ind. App., 453 N.E.2d 340
SUBJECT: Jury trial - waiver of; misdemeanor
HOLDING: Tr. Ct. erred in denying D's request for jury trial in misdemeanor DWI case where D was not advised of consequences of failing to request jury trial. CR 22. CR 22 applies solely to misdemeanor cases & is presumed to limit application of Ind. Code 35-1-34-1 [now Ind. Code 35-37-1-2, requiring D to personally waive jury trial] to felony cases. Held, reversed & remanded.

TITLE: Woodward v. State
INDEX NO.: D.9.b.
CITE: (5th Dist., 6-27-02), Ind. App., 770 N.E.2d 897
SUBJECT: Waiver of jury trial - valid where case transferred to different room in same Ct. division
HOLDING: D's earlier waiver of jury trial was effective upon transfer from one room of Marion Superior Ct. criminal division to another. D was charged with resisting law enforcement & case was docketed in Marion Superior Ct. room 5. D filed waiver of jury trial. Case was subsequently transferred to Marion Superior Ct. room 99 & set for bench trial. Change of venue vitiates prior waiver of jury trial. Schmidt v. State, 294 N.E.2d 638 (Ind. 1973). D argued that because case was switched to different room number change of venue had occurred. Transfer of case from Superior Ct. to Circuit Ct. under Marion County Ct. Criminal Division Rule 1 is not considered change of venue. Likewise, transfer of case between two rooms of criminal division of same Ct. is not change of venue sufficient to render ineffective an earlier waiver of jury trial. Thus, Tr. Ct. did not abuse its discretion in relying on original waiver. Held, judgment affirmed.

TITLE: Young v. State

INDEX NO.: D.9.b.

CITE: (03/02/20), Ind. Ct. App., 143 N.E.3d 965

SUBJECT: To be knowing, voluntary, and intelligent, a guilty plea to a repeat sexual offender and habitual offender enhancement must contain a waiver to the right to a jury trial

HOLDING: In reversing the denial of post-conviction relief, Court held that Defendant was entitled to a new trial on his repeat sexual offender and habitual offender enhancements because he did not personally waive his right to a jury trial on the the enhancements. The stipulation for repeat sexual offender and habitual offender established not just the existence of prior convictions or not just that prior convictions were unrelated, but instead established the ultimate issue that Defendant was a repeat sexual offender and was an habitual offender. Therefore, the stipulation was a guilty plea to the charged enhancements which required a knowing, voluntary, and intelligent personal waiver of the right to jury trial. Because there was not a personal waiver here, the Court vacated the enhancements.

TITLE: Zakhi v. State
INDEX NO.: D.9.b.
CITE: (3d Dist. 10/10/90), Ind. App., 560 N.E.2d 683
SUBJECT: Waiver of jury trial - sufficiency
HOLDING: Tr. Ct. erred in finding that D adequately waived right to jury trial. Waiver of jury trial must be knowing & voluntary choice of D, personally expressed orally or in writing, & memorialized on record. Perkins, 541 N.E.2d 927. Waiver cannot be inferred from silent record, nor from mere submission to bench trial with counsel at one's side. Id. Record here indicates merely that D appeared in person & with counsel, & that counsel waived jury trial to obtain early trial date. Record does not indicate that D personally waived jury trial, either vocally or in writing, nor does it indicate that D was adequately informed by Tr. Ct. or counsel of ramifications of waiver. State acknowledges that D did not personally waive jury trial but argues that he acquiesced in validity of waiver by failing to object upon commencement of bench trial. State *cites* Pier, App., 446 N.E.2d 985, in which D waived jury trial pursuant to statute providing for treatment of substance abuser in lieu of prosecution, in exchange for certain waivers. Pier was ultimately tried, & Ct. App. held that he failed to preserve any error as to waiver of jury trial by failing to object at commencement of bench trial. Ct. App. here distinguishes Pier on ground that it involved statutory grounds for jury waiver. Held, reversed & remanded.

D. TRIAL

D.9. Jury trial

D.9.c. Selection of/challenges to panel (Ind. Code 33-4-5-2; summoning bystanders, Ind. Code 35-37-1-7)

TITLE: Bradley v. State
INDEX NO.: D.9.c.
CITE: (3-31-95), Ind., 649 N.E.2d 100
SUBJECT: Jury venire - selection from voter registration lists alone
HOLDING: Computerized selection of potential jurors from voter registration lists alone, without additional use of tax lists, is adequate to satisfy requirements of Ind. Code 33-4-5-2(a). Ct. noted, however, that statutory venire selection process must "comport with constitutional considerations relating to equal protection & the right to an impartial jury." Violation of right to impartial jury may be found if process used fails to yield juror pool reflecting reasonable cross- section of community by systematically excluding "distinctive" group in community. Duren v. Missouri, 99 S.Ct. 664; U.S. v. Hatchett, 7th Cir. 31 F.3d 1411. In this case, D failed to demonstrate that use of voter registration list systematically excluded any particular group from jury selection process. Held, conviction affirmed.

RELATED CASES: Wilder, App., 813 N.E.2d 788 (D failed to prove that use of voter registration rolls & placing possible jurors in one of six subsets based on zip codes resulted in those from predominantly white zip codes being disproportionately selected to serve on juries); Azania, 778 N.E.2d 1253 (in capital case, disproportionate reduction of African-Americans in jury pool which resulted from computer failure rendered jury pool selection process fundamentally flawed and required new penalty phase); Miller, App., 694 N.E.2d 770 (D failed to provide any showing that excused jurors constituted distinctive group; any analysis addressing D's concern about lack of black juror candidates is precluded by total absence of evidence about race of excused potential jurors, or any "system" employed to excuse jurors of particular race); Fields, 679 N.E.2d 1315 (record contained no evidence of systematic exclusion or that number of black men in venires from which juries were selected was not proportional to their number in community where case was tried); Smith, App., 658 N.E.2d 910 (Ct. rejected D's 14th Amendment equal protection argument & 6th Amendment fair cross section argument).

TITLE: Berghuis v. Smith
INDEX NO.: D.9.c.
CITE: (03-30-10), 130 S.Ct. 1382, (U.S. 2010)
SUBJECT: Fair cross-section - jury venires
HOLDING: Michigan Supreme Court did not unreasonably apply federal law concerning the Sixth Amendment's guarantee of a trial by jurors drawn from a fair cross-section of the community when it denied relief to a federal habeas corpus petitioner who challenged a local juror selection process that the jurisdiction later abandoned due to concerns about its constitutionality. In so holding, U.S. Supreme Court declined to adopt any of the various tests that the lower courts have employed to measure claims that particular groups were underrepresented in pools of prospective jurors. Court noted that the circuits have adopted different tests to determine a fair cross-section: 1) the absolute disparity test (subtracting the difference between the percentage of veniremen vs. the jury-eligible community); 2) the comparative disparity test (dividing the absolute disparity by the percentage in the jury eligible community); 3) absolute impact, which measures the decrease in the number of group members on an average jury panel and 4) a statistical analysis using a standard deviation test. Each of the tests is imperfect, but useful, in given circumstances.

Here, all twelve of jurors who convicted D for second-degree murder were white; D and thirty-six other witnesses to the shooting were African American. The venire panel from which the jury was drawn included no more than three African Americans in its sixty to one hundred members. Michigan Supreme Court reasonably found that, even if the petitioner did demonstrate that African Americans were underrepresented on his jury venire, he failed to show that the disparity resulted from the juror-assignment procedure he challenged or any other factor on his "laundry list" of alleged causes. Held, Sixth Circuit Court of Appeals' decision at 543 F.3d 326 reversed. Thomas, J., CONCURRING, questioned the origins of the fair cross-section requirement and said he would be willing to re-examine the court's precedent on this issue.

TITLE: Harvey v. State
INDEX NO.: D.9.c.
CITE: (1st Dist., 09-29-93), Ind. App., 621 N.E.2d 362
SUBJECT: All white jury venire not improper
HOLDING: Absence of any black persons on jury venire did not require granting of black D's motion to strike venire. D claimed venire did not represent black population of county, & cited to Batson v. KY, (1986), 476 U.S. 79 & Minnefield, 539 N.E.2d 464, for proposition that black Ds are denied equal protection when members of their race are purposefully excluded from jury. D challenged method of generating jury pools from voter registration lists, claiming they do not accurately reflect composition of community.

Ind. Code 33-4-5-2 provides for use of voter registration lists & tax schedules to pick prospective jurors & Ind. Code 33-4-5-2(c) permits use of computerized selection system. Ind. Code 33-4-5-2(d) was added to allow additional sources for venire. Ind. has approved use of voter registration lists, so long as they represent reasonable cross-section of people in county & there is no showing of deliberate attempt to exclude certain groups from jury selection. Burgans, 500 N.E.2d 183, Lloyd, 448 N.E.2d 1062.

In Concepcion 567 N.E.2d 784, Ct. relied on "fair cross-section" requirement of Duren v. Missouri (1979), 439 U.S. 357, requiring D to show: 1) group alleged to be excluded is "distinctive group" in community; 2) representation of that group in venires is not fair & reasonable in relation to number of persons in group in community; & 3) underrepresentation is due to systematic exclusion of group in jury selection process. D satisfied first prong of test but failed other two prongs. Computer randomly selected jurors from registered voters, & unsubstantiated estimates are insufficient to meet burden under second prong of test. Absence of group must be due to purposeful & systematic exclusion, & record showed no evidence of such exclusion. Right to impartial jury does not require any particular class to be represented, Adams 431 N.E.2d 820.

RELATED CASES: Bond, 925 N.E.2d 773 (Ind. Ct. App. 2010) (fact that jury venire was all white and not representative of community did not establish a sixth amendment violation without evidence of systematic exclusion; however, court acknowledged that no court has found Batson burden shifting appropriate in Duren venire challenges, but since federal constitution establishes rights that states may expand, Edwards v. State,. 902 N.E.2d 821, 829 (Ind. 2009), easing burden for Duren challenge might be worth considering).

TITLE: Hasselbring v. State
INDEX NO.: D.9.c.
CITE: (1st Dist. 11/9/82), Ind. App., 441 N.E.2d 514
SUBJECT: Challenges to jury panel - commissioners
HOLDING: Technical defects in appointment of jury commissioners are not grounds for reversal of conviction where otherwise there has been substantial compliance with statutes directing selection of jurors. Owens, 396 N.E.2d 376. Here, following remand for evidentiary hearing regarding whether jury commissioner was resident of Fountain County, Ct. holds that fact commissioner's family home was not in Fountain County did not require reversal because (1) qualification of jury commissioner cannot be collaterally attacked; (2) D failed to show palpable disregard of law regarding selection of jury panel. See Sutherlin, (1905) 165 Ind. 339. D based contention on Ind. Code 33-4-5-2 (qualifications of jury commissioners); Ind. Code 3-1-1-2 (freeholder); Ind. Code 3-1-7-26 (qualified voter); & Ind. Code 3-1-21-3 (residence). Held, voluntary manslaughter (of husband) conviction affirmed.

TITLE: Lockhart v. McCree
INDEX NO.: D.9.c.
CITE: 476 U.S. 162 (1986)
SUBJECT: Fair cross-section (FCS) - distinctive groups
HOLDING: Essence of "FCS" claim is systematic exclusion of "a distinctive group in the community." Duren v. MO, (1979), 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579. Purposes of FCS requirement are: (1) guard against exercise of arbitrary power by ensuring that common sense judgment of community will act as hedge against overzealous or mistaken prosecutor; (2) preserve public confidence in fairness of criminal justice system; & (3) to implement our belief that sharing in administration of justice is a phase of civic responsibility. [Citation omitted.] Wholesale exclusion of blacks, women & Mexican Americans violates FCS requirement. However, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of group from performing 1 of their duties as jurors are not "distinctive groups" for FCS purposes. Here, D challenged removal for cause of prospective jurors whose opposition to death penalty would prevent or substantially impair performance of their duties at sentencing phase ("Witherspoon excludables" (WE)). Court rejects this argument because: (1) death qualification is carefully designed to serve state's legitimate interest in obtaining single jury that can properly/impartially apply law to facts at both guilt/sentencing phases; (2) death qualification cannot be said to create "appearance of unfairness" because group of "WE" includes only those who cannot & will not conscientiously obey law with respect to 1 issue in capital case; & (3) removal for cause of "WE" in capital cases does not lead to substantial deprivation of their basic rights of citizenship because they are not prevented from serving as jurors in other criminal cases. Held, "WE" do not constitute a "distinctive group'" for FCS purposes. Blackmun CONCURS IN JUDGMENT; Marshall, joined by Brennan & Stevens, DISSENTS.

TITLE: Lockhart v. McCree
INDEX NO.: D.9.c.
CITE: 476 U.S. 162 (1986)
SUBJECT: Fair cross-section requirement - applicability to petit juries
HOLDING: Point at which accused is entitled to fair cross-section of community is when names are put in box from which panels are drawn. It is impossible to provide each criminal D with truly representative petit jury. Here, D presented studies (which Court assumed, arguendo, were valid) which indicated that "death qualification" produces juries somewhat more "conviction prone" than "non-death-qualified" juries. Court determines that D's 6th Amend. rights were not violated. Accused is not entitled to petit jury that mirrors community & reflects various distinctive groups in population. Court has never invoked fair cross-section principle to invalidate use of either for-cause or peremptory challenges in effort to ensure that prospective jurors reflect composition of community at large. Court declines D's invitation to extend fair cross-section requirement to petit juries. Held, constitution does not prohibit removal for cause, prior to guilt phase of bifurcated capital trial, of prospective jurors whose opposition to death penalty is so strong that it would prevent or substantially impair performance of their duties as jurors at sentencing phase of capital trial. Blackmun CONCURS IN RESULT; Marshall, joined by Brennan & Stevens, DISSENTS.

TITLE: Mareska v. State
INDEX NO.: D.9.c.
CITE: (3d Dist. 2/20/89), Ind. App., 534 N.E.2d 246
SUBJECT: City Ct. - offense outside city limits
HOLDING: City Ct. jury drawn exclusively from city voters was improper where offense was committed outside city limits. D was charged with disorderly conduct & was tried in Knox City Ct. by jury drawn from City voting lists, pursuant to Ind. Code 33-10.1-5-5. D argues this denied his 6th Amend. right to be tried by jury drawn from "district wherein the crime ... [was] committed." This portion of 6th Amend. has never been interpreted in Ind. In People v. Jones, (1973), 9 Ca.3d 546, 108 Cal.Rptr. 345, 510 P.2d 705, Cal.S.Ct. considered analogous case & determined that 6th Amend. had been violated. Cal.S.Ct. traced this 6th Amend. requirement to common-law requirement of trial by "jury of the vicinage," & determined that while jury from entire county will satisfy this requirement, jury drawn from portion of county excluding location where crime was committed will not. Ct. looked solely to geography & did not consider demographics. S.Ct. of Alaska also considered this issue, in Alvarado v. State, (1971), 486 P.2d 891, & reached similar conclusion. Although Ct. gave weight to demographic dissimilarities, it ruled that, at bare minimum, community from which jury is drawn must include location of alleged offense. Ind. Ct. App. follows reasoning of these 2 Cts., finding that city Ct. jury selection system violated D's 6th Amend. right to impartial jury drawn from district where alleged offense occurred. However, error was cured when D was tried de novo before circuit Ct. jury drawn from entire county. **Note:** Decision does not make clear what city Ct. judges are to do in selecting juries, or on what authority.

TITLE: Robinson v. State
INDEX NO.: D.9.c.
CITE: (4/7/83), Ind., 446 N.E.2d 1287
SUBJECT: Challenges to jury panel - prior service
HOLDING: Tr. Ct. did not err in refusing to call jurors in the reverse order in which individuals' names were drawn for jury service. Ind. Code 33-15-22-1 mandates jurors be called in same order as their names were drawn for service. Here, D contends reverse order was necessary because some jurors had served on previous jury trials & thus were jaded. Ct. finds statute is mandatory thus jurors must be called in same order as drawn. Furthermore, Ct. notes prior jury service alone does not disqualify jurors from service. Begley, 416 N.E.2d 824; Brown, 360 N.E.2d 830. Held, no error.

RELATED CASES: Williams, 487 N.E.2d 441(Jury 83(1); attorney was not ineffective for failing to challenge jurors who had served on another case several hours earlier & who agreed to sit on D's case; Ct. rejects D's contention that agreement violates Ind. Code 35-1-30-4(10) [now Ind. Code 35-37-1-5] which precludes persons from serving who have such interest in cause that they wish to inject themselves into fact finding process; Ct. finds their agreement to serve does not constitute their solicitation of service; held, no error).

TITLE: Smith v. State
INDEX NO.: D.9.c.
CITE: (3/25/85), Ind., 475 N.E.2d 1139
SUBJECT: Challenges to jury panel - method of selection
HOLDING: Ct. rejects D's age/race challenge to computer-generated random list drawn from registered voters in county. Use of voter registration lists is proper. Lloyd, 448 N.E.2d 1062. Held, conviction & death penalty affirmed.

RELATED CASES: Day, App., 643 N.E.2d 1 (D failed to show prejudice resulting from alleged irregularities in selecting talesmen for jury); Weekly, 496 N.E.2d 29 (selection by property tax roles is valid, *citing* Bryan, 438 N.E.2d 709; see also Morris, 364 N.E.2d 132).

TITLE: Tawney v. State
INDEX NO.: D.9.c.
CITE: (9/2/82), Ind., 439 N.E.2d 582
SUBJECT: Challenges to jury panel - age
HOLDING: Composition of jury need not mirror composition of community nor actually reflect various distinctive groups in the population. Taylor v. LA, (1975), 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690; Daniels, 408 N.E.2d 1244. Here, D challenged venire drawn from real property tax rolls because 18-24-year olds were effectively excluded from jury service. Ct. rejects argument, *citing* Grassmyer, 429 N.E.2d 248 which held 18-24 year olds had not been shown to be a group distinct from the rest of society in a significant way, i.e., 18-24 year olds' interests could be adequately represented by other members of the jury panel. Held, no error.

RELATED CASES: Ewing, 719 N.E.2d 1221 (D failed to establish that 18-50 year-olds are "distinctive" group & made no showing of systemic exclusion); Smith 475 N.E.2d 1139 (Jury 33(1.3); Ct. rejects D's age/race challenge to computer-generated random list drawn from registered voters in county; use of voter registration lists was approved in Lloyd, 448 N.E.2d 1062).

TITLE: Weekly v. State
INDEX NO.: D.9.c.
CITE: (8/4/86), Ind., 496 N.E.2d 29
SUBJECT: Challenges to jury panel - race
HOLDING: Ct. rejects D's contention that Tr. Ct. erred in permitting jury panel to be called which did not reflect racial composition of surrounding area. Ct. discusses at length decision in Batson v. KY (1986), U.S., 106 S.Ct. 1712, 90 L.Ed.2d 69; & Swain v. AL, (1965), 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 759. Although it is not clear D even raised issue of discriminatory use of peremptory challenges, Ct. nonetheless finds D waived it. Ct. ultimately finds simple absence of black jurors on a panel without more is insufficient to establish violation of D's constitutional rights. D must demonstrate that county's jury selection process engages in purposeful & systematic exclusion of blacks. Adams, 431 N.E.2d 820 (jury comprised of white persons aged 40-45 did not deny D trial by peers); Tewell, 339 N.E.2d 792. Held, no error. DeBruler CONCURS IN RESULT without opinion.

RELATED CASES: Bean, 467 N.E.2d 671 (D failed to prove systematic exclusion of minorities from jury service; Ct. cites D's failure to introduce witness familiar with selection process employed in county or current census figures); Johnson, 447 N.E.2d 1072 (Jury 33(1.3); (mathematical proportion of jury members to county's racial composition is not required; Ct. finds D failed to prove purposeful discrimination despite fact jury was all white & county population is 10% black).

TITLE: Wells v. State
INDEX NO.: D.9.c
CITE: (1st Dist., 06-15-06), Ind. App., 848 N.E.2d 1133
SUBJECT: Jury venire with no college students -- fair cross- section requirement
HOLDING: Although jury venire included no college students, which comprised one-third of Monroe county's population, jury venire for D's trial represented a fair cross-section of county community. Manner in which Monroe County selected jury venire, i.e., using voter registration & property tax records supplemented by BMV records, comported with jury selection statute, Ind. Code 33-28-4-3. Fact that this selection method resulted in no Indiana University students in D's jury pool indicates that many do not consider themselves to be part of Monroe County "community." D failed to meet his burden of demonstrating that IU students constitute a distinctive group within Monroe County community for purposes of a fair cross-section analysis. See Moore v. State, 427 N.E.2d 1135 (Ind. Ct. App. 1981). Held, judgment affirmed.

Note: Effective July 1, 2006, Ind. Code 33-28-4-3 places sole responsibility for determining lists of prospective voters with the Indiana S.Ct.; there will no longer be a set statutory basis for source of jury pools.

TITLE: Williams v. State
INDEX NO.: D.9.c.
CITE: (4th Dist., 12-12-07), Ind. App., 877 N.E.2d 845
SUBJECT: Challenge to jury panel - fair cross section requirement
HOLDING: Selection of petit jury from a representative cross-section of community is an essential component of the Sixth Amendment right to a jury trial. Wilder v. State, 813 N.E.2d 788 (Ind. Ct. App. 2004). Jurors need not be mathematically proportioned to character of the community, & primary concern is that juror selection not be arbitrary. Here, D argued that zero percent representation of African Americans in D's jury pool failed to reflect a fair cross-section of the St. Joseph County community, which has an African American population of approximately ten percent. Court concluded that D failed to meet his burden of establishing that any under representation of African Americans in his jury panel was due to the systematic exclusion of African Americans in St. Joseph County jury selection process. One-third of those summoned for jury duty failed to appear. Defense counsel's statement that "...there is no hard evidence, but it seems that it is a pattern that continues to be repeated & it's noted by people who make observations of these things" falls far short of proving systematic exclusion. Moreover, D failed to provide any evidence or explanation as to how St. Joseph County currently selects prospective jurors. Held, judgment affirmed.

RELATED CASES: Breaston, App., 893 N.E.2d 6 *sum. aff'd* 907 N.E.3d 992(where D failed to present any evidence as to how County selects prospective jurors or the percentage of African-Americans who were eligible for jury duty in the County, the D failed to prove a Sixth Amendment violation despite there being no African-Americans in the jury panel in the County with a 5.5% African-American population).

TITLE: Wilson v. State
INDEX NO.: D.9.c.
CITE: (2d Dist. 4/17/89), Ind. App., 536 N.E.2d 1037
SUBJECT: Selection of jury panel - summoning bystanders
HOLDING: Tr. Ct. did not err in securing prospective jurors from those called but not selected in adjacent Ct. D was tried in Delaware Superior Ct. II. When venire there was exhausted, venire members who had been excused from Superior I were seated & examined, & 3 were seated on jury that convicted D. D argues on appeal that this violated requirement that sheriff summon persons "outside the courthouse." Ind. Code 35-37-1-7. Minor irregularities in compliance with jury selection statutes do not constitute reversible error. Owen, 396 N.E.2d 376. Purpose of "outside the courthouse" requirement is to prevent individuals from coming to courthouse to indirectly solicit jury service, & to avoid "professional" juries made up of courthouse employees & other "hangers-on." Neither of these purposes is violated by securing prospective jurors who were called for service in another Ct. Held, conviction affirmed.

D. TRIAL
D.9. Jury trial
D.9.d. Voir dire (Ind. Code 35-37-1)

TITLE: Bannowsky v. State
INDEX NO.: D.9.d.
CITE: (3-27-97), Ind., 677 N.E.2d 1032
SUBJECT: Prosecutor misconduct - voir dire; failure to object
HOLDING: Although prosecutor's voir dire questions were improper, failure of defense counsel to object did not require reversal. During voir dire, prosecutor repeatedly advised prospective jurors that complaining witness had related her allegations of molestations to other individuals who would not be permitted to testify. Ct. found questions improper because they clearly informed jurors regarding matters prejudicial to D & inadmissible at trial. However, defense counsel's failure to object to these questions did not deny D his constitutional right to effective assistance of counsel, because failure to object was consistent with reasonable choice of defense tactics & strategy. Defense counsel may have wanted to avoid focusing jurors' attention upon prosecutor's questions & may have preferred to be perceived as cooperative & helpful, rather than as contentious obstructionist. Held, transfer granted, conviction affirmed.

TITLE: Bellas v. Superior Court
INDEX NO.: D.9.d.
CITE: 85 Cal. App. 4th 636 (Cal.Ct. App. 2000)
SUBJECT: Juror Questionnaires -- Return
HOLDING: With the exception of information that can be used to locate and possibly harass jurors, the information given by venire members in response to detailed written questionnaires is presumptively public under the 1st Amendment, and defense counsel cannot be forced to return questionnaires. Tr. Ct. argued that questionnaires indicated that they would be kept confidential and under seal; Court of Appeals writes that Tr. Ct. should not have made this promise. In any event, venire members knew that information on questionnaires would be provided to parties and counsel, and appellate counsel's potential use of questionnaires, together with trial counsel's desire to review voir dire decisions, justified allowing defense counsel to retain them in confidential client file.

TITLE: Black v. State
INDEX NO.: D.9.d.
CITE: (3rd Dist., 06-21-05), Ind. App., 829 N.E.2d 607
SUBJECT: Prohibiting reference to self-defense during voir dire - fundamental error
HOLDING: In murder prosecution, Tr. Ct. committed fundamental error in prohibiting D from questioning prospective jurors during voir dire regarding law of self-defense. D failed to request relief from State's motion in limine during voir dire, & therefore failed to properly preserve issue for appeal. Nevertheless, fundamental error occurred because D was denied the right to a fair & impartial jury provided by Article 1, Section 13 of Indiana Constitution. The ability to question prospective jurors regarding their beliefs & feelings concerning doctrine of self-defense, so as to determine whether they have firmly-held beliefs which would prevent them from applying law of self-defense to facts of case, is essential to a fair & impartial jury. See Everly v. State, 395 N.E.2d 254 (Ind. 1979). State has a valid right to exclude persons who cannot be fair to its position when seeking death penalty. Burris v. State, 465 N.E.2d 171 (Ind. 1984). Likewise, basic fairness dictates that a D has a valid right to exclude persons who cannot be fair to his position when making a claim of self-defense. Prohibiting D from questioning prospective jurors regarding self-defense during voir dire so prejudiced his rights as to make a fair trial impossible. Fact that D was able to establish self-defense claim & advance the theory during closing arguments & that Tr. Ct. gave jury self-defense instruction failed to ensure that jury was fair & impartial &, therefore, could not remedy error that occurred during voir dire. Held, conviction reversed & remanded for a new trial.

TITLE: Glover v. State

INDEX NO.: D.9.d.

CITE: (03/09/2022), Ind., 181 N.E.3d 982 (David, J., dissenting from denial of transfer)

SUBJECT: Justice David would grant transfer to give guidance on how to regulate "mini opening statements" during voir dire.

HOLDING: Justice David wrote an opinion dissenting from the denial of transfer in Glover v. State, 179 N.E.3d 526 (Ind. Ct. App. 2021). The plain language of Jury Rule 14 indicates that the ability to "present brief statements of the facts and issues" falls within the discretion of the trial court. However, the Indiana Supreme Court has never addressed the proper procedure or scope for allowing such statements. Justice David would find that such discretionary determination would best be addressed in a pretrial conference so the parties can determine the breadth and scope of the mini opening in advance, and not do so for the first time when the prospective jurors are seated and the "traditional voir dire" is about to begin. And if the trial court, in its discretion, determines that it is appropriate to allow a mini opening, both sides should be afforded the opportunity, and the trial judge should endeavor to manage the parameters to reduce the potential for issues and abuses resulting from these mini openings before voir dire even begins. In addition, the parties and the trial court should also determine how to clearly delineate between the end of the mini opening and the start of the traditional voir dire to clear up potential confusion from the potential jurors.

TITLE: Major v. State
INDEX NO.: D.9.d.
CITE: (3rd Dist., 09-28-07), Ind. App., 873 N.E.2d 1120
SUBJECT: Jury selection- local rule allowing anonymous juries in all cases unconstitutional
HOLDING: Tr. Ct. erred by allowing an anonymous jury based on local rule. An anonymous jury is one in which certain identifying information, particularly jurors' names, is withheld from the public as well as from the parties themselves. In an issue of first impression, Ct. adopted rule that anonymous juries are permissible so long as: (a) Tr. Ct. concludes that there is strong reason to believe that the jury needs protection; & (b) it takes reasonable precautions to minimize the potential prejudice to D & ensure that his fundamental rights are protected. However, an unconstitutional anonymous jury is not a structural error, but rather is subjected to harmless error analysis. Here, Tr. Ct. provided no case or fact-specific justification in permitting the empanelment of the anonymous jury. The Ct.'s justification was the local rule permitting juries to be anonymous. Thus, the anonymous jury was not justified & was unconstitutional. But, due to the overwhelming evidence against D & the fact that the parties received substantial biographical & background information during voir dire, the error was harmless beyond a reasonable doubt.

RELATED CASES: Green, 994 N.E.2d 1276 (Ind. Ct. App. 2013) (trial counsel was not ineffective for failing to object to empaneling of an anonymous jury); Brewington, 981 N.E.2d 585 *aff'd*, 7 N.E.3d 946 (Ind. Ct. App. 2013) (in granting State's request for anonymous jury, Tr. Ct. appropriately considered very real prospect that D would publish jurors' personal information and expose them to ridicule, intimidation or harassment if outcome of trial was unfavorable to him; further, Tr. Ct. left open possibility of disclosing jurors' information if necessary for fair trial).

TITLE: Shane v. Commonwealth
INDEX NO.: D.9.d.
CITE: 243 S.W.3d 336 (Ky. 2007)
SUBJECT: Automatic reversal required where peremptory strike used where cause denied
HOLDING: Kentucky Supreme Court held Ds who used peremptory strikes to remove prospective jurors whom the Tr. Ct. erroneously refused to dismiss for cause are entitled to automatic reversal of their convictions. Court overturned recent precedent to adopt the minority approach to a question that has divided jurisdictions. In U.S. v. Martinez-Salazar, 528 U.S. 304 (2000), the U.S. Supreme Court held that a D is not deprived of a peremptory challenge when he uses one to remove a prospective juror whom the Tr. Ct. should have removed for cause, noting that the D could wait to appeal the denial of his for-cause challenge and D's choice to remove the juror simply effectuated one of the intended functions of peremptory challenges. Court in a divided opinion had previously joined other jurisdictions in holding that a Tr. Ct. error in failing to strike a juror for cause was harmless. Taking another look at the issue, a solid majority of the Court decided to overrule its recent precedent and to reject the approach taken in Martinez-Salazar. Court concluded that peremptory challenges are so fundamental to the right to a fair trial that is guaranteed by the state's rules and constitution that requiring a D to use one to cure a Tr. Ct.'s failure to remove a juror for cause represented a violation of a "substantial right" that can never be harmless.

TITLE: U.S. v. Martinez-Salazar
INDEX NO.: D.9.d.
CITE: 528 U.S. 304, 98-1255, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)
SUBJECT: Voir dire, cause challenges, peremptory challenges, waiver
HOLDING: The trial judge erred by refusing to dismiss a prospective juror for cause where the juror stated several times that he would favor the prosecution. The co-Ds used a peremptory challenge to remove the juror and subsequently exhausted their peremptory challenges. The jury was empaneled without objection. Held, being forced to use a peremptory challenge to cure a Tr. Ct.'s failure to strike a juror for cause does not violate the D's rights to due process. Peremptory challenges are not of federal constitutional dimension.

D. TRIAL

D.9. Jury trial

D.9.d.1. Procedure

TITLE: Boggs v. State
INDEX NO.: D.9.d.1.
CITE: 667 So.2d 765 (Fla. 1996)
SUBJECT: Pretrial Publicity - Individual Voir Dire
HOLDING: Where two newspapers published articles on eve of trial reporting allegations that capital murder D was faking mental illness, and that he had been convicted previously of charged offenses, it was abuse of discretion for Tr. Ct. to bar individual inquiry of venire persons who had read articles and could not say whether they could set aside their opinions and render verdict solely on evidence presented at trial. Timing and content of articles, together with statements made by venire persons, compelled individual voir dire on this issue.

TITLE: Buchanan v. Kentucky
INDEX NO.: D.9.d.1.
CITE: 483 U.S. 402 (1987)
SUBJECT: Death qualification at joint trial
HOLDING: Death qualification of jurors at joint trial where co-D is charged with death penalty, but D is not, does not violate D's right to jury selected from representative cross-section. Fair cross-section requirement applies only to venires, not to petit juries. Lockhart v. McCree, (1986), 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (see card at D.9.c). "Witherspoon-excludables" do not constitute a distinctive group for fair cross-section purposes. Id. Nor does removal of "Witherspoon-excludables' at joint trial violate D's right to an impartial jury. Impartial jury requirement does not demand balancing of jurors with different predilections. Jury impartiality requires only "jurors who will conscientiously apply the law & find the facts." Id. State's interest in having a single jury decide guilt/innocence of multiple Ds is compelling. Joint trials promote reliability & consistency in judicial process & are more economically efficient. Held, death qualification of jury in joint trial where D is not charged with death penalty, but co-D is, does not violate 6th Amend. Marshall, joined by Brennan, & Stevens, DISSENTS.

TITLE: Doroszko v. State

INDEX NO.: D.9.d.1.

CITE: 201 N.E.3d 1151 (2/1/2023) Ind.

SUBJECT: Reversible error from trial court's refusal to let Defendant or his attorney directly question prospective jurors

HOLDING: In murder prosecution, trial court erred by not allowing defense counsel to directly question prospective jurors. At pretrial hearing, the judge informed the parties that he would ask the voir dire but the attorneys could submit questions for the court's consideration. Defendant then filed a motion to "personally, directly and verbally" question the prospective jurors, which was denied. He then submitted 60 questions, which included 16 about self-defense. Once the jury was impaneled, Defendant renewed his objection to the voir dire procedure as a violation of the Indiana Trial Rules and the right to a fair and impartial jury but was overruled. Defendant's self-defense claim was the focus of trial, with the State arguing he shot the victim to prevent a drug theft. The jury convicted Defendant of involuntary manslaughter, and on appeal, the Court of Appeals found harmless error in the trial court's refusal to allow counsel to question prospective jurors directly.

The Supreme Court disagreed and reversed Defendant's conviction, noting that the parties agreed the trial court's voir dire procedure ran afoul of Trial Rule 47(D). The Court concluded the policy was inadequate to ensure a fair and impartial jury with respect to self-defense. "The trial court not only denied Doroszko the opportunity to conduct his own examination, it also inadequately examined the prospective jurors on controversial legal principles relevant to his claim of self-defense." The cursory nature of the trial court's questions deprived Defendant of the opportunity to intelligently exercise his peremptory and for-cause challenges. The Court has previously found reversible error from prohibiting any inquiry of prospective jurors regarding self-defense. See Everly v. State, 395 N.E.2d 254, 256 (Ind. 1979). "It follows that an inadequate opportunity requires the same remedy." Held, transfer granted, Court of Appeals opinion at 185 N.E.3d 879 vacated, conviction reversed and remanded for new trial.

TITLE: Edwards v. State
INDEX NO.: D.9.d.1.
CITE: (6/28/85), Ind., 479 N.E.2d 541
SUBJECT: Voir dire – individual
HOLDING: Tr. Ct. did not err in refusing to conduct individual voir dire of prospective jurors exposed to pretrial publicity. Here, D's motion for change of venue was denied. D then filed motion for individual voir dire, attaching newspaper articles that referred to D's prior felony arrests & rape conviction. D contends Lindsey, 295 N.E.2d 819 procedures apply (impaneled jurors exposed to prejudicial publicity during trial must be individually interrogated outside presence of other jurors). Ct. finds Tr. Ct. adequately inquired re exposure to publicity; impartial jurors were impaneled. Held, no error.

RELATED CASES: Tatusko, 990 N.E.2d 986 (Ind. Ct. App. 2013) (trial counsel not ineffective for failing to ask Tr. Ct. to interrogate prospective jurors after one juror made potentially prejudicial statements about D during voir dire); Stroud, App., 787 N.E.2d 430 (Tr. Ct. erred in questioning jurors exposed to prejudicial newspaper article in presence of other jurors who had not read article. That in turn, contaminated those who had not read article); Ashby, 486 N.E.2d 469 (no error in denial of individual voir dire).

TITLE: Griffin v. State
INDEX NO.: D.9.d.1.
CITE: (7/19/2017), 81 N.E.3d 243 (Ind. Ct. App. 2017)
SUBJECT: Group voir dire did not violate right to impartial jury
HOLDING: In attempted robbery prosecution, D was not denied his right to an impartial jury by the use of group voir dire. D filed a pretrial motion for individual voir dire based on media coverage in small community and a motion to prohibit the "rehabilitation" of prospective jurors challenged for cause and from asking the "Magic Question," i.e., whether they could set aside their biased opinions and render an impartial verdict. Tr. Ct. substantially denied D's motions but reduced the number of jurors to be examined at one time from 18 to 12. On appeal, D argued that this procedure led to the jury panel being exposed to "a number of accounts of the offense" before jury was seated and "entered the trial with information which tainted perception of the evidence." Specifically, four jurors selected to serve indicated they had heard something about the case, and another prospective juror "thought" that D "was involved."

Court found nothing highly unusual or potentially damaging so as to require individual voir dire in this case. See Brown v. State, 563 N.E.2d 103 (Ind. 1990). Only one juror served after alluding to D's guilt or innocence, and that juror told Tr. Ct. she could set her preliminary opinion aside, follow the instructions and decide based upon the evidence. "Ultimately, 'jurors need not be totally ignorant of the facts involved in order for a D to receive a fair trial.'" Held, judgment affirmed.

TITLE: Jones v. State
INDEX NO.: D.9.d.1.
CITE: (9/4/85), Ind., 482 N.E.2d 243
SUBJECT: Pre-voir dire orientation program
HOLDING: Pre-voir dire orientation program for prospective jurors did not constitute improper delegation of Tr. Ct.'s duty to instruct jury in open Ct. in presence of parties. In Williams, 381 N.E.2d 458, Ct. stated delegation posed problem because judge could not know how or whether instructions were read to jury. Here, any prejudice caused by misstatements of law/juror misperceptions during orientation were cured by jurors' oath & Tr. Ct.'s preliminary & final instructions. Ct. rejects D's request to declare process prejudicial per se & sets forth standards for implementation of such programs: (1) judge must prepare/approve content; (2) content may include general matter re legal process; (3) attorneys have right to attend as observers; (4) avoid specific rules of law re issues in case; (5) defer questions re specific laws, issues & factual situations to judge. Further fair restrictions are discretionary. Held, no error.

TITLE: Peppers v. State

INDEX NO.: D.9.d.1.

CITE: 152 N.E.3d 678 (Ind. Ct. App. 2020) (08/31/2020)

SUBJECT: No error in trial court conducting voir dire where Defendant submitted written questions

HOLDING: Defendant was arrested on a warrant at his home and was cooperative with officers. One month after Defendant's arrest, a video called "To the Judges" was posted on YouTube. In the video, Defendant threatened to kill "Big Country," the nickname of one of the police officers who arrested him, for allegedly pointing a gun in his face and at his stepdaughter during the arrest. Defendant was charged with one count of Level 6 felony intimidation. Prior to jury trial, the parties submitted written questions for voir dire, with Defendant submitting 86 questions for the prospective jurors and the State submitting eight. The trial court conducted voir dire and did not ask all of Defendant's submitted questions finding them either covered by the court's questions or conditioning the jury and therefore not appropriate to ask. Trial counsel did not object to the jury panel before it was sworn or submit additional questions for the jury after his motion to orally examine prospective jurors was denied. Finding the issue waived and reviewed under a fundamental error standard, the Court of Appeals rejected Defendant's argument that the trial court violated Indiana Trial Rule 47(D) by denying his counsel the right to question the prospective jurors and to ask them follow-up questions. The Court found Defendant failed to show how the trial court's voir dire procedure led to a jury panel that was not fair or impartial, or in violation of Indiana Trial Rule 47(D), finding no error in the trial court's conduct of voir dire. The court also found the evidence sufficient to support the intimidation charge in that the jury could reasonably infer that Defendant publicly posted the video to YouTube and that was enough to support the required element that he knew or would have had good reason to believe the video would reach the police officer, relying on prior cases that affirmed the communication can be indirect and not limited to only those threats made directly to or in the presence of the threatened party.

RELATED CASES: Doroszko, 185 N.E.3d 879 (Ind. Ct. App. 2022) (Ct. disagreed with Peppers, to the extent Ct. found no error in refusing to allow attorney to question potential jurors; Ct. believed Peppers was contrary to Indiana Supreme Court precedent).

TITLE: Stroud v. State
INDEX NO.: D.9.d.1.
CITE: (7/6/83), Ind., 450 N.E.2d 992
SUBJECT: Voir dire - juror's comments
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial made after judge pressed potential juror for reasons why she could not set aside feelings in her deliberations. Here, potential juror said her daughters had constant dealings with D & this would influence her deliberations in the case. Judge asked her to explain statement. She responded that there would be trouble & she didn't want to say much about it. Judge excused her for cause. Ds contend judge should have granted mistrial because statements tainted panel. Ct. disapproves of procedure followed by judge. Neither Tr. Ct. counsel should cause juror to express any facts/reasons for having opinion if prospective juror can satisfactorily established he/she has formed opinion which cannot be set aside in order to fairly/impartially try case. Ct. distinguishes this case from Lindsey, 295 N.E.2d 819 (D entitled to have jury polled to determine if jurors had been exposed to prejudicial publicity). Bradberry, 364 N.E.2d 1183 controls (general references made by prospective jurors did not prejudice others). D made no showing that other jurors were prejudiced by woman's remarks. Held, conviction affirmed.

TITLE: Thorne v. State
INDEX NO.: D.9.d.1.
CITE: (4th Dist. 6/30/87), Ind. App., 509 N.E.2d 877
SUBJECT: Jurors - voir dire; challenge of absent jurors
HOLDING: Tr. Ct. did not abuse discretion by refusing to stay proceedings of jury selection due to absenceof 2 jurors who were not properly excused. Here, D relies upon Ind. Code 33-4-5.5-15 & 16, which specify conditions for excuse from jury duty & procedure for Tr. Ct. to follow in cases of substantial noncompliance with subsection 15. Ch. 5.5 applies only to superior Cts. in counties of 500,000 to 600,000, in other words, only Lake County. D's case was tried in Vanderburgh Circuit Ct. Ind. Code 33-4-5 governs D's case. D must show that noncompliance with jury selection process was either in bad faith or was objected to promptly upon discovery & probably harmful to his/her substantial rights. Record shows 5 prospective jurors failed to appear. Three were excused. Two remaining jurors were not excused; record establishes one was on vacation & other was out of town & did not receive notice to appear for jury duty. Ct. finds D has not demonstrated how unexcused absence of 2 prospective jurors prejudiced him or specifically which of his rights were sacrificed because they failed to appear for jury duty. Held, conviction affirmed.

TITLE: Wise v. State
INDEX NO.: D.9.d.1.
CITE: (2-11-02), Ind. App., 763 N.E.2d 472
SUBJECT: Voir dire -- peremptory challenges; time of exercise
HOLDING: Tr. Ct. did not abuse its discretion in denying D's late application to exercise peremptory challenge on juror after he had already been accepted. In Marsh v. State, 396 N.E.2d 883 (Ind. 1979), S.Ct. held that Tr. Ct. properly refused additional peremptory challenges after parties were given opportunity to examine prospective jurors, witnessed examination by opposing party, & made challenge pursuant to local Ct. rule. Whether or not it is written, defense counsel acknowledges local procedure whereby once both parties have had opportunity to question proposed jurors & respective strikes have been exercised, then any juror accepted would not be subject to challenges & would ultimately be impaneled. D argued that attempt to correct error was made as soon as possible & before questioning of second panel was complete. However, it is irrelevant at what point in questioning of second panel issue was broached, as true turning point is when remaining jurors from first panel were accepted by parties. Held, judgment affirmed; Sullivan, J., dissenting on this issue.

TITLE: United States v. Tsarnaev
INDEX NO.: D.9.d.1.
CITE: (03/04/2022), 142 S. Ct. 1024 (US Supreme Court)
SUBJECT: Voir dire - no error in court declining to ask about the content and extent of each juror's media consumption regarding crimes
HOLDING: In capital case, District Court did not abuse its discretion by declining to ask about the content and extent of each juror's media consumption regarding the Boston Marathon bombings. Jury selection falls "particularly within the province of the trial judge," Skilling v. United States, 561 U. S. 358, 386, whose broad discretion in this area includes deciding what questions to ask prospective jurors, see Mu'Min v. Virginia, 500 U. S. 415, 427. Here, the District Court did not abuse that discretion when, recognizing the significant pretrial publicity concerning the bombings, the court refused to allow the question at issue because it wrongly emphasized what a juror knew before coming to court, rather than potential bias. That decision was reasonable and well within the court's discretion.

D. TRIAL

D.9. Jury trial

D.9.d.2. Scope of

TITLE: Marbley v. State
INDEX NO.: D.9.d.2.
CITE: (4/19/84), Ind., 461 N.E.2d 1102
SUBJECT: Voir dire - scope; time limitation; written questions
HOLDING: Tr. Ct. did not err in its conduct of voir dire. Here, Tr. Ct. conducted general voir dire of entire jury panel, then each party was given 45 minutes to question panel. Tr. Ct. also permitted each party to submit written questions to supplement oral voir dire. D submitted typewritten questions, obviously prepared before trial, which were refused. D then submitted handwritten questions, some of which were refused as repetitious or irrelevant. Tr. Ct. has broad discretionary powers to regulate form/substance of voir dire (Lynn, 392 N.E.2d 449), & may limit parties' oral voir dire & permit them to submit written questions. Tyson, 386 N.E.2d 1185; Bradberry, 364 N.E.2d 1183. D fails to show abuse of discretion. Held, no abuse of discretion.

RELATED CASES: Ashby, 486 N.E.2d 469 (30-minute limitation upheld where D was charged with 8 counts (including rape of white woman) & where burning cross & skinned raccoon were found on lawn of jail); Murphy, 469 N.E.2d 750 (20-minute limitation per side (2 Ds) upheld); Lahrman, 465 N.E.2d 1162 (30-minute limitation upheld).

TITLE: McCormick v. State
INDEX NO.: D.9.d.2.
CITE: (7/30/82), Ind., 437 N.E.2d 993
SUBJECT: Voir dire - scope; purpose
HOLDING: Tr. Ct. has broad discretionary power to regulate form & substance of voir dire. Wickliffe, 424 N.E.2d 1007. Function of voir dire is to ascertain whether prospective juror can render fair & impartial verdict in accordance with law & evidence (Blackburn, 390 N.E.2d 653), not to condition them to be receptive to questioner's position (Everly, 395 N.E.2d 254). Here, defense counsel's questioning concerning specific intent carried potential of conditioning, a practice which should be scrutinized by Tr. Ct. Robinson, 297 N.E.2d 409. Held, curtailment of voir dire not an abuse of discretion.

RELATED CASES: Woods, App., 587 N.E.2d 718 (during voir dire in trial for rape, it was not error to allow prosecutor to discuss previously publicized rape case from Florida where jurors had apparently thought alleged victim "asked for it." Issue in instant case was consent & state of mind of D & alleged victim. Ct. found purpose of prosecutor's use of story was to determine whether given all circumstances of case, jurors would base decision on central issue of consent & not solely on isolated evidence that might have some impact on issue); Kalady, 462 N.E.2d 1299 (Tr. Ct. did not abuse discretion in allowing prosecutor to ask questions to elicit attitude re-offense of theft; such questions did not condition juror to state's cause); Equia, App., 468 N.E.2d 559 (no error in allowing prosecutor to read charging information to prospective jurors & discuss elements of offense).

TITLE: Mu'Min v. Virginia

INDEX NO.: D.9.d.2.

CITE: 500 U.S. 415 (1991)

SUBJECT: Questioning potential jurors regarding content of pretrial publicity to which they have been exposed

HOLDING: Due process does not require potential jurors to be questioned regarding content of pretrial publicity to which they have been exposed. Here, D was convicted of & sentenced to death for murder committed in suburban Washington, DC, after D escaped from prison work detail. Tr. Ct. questioned jurors in groups of four regarding their exposure to pretrial publicity & whether they had formed an opinion about D's guilt which they would be unable to set aside as a result. Tr. Ct. refused to permit questioning about content of what jurors had read/heard. Eight of 12 selected jurors stated they had heard about case, but none indicated they had formed opinion or that it would affect their ability to determine guilt/innocence from evidence at trial. Tr. Ct.'s findings of juror's impartiality may "be overturned only for 'manifest error.'" [Citations omitted.] Although pretrial publicity, was substantial, it was not of same kind/extent as that requiring reversal in Irvin v. Dowd, (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (small community with little violent crime; 2/3 of potential jurors had formed opinion on guilt; newspapers delivered to 95% of homes; media accounts included details of D's confession to offense, as well as 24 burglaries & other murders, & his attempt to plead guilty to avoid death penalty). D's reliance upon ABA Standards requiring individual questioning of jurors regarding content of media exposure is unavailing. Question is what 14th Amend. requires, & ABA Standard has not been adopted by majority of state & federal courts that have reviewed issue. Tr. Ct.'s questioning here was "by no means perfunctory." Held, under facts presented here, 14th Amend. does not de mand that potential jurors be questioned regarding content of pretrial publicity to which they have been exposed. O'Connor, CONCURRING; Marshall, joined by Blackmun & Stevens, DISSENTING.

TITLE: Perryman v. State
INDEX NO.: D.9.d.2.
CITE: (4th Dist., 7-19-05), Ind. App., 830 N.E.2d 1005
SUBJECT: Improper questions/conditioning by prosecutor during voir dire - reversible error
HOLDING: Ct. reversed D's convictions for possession of cocaine in excess of three grams, a Class A felony, & possession of marijuana due to improper questions by the prosecutor during voir dire. Ct. agreed with D's contention that prosecutor improperly tried State's case during jury selection & gave jury specific facts not proven at trial, & also conditioned jury with prejudicial comments suggesting they were fighting the war on drugs through this specific case. Prosecutor asked jurors questions about packaging of drugs & whether manner of packaging drugs would suggest dealing or use. D was not charged with dealing, there was no evidence of dealing, & Ct. found the prosecutor's questioning improperly sought to infer to the jurors that dealing was occurring. This tactic was comparable to Robinson v. State, Ind., 297 N.E.2d 409 (1973), where Ct. held that it was improper to ask jurors if they could impose death penalty if a father killed his 20-year-old daughter because she resisted his sexual advances. As in Robinson, voir dire in this case was prejudicial as "the seeds of suspicion [were] firmly planted & anxiously awaiting germination." Ct. also found it improper to "brainwash or attempt to condition the jurors to receive the evidence with a jaundiced eye" through references placing them in the position of the police fighting the drug war. Robinson v. State, 365 N.E.2d 1218 (Ind. 1977). Held, judgment reversed.

RELATED CASES: Emerson, 952 N.E.2d 832 (Ind. Ct. App. 2011) (although prosecutor's questioning of juror's regarding whether they can stand up to a bully were not presented as an effort to determine whether evidence of bullying would affect the prospective jurors' ability to render an impartial verdict, the prosecutor's questions could indeed help the prosecutor, as well as defense counsel, determine whether evidence of bullying would negatively affect any of the potential jurors' ability to render an impartial verdict; no error); Gregory, App., 885 N.E.2d 697 (prosecutor's reading of a poem regarding the dangers and prevalence of methamphetamine was not prosecutorial misconduct; but see Rucker & Dickson, JJ., dissenting from denial of transfer at 902 N.E.2d 205 noting that prosecutor's conduct should be disapproved).

TITLE: People v. Jiminez

INDEX NO.: D.9.d.2.

CITE: 284 Ill. App. 908, 672 N.E.2d 914 (Ill. App. Ct. 1996)

SUBJECT: Voir Dire -- Refusal to Allow Question on Attitudes About Gang Membership Reversible Error

HOLDING: Tr. Ct.'s refusal to allow voir dire of potential jurors about whether a D's gang membership would prevent them from giving him a fair trial was reversible error. Once Tr. Ct. decided to admit evidence of D's gang affiliation, it was under clear duty to take steps in voir dire to ensure that jury was free from prejudice against gangs. D need not prove that the jury empaneled actually harbored bias against him in order to secure reversal.

D. TRIAL

D.9. Jury trial

D.9.d.3. Challenges for cause (Ind. Code 35-37-1-5 and 6)

TITLE: Collins v. State
INDEX NO.: D.9.d.3.
CITE: (7/2/84), Ind., 464 N.E.2d 1286
SUBJECT: Challenge for cause - waiver; exhaustion of peremptory challenges
HOLDING: Tr. Ct. did not err in denying D's challenge for cause of prospective juror Kuzemka (auxiliary police officer) where D still had peremptory challenges available to him. Robinson 453 N.E.2d 280. Here, upon denial of challenge for cause, D's counsel announced intention to deliberately exhaust 6 remaining peremptories & to attempt to exercise additional peremptory. Counsel did use peremptory to dismiss Kuzemka. Counsel's later attempt to exercise 11th peremptory to excuse juror Ranich was disallowed. Counsel then attempted to challenge Ranich for cause but admitted no grounds existed for cause; challenge was denied. D must demonstrate that at time D challenged juror for cause, D had exhausted peremptories. Id. Held, no error.

Note: For other types of waiver of challenges for cause, see Ind. Code 35-37-1-6 (failure to make challenge before jury sworn); Bonman, 644 N.E.2d 1223 (acceptance of jury as chosen); Barnes, 330 N.E.2d 743 (failure to promptly make challenge prior to verdict where D becomes aware of grounds for challenge after jury is sworn).

RELATED CASES: Whiting, 969 N.E.2d 24 (Ind. 2012) (D procedurally defaulted claim that Tr. Ct. erred in not striking prospective juror for cause because D did not use one of her peremptory challenges to strike prospective juror); Lambert, 643 N.E.2d 349 (D failed to exhaust peremptory challenges as required to show that he had been subject to biased panel); Shane, 615 N.E.2d 425 (Although juror was being represented by member of prosecutor's law firm in unrelated case, denial of D's challenge of juror for cause was not reversible error. Juror stated she could be fair & impartial, & at time D used peremptory challenge to remove juror, he had not yet exhausted his peremptory challenges. If he had been forced to accept her because he had no peremptory challenges left, issue might be resolved differently.).

TITLE: Daniel v. State
INDEX NO.: D.9.d.3.
CITE: (12/10/91), Ind., 582 N.E.2d 364
SUBJECT: Ct.'s excusing of juror for cause
HOLDING: It was not error for Ct. on its own motion to excuse prospective juror for cause. Juror had just visited friend in jail & expressed misgivings about her ability to have anyone locked up. When Tr. Ct. questioned her as to whether she would still be able to decide guilt or innocence impartially, she replied "to be honest with you, I really don't know if I could say he's guilty, & I know in the back of my mind that he may be locked up. I don't know." Ct. rejected D's arguments that such reason is not enumerated as grounds for cause under Ind. Code 35-37-1-5, & that her opinions were not so strong & unyielding that she should have been excused. While juror's opinions were perhaps not so unyielding as to be unacceptable, juror prejudice shown to Tr. Ct. does not have to be as great as that needed to prevail on appellate review. Held, conviction affirmed, DeBruler, J., & Dickson, J., dissenting, primarily on other issue.

TITLE: Davis v. State
INDEX NO.: D.9.d.3.
CITE: (9/1/92), Ind., 598 N.E.2d 1041
SUBJECT: Challenge for cause - opinions death penalty
HOLDING: Juror may not be challenged for cause based on his views about death penalty unless those views prevents or substantially impair performance of his duties as juror in accordance with his instructions & his oath. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844. However, State may insist that jurors will consider & decide facts impartially & conscientiously apply law as charged by Tr. Ct. Id. Here, D claims Tr. Ct. erred in excusing for cause 2 prospective jurors for their opposition to death penalty because jurors, while equivocating on imposition of death penalty, stated they could follow law. In excusing jurors for cause, there is no ritualistic adherence to requirement that prospective juror make it unmistakably clear that he or she would automatically vote against imposition of death sentence. Juror's bias need not be proven with unmistakable clarity. Underwood, 535 N.E.2d 507 rev'd on other grounds. Ct. rejected D's argument that there was insufficient questioning to establish that jurors were irrevocably committed to vote against death penalty. Held, judgment affirmed.

RELATED CASES: Castor, 587 N.E.2d 1281 (no error in excusing juror for cause for opposition to death penalty where juror stated that he did not feel he could judge guilt or innocence irrespective of penalty, & he might raise State's burden of proof so high as to deny State fair trial); Underwood, 535 N.E.2d 507 rev'd on other grounds (juror unequivocally stated, in 4 different ways, that she could not fairly consider recommending death penalty); Thacker, 556 N.E.2d 1315 (prospective jurors properly excluded where they held moral, religious or ethical views which would have prevented or substantially impaired their ability to evaluate aggravating & mitigating circumstances & to follow law).

TITLE: Jackson v. State
INDEX NO.: D.9.d.3.
CITE: (8/19/92), Ind., 597 N.E.2d 950
SUBJECT: Challenge for cause - Implied bias or prejudice; relationship with party or witness
HOLDING: D claimed reversible error where Tr. Ct. excused tentatively selected juror for cause because she called one of D's lawyers about legal problem unrelated to D's case. Although subsequent questioning by parties revealed that there was no discussion about case at all, Tr. Ct. excused juror for cause. Juror's bias or prejudice for or against D is grounds for challenging juror for cause. Ind. Code 35-37-1-5(a)(11). Actual bias is not necessary. Woolston, 453 N.E.2d 965. Juror's relationship with either party may raise presumption of bias. Id. Although juror may sit on jury when she knows attorney or judge, situation here went beyond knowledge or prior contact. Bias in D's favor could be implied from juror contacting attorney after she was selected as juror. Ct. concluded Tr. Ct.'s decision to excuse juror was neither illogical nor arbitrary. Held, convictions affirmed.

RELATED CASES: Fox, App., 717 N.E.2d 957 (no abuse of discretion in denying challenge for cause based on juror's past working relationship with State's witness); Andrews, App., 529 N.E.2d 360 (no abuse of discretion in denying challenges of juror Noe, who was active police reserve officer in county D was prosecuted, & juror Ackerman, whose distant brother-in-law was deputy sheriff; links to prosecution are too tenuous & remote to support presumption of bias in favor of State); Smith, 477 N.E.2d 311 (no error in denying D's challenge for cause of juror who was brother of former town marshal who had investigated case & who testified at trial; juror testified that she had no prior knowledge of case & that she could be fair & impartial); but see Woolston, 453 N.E.2d 965 (challenged juror's wife was employee of state police & had typed several evidentiary documents for trial; held, grounds to challenge for cause); Haak, 417 N.E.2d 321 (juror's husband was to begin work for prosecutor's office after trial concluded; held, grounds to challenge for cause).

TITLE: Johnson v. State
INDEX NO.: D.9.d.3.
CITE: (12/22/82), Ind., 442 N.E.2d 1065
SUBJECT: Voir dire - challenge for cause; "householder"
HOLDING: Requirement under Ind. Code 33-4-5-7 that juror be a "householder" simply means that a person must have experience of making important & binding practical decisions of everyday life independently of family or others. Householder does not mean that a person must own a home or have a dependent. Stevens, 354 N.E.2d 727, on *reh'g* 357 N.E.2d 245. Here, D, against whom the death penalty was sought, maintained exclusion for cause of C.L. from jury service because she neither owned real estate nor had anyone depend upon her for support violated Witherspoon prohibition against intentional/systematic exclusion of particular class of persons from jury service. Ct. finds Tr. Ct. has discretionary authority to excuse prospective jurors & D must show prejudice to show abuse of discretion. Holt, 365 N.E.2d 1209; Tewell, 339 N.E.2d 792. D demonstrated no prejudice. Held, no abuse of discretion. CONCURRING IN RESULT, Hunter *cites* Stevens, 354 N.E.2d 727 in which 20-year-old juror who resided in rented apartment with brother was deemed to be a householder within meaning of Ind. Code 33-4-5-7. Hunter feels majority opinion not worded strongly enough, thereby countenancing dismissal of qualified jurors on grounds defying statute.

RELATED CASES: But see Newman, 485 N.E.2d 58 (Jury 50; it is proper to excuse prospective jurors who reside in their parent's home as they do not qualify as householders).

TITLE: Oswalt v. State
INDEX NO.: D.9.d.3.
CITE: (10/22/2014), 19 N.E.3d 241 (Ind. 2014)
SUBJECT: Challenge for cause - waiver; exhaustion rule
HOLDING: D preserved for appeal the Tr. Ct.'s denial of his challenges for cause by exhausting his preemptory strikes even if he used his last preemptory on a juror other than the challenged juror. In order to preserve a for-cause challenge for appeal, the exhaustion rule requires parties to peremptorily remove jurors whom the Tr. Ct. refuses to strike for cause or show that they had already exhausted their allotment of peremptories at the time they request for-cause removal. The parties satisfy the exhaustion rule the moment they use their final peremptory challenge, whether they strike an allegedly incompetent juror or a merely objectionable one. Even where a D preserves a claim by striking the challenged juror peremptorily, an appellate court will find reversible error only where the D eventually exhausts all peremptories and is forced to accept either an incompetent or an objectionable juror. Here, D challenged Tr. Ct.'s denial of for-cause challenges to Jurors 7, 13 and 28. After being denied challenges for cause on Jurors 7 and 13, D used peremptory strikes on both. However, after being denied a for-cause challenge on Juror 28, D had to choose between using his last preemptory strike on Juror 28 or 25. D vacillated and chose to strike Juror 25, and stated "I've got a record that says...I'm out of preempts and I'm not getting who I want." The fact that D chose not to use his last strike on the challenged juror does not matter. He still satisfied the exhaustion rule. However, Tr. Ct. did not abuse its discretion by denying the challenges for cause. Jurors 28 and 13 agreed to either follow the law or try to be impartial. Juror 7's familiarity with one of the detectives was not a sufficient challenge for cause. Held, transfer granted, Court of Appeals' Opinion at 995 N.E.2d 685 vacated, judgment affirmed.

TITLE: Owens v. State
INDEX NO.: D.9.d.3.
CITE: (12/14/95), Ind., 659 N.E.2d 466
SUBJECT: Challenge for Cause - Unable to comprehend
HOLDING: Tr. Ct. did not err when it joined in examining prospective juror during voir dire & sua sponte struck juror for cause because it believed juror could not grasp legal issues to be decided. Tr. Ct. noted that juror's frequently unresponsive answers to questions implied that he might not follow instructions, that he disrupted functioning of jury, & that he seemed too preoccupied with his employment to properly attend to his duties as juror. Tr. Ct. has inherent discretion to excuse jurors, & abuse of discretion occurs only when Tr. Ct. exercises it in illogical or arbitrary manner. Campbell, 547 N.E.2d 843. Tr. Ct. stated for record its reasons for excusing prospective juror, & Ct. found nothing illogical or arbitrary in reasons given. Tr. Ct. was in better position than Ct. to judge fitness of juror. Held, no error.

Note: Ind. Code 35-37-1-5(a)(13) provides that a prospective juror may be excused for cause if person is unable to comprehend evidence & instructions of Tr. Ct. due to defective sight or hearing, ignorance of English language, or any other cause.

TITLE: Smith v. State
INDEX NO.: D.9.d.3.
CITE: (2d Dist. 4/30/85), Ind. App., 477 N.E.2d 311
SUBJECT: Voir dire - challenge for cause; implied bias
HOLDING: Tr. Ct. did not err in denying D's challenge for cause of juror Spitler. Here, after state's first witness testified, Spitler informed Ct. that testimony indicated her brother (town marshall, now retired) had investigated crime. D had subpoenaed brother to testify. Ct. declines to expand concept of implied bias to include relatives of persons no longer employed by law enforcement agency. Link between town marshall's dept. & relative of former deputy, without an existing employment relationship, is "simply too weak to support presumption of bias." See Atkinson, App., 411 N.E.2d 651. Juror biased for/against party may be removed for cause from panel. Ind. Code 35-37-1-5. Bias may be actual (factual bias for/against party is shown) or implied (attributable by law, regardless of actual partiality, because relationship exists between juror & party, Haak, 417 N.E.2d 321 & Block (1885), 100 Ind. 357). Relationship supports presumption of bias where juror's wife was employed by state police (Woolston, 453 N.E.2d 965) but not where juror was no longer employed by sheriff's dept., even though he was serving as volunteer reserve deputy (Porter, 391 N.E.2d 801). Although Spitler's brother had interest in case stemming from his investigation of it, Ct. finds interest after retirement could not operate to automatically disqualify juror who had no other connection with law enforcement. Ct. finds no actual bias of juror. Furthermore, D's failure to discover during voir dire if any potential jurors knew witnesses waived error. Woolston. Held, conviction affirmed. Sullivan CONCURS, noting IN's bias as matter of law rule. **Note:** In related issue, Ct. finds D, who represented himself, waived any error in husband of bailiff serving as jury foreman by failing to object.

RELATED CASES: Pinkston, App. 821 N.E.2d 830 (record supported Tr. Ct.'s conclusion that excused juror was biased in favor of D on account of his race).

TITLE: Wheeler v. State
INDEX NO.: D.9.d.3.
CITE: (1st Dist. 3/26/87), Ind. App., 505 N.E.2d 496
SUBJECT: Voir dire - challenge for cause; familial relationship
HOLDING: Ct. rejects D's contention that he was denied fair trial because prosecutor & juror were related. Here, Tr. Ct. found that prosecutor's great-grandfather was brother of juror's great-grandfather, making juror & prosecutor second cousins once removed or, the seventh degree of consanguinity. Ind. Code 35-37-1-5(a)(4) provides that juror's relationship within fifth degree of victim, complainant, or D, constitutes good cause to challenge that juror. Juror's relationship with prosecutor, although not included in the statute, is sufficiently analogous. See Scott v. Scott, App., 209 N.E.2d 518. Because 7 degrees of consanguinity separate juror & prosecutor, neither Ind. Code 35-37-1-5(a)(4) nor or Ind. Code 1-1-4-1(11) are applicable. Held, no error.

RELATED CASES: Whicker, 511 N.E.2d 1062 (even if juror was distant relative of D, D was not prejudiced where relationship between juror & D was not within 5th degree &, in any event, juror was as likely to be biased in D's favor as prejudiced against him).

TITLE: White v. State
INDEX NO.: D.9.d.3.
CITE: (10-23-01), Ind. App., 756 N.E.2d 1057
SUBJECT: Challenges for cause - relation includes either by blood or marriage
HOLDING: "Related to" for purposes of Ind. Code 35-37-1-5(a)(4) includes relation to D by either consanguinity (by blood) or affinity (by marriage). Ind. Code 35-37-1-5(a)(4) states that person related within fifth degree to D is good cause for challenging any person called as juror for criminal trial. Here, D argued that State improperly used peremptory challenge to strike African American prospective juror who was related by fifth degree to D. D's argument was unpersuasive because State could have struck juror for cause pursuant to statute. Although statute is silent as to what constitutes "relation," reasonable interpretation of statute is that person related by either consanguinity or affinity should be disqualified because both Indiana rule of construction & reasonable understanding of "related to" include both types of relatives. Held, judgment affirmed.

TITLE: Whitehair v. State
INDEX NO.: D.9.d.3.
CITE: (7/31/95), Ind. App., 654 N.E.2d 296
SUBJECT: Challenges for cause - opinion as to guilt or innocence
HOLDING: Tr. Ct. did not err in denying motion to remove juror for cause. Whether to excuse juror for cause is within Tr. Ct.'s discretion because Tr. Ct. is in best position to assess demeanor of prospective jurors. This discretion will be reversed only if judge's authority was used in illogical or arbitrary manner. Walker, 607 N.E.2d 391. Person may be challenged for cause where that person has formed or expressed opinion as to guilt or innocence of D. Ind. Code 35-37-1-5(a)(2). Here, juror who was teacher stated to class that "we could find someone guilty & be back by noon." Ct. found juror was making general reference, in jest, regarding jury selection & methods for getting out of jury duty, not D's guilt or innocence. Further, comment was not inherently prejudicial to all criminal D's. Held, judgment affirmed. See Ind. Code35-37-1-5 (a)(11).

RELATED CASES: Gooch, App., 685 N.E.2d 152 (Tr. Ct.'s refusal to strike jurors for cause was neither illogical nor arbitrary); Walker, 607 N.E.2d 391 (prospective juror, who indicated that he thought D was probably guilty & that when person is arrested, police are correct about 99% of time, was not required to be excused for cause in murder case; D elicited further testimony that juror would listen to testimony & that he could be fair & impartial).

D. TRIAL

D.9. Jury trial

D.9.d.4. Peremptory challenges by D (Ind. Code 35-37-1-3)

TITLE: Castro v. State
INDEX NO.: D.9.d.4.
CITE: (3d Dist. 12/16/82), Ind. App., 442 N.E.2d 1141
SUBJECT: Voir dire - peremptory challenges; number
HOLDING: There is no constitutional right to exercise peremptory challenge. Lund, 345 N.E.2d 826. Right to exercise peremptory challenges is matter of statutory grant & can neither be expanded as a matter of right nor restricted by judicial interpretation. Cochran, 378 N.E.2d 868; Foreman, (1932) 203 Ind. 324; Torrance, (1937) 104 Ind. App. 631. Ind. Code 35-1-30-2 (repealed) provides for the following number of peremptories: 20 (death penalty); 10 (offenses punishable in state prison); 3 (other prosecutions). Here, D, charged with criminal confinement (Class D felony) objected to being limited to 3 peremptory challenges. Ct. finds D entitled to 10 peremptories under Ind. Code 35-1-30-2. Held, harmful error; reversed & remanded.

Note: Present statute, Ind. Code 35-37-1-3, provides for: 20 (death penalty); 10 (murder, Class A, B, C felonies); 5 (other prosecutions).

RELATED CASES: Peck, 563 N.E.2d 554 (D bound by co-D's use of 2 peremptory challenges that he did not agree with; sharing peremptory challenges not reversible error absent showing of actual prejudice); Williams, 455 N.E.2d 299 (Crim L 136(6); held, no error in denial of D's motion to separate number of peremptories from co-D, *citing* Morris, 364 N.E.2d 132 & Swininger, 352 N.E.2d 473); Killian, App., 467 N.E.2d 1265 (co-Ds jointly exercise peremptory challenges under Ind. Code 35-37-1-3); Martin, 317 N.E.2d 431 (statute granting lone D 10 peremptory challenges & co-Ds total of 10 not invalid as repugnant to doctrine of separation of powers).

TITLE: Currin v. State
INDEX NO.: D.9.d.4.
CITE: (8-7-96), Ind., 669 N.E.2d 976
SUBJECT: D's peremptory challenge legitimate under Batson
HOLDING: Failure to grant D's peremptory challenge to prospective juror constituted reversible error. During voir dire, Tr. Ct. imposed requirement that both parties give race-neutral explanation for exercise of peremptory challenge, even though parties did not object to adverse party's peremptory challenge. D's proffered race-neutral justification for peremptory strike of sole African American prospective juror was that juror had previously served on criminal jury, had voted for conviction, & had been frustrated by that jury's inability to reach verdict. Ct. held that defense counsel presented sufficiently clear & reasonably specific explanation of counsel's legitimate reasons for exercising peremptory challenge. Counsel's explanation overcomes great deference given to Tr. Ct.'s fact finding. In so holding, Ct. cited decisions from other states which have found prior jury service to be sufficiently race-neutral explanation to overcome prima facie showing of racial discrimination under Batson v. Kentucky, 476 U.S. 79 (1986). Held, transfer granted; opinion of Ct. App. at 638 N.E.2d 1319 vacated; Tr. Ct. reversed. **Note:** See Williams, reviewed in September Defender, where Ct. held that in future, Tr. Ct.s. may not sua sponte require each side to present race-neutral justification for each of its peremptory challenges absent extraordinary circumstances.

TITLE: Dora v. State
INDEX NO.: D.9.d.4.
CITE: (1st Dist., 2-12-03), Ind. App., 783 N.E.2d 322
SUBJECT: Peremptory strike - violation of local rules, not abuse of discretion
HOLDING: Tr. Ct. did not abuse its discretion in permitting State to exercise its second peremptory strike on potential juror that it had originally passed up. Tr. Ct. had local rules in place that stated once party had made its peremptory strikes from a panel, they could not go back & strike them. State struck juror 4 & defense counsel struck juror 6. Ct. excused those two individuals & as it began to fill those two vacancies, State asked to approach bench. Prosecutor explained that because she had written down jurors' names incorrectly, she inadvertently struck juror 4 when her intention was to strike juror 5. Ct. allowed State to exercise strike, over defense counsel's objection. While this was against local rules, these local procedures were instructions that Ct. presumably prepared for purpose of conducting orderly jury selection process by preventing routine practice of jumping back to prior panels in striking process. A Ct.'s procedures are not necessarily inflexible & without exception; rather, whole process is subject to reasonable regulation by Ct. Further, D's argument that belated strike should not have been allowed because State then knew that juror 5 was acceptable or even desirable to defense, while not without merit, does not conclusively establish prejudice or otherwise rise to level of abuse of discretion. Held, judgment affirmed.

TITLE: McBrady v. State
INDEX NO.: D.9.d.4.
CITE: (2/20/84), Ind., 459 N.E.2d 719
SUBJECT: Voir dire - peremptory challenges; time of exercise
HOLDING: Tr. Ct. did not err in denying D use of 2 remaining peremptory challenges where D had previously passed juror, as had state, without exercising peremptory challenge. Belated challenges are impermissible under local Ct. rule. Right to challenge peremptorily is subject to reasonable regulation by Tr. Ct. Marsh, 396 N.E.2d 883. Here, D contends his failure to exercise challenge at proper time stemmed from misunderstanding between him & his attorney. Ct. rejects contention. Held, no error.

RELATED CASES: Wise, App., 763 N.E.2d 472 (Tr. Ct. did not abuse its discretion in denying D's late application to exercise peremptory challenge on juror after he had already been accepted); Fox, App., 717 N.E.2d 957 (Tr. Ct.'s limiting peremptory strikes to before juror has been empaneled was not unreasonable even when D discovered juror's relationship with State's witness after juror was empaneled).

TITLE: People v. Richie
INDEX NO.: D.9.d.4.
CITE: 217 AD.2d 84; 635 N.Y.S.2d 263 (N.Y. 1995)
SUBJECT: Peremptory Strikes - Pretextual Explanations; 5-part Inquiry
HOLDING: New York Supreme Court sets out 5-part test for determining whether facially neutral explanations for peremptory strikes are pretextual. Under Batson v. Kentucky, 476 U.S. 79 (1986), once opponent of peremptory strike makes out prima facie case of discrimination by establishing that strikes were used to strike minority group members, proponent must offer explanation which is neutral as to basis on which discrimination is claimed. At this point, explanation need only be facially neutral, and need not be persuasive or even plausible. Purkett v. Elem, 115 S.Ct. 1769 (1995). Then, in the third step, opponent bears burden of proving purposeful discrimination. It is at this stage that opponent may allege that explanation is pretextual, and court must make determination. Inquiry includes following factors: (1) whether reason proffered relates at all to facts of case; (2) extent to which party exercising strike actually questioned prospective juror; (3) whether particular questions were asked of only one group of jurors, and not of others; (4) whether particular reason was applied to only one group of jurors and not to others; and (5) whether reason proffered was based upon “hard data” or was purely intuitive.

TITLE: Pfister v. State
INDEX NO.: D.9.d.4.
CITE: (5th Dist., 5-30-95), Ind. App., 650 N.E.2d 1198
SUBJECT: Denial of right to peremptory challenge - prejudicial error
HOLDING: Tr. Ct. wrongfully restricted D's statutory right to exercise peremptory challenges. After questioning juror, defense counsel approached bench & attempted to remove juror because he had been on school board, "was very curt with his answers," & "didn't want to look the D...[or attorney] directly in the eye." Prosecution did not object to or challenge counsel's attempted removal of juror. Tr. Ct. denied peremptory challenge for failure to show "some sort of conjunction to this case," despite fact that D's explanation included no implications of race or gender. Although there is no constitutional right to exercise peremptory challenges in Ind., Ind. Code 35-37-1-3(c) granted D five peremptory challenges. Tr. Ct.'s voir dire order wrongfully placed burden on D to justify every exercise of his peremptory challenges, regardless of whether prosecution raised race or gender-based objection. Ct. disagreed with State's argument that D was not prejudiced from Tr. Ct.'s wrongful denial of his peremptory challenge. Essential nature of peremptory challenge is that it be exercised without reason stated, without inquiry & without being subject to Ct.'s control. Currin v. State, 638 N.E.2d 1319; J.E.B. v. Alabama, 114 S. Ct 1419. Here, D was denied "an important tool with which he may assure that he is tried before a fair & impartial jury." Held, conviction reversed.

TITLE: Phillips v. State
INDEX NO.: D.9.d.4.
CITE: (1st Dist. 5-24-04), Ind. App., 809 N.E.2d 335
SUBJECT: Voir dire - erroneous restriction on exercise of peremptory challenges
HOLDING: A Tr. Ct. may impose reasonable limitations on the exercise of peremptory challenges so long as neither party is required to strike or accept prospective jurors without having had opportunity to consider other party's voir dire. Fox v. State, 717 N.E.2d 957 (Ind. Ct. App. 1999). Here, at conclusion of D's voir dire, Tr. Ct. erred by requiring D to either challenge or accept jury as then seated before State conducted voir dire upon veniremen selected to replace those excused by D. Even though D "passed" the jury after seating three veniremen who replaced those he peremptorily excused, State had not yet voir dired the newly-seated veniremen, & D had the right to listen to State's voir dire before exercising his peremptory challenges. Held, convictions reversed & remanded for new trial.

TITLE: Rivera v. Illinois
INDEX NO.: D.9.d.4.
CITE: (03-31-09), U.S., 556 U.S. 148, 129 S.Ct. 1446
SUBJECT: State judges' erroneous denials of peremptory strikes do not violate federal Constitution
HOLDING: In the absence of a showing that a juror was biased or was challengeable for cause, a state judge's failure to give a D all the peremptories provided by state law "is not a matter of federal constitutional concern." Thus, states can decide for themselves whether this type of mistake is a "structural" error or whether it requires automatic reversal. Here, trial judge seated a juror who was the target of a defense peremptory challenge but who could not have been removed for cause. The judge was concerned that D's peremptory challenge was discriminatory. Illinois Supreme Court found that trial judge erroneously refused to give effect to D's peremptory challenge but applied harmless-error analysis and affirmed Rivera's conviction. It is well established that in the reverse situation, when a juror is discriminatorily struck who should have been seated, there is no "harmless error" analysis and the error is reversible per se.

U.S. Supreme Court unanimously held that, despite the long history of peremptory challenges' role in ensuring the fairness of jury trials, peremptory challenges are not an indispensable feature of the fair jury trial guaranteed by the Sixth and Fourteenth Amendments. "Just as state law controls the existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge." D got a fair trial and was not entitled to reversal just because his peremptory challenge was erroneously denied. Held, judgment affirmed.

TITLE: Williams v. State
INDEX NO.: D.9.d.4.
CITE: (8/7/96), Ind., 669 N.E.2d 1372
SUBJECT: Denial of D's peremptory challenges - sufficiency of race neutral explanations
HOLDING: Tr. Ct. did not abuse discretion in denying D's exercise of peremptory challenges to 4 white jurors. Unless discriminatory intent is inherent in D's explanation, reason offered will be deemed race neutral. Hernandez v. New York, 500 U. S. 352, 111 S.Ct. 1859. Before Ct. will find that Tr. Ct. erred in rejecting peremptory challenge, D must show that counsel's neutral explanation was sufficiently clear & reasonably specific explanation of counsel's legitimate reasons for exercising challenge that it overcomes great deference due to Tr. Ct.'s fact finding. Id. With respect to 2 jurors, Ct. stated counsel's reliance on his "impressions" that juror was unable to comprehend & that other juror was not being honest without being able to point to any answer or act of prospective juror does not meet standard of a "clear & reasonably specific explanation." With respect to 3rd juror, counsel challenged juror because of her failure to raise hand in response to question. Ct. stated failure to raise one's hand in response to such question without more is neither sufficient to cast doubt on juror's ability to understand presumption of innocence nor to overcome great deference due to Tr. Ct.'s findings. Finally, D failed to give sufficiently clear & reasonably specific explanation concerning peremptory challenge of 4th juror where counsel claim he believed that juror failed to understand D's right not to testify which was not supported by any answers given by juror. Held, no reversible error.

RELATED CASES: Pfister, App., 650 N.E.2d 1198 (reversible error in denying peremptory challenge where counsel's stated reasons for removing juror were that juror had been on school board, "was very curt with his answers & "didn't want to look D or attorney directly in eye.")

D. TRIAL

D.9. Jury trial

D.9.d.5. Discriminatory use of peremptory challenges (see also K.11.f.)

TITLE: Addison v. State
INDEX NO.: D.9.d.5.
CITE: (02-22-12), 962 N.E.2d 1202 (Ind. 2012)
SUBJECT: Batson - raising pretext argument for first time on appeal after failing to dispute State's race-neutral explanation at trial
HOLDING: D's race-based Batson claim may be reviewed on appeal despite failing at trial to rebut the State's proffered race-neutral reason for striking a black venireperson. After the State offers race-neutral justification for peremptory strike, Tr. Ct. has duty to determine whether D has proved purposeful discrimination. See Miller-El v. Dretke, 545 U.S. 231 (2005). Batson requires trial judge to assess the plausibility of State's proffered reason for striking, considering all the circumstances that bear upon the strike, including an examination of the strikes of other jurors. Id. At this stage, D may offer additional evidence to demonstrate that the proffered justification for the strike was pretextual. If D fails to make any substantive rebuttal argument in response to State's facially race-neutral reason for removal, Court will address Batson claim under fundamental error doctrine, conducting side-by-side juror comparison even though no such comparison was made to Tr. Ct.

Here, D intended to use the insanity defense in his murder trial. During voir dire, D made a timely Batson objection to State's use of its peremptory challenges to remove venireperson Turner, who was one of only three African Americans on the panel. State explained that it exercised its peremptory strike of Turner because, according to State, Turner said he would only rely on the doctors' testimony regarding D's sanity when deciding the case. In response, D essentially complained that he did not think the State's explanation was race neutral. But he failed to make any substantive rebuttal argument in response to State's facially race-neutral reason for the removal. Instead, for first time on appeal, D argued that other nonblack jurors offered similar testimony as Turner but were not removed.

Using fundamental error doctrine, Court found that the State: 1) failed to strike non-African American venirepersons who gave answers "strikingly similar" to those given by Turner; 2) failed to engage Turner in any meaningful voir dire examination on the issue which State then used as its explanation to strike; and 3) mischaracterized Turner's statements that he would only follow what the doctors said on the question of the insanity defense. "[The] mischaracterization of Turner's voir dire testimony is troubling and undermines the State's proffered race-neutral reason for the strike." Taking these facts collectively, Court concluded that State's proffered explanation for striking Turner was a mere pretext based on race, making a fair trial impossible. Held, transfer granted, Court of Appeals' memorandum decision summarily affirmed in part and vacated on this issue, reversed and remanded for new trial.

RELATED CASES: Whiting, 969 N.E.2d 24 (Ind. 2012) (D's claim that Tr. Ct. erred in not striking prospective juror for cause was not reviewable on direct appeal as fundamental error; allowing such review would weaken requirement to exhaust peremptory challenges; D could also later raise issue in IAC claim).

TITLE: Batson v. Kentucky
INDEX NO.: D.9.d.5.
CITE: 476 U.S. 79 (1986)
SUBJECT: Discriminatory use of peremptory challenges
HOLDING: Purposeful racial discrimination in selection of jury violates D's right to equal protection. D may establish a prima facie case of purposeful discrimination in selection of jury solely on basis of prosecutor's exercise of peremptory challenge at D's trial. Case overrules Swain v. AL (1965), 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 and implicitly overrules Hobson, 471 N.E.2d 281 to extent those cases require showing that prosecutor in case after case used peremptories to exclude blacks with result that no blacks ever served on petit juries. To establish *prima facie* case, D must show that he/she is member of "cognizable racial group" and that prosecutor has exercised peremptory challenges to remove members of D's race. Tr. Ct. in deciding whether D has raised inference of purposeful discrimination should consider all relevant circumstances including any pattern of strikes against blacks as well as prosecutor's statements and questions during voir dire. Once D makes *prima facie* showing, burden shifts to state to come forward with neutral explanation for excluding black jurors. Explanation need not rise to level justifying exercise of challenge for cause. However, explanation that prosecutor believes jurors would be partial to D because of their shared race or explanation affirming prosecutor's good faith in individual selections will not rebut D's *prima facie* case. White, Marshall & O'Connor, concur with separate opinions; Stevens, joined by Brennan, concurs; Burger, joined by Rehnquist, dissents.

RELATED CASES: Blackmon, 47 N.E.3d 1225 (Ind. Ct. App. 2015) (In Batson challenge, Tr. Ct. wasn't required to explicitly find that prosecutor's race-neutral explanation was credible, even though his other explanation raised inference of discriminatory intent, because he would have struck juror based on the race-neutral explanation alone); Griffith v. KY (1987), 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (Batson retroactive to all cases not yet final, see card at G.6.e); Allen v. Hardy (1986), 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (Batson not retroactive to cases on collateral review).

TITLE: Bigsbee v. State
INDEX NO.: D.9.d.5.
CITE: (10/2/2012), 975 N.E.2d 415 (Ind. Ct. App. 2012)
SUBJECT: Jury selection - Batson does not apply to juror age
HOLDING: It is well-settled that age is not an impermissible basis for using a peremptory challenge. Price v. State, 725 N.E.2d 82 (Ind. 2000). Here, State struck an African-American man and an African-American woman--two of four African-Americans--from the venire panel in a dealing in cocaine prosecution. The State struck the man from the panel because he seemed confused and to be asleep at one point, and struck the woman because she was eighteen years old and did not think there was a drug problem in the area. State noted it had also struck two Caucasian members of the panel due to their relatively young ages. In response to prosecutor's explanations for striking the potential jurors, D did not elaborate upon his claim, but instead argued that age is also an impermissible basis for striking potential jurors. In light of State's race-neutral explanations and D's failure to support his claim of purposeful racial bias, Court could not conclude that Tr. Ct. clearly erred in overruling D's Batson objection. Held, judgment affirmed.

TITLE: Brown v. State

INDEX NO.: D.9.d.5.

CITE: 733 So.2d 1128 (Fla. Dist. Ct. App. 1999)

SUBJECT: Black Juror's Statement of Belief that some Police Disproportionately Target Minorities Does Not Show Bias Against All Police

HOLDING: Black juror's statement, during voir dire, that he believed that some but not all police are prejudiced was not a valid reason for state to exercise peremptory challenge to keep him off jury. Court commented that emergence of facts supporting perception of some minority groups that police disproportionately target them requires trial judges to be careful in upholding peremptory challenges based on group bias against police. Court further wrote that subjecting black jurors to peremptory strikes merely because they share the perception that they are disproportionately targeted by police for traffic stops and arrests would cause this explanation to lose its character as race neutral and may constitute singling jurors out for special questioning in order to evoke a certain response.

TITLE: Cartwright v. State
INDEX NO.: D.9.d.5.
CITE: (02-22-12), 962 N.E.2d 1217 (Ind. 2012)
SUBJECT: Batson - claim of discriminatory use of peremptory challenge
HOLDING: Purposeful racial discrimination in jury selection violates a D's right to equal protection because it denies him the protection that a trial by jury is intended to secure. The exclusion of even a sole prospective juror based on race, ethnicity, or gender violates the Fourteenth Amendment's Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79, 86 (1986); Snyder v. Louisiana, 552 U.S. 472 (2008). When a party raises a Batson challenge, Tr. Ct. must undertake a three-step test. First, it must determine if there is a *prima facie* showing that a peremptory challenge was exercised on the basis of race.

Second, if party shows discrimination, the burden is on the party exercising the peremptory challenge to present a race-neutral explanation for striking the juror. Third, if a race-neutral explanation is proffered, Tr. Ct. must determine if the challenger has carried its burden of proving purposeful discrimination. Id. But Snyder does not require Tr. Ct. to explicitly state its reasons for deciding a Batson challenge. See, e.g., Stenhouse v. Hobbs, 631 F.3d 888, 893 (8th Cir. 2011).

Here, during voir dire, State used a peremptory challenge to strike Bard, the only African American from the jury panel. D was an African American male. The State struck Bard because he said he had health issues, did not want to serve on the jury, and is not a good listener. Bard also answered yes to the question of whether he or an immediate family member had been charged with or convicted of a crime. Although Tr. Ct. incorrectly found no *prima facie* case of discrimination, State provided race-neutral reasons for the strikes on the record. Moreover, examination of record showed that non-black venire-persons with problems like Bard's were also dismissed from the jury. D failed to carry his burden of showing that State's race-neutral reasons for striking Bard were pretextual. Held, transfer granted, Court of Appeals' opinion at 950 N.E.2d 807 vacated, convictions affirmed.

RELATED CASES: Villaruel, 52 N.E.3d 834 (Ind. Ct. App. 2016) (Tr. Ct. erred by deciding no Batson analysis was necessary because the prospective juror was Hispanic); Blackmon, (Ind. Ct. App. 2015) (In Batson challenge, Tr. Ct. wasn't required to explicitly find that prosecutor's race-neutral explanation was credible, even though his other explanation raised inference of discriminatory intent, because he would have struck juror based on the race-neutral explanation alone); Thompson, 966 N.E.2d 112 (Ind. Ct. App. 2012) (no Batson violation in view of the entirety of the trial record and in light of the issues presented at trial; Tr. Ct. *sua sponte* expressed sensitivity to Batson-related issues and other jurors who were not African-American were struck from jury for similar reasons as the two African-American jurors).

TITLE: Collier v. State
INDEX NO.: D.9.d.5.
CITE: (12-28-11), 959 N.E.2d 326 (Ind. Ct. App. 2011)
SUBJECT: Tr. Ct. abused discretion in finding Batson violations yet allowing a trial
HOLDING: Tr. Ct. erred in letting case go to trial after finding D proved State's use of peremptory challenges on three of the four African-Americans was racially discriminatory yet let the trial proceed because the jury could be "fair enough." D was convicted of class D felony resisting law enforcement for fleeing police. During jury selection, the deputy prosecutor used peremptory challenges on three of the four African Americans on the panel. D alleged the challenges were racially discriminatory, and the prosecutor tried to rebut the claim with race-neutral explanations, including his claim that: 1) one of the panel members said he/she had been erroneously charged with a crime, 2) another panel member had two family members convicted of criminal offenses, and 3) when asked why someone might flee the police, the third African-American panel member said it might be related to prior intimidation by police. After hearing arguments, Tr. Ct. told D, "you have made your case . . . but I am going to overrule the motion for the challenge. I think we have a 'fair enough jury [so] we can go forward [with the trial]."

Generally, if the State's response to a challenge under Batson v. Kentucky, 476 U.S. 79 (1986), is facially based on something other than race, it is deemed race-neutral. Forrest v. State, 757 N.E.2d 1003, 1004 (Ind. 2001). "However, as the United States Supreme Court observed in Miller-El v. Dretke, 545 U.S. 231, 240 (2005), that some 'stated reasons are false . . . sometimes a court may not be sure unless it looks beyond the case at hand. . . . Hence, a D may rely on >all relevant circumstances to raise an inference of purposeful discrimination.' The Tr. Ct. must decide whether the D, as the opponent of the strike, has proven purposeful racial discrimination. Forrest, 757 N.E.2d at 1004." A Tr. Ct.'s decision about whether a peremptory challenge was discriminatory is given "great deference" on appeal and will be set aside only if clearly erroneous. Killebrew v. State, 925 N.E.2d 399, 401 (Ind. Ct. App. 2010).

Here, D made a *prima facie* showing of discrimination based on race with the three African-American prospective jurors. The deputy prosecutor explained his peremptory strikes. Batson, therefore, required Tr. Ct. to decide whether D had carried the burden of proving purposeful discrimination. . . . "[T]he Tr. Ct. expressed both skepticism and concern about the reasons that the State proffered to explain the peremptory strikes. Thereafter, it determined that, based on the deputy prosecutor's explanation, D had 'made [his] case' and established purposeful discrimination by the State. Tr. Ct. erred in letting the matter go to trial in light of its initial finding that D had met his burden under Batson. Held, judgment reversed.

RELATED CASES: Robertson, 9 N.E.3d 765 (Ind. Ct. App. 2014) (State's use of peremptory challenge on only African-American in venire established prima facie case of racial discrimination).

TITLE: Commonwealth v. Tourscher
INDEX NO.: D.9.d.5.
CITE: 453 Pa. Sup. 1; 682 A.2d 1275 (Pa. Super. Ct. 1996)
SUBJECT: Batson -- Gender-Based Strikes
HOLDING: Prosecutor's use of peremptory strikes to remove women, for stated purpose of providing "a fair and impartial jury" for male D accused of domestic violence, violated the D's equal protection rights. Despite "apparently noble" motives which may have served the D's interests, the strikes were based on gender stereotypes and violate the mandate of Batson and J.E.B.

TITLE: Currin v. State
INDEX NO.: D.9.d.5.
CITE: (8-7-96), Ind., 669 N.E.2d 976
SUBJECT: D's peremptory challenge legitimate under Batson
HOLDING: Failure to grant D's peremptory challenge to prospective juror constituted reversible error. During voir dire, Tr. Ct. imposed requirement that both parties give race-neutral explanation for exercise of peremptory challenge, even though parties did not object to adverse party's peremptory challenge. D's proffered race-neutral justification for peremptory strike of sole African American prospective juror was that juror had previously served on criminal jury, had voted for conviction, & had been frustrated by that jury's inability to reach verdict. Ct. held that defense counsel presented sufficiently clear & reasonably specific explanation of counsel's legitimate reasons for exercising peremptory challenge. Counsel's explanation overcomes great deference given to Tr. Ct.'s fact finding. In so holding, Ct. cited decisions from other states which have found prior jury service to be sufficiently race-neutral explanation to overcome prima facie showing of racial discrimination under Batson v. Kentucky, 476 U.S. 79 (1986). Held, transfer granted; opinion of Ct. App. at 638 N.E.2d 1319 vacated; Tr. Ct. reversed. **Note**: See Williams, reviewed in September Defender, where Ct. held that in future, Tr. Ct.'s may not sua sponte require each side to present race-neutral justification for each of its peremptory challenges absent extraordinary circumstances.

TITLE: Davis v. Ayala
INDEX NO.: D.9.d.5
CITE: (6/18/2015), 135 S.Ct. 2187 (2015)
SUBJECT: Excluding lawyer from part of Batson hearing was harmless error
HOLDING: Any constitutional error that may have occurred by excluding D's attorney from part of a Batson hearing was harmless.

In the course of trying to rob a San Diego auto shop, D killed three people. During voir dire, he raised Batson challenges to seven of the State's peremptory strikes. The Tr. Ct. let the State offer its race-neutral explanations ex parte, accepting the State's claim that letting defense counsel participate in the Batson hearing would divulge the State's trial strategy. On direct review of D's three murder convictions, the California Supreme Court ruled the ex parte procedure was erroneous yet harmless. On habeas review, the Ninth Circuit reversed.

The California Supreme Court's determination that the error was harmless was an "adjudication on the merits," so the highly deferential standard for habeas actions applies here. See Harrington v. Richter, 562 U.S. 86, 103 (2011). D must show that the state court's rejection of his claim: (1) was contrary to or involved an unreasonable application of clearly established federal law, or (2) was based on an unreasonable determination of the facts. Similarly, he must show "actual prejudice," Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), where relief is proper only if a federal court has grave doubts about whether an error involving federal law had a "substantial and injurious effect or influence in determining the jury's verdict." O'Neal v. McAninch, 513 U.S. 432, 436 (1995).

D has not shown actual prejudice from the ex parte procedure. The record adequately supports the State's race-neutral explanations. D has not shown how the absence of his attorney during the Batson hearing affected the Tr. Ct.'s rulings on the State's peremptory strikes. Held, cert. granted, opinion of Ninth Circuit at 756 F.3d 656 reversed, and matter remanded. Alito, J., joined by Roberts, C.J., and Scalia, Kennedy, and Thomas, JJ; Sotomayor dissenting, joined by Ginsburg, Breyer, and Kagan, JJ.

TITLE: Flowers v. Mississippi
INDEX NO.: D.9.d.5.
CITE: (6/21/2019), 139 S. Ct. 2228 (U.S. S. Ct. 2019)
SUBJECT: Batson violation required reversal
HOLDING: Considering all relevant facts and circumstances taken together, trial court at Defendant's sixth trial for murder committed clear error in concluding the State's peremptory strikes of black prospective jurors were not motivated in substantial part by discriminatory intent. Defendant's first three trials had been reversed because of prosecutorial misconduct and a Batson violation. The fourth and fifth trials ended in mistrials. In the sixth trial (at issue here), the State struck five of the six black prospective jurors. On appeal, Flowers argued that the State again violated Batson in exercising peremptory strikes against black prospective jurors. In a divided 5-to-4 decision, the Mississippi Supreme Court affirmed the conviction.

U.S. Supreme Court in a 7-2 opinion authored by Justice Kavanaugh found there were four critical facts that warranted reversal. First, the Court looked at all the six trials combined and analyzed the State's peremptory challenges. It found the State struck 41 of the 42 black prospective jurors. "The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury." Second, the Court looked at the sixth trial in isolation and found the State exercised peremptory strikes against 5 of the 6 black prospective jurors. Third, the Court found that at the sixth trial, the State's questioning of black and white prospective jurors was dramatically disproportionate. Fourth, at the sixth trial the State then struck C.W., a black prospective juror, who was similarly situated to white prospective jurors who were not struck by the State. Without finding that any one of the four facts standing alone is sufficient to require reversal, the Court limited its holding to the fourth fact. The trial court erred in finding the State's peremptory strike of C.W. was not motivated in substantial part by discriminatory intent. Held, judgment and death sentence reversed and remanded. Alito, J., CONCURRING, emphasized that Defendant's case was "highly unusual" in proceedings marked by racial discrimination and misconduct. Thomas, J., joined in part by Gorsuch, J., DISSENTING, argued that the Supreme Court should never have agreed to review Defendant's case in the first place. Moreover, prosecutors had good race-neutral reasons for striking the five black jurors at Defendant's final trial.

TITLE: Foster v. Chatman
INDEX NO.: D.9.d.5.
CITE: (5/23/2016), 136 S.Ct. 1737 (U.S. S. Ct. 2016)
SUBJECT: Batson -- Evidence of Purposeful Discrimination
HOLDING: Where prosecutor's "race neutral" reasons for striking, two Black jurors were either contradicted by the record or applied equally to White jurors accepted for service, and where the prosecutor's files show that the race of Black jurors was highlighted, the five eligible Black jurors were first on the prosecutor's list of six "definite Nos," and a note identified a Black juror who would be "okay" if they "had to" pick a Black juror, the petitioner proved purposeful discrimination sufficient to require reversal under Batson v. Kentucky. The petitioner was convicted and sentenced to death by a jury with no Black members. He had interposed a Batson challenge after jury selection and the state supreme court affirmed on direct appeal. He renewed the challenge in a state habeas proceeding, and the state habeas court rejected the claim on res judicata grounds, and the state supreme court refused to accept review of the claim. Before turning to the merits, the Court determined that they had jurisdiction to review the claim, because in order to make its res judicata ruling, the state court had to have evaluated the Batson claim, applying federal constitutional precedent. As to the merits, the Court found that the record contradicted the prosecutor's "race neutral" explanations for striking the Black jurors, some of which had changed over the years. In some cases the record contradicted facts *cited* by the prosecutor, and in other cases, the record showed that the reasons applied equally to white jurors who were accepted for service. In addition, the prosecutor's own files, obtained through a Freedom of Information Act request, showed the extent to which the race of the Black jurors was highlighted and made the subject of evaluations that they were all "definite Nos." Held, reversed and remanded for new trial. Alito, J., concurs in result, and Thomas, J., dissents.

TITLE: Harrington v. State
INDEX NO.: D.9.d.5.
CITE: (10-3-01), Ind. App., 755 N.E.2d 1176
SUBJECT: Peremptory challenge - proper where State left other African Americans on panel
HOLDING: Although race-neutral explanation was questionable for juror strike, there was no purposeful discrimination in State's use of peremptory strike because two African American jurors remained on panel. After State gives non-discriminatory reason for striking juror, D must then show that State committed purposeful race discrimination. McCants v. State, 686 N.E.2d 1281 (Ind. 1997). Here, State struck potential juror because he was science teacher & they "like to add things up," & because he had previously worked with learning-disabled students which may have made him more sympathetic to D. There was no clear error because State's reasons, when considered cumulatively & in conjunction with actual circumstances surrounding strike, simply did not add up to purposeful race discrimination. Held, judgment affirmed.

RELATED CASES: Williams, App., 818 N.E.2d 970, *aff'd* in part, 838 N.E.2d 1019 (no error in allowing peremptory strike based on prospective juror's dismissive attitude & fact State did not use peremptory challenges on other African Americans).

TITLE: Harris v. Haeberlin

INDEX NO.: D.9.d.5.

CITE: 526 F.3d 903 (6th Cir. 2008)

SUBJECT: Tr. Ct. appropriate forum for new evidence on Batson claim

HOLDING: Sixth Circuit Court of Appeals held a newly discovered videotape depicting prosecutors discussing their use of peremptory juror challenges constitutes the "best evidence" bearing on a claim of discriminatory use of the strikes under Batson v. Kentucky, 476 U.S. 79 (1986), and it is the Tr. Ct., not an appellate court, that should consider that evidence in the first instance as part of the Batson fact-finding process. Applying the standard for federal habeas corpus relief, Court held that a state Supreme Court unreasonably applied federal law established in Batson when it denied relief to the Petitioner without remanding the case for the Tr. Ct. to consider the videotape evidence. Court held that, "In a case such as the one before us . . . where the appellate court has before it new evidence providing direct information about the prosecutor's state of mind, clearly established federal law regarding the Tr. Ct.'s superiority in making credibility determinations in a Batson hearing persuades us that a remand is appropriate." Court pointed to Hernandez v. New York, 500 U.S. 352 (1991), in which a plurality of the U.S. Supreme Court explained that an appellate court should grant "[d]eference to Tr. Ct. findings on the issue of discriminatory intent" because "evaluation of a prosecutor's state of mind based on demeanor and credibility lies 'peculiarly with a trial judge's province.'"

TITLE: Hernandez v. New York
INDEX NO.: D.9.d.5.
CITE: 500 U.S. 352 (1991)
SUBJECT: Prosecutor's explanation for peremptory strike
HOLDING: Prosecutor is prohibited from using peremptory challenges in discriminatory manner. Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. In order to make Baston showing, D must make *prima facie* showing that state used strike based on race. Id. Burden then shifts to prosecutor to articulate race-neutral explanation for strike. Id. Tr. Ct. must determine whether D has carried burden of proving purposeful discrimination. Id.

Here, state struck two Latino prospective jurors. Prosecutor alleged that he was uncertain whether prospective jurors were Latinos and that he was uncertain whether these bilingual prospective jurors would accept interpreter as final arbiter of what was said by Spanish speaking witnesses.

Prosecutor must offer "neutral" explanation for strike, which means explanation based upon something other than race. Unless discriminatory intent is inherent in prosecutor's explanation, reason offered will be deemed race neutral. Challenges here rested neither on intention to exclude Latinos or bilinguals, nor on stereotypical assumptions about Latinos or bilinguals. Prosecutor's articulated basis for challenges divided potential jurors into two classes: (1) those whose conduct during voir dire would persuade him they might have difficulty accepting translator's rendition of Spanish testimony and (2) those who gave no reason for such doubt. Each category would include Latinos and non-Latinos. Even though this criterion might result in disproportionate removal of Latino jurors that impact does not establish *per se* violation of Equal Protection Clause. Disparate impact should be given appropriate weight in determining whether prosecutor acted with forbidden intent but is not conclusive. Unless prosecutor adopted criterion with intent of causing impact asserted, impact itself does not violate principle of race-neutrality. Held, articulated reason here was race neutral. Blackmun DISSENTING; Stevens, joined by Marshall, DISSENTING.

RELATED CASES: Villaruel, 52 N.E.3d 834 (Ind. Ct. App. 2016) (Tr. Ct. erred by deciding no Batson analysis was necessary because the prospective juror was Hispanic).

TITLE: Highler v. State
INDEX NO.: D.9.d.5.
CITE: (3rd Dist., 9-15-05), Ind. App., 834 N.E.2d 182, *sum. aff'd* 854 N.E.2d 823
SUBJECT: Batson claim fails for failure to show systematic exclusion
HOLDING: D was not denied a petit jury from a representative cross-section of the community where venire panel only included one black individual who was struck. See Taylor v. Louisiana, 419 U.S. 522 (1975). Jury panels are not required to be a microcosm of a county or a Ct. District. Peoples v. State, 649 N.E.2d 638 (Ind. Ct. App.1995). To show purposeful discrimination, D must show: (1) the excluded group is distinctive in the community; (2) the jury pool representation of this group is not fair & reasonable compared to the numbers of the group in the community; & (3) the under-representation is caused by systematic exclusion. Duren v. Missouri, 439 U.S. 357 (1979). Here, parties agreed that African Americans comprised 17.4% of the Fort Wayne population. D asserted a 15.3% absolute disparity & an 88% comparative disparity between the percentage of African Americans eligible for jury duty in Allen County & those actually present in his venire. However, D provided no evidence to suggest jury pools in the county systematically exclude African-Americans & there is no requirement that a particular group be represented on every jury as long as the system used to choose jurors is impartial & not arbitrary. Azania v. State, 778 N.E.2d 1253 (Ind.2002); Ind. Code 33-28-4-3(e). Azania also came out of Allen County, but the record reveals the jury selection system in the county has been reformed since that trial to comply with Ind. Code 33-28-4-3 through selection from voter registration & BMV records. Thus, D failed to show systematic exclusion under Duren. Held, judgment affirmed; Robb, J., concurring with opinion on separate issue.

RELATED CASES: Bond, 925 N.E.2d 773 (Ind. Ct. App. 2010) (fact that jury venire was all white and not representative of community did not establish a sixth amendment violation without evidence of systematic exclusion; however, court acknowledged that no court has found Batson burden shifting appropriate in Duren venire challenges, but since federal constitution establishes rights that states may expand, Edwards v. State, 902 N.E.2d 821, 829 (Ind. 2009), easing burden for Duren challenge might be worth considering).

TITLE: Jeter v. State
INDEX NO.: D.9.d.5.
CITE: (06-26-08), Ind., 888 N.E.2d 1257
SUBJECT: Voir dire - D's discriminatory use of peremptory strikes
HOLDING: In capital murder prosecution, Tr. Ct. did not err in concluding that D's attempt to peremptorily challenge a prospective juror violated Batson v. Kentucky, 476 U.S. 79 (1986). Batson has been extended to prohibit criminal Ds from engaging in purposeful discrimination on ground of race in the exercise of peremptory challenges. Georgia v. McCollum, 505 U.S. 42 (1992). Here, State made a *prima facie* showing of racial discrimination, as at time of strike D had previously used his first nine peremptory challenges to exclude whites from jury, especially white males. D struck juror number 212 because juror's father had been police officer, his grandfather had been a local attorney and judge, and juror responded "I guess not" when asked if he could think of any murders that were not suitable for the death penalty. Court acknowledged that D's proferred reasons for striking juror were race neutral as a matter of law. However, Tr. Ct. was not bound to believe D's proffered explanation for striking juror was the real motivation behind the challenge. See Miller-El v. Dretke, 545 U.S. 231 (2005). As a consequence of D's previous strikes, of ten seated jurors, none were white males. Also, D's pretrial motion to dismiss death penalty was premised on argument that white male jurors would be detrimental to D receiving a fair trial. Under these circumstances it was not unreasonable or clearly erroneous for Tr. Ct. to conclude that as part of his trial strategy D was intentionally discriminating against jurors, including juror number 212, on basis of race. Held, judgment affirmed.

TITLE: Jones v. State
INDEX NO.: D.9.d.5.
CITE: (2nd Dist., 01-17-07), Ind. App., 859 N.E.2d 1219
SUBJECT: Voir dire - race-neutral reasons for peremptory challenges
HOLDING: During voir dire of robbery prosecution, trial Ct. properly denied D's Batson challenge. Under Batson, once opponent of peremptory strike makes out prima facie case of discrimination by establishing that strikes were used to strike minority group members, proponent must offer race-neutral explanation, & trial Ct. must then decide whether the opponent of the strike has proved purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995). Here, because prosecutor removed the only two African American venire persons from the panel, D established a prima facie case of racial discrimination. Prosecutor explained that first juror was struck because she stated she could not convict someone based on testimony alone. Second juror was struck because of what State felt was an indifferent attitude "regarding temporal justice" on juror's part. In its ruling, trial Ct. stated that State "[gave] a race neutral reason for at least one" of the peremptory strikes. It is unclear whether trial Ct. meant that a race-neutral reason was given for one of the challenges but not the other. Ambiguity notwithstanding, majority of Ct. could not say that trial Ct.'s ruling was clearly erroneous. State gave a separate reason for each of its peremptory challenges, & each of those reasons appeared to be based on something other than race. D offered no argument to trial Ct. as to why State's explanation for striking second juror should be disbelieved & found to be a pretext, masking a discriminatory intent for striking that person. Held, judgment affirmed; Kirsch, C.J., dissenting, noted that trial Ct. utilized an improper standard & failed to determine whether reason for second peremptory challenge was racially neutral. Furthermore, only trial judge, not Ct. App., can determine whether peremptory challenge is racially motivated & whether purposeful discrimination has been shown.

RELATED CASES: Lindsey, 916 N.E.2d 230 (Ind. Ct. App. 2009) (removal of black juror by peremptory challenge does not, by itself, raise inference of racial discrimination; moreover, State's reason for strike was facially race-neutral where prosecutor noted that juror sat stone-faced, seemed uninvolved in process & was using his Blackberry during voir dire); Boney, App., 880 N.E.2d 279 (prosecutor provided race-neutral reason; reviewing court will not infer pretext from prosecutor's failure to strike white jurors for the same reason he struck black jurors).

TITLE: Kesser v. Cambra
INDEX NO.: D.9.d.5.
CITE: 465 F.3d 351 (9th Cir. 2006)
SUBJECT: Peremptories insincere under Batson
HOLDING: The Ninth Circuit U.S. Court of Appeals, en banc, held that a state court's acceptance of a prosecutor's explanations for peremptory strikes of Native American veniremembers was "unreasonable," for purposes of the federal habeas corpus statute. The federal court's conclusion that none of the facially neutral reasons the prosecutor gave for his strikes was sincere kept it from deciding the open question as to how and whether to apply the "mixed motive" analysis to violations of Batson v. Kentucky, 476 U.S. 79 (1986), which the U.S. Supreme Court has applied to other equal protection claims. The habeas petitioners here were convicted of murder in state court. The prosecutor's numerous explanations for the strikes included several references to group bias and stereotypes about Native Americans. State reviewing courts upheld the petitioners' convictions, concluding that the record of the Batson hearing indicated that the prosecutor was primarily motivated by the race-neutral explanations for the strikes. After a panel of the Ninth Circuit affirmed the decision finding that the handling of the prosecutor's good and bad motivations for the strikes did not constitute an "unreasonable application of U.S. Supreme Court equal protection precedent, six of 11 judges en banc held that none of the prosecutor's explanations for his strike of one Native American held water, and that the state appellate court's failure to recognize that the prosecutor's facially neutral explanations were pretextual was unreasonable. Examining each of the facially neutral explanations offered for the strike using a comparative juror analysis similar to that in Miller-El v. Dretke, 545 U.S. 231 (2005), the Court found that the state courts' findings were an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" pursuant to 28 U.S.C. ' 2254(d)(2). One example of a facially neutral explanation given by the prosecutor included that a witness was "pretentious" when she stated that serving on the jury would be a hardship as she was the only worker in her tribal office who could complete a grant request, with the majority concluding that unstruck white jurors had been more boastful in attempts to get off the jury. Although a trial judge may find racial discrimination without finding that all of a party's explanations for a strike are pretextual, a comparative juror analysis based on a record of the voir dire and juror questionnaires in this case "clearly and convincingly refutes each of the prosecutor's nonracial grounds, compelling the conclusion that his actual and only reason for striking [the potential juror] was her race."

TITLE: Miller-El v. Dretke

INDEX NO.: D.9.d.5.

CITE: 545 U.S. 231, 125 S.Ct. 2317; 162 L.Ed. 2d 196 (2005)

SUBJECT: Batson v. Kentucky, jury selection, peremptory strikes

HOLDING: Miller-El was convicted of murder and sentenced to death by a Texas jury. On federal habeas he claimed that the prosecutors had systematically removed black members of the venire in violation of the 14th Amendment and Batson v. Kentucky, 476 U.S. 79 (1986). The District Court denied relief and the 5th Circuit denied a certificate of appealability. In 2003 the U.S. Supreme Court reversed the denial of a certificate of appealability and remanded the case to the 5th Circuit. Miller-El v. Cockrell, 537 U.S. 322 (2003). The 5th Circuit then rejected Miller-El's claim on the merits. The U.S. Supreme Court granted certiorari and reversed, in an opinion which discussed the facts of the case in unusual detail and which was notably critical of both the 5th Circuit and the Texas state courts.

TITLE: Georgia v. McCollum
INDEX NO.: D.9.d.5.
CITE: 505 U.S. 42 (1992)
SUBJECT: Voir dire - Batson strikes; use by criminal D
HOLDING: Equal Protection Clause prohibits criminal Ds from exercising peremptory challenges on basis of race. Ds, who are white, were charged with assaulting black couple. Before trial, state sought ruling that state was entitled to have defense peremptories scrutinized under procedures established in Batson v. KY, (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. Majority uses four-part analysis: (1) whether harm caused by defense use of racially motivated peremptory challenges is same as that addressed in Batson, (2) whether exercise of peremptories by defense counsel is state action, (3) whether prosecutors have standing to challenge it, & (4) whether constitutional rights of criminal Ds preclude extension of Batson to them. Based on precedents, majority answers first 3 questions in affirmative. Finally, Court finds that nothing in Batson procedure infringes rights of criminal D. Peremptory challenges are not constitutionally mandated, but rather are means by which other rights can be protected. Majority writes that it is affront to justice to argue that fair trial includes right to discriminate on basis of race. Sixth Amendment right to counsel is not infringed by requiring racially-neutral explanation for use of peremptories, & if privileged communications are threat ened, *in camera* discussion can be arranged. Right to impartial jury does not require use of race- based peremptory challenges but can be protected by using peremptories to remove individuals who harbor racial prejudice, a much different matter. Rehnquist, J., CONCURS on basis of precedent, although he does not concede that it is correct. Thomas, J., CONCURS, predicting that this decision will lead to elimination of peremptory strikes. O'Connor, J., DISSENTS, arguing that D's action is not state action. Scalia, J., DISSENTS on basis of his disagreement with precedent.

TITLE: Graham v. State

INDEX NO.: D.9.d.5.

CITE: (2nd Dist.; 12-4-00), Ind. App., 738 N.E.2d 1096

SUBJECT: Discriminatory use of peremptory challenges - prima facie showing established; no race neutral reasons

HOLDING: Where D made prima facie showing of racial discrimination by State in exercising its peremptory challenges, Tr. Ct. erred in not allowing State to give race-neutral reasons for its challenges. To prevail in making prima facie showing of racial discrimination in State's use of peremptory challenge, D must show that 1) State's peremptory challenge removed members of cognizable racial group from jury pool & 2) facts & circumstances raise inference that State used peremptory challenge to prevent ceratin potential jury members from becoming part of jury based on their race. After D makes prima facie showing, State must present race-neutral reason for peremptory challenge. Patterson, App., 729 N.E.2d 1035. Here, D met his burden of showing prima facie evidence of discrimination by showing that State had used peremptory strikes against only two African American potential jurors & there was only one other person on panel who was not Caucasian. Also, fact that only two African American potential jurors were struck & D is African American raise inference that potential jurors were struck in effort to prevent them from becoming part of jury panel because of their race.

Furthermore, Tr. Ct. erred in speculating on State's race-neutral reasons for striking jurors. Assuming Tr. Ct. was correct in speculating that first African-American juror was struck because she was concerned about being fair, this reason is not sufficient race-neutral reason in light that there was widespread concern among all of potential jurors regarding fairness & impartiality. Similarly, speculation that second juror was struck because he claimed he was victim in unrelated crime did not suffice as race-neutral reason because juror was neither questioned concerning his feelings about this incident & how incident was resolved. Lastly, Tr. Ct. erred by delaying arguments on peremptory challenges until after jury had been sworn in & dismissed to jury room. Thus, because Ct. is unable to find any race-neutral reasons for strikes, D must be given new trial. Held, judgment reversed

TITLE: Hernandez v. New York
INDEX NO.: D.9.d.5.
CITE: 500 U.S. 352 (1991)
SUBJECT: Prosecutor's explanation for peremptory strike
HOLDING: Prosecutor is prohibited from using peremptory challenges in discriminatory manner.

Batson v. Kentucky, (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69. In order to make Baston showing, D must make prima facie showing that state used strike based on race. Id. Burden then shifts to prosecutor to articulate race-neutral explanation for strike. Id. Tr. Ct. must determine whether D has carried burden of proving purposeful discrimination. Id. Here, state struck two Latino prospective jurors. Prosecutor alleged that he was uncertain whether prospective jurors were Latinos & that he was uncertain whether these bilingual prospective jurors would accept interpreter as final arbiter of what was said by Spanish speaking witnesses. Prosecutor must offer "neutral" explanation for strike which means explanation based upon something other than race. Unless discriminatory intent is inherent in prosecutor's explanation, reason offered will be deemed race neutral. Challenges here rested neither on intention to exclude Latinos or bilinguals, nor on stereotypical assumptions about Latinos or bilinguals. Prosecutor's articulated basis for challenges divided potential jurors into two classes: those whose conduct during voir dire would persuade him they might have difficulty accepting translator's rendition of Spanish testimony & those who gave no reason for such doubt. Each category would include Latinos & non-Latinos. Even though this criterion might result in disproportionate removal of Latino jurors that impact does not establish per se violation of Equal Protection Clause. Disparate impact should be given appropriate weight in determining whether prosecutor acted with forbidden intent but is not conclusive. Unless prosecutor adopted criterion with intent of causing impact asserted, impact itself does not violate principle of race-neutrality. Held, articulated reason here was race neutral. Blackmun DISSENTING; Stevens, joined by Marshall, DISSENTING.

TITLE: Hernandez v. New York
INDEX NO.: D.9.d.5.
CITE: 500 U.S. 352 (1991)
SUBJECT: Tr. Ct. findings in Batson
HOLDING: Once prosecutor offers race neutral basis for exercise of peremptory challenges, "Tr. Ct. then [has] the duty to determine if the D has established purposeful discrimination." Batson v. Kentucky, (1986), 476 U.S. 79, 106 S.Ct. 1712, 1723-4, 90 L.Ed.2d 69. Here, prosecutor struck two Latino jurors allegedly over concerns regarding whether they would accept interpreter as final arbiter of Spanish speaking witnesses' testimony. Court may consider basis for peremptory challenge that results in disproportionate exclusion of members of certain race as evidence that stated reason is pretext for race discrimination. Had defense suggested that Spanish-speaking jurors advise court in discreet way of problems with translation during trial, which was not done here, & prosecutor persisted in excusing Latinos, this fact could also be considered in determining whether to accept prosecutor's explanation. Reviewing courts must give deference to Tr. Ct. findings on issue of discriminatory intent because finding "largely turn[s] on evaluation of credibility." Batson, *supra*, at 98, n.21, 1724. In absence of "exceptional circumstances," reviewing court should defer to state court factual findings even when those findings relate to constitutional issue. Findings here not "clearly erroneous." Apart from prosecutor's demeanor, which reviewing court could not review, prosecutor defended actions without being asked to do so by judge, that he did not know which jurors were Latinos & that Latino ethnicity of victims & prosecution witnesses tended to undercut motive to exclude Latinos. Fact that prosecutor had subjective reason which had disproportionate impact on Latinos does not leave court with "definite & firm conviction that a mistake has been committed." [Citation omitted.] Held, Tr. Ct. did not err in denying Batson challenge. Blackmun, DISSENTING; Stevens, joined by Marshall, DISSENTING.

TITLE: Highler v. State
INDEX NO.: D.9.d.5.
CITE: (10-04-06), Ind., 854 N.E.2d 823
SUBJECT: Batson applies to religious affiliation but not religious occupation
HOLDING: The use of a peremptory challenge to strike a juror because of the juror's religious affiliation violates the juror's right to equal protection of the laws. However, a prosecutor may strike a juror due to his religious occupation that makes him more sympathetic to Ds generally or his religious beliefs that prevent the juror from following the law. If the prosecutor cites multiple reasons for striking a potential juror, some of which are permissible and others not, a Batson violation is established. Here, D challenged the State's peremptory strike of the only African American potential juror. The State's reasoning for striking the potential juror was that he was a pastor and pastors were inclined to be lenient and forgiving and that juror's statements in his questionnaire and during voir dire raised questions about his ability to be fair and impartial to the State. Because D never challenged the strike on the basis of discrimination of religion or occupation, D waived any error. Held, transfer granted, judgment of Tr. Ct. affirmed; Court of Appeals' decision at 834 N.E.2d 182 (Ind. Ct. App. 2005) is vacated on peremptory issue and affirmed on other issues.

TITLE: Holland v. Illinois

INDEX NO.: D.9.d.5.

CITE: 493 U.S. 474 (1990)

SUBJECT: Standing to assert fair cross-section challenge - white D

HOLDING: To establish prima facie case of discriminatory exclusion of petit jurors in violation of equal protection, D "must show that he is a member of a cognizable racial group... & that the prosecutor has exercised peremptory challenges to remove from the venire members of the D's race." Batson v. Kentucky, (1986), 476 U.S. 79, 96, 106 S.Ct. 1712, 90 L.Ed.2d 69. However, such requirement of correlation between group identification of D & group identification of excluded venue members is not prerequisite to bringing 6th Amend. fair cross-section claim. 6th Amend. entitles every D to object to venire not designed to represent fair cross-section of community, whether or not systematically excluded groups are groups to which D belongs. Held, white D has standing to assert 6th Amend. fair cross-section claim for exclusion of African Americans. All justices CONCUR.

TITLE: Holland v. Illinois
INDEX NO.: D.9.d.5.
CITE: 493 U.S. 474 (1990)
SUBJECT: 6th Amend. fair cross-section (FCS) requirement Does not apply to petit jury
HOLDING: FCS requirement does not apply to petit jury. FCS is means of assuring, not a representative jury (which Constitution does not demand), but an impartial one (which it does). FCS requirement assures that in process of selecting petit jury prosecution & D compete on equal basis. Petit jury must be drawn from source fairly representative of community, however, petit jury actually selected need not mirror community/reflect various distinctive groups in population. Here, white D challenged peremptory challenges of only 2 African Americans on venire on basis that D had 6th Amend. right to "be tried by a representative cross-section of community." Held, 6th Amend. does not prohibit state from exercising peremptory challenges to exclude cognizable racial or other groups from petit jury so long as venire itself is drawn from fair cross-section of community. Kennedy, CONCURRING; Marshall, joined by Brennan & Blackmun, DISSENTING. **Note:** D did not raise equal protection claim, see Batson v. Kentucky (card at D.9.d.5).

TITLE: J.E.B. v. Alabama
INDEX NO.: D.9.d.5.
CITE: 511 U.S. 127, 114 S.Ct. 1419 (1994)
SUBJECT: Jury Selection - Batson; gender
HOLDING: Batson prohibition against discriminatory use of peremptory challenges applies to state's use of peremptories based on gender. Petitioner (P) was subject of paternity action, & at hearing, state used 9 of its 10 peremptories to strike male jurors. On appeal, P's argument that Batson should be extended to use of gender-based strikes was rejected by state court. However, majority here disagrees. Majority opinion traces history of exclusion of women from juriess. Under Court's equal protection analysis, upon which Batson was based, gender-based classifications are subject to heightened scrutiny. Proper inquiry is whether gender-based discrimination in jury selection substantially furthers state's legitimate interest in achieving fair & impartial trial. Majority finds that it does not. State argued that striking of males may reasonably have been based on perception that men might be more sympathetic than women to arguments of man in paternity action. Court's response is that it will not accept as defense to gender-based peremptory challenges "the very stereotype the law condemns." Majority rejects concern that its ruling implies elimination of all peremptory challenges. All it means, majority writes, is that gender may not serve as proxy for bias. Effective voir dire should expose bias, which can serve as gender-neutral reason for strike. O'Connor, J., CONCURS, writing that prohibition should be limited to state's use of strikes, because of the imposition on the use of peremptory challenges. In forcing lawyers to articulate the bases for their hunches & intuition about prospective jurors, the Court is rendering peremptories more like challenges for cause. Kennedy, J., CONCURS. Rehnquist, Scalia, & Thomas, JJ. DISSENT, writing that simply allowing both parties to strike jurors they believe will be unfavorable to them is on the whole even-handed, since all groups are equally subject to peremptories. Here, the DISSENT points out, P used peremptories to strike women.

TITLE: Love v. State
INDEX NO.: D.9.d.5.
CITE: (2/25/88), Ind., 519 N.E.2d 563
SUBJECT: Voir dire - peremptory challenges; removal of black jurors
HOLDING: Tr. Ct. is directed to hold hearing on prosecutor's use of peremptory challenges; the only 2 blacks in venire were struck & D, who is black, was tried by all-white jury. D argues that prosecutor's use of peremptory challenges in this manner constituted purposeful discrimination & violated D's equal protection rights. One month after D was tried, U.S. S.Ct. decided Batson v. KY (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (see card at D.9.d.5). In Griffith v. KY (1987), 479 U.S. 314, 107 S.Ct. 708, U.S. S.Ct. held that Batson applied to all cases pending on direct review. Resolution of past cases tried before Batson but appealed under Batson standard has revolved around record. Ind. S. Ct. has affirmed where record does not establish that members of D's race were peremptorily challenged by prosecutor. See, e.g., Weekly, 496 N.E.2d 29 (voir dire not part of record); Hickman, 515 N.E.2d 511 (record did not indicate race of each challenged juror or which party exercised each challenge). Ct. has also affirmed where neutral grounds for challenges were apparent from record. See Phillips, 496 N.E.2d 87. Stamps, 515 N.E.2d 507. Here, prosecutor challenged both blacks on panel, & his questions to them focused on race. These facts point to possibility of purposeful discrimination. As on other occasions when law has changed while direct appeal was pending, Ind. S. Ct. remands to Tr. Ct. for fact-finding hearing in light of new standard. If Tr. Ct. finds purposeful discrimination, it is directed to order new trial; if not, it is to return case to Ind. S. Ct.

RELATED CASES: Holifield, 572 N.E.2d 490 (after using similar post hoc hearing, Ct. finds state showed adequate race neutral reasons for challenges.).

TITLE: McQuay v. State
INDEX NO.: D.9.d.5.
CITE: (2/14/91), Ind., 566 N.E.2d 542
SUBJECT: Discriminatory use of peremptory challenges - Waiver of Batson issue
HOLDING: D claimed Batson violation when prosecutor used his peremptory challenges to exclude 4 of 6 Blacks from jury. Record failed to contain transcript of voir dire proceedings & defense counsel consented to ct. reporter's absence during voir dire. Hence, nothing in record to aid Ct. in its analysis of D's alleged error. Without record of voir dire proceedings, Ct. cannot undertake analysis specified in Batson. Thus, appellant has waived any consideration of this issue. Maxie, 481 N.E.2d 1307. Held, conviction affirmed.

RELATED CASES: Isom, 585 N.E.2d 1347 (no IAC for failure to request mistrial to preserve record for appeal; while motion for mistrial is appropriate means to challenge purposeful exclusion of jurors based on race, timely objection to striking juror adequately preserves issue for review on appeal); Chambers, App., 551 N.E.2d 1154 (Batson claim waived because counsel failed to present court with record sustaining his argument & did not make contemporaneous objection).

TITLE: Miller-El v. Cockrell

INDEX NO.: D.9.d.5.

CITE: 537 U.S. 322 (2003)

SUBJECT: Federal habeas corpus, AEDPA, certificate of appealability, Batson, racial bias, peremptory challenges

HOLDING: At Miller-El's capital murder trial (in Texas), at the conclusion of voir dire, the defense moved to strike the jury, claiming that the State had violated the Equal Protection Clause of the 14th Amendment by using peremptory challenges to exclude African-American jurors. The Tr. Ct. denied the motion under the controlling standard at the time as set forth in Swain v. Alabama, 380 U.S. 202 (1965), and the D was later convicted. While the case was on direct appeal, the U.S. Supreme Court decided Batson v. Kentucky, 476 U.S. 79 (1986), establishing a three-part test for evaluating claims like the D's. The Texas appellate court remanded the case to the Tr. Ct. for new findings in light of Batson.

On remand, the Tr. Ct. admitted all the evidence from the original Swain hearing and additional evidence and testimony from the attorneys in the original trial, but concluded that Miller-El's evidence failed to even establish a prima facie case of racial motivation in the State's use of peremptory challenges (as required by step one of the Batson test). The federal district court denied habeas relief and the 5th Circuit Court of Appeals denied Miller-El a certificate of appealability (COA), concluding that the state court's adjudication was not unreasonable nor resulted in a decision contrary to clearly established federal law.

The U.S. Supreme Court reversed the 5th Circuit's denial of a COA and remanded for further proceedings, noting that the Court of Appeals had mistakenly confused the standard for habeas relief on the merits with the less stringent standard for the issuance of a COA, and holding that a COA should issue when a District Court's decision to deny habeas relief is debatable.

The U.S. Supreme Court also questioned the lower courts' "dismissive and strained interpretation of petitioner's evidence," noting inter alia that African-American venire members were generally asked different questions than white venire members, and that "the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination," *citing* Batson. The Court also noted that the State's use of a peculiar Texas procedure known as a 'jury shuffle' "when a predominate number of African-Americans were seated in the front of the panel ... raise[d] a suspicion that the State sought to exclude African-Americans from the jury."

TITLE: Minniefield v. State
INDEX NO.: D.9.d.5.
CITE: (6/15/89), Ind., 539 N.E.2d 464
SUBJECT: Discriminatory use of peremptory challenges
HOLDING: Fact that evidence would show that victim was racist was not sufficient "neutral explanation" to justify state's use of peremptory challenges to remove blacks from venire. D & co-D were charged with robbing victim at gunpoint. During jury selection, prosecutor used 6 peremptory challenges to strike 1 white & 5 black members of panel, leaving 1 black & 11 white jurors. Before jury was sworn in, D moved for mistrial, on basis of purposeful exclusion of black jurors. Batson v. KY, (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (card at D.9.d.5). Prosecutor stated that reasons for striking would become apparent during trial, & Tr. Ct. reserved judgment. During trial, contents of victim's pockets, which had been taken during robbery, were admitted into evidence. Included was a slip of paper containing 2 racist jokes. Prosecutor then indicated that he had struck blacks from venire because of possible hostility toward victim. Batson, which was adopted in Weekly, 496 N.E.2d 29, set out 3-prong test for determining whether state's use of peremptory challenges denies D equal protection. (See Batson card at D.9.d.5.) Here, all 3 prongs of test were satisfied, & burden shifted to state to provide neutral explanation for exclusion of blacks. Neutral does not mean "justifiable on strategic grounds" or unrelated to "juror's racial identity with the D." It means neutral with regard to struck juror's group identity - here, race-neutral. Race-based use of peremptory challenges is per se violation of equal protection clause & warrants reversal of conviction. DeBruler & Shepard, JJ., DISSENT, arguing that, while race-based, there was neutral explanation based on facts of case & not on racial identity with D.

TITLE: Palmer v. State
INDEX NO.: D.9.d.5.
CITE: (5th Dist., 8-17-95), Ind. App., 654 N.E.2d 844
SUBJECT: Sufficient race-neutral explanation for peremptory challenge
HOLDING: State's explanation concerning peremptory strike of black juror was race-neutral & valid on its face. In response to D's Batson objection, State explained that it was peremptory striking juror because: 1) he was musician, 2) he avoided eye contact with prosecutor, 3) he spoke very softly, 4) he had strong emotional reaction to subject of controlled substances, & 5) prosecutor felt venireman would be disruptive during deliberations. Ct. affirmed finding that D failed to demonstrate purposeful racial discrimination in light of stated reasons for removing juror. State's race-neutral explanation for removal need not be persuasive or even plausible, but only valid on its face. Purkett v. Elem, 514 U.S. 765 (1995). Held, judgment affirmed.

RELATED CASES: Cornell, 139 N.E.3d 1135 (Ind. Ct. App. 2020) (D failed to show prima facie discrimination where one of two Black prospective jurors remained on the panel and State's explanation for the strike was race neutral); Lindsey, 916 N.E.2d 230 (Ind. Ct. App. 2009) (State's reason for strike was facially race-neutral where prosecutor noted that juror sat stone-faced, seemed uninvolved in process & was using his Blackberry during voir dire); McCants, 686 N.E.2d 1281 (facially race-neutral explanation where juror had previously served on criminal panel & voted to acquit & that juror spends her spare time watching soap operas); Chubb, 640 N.E.2d 44 (satisfactory race-neutral explanation for strike based on juror's reluctance to assume credibility of police was any greater than anyone else); Douglas, App., 636 N.E.2d 197 (legitimate race-neutral reason; fact juror's child had been prosecuted & she was uncomfortable with prosecutor's decision to file charges); Taylor, App., 615 N.E.2d 907 (race-neutral reasons where juror admitted she knew informant's family, & prosecutor felt from way juror answered questions that she had some reservations about voting to convict & sitting in judgment of another person); Willoughby, 660 N.E.2d 570 (race neutral explanation where juror had 3 or 4 brothers who have criminal records); Daniel, 582 N.E.2d 364 (non-pretextual where juror claimed D looked familiar); Holifield, 572 N.E.2d 490 (race-neutral where juror's spouse acquainted with reformatory personnel in case involving attack on prison inmate); Nettles, 565 N.E.2d 1064 (valid reason based on juror's perceived bias against state); Nicks, 598 N.E.2d 520; Atkins, App., 561 N.E.2d 797.

TITLE: Phillips v. State
INDEX NO.: D.9.d.5.
CITE: (8/12/86), Ind., 496 N.E.2d 87
SUBJECT: Voir dire - peremptory challenges; removal of black jurors
HOLDING: Ct. rejects D's contention he was denied fair trial when state exercised its peremptory challenges to excuse 3 blacks from jury. Function of peremptory system is to eliminate extremes of partiality/assure parties jurors will decide issues on evidence presented. Merritt, 488 N.E.2d 340. Peremptory challenge is one exercised without reason stated/inquiry/being subject to Tr. Ct.'s control. Hobson, 471 N.E.2d 281. No party is required to explain its reasons for exercising peremptory challenge. Averhart, 470 N.E.2d 666. U.S. S. Ct. in Batson v. KY, (1986), U.S., 406 S.Ct. 1712, 90 L.Ed.2d 69 *overruled* Swain v. AL, (1965), 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 759, to extent Swain required D to prove prosecutor systematically used peremptories to exclude blacks. In order to establish prima facie case of purposeful racial discrimination, D must show: (1) D is member of cognizable racial group; (2) prosecutor has exercised peremptory challenges to remove group's member from D's jury; & (3) facts & circumstances of D's case raise inference that exclusion was based on race. Batson. Once D has made prima facie showing, burden shifts to state to come forward with neutral explanation for challenging black jurors. Prosecutor's explanation need not rise to level of challenge for cause. Tr. Ct. then has duty to determine whether D has established purposeful discrimination. Batson. Here, D is black & 4 of 29 members of venire were black. State used peremptory challenges to strike 3 blacks from jury panel; final jury had one black member. Ct. finds removal of 3 black jurors does not by itself raise inference of racial discrimination & states reasons gleaned from record why prosecutor might have wished to exclude them. Held, D failed to establish purposeful racial discrimination in selection of jury.

TITLE: Powers v. Ohio
INDEX NO.: D.9.d.5.
CITE: 499 U.S. 400 (1991)
SUBJECT: Standing - white Ds
HOLDING: African American potential jurors may not be excluded from jury service in case involving white D on basis of race alone. Batson v. Kentucky, (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 prohibits discriminatory use of peremptory challenges. Baston rule designed to serve multiple ends - not just protection of individual Ds from discrimination in jury selection. Honor/privilege of jury service is significant opportunity to participate in democratic process. Individual juror does not have right to sit on particular jury but does have right not to be excluded on racial grounds. Right of litigant to bring action on behalf of third party recognized if 1) litigant suffered "injury in fact" which gives him/her "sufficiently concrete interest" in outcome; 2) litigant has close relationship to third party, and; 3) some hindrance to third party's ability to protect own interests. Criminal D suffers cognizable injury when peremptory challenge exercised discriminatorily because such practice casts doubt on integrity of judicial process & places fairness of criminal proceeding in doubt. Criminal D has close relationship to wrongfully excluded jurors - voir dire permits party to establish relation with jurors & both have common interest in eliminating racial discrimination from courtroom. Criminal D will be motivated, effective advocate for excluded venire-person's rights. Finally, although excluded venire-person has right to bring to bring suit on their own, such lawsuits are rare. Potential jurors have no right to be heard at time of exclusion. Declaratory/injunctive relief is not easily obtained. Other practical barriers include small financial stake involved & economic burdens of litigation. Held, white D has standing to raise Baston claim where African American perspective jurors excused on racial grounds. Scalia & Rehnquist DISSENTING.

TITLE: Purkett v. Elem
INDEX NO.: D.9.d.5.
CITE: 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)
SUBJECT: Batson Strikes - Race-neutral Explanation
HOLDING: Race-neutral explanation for strike of venire member need not be persuasive, plausible, or related to venire member's ability to serve on case. Batson set out three-part analysis for determining whether use of peremptory strikes is discriminatory. (1) Opponent makes out prima facie case of discrimination by establishing that peremptories were used to strike minority group members; (2) burden shifts to proponent of strike to offer race-neutral explanation for strike; & (3) Ct. must determine whether opponent has proved purposeful discrimination. At second stage, proponent need only offer explanation which is race neutral. Burden remains with opponent to prove purposeful discrimination. Here, Ct. App. granted habeas relief after blurring stages 2 & 3 & finding that state's explanation for strike was implausible & therefore pretextual. While implausible explanations may well result in finding of purposeful discrimination, this blurring of latter two stages, shifts burden of proof to proponent of strike. Held, reversed. Stevens & Breyer, JJ. DISSENT.

TITLE: Riley v. Commonwealth
INDEX NO.: D.9.d.5.
CITE: 21 VA. App. 330, 464 S.E.2d 508 (Va. Ct. App. 1995)
SUBJECT: Peremptory Strikes - Older Women; Improper Gender-Based Strike
HOLDING: Prosecutor in rape case committed Batson error by striking older women in the belief that they would hold the young complainant's lifestyle against her. Although strikes based on age are permissible, these peremptories fell within ban on gender-based strikes. Prosecutor's explanation of strikes was not gender neutral.

TITLE: Roach v. State
INDEX NO.: D.9.d.5.
CITE: (6/20/2017), 79 N.E.3d 925 (Ind. Ct. App. 2017)
SUBJECT: Batson - credibility findings required for demeanor-based strike
HOLDING: When Defendant contesting State's peremptory challenge of a juror makes a prima facie showing of discrimination on the basis of race and the State presents a race-neutral explanation for the challenge, trial court must then decide whether the challenger has carried its burden of proving purposeful discrimination. Here, Defendant argued trial court erred by overruling his Batson objection to the striking of the only African American male in the jury pool. Addressing the final step of the Batson analysis, Court found the State's first justification for the strike, i.e., that juror said he would not stop for police officer, was not supported by the record. The State's second "body language" reason for striking the juror cannot support the strike because trial court failed to make a finding that the demeanor-based explanation was credible. See, e.g., Snyder v. Lousiana, 552 U.S. 474, 128 S.Ct. 1203 (2008). Although Indiana courts have not specifically required credibility findings in all Batson challenges involving demeanor-based reasons, Court here was left with "little ability to review the trial court's decision without such findings." Thus, Court remanded for trial court to make findings regarding the State's demeanor-based reason for striking the juror. If trial court is unable to recall the prospective juror's demeanor and make a determination regarding the credibility of the State's reason for the strike, a new trial is required. Held, remanded.

TITLE: Schumm v. State

INDEX NO.: D.9.d.5.

CITE: (3rd Dist., 05-21-07), Ind. App., 866 N.E.2d 781

SUBJECT: D has standing to raise Batson challenge regardless of whether he is of same race as excluded juror

HOLDING: In trial for traffic infraction, Tr. Ct. improperly denied D's Batson challenge after State used one of its peremptory challenges to strike only African American from jury panel. Under Equal Protection Clause of Fourteenth Amendment, a party can not constitutionally use a peremptory challenge to strike a prospective juror solely on account of the juror's race. Batson v. Kentucky, 476 U.S. 79, 89 (1986). This rule applies in civil suits as well as criminal trials, & a party may raise a Batson claim regardless of his or her race. Powers v. Ohio, 499 U.S. 400, 415 (1991). Here, by pointing out that State struck the sole African American juror, D put forth prima facie evidence of racial discrimination. At this point, Tr. Ct. should have asked State to put forth a race-neutral reason for excluding the juror. However, Tr. Ct. did not do so & its finding that D had not made a prima facie showing of discrimination & that D did not have standing to raise a Batson challenge was clearly erroneous. Held, judgment reversed & remanded for new trial.

TITLE: Snyder v. Louisiana
INDEX NO.: D.9.d.5.
CITE: 552 U.S. 472, 128 S.Ct. 1203 (2008)
SUBJECT: Batson claim wrongly rejected in capital case
HOLDING: Majority held that the Tr. Ct. clearly erred in rejecting D's Batson claim in a state death-penalty case. Despite Court's admonition in Miller-El v. Dretke, 545 U.S. 231 (2005) that all the circumstances that bear upon a strike must be considered, including an examination of the strikes of other jurors, majority concluded: "In this case, . . . the explanation given for the strike of [the juror in question] is by itself unconvincing and suffices for the determination that there was Batson error." In addressing prosecutor's assertion that the struck juror seemed nervous during *voir dire*, majority acknowledged that nervousness is not something apparent on the record and that deference to a Tr. Ct.'s findings in this regard is especially appropriate when the trial judge has made a finding on the record that a proponent of a strike credibly relied on demeanor. However, trial judge in this case made no reference to demeanor and simply allowed the strike without explanation. Majority also rejected prosecutor's assertion that the juror could not decide the case fairly due to the pressures of his student-teaching obligation and concluded that the explanation "fails even under the highly deferential standard of review that is applicable here." Majority noted that the juror was but one of more than 50 prospective jurors who expressed concern that jury service would interfere with their obligations. Specifically, majority pointed to a white juror who was a building contractor who had to complete a house in the next few days, noting that the prosecutor questioned the juror very closely and explored options that would allow him to serve. Majority concluded that the pretextual explanation for the strike gave rise to an inference of discriminatory intent. Thomas, J., joined by Scalia, J., dissented, criticizing the majority for second-guessing the Tr. Ct.'s factual determinations.

RELATED CASES: Childress, 2018 Ind. App. LEXIS 101 (Ind. Ct. App. 2018) (adequate race-neutral explanation where prospective juror insisted that "beyond a reasonable doubt" meant "no doubt."); Blackmon, 47 N.E.3d 1225 (Ind. Ct. App. 2015) (In Batson challenge, Tr. Ct. wasn't required to explicitly find that prosecutor's race-neutral explanation was credible, even though his other explanation raised inference of discriminatory intent, because he would have struck juror based on the race-neutral explanation alone); Killebrew, 925 N.E.2d 399 (Ind. Ct. App. 2010) (reversal due to Batson violation where State claimed it struck African-American because he had been too "emphatic" in agreeing with how defense counsel had described the State's burden of proof by stating that the State had to prove its case beyond a "shadow of a doubt"; State did not strike two white jurors, one of whom claimed he would only convict if "there is no other possible doubt" and the other who claimed he "would have to be one hundred percent sure that they were guilty" to convict; further, Tr. Ct. made no finding as to juror's demeanor).

TITLE: Soo Koo v. State
INDEX NO.: D.9.d.5.
CITE: (5th Dist., 09-22-94), Ind. App., 640 N.E.2d 95
SUBJECT: Peremptory challenges improperly based on gender
HOLDING: Where D did not satisfactorily explain reason for striking female prospective jurors in gender-neutral manner, Tr. Ct. did not err in denying his peremptory challenges. During jury selection in rape trial, State alleged D had demonstrated pattern of gender-based peremptory challenges in striking 6 of 8 prospective female jurors. Gender-based challenges prohibited under Batson v. Kentucky, 476 U.S. 79, & J.E.B. v. Alabama, (1994), 114 S.Ct. 1419. Ct. rejected D's argument that Tr. Ct. erred in finding prima facie case of discrimination because he did not challenge all female venire persons. Ct. refused to address issue because once party offers neutral explanation for strikes & Tr. Ct. has ruled on ultimate question of discrimination, preliminary issue of prima facie showing is moot, Hernandez v. New York, 111 S.Ct. 1859 (1991). Ct. rejected D's argument that his reasons for challenging jurors were gender neutral. As in race, neutral explanation is based on something other than sex of juror, & explanations given here were not facially neutral, but mix of neutral & gender biased. Given standard of review, Tr. Ct. did not err in denying challenges. Held, conviction affirmed, Barteau, J., concurring but expressing concern over limitations of peremptory challenges. In footnote, majority also expressed similar concerns.

TITLE: Splunge v. Clark
INDEX NO.: D.9.d.5.
CITE: 960 F.2d 705 (7th Cir. 1992)
SUBJECT: Discriminatory use of peremptory challenges
HOLDING: State's explanation for removal of black juror from black D's venire in trial for offense against white victim was not race-neutral enough to rebut D's prima facie showing of purposeful exclusion of black jurors; affirming District Ct.'s grant of habeas corpus relief, despite previous holding of Ind. S.Ct. that explanation was sufficient, Splunge, (1988), 526 N.E.2d 977. Batson v. KY (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 set forth requirements for D to establish prima facie case of purposeful discrimination (see card at D.9.d.5). Ind. S.Ct. held, with vigorous dissents, that prosecutor's explanations that one juror was stricken because he had met D & other juror was stricken because prosecutor felt she would not be good juror ("and I can assure you that they were not racial motivations at all") & that she did not sufficiently understand standard of proof, were adequate to meet standard for nonpurposeful exercise of peremptory challenge. After determining that D had definitely established prima facie case of discrimination, Dist. Ct. & Ct. of App. found that prosecutor's explanation for striking second juror was pretextual only. Ct. examined questions propounded & found there was nothing in record to support proposition she did not understand burden of proof. Ct. also looked to fact that prosecutor examined black jurors differently than white jurors, asking only black jurors whether they would be swayed by D's race or had ever been convicted, or known someone convicted, for crime. Ct. concluded that D had met burden of proving purposeful discrimination, & that his constitutional rights under 14th Amend were violated. Held, habeas corpus relief affirmed unless D is retried within 120 days of decision. **Note:** Opinion also *cited* to general misconduct on part of prosecutor & pointedly stated it should not recur on retrial.

RELATED CASES: Childress, 2018 Ind. App. LEXIS 101 (Ind. Ct. App. 2018) (adequate race-neutral explanation where prospective juror insisted that "beyond a reasonable doubt" meant "no doubt.")Morse, 593 N.E.2d 194 (D did not make necessary prima facie showing of purposeful discrimination in State's exercise of peremptory challenge. DeBruler, J., dissenting); Andrews, App., 588 N.E.2d 1298 (prosecutor failed to give race neutral reasons where he stated that he "had his reasons as a lawyer . . . persons not of type State wanted to have"); Evans, App., 566 N.E.2d 1037 (ct. properly denied peremptory challenge where prosecutor indicated he was "unsure whether [juror] feels like or wants to accept the responsibility of making a decision in this case."); see also Minniefield, this section.

TITLE: State v. Rahman

INDEX NO.: D.9.d.5

CITE: 483 S.E.2d 273 (W. Va. 1996)

SUBJECT: Batson -- Proponent of Peremptory Strike Must Explain Disparate Treatment of Similar Jurors

HOLDING: West Virginia Supreme Court holds that party who exercises peremptory strike against one venire member while leaving similarly situated veniremember of another race on panel must explain decision not to challenge second venire member. Opposing party's assertion that similarly situated venire members are being treated differently must be considered by Tr. Ct. both in determining whether prima facie case of impermissible discrimination has been made out and whether race-neutral explanation proponent offers is pretextual.

TITLE: State v. Robinson

INDEX NO.: D.9.d.5.

CITE: 237 Conn. 238; 676 A.2d 384 (Conn. 1996)

SUBJECT: Connecticut Court Holds that Batson Objection to Peremptory Strike Can Be Raised Anytime Before Jury is Sworn

HOLDING: Connecticut Court holds that Batson challenge to use of a party's peremptory strikes can be made at any time before the jury is sworn. Majority devised this rule after recognizing that in some cases, information needed for Batson claim will not be available until late in jury selection process. Grounds for Batson claim regarding particular juror may emerge only in light of opposing party's conduct with respect to other jurors. Setting deadline as point of swearing in has virtue of consistency and ensures that the information to support a Batson claim, if any, will be available. **Note:** Cf. Chambers v. State, 551 N.E.2d 1154 (Ind. App. 1990).

TITLE: State v. Silva
INDEX NO.: D.9.d.5.
CITE: (5th Dist., 6-26-96), Ind. App., 668 N.E.2d 718
SUBJECT: Prohibition against gender-based peremptory challenges - retroactivity
HOLDING: Prohibition against discriminatory use of peremptory challenges based on gender was not retroactively applicable on collateral attack of D's conviction. Relying upon S. Ct.'s decision in J.E.B. v. Alabama, 114 S.Ct. 1419 (1994), post-conviction Ct. vacated D's conviction based on State's purposeful & systematic use of peremptory challenges to eliminate male jurors. However, D's direct appeal was concluded before new constitutional rule was announced in J.E.B. decision, thus D could not benefit from its retroactive application. Teague v. Lane, 109 S.Ct. 1060 (1989); Daniels v. State, 561 N.E.2d 487 (Ind. 1990). Ct. held that rule prohibiting gender- based exercise of peremptory challenges does not implicate fundamental fairness so as to fall within one of the exceptions to non-retroactivity of new rules of criminal procedure. D did not argue, & record did not demonstrate, that accuracy of D's conviction was diminished by State's gender-based exercise of peremptory challenges. Held, post-conviction Ct. reversed.

TITLE: Sylvester v. State
INDEX NO.: D.9.d.5.
CITE: (1/26/90), Ind., 549 N.E.2d 37
SUBJECT: Disqualification of juror - removal of only black juror
HOLDING: Tr. Ct. did not err in disqualifying only black juror after he asked bailiff about choosing foreperson & then discussed it with other jurors during trial. On appeal, D who is black, argues that dismissal of juror denied him equal protection, under Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (card at D.9.d.5). However, D objected at trial on grounds that juror was no more culpable than others, not on Batson grounds. While juror's conduct did not necessitate removal, removal was not fundamental error. Juror was not removed from venire during formation of jury. In requesting juror's removal, state asserted its reservations about his continuing to serve due to his disinclination to follow instructions of Tr. Ct. not to discuss case. This was racially neutral explanation. Held, conviction affirmed. DeBruler & Shepard, JJ. DISSENT, arguing that juror's removal for discussing foreperson selection was abuse of discretion, which therefore could not constitute racially neutral explanation required by Batson.

TITLE: Tankleff v. Senkowski
INDEX NO.: D.9.d.5.
CITE: 135 F.3d 235 (2nd Cir. 1998)
SUBJECT: Batson Error is Structural -- Not Subject to Harmless Error Analysis
HOLDING: Batson error, racially discriminatory use of jury strikes, is structural error which is not subject to review for harmlessness. Fact that D and struck jurors were not of same race is irrelevant.

RELATED CASES: Davis v. Ayala, 135 S.Ct. 2187 (2015) (excluding lawyer from part of Batson hearing was harmless error; see full review, this section).

TITLE: U.S. v. Annigoni
INDEX NO.: D.9.d.5.
CITE: 96 F.3d 1132 (9th Cir. 1996)
SUBJECT: Batson -- Erroneous Denial of Peremptory Strike - Automatic Reversal
HOLDING Ninth Circuit, en banc, holds that Batson did not change rule that erroneous denial of a D's peremptory challenge of a prospective juror mandates automatic reversal of the D's conviction. Majority writes that it is virtually impossible to determine the effect of allowing the seating of a juror who should have been excused, and the erroneous denial of the right of peremptory challenge is simply not amenable to harmless-error analysis.

RELATED CASES: Davis v. Ayala, 135 S.Ct. 2187 (2015) (excluding lawyer from part of Batson hearing was harmless error; see full review, this section).

TITLE: Wallace v. Morrison
INDEX NO.: D.9.d.5.
CITE: 87 F.3d 1271 (11th Cir. 1996)
SUBJECT: Batson Strikes - "Dual Motivation"
HOLDING: Eleventh Circuit holds that peremptory strike based partly on race and partly on permissible factors does not violate equal protection if challenge "would have been" exercised on non-racial factors alone. Prosecutor here, who used peremptories to strike 7 of 9 venire members, conceded race was a factor but *cited* other factors as well. Court uses "dual motivation" analysis, finding that such peremptories will be permitted if party who exercised them shows by preponderance of evidence that same strikes would have been exercised in absence of any discriminatory motivation.

TITLE: Whitfield v. State
INDEX NO.: D.9.d.5.
CITE: (6-26-19), Ind. Ct. App., 127 N.E.3d 1260
SUBJECT: Batson - peremptory strike of potential juror upheld despite lack of demeanor finding
HOLDING: Trial court had a "sound basis" for rejecting Defendant's Batson challenge to prosecutor's peremptory challenge to a venireperson based on her race, even without a specific finding on the demeanor-based reasons for the strike. In addition to the demeanor-based reasons, the State provided other reasons for the strike. The State explained that the venireperson did not indicate on her questionnaire that she could be fair and impartial, she had family members who had been arrested for or charged with a crime, and based on her statements during voir dire, she seemed unclear on her ability to be fair and impartial and whether she could find guilt even if the elements of the crime were proven beyond a reasonable doubt.

In cases where the State seeks to peremptorily strike a potential juror based partially on the juror's demeanor and the defense raises a Batson challenge of racial discrimination, Court encouraged trial courts to make factual findings regarding its observations of the juror's demeanor when making its ruling.

TITLE: Williams v. State
INDEX NO.: D.9.d.5.
CITE: (3rd Dist., 7-6-05), Ind. App., 830 N.E.2d 107
SUBJECT: State's peremptory challenge - Batson claim rejected; exclusion for religious beliefs
HOLDING: Tr. Ct. did not err in allowing State's use of peremptory strike of a black venire person despite Batson challenge. Ct. found State gave sufficient race-neutral reason for the strike. Prosecutor was apprehensive that potential juror would inject her religious concerns into her duties & seemed indecisive. D waived argument that the potential juror was excluded for her religious beliefs & that Batson should be extended to religion by not raising that specific issue at trial. Waiver notwithstanding, such a striking is proper if the person's belief would prevent her from deciding a case on the evidence & instructions, even if belief is religious in nature. See U.S. v. Stafford, 136 F.3d 1109 (7th Cir.1998). Held, judgment affirmed.

TITLE: Williams v. State
INDEX NO.: D.9.d.5.
CITE: (8/15/96), Ind., 669 N.E.2d 1372
SUBJECT: Procedure for Batson claim - Blanket policy requiring race-neutral explanation
HOLDING: In deciding whether it is appropriate for Tr. Ct. to sua sponte require race-neutral justifications for D's peremptory challenges, Tr. Ct. must balance 3 separate legal principles: 1) Tr. Ct.'s inherent authority to manage & control proceedings & to supervise voir dire; 2) "cherished role of peremptory challenge in assuring selection of qualified &unbiased jury," & 3) equal protection right of potential jurors not to be excluded on basis of race or gender, pursuant to Batson & its progeny. Here, Tr. Ct. required both parties in death penalty case to provide Tr. Ct. with race, ethnic, religious, & sex-neutral reasons for peremptory challenges. Held, no reversible error for Tr. Ct. to require each side to present race-neutral justification for each of its peremptory challenges where prosecution was subjected to same rules & procedure took place outside presence of jury. In future cases, Tr. Ct. should not require each side to present race-neutral justification for each of its peremptory challenge absent extraordinary circumstances, but should wait for objection by opposing party before deciding whether prima facie case of discrimination is made & demanding a race-neutral explanation. Ct. reasoned that interests of State & Ds are weightier than interests of juror in serving in particular case. Intervention only authorized when prima facie case is abundantly clear with respect to particular juror. Judge who adopts blanket policy of demanding explanations, as Tr. Ct. did here, would not have articulated particularized showing & would commit error.

D. TRIAL

D.9. Jury Trial

D.9.d.6 Voir dire

TITLE: Morgan v. Illinois
INDEX NO.: D.9.d.6.
CITE: 504 U.S. 719 (1992)
SUBJECT: Voir dire - capital case; reverse-Witherspoon questioning
HOLDING: Due process requires that capital murder D be allowed, on request, to have potential jurors asked during voir dire whether they would automatically impose death penalty upon conviction of crime charged without regard to existence of any mitigating evidence. It is well established by Witherspoon v. IL (1968), 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776, and its progeny that state has right to excuse for cause any venire members who have such strong feelings against death penalty that they would be unable to impose it under any circumstances. In such case, state is entitled to so-called "Witherspoon inquiry" to determine whether potential jurors harbor such attitudes. Here, D claimed due process afforded him concomitant right to "reverse-Witherspoon" inquiry. Majority notes that, while there is no constitutional right to be sentenced by jury in capital case, state that provides for jury sentencing must ensure that such jurors are impartial. In Ross v. OK (1988), 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80, Court indicated that D should be allowed to remove for cause juror who would automatically vote for death, and this right can only be enforced by requiring that D be allowed to have jurors queried as to their position on capital punishment, including reverse-Witherspoon inquiry. State argued here that trial judge's general inquiry on voir dire into whether jurors could be fair & follow law was sufficient, but majority notes that state's right to Witherspoon inquiry answers that question. Scalia, Rehnquist, & Thomas, JJ. dissent.

RELATED CASES: White v. Wheeler, 136 S. Ct. 456 (2015) (Sixth Circuit did not properly defer to state court's reasonable finding that trial judge was within her discretion to grant State's motion to strike juror who appeared uncomfortable voting to impose death penalty).

D. TRIAL

D.9. Jury trial

D.9.e. Jurors/Jury

TITLE: Baird v. State
INDEX NO.: D.9.e
CITE: (4th Dist., 09-26-06), Ind. App., 854 N.E.2d 398
SUBJECT: Delay in providing jury list to D was not reversible error
HOLDING: Tr. Ct. erred in providing jury list to D, over objection, just fifteen minutes before trial. Ind. Code 33-28-4-9(b) provides that "the jurors called to service shall be identified long enough before the trial or grand jury session to permit counsel to study their backgrounds." However, Ind. Code 33-28-4-9(e) provides that "no trial...or proceeding shall be reversed or held invalid on the ground that the terms of this section have not been followed, unless it appears that the noncompliance was either in bad faith or was objected to promptly upon discovery & was probably harmful to the substantive rights of the objecting party."

Here, there was no evidence that Tr. Ct. acted in bad faith. While alleging that the delay was "highly prejudicial," D does not explain why. State presented evidence that police caught D in act of cooking methamphetamine, & that he signed a consent to search. During voir dire, counsel had same opportunity to interview jurors & determine their attitude towards drugs in general & methamphetamine in particular. Thus, Tr. Ct.'s delay in producing the list was not harmful to D's substantial rights. Held, judgment affirmed.

TITLE: Fuller v. State
INDEX NO.: D.9.e.
CITE: (4th Dist., 08-09-06), Ind. App., 852 N.E.2d 22
SUBJECT: Right to impartial jury - Jury Rule 20
HOLDING: On appeal of murder prosecution, D challenged preliminary jury instruction & procedures promulgated thereby which incorporated language of Indiana Jury Rule 20(a)(8). D argued that: 1) allowing discussion among jurors in jury room before all evidence is presented destroys impartiality & thus violates due process; 2) jurors should have been sequestered, because they were effectively deliberating if they were discussing the case; & 3) instruction was misleading & confusing about when discussion could take place.

D did not demonstrate that he was denied an impartial jury & deprived of due process. Although Ind. Code 35-37-2-6(a) contemplates sequestration during deliberations, requirement for sequestration is invoked when jury is charged. D did not claim that jury in this case failed to comply with sequestration requirement after they were charged or that he requested sequestration during entirety of trial. Moreover, D did not provide authority supporting his position that ct.-sanctioned internal jury discussion in jury room during recesses constitutes a denial of due process. Finally, Tr. Ct.'s preliminary instruction specified that discussion of case among jurors could take place in jury room during recesses, but not outside jury room, thus jurors were not confused & misled. D failed to show that jurors were unable to render a fair & impartial verdict because of procedures or instruction employed by Tr. Ct. Held, judgment affirmed.

RELATED CASES: Lyons, 993 N.E.2d 1192 (Ind. Ct. App. 2013) (Tr. Ct.'s failure to instruct two alternate jurors not to participate in deliberations was not fundamental error); Weatherspoon, 912 N.E.2d 437 (Ind. Ct. App. 2009) (rejecting D's argument that juror's participation in juror discussions, permitted by 2008 amendment to Jury Rule 20(a)(8), are equivalent of deliberations & therefore he was denied his constitutional & statutory right to a jury of twelve).

TITLE: Harrison v. State
INDEX NO.: D.9.e.
CITE: (5th Dist., 07-22-91), Ind. App., 575 N.E.2d 642
SUBJECT: Jurors' testimony - use to show exposure to extraneous materials
HOLDING: Where jurors did not testify as to effect exposure to extraneous materials had on their deliberations, it was error not to consider evidence regarding their exposure to materials when offered to show improper behavior resulting in denial of D's right to be present at all stages of proceeding. In PCR D sought to admit testimony & affidavits of jurors that bailiffs had taken certain information &/or single instructions into jury deliberations. PCR Ct. denied petition on ground that Ct. cannot consider testimony of jurors to impeach their verdict, & without this evidence D failed to show improper contact with jury.

Ct. App. found there is exception to this rule where evidence is offered to show exposure to extrinsic materials, if it does not show how far influence of materials operated on jurors' minds. Fox, 457 N.E.2d 1088. Ct. also found there is no threshold requirement that nonjurors testify as to exposure before jurors' testimony is admissible, & that testimony was vital to D's claim of denial of right to be present, because it was undisputed that neither D nor his counsel were present when alleged misconduct occurred. Once D demonstrates likelihood of denial of right to be present, burden shifts to State to show violation was harmless. On remand State could rebut presumption of harm by showing bailiff responded to jury requests by giving entire body of Ct.'s instructions, but if only partial instructions were given, presumption of harm would not be satisfactorily rebutted. Held, reversed & remanded for consider action of jurors' testimony on exposure to extraneous material.

RELATED CASES: Dowell, App., 865 N.E.2d 1054, *sum. aff'd* 873 N.E.2d 59 (jury's speculation that the D did not testify because of his prior criminal history does not satisfy the requirements of 606(b)).

TITLE: Merritt v. State
INDEX NO.: D.9.e.
CITE: (3rd Dist., 2-18-05), Ind. App., 822 N.E.2d 642
SUBJECT: Improper voir dire example given by trial judge

HOLDING: Court found fundamental error where Tr. Ct. during voir dire used an example of constructive possession that was strikingly similar to D's case. In the present case, police discovered cocaine located in a shoe on the floor of the second-row seat & the sliding passenger's door of a van driven by D. They also discovered a baggie containing cocaine & a crack pipe in D's purse, which was located on a console in between the two front seats. During voir dire, the Tr. Ct. gave the following example of constructive possession:

> 'Possession can be either actual or it can be what we call constructive possession. . . . I would venture a guess . . . that most of you women who have purses . . . [M]ay have purses at your feet on the floor. I don't know that to be true because I can't see. I'm assuming that's where they are. You still have constructive possession of your purse because it is in a location under your control & you intend to control it there.'

The trial judge then asked a female juror if her purse was on the floor & was it under your control, to which she answered affirmatively. "Okay. Constructive possession," the trial judge concluded. Although a Tr. Ct. has broad discretionary power to regulate the form & substance of voir dire, Wentz v. State, 766 N.E.2d 351 (Ind.2002), Tr. Ct. also has "a concurrent duty to remain impartial & to refrain from making unnecessary comments or remarks." The jury could easily have been tainted due to the striking similarity of the example to the facts of this case. Court concluded that undue prejudice of the jury could have resulted & thus fundamental error occurred without the necessity of an accompanying objection at trial. Held, judgment reversed & remanded for a new trial.

D. TRIAL

D.9. Jury trial

D.9.e.1. Custody/separation/sequestration of jury (Ind. Code 35-37-2-4 and 6)

TITLE: Clemens v. State
INDEX NO.: D.9.e.1.
CITE: (3/11/93), Ind., 610 N.E.2d 236
SUBJECT: Sequestration of jury
HOLDING: D claimed error in murder case where Tr. Ct. denied D's motion to sequester jury. In all cases not charged as capital offense, sequestration is matter of Tr. Ct. discretion. Harris, 480 N.E.2d 932. D has burden of showing whether any jurors were actually exposed to prejudicial publicity. Sanders, 428 N.E.2d 23. Here, D argued extensive pretrial publicity, including numerous news articles & radio news reports from day after victim's death up today before trial. For purposes of jury sequestration motions, however, publicity at issue is not pretrial coverage but rather that generated & reported during trial itself; to demonstrate prejudicial exposure, D must show that someone on jury was exposed to media coverage during trial & that sequestration would have avoided particular juror prejudice. Rankin, 563 N.E.2d 533. Having failed to establish any such exposure, D did not demonstrate any abuse of discretion in denying his motion to sequester jury. Held, no error in denying motion for sequestration.

RELATED CASES: Lowery, 434 N.E.2d 868 (reversible error to deny timely pretrial motion to sequester jury during capital murder & attempted murder case); Poling, 515 N.E.2d 1074 (no reversible error to refuse to grant motion to sequester probable jurors in capital case before jury is sworn); Bellmore, 602 N.E.2d 111 (though capital murder D's motion for sequestration of jury must be granted, no error in denial of motion to sequester prospective jurors during voir dire where all prospective jurors received written admonishments to neither view nor listen to media coverage or to discuss case, & where judge repeated admonitions in opening statements to each group of prospective jurors).

TITLE: Drake v. State
INDEX NO.: D.9.e.1.
CITE: (8/31/84), Ind., 467 N.E.2d 686
SUBJECT: Separation of Jurors during deliberations - harmless error
HOLDING: D fails to raise issue of improper influence on jury (resulting from release by bailiff to allow jurors to drive to hotel after deliberations began) in manner sufficient for appellate review. Barring exigent circumstances, jury should not be permitted to separate once deliberations begin. Bales, 418 N.E.2d 215; Walker, 410 N.E.2d 1190. Jurors should not be sent home during deliberations. Follrad, 428 N.E.2d 1201; McGaughey, App., 419 N.E.2d 184. D neither alleges that any juror exposed to prejudicial influence nor that any irregularity occurred. Held, conviction affirmed.

RELATED CASES: Treadway, 924 N.E.2d 621 (Ind. 2010) (D pointed to no specific evidence of prejudice resulting from 20-minute separation of jury, where juror who was breastfeeding her child went to adjacent room to express breast milk); Pagan, App., 809 N.E.2d 915 (extra-judicial communication caused by two jurors making cell phone calls to their homes did not pertain to any matter being considered by jury, & separation did not cause D any actual prejudice); Pruitt (Where Tr. Ct. announced in advance that it intended to let jury separate, & D did not object, issue could not be raised for first time on appeal, because error was not fundamental. Although in Bales, 418 N.E.2d 215, allowing jury to separate was reversible error because State did not prove separation didn't affect deliberation, Ct. found under circumstances here, error was not fundamental. At post-trial hearing on influence of separation on jurors, they all testified that they were unaffected by separation, had no communication with anyone about case, saw & heard nothing in media about case, & were not influenced adversely to D. Because State demonstrated lack of improper influence & D didn't object, separation did not require reversal); Stewart, 531 N.E.2d 1146 (fact that juror had left jury room for 5 minutes after deliberation had begun did not require granting of new trial where D failed to establish how any juror was exposed to prejudicial influence); Bryant, 202 N.E.2d 161 (no reversible error where juror was separated by permission of Tr. Ct. to make phone call to relative caring for his livestock, & such permission was granted in absence of D & his counsel, & no apparent emergency was involved).

TITLE: Rivera v. State
INDEX NO.: D.9.e.1.
CITE: (06/26/19), Ind. Ct. App., 127 N.E.3d 1256
SUBJECT: No need for second admonishment before excusing jury for lunch
HOLDING: Ind. Code § 35-37-2-4(a) requires trial court to give jury an admonishment limiting juror discussions of the case "in the preliminary instruction, before separating for meals, and at the end of the day." Where, as here, there are no intervening proceedings between the reading of preliminary instructions and the jury being excused for lunch, trial courts are not required to give the admonishment required by Ind. Code § 35-37-2-4(a) a second time. Jury instructions are considered as a whole and in reference to each other when deciding whether an instructional error amounts to fundamental error.

TITLE: White v. State
INDEX NO.: D.9.e.1.
CITE: (11/30/94), Ind. App., 643 N.E.2d 414
SUBJECT: Separation of jurors during deliberations - reversible error
HOLDING: Absent exigent circumstances, jury is to remain together once deliberations begin & until verdict is returned. Farrell, 622 N.E.2d 488; Follrad, 428 N.E.2d 1201; Ind. Code 35-37-2-6. Although separation of jurors during deliberations is not error per se, separation for convenience is unacceptable. Follrad. Separation of jury could be held harmless if State proves beyond reasonable doubt that: 1) separation of jurors did not influence them adversely or render them less capable of discharging their duty, & 2) verdict clearly appears to be right upon the evidence. Walker, 410 N.E.2d 1190. Follrad modified Walker by applying harmless error analysis to significant jury separations in absence of exigent circumstances. Id. Here, separation was overnight with no exigent circumstance to justify separation of jury. Further, Ct. rejected view that jury returned its verdict as to one count prior to separation because verdict was subject to change at any time before it was accepted by Tr. Ct. & jury was discharged. Held, reversed & remanded for new trial.

RELATED CASES: McGaughey, App., 419 N.E.2d 184; Bales, 418 N.E.2d 215 (permitting jurors to separate overnight in midst of deliberations was reversible error in absence of State showing beyond reasonable doubt that separation did not adversely influence them); Walker, 410 N.E.2d 1190 (reversible error to separate jurors for 4-day recess where, after deliberating eight hours, Tr. Ct. instructed jury to adjourn on evening of 6/30 & to reconvene on morning of 7/5 to continue deliberations); Follrad, 428 N.E.2d 1201 (reversible error in allowing jury to return to their homes at 1:30 a.m. after deliberating for seven hours & to return to court at 9:00 a.m., even though they were admonished not to talk with anyone, to stop nowhere, nor allow anyone to address them).

D. TRIAL

D.9. Jury trial

D.9.e.2. Misconduct of or affecting jurors/procedure for handling

TITLE: Berkman v. State
INDEX NO.: D.9.e.2.
CITE: (4th Dist. 1/23/84), Ind. App., 459 N.E.2d 44
SUBJECT: Jurors - misconduct; voir dire
HOLDING: Tr. Ct. properly found affidavit of venire man, alleging juror's "predisposition of guilt towards individuals charged with drug related cases," was insufficient to entitle D to a new trial or to warrant an evidentiary hearing. Generally, proof that a juror was biased against D or lied on voir dire entitles D to a new trial. McFarland, 390 N.E.2d 989; McDaniel, 375 N.E.2d 228; Barnes, 330 N.E.2d 743. When D presents evidence, juror was possibly biased & concealed this bias on voir dire, Tr. Ct. generally must hold an evidentiary hearing to determine whether juror was in fact biased. McFarland; Barnes; Atkinson, App., 391 N.E.2d 1170. Ct. finds D may not force evidentiary hearing on juror's bias after jury has been discharged based upon conclusory allegations of misconduct. Such hearings, if granted without some showing of good cause, could become means for harassing jurors who have returned guilty verdicts. Affidavit in McDaniel (juror told third party she was juror in trial of that "nigger who killed the cop") was insufficient to warrant hearing. Although Tr. Ct. is required to take as true facts alleged in an un-contradicted affidavit (Harris, 427 N.E.2d 658), it is not required to accept affiant's conclusions. Held, no error.

RELATED CASES: Fuquay, 583 N.E.2d 154 (D's evidence not adequate to show juror made false statements on voir dire); Driver, 467 N.E.2d 1186 (D should have attached affidavits to MCE in support of assertion that 3 jurors knew him; held, affirmed).

TITLE: Bockting v. State
INDEX NO.: D.9.e.2.
CITE: (5/11/92), Ind. App., 591 N.E.2d 576
SUBJECT: Juror misconduct - taking books into jury room
HOLDING: D claimed jury misconduct when jury, while in jury room, reviewed medical book & dictionary not in evidence. Indiana follows common law rule that verdict may not be impeached by evidence from jurors who returned it. Harrison, App., 575 N.E.2d 642. Exception occurs when evidence shows that jury was exposed to improper, extrinsic material during its deliberations. Fox, 457 N.E.2d 1088, & when substantial possibility exists that verdict was prejudiced by improper material. Lindsey, 295 N.E.2d 819. Here, record reveals juror brought medical book & dictionary in jury room to learn about pregnancy because another juror was pregnant & nearly due. Juror testified he used dictionary to learn definition of word "schizophrenia" out of "curiosity," & claimed it had no bearing on verdict. Other jurors looked at books "to pass the time," & testified their decision was not influenced by either medical book or dictionary. Ct. found D failed to show substantial possibility verdict was prejudiced by presence of 2 books. Held, judgment affirmed.

RELATED CASES: Dawson v. Hummer, App., 649 N.E.2d 653 (D did not demonstrate prejudice where jury obtained legal dictionary from bailiff during deliberations; Ct. unable to determine if definitions conflicted with Tr. Ct.'s instructions & no evidence jury actually utilized information in its deliberations)

TITLE: Caruthers v. State
INDEX NO.: D.9.e.2.
CITE: (05-14-10), Ind., 926 N.E.2d 1016
SUBJECT: Failure to investigate alleged threats against jury was not fundamental error
HOLDING: In murder prosecution, Tr. Ct's failure to *sua sponte* interrogate jury about whether tightening security during trial made some jurors biased against D did not constitute fundamental error. Record discloses only that: 1) some jurors expressed security concerns related to victim's family members, D and D's family, 2) extra security included allowing jurors to park next to courthouse entrance, and 3) Tr. Ct. advised jury about "ministerial aspects" of precautions. Upon suggestion of extrajudicial comments made to juror, Tr. Ct. should assess likelihood of prejudice. If court determines no risk of substantial prejudice exists, it need not investigate further. If it finds the risk of prejudice is substantial, it should interrogate jury collectively to determine if anyone was exposed to extrajudicial comments, and individually interrogate such jurors away from other jurors.

Here, the scant facts the record does provide, even taken most favorably to D, do not establish substantial prejudice requiring *sua sponte* interrogation about potential prejudice to D from security measures. For instance, because record does not contain Tr. Ct's explanation to jury about tightened security, it was impossible to determine whether explanation creates presumption of jury bias so serious that it amounts to fundamental error. Best practice would have been for Tr. Ct. to state on record specific concerns expressed by jurors and its reasons for taking security measures it did. Nonetheless, Tr. Ct's failure to interrogate jury did not constitute a "blatant violation of basic and elementary due process" that undeniably made a fair trial impossible. Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009). Held, transfer granted, Court of Appeals' opinion at 909 N.E.2d 500 vacated, judgment affirmed.

TITLE: Chubb v. State
INDEX NO.: D.9.e.2.
CITE: (09-08-94), Ind., 640 N.E.2d 44
SUBJECT: Juror misconduct - inattentiveness or sleeping
HOLDING: Affidavit of Ct. room observer stating he saw one of jurors asleep during certain parts of testimony, counsel's closing argument, & final instructions, was insufficient to show juror was actually inattentive & inattention resulted in actual prejudice to D, as required to show denial of fair trial, Whiting, 516 N.E.2d 1067. Ct. found that it was impossible to know whether juror was actually asleep & conclusory statement in affidavit was not determinative. Affidavit failed to specify identity or duration of specific instructions, argument, or testimony missed. Ct. concluded D failed both to establish inattentiveness & to demonstrate prejudice. Held, conviction affirmed.

RELATED CASES: Hardin, 956 N.E.2d 160 (Ind .Ct. App. 2011) (both prosecutor and defense attorney have a duty to notify Tr. Ct. when they suspect juror inattentiveness and to request corrective action that involves a factual determination on the record concerning the behavior, i.e., removal and replacement of the juror or a voir dire of that juror to factually determine the actuality and extent of the problem; here, issue was waived); Spurlock, 718 N.E.2d 773 (D failed to show that ill juror was actually inattentive & that her inattention prejudiced D); Steward, App., 636 N.E.2d 143 (Tr. Ct. did not err in denying D's request for new trial alleging one or two jurors were asleep during trial. Although finding D waived error by not raising issue with Tr. Ct. at time of occurrence, Ct. also found D failed to show any juror was actually inattentive (just had eyes closed & head down), & even if juror had been asleep, that actual prejudice to D occurred); Hopkins, 579 N.E.2d 1297 (waiver of alleged error due to juror's inattentiveness by failure to call to Ct.'s attention at time when corrective measures could have been taken); Smith, 432 N.E.2d 1363 (D failed to meet burden of showing prejudice where juror fell asleep & missed part of court-appointed psychiatrist's testimony that D was not insane; Tr. Ct. took action to insure juror remained awake during rest of day's proceeding).

TITLE: Currin v. State
INDEX NO.: D.9.e.2.
CITE: (9/30/86), Ind., 497 N.E.2d 1045
SUBJECT: Jurors - misconduct; contact with witnesses/victim's family
HOLDING: Tr. Ct. did not err in denying D's Motion to Correct Error. Here, D submitted affidavits from his parents asserting that during D's trial, parents observed juror talking with victim's father & other prosecution witnesses. At hearing on D's MCE, juror testified no such conversation took place. Victim's father also denied conversation. D contends extrajudicial contact was presumptively prejudicial, & argues state failed to sufficiently rebut presumption. Rebuttable presumption of prejudice arises from juror misconduct involving out-of-Ct. communications with unauthorized persons. Conrad v. Tomlinson, 279 N.E.2d 546. Such conduct must be based on proof, by preponderance of evidence, that extrajudicial contact/communication occurred & that it pertained to matter pending before jury. See Fox, 457 N.E.2d 1088; Oldham, 231 N.E.2d 791; Brown, 201 N.E.2d 281; Myers, 168 N.E.2d 223; Barker, 150 N.E.2d 680; York, App., 380 N.E.2d 1255. Where factual conflict exists, Tr. Ct. has discretion to deter-mine whether evidence presented shows irregularity. Reed, 479 N.E.2d 1248. Ct. finds conflicting evidence was presented & D failed to introduce evidence that alleged communication involved matter pending before jury. Ct. rejects D's argument that state had obligation to introduce bailiff, other jurors, & witnesses to testify re their observation of alleged conversation. Held, no abuse of discretion.

RELATED CASES: Bisard, 26 N.E.3d 1060 (Ind. Ct. App. 2015) (no abuse of discretion in denying motion for mistrial trial; even though juror researched reliability of blood-alcohol testing on Internet and shared research with some other jurors, offending juror was removed and Tr. Ct. ensured that remaining jurors decided case solely on evidence presented by the parties); Ramirez, 7 N.E.3d 933 (Ind. 2014) (Tr. Ct. properly denied D's motion for mistrial because D failed to prove by preponderance of evidence that, when Juror 282 told others about gun shooting incident at her neighbor's residence during 5th day of trial, the incident had any connection to D's trial; see full review, this section); Agnew, App., 677 N.E.2d 582 (behavior of State's key witness during trial & after taped replay of D's testimony did not deprive him of his right to fair trial; witness's behavior did not occur "out-of-court"); Driver, 467 N.E.2d 1186 (Jury 149; case is distinguishable from Woods, 119 N.E.2d 558; there, police/witnesses visited with jury during intermissions/recesses & Ct. reversed, finding prima facie prejudice; here, state's witness sat with jury before voir dire, said he was a witness but did not discuss D/particulars).

TITLE: Dickenson v. State
INDEX NO.: D.9.e.2.
CITE: (2nd Dist., 7-21-00), Ind. App., 732 N.E.2d 238
SUBJECT: Juror misconduct required new trial
HOLDING: Tr. Ct. erred by not granting D new trial on basis of juror misconduct. Proof that juror was biased against D or lied on voir dire entitles D to new trial. Lopez, 527 N.E.2d 1119 (Ind. 1988). Here, juror misrepresented her relationship with attempted murder victim's wife when asked about it on voir dire & at post-verdict evidentiary hearing. Further, evidence revealed that juror was not truthful when she failed to affirmatively respond to Tr. Ct.'s inquiry on voir dire as to whether any of potential witnesses had prior knowledge of case. Because evidence revealed that juror had knowledge of case prior to trial & was friendly with victim's wife, who testified at trial, Ct. held that misconduct was gross & probably harmed D. Although D did not raise juror misconduct issue in his petition for post- conviction relief, denial of right to impartial jury guaranteed by Article I, § 13 of Indiana Constitution is fundamental error. Held, reversed & remanded for new trial; Vaidik, J., dissenting, would remand case for evidentiary hearing to determine whether juror was biased.

RELATED CASES: Archer, 133 N.E.3d 176 (Ind. Ct. App. 2019) (the presence of even one biased juror on the jury is a structural error requiring a new trial).

TITLE: Dye v. State
INDEX NO.: D.9.e.2.
CITE: (3-6-03), Ind., 784 N.E.2d 469
SUBJECT: Juror misconduct – omissions & false responses on jury questionnaires & during voir dire
HOLDING: In death penalty case, post-conviction court did not err in concluding that juror's omissions & false responses on her jury questionnaires & during voir dire amounted to gross misconduct that probably harmed D, denying him a fair trial. New trial was required because juror concealed her family's criminal histories, her history as a victim of rape, & her disposition to automatically impose death penalty. Juror's brother's prior convictions & death sentence were intentionally obscured by her deliberate dishonesty in responding to questionnaire regarding family criminal charges. Further, D's failure to disclose that she had been a rape victim when she was two or three years old deprived State & D of opportunity to determine upon voir dire whether these experiences would have impacted her verdict or recommendation.

Court rejected State's argument that inaccuracies in juror's questionnaire answers were unintentional, her victimization was dissimilar & remote, & that she repeatedly affirmed that she could be a fair juror & would decide case on evidence presented. Distinguishing Warner v. State, 773 N.E.2d 239 (Ind. 2002), Court affirmed post-conviction court's conclusion that juror's misconduct in this case warranted new trial because misconduct was both gross & probably harmed the D by denying him a fair trial. Held, grant of post-conviction relief on juror misconduct claim affirmed.

RELATED CASES: Loehrlein, 158 N.E.3d 768, Ind. 2020 (when a juror commits gross misconduct, a defendant must still demonstrate that he was probably harmed as a result of that misconduct to be entitled to relief; see full review, this section); Wilkinson, 70 N.E.3d 392 (Ind. Ct. App. 2017) (failure of two jurors to disclose that they knew the State witness did not affect the jurors' performance; D presented no specific, substatial evidence that the two jurors were biased); Slaybaugh, 44 N.E.3d 111(Ind. Ct. App. 2015), *aff'd* and expressly adopted at 47 N.E.3d 607 (Ind. 2016) (Tr. Ct. did not abuse its discretion by accepting, as true, juror's post-conviction testimony that she did know witness, victim or victim's family, despite being Facebook friends with witness; juror had over 1000 Facebook friends and the fact that they were Facebook friends, alone, did not constitute a relationship form which bias can be inferred).

TITLE: Easler v. State
INDEX NO.: D.9.e.2.
CITE: (9/20/2019), 131 N.E.3d 584, (Ind.),
SUBJECT: Erroneous denial of D's request to further question juror regarding potential bias
HOLDING: In operating while intoxicated prosecution, trial court abused its discretion when it failed to hold a hearing on a juror's note that raised concerns of potential bias before the jury was sworn in. The presence of even one biased juror on the jury is structural error requiring a new trial. Whiting v. State, 969 N.E.2d 24 (Ind. 2012). The burden to show a possibility of juror bias or misconduct and thus receiving a hearing is lower before the jury is sworn in than it is after trial. Here, after a six-person jury was selected, but before an alternate was selected, the trial court informed both parties that Juror 4 wrote the court a note which read: "a family member was killed by a drunk driver. It was before I was born, but altered my family dynamic irreparably. I can be a jury member, but thought it is relevant to disclose." Defendant asked to question the juror about potential bias but the trial court denied the request, as well as Defendant's request that Juror 4 be removed for cause for not being forthcoming on her juror questionnaire.
Court held that when a party requests a hearing on possible juror bias or misconduct after the jury is selected but before it is sworn in, a trial court should hold such a hearing if the party demonstrates some relevant basis for that bias or misconduct. Because the trial court did not hold a hearing, it abused its discretion. The Court remanded for a new trial instead of a hearing because examining whether Juror 4 was biased at trial involved a subjective assessment that would be difficult to make outside the context and timing of the voir dire setting. And holding a new trial avoids potential juror harassment. Held, transfer granted, Court of Appeals' opinion at 118 N.E.3d 84 vacated, reversed and remanded for new trial.

TITLE: Franklin v. State
INDEX NO.: D.9.e.2.
CITE: (2/3/89) 533 N.E.2d 1195 Ind.
SUBJECT: Misconduct affecting jurors – improper evidence in jury room
HOLDING: Jury's consideration of D's prior conviction, improperly allowed in jury room, was reversible error. D was charged with murder & conspiracy to commit murder. Tr. Ct. granted D's motion in limine excluding evidence of D's prior convictions. At trial, firearms transaction record, contained in clear plastic bag, was admitted on D's stipulation. Following guilty verdict & discharge of jury, juror informed D's counsel that plastic bag containing firearms transaction record also contained fingerprint record for D, indicating that he had been convicted for violation of Controlled Substance Act. Juror indicated that jury had discussed this prior conviction during deliberations. State argues this "mishap" was harmless error. However, case against D was entirely circumstantial. There was also testimony from 2 jail inmates that D had told them about his participation in crime. Testimony of this sort is always suspect, & credibility is left to jury. Where jury is required to base decision on circumstantial evidence & testimony of fellow prisoners as to statements made by D during confinement, it is essential that they not be unduly influenced by improper evidence. There is little question that jury here was influenced by document that should not have been presented to them. This "mishap" violated "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Turner v. LA, (1965), 379 U.S. 466, 85 S. Ct. 546, 13 L.Ed.2d 424. Held, reversed & remanded for new trial.

RELATED CASES: Hape, App., 903 N.E.2d 977 (text messages on a cell phone that was admitted into evidence are intrinsic to the cell phone; thus, the jury reading the text messages was not reversible error, even though defense counsel and prosecutor were unaware of their existence; turning on a device that is made be turned on constitutes a permissible examination of the evidence before the jury); Schlabach, App., 842 N.E.2d 411 (Court remanded for new trial where after jury verdict, D learned that a juror had found inside a notebook entered into evidence a folded-up summons alleging that D violated probation on a prior conviction for possession of marijuana).

TITLE: Griffin v. State
INDEX NO.: D.9.e.2.
CITE: (9-7-01), Ind., 754 N.E.2d 899
SUBJECT: Alternate juror's participation in deliberations
HOLDING: Trial Ct. did not abuse discretion in denying motion to correct error based on juror misconduct. Indiana Evidence Rule 606(b) provides that juror may not testify as to any matter or statement occurring during course of deliberations, except that juror may testify: 1) to drug or alcohol use by any juror; 2) on question of whether extraneous prejudicial information was improperly brought to jury's attention; or 3) whether any outside influence was improperly brought to bear upon any juror. In this case, during deliberations, several jurors sought to break deadlock by asking alternate her opinion on D's guilt. Alternate answered that she thought D was guilty, & one juror stated in affidavit that alternate's input affected her vote.

Ct. held that alternate juror's conduct during deliberations amounted to "outside influence" under Rule 606(b)(3). However, under common law, juror was prohibited from testifying about how outside influence affected her decision. Fox v. State, 457 N.E.2d 1088 (Ind. 1984). In interpreting Federal Rule 606(b), federal Ct.'s will accept juror affidavits stating that deliberations were tainted by improper information or influence but disregard any statements on effect of that information or influence on juror's decision. Thus, fact that one juror says alternate's input affected her decision is not part of analysis governing request for new trial. Rather, trial Ct. must consider alternate's conduct in overall trial context. Here, alternate did not add any fresh perspective to deliberations, & her only influence was adding one more "me, too" to the collective voice of jury majority. D failed to show either gross misconduct or probable harm. Held, transfer granted, Ct. App.' opinion on this issue at 735 N.E.2d 258 vacated, judgment affirmed.

RELATED CASES: Lyons, 993 N.E.2d 1192 (Ind. Ct. App. 2013) (Tr. Ct.'s failure to instruct two alternate jurors not to participate in deliberations was not fundamental error); Rice, 916 N.E.2d 962 (Ind. Ct. App. 2009); Weatherspoon, 912 N.E.2d 437 (Ind. Ct. App. 2009) (Ct. rejected constitutional challenge to 2008 amendment to Rule 20(a)(8), which permits alternate juror's participation in juror discussions before deliberations); Stokes, 908 N.E.2d 295 (Ind. Ct. App. 2009) (although Tr. Ct. did not inquire as to what alternate juror said, its inquiry whether jurors were influenced by the alternate amounts to adequate "consideration of the alternate's conduct in the overall trial context" to satisfy the Griffin standard); Sanchez, App., 794 N.E.2d 488 (situation was actually less egregious than that found harmless in Griffin, in that alternate merely confirmed a fact several other jurors had written down, rather than expressing an opinion on the D's guilt); Majors, 773 N.E.2d 231 (same concerns apply to post-verdict juror depositions).

TITLE: Hall v. State
INDEX NO.: D.9.e.2.
CITE: (1-15-02), Ind. App., 760 N.E.2d 688
SUBJECT: No right to depose jurors to determine existence of juror misconduct
HOLDING: Tr. Ct. did not abuse its discretion in denying D's post-trial motion for leave to depose members of jury. D argued that Federal & State constitutional right to confrontation includes right to depose members of jury to determine if misconduct occurred during trial or deliberations. Ct. disagreed & held that Ds are not guaranteed right to depose jurors in matters of juror misconduct; rather, this discovery method should be used only in most appropriate situations. More common method of dealing with juror misconduct is for Tr. Ct. to conduct *in camera* interviews, although decision is best left to Tr. Ct.'s discretion. Holding that Ds are guaranteed right to depose jurors would be contrary to time honored & accepted understanding of common law & Evidence Rule 606(b) both at state & federal levels. Further, in this case, it did not appear that D could have garnered any information other than effect information had on jurors, since all parties had submitted sworn affidavits. In light of foregoing & fact that State has paramount interest in limiting discovery regarding jury misconduct due to fears of post-verdict tampering, defeating jury's solemn acts under oath, & possibility that dissatisfied jurors would attempt to destroy verdict after assenting, Ct. affirmed denial of D's motion to depose jurors. Hel, judgment affirmed.

TITLE: Henriquez v. State
INDEX NO.: D.9.e.2.
CITE: (08-22-12), 973 N.E.2d 1154 (Ind. Ct. App. 2012)
SUBJECT: Improper influence of alternate juror
HOLDING: In situations involving improper juror influence, Tr. Ct. should make a determination as to likelihood of resulting prejudice, but if Tr. Ct. determines that jury's exposure to prejudicial information does not raise a substantial risk of prejudice, it has no duty to interrogate jurors or to take further remedial action. Agnew v. State, 677 N.E.2d 582 (Ind. Ct. App. 1997). Here, during jury deliberations, the bailiff informed Tr. Ct. that she heard someone in the jury room say something to the effect of "you need to be able to live with your decision." The bailiff thought this was the alternate juror. The judge brought the alternate into the courtroom and admonished him not to take part in the deliberations. Further, at request of defense counsel, Tr. Ct. admonished the alternate not to speak with the jury about this current communication with the court. Tr. Ct., in its proper discretion, determined that the alternate's alleged conduct posed only a remote risk of prejudice, if any at all. Therefore, no full scale inquiry as set forth in Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819 (1973), was warranted. D's constitutional right to a fair and impartial jury was not violated by the alleged improper influence of the alternate juror. Held, judgment affirmed.

RELATED CASES: Sterling, 199 N.E.3d 377 (Ind. Ct. App. 2022) (no abuse of discretion by failing to dismiss an alternate juror who read publicity and told other jurors that she thought D might be from Fort Wayne) RC to Brand at L.3.a (no error in excluding a defense witness who would have testified that the victim had said he would kill D, because victim's hearsay statements were never relayed to D and did not fall within an exception).

TITLE: Johnson v. State
INDEX NO.: D.9.e.2.
CITE: (2nd Dist., 10-8-98), Ind. App., 700 N.E.2d 480
SUBJECT: Juror misconduct - claim of intimidation & pressure to return guilty verdict
HOLDING: Tr. Ct. did not err in denying D's motion to correct errors, which alleged that juror misconduct denied D fair trial. Affidavit from juror stated that other five jurors pressured her into guilty finding on theft charge. Indiana Evidence Rule 606(b) provides that juror may not testify as to any matter or statement occurring during course of deliberations, except that juror may testify (1) to drug or alcohol use by any juror, (2) on question of whether extraneous prejudicial information was improperly brought to jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. Exception (3) within 606(b) plainly envisions sources outside of jury, & does not include testimony regarding purported intimidation or harassment by other jurors. Jurors may not decide, in hindsight, that weighing process during deliberations overcame their spirit or will. Held, judgment affirmed.

TITLE: Kelly v. State
INDEX NO.: D.9.e.2.
CITE: (6/7/90), Ind., 555 N.E.2d 140
SUBJECT: Juror misconduct - contact with witness
HOLDING: Tr. Ct. erred in refusing to grant D's motion for mistrial after 3 of 6 jurors ate lunch with state's sole witness. D was charged with theft, & store security guard testified that he saw D leave retail store without paying for merchandise. D admitted this but testified that he had forgotten the merchandise was in his possession when he walked outside store to attend to several small children. When trial reconvened after lunch, D immediately moved for mistrial. Tr. Ct. conducted hearing at which guard & jurors admitted eating together but denied discussing case. Upon questioning, jurors said that they had not formed opinion as to guard's credibility. Evaluation of witnesses' credibility in this case was most important component of fact-finding process. D contends fairness of this process was prejudicially compromised when state's only witness socialized with half of jury (including foreperson) during 55-minute lunch break of 1-day trial. In Woods, 119 N.E.2d 558, Ind. S. Ct. ordered new trial because police officer witnesses visited with jurors in jury room during recesses. Although there was no evidence that conversations took place concerning trial, Ct. found conduct prima facie prejudicial to D, noting that it is all too easy for jury unconsciously to be influenced in credibility determination by friendly association with state's witnesses. See also Turner v. Louisiana, (1965), 379 U.S. 85 S. Ct. 546, 13 L. Ed.2d 424. Ct. here finds Woods controlling. Despite lack of clear evidence that guard & jurors discussed case, & despite assertions of jurors that their impartiality was intact, enhancement of guard's credibility seems highly probable. Held, conviction reversed; remanded for new trial.

RELATED CASES: Holden, 916 N.E.2d 223 (Ind. Ct. App. 2009) (Tr. Ct. did not abuse its discretion in denying a mistrial where the juror asked the State's firearms expert a question (which had already been answered on direct examination) outside the courtroom during a recess in the trial).

TITLE: Lawson v. State
INDEX NO.: D.9.e.2.
CITE: (5/3/96), Ind. App., 664 N.E.2d 773
SUBJECT: Alternate juror's participation in deliberations
HOLDING: Both State & federal constitutions along with Ind. Code 35-37-1-1(b)(1) guarantee right to have trial by jury of 12 persons in murder prosecution. Here, Tr. Ct. permitted alternate juror to be present during deliberations. Tr. Ct. received note, signed by alternate juror, requesting T.V. to replay video. D alleged requests demonstrated alternate impermissibly participated in deliberations. State argued that facts were equally susceptible to conclusion that jury asked alternate to perform ministerial task, because alternate was not participating in deliberations. Tr. Ct. subsequently instructed jurors twice that alternate may accompany jury to jury room but may not take part in deliberations. Juror is presumed to have followed ct's instruction. Vega, 656 N.E.2d 497. Written request for T.V. was not evidentiary question & was submitted with unsigned note containing evidentiary matters. This, along with foreman's affirmation that alternate did not participate in deliberations, negated any inference of impropriety arising from alternate juror's request that jury be provided with means to view tape. Held, convictions affirmed.

TITLE: Loehrlein v. State

INDEX NO.: D.9.e.2.

CITE: (12/09/2020), Ind., 158 N.E.3d 376

SUBJECT: Defendant not harmed by jury forewoman's gross misconduct in providing a misleading answer on a jury questionnaire

HOLDING: Proof that a juror was biased against the defendant or lied during voir dire generally entitles the defendant to a new trial. State v. Dye, 784 N.E.2d 469 (Ind. 2003). But when a juror commits gross misconduct, defendants must still demonstrate that they were probably harmed as a result of that misconduct to be entitled to relief. Here, in a case where Defendant murdered his wife and savagely attacked his two daughters, Defendant was not harmed by the attorney juror forewoman's gross misconduct in providing a misleading answer on her jury questionnaire. The juror (L.W.) falsely answered "N/A," meaning not applicable, instead of "yes" to questions concerning whether she, immediate family members or close friends had been charged or convicted with a crime. The Supreme Court first noted that L.W. committed gross misconduct, and her actions were even more egregious "because she is an attorney who had previously handled some criminal matters and as such, she should have known better." Because L.W.'s answers on the jury questionnaire were cryptic and her demeanor during her post trial deposition was defensive and evasive, Court found that her misconduct was gross. But given the facts and circumstances of this case, including strong evidence of Defendant's sanity, it was not likely that he was harmed. L.W.'s personal experience with domestic violence is not directly related to a sanity inquiry and further, she testified that she was impartial. Thus, trial court did not abuse its discretion in denying Defendant's motion to set aside the jury verdict. Held, transfer granted, Court of Appeals' opinion at 142 N.E.3d 966 vacated, denial of request for new trial affirmed.

TITLE: Majors v. State
INDEX NO.: D.9.e.2.
CITE: (8-14-02), Ind., 773 N.E.2d 231
SUBJECT: Juror misconduct allegations - denial of request to depose jurors
HOLDING: In murder prosecution, Tr. Ct. did not err in denying D's post-verdict request to depose jurors, alternates & bailiffs to explore further his allegations of juror misconduct. *Citing* Griffin v. State, 754 N.E.2d 899 (Ind. 2001), which emphasized public interest in discouraging post-trial verdict impeachment via affidavit, Ct. concluded that same concerns apply to post-verdict juror depositions. D failed to demonstrate a defense interest sufficient to overcome interests of finality of verdicts & avoidance of juror harassment. Held, judgment affirmed.

Note: Ct. rejected D's multiple claims of jury mismanagement & misconduct, based on jurors' alcohol consumption on evening after third day of deliberations, & fraternization with law enforcement oficers at two picnics hosted by sheriff. None of officers were involved in murder investigation.

TITLE: Matthews v. State
INDEX NO.: D.9.e.2.
CITE: (4/26/85), Ind., 476 N.E.2d 847
SUBJECT: Juror question to Ct. during trial
HOLDING: Tr. Ct. did not deny D's right to fair & impartial jury by interrogating individual juror & instructing juror not to discuss nature or content of inquiry with other jurors. Here, during state's case in chief, juror asked Ct. (in writing) why case was being tried before all-white jury & why only black person in first group of jurors was asked to leave before jury selection began. Tr. Ct. questioned juror (outside presence of other jurors, but in presence of D & state) to determine whether juror extraneous matter would affect his ability to be fair/impartial. D objected to hearing & requested admonishment, which was given. D contends Ct. inquiry created bias (Stevens, 354 N.E.2d 727 - singling out juror for questioning re bias presents real danger of creating bias even if none existed before) & admonition invaded province of jury. Ct. likens situation to questioning of juror exposed to (1) out-of-Ct. statements of D (Chambers, 422 N.E.2d 1198) or (2) prejudicial publicity (Lindsey, 295 N.E.2d 819), where Tr. Ct. must question juror. Procedure followed by Ct. was proper. Ct. rejects D's contention that admonition invaded province of jury; race issue could still be discussed in deliberations. Held, no error.

TITLE: Mickens v. State
INDEX NO.: D.9.e.2.
CITE: (2-27-01), Ind., 742 N.E.2d 927
SUBJECT: Juror misconduct - claim of pressure by other jurors to return guilty verdict
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial based on juror misconduct during deliberations. As counsel polled jury after guilty verdict, one juror said she had been intimidated by another & was unsure about voting to convict. In response, trial judge instructed jury to continue deliberations & conducted two separate inquiries of beleaguered juror to confirm importance of verdict being individual decision. Judge admonished jury to maintain civility during their deliberations & polled jurors independently after verdicts were announced to verify that result was truly individual decision. Without hesitation, affected juror assured Tr. Ct. that she understood how she voted was individual decision, & she agreed with jury's verdict. Trial judge was satisfied that verdict represented impartial & separate judgment of all jurors. Held, judgment affirmed.

TITLE: Mitchell v. State
INDEX NO.: D.9.e.2.
CITE: (4-18-00), Ind., 726 N.E.2d 1228
SUBJECT: Juror misconduct - experiment during deliberations
HOLDING: Experiment performed by jury during deliberations did not constitute misconduct. In Kennedy, 578 N.E.2d 633, *cert. den'd*, 503 U.S. 921, 112 S. Ct. 1299, 117 L.Ed.2d 521 (1992), Ct. held that actions of two jurors, who were of height & build similar to D, in trying on clothing introduced into evidence, constituted permissible examination of evidence & not improper extra- judicial experiment. Here, jury foreman allegedly beat back of leather chair fifty times with two- foot-long wooden rod that had been introduced into evidence & that had been used by D to beat victim. During trial, State had hit bag five times with rod & argued that jury should imagine child being hit similarly, up to fifty times. Because experiment was not extra-judicial but rather was performed in trial, D's right to be present during all critical stages of trial was not violated & Tr. Ct. did not abuse its discretion in denying D's motion to correct errors. Held, judgment affirmed.

RELATED CASES: Patterson, App., 742 N.E.2d 4 (comparing shoe to plaster cast & picture of shoe print at scene of crime was not improper experiment, although officer was not allowed to make comparison during trial).

TITLE: Pattison v. State
INDEX NO.: D.9.e.2.
CITE: (12-09-11), 958 N.E.2d 11 (Ind. Ct. App. 2011)
SUBJECT: Jury's experiment during deliberations
HOLDING: In murder prosecution, Tr. Ct. did not err in allowing jury to examine a weightlifting machine during their deliberations. D argued that he should have been given notice and opportunity to be present for jury's examination of the machine, and jurors engaged in inappropriate experiments with the machine. D failed to object when Tr. Ct. informed jury that it would be given an opportunity to examine the machine during deliberations, thus he waived issue of notice and opportunity to be present during deliberations. During deliberations, a female juror lay on the weight bench and tried to get out from under the weight bar while another juror sat on her and held her wrists. As in Bradford v. State, 675 N.E.2d 296 (Ind. 1996), jurors' actions were in keeping with the evidence presented at trial and were not improper. Further, the jurors were examining a properly admitted exhibit. Court also found no abuse of discretion in denying D's request to question jurors about their experiments with the weight machine. Held, judgment affirmed.

TITLE: Peters v. State
INDEX NO.: D.9.e.2.
CITE: (9/5/89), Ind., 542 N.E.2d 1340
SUBJECT: Misconduct affecting jurors
HOLDING: Tr. Ct. did not err in denying mistrial because juror & alternate overheard alibi witness (AW) say, "What some people won't do for money." D was charged with rape & presented brother's girlfriend as AW. During recess after AW testified, juror & alternate were in restroom when they heard AW make above statement in singsong manner. Juror became upset & began to cry in presence of other jurors. Incident was brought to attention of Tr. Ct. & D moved for mistrial. Tr. Ct. held hearing at which each juror was voir dired. Juror who had heard AW, testified that incident had scared her, but that she realized D had no control over AW. Several other jurors indicated that they gave thought to incident but were able to set aside any apprehension. Eight jurors said incident would have no effect on their decision. Tr. Ct. then denied motion & admonished jury not to consider incident and to decide case solely on evidence heard in Ct. room. Denial of motion for mistrial lies within discretion of Tr. Ct. & reviewing Ct. will reverse only when D was placed in position of grave peril to which he should not have been subjected. [*Citations* omitted.] Admonishment is generally considered sufficient. [Citations omitted.] Here, all jurors stated incident would not affect ability to serve on jury, & Tr. Ct. admonished them. Held, conviction affirmed. See Tacy, 452 N.E.2d 977.

RELATED CASES: Lee, 735 N.E.2d 1112 (D did not show that juror lied during voir dire & did not present evidence of any out-of-Ct. communication by juror to prove bias; although juror's bias may arise by inference when juror has some connection to case, here any connection by juror to case was purely speculative); Dupree, App., 712 N.E.2d 1076 (fact that courthouse employee made improper remark to juror during lunch break did not require mistrial because court questioned and admonished jury); Timm, 644 N.E.2d 1235 (Tr. Ct. questioned juror at length re her knowledge of D's prior conviction; juror was admonished repeatedly & remained qualified to serve & did not share information with other jurors).

TITLE: Pribie v. State
INDEX NO.: D.9.e.2.
CITE: (12/4/2015), 47 N.E.3d 629 (Ind. Ct. App. 2015)
SUBJECT: Juror/bailiff communication - harmless error
HOLDING: When communication between a bailiff and a jury occurs outside of the D's presence, there is a presumption of harm to the D that the State must rebut to avoid reversal. Azania v. State, 730 N.E.2d 646 (Ind. 2000). Here, during break in a rape trial, a juror told the bailiff she knew people on both sides of the case. The bailiff asked the juror if the recognized people were close friends, to which she said no. She also said it would not prejudice her decision. Although the bailiff should have informed Tr. Ct. or defense about this ex parte conversation and allowed the judge to question the juror, the bailiff's actions were harmless error because Tr. Ct. would have asked substantially the same questions bailiff did and would have kept the juror. Thus, following the correct procedure pursuant to Indiana Jury Rule 24 would not have yielded a different result for D. But Court "will continue to examine closely communication between bailiffs and juries." Farris v. State, 732 N.E.2d 230, 235 (Ind. Ct. App. 2000). Held, judgment affirmed.

TITLE: Proctor v. State
INDEX NO.: D.9.e.2.
CITE: (01/23/92), Ind., 584 N.E.2d 1089
SUBJECT: Misconduct of judge during jury deliberations
HOLDING: When, after considerable deliberation by jury, repeated requests to review testimony, & apparent deadlock, Tr. Ct. advised jury that D had requested mistrial, such conduct was error. Jury made repeated requests over long period of deliberation, for various exhibits & transcripts of testimony, all of which were eventually denied.

Jury was eventually called back & still indicated desire to hear testimony but was excused without testimony. Judge then indicated inclination to grant mistrial; defense so moved, & judge said he would grant it. Prosecutor asked that before granting mistrial, judge bring in jury & inform them that they couldn't have testimony & see if they still could not reach verdict. Judge then did this, & jury indicated it would not be reasonably possible to reach verdict. Judge also stated that D had moved for mistrial because of inability to reach verdict. Foreman then indicated that jury had decided if this happened, they wanted to try one more vote. After jury retired, defense again moved for mistrial, adding as grounds, judge's statement about D requesting mistrial. Shortly thereafter jury returned with guilty verdict. S. Ct. found that while it couldn't precisely gauge impact of judge's comment on jury, it undoubtedly had some effect, & its clear import was that D was not confident in his position. Because jury could easily have interpreted request as indication of guilt or mistrust of jury, & jury wasn't advised that mistrial only results in retrial, rather than acquittal, statement had prejudicial effect & tainted proceedings. Held, remanded for new trial, Shepard, C.J., dissenting.

RELATED CASES: Smith, 382 N.E.2d 937 (where jury is admonished to disregard what has occurred, or other curative measures are taken, reversible error will normally not be found; here, judge asked jurors if any one of them was impaired in his capacity to act as juror after bomb threat was called in to courthouse during trial; this measure was sufficient to prevent mistrial).

TITLE: Ramirez v. State
INDEX NO.: D.9.e.2.
CITE: (4/29/2014), 7 N.E.3d 933 (Ind. 2014)
SUBJECT: D failed to show prejudice from juror's extra-judicial comment
HOLDING: In clarifying its precedent, Court held that D was not entitled to rebuttable presumption of prejudice from communication from one juror to other jurors because D failed to prove by preponderance of evidence that incident juror shared with other jurors related to his trial.

Five days into D's trial for murder and criminal gang activity, Juror 282 wrote a note to the judge about an incident at her home where a neighbor heard gunshots. Juror 282 also told the other jurors about the incident.

"Ds 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. Currin v. State, 497 N.E.2d 1045, 1046 (Ind. 1986)." Because D failed to make such showings, Tr. Ct. properly denied his motion for mistrial. Held, transfer granted, Court of Appeals' opinion summarily affirmed on all other issues, judgment affirmed.

RELATED CASES: Hambel, 119 N.E.3d 1142 (Ind. Ct. App. 2019) (Tr. Ct. did not abuse its discretion in denying mistrial based on juror's extrajudicial communication, where each juror was questioned, Tr. Ct. admonished the jurors and dismissed the offending juror; no evidence that juror's remarks, which were harmless and favorable to D, impacted the jurors' ability to remain impartial); Wahl, 51 N.E.3d 113 (Ind. 2016) (Erroneous denial of motion for mistrial based on alternate juror's misconduct, based on fact he immediately involved himself in the jury deliberations and manipulated physical evidence and a DVD; juror's affidavit established by preponderance of the evidence that the alternate juror's participation in deliberations was an external influence that pertained to the case, and under Ramirez, the assertions in the affidavit result in a presumption of prejudice to the defendants. Because the State has not rebutted the presumption by showing that the jury was nevertheless impartial, a new trial is required).

TITLE: Ridenour v. State
INDEX NO.: D.9.e.2.
CITE: (4th Dist., 08-15-94), Ind. App., 639 N.E.2d 288
SUBJECT: No need to question jurors re influence from excused juror
HOLDING: Because risk of prejudice due to possible contamination from excused juror did not appear substantial, no error in failing to question jurors. On 3rd day of child molesting trial, juror revealed to judge she thought she was biased in favor of State & could not be impartial. Upon questioning she revealed girl's testimony reminded her of similar incident that had occurred in her family & she thought she could remain impartial until receiving upsetting phone call from daughter. Because she couldn't discuss her dilemma with anyone, she was awake almost all night, & now thought she couldn't be impartial. Juror removed at D's request, & jury admonished not to speculate on substitution of alternate, & not to let situation have any impact on, or be discussed during, deliberations.

Ct. rejected D's argument that Tr. Ct. should have interrogated remaining jurors to find if they were exposed to prejudice through conversations with excused juror. Tr. Ct. must follow procedure set forth in Lindsey, 295 N.E.2d 819 when jury has been potentially exposed to prejudicial publicity during trial, or in situations involving improper juror influence, but only if Ct. is presented with some basis for reasonable belief that one or more jurors actually was exposed to potentially harmful influence.

There was no evidence juror discussed her problem with other jurors or that she had come into contact with any of them on morning she decided she was no longer impartial. Absent basis for believing jury may have been subject of improper stimuli, Lindsey procedure does not have to be followed. Ct. also found that even if juror had discussed her situation with others, incidents causing her problems were not sufficiently closely related to charges against D to show why they would have prejudicially tainted jury. Because threshold issue was not met, Tr. Ct. did not err in failing to question jurors. Held, convictions affirmed.

RELATED CASES: Barnett, 916 N.E.2d 280 (Ind. Ct. App. 2009) (denial of mistrial affirmed where juror rolled her eyes & prematurely formed opinion prior to close of evidence but did not share it with other jurors); West, 758 N.E.2d 54 (discovery of handgun associated with unrelated case did not affect juror's ability to remain fair & impartial); Flowers, 738 N.E.2d 1051 (where D failed to show risk of substantial prejudice resulting from 2 potential jurors' conversation about retrial of D, Tr. Ct. was not required to inquire whether already picked jurors overheard conversation).

TITLE: Saperito v. State
INDEX NO.: D.9.e.2.
CITE: (3/25/86), Ind., 490 N.E.2d 274
SUBJECT: Misconduct by jurors - going to scene
HOLDING: D was denied his right to confrontation when juror injected evidence (of scene) into deliberations that was not in record (Dyer, App., 342 N.E.2d 671), but error is not reversible. Specific facts of case deter-mine whether jury contact with outside information requires reversal. Grigsby, 371 N.E.2d 384. Here, entire jury was polled & each member stated information did not affect their verdict. Information was cumulative to some extent & went to witness' credibility rather than to element of offense/defense. Ct. finds juror's information was not influential enough to have affected D's rights. Held, error was harmless.

RELATED CASES: Isaacs, 673 N.E.2d 757 (juror who relayed her personal experience as rape victim during deliberations did not interject information specific to events of charged incident; although there may be instances where juror has specific knowledge whose use during deliberations undermines adversary system, this is not one of them).

TITLE: Schultz v. Valle
INDEX NO.: D.9.e.2.
CITE: (3d Dist. 6/12/84), Ind. App., 464 N.E.2d 354
SUBJECT: Jurors - misconduct; alcoholic consumption
HOLDING: Tr. Ct. erred in denying MCE predicated upon juror's consumption of alcohol during dinner, after deliberations had begun & with Ct.'s approval. A verdict is invalid per se if rendered by jury which has consumed alcoholic beverages after deliberations have begun. Davis, (1871) 35 Ind. 496; other *citations* omitted. Per se rule is necessary because of impracticality of determining effect of alcohol on individual jurors, unlike cases involving prejudicial material in jury room (Fox, 457 N.E.2d 1088) or intimidating phone calls to juror (Rodriguez, 388 N.E.2d 493) or witness communications with jurors (Buchanan, 348 N.E.2d 70). Opinion discusses ALR & cases from other states. Held, reversed & remanded for new trial. Hoffman DISSENTS, arguing reversal is unnecessary unless drinking resulted in some degree of intoxication, *citing* "modern rule" adopted by other states & CA4. No law similar to law prohibiting sale of alcoholic beverages on election days exists for jury duty.

RELATED CASES: Majors, 773 N.E.2d 231 (distinguishing Schultz, Ct. held that focus is whether jury was free from influence of alcohol during actual deliberations; here, full night passed after juror drank two beers).

TITLE: Stokes v. State
INDEX NO.: D.9.e.2.
CITE: (4th Dist.; 01-27-10), 919 N.E.2d 1240 (Ind. Ct. App. 2010)
SUBJECT: Jury exposure to extraneous information
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion for mistrial, which alleged the jury's impartiality was compromised because several jurors saw two documents indicating D and his co-Ds were incarcerated pending trial. Tr. Ct. reasonably concluded from its voir dire of jurors that knowledge obtained from documents would not impair jurors' ability to be fair and impartial. A reasonable person would expect Ds facing multiple charges of robbery, attempted robbery, and criminal recklessness to be incarcerated pending trial. D did not demonstrate that jury's knowledge that he was incarcerated placed him in grave peril that the jury's verdict would be influenced by this information. D waived claim that Tr. Ct. did not follow proper process by failing to interrogate and admonish the jury because, at trial, D opposed interrogation and did not request an admonishment. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Whitehair v. State
INDEX NO.: D.9.e.2.
CITE: (7/31/95), Ind. App., 654 N.E.2d 296
SUBJECT: Juror misconduct - false statements on voir dire
HOLDING: Tr. Ct. did not abuse its discretion in denying motion for mistrial based on juror's inaccurate response to question on jury questionnaire regarding prior arrests. Here, juror indicated he had no prior arrests or convictions. After jury reached verdict, but prior to verdict being returned, State informed Tr. Ct. that juror had been stopped for shoplifting & that charges against him were subsequently dismissed. Upon questioning juror, Tr. Ct. determined that it could not say that juror was lying on questionnaire because juror indicated that he did not consider himself arrested, as he was never read any rights, was not taken anywhere, & officer just sent him home. Juror further insisted he forgot to pay for item, & prosecutor's office dismissed charges when they heard his explanation.

Issue of juror misconduct is matter within Tr. Ct.'s discretion. Lopez, 527 N.E.2d 1119. Generally, it is reversible error for juror to make false statements during voir dire examination, because it impairs right to challenge juror, either peremptorily or for cause. Fuquay, App., 583 N.E.2d 154. To warrant new trial, D must show that misconduct was gross, & that it probably harmed D. Here, juror's inaccurate response did not constitute gross misconduct & was false only in technical sense. Ct. found ample evidence to support Tr. Ct.'s conclusion that juror did not "lie"- he simply did not comprehend that store incident may have constituted an "arrest." Held, conviction affirmed.

RELATED CASES: Warner, 773 N.E.2d 239 (although it was wrong for juror to omit information from questionnaire, Ct. could not conclude that omission rose to level of gross misconduct or that D was harmed).

TITLE: Wilkinson v. State
INDEX NO.: D.9.e.2.
CITE: (1/27/2017), 70 N.E.3d 392 (Ind. Ct. App. 2017)
SUBJECT: Sufficiency, warrantless search and juror misconduct claims rejected
HOLDING: State presented sufficient evidence to show Defendant operated a vehicle while intoxicated, and police searches of the car and Defendant were justified under the medical assistance and automobile exceptions, the plain view doctrine, and as a search incident to a lawful arrest.

Residents of a home found a strange car parked in their driveway. Defendant was seated behind the steering wheel of the car and appeared disoriented and unsteady, telling one of the residents he had been in an accident. When police officers arrived, Defendant was slumped over behind the steering wheel and appeared to be sleeping. Officers asked Defendant if he was okay and if he needed medical attention. Defendant stated he did not know. Officers opened the door and observed a plastic vial between Defendant's legs and a partially filled bottle of rum on the floor. The officers asked Defendant to exit the car and assisted him because he was unable to do so on his own. Defendant declined to take a field sobriety test but after police obtained a warrant, his blood tested positive for amphetamine and methamphetamine.

In affirming Defendant's convictions, Court noted that the jury could have reasonably concluded that Defendant operated the vehicle while intoxicated, despite the fact that a security video showing the car entering the driveway was not presented at trial. Court also rejected Defendant's claim that the warrantless search of his vehicle violated the Indiana and Federal constitutions.

Finally, Court held that the failure of two jurors to disclose that they knew the State witness whose car Defendant was found in at the time of the incident did not affect the jurors' performance. Defendant presented no specific, substantial evidence that the two jurors were biased. Held, judgment affirmed.

D. TRIAL

D.9. Jury trial

D.9.e.3. Disqualification of jurors/alternates (Ind. Code 35-37-2-3(b))

TITLE: Ballin v. State
INDEX NO.: D.9.e.3.
CITE: (3/10/93), Ind. App., 610 N.E.2d 846
SUBJECT: Disqualification of juror - alleged personal knowledge of material fact
HOLDING: Tr. Ct. did not err in failing to examine juror regarding juror's alleged personal knowledge of material fact in case. Ind. Code 35-37-2-3 requires Tr. Ct. to instruct jurors that if juror realizes that he has personal knowledge of any fact material to the cause, he shall inform bailiff. If Tr. Ct. finds that juror has personal knowledge of material fact, juror shall be excused & court shall replace that juror with alternate. Id. If there is no alternate juror, then Tr. Ct. shall discharge jury w/o prejudice, unless parties agree to submit cause to remaining jurors. Id. Here, juror questioned expert witness about possibility of necrosis of surrounding tissue immediately adjacent to burn marks found on victim. D argued that juror's question demonstrated that juror had particularized knowledge of medical condition known as necrosis & that this knowledge was "personal knowledge of any fact material to the cause" within meaning of statute. However, Ind. Code 35-37-2-3 applies only to any "fact" material to the cause. Type of "fact" contemplated by statute generally includes underlying story & what happened to bring parties into court, "the what-happened or who dunnit of the case." It is not meant to encompass general knowledge that jurors may bring with them from their life experiences. In this case, general knowledge of necrosis as medical condition could not be considered a "fact" within meaning of Ind. Code 35-37-2-3. Thus, statute did not apply. Held, no error.

TITLE: Barnes v. State
INDEX NO.: D.9.e.3.
CITE: (3-11-98), Ind., 693 N.E.2d 520
SUBJECT: Disqualification of jurors - juror's relationship with State's witness
HOLDING: Tr. Ct. did not abuse discretion by replacing original juror with alternate juror. Juror's relationship with State's witness is not per se disqualifying. Grey, 533 N.E.2d 1196. However, disqualification depends on critical role of firsthand observation in determining whether juror -- irrespective of relationships with expected witnesses -- may be unable to reach decision free from extraneous considerations. Here, just before opening statements, juror told Tr. Ct. that he knew D's brother, who was also witness, from work. Although juror asserted several times that he believed he could render verdict based on evidence & indicated that he & D's brother never discussed case, Tr. Ct. dismissed juror because juror appeared hesitant in spite of repeated assertions. Ct. was concerned that juror feared reprisal in light of D's brother's pending battery charge. Thus, Tr. Ct.'s decision to dismiss juror was reasonable. Held, conviction affirmed.

RELATED CASES: Kimbrough, 911 N.E.2d 621 (Ind. Ct. App. 2009) (no abuse of discretion in refusing to dismiss juror who worked with victim more than 30 years before trial); Alvies, App., 795 N.E.2d 493 (mere fact that juror was distantly related to a victim did not entitle D to new trial; two other jurors had only casual working relationship with two other state witnesses, but there was nothing in record to support D's claim of implied bias. Jurors made it clear that their knowledge of these witnesses would not affect their ability to serve as jurors).

TITLE: Burtley v. State
INDEX NO: D.9.e.3.
CITE: (4/25/85), Ind., 476 N.E.2d 835
SUBJECT: Jurors - disqualification during trial
HOLDING: Tr. judge properly discharged juror & replaced her with alternate prior to closing arguments where juror developed high state of anxiety/physical condition rendering her unable to perform her jury duties. Ind. Code 35-37-2-3; TR 47(B); Blevins, 291 N.E.2d 84 (replacement of juror who suffered asthma attack upheld); McPhearson, 219 N.E.2d 907 (lone juror holding out for acquittal became ill & was properly replaced); Smith, 170 N.E.2d 794 (discharge of violently ill juror upheld). Held, no error.

RELATED CASES: Walker, 988 N.E.2d 341 (Ind. Ct. App. 2013) (no abuse of discretion in replacing juror 271, the only African-American juror, where he was late, could not be reached and arrived during closing argument after a lengthy bus delay); LeFlore, App., 823 N.E.2d 1205 (juror properly removed after communicating to Tr. Ct. that she could not continue because she could not "determine somebody's fate" & was unable to vote her conscience); Casey, App., 689 N.E.2d 465 (juror who claimed he could not be impartial & that his system was “messed up” was properly removed from panel); Ferry, 453 N.E.2d 207 (no error in replacement of juror, about to be arrested on outstanding warrant, with alternate on morning of last day of murder trial).

TITLE: Durden v. State
INDEX NO.: D.9.e.3.
CITE: (6/20/2018), 99 N.E.3d 645 (Ind. 2018)
SUBJECT: Defective juror-removal procedure was structural error but D invited the error
HOLDING: Even though trial court committed "structural error" in how it removed and replaced a juror, D's attorney invited the error, so D is not entitled to a new trial.

D was charged with murder and eight drug-related offenses. Once jury deliberations began, Juror 12 asked to be excused. In deciding whether to grant her request, the trial court did not follow the requirements of Riggs v. State, 809 N.E.2d 322 (Ind. 2004). Riggs requires a trial court to determine, on the record, that removal "is necessary for the integrity of the process, does not prejudice the deliberations of the rest of the panel, and does not impair the parties[']right to a trial by jury." Id. at 327–28. The court must also: (1) avoid questions that affect the juror's judgment, in case he or she continues to serve; and (2) in the event of removal, take steps to minimize any prejudicial impact removal may have had on the remaining jurors. Id. at 329. Based on these omissions, the Court of Appeals ruled D was entitled to a new trial. Structural error is error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Ds enjoy a constitutional right to an impartial jury; that right "is a structural guarantee," Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring), and its "infraction can never be treated as harmless error." Gray v. Mississippi, 481 U.S. 648, 668 (1987). Structural error also results if "the precise effect of the violation cannot be ascertained" from the record. Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017).

Here, the trial court committed structural error by not following Riggs. The error affected the framework within which the trial proceeded, and the precise effect of the error cannot be determined because the trial court did not "demonstrate, through a carefully developed record, that removal was "necessary for the integrity of the process.'" Riggs, 809 N.E.2d at 327. However, by agreeing to the trial court's procedure, D invited the error. It is not true, as D contends, that there are no circumstances where structural error permits anything other than reversal. There is "no reason to exempt 'structural errors'" from the invited-error doctrine. United States v. Gaya, 647 F.3d 634, 640 (7th Cir. 2011); Ex parte Thuesen, No. WR-81584-01, 2018 WL 1179875, at *5 (Tex. Crim. App. Mar. 7, 2018) ("This Court and other courts often apply the doctrine of invited error to rule against Ds on a wide variety of matters, including errors that might amount to fundamental or structural errors.").

Further, D did far more than simply fail to object to the procedure. His attorney expressly declined "any caveats" or special instructions for the jury and repeatedly assured the court of his approval of the procedure employed. Based on the record, "we can only conclude that [D] decided to engage in a rational, albeit unsuccessful, trial strategy. Any other conclusion runs contrary to our 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' at trial. Strickland v. Washington, 466 U.S. 668, 689 (1984)." Held, transfer granted, Court of Appeals opinion at 83 N.E.3d 1232 vacated, and judgment affirmed.

TITLE: Gavin v. State
INDEX NO.: D.9.e.3.
CITE: (2nd Dist., 9-17-96), Ind. App., 671 N.E.2d 440
SUBJECT: Erroneous dismissal & replacement of juror
HOLDING: Tr. Ct. abused discretion in replacing juror with alternate juror & in denying D's motion for mistrial. Trial judge decided to remove juror solely on basis of note that inaccurately stated that juror could not make decision in case. During questioning by trial judge, juror stated that he had decided to acquit based upon evidence presented at trial. Juror also admitted that his decision was influenced by past incident where innocent person was wrongfully convicted of crime. Trial judge refused to consider allowing juror to continue deliberations even after being apprised of facts. Ct. held that removing juror who voted to acquit based upon evidence presented at trial & on juror's life experiences placed D in substantial peril. Harris v. State, 659 N.E.2d 522 (Ind. 1995). Record as whole supported conclusion that juror was not unduly influenced by his life experiences, or his knowledge of prior case. Held, judgment reversed.

TITLE: May v. State
INDEX NO.: D.9.e.3.
CITE: (9-23-99), 716 N.E.2d 419, (Ind.)
SUBJECT: Refusal to dismiss juror – contact with State's witness during lunch break
HOLDING: Tr. Ct. abused its discretion in denying D's motion to replace juror with alternate after juror exchanged pleasantries with State witness & invited witness to watch boxing match at his home on weekend following trial. Article I, § 13 of Indiana Constitution guarantees D's right to impartial jury; therefore, biased juror must be dismissed. In cases alleging juror misconduct involving out-of-Ct. communications with unauthorized persons, rebuttable presumption of prejudice exists. Timm, 644 N.E.2d 1235. Juror conduct with witnesses occurring contemporaneous to trial proceeding more directly implicates public's trust & confidence in our criminal justice system. Under certain circumstances, extra-judicial conduct is so fundamentally harmful to appearance of fair & impartial administration of justice, it will be considered "prima facie prejudicial" to D, irrespective of whether communication concerned matter pending before jury. Kelley, 555 N.E.2d 140. Not only was conduct in this case prejudicial & inflammatory in nature, it no doubt affected juror's ability to assess witness's credibility. Held, transfer granted, decision of Ct. App. At 697 N.E.2d 70 vacated, reversed & remanded for new trial.

RELATED CASES: Rose, 36 N.E.3d 1055 (Ind. Ct. App. 2015) (no fundamental error with judicial candidate acting as jury foreman where she knew attorneys in the case and had represented complaining witness's mother in paternity action years before); Leslie, 978 N.E. 2d 486 (Ind. Ct. App. 2012) (no fundamental error in denying request to remove juror who stood in a hallway for 5 to 10 seconds as D and counsel discussed trial strategy; juror testified she did not recognize D or his lawyer as she stood nearby and did not overhear their conversation); Holden, 916 N.E.2d 223 (Ind. Ct. App. 2009) (Tr. Ct. did not abuse its discretion in denying a mistrial where the juror asked the State's firearms expert a question (which had already been answered on direct examination) outside the courtroom during a recess in the trial); Spears, App., 811 N.E.2d 485 (Tr. Ct. did not commit fundamental error when it failed to replace a juror, despite fact that a witness's conversation with a juror during a recess pertained to credibility of State's witnesses, an issue squarely pending before jury); Dixon, App., 769 N.E.2d 685 (D was not deprived of fair trial because of ex parte communications between jury foreman & bailiff. Brief interaction did not involve facts of case or any legal discussion, but was rather procedural in nature as to where verdict form should be placed); Parks, App., 734 N.E.2d 694 (mistrial was not required because witness did not engage in conversation with jurors, case was not discussed, & each juror stated that being in proximity of witness would not influence their decision about this case); Farris, 732 N.E.2d 230 (although communication between juror & bailiff was improper, error was harmless).

TITLE: Phillips v. State
INDEX NO.: D.9.e.3.
CITE: (12/10/2014), 22 N.E.3d 749 (Ind. Ct. App. 2014)
SUBJECT: No basis to remove juror based on question
HOLDING: In child molesing prosecution, Tr. Ct. did not deny D the right to an impartial jury and fair trial under federal and state constitutions by denying D's motion to replace juror and for mistrial after juror asked a question. After the C.W. testified, a juror sent a question to Tr. Ct. expressing concern for C.W. "implicating someone he has been so close to" and "telling the truth has hurt someone who has been like a grandfather to him." The juror asked whether courts ever order counseling for children in these situations. D argued that this question showed the juror was biased and already had made up his or her mind regarding his guilt. Instead of revealing the identity of and permitting counsel to question the juror, Tr. Ct. instead included a curative instruction informing the jury not to reach a conclusion on guilt or innocence until all evidence was presented and deliberations began. Court found no basis to remove the juror under either federal or state constitutional analyses. Juror's question did not indicate bias in favor of or against a particular verdict, thus removal was not necessary for the integrity of the process. Held, judgment affirmed.

TITLE: Riggs v. State
INDEX NO: D.9.e.3.
CITE: (6-03-04), 809 N.E.2d 322, (Ind.)
SUBJECT: Improper removal of juror – reversible error
HOLDING: Ct. reversed D's convictions for murder & criminal deviate conduct because juror was improperly removed & replaced by alternate juror after deliberations had begun. About four hours after deliberations began, jury foreman asked to see the judge because a juror was being "belligerent" & deliberations had slowed. Although trial judge attempted to get the foreman to say that other jurors were afraid of the "belligerent" juror, the foreman's answers were conflicting on this question. Later, the juror asked to see the trial judge because the foreman was accusing juror of "trying to defend the D." He told the judge he did not have to take that because, "I'm trying to give a fair & impartial determination to this evidence & to this Ct." The State requested that the juror be dismissed. Tr. Ct. granted this request while denying D's request to poll the jury on whether it could reach a verdict.

Ct. noted that "a failure to agree, however unreasonable, is a ground for mistrial, not removal of the obstacle to unanimity." If there were a showing of physical confrontation or intimidation of other jurors, removal may be permissible, but record did not establish these extremes & it appears "the avoidance of a hung jury" may have influenced the juror's dismissal in this case. Ct. also disagreed with the State's contention that D failed to establish prejudice, as unjustified juror removal is structural error equivalent to the denial of the right to an impartial jury & is so "basic to a fair trial" that it cannot be treated as harmless error. Gray v. Mississippi, 481 U.S. 648 (1987). Finally, noting a difference between removing a deliberating juror & one during voir dire, Ct. questioned Tr. Ct.'s instructions to jurors after the removal, as removal should be accompanied by an instruction that shows that removal did not reflect on the guilt/innocence views expressed by a juror. Held, transfer granted, judgment reversed & remanded for new trial.

RELATED CASES: Druden v. State, 99 N.E.3d 645 (Ind. 2018), (defective juror removal procedure was structural error, but since Defendant invited the error, he was not entitled to a new trial), Wright, 12 N.E.3d 314 (Ind. Ct. App. 2014) (errors in replacing juror for refusing to change vote to acquit and in failing to instruct jury that removal of juror didn't reflect Tr. Ct.'s opinion on D's guilt); Leslie, 978 N.E. 2d 486 (Ind. Ct. App. 2012) (Tr. Ct. did not abuse discretion in removing juror after deliberations began where juror said she could not overcome her discomfort with deciding whether D was innocent or guilty, making her unable to make a decision); Lichti, App., 827 N.E.2d 82 (Tr. Ct. acted properly in dismissing two jurors who advised their religious scruples would not allow them to deliberate on Sunday); Scott, App., 829 N.E.2d 161 (Tr. Ct. abused its discretion in dismissing juror who equivocated & referred often to his own life experiences during deliberations; failure to agree, however unreasonable, is a ground for mistrial & not removal); Rector, App., 826 N.E.2d 12 (Ct. declined to follow Riggs, finding that recommended instruction did not have retroactive effect & that Riggs did not mandate an instruction in all cases).

TITLE: Sylvester v. State
INDEX NO.: D.9.e.3.
CITE: (1/25/90), Ind., 549 N.E.2d 37
SUBJECT: Disqualification of juror – removal of only black juror
HOLDING: Tr. Ct. did not err in disqualifying only black juror after he asked bailiff about choosing foreperson & then discussed it with other jurors during trial. On appeal, D who is black, argues that dismissal of juror denied him equal protection, under Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (card at D.9.d.5). However, D objected at trial on grounds that juror was no more culpable than others, not on Batson grounds. While juror's conduct did not necessitate removal, removal was not fundamental error. Juror was not removed from venire during formation of jury. In requesting juror's removal, state asserted its reservations about his continuing to serve due to his disinclination to follow instructions of Tr. Ct. not to discuss case. This was racially neutral explanation. Held, conviction affirmed. DeBruler & Shepard, JJ. DISSENT, arguing that juror's removal for discussing foreperson selection was abuse of discretion, which therefore could not constitute racially neutral explanation required by Batson.

D. TRIAL

D.9. Jury trial

D.9.e.4. Evidence/exhibits/instructions in jury room (Ind. Code 35-37-2-2(5))

TITLE: Anderson v. State
INDEX NO.: D.9.e.4.
CITE: (3/30/77), Ind. App., 360 N.E.2d 1266
SUBJECT: Materials sent into jury room – mug shots
HOLDING: Under guidelines adopted in Thomas, 289 N.E.2d 508, Tr. Ct. abused its discretion in permitting Ds' mug shots to be taken into jury room at beginning of deliberations. Here, mug shots were of standard type & no effort was made to conceal printed booking information on & back of pictures. Ct. found it difficult to imagine how mug shots could have assisted jury where State's witness identified Ds & jury had opportunity to view mug shots during trial. Further, mug shots are extremely prejudicial. Blue, 235 N.E.2d 471. Finally, jury could have subjected mug shots to improper use (i.e., that Ds had long criminal history). Held, judgment reversed & remanded.

TITLE: Coleman v. State
INDEX NO.: D.9.e.4.
CITE: (7/25/84), Ind., 465 N.E.2d 1130
SUBJECT: Jury deliberations – instructions to jury room
HOLDING: Tr. Ct. did not err in denying D's objection to sending preliminary & final instructions with jury during deliberations. Accepted practice is not to allow jurors to take written instructions with them into jury room. Cornett, 436 N.E.2d 765. However, when instructions are read in open Ct. in presence of D/attorney (as occurred here), Ind. S. Ct. has held violations of rule harmless error. Rock, 426 N.E.2d 1320; Wofford, 394 N.E.2d 100; Morris, 384 N.E.2d 1022; Jameison, 377 N.E.2d 404. Here, D contends Cornett requires reversal. In Cornett, rather than rereading instructions in open Ct. after jury had begun deliberating, judge simply sent final instructions to jury. Ind. S. Ct. found reversible error, compounded by irrelevant matter on face of instructions. Cornett does not hold extraneous markings, standing alone, require reversal. D did not object to extraneous matter; if he had, Ct. could have excised it. Held, affirmed.

Note: Ind. Code-35-37-2-2(6) provides if final instructions are submitted to jury in written form after being read by Tr. Ct., no indication of party or parties tendering instructions may appear on any instruction

RELATED CASES: Henning, 477 N.E.2d 547 (Crim L 858(4); notwithstanding that 4 of 13 instructions sent to jury room had some extraneous markings, Ct. finds they did not give rise to potential for misconstruction or undue emphasis; however, Ct. notes wisdom of prior decisions holding that instructions should not be sent to jury room).

TITLE: Hall v. State
INDEX NO.: D.9.e.4.
CITE: (4th Dist., 12-12-08), Ind. App., 897 N.E.2d 979
SUBJECT: Sound recording in jury room
HOLDING: In drug dealing prosecution, Tr. Ct.'s decision to provide sound recording and equipment to jurors during deliberations, albeit technically erroneous, did not prejudice D's substantial rights. *Citing* Powell v. State, 644 N.E.2d 855 (Ind. 1994) and Ind. Code 34-36-1-6, D argued that Tr. Ct.'s decision invited jury to "unduly emphasize" this evidence. After jury has begun deliberations, statute provides that counsel must be informed of jury's request and be given opportunity to be present when information is given to jury if jury manifests disagreement about evidence or seeks clarification of legal issues in case. Where jury does not explicitly manifest any disagreement about testimony or does not ask for clarification of legal issue, statute does not apply. Bouye v. State, 699 N.E.2d 620 (Ind. 1998).

Here, unlike in Powell, jury indicated neither an explicit disagreement nor a request for legal instruction, but rather merely requested to review a portion of the sound recording. Where, as here, Ind. Code 34-36-1-6 is inapplicable, Tr. Ct. should consider three factors in deciding whether to permit jury to take a copy of exhibits into jury room: 1) whether material will aid jury in proper consideration of case; 2) whether any party will be unduly prejudiced by submission of material; and 3) whether material may be subjected to improper use by jury. Thacker v. State, 709 N.E.2d 3 (Ind. 1999). Even assuming jury in this case listened to sound recording repeatedly in an unsupervised setting, D did not identify what prejudice to his substantial rights might have ensued. Held, judgment affirmed.

TITLE: Harris v. State
INDEX NO.: D.9.e.4.
CITE: (12/28/95), Ind., 659 N.E.2d 522
SUBJECT: Exhibits sent to jury room – audio tape and video tape
HOLDING: Tr. Ct. did not err by sending D's videotaped and audio taped confessions to jury room when jury began its deliberations. Tr. Ct. has considerable discretion in deciding what jury may appropriately take with it as it begins its deliberations. Powell, 644 N.E.2d 855. In Thomas, 289 N.E.2d 508, Ind. S. Ct. adopted ABA Standard Relating to Trial by Jury 5.1: (a) Tr. Ct. in its discretion may permit jury, upon retiring for deliberation, to take to jury room copy of charges against D & exhibits & writings which have been received in evidence, except depositions; (b) among appropriate considerations are: (i) whether material will aid jury in proper consideration of case; (ii) whether any party will be unduly prejudiced by submission of material; & (iii) whether material may be subjected to improper use by jury.

Here, video & audio taped confessions were sent, over D's objection, with all other exhibits to jury room prior to deliberations. After deliberations commenced, jury requested transcript of audio taped confession. Tr. Ct., over D's objection, sent tape player to jury room instead of transcript because transcript had not been entered into evidence. D made no objection to admission of exhibits into evidence or when State requested audio taped confession be played for jury in open court. D failed to demonstrate how or why exhibits unduly prejudiced his case or were subject to improper use by jury. Audio taped confession served to aid jury in its understanding extent of D's participation in crimes and how these crimes were committed. Held, no error.

RELATED CASES: Mays, App., 907 N.E.2d 128 (although Tr. Ct. abused its discretion in sending a video to the jury room for the jury to view unmonitored from the prosecution's lap top, the error was harmless); Stokes, App., 801 N.E.2d 1263 (harmless error in allowing videotape exhibit to go back to jury after deliberations began); Robinson, 699 N.E.2d 1146 (same considerations set forth in Thomas apply to requests made after deliberations have begun, unless Ind. Code 34-36-1-6 is implicated); Sturma, App., 683 N.E.2d 606 (where additional material is provided to jury following onset of deliberation, Ind. Code 34-1-21-6 & Ind. Precedent suggests providing information in open Ct.).

TITLE: Huffman v. State
INDEX NO.: D.9.e.4.
CITE: (9/7/89), Ind., 543 N.E.2d 360 *rev'd* on other grounds 567 N.E.2d 102
SUBJECT: Sending materials into jury room - charging information
HOLDING: Tr. Ct. did not err in allowing jury to take charging information with them into jury room upon retiring to deliberate. D argued that because people are inclined to believe that accused is guilty if State filed charges against him, & because information was signed & sworn, information's presence in jury room was prejudicial to him. Here, jury had been fully apprised of charges against Ds & information had been read to jury twice. Jury was instructed that fact that information was filed was not evidence of Ds' guilt & should not be considered evidence of guilt. Further, jury was told information is merely formal, written charge by which person is accused of commission of crime & upon which he is tried. Finally, jury was instructed that information was being submitted to them only for purpose of informing them of nature of charges. Ct. refused to accept D's speculation that jury was influenced by information. No prejudice shown. Held, no error.

Note: Counsel should insist on instruction that charging document is only accusatory, not evidence. For dismissed counts or counts pertaining to severed Ds, insist on redaction. See IPDC Criminal Trial Law Manual, p. 367.

TITLE: Jackson v. State
INDEX NO.: D.9.e.4.
CITE: (10/21/80), Ind., 411 N.E.2d 609
SUBJECT: Sending materials into jury room - physical exhibits & photographs
HOLDING: Tr. Ct. did not err in allowing evidentiary exhibits (bullets removed from victim's body, photographs, & copy of D's confession & signed Miranda waiver) to be taken into jury room during deliberations. Whether jury is permitted to take exhibits with them upon retiring to deliberate is matter of Tr. Ct. discretion limited by standard set out in Thomas, 289 N.E.2d 508 (see Harden, this section). Here, D did not show abuse of discretion. Although having confession to read & re-read during deliberations could have undue influence upon jury, fact that statement was made was not disputed but issue was its voluntariness. Propriety of sending other exhibits to jury room is controlled by Marsh, 393 N.E.2d 757 where Ct. held that it was not abuse of discretion to send shotgun, 10 photographs & 2 sketches to jury room. Following Marsh, Ct. reviewed exhibits & concluded that D failed to show how jury could misuse exhibits, how D could be unduly prejudiced by jury's review of exhibits or why they would not aid jury. Held, no error.

TITLE: Jewell v. State
INDEX NO.: D.9.e.4.
CITE: (1st Dist., 11-23-93), Ind. App., 624 N.E.2d 38
SUBJECT: Improper ex parte communications between judge & jury
HOLDING: D's constitutional right to be present at all critical stages of proceedings was violated by ex parte communications between judge & jury, including discussion about difficulty in reaching verdict, cost of sequestering jury overnight, & providing jury with partial instructions, some of which were identified with party submitting & case law. D filed Motion to Correct Error (MCE) & motion for evidentiary hearing. Included with MCE were affidavits of jury foreman, reporter, & trial counsel. State filed no counter-affidavits, but Tr. Ct. summarily denied both motion for hearing & MCE. Foreman's affidavit indicated he initiated number of communications with judge through bailiff. Affidavit of reporter noted judge was quoted as saying jury kept saying they were having trouble reaching verdict, & he kept encouraging them to try. Attorney's affidavit indicated he became aware of requests for instructions & exhibits & that material had been made available, but he wasn't aware of what material was sent to jury. He remembered judge saying jury thought they were hung, & that number of jurors in disagreement was being "whittled down." When jury requests guidance from Tr. Ct., proper procedure is to notify parties so they can be present in Ct. when judge communicates with jury. Communications between judge & deliberating jury in D's absence are forbidden & raise inference of prejudice & rebuttable presumption of reversible error, Marsillett, 495 N.E.2d 699. Communications between judge & jury regarding instructions, without notice to D, violates both D's constitutional rights & Ind. Code 34-1-21-6, which requires Tr. Ct. to call jury into Ct. with parties & reread all instructions without undue emphasis on anyone. TR 59 & CR 17 provide for use of verified affidavits which become part of record on appeal. If uncontradicted, affidavits must be accepted as true by appellate Ct. D's affidavits were properly submitted & served & accepted as true because State did not offer counter-affidavits. Ct. found D established violation of constitutional right to be present, & error was not harmless.

Tr. Ct. has discretion to send entire body of instructions with jury, if they have been cleansed of extraneous information, Mitchell, 535 N.E.2d 498. Once deliberations have begun, however, written instructions should not be sent to jury room without using "open Ct." procedure with all parties present. Here, it also appeared that only part of instructions were sent to jury, & this constituted reversible error, Harrison, App., 575 N.E.2d 642. Error was compounded because 5 instructions identified State as proponent, & two others cited to case law, in violation of Ind. Code 35-37-2-2(6). Presumption of reversible error was not rebutted, & communications were not merely harmless error. Held, reversed & remanded for new trial.

RELATED CASES: Jones, App., 656 N.E.2d 303 (judge's failure to follow proper procedure was not reversible error because D failed to show that he was prejudiced by judge's communications); Faceson, App., 642 N.E.2d 985 (Tr. Ct. committed reversible error in giving jury additional instructions on merits of case); Grant, App., 623 N.E.2d 1090 (stressing importance of adherence to Ind. Code 34-1-21-6); Butler, App., 622 N.E.2d 1035 (discussing various issues related to jury conduct).

TITLE: Shields v. State

INDEX NO.: D.9.e.4.

CITE: (08-21-19), Ind. Ct. App., 131 N.E.3d 708

SUBJECT: No fundamental error in sending State's exhibit, fetal remains, to jury for review and keeping the exhibit in refrigerator in jury room

HOLDING: Defendant was charged with child molesting for having sex with his thirteen year daughter resulting in her pregnancy and abortion. During trial the fetal remains were admitted into evidence. Without objection the fetal remains were sent to the jury with the other exhibits during deliberations. The fetal remains were kept in the refrigerator in the jury room where the jury placed their lunch and snack items. On appeal, Defendant argued sending the fetal remains back to the jury was highly prejudicial, requiring a new trial. Court of Appeals encourages trial courts to take care with biohazard exhibits but that considering the evidence as a whole, the Defendant did not show prejudice and a due process violation did not occur, thus new trial was not required.

TITLE: Shipley v. State
INDEX NO.: D.9.e.4.
CITE: (8/31/93), Ind. App., 620 N.E.2d 710
SUBJECT: Material inadvertently sent into jury room - inadmissible evidence
HOLDING: D claims Tr. Ct. erred in denying her motion for mistrial after suppressed information, a partially un-redacted portion of co-D's voluntary statement to police, was inadvertently taken into jury room along with other exhibits & photographs. Upon discovery of oversight after ½ hour of deliberations, Tr. Ct. ordered bailiff to retrieve all exhibits & documents, except for photographs, from jury room. Tr. Ct. has discretion in determining whether to grant mistrial, which is extreme remedy warranted only when D is placed in grave peril to which person should not have been subjected. Gregory, 540 N.E.2d 585; Kelly, 561 N.E.2d 771. Gravity of the peril is determined by considering probable persuasive effect of incident on jury's decision, not degree of impropriety. Gregory. Here, un-redacted exhibit was not prejudicial to D & did not place her in grave peril. Improper portions of exhibit made no reference to D. Further, evidence was in fact exculpatory & not incriminating. Held, no abuse of discretion in denying motion for mistrial.

RELATED CASES: Inman, 4 N.E.3d 190 (Ind. 2014) (ex parte submission of exhibit list to trial court did not require mistrial because D wasn't placed in great peril; only value of exhibit was its administrative value - helping the judge track exhibits at trial); Franklin, 533 N.E.2d 1195 (jury's consideration of inadmissible fingerprint record which revealed D's prior conviction was not harmless error; whether evidence was deliberately or inadvertently placed before jury during its deliberations is of little consequence).

TITLE: State v. Harden
INDEX NO.: D.9.e.4.
CITE: (8/5/86), Ind., 496 N.E.2d 35
SUBJECT: Sending exhibits into jury room - transcripts of prior inconsistent statements
HOLDING: Ct. affirmed PCR Ct.'s holding that D was prejudiced by one exhibit taken into jury room.

In Thomas, 289 N.E.2d 508, Ind. S. Ct. endorsed ABA Standard Relating to Trial by Jury 5.1: (a) Tr. Ct. in its discretion may permit jury to take into jury room copy of charges against D & exhibits & writings which have been introduced in evidence, except depositions; (b) among considerations appropriate are: (i) whether material will aid jury in proper consideration of case; (ii) whether any party will be unduly prejudiced by submission of materials; & (iii) whether material may be subjected to improper use by jury. Thomas Ct. held reversible error occurred when jury allowed to take into deliberations transcripts of prior inconsistent statements used to impeach state's witnesses who had surprised prosecution by giving exculpatory testimony. Among factors which weighed in decision were highly conflicting nature of all evidence & danger that impeaching statements would be considered by jury as substantive evidence & given undue influence. Here, Ct. finds most exhibits taken into jury room had been offered as substantive evidence, but one exhibit was precisely type of evidence which Thomas jury was allowed to review at its leisure & which Ct. held prejudiced Thomas. Evidence at D's trial was conflicting, D's first trial ended when jury was unable to reach verdict & second trial involved some recantation of earlier statements against him. Held, grant of PCR affirmed.

RELATED CASES: Henning, 477 N.E.2d 547 (no error allowing jury to study brick used to render victim unconscious during deliberations); Choate, 462 N.E.2d 1037 (no error sending Ct. records re prior felonies to jury room during deliberations on habitual).

D. TRIAL

D.9. Jury trial

D.9.e.5. Requests for information (Ind. Code 34-1-21-6)

TITLE: Bouye v. State
INDEX NO.: D.9.e.5.
CITE: (7-20-98), Ind., 699 N.E.2d 620
SUBJECT: Request for information during jury deliberations
HOLDING: Tr. Ct. did not err when it denied jury's request for testimony of D's girlfriend without first informing D or his counsel of request in open Ct. After jury has begun deliberations, Ind. Code 34-1-21-6 provides that counsel must be informed of jury's request & be given opportunity to be present when information is given to jury if jury manifests disagreement about evidence or seeks clarification of legal issues in case. Where jury does not explicitly manifest any disagreement about testimony or does not ask for clarification of legal issue, statute does not apply. Riggs, App., 689 N.E.2d 460. Disagreeing with Ct. App.' decisions in Anglin, App., 680 N.E.2d 883, & Winters, App., 678 N.E.2d 405, Ct. held that statute is not triggered every time jury makes request for testimony. Plain language of Ind. Code 34-1-21-6 indicates its intent to limit its application to those cases in which jury explicitly indicated disagreement. Here, statute was not implicated because jury did not give indication that there was disagreement regarding testimony.

In rejecting D's claim under common law, Ct. noted that Tr. Ct.'s ex parte denial of jury's request is harmless error. Grey, 553 N.E.2d 1196. Danger of ex parte communication is extraneous influence judge may have over jury by his communications. When judge refuses any communication, danger of extraneous influence is eradicated. Therefore, prohibition against ex parte communications is not designed to give D opportunity to provide jury with more information that might benefit case, but rather it is designed to prevent jury from being improperly influenced by judge. Held, no error.

RELATED CASES: Thomas, 774 N.E.2d 33 (Tr. Ct. abused its discretion by responding to jury's inquiry by reading from prosecution's closing argument; this was not "point of law" within meaning of statute); Hernandez, 761 N.E.2d 845 (jury's note requesting instruction on effect of hung jury was not request for "point of law arising in case," thus procedure specified by Ind. Code 34-36-1-6 did not apply); Foster, 698 N.E.2d 1166 (Tr. Ct. should exercise its discretion “extremely carefully” in responding to jury questions which do not fall within ambit of statute); Winters, App., 698 N.E.2d 1197 (D was not prejudiced by appellate counsel’s failure to raise issue of improper ex parte responses to jury questions).

TITLE: Brownlee v. State
INDEX NO.: D.9.e.5.
CITE: (4th Dist. 6/19/90), Ind. App., 555 N.E.2d 505
SUBJECT: Jury deliberations - jury seeking replay of testimony
HOLDING: Tr. Ct. erred in failing to notify D that jury had requested replaying of testimony of D's alibi witness, & in not permitting D's belated Motion to Correct Errors (MCE). D was being retried following hung jury on attempted murder & attempted robbery counts, & tape of prior testimony of alibi witness was played due to her unavailability. During jury deliberations, jury sent note to Tr. Ct. indicating that 2 jurors were unable to hear tape & requested that it be replayed. Without informing or consulting D or state, Tr. Ct. replied, "No." Neither D nor counsel were aware of this communication until appellate counsel received trial transcript. Tr. Ct. denied petition for belated MCE. Ct. App. finds that because D here had no reason to know of error, since it was in fact concealed from him & his counsel, he should be allowed to raise it in belated MCE. Ct. further finds failure to inform D of jury request constituted reversible error. In Ortiz, 356 N.E.2d 1188, Ind. S. Ct. held that Ind. Code 34-1-21-6 requires Tr. Ct. to re-read or replay any properly admitted testimony, if jury indicates there is disagreement about it. Here, it is not clear whether jurors simply could not hear taped testimony, or whether they disagreed in their recollections of it. Because D was not informed of jury's request, he had no opportunity to seek clarification & determine if there was in fact disagreement requiring replaying of tape. Alibi testimony which jury requested to hear was central to D's defense. When communications between Tr. Ct. & jury occur outside D's presence, presumption of harm arises. Alexander, 449 N.E.2d 1068; Ind.Const. Art. I, Sec. 13. Held, Tr. Ct.'s failure to inform D of jury's request is reversible error.

RELATED CASES: Kiner, App., 643 N.E.2d 950 (inference of prejudice from alleged ex parte communication rebutted by trial judge's denial of jury's request to review evidence photographs); Thompson, App., 555 N.E.2d 1301 (denial of jury's request for "any (as much as possible) transcripts of testimony," was harmless); Linger, 508 N.E.2d 56 (no error where Tr. Ct., during jury deliberations, replayed tape in open court at jury's request); Marsillett, 495 N.E.2d 699 (Crim L 636(7), 864; inference of prejudice arising from ex parte communication between judge & jury creates rebuttable presumption of error; Ct. must evaluate nature & effect of communication on fair determination of guilt/innocence; here, Ct. finds communication (request to replay part of transcript, which judge denied) was harmless error); Cox, 493 N.E.2d 151 (jury's inquiry to bailiff re D's age was not error because age of D was not indispensable part of verdict, *citing* McClahan, 118 N.E.2d 734); Randall, 474 N.E.2d 76 (Crim L 1174(7); where jury reached verdict on count 1 before communicating with bailiff re other counts, D shows no prejudice; reversal on count 1 not required, *citing* Gann, 330 N.E.2d 88 & Krivanek, 247 N.E.2d 505; Tr. Ct.'s vacation of guilty verdict on counts 2-9 upheld); Crain, App., 493 N.E.2d 827 (Tr. Ct. did not err by re-reading instructions to jury when they inquired what would happen if all jurors except 1 found D guilty).

TITLE: Dowell v. State
INDEX NO.: D.9.e.5.
CITE: (08-27-12), 973 N.E.2d 58 (Ind. Ct. App. 2012)
SUBJECT: Giving special instruction during deliberations - reversible error
HOLDING: In robbery prosecution, Tr. Ct. erred by providing jury with additional instruction after it had begun deliberating and by failing to call jury back into courtroom or re-read entire set of final instructions. Once jury deliberations commence, Tr. Ct. should not give any additional instructions. Crowdus v. State, 431 N.E.2d 796 (Ind. 1982). Limited and narrow "legal lacuna" exception allows supplemental final instruction when jury has question which coincides with error or omission in final instructions.

Here, D and two others beat and robbed victim. Tr. Ct. instructed the jury as to the elements of robbery, but there was no instruction concerning accomplice liability. The jury asked a question and Tr. Ct. returned their note with the handwritten statement “Indiana law provides that a person who aids another person to commit an offense commits that offense.” Giving jury an accomplice liability instruction after deliberations had begun gave that instruction improper emphasis because Tr. Ct. did not re-read the entire set of final instructions contemporaneously with the giving of the additional instruction. As in Graves v. State, 714 N.E.2d 724 (Ind. Ct. App. 1999), the additional instruction tended to “emphasize that issue as being of primary importance and . . . to tell the jury what it ought to do.” Hero v. State, 765 N.E.2d 599 (Ind. Ct. App. 2002). Held, judgment reversed and remanded.

RELATED CASES: Ramirez, 174 N.E.3d 181 (Ind. 2021) (consistent with IC 34-36-1-6, an error or legal lacuna — a gap in final instructions — is no longer required for trial courts to supplement final instructions in responding to a jury’s question on a point of law).

TITLE: Johnson v. State
INDEX NO.: D.9.e.5.
CITE: (3rd Dist., 11-26-96), Ind. App., 674 N.E.2d 180
SUBJECT: Ex parte denial of jury request for information - presence of counsel
HOLDING: Tr. Ct.'s ex parte denial of jury request for information during deliberations is harmless error, even when parties or their counsel are not present. Grey v. State, 553 N.E.2d 1196 (Ind. 1990). Where, as here, jury sends out question to which Ct.'s obvious response is that request must be denied, it is impractical & unnecessary to locate counsel & await their return to courtroom before transmitting that denial to jury. Because Tr. Ct.'s denial of jury's request was harmless error, post-conviction Ct. properly determined that Tr. Ct.'s ex parte communication with jury did not constitute reversible error. Held, denial of post-conviction relief affirmed.

RELATED CASES: Bouye, 699 N.E.2d 620 (prohibition against ex parte communications is not designed to give D opportunity to provide jury with more information that might benefit case, but rather it is designed to prevent jury from being improperly influenced by judge).

TITLE: Kayser v. State

INDEX NO.: D.9.e.5.

CITE: (08-23-19), Ind. Ct. App., 131 N.E.3d 717

SUBJECT: Consecutive sentences for sexual misconduct with a minor and failure to register affirmed

HOLDING: Aggregate consecutive seven-year sentence for Level 5 felony sexual misconduct with a minor and Level 6 felony failure to register convictions was not inappropriate. Although trial court's use of Defendant's risk assessment score as a separate aggravator was improper, remand for resentencing was not required given the undisputed, lengthy criminal history aggravating circumstance. The criminal history aggravator alone was sufficient to justify Defendant's consecutive sentences. Geason v. State, 965 N.E.2d 702 (Ind. Ct. App 2012).

TITLE: Massey v. State
INDEX NO.: D.9.e.5.
CITE: (3rd Dist., 2-24-04), Ind. App., 803 N.E.2d 1133
SUBJECT: Giving further instruction in response to juror inquiry - no error
HOLDING: Tr. Ct. did not err in giving additional instruction regarding lesser-included offenses after jury began deliberating. Prior to the adoption of Indiana's new Jury Rules, the proper procedure in answering a jury question on a matter of law was to re-read all of the instructions again in order not to emphasize any particular point. However, the new jury rules afford greater flexibility in responding to jury questions. Powell v. State, 769 N.E.2d 1128 (Ind. 2002). Under the circumstances & considering the new rules, Ct. found no error in Tr. Ct. re-reading all the instructions & adding an instruction on how to apply the verdict forms for the lesser-included offense.

Further, Ct. found no error in instruction given. D had been charged with Aggravated Battery as a Class B felony & Battery as a Class C felony, a lesser-included offense of Aggravated Battery. Although not charged, Tr. Ct. also instructed the jury it could consider battery as a Class A or B misdemeanor. After receiving several questions from the jury, the Tr. Ct. informed the jury they could only consider the verdict forms for the lesser-included offenses in relation to the Class C felony battery, which D argued violated Art. I, ' 19 of the Indiana Constitution & the jury's right to determine both the law & facts. Ct. found that instruction that limited jury's discretion was not error as long as it was given in conjunction with instruction informing jury that it is judge of law & facts. McBride v. State, 785 N.E.2d 312 (Ind. Ct. App. 2003). Ct. also found that comments trial judge made in relation to evidence did not show bias or prejudice. Held, judgment affirmed.

RELATED CASES: Campbell, 19 N.E.3d 271 (Ind. 2014) (trial counsel not ineffective for failing to object to supplemental instruction, read to jurors after they requested definition of intent; Tr. Ct.s have flexibility to help jurors deliberate in order to avoid mistrials); Jervis, 916 N.E.2d 969 (Ind. Ct. App. 2009) (trial counsel was not ineffective for failing to request an instruction on a lesser included offense, reckless homicide, after the jury claimed during deliberations in a murder trial that it bothered some of them that they did not have the option of reckless homicide; such request could not legally have been granted); Ronco, 862 N.E.2d 257 (after new jury rules, it was proper for judge to re-read only relevant instructions & explain the instructions in response to jury's questions about the law); Gantt, App., 825 N.E.2d 874 (Tr. Ct. acted appropriately under new Jury Rule 28 in providing an additional jury instruction to address a disagreement among jury members. However, the instruction given was an erroneous statement of the law & invaded the province of the jury to determine credibility & accept or reject evidence as it sees fit; see full review at D.9.g.2.o).

TITLE: Morrison v. State
INDEX NO.: D.9.e.5.
CITE: (3/4/93), Ind. App., 609 N.E.2d 1155
SUBJECT: Request for information - Jury seeking factual determination
HOLDING: Ind. Code 34-1-21-6 governs situation where jury, during deliberations, requests Tr. Ct. to replay trial testimony or provide clarification on legal issues. Statute provides after jury has retired for deliberations, if there is disagreement between them as to any part of testimony, or if they desire to be informed as to any point of law arising in case, they may request officer to conduct them into court, where information required shall be given in presence of, or after notice to, parties or their attorneys. Statute does not provide jury carte blanche to elicit any information it so desires. Statute clearly states that jury must either manifest disagreement over testimony or request legal guidance before court has duty to furnish jury with any additional information. Grayson, App., 563 N.E.2d 1200; Brownlee, App., 555 N.E.2d 505. Here, Tr. Ct. did not abuse discretion in refusing to replay portions of trial testimony & communicating with jury outside of D's presence. Jury asked question regarding testimony & court responded: "The testimony of the State & the Defense is in conflict." D was not present. Ct. found no evidence jury disagreed over any trial testimony, or desired clarification of legal matters. Jury's note simply asked court to make factual determination regarding officer. D failed to demonstrate how this request invoked requirements of Ind. Code 34-1-21-6. When 34-1-21-6 is inapplicable, decision to replay testimony lies within sound discretion of Tr. Ct. Grayson. It is unique province of jury to weigh trial testimony & to assess witness credibility. Dean, App., 377 N.E.2d 420. Had Tr. Ct. complied with jury's request & provided factual determinations, it would have usurped jury's role. Held, no error.

TITLE: Parks v. State
INDEX NO.: D.9.e.5.
CITE: (1st Dist., 02-18-10), 921 N.E.2d 826 (Ind. Ct. App. 2010)
SUBJECT: Replay of witness's testimony during deliberations - no error
HOLDING: In burglary and theft prosecution, Tr. Ct. did not err by invoking Indiana Jury Rule 28 to replay witnesss' testimony after jury had already begun deliberations. Tim Richardson testified that D's father promised to return items to Tim and pay him $2000 if Tim dropped charges against D. After jury began to deliberate, it asked questions about D's alibi defense. Tr. Ct. told jurors that their questions could not be answered. Jury foreperson then asked court to replay Tim's testimony. D objected. Later, jury again asked to review Tim's testimony. Tr. Ct. found jury was at an impasse and replayed Tim's testimony.

In order to avoid mistrials, Indiana's jury rules give more latitude to courts to help juries deliberate. Ronco v. State, 862 N.E.2d 257, 259 (Ind. 2007). If jury reaches an impasse, Tr. Ct. may ask jurors to determine how the court and counsel can help them deliberate. Ind. Jury Rule 28. An "impasse" is a "position from which there is no escape." Litherland v. McDonnell, 796 N.E.2d 1237, 1242 (Ind. Ct. App. 2003). Even if there is no impasse, Ind. Code 34-36-1-6 requires Tr. Ct. to replay testimony when jury expresses disagreement about testimony. Even though mandatory provisions of this statute do not come into play unless jury explicitly indicates disagreement, Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1993), Tr. Ct. still has discretion to replay testimony. Pettrie v. State, 713 N.E.2d 910, 913 (Ind. Ct. App. 1999).

Here, several facts show jury was at an impasse. Jury submitted several questions that were not answered. Jury foreperson indicated jury was not close to reaching a verdict and asked to review Tim's testimony. Jury later indicated it had no more questions but again asked to review Tim's testimony. Because the jury was at an impasse, Tr. Ct. did not err by replaying Tim's testimony under authority of Jury Rule 28. Cf. Ronco, 862 N.E.2d at 260 (jury not at impasse where it merely asked about findings necessary to support conviction) and Perry v. State, 867 N.E.2d 638, 643 (Ind. Ct. App. 2007) (jury not at impasse where it asked what would happen if it could not reach unanimous decision).

Ind. Code 34-36-1-6 also allowed Tr. Ct. to replay Tim's testimony. Jury foreperson's comment that rehearing Tim's testimony had "cleared up a few items" suggested there was disagreement among jurors about Tim's testimony. Further, replaying testimony was not unfairly prejudicial, despite statements about D's father's offer to pay Tim $2000 if he dropped charges. D cannot complain that Tr. Ct. did not strike comments because D made no such request to Tr. Ct. Further, when Tim's testimony was replayed, statements about the $2000 offer were redacted. Held, judgment affirmed.

TITLE: Pettrie v. State
INDEX NO.: D.9.e.5.
CITE: (2nd Dist.; 7-13-99), Ind. App., 713 N.E.2d 910
SUBJECT: Jury request for replay of testimony - procedure
HOLDING: Tr. Ct. did not abuse its discretion by questioning jury foreman in open Ct. to determine whether jurors had disagreement as to content of requested testimony, although jury's initial note requesting replay of testimony did not, on its face, demonstrate express showing of disagreement among jurors. If, after jury retires for deliberation: (1) there is disagreement among jurors as to any part of testimony; or (2) jury desires to be informed as to any point of law arising in case; jury may request officer to conduct them into Ct., where information required shall be given in presence of, or after notice to, parties or attorneys representing parties. Ind. Code 34-36-1-6. Nonetheless, upon receiving jury's note, Tr. Ct. had discretion to question jury further to determine whether jurors had disagreement as to content of requested testimony. Cade, App., 590 N.E.2d 624, 627. Here, instead of denying jury's request based on its initial note simply requesting to rehear testimony, judge called jury into Ct. where prosecutor, D & defense counsel were present, & questioned foreman to determine whether jury had disagreement as to what witness said. Tr. Ct.'s procedure was proper. Held, judgement affirmed.

TITLE: Perry v. State
INDEX NO.: D.9.e.5.
CITE: (5th Dist., 06-05-07), Ind. App., 867 N.E.2d 638
SUBJECT: Response to jury questions - prejudicial effect of scrivener's error
HOLDING: In murder & aggravated battery prosecution, Tr. Ct. erroneously declared jury to be at an impasse, & a typographical error in Tr. Ct.'s response to a jury question resulted in incalculable prejudice. Indiana's jury rules provide Tr. Ct.'s with greater flexibility in responding to jury questions. See Jury Rule 28. A jury impasse has been defined as "a position from which there is no escape, a deadlock," & "deadlock" is defined as "a condition or situation in which no progress or activity is possible; a complete standstill; a lack of progress due to irreconcilable disagreement or equal opposing forces." Litherland v. McDonnell, 796 N.E.2d 1237 (Ind. Ct. App. 2003). A question is not an impasse, & Jury Rule 28 confers discretionary authority for further proceedings only at moments of impasse. Ronco v. State, 862 N.E.2d 257 (Ind. 2007). Here, Tr. Ct. improperly determined that jury had reached an impasse. Jury had continued to deliberate & submit questions three or four hours after submitting note asking what would happen if it could not come to a unanimous decision. Jury gave Tr. Ct. no indication that it was deadlocked & not able to progress further. Because parties stipulated to Tr. Ct.'s responses to questions in Jury Note #4, it was proper for Tr. Ct. to respond to Note in accordance with parties' stipulation.

However, in its typed response to jury's questions, Tr. Ct. erroneously inserted D's first name instead of State's witness, which conveyed to jury that D admitted that he fired shots. Neither parties nor Tr. Ct. recognized the error, jury was never informed of mistake & Tr. Ct. did not question jury to make sure that it had understood that question should have referred to State witness, not D. Although typographical error does not necessarily mandate reversal, Ct. found fundamental error in this case because evidence of D's guilt was not overwhelming & jury notes make it clear that jurors were uncertain about evidence presented at trial. Ct. could not say that Tr. Ct.'s error did not influence jury's verdict, thereby prejudicing D. Held, convictions reversed & remanded for new trial. Crone, J., dissenting, would hold that D procedurally defaulted this issue by failing to object to typographical error, & finds it "extremely unlikely the typo misled the jury" & resulted in D's conviction.

TITLE: Powell v. State
INDEX NO.: D.9.e.5.
CITE: (12-16-94), Ind., 644 N.E.2d 855
SUBJECT: Request for information - supplying jury with audiotapes & recorder
HOLDING: Tr. Ct. committed reversible error when it supplied jury, after it had begun deliberating, with tape recorder & audiotapes of alleged drug deals. Once jury begins its deliberations, Ind. Code 34-1-21-6 governs procedure applicable when jury interrupts its deliberations & asks to rehear evidence. Statute requires that prior notice be given to parties or attorneys before evidence is replayed, & evidence must be replayed in open Ct. Hampton v. State, Ind., 526 N.E.2d 1154. Although tapes given to jury were not of trial testimony, it was error to send materials to jury room & permit jury to review tapes on its own. D has substantial right under statute to be present when jury interrupts its deliberations to review evidence not initially sent to it by Tr. Ct. prior to deliberations. Held, conviction reversed.

Note: In dicta, Ct. made clear distinction between materials given to jury before it has begun its deliberations & materials given to jury, upon its request, after deliberations have begun. Tr. Ct. has considerable discretion in deciding what jury may take with it as it begins its deliberations, & that discretion is limited by considerations adopted in Thomas, 289 N.E.2d 508. See D.9.e.4.

RELATED CASES: Roberts, App., 712 N.E.2d 23 (when Ind. Code 34-36-1-6 does not apply, Thomas standard is applied); Bouye, 699 N.E.2d 620 (statute applies only to cases in which jury expressly indicates disagreement, not to any request made after deliberations begin; see card, this section); Gibson,702 N.E.2d 707 (no error to send to jury all exhibits admitted during trial); Harris, 659 N.E.2d 522 (no error in sending audiotapes & tape player to jury room when jury began deliberations; audiotaped confession served to aid jury in attempt to understand charged crimes).

TITLE: Reynolds v. State
INDEX NO.: D.9.e.5.
CITE: (3/14/84), Ind., 460 N.E.2d 506, on *reh'g* 463 N.E.2d 1087
SUBJECT: Jury deliberations - requests for information; waiver of error
HOLDING: By failing to object to Tr. judge's phone conversation with juror during deliberations, D did not preserve issue for appeal; error was not fundamental. Here, juror used phone in jury room to contact judge in his chambers & asked why state had not called co-D to testify. Judge responded without notifying state or D, but related incident to attorneys after verdict was reached but before it was announced. Mere fact error relates to constitutional right does not render it fundamental, thus obviating objection. Nelson, 409 N.E.2d 637; Malo, 361 N.E.2d 1201. Ct. finds situation similar to Phillips, 376 N.E.2d 1143 & Decker, App., 386 N.E.2d 192. Held, conviction affirmed.

RELATED CASES: Rhinehardt, 477 N.E.2d 89 (Crim L 868; where judge consulted with & gained agreement of state & defense counsel before answering jury's inquiries & D did not object, any error is waived, *citing* Reynolds).

TITLE: Robinson v. State
INDEX NO.: D.9.e.5.
CITE: (10-2-98), Ind., 699 N.E.2d 1146
SUBJECT: Jury request to review evidence during deliberations - right to be present
HOLDING: Tr. Ct. did not err in sending photographs to jury room during deliberations. Procedure set forth by Ind. Code 34-36-1-6 applies only to cases in which jury expressly indicates disagreement, not to any request made after deliberations begin. Bouye, 699 N.E.2d 620. Following considerations apply to Tr. Ct.'s decision whether to send exhibits to jury room when deliberations begin: 1) whether material will aid jury in proper consideration of case; 2) whether any party will be unduly prejudiced by submission of material; & 3) whether material may be subjected to improper use by jury. Thomas, 259 Ind. 537, 289 N.E.2d 508. Holding in Thomas did not purport to limit itself to exhibits sent to jury room at commencement of deliberations, & if statute is not implicated, same considerations apply to request made after deliberations have begun. Held, judgment affirmed.

TITLE: Shaffer v. State
INDEX NO.: D.9.e.5.
CITE: (6/17/83), Ind., 449 N.E.2d 1074
SUBJECT: Jury deliberations – requests for information; replay of taped trial testimony
HOLDING: Tr. Ct. erred in allowing jury to listen to taped trial testimony of D & 4 witnesses where the evidence was completely in conflict & credibility of witnesses as a major issue. Here, jury commenced deliberations at 11:15 a.m. At 2:30 p.m., jury asked to hear tapes of testimony of D & 3 witnesses (3 ½ hours of testimony). Relying on Ortiz, 356 N.E.2d 1188 (holding statute (Ind. Code 34-1-21-6) governing communication with jurors during deliberations is applicable to criminal proceedings; co-D's written statement to police reread to jury), Tr. Judge allowed jury to hear tapes. D objected. At 12:25 a.m., jury asked to hear taped testimony of another witness. Over D's objection, jury was allowed to hear tape. D contends Tr. Ct. abused its discretion by allowing jury to be presented with 2 trials, 1 in which jurors could view witnesses, judge their demeanor, & evaluate their credibility, while the other consisted of only substance & sound. Ct. holds neither facts of Ortiz nor language of Ind. Code 34-1-21-6 authorizes a virtual complete replay of the trial. Ct. distinguishes Douglas, 441 N.E.2d 957 (replay of 1 witness' testimony); Long, 422 N.E.2d 284 (jury reviewed exhibits, including D's confession); Harris, 382 N.E.2d 913 (jury saw & heard certain items of evidence after deliberations had commenced); Ortiz; Hooker, App., 387 N.E.2d 1354 (jury reviewed D's written statement to police). Contradictions in testimony indicated 1 or more witnesses had committed perjury. Jury could not decide who committed perjury with only soundtracks. Demeanor is critical to issue of credibility. Tr. Ct.'s error denied D a fair trial. Held, conviction reversed; remanded for new trial. DISSENT by Givan, joined by Pivarnik, contends Ortiz authorizes replaying of taped testimony.

RELATED CASES: Driver, App., 594 N.E.2d 488 (it was error for bailiff to allow jury to have tape of final instructions, without consulting with judge & parties); Cade, App., 590 N.E.2d 624 (Tr. Ct. did not commit reversible error in refusing jury's request to listen to testimony of "any of the witnesses for further review & consideration." Decision discusses Tr. Ct.'s duty to inquire about juror disagreement); Brownlee, 555 N.E.2d 505 (error found in Ct.'s failure to inform D of jury's request, so he could determine if Ind. Code 34-1-21-6 applied); Crowe, 485 N.E.2d 115 (Crim L 867; jury's request for taped testimony is evidence supporting foundation for mistrial but request alone is insufficient reason to grant mistrial).

TITLE: Sowers v. State
INDEX NO: D.9.e.5.
CITE: (5/16/2013), 988 N.E.2d 360 (Ind. Ct. App. 2013)
SUBJECT: Jury deliberations – communication with bailiff constituted fundamental error
HOLDING: Communication between the bailiff and the foreperson of the jury during deliberations constituted fundamental error. To ensure the right of criminal Ds generally to be present at all stages of a criminal proceeding, Indiana courts have often stated that when communication between a bailiff and a jury occurs outside the D's presence, there is a presumption of harm to the D. A bailiff's comments implying that a verdict is required are "grossly improper." Coolman v. State, 163 Ind. 503, 72 N.E. 568 (1904). Here, the jury was in deliberations when the foreman asked the bailiff "if they were to stay and deliberate until they reached a 100 percent agreement with the counts." The bailiff stated: "yes as the Judge stated in there you have to 100 percent in agreement." When the jury was polled as to whether the guilty verdict was her verdict, Juror No. 3 stated "I have a conscience about it but yes." After trial, as the prosecutor discussed the case with the jury, Juror No. 3 became upset upon learning of the option of a hung jury because they had been told there had to be verdicts. Juror No. 3's implied to the prosecutor that this was a very important piece of information and she might have proceeded differently." Under the circumstances, the harm or potential for harm is substantial, and the error denied D's fundamental due process. Held, judgment reversed; Bradford, J., dissenting on basis that the bailiff did not expressly state that the jury was required to reach a verdict and that the record is insufficient to conclude prejudice because neither party called the jury foreperson to testify about what she said to the jury, if anything, after speaking with the bailiff.

RELATED CASES: Pribie, 47 N.E.3d 629 (Ind. Ct. App. 2015) (ex parte conversation between juror and bailiff during break in trial was harmless error; see full review at D.9.e.2).

TITLE: State v. Chandler
INDEX NO.: D.9.e.5.
CITE: (5th Dist., 11-12-96), Ind. App., 673 N.E.2d 482
SUBJECT: Requests for information during jury deliberations
HOLDING: Ind. Code 34-1-21-6, which governs jury requests for information submitted after deliberations have begun, does not require Tr. Ct. to conduct jury back into Ct. & give them requested information any time jury makes request to view evidence during deliberation. Statute is implicated only when jury manifests disagreement about evidence or seeks clarification of legal issues. Cade v. State, 590 N.E.2d 624 (Ind. Ct. App. 1992). Here, after beginning deliberations, jury sent note to Tr. Ct. requesting medical drawings & ruler. There was no indication that request stemmed from disagreement as to testimony or confusion as to point of law, thus mandatory provisions of Ind. Code 34-1-21-6 did not apply. Moreover, D waived any error by agreeing to Tr. Ct.'s proposed response of telling jury to re-read instructions & continue to deliberate. Accordingly, Tr. Ct. erred in setting aside guilty verdict. Held, reversed & remanded with instructions to reinstate jury verdict. Sullivan, J., concurring.

RELATED CASES: Hernandez, 761 N.E.2d 845 (jury's note requesting instruction on effect of hung jury was not request for "point of law arising in case," thus procedure specified by Ind. Code 34-36-1- 6 did not apply); Wray, App., 720 N.E.2d 1185 (D presented no evidence to show that trial judge received note during jury deliberation or that he ever answered questions raised in note; while better practice would have been for Tr. Ct. to make record of its decision not to respond to jury, Ct. would not reweigh evidence in D's favor).

TITLE: Taylor v. State
INDEX NO.: D.9.e.5.
CITE: (4th Dist., 2-25-97), Ind. App., 677 N.E.2d 56
SUBJECT: Jury deliberations - requests for information
HOLDING: Under Ind. Code 34-1-21-6, judge has responsibility to clarify legal issues when requested to do so by jury, but judge should use discretion in determining which requests should be answered. Kiner, App., 643 N.E.2d 950, *reh'g denied*. Here, in prosecution for conspiracy to deal marijuana, jury wanted to be informed about several points of law. Following Ind. Code 34-1-21-6, judge called jurors into open Ct. & answered their questions in presence of D & both attorneys. D argued that judge's response to questions weakened State's burden of proof & gave jury subtle message that guilty verdict was expected. Ct. held that judge properly handled jury's questions, in that his answers did not address merits of case & did not amount to additional, modified or supplemental instructions. Even if communication with jury was inappropriate, error was harmless. Held, judgment affirmed.

RELATED CASES: Fields, 972 N.E.2d 977 (Ind. Ct. App. 2012) (no abuse of discretion in answering jury question about one instruction, instead of re-reading all instructions, where question involved question of law and Tr. Ct. answered question succinctly and without elaboration).

TITLE: Williams v. State
INDEX NO.: D.9.e.5.
CITE: (3rd Dist., 7-6-05), Ind. App., 830 N.E.2d 107
SUBJECT: Jury's request for guidance - no violation of D's right to be present
HOLDING: Tr. Ct. did not err in failing to inform D of jury's request for information during deliberations. D argued this violated both his constitutional right to be present & Ind. Code 34-36-1-6. Such *ex parte* communication creates a rebuttable presumption of error, & when a judge denies a jury request any inference of prejudice is rebutted. Pendergrass v. State, 702 N.E.2d 716 (Ind.1998). Here, Tr. Ct.'s response that the "instructions & verdict forms are your best guidance" was essentially a denial of the jury request. Likewise, Ind. Code 34-36-1-6 requires notice or presence only when "information" is given & the jury received no information. Held, judgment affirmed.

RELATED CASES: Dickenson, App., 835 N.E.2d 542 (any error in trial judge's handling of jury request for guidance was harmless where judge denied jury's request for additional information).

D. TRIAL

D.9. Jury trial

D.9.e.6. Deadlocked jury

TITLE: Bailey v. State
INDEX NO.: D.9.e.6.
CITE: (8-7-96), Ind., 669 N.E.2d 972
SUBJECT: Deadlocked jury - rereading all instructions
HOLDING: Proper procedure for instructing jury once deliberations have begun is to reread all instructions given to them prior to deliberations, without emphasis or further comment. Lewis v. State, 424 N.E.2d 107 (Ind. 1981). During deliberations, note from juror asked Tr. Ct.: "What happens if we cannot come to a unanimous decision this evening?" Interpreting this note as indication that jury was deadlocked, Tr. Ct. reread only instruction dealing with manner of deliberations. Ct. has continually held that it is not proper to reread that instruction alone when faced with jury deadlock Ind. Ct. App. Held, reversed & remanded; Shepard, C.J., & Dickson, J., concurring.

RELATED CASES: Desjardines, App., 751 N.E.2d 323, *sum. aff'd* 759 N.E.2d 1036 (there was no evidence that jury was deadlocked).

TITLE: Fox v. State
INDEX NO.: D.9.e.6.
CITE: (1/12/84), Ind., 457 N.E.2d 1088
SUBJECT: Jury deliberations - deadlock; length
HOLDING: Tr. Ct. did not abuse discretion in permitting jury to deliberate 8.5 hours (2 reports of inability to agree). Length of deliberation is discretionary. Cade, 348 N.E.2d 394. Here, after 5.5 hours, jury reported deadlock; judge gave Lewis, (424 N.E.2d 107) instruction. 1.5 hours later, jury reported inability to agree. Tr. Ct. advised jury it could give no further instructions & to continue deliberating. Guilty verdict returned 1 hour later. 3d Dist. held no abuse of discretion as to either length of deliberations or latter communication (did not coerce verdict, Ayad, 261 N.E.2d 68). On petition to transfer, Ind. S. Ct. adopts 3d Districts' opinion (439 N.E.2d 1385). Held, conviction affirmed.

RELATED CASES: Cole, App., 790 N.E.2d 1049 (12 hours was not unreasonable length of time to allow jury to deliberate); Moore, App., 659 N.E.2d 694 (jury worked continuously for 17 hours & did not finish deliberating until 2:05 AM).

TITLE: Mitchell v. State
INDEX NO.: D.9.e.6.
CITE: (3/10/89), Ind., 535 N.E.2d 498
SUBJECT: Deadlocked jury - sendings exhibits into jury room
HOLDING: Tr. Ct.'s sending exhibits to jury room after jury twice indicated it was deadlocked was not equivalent to impermissible Allen charge. Allen charge refers to supplemental charge given to apparently deadlocked jury, which is reversible error when it unduly intimidates or coerces jury. Allen v. US (1896), 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528; Lewis, 424 N.E.2d 107. Decisions re sending exhibits to jury room are within discretion of Tr. Ct. Thomas, 289 N.E.2d 508. Tr. Ct. supplied all appropriate exhibits, & cautioned jury that he did so in hopes that it would enable them to reach unanimous verdict. Ind. S. Ct. finds no coercion in such action. Held, affirmed. Pivarnik, J., DISSENTS, noting that Tr. Ct. did not send arguably relevant defense exhibits, so that undue emphasis was placed on those sent.

TITLE: Ronco v. State
INDEX NO.: D.9.e.6.
CITE: (03-06-07), Ind., 862 N.E.2d 257
SUBJECT: Jury's legal query - re-reading only relevant instructions & explaining instruction
HOLDING: Tr. Ct. properly answered the jury's legal query by re-reading only the relevant instructions & explaining one instruction. If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, &, in a criminal case the parties, inquire of the jurors to determine whether & how the court & counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate. Jury Rule 28. Here, during deliberations, the jury submitted a question concerning an instruction on the two mutually exclusive ways the jury could convict the D of resisting law enforcement. Even after asking the jury to re-read the instruction, one juror wrote that he "felt that [he] needed to hear [the instruction] again" & that "it was going to be a long night." In open court, the judge explained the instruction.

Although Jury Rule 28 did not apply because the jury had not reached an "impasse" which is closer to a deadlock than a question about the law, the policy of greater flexibility in jury management reflected in the Jury Rules informs actions taken under Ind. Code 34-35-1-6. The Tr. Ct. properly responded to the jury's desire to be informed as to any point of law arising in the case under Ind. Code 34-35-1-6. Held, transfer granted, judgment affirmed, & Ct. App.' opinion at 840 N.E.2d 368 (Ind. Ct. App. 2006) vacated in part & summarily affirmed as to the search & seizure issue.

RELATED CASES: Treadway, 924 N.E.2d 621 (Ind. 2010) (Tr. Ct. properly called jury and parties into open court, polled the jury, then notified the parties of its intent to instruct the jury to continue deliberating before sending the bailiff to the jury room).

D. TRIAL

D.9. Jury trial

D.9.e.7. Notetaking

TITLE: Hailey v. State
INDEX NO.: D.9.e.7.
CITE: (4/29/88), Ind., 521 N.E.2d 1318
SUBJECT: Jury Notetaking
HOLDING: Tr. Ct. did not abuse discretion in denying D's motion for mistrial after discovering two jurors took notes during trial. Granting of mistrial is within discretion of Tr. Ct. Coleman, 490 N.E.2d 325. Absent clear showing of error, Tr. Ct.'s decision will not be reversed. D must demonstrate that notetaking by jurors placed him in grave peril that Tr. Ct. would have been justified in granting mistrial. See Morgan, 419 N.E.2d 964. Question of grave peril is determined by considering probable persuasive effect of misconduct on jury's decision, not by degree of impropriety of conduct. Asbell, 468 N.E.2d 845.

Here, during habitual criminal phase of trial, Tr. Ct. discovered that two jurors had taken notes during trial. Tr. Ct. interrogated, separately & apart from other jurors, each juror who had taken notes. One juror stated he did not refer to his notes during deliberations or convey their content to any other jurors. Other juror stated he did review his notes & discussed them with jurors. Although notes of jurors indicated their awareness of D's previous incarceration, Tr. Ct. found no impermissible interference with jury process, and no showing that notes placed D in grave peril. Held, judgment affirmed.

RELATED CASES: Stephenson, 742 N.E.2d 463 (Ct. rejected argument that juror's notebook was tantamount to unofficial transcript wrongfully brought into jury room); Marbley, 461 N.E.2d 1102 (record did not show case was so complex & evidence so filled with detail that Tr. Ct. abused discretion by denying D's motion to permit jury to take notes during trial; within Tr. Ct.'s discretion to determine whether it is reasonable for jurors to take notes to support their memory with respect to complexities of particular case).

D. TRIAL

D.9. Jury trial

D.9.e.8. Other

TITLE: Ashba v. State
INDEX NO.: D.9.e.8.
CITE: (1st Dist., 5-18-04), Ind. App., 816 N.E.2d 862
SUBJECT: Procedure for posing questions from jury to witness
HOLDING: Tr. Ct. did not commit reversible error when it did not allow jurors to ask questions at close of each witness's testimony pursuant to Jury Rule 20. In preliminary instructions, Tr. Ct. advised jurors that they would have an opportunity to ask questions prior to each witness being excused. The judge looked over to the jury after each witness finished but did not specifically ask them if they had any questions. The bailiff informed the judge after the evidence was closed that jurors had some questions & were upset they didn't get a chance to ask them. As the evidence was closed, the parties agreed the case should not be re-opened & the questions should be denied. The judge accepted responsibility for the error before the jury, noting that this new rule had just taken effect (effective date January 1, 2003).

In issue of first impression, Ct. found that proper procedure would be to accept written juror questions as consistent with Ind. Rule of Evid. 614(d) (Dowdy v. State, 672 N.E.2d 948, 953 (Ind. Ct. App. 1996)) & to specifically ask jurors if they have any questions once a witness finishes testifying (Lawson v. State, 664 N.E.2d 773 (Ind. Ct. App. 1996)). However, as D did not object, Ct. found that he invited error, thus there was no reversible error. Held, judgment affirmed.

Note: Court vacated its original opinion at 808 N.E.2d 670 and *clarified* that Tr. Ct. should explain to jurors what questioning procedure will entail, & to ensure that jurors know when they will be given an opportunity to ask such questions.

RELATED CASES: Lemond, App., 878 N.E.2d 384 (Tr. Ct. did not abuse discretion by disallowing questions submitted by jury after close of evidence, where jurors were instructed to submit questions before each witness left the stand); Burks, App., 838 N.E.2d 510 (questions propounded by jurors pursuant to Jury Rule 20 are entitled to no less scrutiny under Ind.R.Evid. than those propounded by parties); Howard, App., 818 N.E.2d 469 (neither Jury Rule 20(a)(7) nor Evid. Rule 614(d) require Tr. Ct. to ask jury if it has questions after excusing each witness, but merely requires Tr. Ct. to give a preliminary instruction that does not leave jurors in doubt as to how they may ask questions).

TITLE: Farrell v. State
INDEX NO.: D.9.e.8.
CITE: (10-22-93), Ind., 622 N.E.2d 488
SUBJECT: Allowable length of jury deliberations
HOLDING: Where jury deliberated for 30 hours without sleep, Tr. Ct. abused its discretion in not calling recess & sequestering jury; vacating decision at 612 N.E.2d 124. Trial lasted three days, with jury deliberations beginning at 8:15 p.m. on the third day. After various questions from jury, concerns expressed about their fatigue, & eventual request for their sequestration, Tr. Ct. suggested that if agreement wasn't reached in next few hours, then jury could be sequestered. Approximately two to three hours later, jury returned with verdict of guilty on all counts. Ct. found Tr. Ct. erred in expecting jury to deliberate for approximately 30 hours without sleep. Although Tr. Ct. has discretion to determine how long jury should be permitted to deliberate, King, 531 N.E.2d 1154, it must also conduct trial to ensure fairness & protect rights of all concerned, Proctor, (1992), 584 N.E.2d 1089. Verdict must be based on evidence presented, not ability of jurors to remain awake & rational for 30 hours, & Tr. Ct's. must be careful not to let economic considerations outweigh process of fairness. Ct. noted that when deprived of sleep, people are less capable of clear thinking, maintaining their attention spans, controlling their anger, & making appropriate judgments. While not mandating curfews for juries, Ct. found that because verdict after 30-hour period without sleep was suspect, D was entitled to new trial. "We have dispensed with trial by ordeal for litigants & should do so for jurors as well." Held, Ct. App. decision vacated & convictions reversed, Givan, J., dissenting on need for new trial.

TITLE: Fox v. State
INDEX NO.: D.9.e.8.
CITE: (1/12/84), Ind., 457 N.E.2d 1088
SUBJECT: Jury deliberations - prejudicial material
HOLDING: Where D alleges jury has been exposed to prejudicial extrinsic material discovered after verdict has been returned/jury discharged, D must prove by a preponderance of evidence (POE) that jury saw or heard such material. Only upon such proof should judge inquire re likelihood verdict was polluted. Here, Newsweek featuring cover story "The Epidemic of Violent Crime" was found in jury room morning after verdict reached. Tr. Ct. concluded material had no effect on verdict. 3d Dist. remanded, holding that Lindsey, 295 N.E.2d 819 requires post-verdict voir dire; reversal of conviction not required unless post-verdict voir dire is impractical/impossible. On petition to transfer, Ind. S. Ct. vacates 3d Dist.'s opinion (439 N.E.2d 1385) & holds Lindsey procedures neither appropriate nor available for attacking a verdict, *citing* Hardiman, App., 377 N.E.2d 1384. Ct. notes juror may not impeach verdict but may give testimony re what transpired at trial, including deliberations. Mattox v. US (1892), 146 U.S. 140, 13 S.Ct. 50; Llewellyn v. Stynchcombe (CA5 1980), 609 F.2d 194; US v. Vasquez (CA9 1979), 597 F.2d 192. D's MCE presented evidence that exposure did occur. Held, Ct. App. decision vacated; Tr. Ct. affirmed. DISSENT by Hunter agrees Lindsey inquiry is inappropriate after verdict is returned but rejects POE standard. Constitutional guarantee to fair trial demands reversal if substantial likelihood exists jury was improperly exposed to prejudicial, extrinsic material during deliberations.

RELATED CASES: Harris, App., 824 N.E.2d 432 (no prejudice where search warrant was inadvertently sent back with jury; both parties agreed the jury had been informed during trial about search warrant; additionally, Tr. Ct. sufficiently advised the jury through instructions to limit any prejudice, & statements included in the warrant from a State witness mirrored his trial testimony & were subject to cross-examination); Taylor, 681 N.E.2d 1105 (presence of withdrawn death sentence request in jury room was not reversible error; Tr. Ct. correctly evaluated effect, if any, of this error & determined there was none); Butter, App., 622 N.E.2d 1035 (State bears burden of establishing extrinsic material was harmless); Harrison, 575 N.E.2d 642 (exception to general rule against using testimony of jurors to impeach their verdict where jurors did not testify as to effect exposure to extraneous materials had on their deliberations, but only as to their exposure to materials when offered to show improper behavior resulting in denial of D's right to be present at all stages of proceeding.).

TITLE: Lyons v. State
INDEX NO.: D.9.e.8.
CITE: (9/16/2013), 993 N.E.2d 1192 (Ind. Ct. App. 2013)
SUBJECT: No fundamental error from failing to order bailiff to take electronic devices from jurors
HOLDING: Tr. Ct. did not commit fundamental error by failing to order bailiff to take electronic devices from jurors. See Ind. Jury Rule 26(B). Tr. Ct. had previously instructed jurors not to use such devices and court presumes jurors follow instructions unless there is evidence to the contrary. See Tormoehlen v. State, 848 N.E.2d 326, 332 (Ind. Ct. App. 2006), *trans. denied*. Held, judgment affirmed.

TITLE: Stancombe v. State
INDEX NO.: D.9.e.8.
CITE: (1st Dist., 12-30-92), Ind. App., 605 N.E.2d 251
SUBJECT: Questioning by jury during trial not error
HOLDING: Where judge stated that jurors would be allowed to pose questions aloud during trial, & questions were directed to judge who discussed them with counsel without excusing jury & gave counsel opportunity to object before allowing witness to answer, procedure did not so prejudice D that it was abuse of discretion. Although Ct. acknowledged dangers inherent in questions from jury, i.e., that they are not familiar with rules of evidence & very nature of situation will make counsel hesitant to object to question propounded by juror, Cherry, 280 N.E.2d 818, it rejected argument that by not having questions submitted in writing & allowing objections outside presence of jury, Tr. Ct. had prejudiced rights of parties to litigation. Ct. discussed several previous cases involving different procedures for handling juror questions & seemed to indicate that they should not be encouraged, & if used should be in writing with objections outside presence of jury, but did not find procedure employed here required reversal. Ct. examined each question propounded & stated why it was not considered impermissibly prejudicial. To sustain procedure used, Ct. seemed to rely on facts that questions were to be directed to judge; counsel were exposed to questions before witnesses were allowed to answer; counsel could have objected to questions at bench outside of presence of jury; & many of questions were proper & for evident purpose of discovering truth.

Note: Given cases discussed in decision, procedure used seems far different from those previously found not to be abuse of discretion.

RELATED CASES: Dowdy, App., 672 N.E.2d 948 (no error in instructing jurors that they would be able to submit questions to witnesses to clarify testimony); Lawson, App., 664 N.E.2d 773 (Ind. Evid. R. 614(d) permits jury to submit questions to witnesses; Tr. Ct. has discretion to incorporate jury question procedure into trial).

TITLE: Trotter v. State
INDEX NO.: D.9.e.8.
CITE: (2nd Dist., 8-17-00), Ind. App., 733 N.E.2d 527
SUBJECT: Juror question during trial - no error
HOLDING: In theft & attempted fraud prosecution, Tr. Ct. did not abuse its discretion in submitting juror question regarding discrepancy in evidence. Indiana Evidence Rule 614(d) permits Tr. Ct. to determine whether juror questions are appropriate to submit to witness after hearing objections from parties. Overriding concern is whether question allows jury to better understand evidence, discover truth & be admissible under rules of evidence. Here, after noticing discrepancy in time listed on sales receipt & time displayed on videotape, juror submitted question asking whether time of day indications were consistent. By allowing juror's question to be addressed, jury was able to better understand evidence already before it & to discover whether person who approached sales associate was same person in videotape. Because this evidence led to discovery of truth, it was proper question. Ct. also held that trial judge is permitted to ask foundational questions of witness to ensure that witness has sufficient knowledge to answer question, as long as questioning is done in impartial manner & does not influence jury improperly with judge's own contentions. Discretion afforded Tr. Ct. in determining appropriateness of juror question under Rule 614(d) necessarily includes discretion to question witness about ability to answer.

RELATED CASES: Amos, App., 896 N.E.2d 1163 (Tr. Ct. properly allowed jury to ask questions beyond the scope of D's cross; the jurors can ask questions to clarify issues).

D. TRIAL

D.9. Jury trial

D.9.f. Jury viewing crime scene (upon motion of parties/order of court) (Ind. Code 35-37-2-5)

TITLE: Carroll v. State
INDEX NO.: D.9.f.
CITE: (8/16/82), Ind., 438 N.E.2d 745
SUBJECT: Jury viewing crime scene
HOLDING: Tr. Ct. did not err in denying of D's request that jury view interrogation room. Jury view is discretionary (Gross, 370 N.E.2d 885); it is neither a substantive right nor essential to a fair trial (Misenheimer, 374 N.E.2d 523). Purpose of jury view is to aid jury in understanding the evidence. Tr. Ct. does not abuse discretion if view would not be materially helpful to jury or where photographs/other evidence adequately present situation. Pinkerton, 283 N.E.2d 376. Here, Tr. Ct. ordered dimensions of room measured. Parties stipulated to figures which were admitted into evidence. Held, no error.

RELATED CASES: Simmons, App., 717 N.E.2d 635 (Tr. Ct.'s act of accompanying jury to view of crime scene did not violate D's right to be present at every stage of trial & did not prejudice D); Jackson, 597 N.E.2d 950 (Tr. Ct. did not err in refusing to allow jury to view site of kidnapping in Columbus, OH where several photos where admitted showing scene of kidnapping & location of eye-witness; jury's view of location is not evidence, but merely aids jury's understanding of evidence); Vincent, 489 N.E.2d 49 ("fact that the State consented to viewing does not alter the fact that the decision [to deny motion for jury view] was wholly discretionary with the Tr. Ct. " [cite omitted]).

D. TRIAL

D.9. Jury trial

D.9.g. Jury instructions (see, also IPDC Jury Instructions in Criminal Cases Manual & 1991 Pattern Criminal Jury Instructions)

D.9.g.1. In general

TITLE: Ash v. State
INDEX NO.: D.9.g.1.
CITE: (4th Dist. 11/2/83), Ind. App., 455 N.E.2d 965
SUBJECT: Jury instructions - completed before final argument
HOLDING: Tr. Ct. did not err in altering content of final instruction (rape statute) during final argument. Here, D was charged with burglary & attempted rape, initiated upon a sleeping victim. After D's final argument & during state's rebuttal, Tr. Ct. attempted to read section of rape statute (unaware victim) not read during preliminary instructions. D objected but was *overruled*. D was allowed to readdress jury after prosecutor's rebuttal. D contends final instructions must be completed before final argument (Ind. Code 35-1-35-1, now Ind. Code 35-37-2-2; TR 51(B) & (C); CR 8(B)) & cannot be changed once final argument begins. State argues completion of instruction did not change theory of case & D failed to prove prejudice. Preferred procedure is for final instructions to be completed before final argument begins. CR 8(B). Ct. finds error harmless because D was not surprised & failed to show prejudice. Held, harmless error.

RELATED CASES: Snell, App., 866 N.E.2d 392 (local rule requiring instructions to be submitted to court at least one day before trial conflicts with Trial Rule 51 allowing instructions to be submitted at close of evidence & thus is invalid); Gunter, App., 605 N.E.2d 1209 (Where D did not show any prejudice to defense from Ct. giving jury additional instruction tendered by State prior to deliberation, error in technical noncompliance with procedure was harmless.).

TITLE: Askew v. State
INDEX NO.: D.9.g.1.
CITE: (10/4/82), Ind., 439 N.E.2d 1350
SUBJECT: Tendered instructions - numbered & signed
HOLDING: Ind. Code 35-1-35-1 [now Ind. Code 35-37-2-2] requires tendered instructions to be numbered & signed. Failure to follow statute constitutes waiver of any error in rejection of tendered instruction. Wiley (1929) 200 Ind. 572 (decided under similar statute). Here, D failed to either number or sign tendered instruction captioned voluntary manslaughter. Ct. holds instruction properly refused even if numbered & signed in conformity with statute. Tendered instruction deemed likely to mislead or confuse jury, Smith 422 N.E.2d 1179, & an incorrect statement of the law, Battle 415 N.E.2d 39, Faught 390 N.E.2d 1011, because it intimated state must prove absence of sudden heat as element of voluntary manslaughter.

RELATED CASES: Hopper, 475 N.E.2d 20 (no conflict between statute & CR 8(D); both require instructions to be signed); Prentice, 474 N.E.2d 496 (held, no error in refusal to give oral instruction; instructions must be in writing, *citing* Ind. Code 35-37-2-2(6)(A); Harding, 457 N.E.2d 1098; Galbraith, App., 468 N.E.2d 575 (Crim L 845; refusal to give unsigned instruction must be fundamental error for D to prevail).

TITLE: Fought v. State
INDEX NO.: D.9.g.1.
CITE: (3d Dist. 9/13/84), Ind. App., 468 N.E.2d 247
SUBJECT: Instructions - CR 8(A), number tendered
HOLDING: Where D tendered more than 10 proposed final instructions without requesting leave to tender more than 10, as required under CR 8(A), D cannot claim that Tr. Ct. erred in refusing his instruction No. 14. Kelsie, 354 N.E.2d 219. CR 8(A) limits D to tendering 10 instructions, unless Tr. Ct. permits a greater number in a particular case. Held, affirmed.

RELATED CASES: Brooks, 497 N.E.2d 210 (no error in allowing State to tender forty final instructions and not permitting sufficient time for D to file additional instructions after allowing State continuance of ninety minutes to file additional instructions; D failed to show any instruction that he was unable to tender and failed to show any prejudice); Mingle, 396 N.E.2d 399 (Tr. Ct. did not err in allowing State to offer twice as many instructions as D because number of instructions need not be numerically balanced; no error will be found absent showing of prejudice).

TITLE: Lynn v. State

INDEX NO.: D.9.g.1.

CITE: (8/23/2016), 60 N.E.3d 1135 (Ind. Ct. App. 2015)

SUBJECT: Charging information affirmation language in preliminary jury instructions problematic, but not fundamental error

HOLDING: Tr. Ct.'s failure to redact affirmation language from preliminary jury instruction did not constitute fundamental error. Jury was specifically instructed regarding presumption of innocence, State's burden of proof and that the filing of charges is not to be considered as evidence of guilt. D was found guilty of lesser-included Class B misdemeanor battery rather than the charged A misdemeanor. Thus, the preliminary instruction did not invade the province of the jury and affirmation language did not so affect the entire charge that the jury was misled. Nonetheless, Court noted that the "swear or affirm under the penalties of perjury" language generally has no place in jury instructions and best practice is for Tr. Ct.s to redact such language. "Inclusion of affirmation language of this type raises several potential problems, including that it gives the semblance of attribution to the Tr. Ct. or to an unknown affiant, who may or may not be available for cross-examination, as to the veracity of the factual basis for the charges. This is undesirable and completely avoidable. Thus, while the pattern jury instructions do not clearly require redaction, we strongly advise it." Held, judgment affirmed.

TITLE: Quiroz v. State
INDEX NO.: D.9.g.1.
CITE: (02-23-12), 963 N.E.2d 37 (Ind. Ct. App. 2012)
SUBJECT: No fundamental error in jury seeing previously dismissed counts
HOLDING: In child molesting prosecution, Tr. Ct. did not commit fundamental error by including in the jury instructions the charging information that included two charges that had been previously dismissed. D did not object at trial and Tr. Ct. specifically instructed the jury that those two counts had been withdrawn and to not consider them when evaluating the other charges. There also appeared to be some confusion as to whether the charges had in fact been dismissed prior to trial. Although Court could not find any Indiana case directly on point, it relied on Berry v. State, 196 Ind. 258, 148 N.E. 143 (1925), and Nordyke v. State, 213 Ind. 243, 11 N.E. 2d 165 (1937), as well as decisions from outside of Indiana to find there is no error in permitting the jury to have access to an information or indictment that has dismissed counts when the jury is also told that the dismissed counts are not to be considered or the charging instrument is not evidence. "[W]hile certainly not the best practice" for jurors to be exposed to allegations of dismissed charges, there was no fundamental error. Held, judgment affirmed.

TITLE: Reyes v. State
INDEX NO.: D.9.g.1.
CITE: (5/6/2022), Ind. Ct. App., 185 N.E.3d 886
SUBJECT: No presumption that final instructions be given to jury after closing arguments
HOLDING: The Court of Appeals rejected a defendant's claim that the presumption should be that final instructions are given last and trial courts must provide a reason for giving them before closing arguments. Jury Rule 26(a) gives trial courts the option to give final instructions before or after closing arguments; it creates no presumption. The Indiana Supreme Court could have written a presumption into Jury Rule 26 but did not. Reading final instructions before closing helps the jury better understand counsels' arguments about how the law applies to the facts. Further, there would be no guessing during closing as to what the instructions will be. The downside is that the last thing the jury would hear is the State's rebuttal argument, which might have a greater impact on it because of "recency bias." But as the trial court did here, courts could lessen any impact by addressing housekeeping matters after the State's rebuttal argument. That said, because Jury Rule 26(a) affords trial courts the option to give final instructions before or after closing arguments, a court can do either without abusing its discretion. Held, judgment affirmed.

TITLE: Rowley v. State
INDEX NO.: D.9.g.1.
CITE: (12/3/82), Ind., 442 N.E.2d 343
SUBJECT: Final instructions - reading of
HOLDING: In a criminal proceeding, D is entitled to have final instructions read to jury; however, right is not of constitutional import. Rice, 426 N.E.2d 680. Tr. Ct.'s should orally instruct jurors in open Ct. Foresta, 413 N.E.2d 889; Drake 393 N.E.2d 148; Williams, 381 N.E.2d 458; Purdy, 369 N.E.2d 633. D need not specifically request oral reading of instructions. Williams; Drake. Objection not required for appellate review of Tr. Ct.'s failure to orally instruct jurors. Drake. However, D can expressly waive reading (Rice), when invited to do so by Ct., but Tr. Ct.s. are discouraged from this practice. Here, D contends Tr. Ct. committed fundamental error in failing to read final instructions to jury. In response to judge's invitation, D & his counsel expressly waived reading. A party expressly waiving right to have jury instructed orally may not, in wake of adverse verdict, gain relief on basis that error was fundamental. Since right to have instructions read to jury is not constitutionally based, a knowing waiver by D is not required. Held, no error.

TITLE: Scisney v. State
INDEX NO.: D.9.g.1.
CITE: (11-2-98), Ind., 701 N.E.2d 847
SUBJECT: Claim of instruction error - appellate review; failure to tender alternative instruction
HOLDING: Appellate review of claim of error in giving of jury instruction requires timely trial objection clearly identifying both claimed objectionable matter & grounds for objection. However, tender of proposed alternative instruction is not necessarily required to preserve claim of error. Focus is not merely upon tender of alternative instruction but rather upon whether instruction objection at trial was sufficiently clear & specific to inform Tr. Ct. of claimed error & to prevent inadvertent error. Mitchem, 685 N.E.2d 671. Ind.Trial Rule 51(C) does not contain any express requirement for submission of alternative instruction to preserve for appeal claim of error in giving of instruction.

Here, final instruction at issue was formulated during Tr. Ct.'s instruction conference with counsel. Defense counsel objected to instruction on constructive possession on general ground that instruction was unclear statement of law. Counsel failed to explain to Tr. Ct. why instruction was unclear or what could be done to correct instruction, & thus failed to identify adequately "matter to which he objects & grounds of his objection," T.R. 51(C), to facilitate correction of claimed error. Claim of error was waived. Held, transfer granted, Ct. App.' opinion as to all other issues summarily affirmed.

RELATED CASES: Minor, 36 N.E.3d 1065 (Ind. Ct. App. 2015) (D's objection to erroneous instruction was sufficient to preserve issue for appellate review; a D is not ordinarly required to tender an alternate instruction); Garrett, 964 N.E.2d 855 (Ind. Ct. App. 2012) (D's failure to submit a written instruction did not result in waiver of issue where Tr. Ct. understood the request for the lesser included offense instruction and was able to consider it fully); Fry, 748 N.E.2d 369 (because D did not tender proposed instruction on “mere presence,” he waived any claim of error); Mitchell, 742 N.E.2d 953 (D waived any error in jury instruction on aiding & abetting, where his objection at trial did not make clear that he was objecting based on missing information in proposed instruction, & it was necessary for D to propose alternative instruction containing additional law).

TITLE: Sims v. State
INDEX NO.: D.9.g.1.
CITE: (3d Dist. 9/26/85), Ind. App., 482 N.E.2d 1182
SUBJECT: Instructions - preservation of error
HOLDING: D is not required to tender written instruction at trial in order to challenge instruction given; objection at trial & raising issue in MCE & appellate brief preserves issue for appeal. TR 51(c); Cox, 475 N.E.2d 664. Here, D objected that instruction re possession of stolen property put emphasis on state's evidence. Ct. conducts excellent review of other cases involving this instruction. Ct. finds instruction was erroneous. Reversal is required if jury's decision may have been based on erroneous instruction. Held, reversed.

TITLE: Weeks v. Angelone
INDEX NO.: D.9.g.1.
CITE: 528 U.S. 225, 120 S.Ct. 727 (2000)
SUBJECT: Jury instructions, questions from jury
HOLDING: Where the jury instructions are constitutionally sufficient and the jury does not expressly state that it does not understand them, the Tr. Ct. is not required to supplement them in response to a jury question. Here, D was convicted of capital murder. During the penalty phase, the jury sent out a note asking the Tr. Ct. to clarify whether the jury had a duty to impose a death sentence if it found an aggravating circumstance had been proven beyond a reasonable doubt, or if it was to decide between a death sentence and a life sentence. The judge sent the jury a written note directing it to refer to one of the jury instructions it had already been given. Defense counsel objected and asked the judge to instruct the jury that it might impose a life sentence even if it found an aggravating circumstance beyond a reasonable doubt.

TITLE: Willis v. State
INDEX NO.: D.9.g.1.
CITE: (7/28/87), Ind., 510 N.E.2d 1354
SUBJECT: Repetitive instructions
HOLDING: Tr. Ct. did not err in giving 3 instructions on accomplice testimony. Here, D submitted 1 instruction & state submitted 2 instructions (all set forth in opinion). D contends state's instructions were repetitive of his own & placed undue emphasis on accomplice testimony. It is generally improper for Tr. Ct. to emphasize particular phase of case by emphasizing certain propositions of law in its instructions. Coleman, 465 N.E.2d 1130. However, in order to constitute reversible error, instructions must be so repetitive as to violate rights of D by becoming argument of Ct. on particular phase of case. Johnson, 284 N.E.2d 517. Ct. finds instructions when considered together were not so repetitious as to place undue emphasis on accomplice testimony, particularly because instructions were submitted by both parties & because instructions were correct statements of law. Held, no error.

D. TRIAL

D.9. Jury trial

D.9.g.2. Specific instructions (see, also substantive law categories)

TITLE: Corley v. State
INDEX NO.: D.9.g.2.
CITE: (3rd Dist., 3-20-96), Ind. App., 663 N.E.2d 175
SUBJECT: Multiple issues - jury instructions
HOLDING: In decision affirming conviction for murder, Ct. held that: 1) Tr. Ct. did not err in refusing D's tendered instruction on culpability which included "causing a result" language; 2) Tr. Ct. did not err in refusing D's instruction on lesser included offenses, where instruction was incomplete, insufficient, & confusing; & 3) instruction on intent was correct statement of law. Ct. rejected argument that jury should also have been instructed concerning other inferences which they could draw from use of deadly weapon, including intent to threaten, scare or intimidate. Ct. based holding on fact that D failed to cite any authority for this instruction & waived issue by failing to proffer instruction at trial. Held, conviction affirmed.

TITLE: Fleenor v. State
INDEX NO.: D.9.g.2.
CITE: (09-03-93), Ind., 622 N.E.2d 140
SUBJECT: Instructions not fundamentally unfair
HOLDING: Various instructions given in guilt phase of death penalty trial did not require reversal, including instruction on voluntary manslaughter as included offense of murder that included following language: The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. To convict the D, the State must have proved each of the following elements that the D knowingly or intentionally killed another human being. If the State failed to prove each of these elements beyond reasonable doubt, you should find the D not guilty. If the D [sic] did prove each of these elements beyond a reasonable doubt, & you further find that the D did the killing while acting under sudden heat, you should find the D guilty of voluntary manslaughter, a class B felony. The crime of voluntary manslaughter is distinguished from the charged crime of murder by the inclusion, in voluntary manslaughter, of the element of a sudden heat. Instruction was clearly erroneous & confusing because it misstated burden of proof (BOP) & considered sudden heat as element of offense. Ct. found, however, that reasonable juror would have immediately recognized BOP misstatement as inadvertent & patent error & discounted its express message. Additionally, because evidence did not support giving of voluntary manslaughter instruction, there was no impairment to fairness of determination of guilt by giving erroneous & confusing instruction. Ct. also rejected D's arguments about other guilt phase instructions covering BOP, flight, & prior inconsistent statements. Held, judgment affirmed.

TITLE: Gammons v. State
INDEX NO.: D.9.g.2.
CITE: (06/26/20), Ind., 148 N.E.3d 301
SUBJECT: Self-defense jury instruction - contemporaneous crime limitation did not apply
HOLDING: Under Indiana's self-defense statute, "a person is not justified in using force if the person," among other things, "is committing . . . a crime." Ind. Code § 35-41-3-2. Here, during Defendant's trial for attempted murder and carrying a handgun without a license, he asserted that he acted in self-defense when he fired six shots at a man who aggressively confronted him and whom he knew had a history of violence. Over Defendant's objection, the trial court instructed the jury using language that tweaked his tendered self-defense instruction and stated that "a person may not use force if," among other things, "he is committing a crime that is directly and immediately related to the confrontation." Noting and agreeing with Justice Boehm's concurring opinion in Mayes v. State, 744 N.E.2d 390, 396 (Ind. 2001), which warned that the "but for" test was too broad and could foreclose self-defense where the defendant should be free to argue it, the Indiana Supreme Court held that self-defense is only barred when there is "an immediate causal connection between the crime and the confrontation." Because the instructional error could have served as the basis for the jury's decision to convict, the Court reversed Defendant's conviction and remanded for a new trial.

D. TRIAL

D.9. Jury trial

D.9.g.2.a. General instructions (juror's personal knowledge of material fact (Ind. Code 35-37-2-3(a); juror's duty not to converse re case, Ind. Code 35-37-2-4(a))

TITLE: Buckner v. State
INDEX NO.: D.9.g.2.a.
CITE: (2nd Dist., 12-05-06), Ind. App., 857 N.E.2d 1011
SUBJECT: Proper to instruct that jury can "discuss" case prior to deliberations
HOLDING: Tr. Ct. did not abuse its discretion in instructing the jury, pursuant to Pattern Jury Instruction 1.01, that they may discuss the evidence with fellow jurors in the jury room during recesses from trial when all are present as long as they reserve judgment about the outcome of the case until the deliberations begin. Jurors are prohibited from being separated once the "deliberation" has begun. Ind. Code 35-37-2-6(a)(1). Here, the fact that jurors were told they could discuss the case during the trial & before being sequestered did not violate Ind. Code 35-37-2-6(a)(1). Because the jurors were instructed to "reserve judgment" until deliberations, any discussions in the jury room during presentation of evidence were not considered deliberations. The deliberative process begins at the point the jury could form opinions, reach conclusions & arrive at a judgment. Held, judgment affirmed.

TITLE: Cox v. State
INDEX NO.: D.9.g.2.a.
CITE: (3/21/85), Ind., 475 N.E.2d 664
SUBJECT: Instructions - "jury is moral conscience of society"
HOLDING: Tr. Ct. did not err in instructing jury that it was "moral conscience of society." Here, D objected that instruction (set forth in opinion) misled jury allowing them to be guided by emotion/morality rather than law/evidence & was inconsistent with another instruction that jury base its decision on evidence & law. Ct. finds instruction was not erroneous or inconsistent. Jury is to determine the law & in doing so are the moral conscience of our society. See 2 W. Blackstone, Commentaries, ch. 23, 380-81. Instruction was in nature of general admonition. Held, no error.

RELATED CASES: Wilson, 697 N.E.2d 466 (instruction is not unconstitutional appeal to community conscience).

TITLE: Doyle v. State
INDEX NO.: D.9.g.2.a.
CITE: (4th Dist. 9/11/84), Ind. App., 468 N.E.2d 528
SUBJECT: Instructions - "don't convict to deter others"
HOLDING: Tr. Ct. did not err in refusing D's tendered instruction that read: "You are instructed that you have no right to find D guilty only for the purpose of deterring others from committing crimes." Negative instructions, telling jury what is not at issue in case, are usually superfluous & may be refused if jury has been instructed on positive aspects of same issue. Dayton Walther Corp. v. Caldwell, 402 N.E.2d 1252. Held, no error.

TITLE: Griffin v. State
INDEX NO.: D.9.g.2.a.
CITE: (12-16-94), Ind., 644 N.E.2d 561
SUBJECT: Erroneous acquittal instruction
HOLDING: S.Ct. expressly disapproved of future use of following erroneous acquittal instruction, previously approved in Murray v. State, Ind., 442 N.E.2d 1012, & Timmons v. State, Ind., 584 N.E.2d 1108: If a D is innocent, he should not be convicted erroneously; but if a D is guilty, he should not be acquitted erroneously. By acquittal of the guilty, a contempt of the law is aroused among the criminal classes & the safeguards of society are weakened. Instruction is constant source of difficulty because it clouds presumption of innocence & risks distracting jury by its speculation on sociological impact of erroneous verdicts.

TITLE: Taylor v. State
INDEX NO.: D.9.g.2.a.
CITE: (5th Dist., 11-24-97), Ind. App., 687 N.E.2d 606
SUBJECT: Failure to properly instruct alternate juror
HOLDING: Tr. Ct.'s failure to instruct alternate juror that he was not to participate in deliberations was erroneous but not fundamental error. Error in instructing jury will not amount to fundamental error unless error is blatant & harm or potential for harm is substantial & appears clearly on face of record. Although D has statutory right to jury of twelve, there is no constitutional limit to maximum number of jurors. Here, D failed to object when Tr. Ct. erroneously instructed alternate juror that he could retire with jury to jury room to deliberate, without also instructing that he could not participate in deliberations. Because D neither identified any facts which would substantiate mere possibility that alternate did in fact participate as thirteenth juror nor demonstrated how he would have been substantially harmed by alternate's participation in deliberations, such error was not fundamental & D waived error by failing to object at time instruction was given. Held, conviction affirmed.

D. TRIAL

D.9. Jury trial

D.9.g.2.b. Effect of erroneous instruction

TITLE: California v. Roy
INDEX NO.: D.9.g.2.b.
CITE: 519 U.S. 2, 117 S.Ct. 337 (1996)
SUBJECT: Harmless Error Standard -- Erroneous Jury Instruction Defining Offense
HOLDING: Erroneous jury instruction defining offense is "trial error" which, on federal habeas review, is subject to harmless error standard set out in Brecht v. Abrahamson, 507 U.S. 619 (1993). Petitioner was charged with robbery and first-degree murder, and state's theory was that he had aided another in robbing and killing the victim. Jury was instructed that it could convict petitioner if it found that he had, "'with knowledge of' the confederate's 'unlawful purpose' (robbery), had helped the confederate, i.e., had 'aid[ed],' 'promote[d],' 'encourage[d],' or 'instigate[d],' by 'act or advice the commission of' the confederate's crime." California Supreme Court later held, in another case, that this instruction was erroneous because it did not tell jury that it must also find that petitioner had "'knowledge [and] intent or purpose of committing, encouraging, or facilitating' the confederate's crime." Petitioner raised erroneous instruction as error in federal habeas petition, and district court found it to be harmless. Ninth Circuit Court of Appeals reversed, applying less strict harmless error standard than that set out in Brecht. U.S. Supreme Court, per curiam, reverses and remands to Ninth Circuit, finding that Brecht harmless error standard should apply, because this is "trial error."

TITLE: Correll v. State
INDEX NO.: D.9.g.2.b.
CITE: (4th Dist., 09-08-94), Ind. App., 639 N.E.2d 677
SUBJECT: Erroneous instruction fundamental error
HOLDING: Although D invited error by tendering erroneous instruction, it is fundamental error to allow D to be convicted for offense including element not listed in charge, & therefore D's conviction constituted reversible error. D was charged with, inter alia, kidnapping for removing another by force from one place to another to aid in his own escape, forcing another to remove herself from her place of residence to her own automobile to take him to aid in his escape. Tr. Ct. instructed jury on kidnapping as class A felony, & neither information nor instruction mentioned used of deadly weapon. D tendered instruction on criminal confinement, allowing verdict of criminal confinement as class D felony (not involving use of deadly weapon), but also including language that if jury found acts of confinement were committed with deadly weapon, D should be found guilty of confinement as class B felony. Before submitting instruction to jury, Tr. Ct. crossed out section relating to confinement as class D felony. D was convicted of confinement as class B felony.

In PCR petition, D argued that because kidnapping charge did not mention deadly weapon, he was convicted of crime (confinement as B felony) including element not contained in charge. State argued that D invited error by tendering instruction with offensive, deadly weapon, language. However, to convict D of confinement as class B felony, State had to allege he was armed with deadly weapon. State's failure to do this was fundamental error, & therefore conviction was erroneous. Yarborough, Ind., 497 N.E.2d 206. Held, remanded for entry of conviction for confinement as class D felony.

RELATED CASES: Ross, App., 877 N.E.2d 829 (Trial counsel was not ineffective for failing to object to jury being given an instruction on Class A felony voluntary manslaughter, even though D could only have been convicted of Class B felony manslaughter); Corn, Ind., 659 N.E.2d 554 (Tr. Ct.'s erroneous instruction on criminal confinement as Class B felony was reversible error, where Class B felony was not properly lesser included offense of Class A kidnapping, as latter had been charged).

TITLE: Hedgpeth v. Pulido
INDEX NO.: D.9.g.2.b.
CITE: 555 U.S., 129 S.Ct. 530, 172 L.Ed.2d 388 (2008)
SUBJECT: Harmless error extends where invalid instruction on alternative theory of guilt given
HOLDING: In *per curiam* decision, majority held the proper standard to review a jury instruction error where the jury was instructed on alternative theories of guilt and may have relied on an invalid one is whether the flaw "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619 (1993). The Ninth Circuit termed the error "structural" rather than a trial error, which both parties conceded was incorrect. The incorrect instruction allowed the jury to convict D of felony murder if he formed the intent to aid and abet the underlying felony before the murder, but also permitted the jury to find him guilty if he formed that intent only after the murder. Majority noted Ninth Circuit improperly relied on Stromberg v. California, 283 U.S. 359 (1931) and Yates v. United States, 354 U.S. 298 (1957), which were decided before Court determined in Chapman v. California, 386 U.S. 18 (1967) that constitutional errors can be harmless. Accordingly, neither Stromberg nor Yates had reason to address whether the instructional errors they identified could be reviewed for harmlessness, or instead required automatic reversal. Majority noted several cases after Chapman concluded that various forms of instructional error are not structural. Majority remanded for Ninth Circuit to analyze case in relation to Brecht. Stevens, J., joined by Souter and Ginsburg, JJ. dissented on basis that district court properly conducted a harmless error analysis and the Ninth Circuit's "result" was substantially the same although it failed to consider Brecht. Stevens concluded a third analysis of harmless error would be a "misuse of scarce judicial resources."

TITLE: Potter v. State
INDEX NO.: D.9.g.2.b.
CITE: (8-25-97), Ind., 684 N.E.2d 1127
SUBJECT: Erroneous jury instruction - IAC claim
HOLDING: Trial counsel's failure to object to jury instruction which defined rape broader than charge contained in information did not constitute IAC. To establish IAC, D must prove that proper objection would have been sustained & failure to object resulted in sufficient prejudice such that there exists reasonable probability outcome would have been different. Spranger, 650 N.E.2d 1117. There is no prejudice created by erroneous instruction if jury is plainly made aware that it can only convict upon finding that D committed specific acts charged in information. Evans, 571 N.E.2d 1231. Here, jury instruction informed jury of three possible means of elevating rape to Class A felony, but charging information was limited to just one means of elevation, i.e., armed with deadly weapon. In another instruction, jury was read verbatim charging information with deadly weapon as means of elevation. Also, verdict form stated that jury found D guilty of Count I of information, rape, Class A felony. Although instruction was erroneous, it did not create prejudice because jury was aware of crime charged & that conviction was solely for that crime. Held, transfer granted, Ct. App.' decision at 666 N.E.2d 93 vacated, conviction affirmed.

TITLE: Rose v. Clark
INDEX NO.: D.9.g.2.b.
CITE: 478 U.S. 570 (1986)
SUBJECT: Instructions - effect of instruction which impermissibly shifts burden of proof
HOLDING: An otherwise valid conviction should not be set aside if reviewing court may confidently say, based upon whole record, that constitutional error was harmless beyond a reasonable doubt. DE v. Van Arsdall, (1986), 475 U.S., 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674. Despite strong interests that support harmless error doctrine, some constitutional errors require reversal without regard to evidence in particular case. Chapman v. CA, (1967), 386 U.S. 18, 23, n.8, 87 S.Ct. 824, 828, n.8, 17 L.Ed.2d 705. This limitation recognizes that some errors necessarily render trial fundamentally unfair. However, where reviewing court can find that record developed at trial establishes guilt beyond a reasonable doubt, interest in fairness has been satisfied & judgment should be affirmed. Here, D received full opportunity to put on evidence & make argument to support claim of innocence. He was tried by fairly selected, impartial jury, supervised by impartial judge. Apart from one instruction which impermissibly shifted burden of proof on element of malice, jury was clearly instructed that it had to find D guilty beyond a reasonable doubt of every element of each offense. This type of error is not "so basic to a fair trial" that it can never be harmless. Reversal is not required where guilty verdict is correct beyond a reasonable doubt. Held, case remanded for determination as to whether error was harmless. Burger, & Stevens CONCUR IN JUDGMENT (writing separately); Blackmun, joined by Brennan & Marshall, DISSENTS.

TITLE: Russell v. State
INDEX NO.: D.9.g.2.b.
CITE: (1/2/86), Ind., 487 N.E.2d 136
SUBJECT: Erroneous instruction harmless
HOLDING: Error in giving instruction defining serious bodily injury when evidence did not warrant instruction was harmless. Here, D argues instruction misled jurors. Ct. finds Tr. judge properly charged jury on relevant classifications of robbery; therefore, jury was not misled. Held, error was harmless.

RELATED CASES: Reese, 939 N.E. 2d 695 (Ind. Ct. App. 2011) (use of the word “attack” in instruction on intent was at most harmless error in light of testimony that D fired multiple shots, two of which struck the officer with deadly accuracy in his head and chest); Emerson, 695 N.E.2d 912 (harmless error to give instruction which defined offense too broadly when actual evidence presented proved charged offense); Potter, 684 N.E.2d 1127 (see review, this section; non prejudicial error to allow instruction defining offense broader than charge if jury is also read information with proper charge & verdict states D is guilty of charge in information); Rogers, 506 N.E.2d 481 (instruction re motive is one "law prefers to leave to summation of counsel," but mistake in giving it does not warrant reversal).

D. TRIAL

D.9. Jury trial

D.9.g.2.c Definitions

TITLE: Abercrombie v. State
INDEX NO.: D.9.g.2.c.
CITE: (6/11/85), Ind., 478 N.E.2d 1236
SUBJECT: Instructions - definitions
HOLDING: Tr. Ct. has duty to give instructions defining words of art. Martin 314 N.E.2d 60. Here, Ct. finds terms "knowingly" & "intentionally" are terms of art (have specific legal definitions); thus Tr. Ct. should have given instructions defining these words which appeared in burglary & theft instructions. D did not tender instruction defining terms & has shown no prejudice. Under circumstances, Ct. finds error did not impinge on substantial right requiring reversal. Held, conviction affirmed.

RELATED CASES: King, 468 N.E.2d 226 (instruction defining shotgun as deadly weapon did not remove question of fact from jury; Ct. rejects D's analogy to Hubbard, (1925) 196 Ind. 137 (moonshine whiskey is intoxicating liquor); held, affirmed); Erickson, 439 N.E.2d 579 (Crim L 800(2); held, no error in Tr. Ct. refusal to define "handgun" & "firearm," contained in instruction re "deadly weapon"); McCormick, 437 N.E.2d 993 (statutory definitions).

TITLE: Clemons v. State
INDEX NO.: D.9.g.2.c.
CITE: (8/30/2017), 83 N.E.3d 104 (Ind. Ct. App. 2017)
SUBJECT: Failure to define SBI was not fundamental error
HOLDING: Trial court did not commit fundamental error in not instructing the jury on the definition of "serious bodily injury." (Ind. Code § 35-31.5-2-292).

Defendant struck Margaret Willoughby with a metal rod that was "real heavy," "a really really hard aluminum." Willoughby suffered a fractured wrist and significant pain. Defendant was convicted of level 5 battery with a deadly weapon. A deadly weapon is any "material that in the manner it (A) is used . . . is readily capable of causing serious bodily injury." Ind. Code 35-31.5-2-86(a)(2) (emphasis added).

When determining if the State has proven an element, the jury may rely on common sense. Halsema v. State, 823 N.E.2d 668, 673-74 (Ind. 2005). "The trial court has a duty to give further instructions defining words . . . only if the words are of a technical or legal meaning normally not understood by jurors unversed in the law." Martin v. State, 314 N.E.2d 60, 70 (Ind. 1974). Sometimes, "serious bodily injury" may require further definition, but the average layman understands it to mean some injury short of death. See Comer v. State, 428 N.E.2d 48, 55 (Ind. Ct. App. 1981). Here, the jury was able to apply its common sense that the metal rod Defendant used was capable of causing serious bodily injury. Held, judgment affirmed. Baker, J., dissenting, arguing that without an instruction defining "serious bodily injury," the jury had no way of knowing that creating a substantial risk of death is included in the definition of serious bodily injury.

RELATED CASES: Paul, 189 N.E.3d 1146 (Ind. Ct. App. 2022) (fundamental error claim rejected for accomplice liability instruction that failed to provide definition of "acting in concert").

TITLE: Henderson v. State
INDEX NO.: D.9.g.2.c.
CITE: (8/17/2018), 108 N.E.3d 407 (Ind. Ct. App. 2018)
SUBJECT: Instruction on "operate" adequate even though it did not include words "expended some effort"
HOLDING: In a prosecution for Operating While Intoxicated, the trial court's instruction on "operate" adequately conveyed that to operate a vehicle is to "expend some effort," even though the instruction did not use those words. D was found in his parked truck nearly passed out, but when police approached him, he revved the engine, shifted the transmission from "park" to "drive," and lurched a few feet forward before striking another car.

The trial court instructed the jury as follows:
"Operate" means to navigate or otherwise be in actual physical control of a vehicle, motorboat, off-road vehicle, or snowmobile.

Several factors may be examined to determine whether a D has "operated" a vehicle:

1. the location of the vehicle when it is discovered;
2. whether the car was moving when discovered;
3. any additional evidence indicating that the D was observed operating the vehicle before he was discovered; and
4. the position of the automatic transmission.

In addition to these four factors, any evidence that leads to a reasonable inference should be considered. See Hampton v. State, 681 N.E.2d 250 (Ind. Ct. App. 1997). Though the Court has never formally required the words "expended some effort," it has previously observed that there must be some evidence of effort. Compare Hiegel v. State, 538 N.E.2d 265, 268 (Ind. Ct. App. 1989). Even so, three of the four factors listed above inherently include some form of effort. See Johnson v. State, 518 N.E.2d 1127, 1128 (Ind. Ct. App. 1988). For instance, if a vehicle is moving or if an individual is observed driving the vehicle, a jury may reasonably infer that some effort was expended by the driver. Likewise, if a vehicle's transmission is found to be in gear, as opposed to in park, a jury may reasonably infer that some effort was expended by the driver. Therefore, the trial court's instruction was adequate. Held, judgment affirmed.

D. TRIAL

D.9. Jury trial

D.9.g.2.d. Elements of offense

TITLE: Armstrong v. State
INDEX NO.: D.9.g.2.d.
CITE: (4th Dist. 6/28/89), Ind. App., 540 N.E.2d 626
SUBJECT: Instruction - elements of offense; attempt
HOLDING: Attempt instruction indicating that D must act with culpability required for commission of crime, given in conjunction with murder instruction including definition of felony murder, is fundamental error. Combined instructions permitted jury to convict Armstrong of "attempted felony murder," which is not recognized offense in IN. Head, 443 N.E.2d 44. Instructions did not adequately advise jury that D must have acted with specific intent to kill. Fact that definition of murder requiring specific intent was also given does not cure error. Id. Although D raises error for first time in petition for post-conviction relief, it is fundamental error. See Abdul-Wadood, 521 N.E.2d 1299. Held, reversed.

RELATED CASES: Coleman, App., 708 N.E.2d 25 (“attempted felony murder” instruction was not fundamental error; intent was not in issue).

TITLE: Collins v. State
INDEX NO.: D.9.g.2.d.
CITE: (03/07/91), Ind., 567 N.E.2d 798
SUBJECT: Instructions, mandatory rebuttable presumption
HOLDING: Final instruction which stated, "[e]vidence that a letter properly addressed, stamped & deposited in the U.S. Mail is prima facie proof that the letter was received by the person to whom it was addressed. Whether the denial of receipt by the person to whom the letter was addressed is sufficient to overcome the prima facie case is for the trier of fact to determine from all of the evidence. 'Prima facie evidence' means such evidence as is sufficient to establish a given fact & which will remain sufficient if uncontradicted," created improper mandatory presumption, even though instruction made presumption rebuttable. S.Ct. agreed that this instruction impermissibly relieved State of burden of persuasion on element of offense, in light of Sandstrom v. Montana, 442 U.S. 510, Francis v. Franklin, 471 U.S. 307, & In re Winship, 397 U.S. 358. Ct. also found that such improper instruction constituted fundamental error, but because of other evidence that D was aware of his license suspension, such error was harmless beyond reasonable doubt & did not require reversal. Held, transfer granted, unpublished opinion of Ct. App. vacated, & conviction affirmed. See also, notice of mailing issue in Collins at K.9.c.2.

RELATED CASES: Jones, App., 805 N.E.2d 469, sum. aff'd in part and rev'd in part on other grounds, 835 N.E.2d 1002 (instruction stating that "opening an unlocked door constitutes breaking" created mandatory presumption, but error was harmless because breaking element of residential entry was indisputably established); Matney, App., 681 N.E.2d 1152 (jury instruction on theft constituted improper mandatory rebuttable presumption but error was harmless beyond reasonable doubt).

TITLE: Davidson v. State

INDEX NO.: D.9.g.2.d.

CITE: (06-28-06), Ind., 849 N.E.2d 591

SUBJECT: Evidence of involuntary intoxication does not require instruction including voluntariness as element of crime

HOLDING: Tr. Ct. did not err by refusing to read D's tendered instruction adding "& voluntarily" as an additional element of murder. If evidence raised voluntariness as an issue, State must prove the D acted voluntarily beyond a reasonable doubt. Baird v. State, 604 N.E.2d 1170 (Ind. 1992). In fact, Indiana Pattern Jury Instructions insert the phrase "& voluntarily" into elements of crime when evidence raises voluntariness issue. Ind. Pattern Jury Inst. 9.01 (3rd. ed. 2005). Here, D presented expert testimony that combination of Ambien & Zoloft, which D took night of murder, could adversely affect person's control over impulsive behavior, causing one to become uninhibited. Experts also testified that D was unaware of these potential adverse effects, & D was in a disassociative state rendering his conduct involuntary. This testimony supports an involuntary intoxication defense. If the Ct. were to hold that evidence of intoxication raised question of voluntary conduct, result would be that all intoxication, & not just involuntary intoxication, would be a defense. Further, because D has burden to prove defense of involuntary intoxication, D could switch burden back to State by framing intoxication as evidence of voluntariness. Thus, evidence of intoxication does not raise issue of voluntariness, & does not require Ct. to add the phrase "& voluntarily" into the element instruction of the charged crime. Held, judgment affirmed.

TITLE: Doss v. State
INDEX NO.: D.9.g.2.d.
CITE: (4th Dist. 9/27/84), Ind. App., 470 N.E.2d 732
SUBJECT: Instructions - element of offense; possession
HOLDING: Tr. Ct. erred in giving instruction defining "possession" which failed to state possession requires knowing exercise of control. Possession as used in Ind. Code 35-47-5-4 (dealing in sawed off shotgun) is not defined by code; Ct. presumes legislature intended word to have plain, ordinary meaning. Brook, App., 448 N.E.2d 1249. Black's Law Dictionary definition of possession includes knowingly. See Fyock, 436 N.E.2d 1089 (constructive possession requires knowledge of object's presence/nature). Here, D tendered instruction defining possession as "knowing exercise…," which Tr. Ct. refused. Importance of instruction reflected by jury's request of copy of instruction during deliberations. Held, reversed.

TITLE: Elliott v. State
INDEX NO.: D.9.g.2.d.
CITE: (4th Dist. 7/7/83), Ind. App., 450 N.E.2d 1058
SUBJECT: Instruction - causation; involuntary manslaughter
HOLDING: Tr. Ct.'s failure to instruct jury on proximate cause element of involuntary manslaughter was not fundamental error where D did not rely on proximate cause as his defense & no probative evidence was presented that victim's death was not result of bullet wound caused by herself or D. Nonprejudicial omissions of necessary element of crime in instructions are not reversible error. Headlee, (1929) 201 Ind. 545. See Higginbotham, App., 427 N.E.2d 896 (D charged with DWI causing death asserted blinding sun & victim's presence on roadway caused death; Ct.'s refusal to give D's tendered causation instruction was reversible error). Here, D was not prejudiced because jury could not reasonably have determined proximate cause of victim's death was other than D's battery upon her. Ct. distinguished dictum in Lacy 438 N.E.2d 968 (total failure to instruct on elements of criminal defense is reversible error). Viewed in context of whole charge/trial, failure to deliver proper instruction was not fundamental error because jury could not have failed to be aware of causation element. US v. Parks, (1975) 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489. [Other citations omitted.] Held, conviction affirmed.

TITLE: Elswick v. State
INDEX NO.: D.9.g.2.d.
CITE: (3d Dist. 01/29/91), Ind. App., 565 N.E.2d 1123
SUBJECT: Jury instruction - inference of intent from acts
HOLDING: It is not error to give instruction which permits, rather than mandates, conclusion that actor intends consequences of his acts, because this does not improperly shift the burden of proof to D. Tr. Ct. gave instruction on intent which included the following language: "[y]ou may infer that a person is presumed to intent [sic] the natural & probable consequences of his voluntary act, unless the circumstances are such to indicate the absences of such intent." Ct. App. held that this language did not relieve the State of its burden of proof on essential element of crime, was consistent with Sandstrom v. Montana, (1979), 442 U.S. 510 & Francis v. Franklin, (1985), 471 U.S. 307, & even less offensive that instruction approved by Ind. S.Ct. in VanOrden, 469 N.E.2d 1153. Ct. found that when instruction was considered in its entirety, reasonable jurors would not have been led by its language to understand that burden on intent was shifted to D, & therefore permissive inference did not violate due process. Held, conviction affirmed.

RELATED CASES: Matthews, App., 718 N.E.2d 807 (where D's ability to determine whether victim could consent was at issue, instruction that D can be presumed to know consequences of his actions was reversible error).

TITLE: Evans v. State
INDEX NO.: D.9.g.2.d.
CITE: (7/20/2017), 81 N.E.3d 634 (Ind. Ct. App. 2017)
SUBJECT: Escape - erroneous mens rea instruction did not constitute fundamental error
HOLDING: Athough improper "knowingly" mens rea language in escape instruction was problematic, instructional error did not deprive D of a fair trial. Indiana Code § 35-44.1-3-4(a) states that a person who "intentionally flees" commits the crime of escape, but the jury instructions indicated the crime was defined by "knowingly or intentionally" fleeing. *Citing* Ramsey v. State, 723 N.E.2d 869 (Ind. 2000), Court concluded the instructions "sufficiently informed the jury of the proper mens rea which the State was required to prove beyond a reasonable doubt." The correct "intent to flee" mens rea was listed during the State's closing argument, final instructions and charging information. In the context of all the information given to the jury, the escape instructions informed the jury that the State was required to prove beyond a reasonable doubt that D intentionally fled from lawful custody. Following Newman v. State, 690 N.E.2d 735 (Ind. Ct. App. 1998), Court also held that D's crimes of unlawful possession of a syringe and escape were part of two distinct criminal episodes because a full account of the individual crimes can be given without reference to the other. Thus, Tr. Ct. did not abuse its discretion when it ordered the sentences for each offense to be served consecutive to one another. Held, judgment affirmed.

TITLE: Frias v. State
INDEX NO.: D.9.g.2.d.
CITE: (12/11/89), Ind., 547 N.E.2d 809
SUBJECT: Instruction - agreement element of conspiracy
HOLDING: Tr. Ct.'s instruction that agreement may be implied from conduct of parties "although they acted separately or by different means & did not come together or enter into an express agreement" was reversible error. D was convicted of conspiracy to deal cocaine & on appeal argues that challenged instruction relieved state of burden of proving agreement element of conspiracy. It is well established that state need not prove existence of formal express agreement to sustain conspiracy conviction. Existence of agreement may be inferred from conduct of parties or other circumstances. [*Citations* omitted.] Ind. S. Ct. has often quoted language from Brewster v. State, (1917), 115 N.E. 54, that it is not necessary to prove that parties "came together & actually agreed." Problem with challenged instruction is that it extracts language from cases such as Brewster but puts it in different context. Brewster indicates only that state need not directly prove coming together & agreement, not that they need not occur. There must be evidence from which agreement may be legally inferred. Robertson, 108 N.E.2d 711. Instruction here could be understood to say that jury could find there was agreement even though evidence showed parties never came together & never entered into agreement. Although it appears that there was sufficient circumstantial evidence from which jury could find such agreement, it required weighing of all circumstantial evidence to reach this conclusion, & jury was told it did not need to do this weighing. Held, reversed & remanded. DeBruler & Dickson, JJ. CONCUR separately.

TITLE: Hall v. State
INDEX NO.: D.9.g.2.d.
CITE: (11-30-10), 937 N.E.2d 911 (Ind. Ct. App. 2010)
SUBJECT: Mens rea instruction for operating as HTV - fundamental error
HOLDING: Instruction was fundamentally erroneous as it instructed jury that D could be found guilty of operating a vehicle as a habitual offender (Ind. Code 9-30-10-16(a)(1)) if D knew or should have known that his driving privileges were suspended.

The State must prove beyond a reasonable doubt that "the person knows that the person's driving privileges are suspended." Ind. Code 9-30-10-16(a)(1) (emphasis added). Fundamental error may occur where jury is instructed that it may convict [a person] based on a lesser *mens rea* than provided in a statute. See Metcalfe v. State, 715 N.E.2d 1236, 1237 (Ind. 1999); Wilson v. State, 644 N.E.2d 555, 557 (Ind. 1994). Error in a *mens rea* instruction is not fundamental error where either: 1) the instructions as a whole sufficiently inform the jury of required *mens rea* or 2) D's *mens rea* was not a central issue at trial. See Ramsey v. State, 723 N.E.2d 869, 872-73 (Ind. 2000); Yerden v. State, 682 N.E.2d 1283, 1286 (Ind. 1997).

Here, D claimed he did not receive notice of his license suspension. The other instructions did not sufficiently inform jury of the required *mens rea*. "Moreover, *mens rea* was the central issue of [D's] trial. D did not dispute that he was an HTV or that he was driving when he was stopped. He only disputed that he knew of his suspension." Held, judgment reversed and remanded for a new trial.

TITLE: Jones v. State
INDEX NO.: D.9.g.2.d.
CITE: (4/20/2018), 101 N.E.3d 249 (Ind. Ct. App. 2018)
SUBJECT: Resisting law enforcement by fleeing officer's order - need not instruct jury on reasonable suspicion
HOLDING: Addressing a sufficiency claim for resisting law enforcement (by ignoring an officer's order to stop), Court found no fundamental error from Tr. Ct.'s failure to instruct jury that the order to stop must be supported by reasonable suspicion.

Several police officers were trying to find Tyrone Esters, who had outstanding warrants for burglary and battery on law enforcement. Because Esters dated D and lived with her, the officers surveilled D's residence. Esters often drove a gold Chevy Malibu, and D did the same. One of the officers watched D drive away from her residence in a gold Malibu; she soon returned with a passenger who loosely matched Esters' description. Another officer pulled his car behind the gold Malibu and activated his lights. D sped away but eventually stopped. The officers soon realized the passenger was not Esters, but they arrested D for resisting law enforcing by fleeing and driving with a suspended license.

D filed a motion to suppress, arguing the officerss lacked reasonable suspicion to stop the Malibu; the Tr. Ct. denied the motion. At trial's end, the Tr. Ct. instructed the jury but did not instruct it that a resisting by fleeing conviction requires a finding that the decision to stop was supported by reasonable suspicion.

To convict a person of resisting by fleeing, the State must show, inter alia, that an officer has "ordered a person to stop." Ind. Code § 35-44.1-3-1(a)(3). This element requires a finding that reasonable suspicion supported the stop. See Gaddie v. State, 10 N.E.3d 1249, 1255 (Ind. 2014). Here, when the Tr. Ct. denied D's pretrial motion to suppress, it made the requisite finding of reasonable suspicion. Accordingly, there was no reason to submit this issue to the jury. Thus, the Tr. Ct. did not err, let alone commit fundamental error, in failing to instruct the jury about reasonable suspicion. Held, judgment affirmed.

TITLE: Kane v. State
INDEX NO.: D.9.g.2.d.
CITE: (10/30/2012), 976 N.E.2d 1228 (Ind. 2012)
SUBJECT: Erroneous accomplice liability instruction
HOLDING: In receiving stolen property prosecution, Tr. Ct. improperly instructed jury on mental state required to convict D. Tr. Ct.'s instruction read: "When two or more persons combine to commit a crime, each is criminally responsible for the acts of his or her confederates committed in furtherance of a common design, the act of each being the act of all." Indiana's accomplice liability statute states that "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense..." Ind. CodeE 35-41-2-4. Tr. Ct.'s final instruction, in contrast, erroneously omitted altogether the key phrase "knowingly or intentionally" and said nothing about mens rea at all. Because evidence of D's knowledge that she was helping accomplice "fence" stolen property is far from overwhelming, Court could not say the verdict would have been the same if the jury had been properly instructed as to the knowledge requirement of the offense. Thus, the error was not harmless. Held, transfer granted, Court of Appeals' memorandum opinion vacated, conviction reversed and remanded for retrial.

TITLE: Keister v. State

INDEX NO.: D.9.g.2.d.

CITE: (02/08/2023), 203 N.E.3d 1531 (Ind. Ct. App.)

SUBJECT: Erroneous Jury instruction relieving State of burden to prove crime committed in particular time period

HOLDING: Defendant was charged with two counts of child molesting. The complaining witness (C.W.) testified to acts that occurred in 2014, before and after the criminal code revision and so the State charged Defendant with both Class C and level 4 felony counts. At the end of trial, over objection the State proposed a jury instruction that said it was not required to prove the crime charged was committed on the particular date or during a particular time period alleged in the charging information. But in her testimony, C.W. did not pinpoint when in 2014 the inappropriate touching occurred. The Court of Appeals found the evidence showed the single 2014 act may have occurred in the time period alleged in Count II (July 1, 2014, to August 26, 2015) but it also may have occurred in the time period alleged in Count II (August 27, 2011 to June 30, 2014). Because the classification of and penalties for crimes changed in mid-2014, it does matter to that extent when the 2014 molestation occurred. The trial court did read the charging information as part of the final instructions, including the date ranges alleged for each count. But by instructing the jury thereafter that the State did not have to prove the 2014 offense occurred on a particular date or during the particular time period alleged in the information, the jury could have been misled into believing that if the single act of molestation occurred anytime in 2014, it could find Defendant guilty of Count II. The case was remanded for the trial court to vacate the Level 4 felony conviction and to issue a new sentencing order on the Class C felony only.

TITLE: Lacy v. State
INDEX NO.: D.9.g.2.d.
CITE: (8/18/82), Ind., 438 N.E.2d 968
SUBJECT: Instruction - elements of offense
HOLDING: Total failure to give an instruction detailing the elements of the offense constitutes reversible error even absent contemporaneous objection. Screws v. US, (1945) 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495; US v. Noble, (CA3 1946) 155 F.2d 315. Here, an instruction regarding elements of offense of armed robbery was read as a preliminary instruction. D affirmatively waived a rereading of preliminary instructions; D cannot complain of error he invited Ct. to make. Held, no fundamental error.

RELATED CASES: Winkleman, 22 N.E.3d 844 (Ind. Ct. App.. 2014) (because the element of force or threat of force was not a central issue at trial for D's kidnapping charge, its omission from jury instruction did not rise to level of fundamental error); Davis, App., 835 N.E.2d 1102 (Tr. Ct. did not commit fundamental error in failing to include an instruction on elements of resisting law enforcement, where Tr. Ct. read charging information to jury during both preliminary & final instructions. In addition, prosecutor presented elements of resisting law enforcement to jury during closing arguments).

TITLE: Lacy v. State
INDEX NO.: D.9.g.2.d.
CITE: (8/16/2016), 58 N.E.3d 944 (Ind. Ct. App.. 2015)
SUBJECT: Lawful purpose exception to identity theft is an affirmative defense; instruction properly rejected
HOLDING: In an issue of first impression, the "lawful purpose" exception to identity deception is an affirmative defense, not an element of the crime. Thus, Tr. Ct. properly refused D's instruction, which claimed the exception was a statutory element.

D's wife was incarcerated. To get private, unsupervised access to her, D tried to pass himself off as her attorney, resulting in his arrest for identity deception. At trial, the court refused D's tendered instruction, which said the lawful purpose language was a statutory element, requiring the State to prove D used his attorney's identify for an unlawful purpose.

To decide whether a statutory exception is an element or an affirmative defense, courts consider the location of the exception compared to the location of the definition of the crime. Lyles v. State, 970 N.E.2d 140, 143 n.3 (Ind. 2012). If the exception is closely connected to the clause creating the offense, it is a material element the State must prove. Id. However, if the exception is located in a subsequent clause, it is an affirmative defense that must be raised by a D. Id.

Identity deception is defined in subsection (a) of the controlling statute, Ind. Code § 35-43-5-3.5(a), while the "lawful purpose" exception appears in subsection (c). See Ind. Code § 35-43-5-3.5(c)(3). This indicates the legislature intended the lawful purpose exception to be an affirmative defense, not a material element. Therefore, D's tendered instruction incorrectly stated the law, and Tr. Ct. properly rejected it. See Nichols v. State, 542 N.E.2d 572, 575 (Ind. Ct. App. 1989). Held, judgment affirmed.

TITLE: McDowell v. State
INDEX NO.: D.9.g.2.d.
CITE: (05-15-08), Ind., 885 N.E.2d 1260
SUBJECT: Jury instruction regarding intent to kill - reversible error
HOLDING: In voluntary manslaughter prosecution, Tr. Ct. erred in instructing jury that "intent to kill may be inferred from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused." Instruction should not have been given because it improperly operates to relieve the State's burden to prove that D knowingly or intentionally killed a person. Although D's objection to instruction asserting that it was "unduly prejudicial" would normally lack the necessary specificity to preserve error for appeal, in this case trial judge gave specific consideration as to whether the proposed instruction was a correct statement of law. In finding instruction erroneous, Court distinguished other cases where similar instructions employed language specifically relating to actor's state of mind and referring to evidentiary facts relevant to inferring criminal intent. Here, victim died six days after receiving one-inch stab wound inflicted by D, and principal issue at trial was D's intent, not her actions. Instruction was incorrect statement of law, it misled jury, and error prejudiced D's substantial rights with respect to voluntary manslaughter charge. Held, transfer granted, Court of Appeals' decision at 872 N.E.2d 689 reversed but summarily affirmed as to other issues, voluntary manslaughter conviction reversed.

RELATED CASES: Albert, 193 N.E.3d 1040 (Ind. Ct. App. 2022) (unlike instruction in McDowell, instruction here did not authorize a conviction based merely on the result of the actor's use of a deadly weapon; D's state of mind was the focus of the case, and the challenged instruction was a proper statement of the law, it did not lessen the State's burden of proof, and it did not mislead the jury).

TITLE: McFadden v. U.S.
INDEX NO.: D.9.g.2.d.
CITE: (6/18/2015), 135 S.Ct. 2298 (2015)
SUBJECT: Mens rea instruction on dealing analogue erroneous
HOLDING: The Fourth Circuit erred in approving a jury instruction about the mens rea requirement for a conviction for Distributing Controlled Substance Analogues.

D sold bath salts to Lois McDaniel, a video store owner in Charlottesville, Virginia. The salts were capable of affecting the nervous system in ways similar to cocaine, methamphetamine, and methcathinone. At trial, D argued he did not know the substances were controlled substances under the Analogue Act. The District Court instructed the jury that the Act required the government to prove D knowingly or intentionally distributed a substance that affects the nervous system as a controlled substance does and that D intended the substance to be consumed by humans. The Fourth Circuit lessened the government's burden, requiring it to show only that D meant for the substance to be consumed by humans.

The instruction approved by the Fourth Circuit was erroneous. The government must show either that: 1) D knew the substance was a controlled substance, even if he did not know the particular identity of the substance, or 2) D knew the specific analogue he was dealing, even if he did not know its legal status as an analogue.

Nonetheless, the omission of an element from an instruction is subject to harmless-error analysis. Neder v. United States, 527 U. S. 1, 15 (1999). The Fourth Circuit is directed to consider that issue on remand. Held, cert. granted, Fourth Circuit opinion at 753 F.3d 432 vacated, and remanded. Thomas, J., joined by all other Justices except Roberts, C.J., concurring in part and concurring in judgment.

TITLE: McQuinn v. State

INDEX NO.: D.9.g.2.d.

CITE: (12/19/2022), 197 N.E.3d 348 (Ind. Ct. App. 2022)

SUBJECT: Erroneous instruction on intent for attempted murder invaded province of the jury to determine weight of evidence

HOLDING: In attempted murder and unlawful possession of a firearm by a SVF prosecution, trial court erroneously instructed the jury that "discharging a weapon in the direction of a victim can be substantial evidence from which the jury could infer intent to kill." The instruction unduly emphasized the direction in which Defendant fired the gun and encouraged the jury to give it considerable weight — all at the expense of conflicting evidence. Defendant fired a handgun in the parking lot of his apartment complex as a police officer arrived to investigate a report of domestic violence by Defendant. Evidence as to Defendant's intent in firing the gun was disputed at trial. Because the Court of Appeals was "not completely confident the jury would have found McQuinn guilty had it been properly instructed," it concluded the challenged instruction prejudiced Defendant's substantial rights. The instruction undermined Defendant's defense that he did not have the specific intent required for attempted murder.

"Though the State's evidence may seem more compelling, this is not a sufficiency review. A properly instructed jury could have found that [Defendant] did not intend to kill [officer] based on the evidence [Defendant] presented at trial. More importantly, the jury could have found reasonable doubt on the issue. But the challenged instruction emphasized the direction in which [Defendan] fired the gun as "substantial" (i.e., "significantly great") evidence of his intent to kill."

The Court also reversed Defendant's conviction for unlawful possession of firearm by a SVF conviction, finding the trial court erred in accepting his guilty plea on that charge because he never personally communicated a desire to waive his right to jury trial. Finally, Court rejected Defendant's claim that his convictions for carrying a handgun without a license and unlawful possession by SVF constitute two punishments for the same criminal act in violation of double jeopardy. Held, convictions reversed and remanded for new trial.

TITLE: McWhorter v. State
INDEX NO.: D.9.g.2.d.
CITE: (07-12-12), 970 N.E.2d 770 (Ind. Ct. App. 2012), *sum. aff'd* 993 N.E.2d 1141
SUBJECT: Ineffective assistance of counsel - erroneous instruction on voluntary manslaughter
HOLDING: In murder prosecution, trial counsel was ineffective for failing to object to voluntary manslaughter instruction that was not warranted by the evidence and invited a compromise or unreliable verdict. The theory of defense was that an accidental shooting occurred. Voluntary manslaughter instruction lacked evidentiary support because it was based on anger alone and a verbal admission by the victim that she had been with another man at some time in the past. Words alone do not constitute sufficient provocation to warrant instruction, particularly where, as here, the words at issue are not intentionally designed to provoke the D. Suprenant v. State, 925 N.E.2d 1280 (Ind. Ct. App.. 2010).

Moreover, the in artfully drafted instruction directed the jury to proceed, upon failure of proof of one or more of the elements of murder, to consider the lesser charge of voluntary manslaughter. However, the only element in dispute was intent. The jury was led by the sequential error of the instruction to, as a practical matter, find that D did not knowingly or intentionally kill victim, but that he did knowingly or intentionally kill victim while acting in sudden heat. This error invited inconsistency and renders the result of the trial unreliable. D was prejudiced in that he ultimately stood convicted of voluntary manslaughter, an offense not initially charged by the State and one upon which D did not proffer evidence or request instruction. Held, denial of post-conviction relief reversed and remanded for retrial.

RELATED CASES: McWhorter, 993 N.E.2d 1141 (Ind. 2013) (after grant of post-conviction relief on voluntary manslaughter conviction due to flawed jury instruction, on remand there is no prohibition for retrial on either voluntary manslaughter or reckless homicide).

TITLE: Phillips v. State
INDEX NO.: D.9.g.2.d.
CITE: (1st Dist., 10-31-07), Ind. App., 875 N.E.2d 480
SUBJECT: Possessing material capable of causing bodily injury by inmate - jury instruction
HOLDING: Tr. Ct.'s instruction on elements of Ind. Code 35-44-3-9.5 correctly stated the law.

Statute provides that "[a] person who knowingly or intentionally while incarcerated... possesses a device, equipment, a chemical substance, or other material that: 1) is used; or 2) is intended to be used; in a manner that is readily capable of causing bodily injury commits a Class C felony...." Tr. Ct. instructed jury as follows: the question of D's intent is whether he knowingly possessed the device while he was incarcerated. The device must be one that is generally intended to be used in a manner that is readily capable of causing bodily injury. The State does not have to prove that the D specifically intended to use the device to harm someone.

D argued that final instruction misinterprets Ind. Code 35-44-3-9.5, which he believes requires proof he intended to cause bodily injury. Ct. held that "intended to be used" describes the device, not the intent required for a conviction. Abney v. State, 822 N.E.2d 260 (Ind. Ct. App. 2006). Thus, Tr. Ct.'s instruction correctly stated law. Further, D was not entitled to argue during closing arguments that he lacked intent to cause bodily injury. Held, judgment affirmed.

TITLE: Shepherd v. State
INDEX NO.: D.9.g.2.d.
CITE: 155 N.E.3d 1227 (Ind. Ct. App. 2020) (09/14/2020)
SUBJECT: No evidence to support defendant's proposed reckless homicide instruction
HOLDING: In reckless homicide and criminal recklessness with deadly weapon prosecution, trial court did not abuse its discretion when it rejected Defendant's proposed instruction that read: "[p]roof that an accident arose out of the inadvertence, lack of attention, forgetfulness or thoughtfulness of the driver of a vehicle or from an error in judgment on his part, will not support a charge of reckless homicide." Charges resulted from the deaths of three young children and serious injury of another struck by pickup truck Defendant was driving that failed to stop for a school bus stopped to pick up the children for school. Defendant's theory at trial was that she experienced an error of judgment which caused the collision. Nonetheless, Court of Appeals found there was no evidence at trial to support giving the instruction because Defendant did not point to evidence supporting portions of her proffered instruction regarding "inadvertence, lack of attention, forgetfulness or thoughtfulness." Even if there were evidence to support defense theory that the collision resulted from an error of judgment, Defendant did not offer a separate instruction limited just to that wording. The Court of Appeals found sufficient evidence Defendant acted recklessly rather than negligently, thus sustaining her convictions for reckless homicide and criminal recklessness. The jury reasonably concluded that Defendant recognized that the vehicle before her in the road was a stopped school bus or that she was aware of conditions that would have disclosed that fact to any reasonable person. However, the Court vacated Defendant's misdemeanor reckless driving conviction on double jeopardy grounds, finding that the reckless driving and criminal recklessness convictions were both established by the same evidence and same act of recklessly driving past the stopped school bus. Thus, the Court remanded the case with instructions to issue a new sentencing order expressly indicating the two ordered license suspensions are to be served concurrently.

TITLE: Shields v. State
INDEX NO.: D.9.g.2.d.
CITE: (1st Dist. 12/7/83), Ind. App., 456 N.E.2d 1033
SUBJECT: Instructions - elements of offense; intent
HOLDING: Tr. Ct. did not err in giving following instruction: "Intent to commit felony, element of burglary, can be inferred from time, force, & manner of entry, if there is no evidence that entry was made with some lawful intent." Ct. holds instruction correct statement of law. State must sustain burden of proof on each element of offense charged, but some elements may be proven by circumstantial evidence. Kondrup, 235 N.E.2d 703. Because intent is mental state of actor, trier of fact must resort to reasonable inferences based upon examination of surrounding circumstances to reasonably infer its existence. Lisenko, 355 N.E.2d 841; Duncan, 409 N.E.2d 597. Held, no error.

RELATED CASES: Haggenjos, 493 N.E.2d 448 (Crim L 998(3); Ct. rejects D's challenge to instructions raised on PCR rather than appeal; it is proper to use permissive language "intent to commit criminal act may be inferred," *citing* Jacks, 394 N.E.2d 166; when read with other instructions re burden of proof & presumption of innocence, Ct. finds no question that state had to prove specific intent beyond a reasonable doubt).

TITLE: Sipp v. State
INDEX NO.: D.9.g.2.d.
CITE: (3d Dist. 10/27/87), Ind. App., 514 N.E.2d 330
SUBJECT: Instruction - element; recklessness
HOLDING: Tr. Ct.'s refusal to give D's tendered instructions on negligence, where D was charged with reckless homicide, was improper. Test of whether tendered instruction is proper is whether there is evidence to support it, whether it properly states law, & whether other instructions cover its substance. Bieghler, 481 N.E.2d 78. Here, tendered instructions correctly stated law & their substance was not otherwise covered. State argues evidence does not support instructions. However, whether evidence establishes negligence or recklessness is for the jury to determine. Cichos, 184 N.E.2d 1. Held, reversed & remanded. Garrard, J., CONCURS.

RELATED CASES: Springer, 798 N.E.2d 431 (in criminal recklessness prosecution, Tr. Ct. did not abuse its discretion in refusing to give D's tendered jury instructions regarding distinction between negligence & recklessness; see full review at K.3.a.2).

TITLE: Smith v. State
INDEX NO.: D.9.g.2.d.
CITE: (2/8/84), Ind., 459 N.E.2d 355
SUBJECT: Instruction - elements of offense; attempt
HOLDING: Jury Instruction that purported to state essential elements of attempted murder but failed to include an essential element (specific intent to commit murder) constituted fundamental error. Here, instruction was: "You are instructed... essential elements of attempted murder ... are ... D knowingly ... [e]ngaged in conduct that constituted a substantial step toward the commission of murder." Other instructions included charging information, attempt & murder statutes & D's instruction defining bases for criminal liability. No instruction required finding of intent to kill. Held, reversed; remanded for new trial. DISSENT by Pivarnik, joined by Givan.

RELATED CASES: Anderson, App., 751 N.E.2d 714 (Indiana case law requiring specific intent to kill be included in attempted murder jury instruction applied retroactively to D's case, which was tried before holding in Smith); Brown, App., 587 N.E.2d 693 (instruction on attempted murder was sufficiently erroneous to constitute fundamental error, & requirement of inclusion of specific attempt to kill in attempted murder instruction, announced in Smith & Abdul-Wadood, is to be applied retroactively); Abdul-Wadood v. State,521 N.E.2d 1299 (Smith instruction was fundamental error; conviction reversed & remanded); Alexander, 520 N.E.2d 99 (Smith instruction upheld when definition of murder was added); Woodford, 488 N.E.2d 1121 (instruction clearly informed jury that prerequisite culpability applies to crime attempted, not to "substantial step" which constitutes attempt; held, attempted rape conviction affirmed); Santana, 486 N.E.2d 1010 (Ct. distinguishes Smith & holds instruction did not constitute fundamental error; Prentice DISSENTS).

TITLE: State v. Smith
INDEX NO.: D.9.g.2.d.
CITE: 131 Wn.2d 258; 930 P.2d 917 (Wash. 1997)
SUBJECT: Omitting Element of Offense From Instruction -- Per Se Reversible Error
HOLDING: Washington Supreme Court holds that erroneous omission of element of offense from instruction purporting to set out all elements jury must find in order to convict is always reversible error. Instruction telling jury what it needed to find in order to convict D of conspiracy to commit murder failed to include agreement to commit murder. While other instructions correctly defined offense, Court finds that instruction that purports to list all essential elements, but fails to do so, cannot be considered harmless, because such instructions necessarily misstructure jury's deliberations.

TITLE: Stewart v. State
INDEX NO.: D.9.g.2.d.
CITE: (3d Dist. 03/07/91), Ind. App., 567 N.E.2d 171
SUBJECT: Attempted murder instruction - not fundamental error
HOLDING: While instruction on attempted murder was not model presentation of intent element, "reasonable jurors would, without question, interpret the requirement for conviction that the D intended to kill as supplying the necessary intent element...," & therefore giving of instruction was not fundamental error. Instruction complained of set forth the statutory definition of attempt, & then stated: "[t]o convict the D the State must have proved each of the following elements: The D 1. did knowingly 2. engage in conduct to wit: attempt to commit the crime of Murder by attempting to kill 3. another human being 4. that the conduct was a substantial step toward the commission of the crime of murder." Jury was apparently not instructed on definition of murder, & D did not object to instructions on elements of offense at trial. Ct. App. noted that error has been found to be fundamental where Tr. Ct. failed to advise jury of one of elements of offense under circumstances where jury might have convicted despite possibility of reasonable doubt as to omitted element, but that in instant case these circumstances did not exist. Instruction did not suffer from fatal failure to require jury to find existence of specific intent to kill found by S. Ct. in Jackson, 544 N.E.2d 853, Abdul-Wadood, 521 N.E.2d 1299, & Smith, 459 N.E.2d 355. Held, conviction affirmed, Sullivan dissenting on this issue & sentencing issue. **Note:** Dissent on instruction issue contains extensive discussion of instruction in light of Jackson, Abdul-Wadood, & Smith, which may be instructive & useful.

RELATED CASES: Perez, App., 872 N.E.2d 208 (although attempted murder instruction suggested that "knowing" mens rea is sufficient to establish guilt, error was not fundamental because Tr. Ct.'s instructions sufficiently suggested the requirement of intent to kill); Edwards, App., 773 N.E.2d 360 (Tr. Ct. committed reversible error when it instructed jury that they could convict D of attempted murder if he had mens rea of knowingly; D properly preserved issue for review); Sanders, App., 764 N.E.2d 705, habeas relief granted on other grounds, 398 F.3d 572 (attempted murder instruction that failed to require finding of specific intent to kill did not constitute fundamental error, because D's intent to kill was not central issue at trial & intent to kill was addressed in another instruction regarding transferred intent, which was given to jury); Booker, App., 741 N.E.2d 748 (despite repeated references to "knowing" mens rea, attempted murder instruction did not constitute fundamental error, because Tr. Ct. listed "specific intent to kill" among elements required to be proven by State, & instruction did not equate "specific intent" with "knowingly"); Ramsey, 723 N.E.2d 869 (although attempted murder instruction in this case suggested that "knowing" mens rea is sufficient to establish guilt of attempted murder, language was not objected to & Ct. "narrowly" concluded that error was not fundamental); Greenlee, 655 N.E.2d 488 (instructions taken together adequately informed jury that it needed to conclude D must have acted with intent to kill before it could convict him).

TITLE: Taylor v. State
INDEX NO.: D.9.g.2.d.
CITE: (03-11-10), 922 N.E.2d 710 (Ind. Ct. App. 2010)
SUBJECT: IAC - failure to object to instruction
HOLDING: Post-conviction court erred in finding D did not receive ineffective assistance of trial counsel. Counsel's failure to object to lack of robbery instruction where robbery was underlying felony for felony murder denied D's right to fundamental due process. To succeed on claim that counsel was ineffective for failure to object, D must show that if counsel had objected Tr. Ct. would have had no choice but to sustain objection. Little v. State, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004). Here, "it was necessary to instruct the jury on the definition of robbery, in that it was necessary for the jury to find that a robbery in fact had been perpetrated before it could come to the conclusion that a felony murder had been committed." Brownlow v. State, 484 N.E.2d 560, 562 (Ind. 1985). "[I]t is bedrock law that a D is entitled to have the jury instructed on all the elements of a charged offense." Thomas v. State, 827 N.E.2d 1131, 1134 (Ind. 2005).

D was denied fundamental due process because lack of instruction "left [jurors] to fend for themselves and cobble together whatever robbery elements they could." Decision to not dispute robbery occurred does not explain counsel's failure to object. Trial counsel admitted failure to object was oversight, not strategic decision. Further, court's analysis requires reviewing judge to prejudge what jury might have determined if properly instructed. This denied D's right to jury trial and jury's right to determine law and facts. Ind. Const. art. I, § 13(a), 19. Similarly, harmless error analysis was not appropriate because jury received no instruction whatsoever on robbery, making it impossible to say error did not contribute to the verdict. Held, judgment reversed and remanded for new trial; Bradford, J., dissenting on basis that "[i]n light of the overwhelming evidence of D's guilt, the fact that the jury was told the elements of robbery at least twice, and that the defense strategy would not have been affected in the least by an instruction on robbery, I conclude that D has fallen far short of establishing a reasonable probability that he could have been acquitted had the jury been so instructed."

RELATED CASES: Fry, 25 N.E.3d 237 (Ind. Ct. App.. 2015) (evidence did not support giving "mere presence at scene" instruction, an accomplice liability instruction, because neither State's theory nor evidence suggested that D was an accomplice).

TITLE: Taylor v. State
INDEX NO.: D.9.g.2.d.
CITE: (01-17-06), Ind., 840 N.E.2d 324
SUBJECT: D can be guilty as accomplice even if principal does not act "knowingly or intentionally"
HOLDING: While jury unanimity is required as to D's guilt, it is not required as to the theory of D's culpability. Here, there were two different theories upon which jury could have found that D committed one act of murder -- either as principal or accomplice. Thus, trial counsel did not exhibit deficient performance by not objecting to instructions & verdict form because jury did not need to agree unanimously on which theory supported murder conviction.

D also argued that trial counsel provided ineffective assistance by failing to object to a jury instruction that omitted essential element of offense. Jury was not instructed that the person that D was aiding, inducing, or causing to kill victim had to do so with a knowing or intentional mens rea to commit murder. Following other jurisdictions, Court held that an accomplice can be guilty of a greater homicide crime than the principal when the accomplice's mens rea is more culpable. Therefore, instruction that would allow a jury to find D guilty of murder as principal's accomplice, even if it found that principal did not kill victim knowingly or intentionally, was not erroneous. If D knowingly or intentionally aided & abetted principal to kill victim, D can be found guilty of murder so long as: 1) principal killed victim & 2) D knew or intended that victim be killed. Because instruction was not erroneous, victim's claim of ineffective assistance of trial counsel failed. Court noted this holding does not apply to accomplice liability cases dealing with attempted murder. See Bethel v. State, 730 N.E.2d 1242 (Ind. 2000). Held, transfer granted, Ct. App..' opinion at 820 N.E.2d 691 vacated, denial of post-conviction relief except with respect to claim of ineffective assistance of counsel for failing to appeal D's sentence; remanded for new sentencing order.

RELATED CASES: Suggs, App., 883 N.E.2d 1188 (even assuming State argued accomplice liability to jury but no instruction was given, error was not fundamental because evidence was sufficient to convict D as principal).

TITLE: Wallen v. State
INDEX NO.: D.9.g.2.d.
CITE: (3/27/2015), 28 N.E.3d 328 (Ind. Ct. App.. 2015)
SUBJECT: Instruction created mandatory presumption but error harmless
HOLDING: Instruction on intent in theft case was erroneous but harmless. At trial, court instructed the jury that concealing and removing property from its point of display "constitutes evidence of intent to deprive the owner of the property of a part of its value and/or that the person exerted unauthorized control over the property." This instruction created a mandatory presumption; it required the jury to find the requisite intent upon the State's proof that D concealed and removed Wal-Mart merchandise. See Brown v. State, 691 N.E.2d 438, 445 (Ind. 1998). This relieved the State of its burden to establish D's intent. See Matney v. State, 681 N.E.2d 1152, 1153 (Ind. Ct. App. 1997), *trans. denied*. However, the error was harmless because there was overwhelming evidence from which the jury could independently conclude D intended to take the merchandise. Held, judgment affirmed. Baker, J., concurring in judgment, finding that the instruction did not create a mandatory presumption but agreeing with the majority to affirm the conviction.

D. TRIAL

D.9. Jury trial

D.9.g.2.e. Lesser included offense

TITLE: Aguilar v. State
INDEX NO.: D.9.g.2.e.
CITE: (5th Dist., 7-9-04), Ind. App., 811 N.E.2d 476, *sum. aff'd* at 827 N.E.2d 31
SUBJECT: Refusal to give lesser included offense (LIO) instruction - no error
HOLDING: Tr. Ct. did not abuse its discretion in refusing D's tendered jury instruction on voluntary manslaughter as LIO of murder. Tr. Ct. refused his instruction on basis that: 1) no serious evidentiary dispute existed regarding presence of sudden heat; 2) D had a sufficient cooling off period; & 3) evidence showed premeditation. To establish that he acted in sudden heat, D must show sufficient provocation to engender passion. Culver v. State, 727 N.E.2d 1062 (Ind. 2000). D claimed his arguments & altercations with victim, several hours before her murder, were sufficient provocation to engender passion. However, D returned to victim's apartment after their altercation in bar, retrieved knife from her kitchen, donned latex gloves, hid in her bathroom, waited several hours for her return, & stabbed her to death. This evidence does not support inference that D acted under sudden heat. Horan v. State, 682 N.E.2d 502 (Ind. 1997). Held, judgment affirmed.

RELATED CASES: Suprenant, 925 N.E.2d 1280 (Ind. Ct. App. 2010) (discovery of alleged infidelity & victim's gathering of her belongings to move out of house does not go so far beyond "mere words" as to constitute "sudden heat" justifying a voluntary manslaughter instruction; furthermore, record shows that impetus to kill did not "suddenly" arise in response to a contemporaneous event).

TITLE: Aschliman v. State
INDEX NO.: D.9.g.2.e.
CITE: (04/14/92), Ind., 589 N.E.2d 1160
SUBJECT: Lesser-included Offense (LIO) instruction - theft & conversion
HOLDING: Because there was sufficient evidence of existence of serious evidentiary dispute on issue of intent, it was error for Tr. Ct. to refuse D's tendered instruction on LIO of conversion; granting transfer & reversing Ct. App. decision in Aschliman, 578 N.E.2d 759. D was convicted of theft & also found to be habitual offender (HO). Evidence revealed that D entered victim's property, attempted to get in house & failed, went to toolshed & removed pry bar. D then used pry bar to attempt to enter home from porch, & when neighbor called on phone, D left porch, threw pry bar away under tree & drove away. At trial, D tendered instruction on conversion as LI of theft, which was denied. During deliberations, jury sent question to Ct., asking if person enters another's property without permission & merely moves object from one location to another, does that action constitute theft? Ct. referred jury to instructions. S.Ct. agreed with Ct. App..'s analysis that conversion was LIO of theft, & that distinguishing element between 2 was intent to deprive. Ct. disagreed with Ct. App..'s finding that facts did not support serious evidentiary dispute on this issue, however. While finding there was sufficient evidence to support conviction of theft, Ct. noted that conclusion was not compelled & evidence did not rule out existence of serious evidentiary dispute on intent. Ct. also disagreed with Ct. App. finding that State had drafted Information in way that precluded instruction on criminal conversion. Ct. noted that while there may be some circumstances where drafting of Information could preclude LIO instruction, Lynch 571 N.E.2d 537, such is not the case where inherently LIO is involved. Although Information alleged that D acted with "`intent to deprive,'" it also charged each element of crime of conversion.

RELATED CASES: Dixey, 956 N.E.2d 776 (Ind. Ct. App. 2011) (D's tendered lesser-included offense instructions on utility fraud and criminal deception in theft prosecution were properly refused, but Tr. Ct. erred in restricting D's closing argument; see full review at D.18); Poling, 938 N.E.2d 1212 (Ind. Ct. App.. 2010) (distinguishing Morris {below}factually, court held that there was no serious evidentiary dispute as to D's intent to deprive and thus, D had no right to an instruction on conversion in her theft trial; moreover, court disagreed with Morris to the extent it held that the rule of lenity and the Proportionality Clause of the Indiana Constitution requires such a lesser included offense instruction); Morris, App., 921 N.E.2d 40 (failure to instruct jury on LIO of conversion required reversal because there was a serious evidentiary dispute about whether D intended to deprive a store of the use of its merchandise; see full review at K.4.h or K.4.r); Wright, Ind., 658 N.E.2d 563 (decision provides 3-step analysis that Tr. Ct.s. should use when called upon by either party to give LIO instruction); Anderson, App., 653 N.E.2d 1048 (no error in refusing D's tendered LIO instructions on criminal conversion; based on evidence at trial, Ct. concluded that serious evidentiary dispute did not exist with regard to D's intent to deprive store of drill).

TITLE: Blackburn v. State

INDEX NO.: D.9.g.2.e.

CITE: (08/19/19), Ind. Ct. App., 130 N.E.3d 1207

SUBJECT: Pointing a firearm may be factually included lesser included offense of involuntary manslaughter. Court of Appeals affirms trial court denial of continuance to locate material witness.

HOLDING: In murder prosecution, trial court did not abuse its discretion in refusing to instruct jury on alleged lesser included offense of involuntary manslaughter. Ind. Code § 35-42-1-4(b) provides that a person who kills another human being while attempting to commit a level 5 or level 6 felony that inherently poses a risk of serious bodily injury commits involuntary manslaughter. Victim died after Defendant shot him in the face. Assuming without deciding that pointing a firearm at another person inherently poses a risk of serious bodily injury, involuntary manslaughter may be a factually included lesser offense to murder because the means to commit the murder as charged clearly included pointing a firearm at the victim. Here, however, there was no serious evidentiary dispute that Defendant, by shooting victim in the head at close range, only intended to point his firearm at him. Defendant admitted to intentionally pulling the trigger but that incidentally the firearm was aimed at victim's head. If his testimony is taken as true, it would warrant a reckless homicide instruction, which was given, but not an instruction of involuntary manslaughter.

TITLE: Burnside v. State

INDEX NO.: D.9.g.2.e.

CITE: (4th Dist., 12-14-06), Ind. App., 858 N.E.2d 232

SUBJECT: IAC of appellate counsel- instruction erroneously required self-defense as precondition to finding of lesser included reckless homicide

HOLDING: Appellate counsel was ineffective for failing to challenge an erroneous jury instruction as fundamental error. Appellate counsel is deficient if: (1) unraised issues are significant & obvious from the face of the record; & (2) the unraised issues are clearly stronger than the raised issues. If appellate counsel is deficient, the Ct. then examines whether the unraised issues would have been clearly more likely to result in reversal or an order for a new trial. Here, D was charged with murder, & his defense was a mix of self-defense & lesser included offense of reckless homicide. The Tr. Ct. instructed, without objection, that if ". . .you find that the D was acting in self-defense, & that he used deadly force, but you find that in his use of deadly force, the D was acting recklessly, . . ., you may find the D guilty of reckless homicide, a Class C felony." This instruction required a finding of self-defense as a precondition to a reckless homicide verdict, & thus, deprived the D of his right to have the jury consider his guilt on reckless homicide as a lesser-included offense. Because this issue was significant & obvious from the face of the record & was clearly stronger than the issues raised in the direct appeal, appellate counsel's performance was deficient. Because the instruction misled the jury by instructing the jury to find that the D did not commit reckless homicide if he did not act in self-defense, it would have constituted fundamental error on appeal. Held, denial of petition for post-conviction relief reversed.

TITLE: Butcher v. State

INDEX NO.: D.9.g.2.e.

CITE: (1st Dist., 1-27-94), Ind. App., 627 N.E.2d 855, *overruled* on other grounds, 784 N.E.2d 459 (Ind. 2003)

SUBJECT: Lesser included instruction (LIO) on attempted child molesting not error

HOLDING: Tr. Ct. did not err in instructing jury on LIO of attempted child molesting after granting judgment on evidence (JOE) on child molesting count. At close of evidence, Tr. Ct. granted JOE on child molesting as Class C felony but submitted instruction on non-charged attempted child molesting. Ct. rejected D's argument that instruction on attempt was impermissible because child molesting was general intent crime & attempt can be made to commit only specific intent crime, finding two flaws in argument. Ct. first noted general attempt statute applies to any crime requiring both culpability & conduct that is substantial step toward crime. Intent is element of relevant portion of child molest statute, Ind. Code 35-42-4-3(b) (fondling with child under 12), even though language contains no specific mention of intent. [This section of opinion is somewhat confusing as fondling section of statute does refer to specific intent to gratify sexual desires.] Because requisite culpability or intent element is present in offense, application of attempt statute is proper. Ct. also found attempt to commit offense charged is, by definition, LIO. When Tr. Ct. granted JOE, it said it was not dismissing count entirely, but would permit State to, in effect, amend count to LIO of attempted child molesting. Held, conviction affirmed.

TITLE: Champlain v. State
INDEX NO.: D.9.g.2.e.
CITE: (6-13-97), Ind., 681 N.E.2d 696
SUBJECT: Refusal to give lesser included offense instruction - appellate review
HOLDING: In murder prosecution, Tr. Ct. committed reversible error when it refused to instruct jury on reckless homicide. Holding in Wright, 658 N.E.2d 563, (see card, this section) clearly dictates that reversal is required if Tr. Ct. wrongly concludes that no serious evidentiary dispute exists about element or elements distinguishing greater from lesser offense, & refuses to give lesser included offense instruction. If Tr. Ct. makes no ruling as to whether serious evidentiary dispute exists, Wright implicitly requires reviewing Ct. to make this determination de novo based on its own review of evidence. Here, Tr. Ct. refused to give D's reckless homicide instruction on ground that theory of defense was inconsistent with conviction for lesser included offense. In colloquy with Tr. Ct., defense counsel conceded that D's strategy was to pin murder on State's witness. Under facts of case it was for jury to decide whether, if D fired shot that killed victim, he was reckless or was actually aware of high probability that he was firing at victim, or intentionally shot her. This ambivalence raises serious evidentiary dispute over whether D knowingly killed victim even where jury concluded that he was shooter. Held, conviction reversed & remanded for new trial.

RELATED CASES: Brown, 703 N.E.2d 1010 (de novo review is appropriate standard only where D points to specific evidentiary dispute but Tr. Ct. does not make finding as to existence or absence of substantial evidentiary dispute); Brown, 770 N.E.2d 275 (Tr. Ct.'s refusal to instruct jury on lesser included offenses of aiding in reckless homicide or in voluntary manslaughter was reversible error); Young, 699 N.E.2d 252 (reversible error in refusing LIO instruction where there was serious evidentiary dispute about whether D knowingly or recklessly killed victim when he fired two shots from moving vehicle in direction of numerous people twenty feet away).

TITLE: Galindo v. State
INDEX NO.: D.9.g.2.e.
CITE: (11/15/2016), 62 N.E.3d 1285 (Ind. Ct. App.. 2016)
SUBJECT: Within discretion to deny instruction on involuntary manslaughter
HOLDING: There was no abuse of discretion in denying D's instruction on involuntary manslaughter because there was no serious evidentiary dispute about his intent to kill victim. After having sex with victim, D kicked or stomped her head multiple times with tremendous force, which mangled her face so badly that CPR was impossible, and strangled her for at least ninety seconds. "Choking someone for a minimum of forty-five seconds clearly evinces an intent to kill or, at the very least, an awareness of a high probability that death would result." Erlewein v. State, 775 N.E.2d 712, 715 (Ind. Ct. App. 2002), *trans. denied*. The force of the battery also clearly establishes the intent to kill. These factors along with D's refusal to seek medical treatment for victim and failure to contact police after learning of her death clearly establishes that there was no serious evidentiary dispute about his intent to kill victim. Held, judgment affirmed.

RELATED CASES: Atkinson, 151 N.E.3d 311 (Ind. Ct. App. 2020) (No error in failing to instruct jury on lesser included offenses of reckless homicide and involuntary manslaughter).

TITLE: Garner v. State

INDEX NO.: D.9.g.2.e.

CITE: (9/9/2016), 59 N.E.3d 355 (Ind. Ct. App.. 2015)

SUBJECT: Lesser included offense instruction - no serious evidentiary dispute regarding substantial pain following battery

HOLDING: In prosecution for Level 6 felony battery with moderate bodily injury, Tr. Ct. did not abuse its discretion in declining to instruct the jury on lesser included offense of battery resulting in bodily injury. Tr. Ct. determined that there was no serious evidentiary dispute about the element that distinguishes the misdemeanor battery from the felony, i.e., the degree of injury D caused the victim. Court affirmed Tr. Ct.'s decision in this case because the injuries victim received could have justified a charge of Level 5 battery resulting in serious bodily injury. And D did not present evidence that the injuries he inflicted on victim would have caused only "physical pain" rather than "substantial pain." Held, judgment affirmed.

TITLE: Garrett v. State
INDEX NO: D.9.g.2.e.
CITE: (2nd Dist., 9-28-01), Ind. App., 756 N.E.2d 523
SUBJECT: Lesser included offense instruction over D's objection - no error
HOLDING: In murder prosecution, trial Ct. did not err in giving the State's tendered instruction on lesser included offense of reckless homicide over D's objection. State presented evidence that, as D was playing with her two yearold son, she was frustrated & put her arm around his neck & choked him. This evidence, if believed, would allow trier of fact to conclude that D acted in plain, conscious, & unjustifiable disregard of harm that might result, & that such disregard involved substantial deviation from acceptable standards of conduct. Therefore, there was serious evidentiary dispute as to whether D knowingly or intentionally killed her son, as alleged in charging information, or whether she did so recklessly. Ct. rejected D's argument that her choice to present defense of accidental drowning forbade trial Ct. from instructing jury regarding any lesser included offenses. D is not precluded from lesser included offense instruction by interposing a defense inconsistent with commission of crime covered by instruction. Young v. State, 699 N.E.2d 252 (Ind. 1998). Even where D offers defense which would absolve her of any liability, Cts. must use test set forth in Wright v. State, 658 N.E.2d 563 (Ind. 1995), to determine whether it is appropriate to instruct jury regarding lesser included offenses. Held, no error.

Note: In footnote, Ct. acknowledged fact that case law seems to frequently preclude D from obtaining lesser included offense instruction when under same or similar set of facts the State would be entitled to such instruction. Ct. called upon S.Ct. to consider & resolve this anomaly.

RELATED CASES: Johnson, 986 N.E.2d 852 (Ind. Ct. App.. 2013) (in murder case, no error in denying lesser-included instruction on reckless homicide because there was no evidence to support such an instruction; D shot victim 11 times, two times at close range and nine times while retreating from victim).

TITLE: Gonzales v. State
INDEX NO.: D.9.g.2.e.
CITE: (11-2-94), Ind., 642 N.E.2d 216
SUBJECT: Refusal to give lesser-included instruction on manslaughter
HOLDING: In murder prosecution, Tr. Ct. did not err in refusing to give D's tendered jury instruction on lesser-included offense of manslaughter. After arguing with victim over unpaid telephone bill, D & another participant fatally stabbed victim & took money from victim's wallet. D raised defenses of insanity & intoxication, & Tr. Ct. appointed experts to examine D. Following medical reports, Tr. Ct. determined that D was competent to stand trial. Reports were placed into evidence in attempt to convince jury that D did not have ability to form intent to kill. Court reiterated rule stated in Rowe v. State, Ind., 539 N.E.2d 474, that defense of insanity or intoxication to point of rendering person incapable of forming intent is inconsistent with giving instruction on lesser-included offense. D also waived issue because instruction was not included in record, Clemons v. State, Ind., 424 N.E.2d 113. Held, conviction affirmed.

TITLE: Griffin v. State
INDEX NO.: D.9.g.2.e.
CITE: (12-16-94), Ind., 644 N.E.2d 561
SUBJECT: Lesser included offense instruction - voluntary manslaughter
HOLDING: In murder prosecution, evidence in record supported voluntary manslaughter & sudden heat instructions. Voluntary manslaughter instruction should be given if there is any appreciable evidence of sudden heat, which requires "sufficient provocation to engender passion," Johnson v. State, Ind., 518 N.E.2d 1073. Here, D & victim had been experiencing marital discord, & on date of shooting, victim pointed loaded gun at D & informed him to remove his belongings from marital residence. D had bruises & scratches on his arms consistent with struggle & victim was shot with gun that she brought to residence. Jury could have found sudden heat under these circumstances & Tr. Ct. committed reversible error by refusing to give D's tendered instructions as required. When question to instruct on lesser included offense is close, Tr. Ct. should give instruction & avoid risk of expense & delay involved in retrial. Held, conviction reversed & remanded, Givan, J., dissenting.

RELATED CASES: Watts, 885 N.E.2d 1228 (*overruling* Griffin to extent inconsistent with holding that it is reversible error for Tr. Ct. to instruct jury on voluntary manslaughter in absence of evidence of sudden heat; see full review, this section); Sarwacinski, App., 564 N.E.2d 950 (issues of necessity of lesser included instruction on voluntary manslaughter, of effectiveness of counsel, & of sufficiency of evidence to rebut self-defense claim decided contrary to D).

TITLE: Hopkins v. Reeves

INDEX NO.: D.9.g.2.e.

CITE: 524 U.S. 968, 119 S.Ct. 5, 141 L. Ed2d 766 (1998)

SUBJECT: Death Penalty -- Lesser Included Sentencing Instructions

HOLDING: Beck v. Alabama, 447 U.S. 625 (1980), does not require that capital Tr. Ct. give lesser included offense instruction on offenses which are not, as a matter of state law, lesser included offenses of capitally charged crime. In Beck, state statute prohibited giving of lesser included offense instructions in capital cases. U.S. S. Ct. found this practice unconstitutional because it created risk of unwarranted convictions, in that jurors were faced with "all or nothing" choice between convicting Beck of capital offense or acquitting him altogether. Here, D was charged with felony murder, and state sought death penalty. D tendered instruction on second-degree murder and manslaughter, but these instructions were rejected because under Nebraska law, these offenses are not lesser included within felony murder. Eighth Circuit Court of Appeals granted habeas relief on Beck grounds. U.S. S. Ct. distinguishes Beck, reasoning that in Beck, state prohibited giving of instructions on legally lesser included offenses, only in capital cases, so that it erected "artificial barrier" restricting juries to choice between capital conviction or acquittal. Here, no such artificial barrier was erected; Nebraska merely denied D instruction on offenses which were not lesser included offenses of charged crime. Stevens, J, DISSENTS, arguing that reason Nebraska's felony murder charge has no lesser included offenses is that it has no mens rea requirement as to killing. Because state sought death penalty and would thus have to prove sufficient mens rea to satisfy Enmund and Tison instructions on second-degree murder and manslaughter should have been given.

RELATED CASES: Bobby, 131 S.Ct. 1762 (U.S. 2011) (penalty phase instructions requiring jurors to first reject the death penalty before considering a sentence of life imprisonment does not amount to impermissible "all or nothing" instruction prohibited by Beck v. Alabama, 447 U.S. 625 (1980) and was not contrary to clearly established federal law; Beck instruction concerned guilt determination and precluded jury from considering lesser-included non-capital offense, but instruction here set forth options for sentence, not options regarding determination of guilt).

TITLE: Jackson v. State
INDEX NO.: D.9.g.2.e.
CITE: (5/20/2015), 33 N.E.3d 1067 (Ind. Ct. App. 2015)
SUBJECT: Lesser offense instruction properly rejected
HOLDING: Tr. Ct. did not err in refusing D's tendered instruction on check deception as a lesser-included offense of theft. The charges stemmed from checks D presented to church, where she purchased bingo cards and received hundreds of dollars of cash in excess of the purchases. At trial, D did not deny that the State's charged acts were committed, but she claimed she was the victim of identity theft and someone else was the perpetrator. Because there was no controversy regarding whether the lesser offense of check deception was committed while a greater offense was not, Tr. Ct. did not abuse its discretion by refusing the instruction. Held, judgment affirmed.

TITLE: Jones v. State
INDEX NO.: D.9.g.2.e.
CITE: (03-19-12), 966 N.E.2d 1256 (Ind. 2012)
SUBJECT: State may foreclose instruction on factually lesser included offense
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion by refusing D's tendered instructions on reckless homicide and involuntary manslaughter. Evidence showed that D, who outweighed the victim by about fifty pounds, pushed victim to floor, punched him in chest twice to "get the wind out of him," placed his hands on victim's neck in an effort "to render him unconscious," applied his body as pressure weight until victim was unconscious and let go only when blood and air bubbles were expressed through victim's mouth. Expert testimony indicated victim would have lost consciousness after ten to fifteen seconds, but he would have died only after an additional period of oxygen deprivation, up to two minutes. Upon observing victim's nonresponsive state, D did not summon help or attempt to revive victim but rather took his money and vehicle and fled. At trial, D's theory of defense was self-defense, but on appeal he argued that jury, if properly instructed, could have found that he intended only to batter victim, who died during commission of battery, or that he recklessly killed victim, but did not do so knowingly.

As in Horan v. State, 682 N.E.2d 502 (Ind. 1997) and Lyttle v. State, 709 N.E.2d 1 (Ind. 1999), Court held that D could not have engaged in this protracted conduct without an awareness that his actions could result in victim's death. Thus, there was no error in finding no serious evidentiary dispute and reckless homicide instruction was properly refused.

Moreover, involuntary manslaughter was not a factually included lesser offense of murder because D was charged with knowingly killing the victim. Although the State cannot foreclose through its drafting of the charging information an instruction on an inherently lesser included offense, it may foreclose an instruction on a factually included offense. The State did precisely that in this case by omitting from D's charging information any reference to a battery. Held, transfer granted, Court of Appeals' opinion at 948 N.E.2d 1197 adopted, judgment affirmed.

TITLE: Kemp v. State
INDEX NO.: D.9.g.2.e.
CITE: (2nd Dist., 3-16-95), Ind. App., 647 N.E.2d 1143
SUBJECT: Lesser included offense instruction - sexual battery
HOLDING: In rape prosecution, where D expressly agreed to jury instruction on sexual battery, invited error doctrine precluded challenge to instruction on appeal. D was charged only with rape, & record showed that D knew that sexual battery was not lesser included offense. Nevertheless, D weighed options & ultimately agreed to instruction. A party who agrees to certain procedure at trial cannot claim error on appeal based on that procedure. Craig v. State, 484 N.E.2d 566. Error was not fundamental because D failed to specify how instructions harmed him. Held, judgment affirmed. Sullivan, J., concurring on grounds that sexual battery covered by instruction was an included offense in rape as charged.

RELATED CASES: Anderson, App., 674 N.E.2d 184 (invited error doctrine may not apply to convict person of non-existent crime; here, aggravated battery conviction constituted fundamental error despite D's request for LIO instruction).

TITLE: Lahr v. State
INDEX NO.: D.9.g.2.e.
CITE: (10-5-94), 2nd Dist., Ind. App., 640 N.E.2d 756
SUBJECT: Lesser included offense instruction conspiracy to commit murder and assistant criminal
HOLDING: Tr. Ct. properly refused to give D's tendered instruction that, if evidence warranted, jury could find D guilty of assisting criminal as lesser included offense of charged crime of Conspiracy to commit murder. To determine whether lesser included offense instruction should be given, Ct. must consider whether lesser offense is inherently or factually included in greater offense & whether evidence at trial justifies giving instruction, Aschliman v. State, Ind., 589 N.E.2d 1160. Ct. first examined relevant statutes & concluded that because it is possible to conspire to commit murder without intent to hinder apprehension of criminal or fugitive from justice, assisting criminal is not inherently a lesser included offense of conspiracy. Ct. then reviewed charging information & facts & concluded that assisting criminal is neither inherently nor factually included in greater offense of conspiracy in this case. **Note:** Because D failed to include his tendered instructions in Brief, Ct. held he consequently waived any error, Ind. Appellate Rule 8.3(A)(7).

TITLE: Larkin v. State
INDEX NO.: D.9.g.2.e.
CITE: (Ind. 9/14/2021), Ind., 173 N.E.23d 662
SUBJECT: Reference to "handgun" in charging information for voluntary manslaughter gave D fair notice of lesser included involuntary manslaughter instruction
HOLDING: Charged with voluntary manslaughter in the death of his wife, Defendant was convicted of involuntary manslaughter as a lesser offense. During a domestic altercation in their home, Defendant's wife was shot twice and died; either of the shots could have been fatal.

First, the Court found by simply alleging Defendant killed his wife with a handgun, the charging information alleged that he committed a battery against her. Thus, involuntary manslaughter based on a battery was a factually included lesser offense. The Court found there was a serious evidentiary dispute about the elements that distinguish voluntary manslaughter from involuntary manslaughter and sufficient evidence to support a conviction of either offense. If the jury believed Defendant's statement, he only intended to push his wife with the gun, they could convict him of involuntary manslaughter. The jury could also reasonably infer Defendant killed her while acting in sudden heat because of evidence of a heated verbal and physical confrontation between the two just before the shooting. The Court concluded there was no abuse of discretion in instructing the jury on involuntary manslaughter as a lesser included offense. The Court also held Defendant was given fair notice of the possibility of conviction of the lesser offense by alleging Defendant killed his wife with a handgun because the two charges were both based on the same means, the handgun, with the difference being whether the killing resulted from a pushing or a shooting.

Justice David dissented, believing the involuntary manslaughter instruction was not appropriate. While battery may be included where there is a murder by a handgun, that's not always the case. The "terse" charging information here only alleged the use of a handgun without any mention of a battery or facts that would even indicate one. The State requested the instruction over the defense's objection just minutes before final instructions and closing arguments. This does not give defense counsel adequate time to prepare a defense and the State should not be able, "to seek a lesser included instruction mid trial once it realizes things aren't going well or use a vague charging information to ambush a defendant."

TITLE: Moore v. State
INDEX NO.: D.9.g.2.e.
CITE: (4th Dist. 2/22/83), Ind. App., 445 N.E.2d 576
SUBJECT: Instruction - lesser included offense; conviction upon
HOLDING: Where D tenders & Tr. Ct. gives instruction on a crime which is neither charged in information nor a lesser included offense of any crime charged in information, D may not seek reversal if convicted of such crime. Here, D was charged with murder & attempted murder. D tendered instruction on crime of assisting a criminal (Ind. Code 35-44-3-2), which was given by Tr. Ct. Jury received verdict forms for this crime & found D guilty of 4 counts of assisting a criminal. Ct. finds D invited error by tendering instruction. D may not invite error & then seek reversal based on that error. Farley, 163 N.E.2d 885; Matthews, 148 N.E.2d 334; Sund, App., 320 N.E.2d 790. Young, J., dissenting.

TITLE: Norris v. State
INDEX NO.: D.9.g.2.e.
CITE: (01-31-11), Ind. App., 943 N.E. 2d 362
SUBJECT: Involuntary manslaughter instruction foreclosed by charging information
HOLDING: Tr. Ct. did not err in refusing to instruct jury on involuntary manslaughter as a lesser included offense of murder. The D's intent--the intent to kill or the intent to batter--distinguishes murder from involuntary manslaughter. Wilson v. State, 765 N.E.2d 1265 (Ind. 2002). It is undisputed that involuntary manslaughter is not an inherently lesser included offense of murder. It may, however, be factually included if the charging information alleges that a battery accomplished the killing. Ketcham v. State, 780 N.E.2d 1171 (Ind. Ct. App.. 2003). Here, charging information alleged only a knowing or intentional killing and contained no reference to a battery that could have been a basis for an involuntary manslaughter instruction. Contrary to D's assertion that the State's drafting of the information lacked detail, the State was within its discretion to draft the information in a manner that foreclosed the opportunity for D to seek a conviction on a lesser offense. Wright v. State, 658 N.E.2d 563 (Ind. 1995); Jones v. State, 438 N.E.2d 972 (Ind. 1982). Thus, Tr. Ct. properly rejected D's involuntary manslaughter instruction. Held, judgment affirmed.

TITLE: Pinegar v. State
INDEX NO.: D.9.g.2.e.
CITE: (3d Dist. 5/3/90), Ind. App., 553 N.E.2d 525
SUBJECT: Lesser included offense (LIO) instruction - voluntary manslaughter
HOLDING: Tr. Ct. erred in refusing to give D's tendered instruction on voluntary manslaughter as LIO of murder. Evidence showed that friend of victim's wife told victim that D had been bothering her. Victim, his wife, & this friend went to bar, & asked manager to tell them if D came in. When D came in, victim confronted him & they went outside to talk. Victim pushed D, & D stabbed victim, killing him. Ind. Cts. use 2-step analysis to determine whether tendered LIO instruction should be given. Lawrence, 375 N.E.2d 208. First, Ct. must determine whether lesser offense is included in charged offense. Lesser offense may be inherently included, or it may be factually or possibly included if factual allegations in charging instrument include commission of all elements of lesser offense. Jones, 438 N.E.2d 972; Roddy, App., 394 N.E.2d 1098. Actual elements of murder & voluntary manslaughter are identical, so that latter is inherently included. [Citations omitted.] Ct. must next determine whether evidence supports instruction on lesser offense. Ct. looks at element distinguishing greater from lesser, & if evidence raises serious conflict as to that element, LIO instruction must be given. [Citations omitted.] Although sudden heat is not element, it is distinguishing feature. Here, there was evidence that victim sought confrontation, struck first blow, & engaged in fight with D. This is sufficient to raise question as to existence of sudden heat, & instruction should have been given to jury. Held, reversed & remanded for new trial.

TITLE: Scrivener v. State
INDEX NO.: D.9.g.2.e.
CITE: (11/12/82), Ind., 441 N.E.2d 954
SUBJECT: Instruction - lesser included offenses; incompatible with defense N.E.2d evidence
HOLDING: Two step analysis: (1), Is lesser offense included within crime charged, as allegedly committed according to charging instrument? (2), If so included, does evidence produced at trial warrant submission of lesser & included offense to jury? Easley, 427 N.E.2d 435; Lawrence, 375 N.E.2d 208. Here, D did not dispute elements of offenses charged but asserted alibi defense. Ct. finds evidence did not warrant lesser included instruction. Easley, Brown, 416 N.E.2d 828. D also argued refusal to instruct on lesser includeds denied jury right to determine law, contrary to Ind.Const. Art. I, Section 19. This issue was raised & addressed in Brown which held 2-step analysis does not prevent jury from finding whether lesser offenses were committed where there is no evidence to support finding of lesser offense. Held, burglary & theft convictions affirmed.

RELATED CASES: Simpson, App., 628 N.E.2d 1215 (In trial for murder, conspiracy & robbery, Tr. Ct. did not err in refusing D's LIO instructions on involuntary manslaughter, battery, criminal recklessness, & theft. Evidence showed denial of involvement by D, not difference in intent elements for various offenses that would have merited LIO instructions); Pinegar, 553 N.E.2d 525 (self-defense not inconsistent with claim of sudden heat); Jones, 438 N.E.2d 972 (intoxication); Hester, 315 N.E.2d 351 (insanity); Fry, App., 440 N.E.2d 1133 (duress).

TITLE: Tomlinson v. State
INDEX NO.: D.9.g.2.e.
CITE: (1st Dist. 6/26/89), Ind. App., 540 N.E.2d 78
SUBJECT: Erroneous lesser included offense (LIO) instruction
HOLDING: Tr. Ct. erred in giving LIO instruction on attempted dealing in cocaine, based on delivery of counterfeit substance. D was charged with dealing cocaine, pursuant to Ind. Code 35-48-4-1. Tr. Ct. instructed jury that it could find D guilty of attempted dealing in cocaine if it found, among other elements, that D had in fact delivered substance believing it to be cocaine. Statute forming basis for this instruction is Ind. Code 35-48-4-5, which concerns dealing in counterfeit substance. For instruction to be proper, dealing in counterfeit substance must be LIO of dealing in cocaine. To determine whether offense is LIO of another, Cts. must first look at statutory provisions to determine whether offense is "inherently" included, & also at factual allegations in charging instrument to determine whether it is "factually" included. Decker, 528 N.E.2d 1119. Assuming evidence supported conviction for greater offense, it must prima facie warrant conviction for LIO. Id. Here, Ct. App. concludes that conviction for dealing in cocaine would in fact preclude conviction for dealing in counterfeit substance, since substance involved must either be cocaine or not. Ct. need not proceed to 2d step in determining whether LIO instruction is proper. Held, conviction reversed.

TITLE: True v. State
INDEX NO.: D.9.g.2.e.
CITE: (10-13-11), 954 N.E. 2d 1105 (Ind. Ct. App. 2011)
SUBJECT: State's lesser included offense (LIO) instruction - reversible error
HOLDING: In Class D felony domestic battery prosecution, Tr. Ct. erred in instructing jury on lesser included offense of Class A misdemeanor domestic battery, because there was no serious evidentiary dispute about whether the battery was committed in the presence of children. D was charged with Class D felony domestic battery for going to his ex-wife's apartment and attacking her while his children and another minor relative were staying there. He claimed he couldn't have been the one to attack her because he was at church and that his ex-wife and children fabricated the battery allegation to influence an ongoing custody battle between the two. At State's request and over D's objection, Tr. Ct. instructed jury that it could convict D of lesser included offense of Class A misdemeanor domestic battery, which does not require the battery to occur in the presence of a child.

It is reversible error to give a lesser included offense instruction at request of State in the absence of a serious evidentiary dispute distinguishing the lesser offense from the greater. Watts v. State, 885 N.E. 2d 1228 (Ind. 2008). D pursued an "all-or-nothing" defense strategy, noting conflicting evidence whether he was even at his ex-wife's apartment the morning she was battered. The evidence was conflicting only on whether D committed any battery at all, not on whether the crime was committed in the presence of children. Either there was a domestic battery committed in presence of children, or there was no battery at all. Instructing jury on Class A misdemeanor instead of Class D felony domestic battery was not supported by evidence and improperly invited the jury to reach a "compromise" verdict. Held, conviction reversed and remanded for further proceedings.

TITLE: Washington v. State
INDEX NO.: D.9.g.2.e.
CITE: (3rd Dist., 9-22-97), Ind. App., 685 N.E.2d 724
SUBJECT: Lesser included offense instruction over D's objection - no error
HOLDING: In murder prosecution, Tr. Ct. did not err in, *sua sponte* & over D's objection, giving instruction on voluntary manslaughter. There was sufficient evidence of sudden heat warranting such instruction. There was substantial evidence that victim sought confrontation & initiated contact with D by firing first gunshot. D reacted to attack by grabbing nearby gun & running from victim, firing repeatedly as he ran. Evidence established that there was provocation & possible sudden heat such that rational basis existed for finding that D was not guilty of murder but of voluntary manslaughter. Because evidence supported Tr. Ct.'s determination that voluntary manslaughter instruction was warranted, Tr. Ct. did not err in giving instruction. Held, conviction affirmed; Staton, J., dissenting on grounds that test set forth in Wright, 658 N.E.2d 563, was ignored by majority, & that there was "absolute absence of a serious evidentiary dispute" in record regarding D's sudden heat.

RELATED CASES: Watts, 885 N.E.2d 1228 (it is reversible error for Tr. Ct. to instruct jury on voluntary manslaughter in absence of evidence of sudden heat; see full review, this section).

TITLE: Watts v. State
INDEX NO.: D.9.g.2.e.
CITE: (05-13-08), Ind., 885 N.E.2d 1228
SUBJECT: Voluntary manslaughter instruction where no evidence of sudden heat - reversible error
HOLDING: In murder and criminal recklessness prosecution, it was reversible error for Tr. Ct. to give voluntary manslaughter instruction over defense counsel's objection because there was no evidence of sudden heat. In Wright v. State, 658 N.E.2d 563 (Ind. 1995), Court adopted a three-part test to determine whether it is appropriate to instruct jury regarding lesser-included offenses (LIOs), and held it is reversible error for Tr. Ct. to refuse to instruct jury on a LIO in presence of a serious evidentiary dispute about element or elements distinguishing greater from lesser offense. Court now holds it is also reversible error to give an instruction on a LIO in the absence of a serious evidentiary dispute. Specifically, if there is no serious evidentiary dispute over sudden heat, it is reversible error for Tr. Ct. to instruct a jury on voluntary manslaughter in addition to murder. Court noted that an unsupported voluntary manslaughter instruction, as was given in this case, deprives D of the opportunity to pursue a legitimate "all-or-nothing" trial strategy.

Here, D objected to instruction on grounds that "sudden heat has to be interjected by the D and I don't think that's happened." While defense counsel was incorrect that only the defense may introduce evidence of sudden heat, counsel was correct that evidence of sudden heat had not been introduced during trial. Thus, D adequately preserved this issue for appeal. Besides isolated moment when victim "got in the face" of D before D fired four to five shots as victim walked away, there was no possible evidence of sudden heat before jury. Insults and taunts alone are not sufficiently provocative to merit conviction of voluntary manslaughter instead of murder. See Jackson v. State, 709 N.E.2d 326 (Ind. 1999). Held, transfer granted, Court of Appeals' memorandum opinion vacated, voluntary manslaughter conviction reversed. Shepard, C.J., dissents without opinion; Boehm, J., dissenting, believes D did not properly preserve this issue for appeal, as he did not focus on the lack of evidence of sudden heat.

RELATED CASES: Collins, 966 N.E.2d 96 (Ind. Ct. App. 2012) (because there was evidence of sudden heat, i.e., D snapped from years of domestic abuse, when she shot her husband, Tr. Ct. court did not abuse its discretion by granting State's request to give a voluntary manslaughter instruction).

TITLE: Webb v. State

INDEX NO.: D.9.g.2.e.

CITE: (03-23-12), 963 N.E.2d 1103 (Ind. 2012)

SUBJECT: Lesser included offense (LIO) instruction - must consider evidence presented by both parties

HOLDING: In murder prosecution, Tr. Ct. committed reversible error when it refused to instruct jury on LIO of reckless homicide. Because reckless homicide is an inherently included lesser offense of murder, the issue was whether there was a serious evidentiary dispute about D's state of mind to justify giving the requested instruction. See Wright v. State, 658 N.E.2d 563 (Ind. 1995). D claimed at trial that he was not even present when the shooting took place, but that does not end the analysis. Wright makes clear that in determining whether a serious evidentiary dispute exists, Tr. Ct. must look at the evidence presented in the case by both parties. See also Young v. State, 699 N.E.2d 252 (Ind. 1998) (presenting alibi defense does not automatically bar LIO instructions)

Here, if Court were to consider only the evidence presented by D, there would be no question that he would not be entitled to the LIO instruction. But the State's evidence concerning D's state of mind was "at best ambiguous." Although evidence was sufficient to support jury's guilty verdict of murder, evidence also produced a serious evidentiary dispute concerning whether D acted knowingly or recklessly. Depending on how jury might have weighed and credited all the evidence, it very well could have returned with a conviction of reckless homicide. Held, transfer granted, Court of Appeals' memorandum opinion on this issue vacated, conviction reversed and remanded for new trial. David, J. joined by Shepard, C.J., dissenting, believing that requiring Tr. Ct. to give a LIO jury instruction after D denied his guilt under oath by saying he wasn't present at the scene would be creating a mockery of murder trial.

TITLE: Wojtowicz v. State
INDEX NO.: D.9.g.2.e.
CITE: (3d Dist. 7/13/87), Ind. App., 510 N.E.2d 187
SUBJECT: Instruction - lesser included offenses; refusal to give held reversible error
HOLDING: Tr. Ct. erred in refusing D's tendered instruction that conversion is lesser included offense of theft. Here, Ct. finds D presented evidence that supported lesser included offense instruction on conversion & negated at least 1 necessary element for a conviction of theft. When deciding what instructions to submit to jury, it is not judge's place to evaluate credibility of evidence presented in D's behalf. It is jury who should have option of finding that D is guilty only of lesser crime if evidence presented at trial could support such a finding. Held, convictions reversed. D's conviction for corrupt business influence (RICO) is affirmed; convictions on predicate offenses are unnecessary to sustain conviction. 4447 Corp. v. Goldsmith, 504 N.E.2d 559.

RELATED CASES: Morris, App., 921 N.E.2d 40 (failure to intruct jury on LIO of conversion required reversal because there was a serious evidentiary dispute about whether D intended to deprive a store of the use of its merchandise; see full review at K.4.h or K.4.r).

TITLE: Wright v. State
INDEX NO.: D.9.g.2.e.
CITE: (11-17-95), Ind., 658 N.E.2d 563
SUBJECT: Lesser included offense (LIO) instruction - when to give
HOLDING: Decision sets out following analysis that Tr. Ct.s. should use when called upon by either party to give jury instruction on LIO of crime charged: 1) compare statute defining crime charged with statute defining alleged LIO. If LIO is inherently included in crime charged, proceed to step 3 below. Wording of charging instrument never forecloses or precludes instruction on inherently LIO. Aschliman, 589 N.E.2d 1160. 2) if alleged LIO is not inherently included in crime charged, compare statute defining alleged LIO with charging instrument. If charging instrument alleges means used to commit crime charged include all elements of alleged LIO, then alleged LIO is factually included in crime charged; proceed to step 3 below. Tr. Ct. should not give requested instruction on alleged LIO if it is neither inherently nor factually included in crime charged. Straub, 567 N.E.2d 87. 3) If alleged LIO is either inherently or factually included in crime charged, consider evidence presented in case by both parties. If there is serious evidentiary dispute about element(s) distinguishing greater from lesser offense, & jury could conclude that lesser offense was committed but not greater, it is reversible error to not give LIO instruction when requested. Tr. Ct. should not give LIO instruction if evidence does not support it, & D must object to instruction to preserve issue for appeal.

Here, although information charging D with murder closely tracked language of murder statute, Ct. App. erred in reversing reckless homicide conviction. Because reckless homicide is inherently included offense of murder, information charging murder cannot be drafted to preclude reckless homicide instruction. Aschliman, *supra*. If evidence warrants it, requested instruction on reckless homicide should always be given in case where murder has been charged. D in this case waived any objection to reinstruction of jury when Tr. Ct. offered to declare mistrial & D made tactical decision to decline offer & accept verdict. Held, transfer granted, decision of Ct. App. at 643 N.E.2d 417 vacated & conviction affirmed; DeBruler, J., concurring. **Note:** Ct. explicitly *overruled* or disapproved of several cases which suggest prosecutors may foreclose instruction on either inherently or factually included offense by drafting charging instrument to track statutory language defining crime charged.

RELATED CASES: Larkin, 173 N.E.3d 662 (Ind. 2021) (prosecution can request a jury instruction on a LIO so long as the charging documents provide adequate notice and the record at trial reveals a serious evidentiary dispute); Leonard, 80 N.E.3d 878 (Ind. 2017) (Tr. Ct. did not abuse discretion in refusing reckless homicide instruction; though some evidence suggested D only acted recklessly, it was reasonable for Tr. Ct. to conclude the weight of the evidence showed no serious evidentiary dispute that D acted knowingly), Young, 30 N.E.3d 719 (Ind. 2015) (even though elements of attempted aggravated battery are inherently included in murder, charging Ds only with murder by shooting deprived them of due process right to fair notice to also defend against lesser, completely different offense of attempted aggravated battery by beating); Johnson, 959 N.E.2d 334 (Ind. Ct. App. 2011) (In class A felony neglect of a dependent prosecution, Tr. Ct. did not abuse its discretion in refusing to instruct jury on lesser included offenses of class C and D felony neglect of a dependent. There was no serious dispute about the degree of harm to the dependent); Morris, App., 921 N.E.2d 40 (failure to intruct jury on LIO of conversion required reversal because there was a serious evidentiary dispute about whether D intended to deprive a store of the use of its merchandise; see full review at K.4.h or K.4.r); Danner, App., 900 N.E.2d 9 (in Class A felony possession of cocaine prosecution, Tr. Ct. did not abuse its discretion in

refusing D's tendered jury instruction on class C felony possession of cocaine as a LIO, because there was no serious evidentiary dispute regarding whether D possessed cocaine within 1,000 feet of school property); White, App., 849 N.E.2d 735 (criminal recklessness was not factually included in crime of attempted murder because charging information for attempted murder included no element of reckless behavior); Clark, App., 834 N.E.2d 153 (in murder prosecution, Tr. Ct. erred in failing to instruct jury on LIO of voluntary manslaughter where evidence demonstrated a serious evidentiary dispute regarding the mitigating factor of sudden heat); Waibel, App., 808 N.E.2d 750 (no error in refusing D's tendered instructions on intimidation, battery & auto theft as LIO of robbery & carjacking); Simmons, App., 793 N.E.2d 321 (Class C Felony Battery, Ind. Code 35-42-2-1(a)(3), is inherently included offense of Aggravated Battery under Ind. Code 35-42-2-1.5, & it was not fundamental error to so instruct jury); Hamilton, App., 783 N.E.2d 1266 (Tr. Ct. did not err in refusing to give D's jury instruction on criminal recklessness as LIO of murder, even though it instructed jury on reckless homicide as LIO); Higgins, App., 783 N.E.2d 1180 (criminal trespass is not inherently included in offense of residential entry, but may be factually included lesser offense of burglary or residential entry); Ketcham, App., 780 N.E.2d 1171; Erlewein, App., 775 N.E.2d 712 (in murder prosecution, Tr. Ct. properly refused to instruct jury on involuntary manslaughter because there was no serious evidentiary dispute regarding element distinguishing involuntary manslaughter from murder); Edwards, App., 773 N.E.2d 360 (because jury could have concluded that D committed battery upon victim but did not commit crime of attempted murder, Tr. Ct. erred in refusing to give his tendered LIO instruction on battery); Ellis, 736 N.E.2d 731 (although intent was at issue through involuntary intoxication defense, Tr. Ct. did not err by refusing to give reckless homicide and criminal recklessness instructions in murder prosecution); Craig, App., 737 N.E.2d 442 (where jury could have found D acted recklessly & with disregard for consequences of shooting at van, D was entitled to criminal recklessness instruction although charged with attempted murder); Tucker, App., 725 N.E.2d 894 (in battery prosecution, despite victim's testimony that bruise on her arm did not hurt, there was no serious evidentiary dispute as to whether victim suffered bodily injury); Sanders, App., 713 N.E.2d 918 (where only evidence was that D pointed gun at victim & told him to get out of car, there was no substantial evidentiary dispute which required lesser included instruction on theft in carjacking case); Robertson, App., 699 N.E.2d 697 (Wright rule should not be applied retroactively); Mauricio, App., 683 N.E.2d 1329 (no error in failing to give LIO instruction of involuntary manslaughter in murder prosecution because there was no serious evidentiary dispute re intent); Walker, App., 678 N.E.2d 402 (where D was charged with rape & criminal deviate conduct as class A felonies, no error in giving LIO instructions for offenses as class B felonies); Sledge, App., 677 N.E.2d 82 (in prosecution for dealing cocaine, Tr. Ct. did not err in refusing D's instructions on LIOs of possession of cocaine, maintaining common nuisance & visiting common nuisance); Porter, App., 671 N.E.2d 152 (in attempted murder prosecution, Tr. Ct. properly instructed jury on lesser factually included offense of battery with deadly weapon); Brown, App., 659 N.E.2d 652 (Tr. Ct. erred in refusing LIO instructions on reckless homicide & involuntary manslaughter); Taylor, App., 659 N.E.2d 535 (in prosecution for attempted rape, Tr. Ct. correctly refused D's requested instruction on resisting law enforcement).

TITLE: Young v. State
INDEX NO.: D.9.g.2.e.
CITE: (1st Dist., 05-09-06), Ind. App., 846 N.E.2d 1060
SUBJECT: Refusal to give lesser included offense instruction - reversible error
HOLDING: Tr. Ct. abused its discretion when it failed to instruct jury on Class A Misdemeanor criminal trespass as a factually lesser included offense of residential entry. Although residential entry charge did not explicitly allege that D entered another person's apartment without a contractual interest in the property or consent, the charge did allege that D "did knowingly break or enter the dwelling of another." Thus, criminal trespass is a factually included lesser offense of residential entry. Higgins v. State, 783 N.E.2d 1180 (Ind. Ct. App. 2003). Distinguishing Higgins, Ct. concluded that a serious evidentiary dispute existed over whether D broke & entered victim's apartment or merely entered it. After listening to victim's testimony, a reasonable jury could have found that the attic access in victim's closet ceiling was either open or closed prior to D's entry into his apartment. Reversal is required if Tr. Ct. wrongly concludes that no serious evidentiary dispute exists & refuses to give an instruction on a lesser included offense. Champlain v. State, 681 N.E.2d 696 (Ind. 1997). Held, conviction reversed & remanded for retrial.

D. TRIAL

D.9. Jury trial

D.9.g.2.f. Reasonable doubt/presumption of innocence/burden of proof

TITLE: Abercrombie v. State
INDEX NO.: D.9.g.2.f.
CITE: (6/11/85), Ind., 478 N.E.2d 1236
SUBJECT: Instructions - finding upon proof of guilt
HOLDING: Ct. rejects D's contention that instruction (set forth below) invaded province of jury. Ct. finds D failed to object to instruction, approved in Taylor, 420 N.E.2d 1231. Held, review foreclosed.
INSTRUCTION GIVEN: You must first determine the guilt or innocence of the D, & if you have reasonable doubt as to guilt of the crime charged, then you must find the D not guilty. However, if you find that the State has proven beyond a reasonable doubt the material allegations of the charge against the D, then you must find the D guilty. Proper verdict forms will be furnished for your use.

RELATED CASES: Daniel, 582 N.E.2d 364 (similar instruction found not to deny D due process or presumption of innocence, when read in conjunction with instruction on presumption of innocence).

TITLE: Benefield v. State
INDEX NO.: D.9.g.2.f.
CITE: (1st Dist., 02-25-09), 904 N.E.2d 239 (Ind. Ct. App. 2009)
SUBJECT: Erroneous jury instruction
HOLDING: In forgery prosecution, Tr. Ct. erred in instructing jury that "Defraud means to make a misrepresentation of an existing material fact, knowing it to be false, or making it recklessly without regard to whether it is true or false." Instruction impermissibly instructed the jury that it could convict upon merely a "reckless" state of mind, when the forgery statute requires that the making, uttering, or possession of the written instrument in question be done with the "intent to defraud." Ind. Code 35-43-5-2(b). In other words, mere reckless disregard for the truth or falsity of the instrument is not enough; knowledge that the information in the instrument is false is required. To the extent instruction suggests that a person making a representation with a reckless disregard for its truth may have the intent to deceive, it is not a proper statement of law. Court concluded that even though jury was misinformed once regarding the proper mens rea for forgery, error was not fundamental because it was properly informed four times, including three times by Tr. Ct. Jury was also instructed that it was "to consider all the instructions as a whole" and not to "single out any certain sentence, or any individual point or instruction and ignore the others." Finally, while jury was instructed on legal meaning of term "intentionally," it was not given the legal meaning of "recklessly." The lack of any elaboration on concept of recklessness made it even less likely that jury was focused on it. Held, judgment affirmed. May, J., concurring on basis that she disagreed with majority's conclusion that instruction required State to prove an element beyond that required by the forgery statute.

TITLE: Cage v. Louisiana
INDEX NO.: D.9.g.2.f.
CITE: 498 U.S. 39 (1990)
SUBJECT: Reasonable doubt
HOLDING: Per curiam. Due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. Here, jury was instructed that to convict, guilt must be found beyond reasonable doubt but then equated reasonable doubt with "grave uncertainty" & "an actual substantial doubt." It further stated that what was required was a "moral certainty" that D was guilty. Court finds that words "substantial" & "grave," as commonly understood, suggests a higher degree of doubt than is required for acquittal under reasonable doubt standard. When those statements considered with reference to "moral certainty " (rather than evidentiary certainty), it is clear that reasonable juror could have interpreted instruction to allow finding of guilt based on degree of proof below that required by due process clause. Held, conviction reversed. All justices concur.

TITLE: Davidson v. State
INDEX NO.: D.9.g.2.f.
CITE: (12/27/82), Ind., 442 N.E.2d 1076
SUBJECT: Instruction - burden of proof; intent
HOLDING: An instruction identifying a conclusive presumption that shifts burden of proof (BOP) from state to D is unconstitutional. Sandstrom v. MT, (1979) 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 ("law presumes person intends ordinary consequences of voluntary acts"). Here, D argued intent instruction constituted fundamental error because it shifted BOP on intent from state to D. Ct. examines instruction & finds it only attempts to explain intent to jury & tells them they may infer from act & surrounding circumstances leading up to it that a person intends to accomplish necessary material & probable consequences of his/her act. Held, giving of instruction not fundamental error; murder conviction affirmed.

RELATED CASES: Jones, App., 805 N.E.2d 469, *sum. aff'd* in part and rev'd in part on other grounds, 835 N.E.2d 1002 (instruction stating that "opening an unlocked door constitutes breaking" created mandatory presumption, but error was harmless because breaking element of residential entry was indisputably established); Lampkins, App., 749 N.E.2d 83 (instruction which implied irrebuttable presumption that if D fired gun, law presumes intent, constituted fundamental error); Matthews, App., 718 N.E.2d 807 (Tr. Ct. deprived D of fundamental due process by instructing jury that "[t]he law presumes that an individual intends the consequences of his act."); Walker, 632 N.E.2d 723 (giving of Sandstrom instruction was fundamental error); Reid 529 N.E.2d 1309 (Sandstrom instruction was harmless error where defense was alibi & evidence clearly showed that offense was intentional); Fowler, 526 N.E.2d 1181 (Crim L 922(3); instruction that D had burden of proving voluntary intoxication defense beyond reasonable doubt was reversible error); Darby, 514 N.E.2d 1049 (instruction on presumption that all persons are sane & intend reasonable foreseeable consequences is not error; any misimpression was corrected by other instructions on intent & burden of proof); Van Orden, 469 N.E.2d 1153 (intent instruction is not contrary to Sandstrom).

TITLE: Estelle v. McGuire
INDEX NO.: D.9.g.2.f.
CITE: 502 U.S. 62 (1991)
SUBJECT: Battered child syndrome evidence - admissibility; instruction
HOLDING: Evidence of prior bodily injuries suffered by infant victim was relevant to show that her death was intentionally caused, & admission at her father's murder trial was proper despite lack of evidence connecting him to those prior injuries. Although 9th Cir. Ct. App. had granted habeas relief, based in part on ruling that admission of this evidence was improper under state law, federal habeas review is limited to deciding whether conviction violated federal constitution or laws. U.S. S.Ct. determines that admission of battered child syndrome evidence did not violate D's federal constitutional rights. Evidence of repeated, serious injuries serves to demonstrate that child did not receive those injuries accidentally. Intent was element of murder charge & D's plea of not guilty put each element in issue. Despite lack of evidence connecting prior injuries to D, evidence of those injuries was relevant to show intent of person who inflicted them, & admission did not violate due process. D also challenged jury instruction stating that evidence of prior injurious acts could be considered for purpose of determining whether it tended to show clear connection between those injuries & charged crime, "so that it may be logically concluded that if D committed other acts, he committed charged act as well." Because it contained word "if," it properly left to jury determination whether D committed prior acts, and thus whether evidence could be considered. D further argued that instruction allowed jury to base determination of guilt in part on prior bad acts/propensity evidence. Court found that restrictive language of instruction created situation parallel to use of prior bad acts to show intent, identity, motive, or plan. Majority concedes that instruction could have been clearer but found no reason able likelihood that the jury had applied the instruction in violation of the constitution. O'Connor & Stevens, JJ. DISSENT on instruction issue.

TITLE: McCowan v. State
INDEX NO.: D.9.g.2.f.
CITE: (3/25/2015), 27 N.E.3d 760 (Ind. 2015)
SUBJECT: Supreme Court clarifies proper instruction on presumption of innocence
HOLDING: In reviewing D's murder conviction, the Indiana Supreme Court announced a prospective rule, stating that upon a D's request, a Tr. Ct. must instruct a jury that the presumption of innocence continues throughout trial and that the jury should fit the evidence into the presumption. Specifically, the approved instruction states: "The presumption of innocence continues in favor of the D throughout the trial. You should fit the evidence to the presumption that the D is innocent if you can reasonably do so." In so ruling, the Court *clarified* Robey v. State, 454 N.E.2d 1221 1983), which set forth two rules for instructions on presumption of innocence, one a bright line rule that used the above-recited the language, the other a more flexible standard allowing for other instructions to cover the key elements of presumption of innocence. Without explicitly saying so, the Court disapproved the more flexible standard in Robey.

Here, the Tr. Ct.'s presumption of innocence instruction did not conform to the approved language; however, the Court affirmed the conviction because: a) the law was ambiguous when D was tried; b) the instruction was not inconsistent with then-existing precedent; and c) other instructions essentially advised the jury about the proper standard for the presumption of innocence. Held, transfer granted and judgment affirmed.

RELATED CASES: Littleton, 162 N.E.3d 531 (although it would have been "better practice" for Tr.Ct. to instruct using same words proscribed by McCowan, instructions here contained the same substantive information); Mardis, 72 N.E.3d 936 (Ind. Ct. App. 2017) (McCowan places burden on D, not Tr. Ct., to request jury instruction that presumption of innocence must be maintained throughout the course of trial).

TITLE: Hall v. State
INDEX NO.: D.9.g.2.f.
CITE: (2d Dist. 10/11/90), Ind. App., 560 N.E.2d 561
SUBJECT: Burden of proof (BOP) - mandatory presumption; .10 BAC
HOLDING: Instruction that jury "shall presume" that D had .10% BAC at time of operating vehicle, because he tested at least .10 within 3 hours after arrest, created mandatory presumption & impermissibly shifted BOP to D. Instruction given parallels Ind. Code 9-11-4-15(b), which was challenged in Chilcutt, App., 544 N.E.2d 856. In Chilcutt, Ct. held statute to be constitutional, because presumption is subject to rebuttal & there is rational connection between fact proved (.10 within 3 hours of arrest) & ultimate fact presumed (.10 at time of operating). Presumptions in criminal statutes are never considered conclusive & do not affect BOP, although they may impose burden of going forward to rebut presumption. Cts. have also long held that burden may be placed on D to establish facts which would mitigate culpability for offense. Chilcutt, *supra*. Statute does not create conclusive presumption or shift BOP to D. However, its language does appear to create mandatory, rather than permissive, presumption. Accordingly, although instruction faithfully tracks language of statute, it was subject to interpretation by jury that if D did not rebut or attempt to rebut presumption, jury was compelled to find presumed fact (.10 BAC at time of operating). U.S. S.Ct. has repudiated mandatory & mandatory rebuttable presumptions. Francis v. Franklin, (1984), 471 U.S. 307, 105 S.Ct. 1965. Instruction which embraces this statute must clearly advise jury that presumption is only permissive. Instruction given here did not do so. Held, reversed & remanded.

RELATED CASES: Disbro, App., 791 N.E.2d 794 (Tr. Ct. did not err in giving jury presumptive instruction based on Ind. Code 9-30-6-15(b) & Ind. Code 9-30-6-2, relating D's blood alcohol content level at time his chemical test was performed to his BAC level at time of his driving; instruction properly informed jury that presumption was rebuttable); Thompson, App., 646 N.E.2d 687 (Tr. Ct. properly instructed jury that BAC presumption was rebuttable, that jury was free to accept or reject presumption, even if no rebuttal evidence was introduced).

TITLE: Hampton v. State
INDEX NO: D.9.g.2.f.
CITE: (02-14-12), 961 N.E.2d 480 (Ind. 2012)
SUBJECT: Reasonable doubt instruction in circumstantial cases
HOLDING: Post-conviction court did not abuse its discretion by denying D's claim of ineffective assistance of appellate counsel for failing to raise Tr. Ct.'s refusal to give the "reasonable theory of innocence" jury instruction. To prevail on a claim of ineffective assistance of appellate counsel, it is not enough to show that counsel did not raise some potential issues; instead, D must show that the issue was one which a reasonable attorney would have thought availing. Here, in post-conviction proceedings, D raised one issue: that appellate attorney was ineffective for failing to raise Tr. Ct.'s refusal to instruct the jury that "where proof of guilt is by circumstantial evidence only, it must be so conclusive in character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable theory of innocence." The Supreme Court agreed that providing the jury with an additional cautionary instruction in evaluating circumstantial evidence not only supports but further enhances the concept of requiring proof beyond a reasonable doubt. It admonishes the jury to react lightly where the evidentiary gap between logical certainty and guilt is more tenuous. However, the language of the tendered instruction is confusing. Thus, when a Tr. Ct. determines that the D's conduct required for the commission of a charged offense, the actus reus, is established exclusively by circumstantial evidence, the jury should be instructed as follows:

> **In determining whether the guilt of the accused is proven beyond a reasonable doubt, you should require that the proof be so conclusive and sure as to exclude every reasonable theory of innocence.**

In this case, D's convictions were based primarily on D's DNA found in the deceased's vagina. Although this evidence is considered circumstantial, the law was unfavorable to D at the time of his trial and direct appeal. Thus, appellate counsel's failure to raise the issue did not constitute sub-standard performance. Held, transfer granted, Court of Appeals' opinion at 936 N.E.2d 1274 vacated, judgment affirmed.

RELATED CASES: Lewis, 34 N.E.3d 240 (Ind. Ct. App.. 2015) (failure to give "reasonable theory of innocence" instruction was not fundamental error where there was direct evidence of non-consensual sex along with DNA found on victim's anus); Griffin, 16 N.E.3d 997 (Ind. Ct. App.. 2014) (reasonable theory of innocence instruction properly rejected in accomplice liability case; direct evidence against the principals is attributable to D as the accomplice); Harper, 963 N.E.2d 653 (Ind. Ct. App.. 2012) (instruction requiring exclusion of every reasonable theory of innocence was not necessary because there was direct evidence of the actus reus of all of D's convictions).

TITLE: Harrington v. State
INDEX NO.: D.9.g.2.f.
CITE: (12/17/87), Ind., 516 N.E.2d 65
SUBJECT: Burden of proof - sudden heat
HOLDING: Tr. Ct. erred in failing to instruct jury that state had burden of proving that D did not shoot victim in sudden heat. D was charged with murder for shooting man D found in bed with D's girlfriend. Presence or absence of sudden heat was, for all practical purposes, only issue before jury. D sought instruction correctly explaining that burden of proof was upon state to negate presence of sudden heat. Holland, 454 N.E.2d 409. Tr. Ct. refused, informing counsel that same language was included in pattern jury instruction that he would give. No such instruction was given. Held, reversed & remanded. Givan & Pivarnik DISSENT.

RELATED CASES: Sanders, 7th Cir., 398 F.3rd 572 (federal habeas relief was granted in a case where jury instructions failed to properly identify prosecution's burden of proving absence of sudden heat in order to convict D of murder & attempted murder; see full review at K.3.b.4).

TITLE: Higgins v. State
INDEX NO.: D.9.g.2.f.
CITE: (4th Dist., 2-21-03), Ind. App., 783 N.E.2d 1180
SUBJECT: Jury instruction on breaking element of residential entry - permissive inference
HOLDING: In residential entry prosecution, Tr. Ct. did not violate D's rights under United States & Indiana Constitutions by instructing jury that "the opening of a locked door or unlocked door is sufficient" to establish that a breaking has occurred. D argued that instruction creates an impermissible mandatory presumption, relieving State of its burden of proof on "breaking" element of residential entry. Due Process Clause prohibits State from using evidentiary presumptions in a jury charge that have effect of relieving State of its burden of persuasion beyond reasonable doubt of every essential element of crime. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985). Distinguishing Walker, App., 769 N.E.2d 1162, *clarified* on *reh'g*, 779 N.E.2d 1158, disapproved at 797 N.E.2d 257), Ct. held that instruction created merely a permissive inference, not a mandatory presumption. Article I, § 19 of Indiana Constitution provides that in all criminal cases whatever, the jury shall have right to determine law & facts. A mandatory instruction that binds minds & consciences of jury to return a guilty verdict upon finding certain facts invades province of jury under Article I, § 19. Curran v. State, 675 N.E.2d 341 (Ind. Ct. App.. 1996). Even if instruction, standing alone, violated this provision & constituted mandatory instruction, reversal was not required because instruction was accompanied by contemporaneous instruction informing jury that it is judge of law & facts. Parker v. State, 698 N.E.2d 737 (Ind. 1998). Ct. noted that instructions stating that certain evidence "is" sufficient to establish element of crime should not be given in future, & that words or phrases such as "may," "may infer," "may consider," or "may look to" should be used in place of "is." Held, conviction affirmed; Vaidik, J., concurring.

RELATED CASES: White, App., 846 N.E.2d 1026 (no error in instructing jury that "breaking is proved by a showing that even the slightest force was used to gain unauthorized entry;" giving an impermissible mandatary instruction does not necessarily constitute reversible error where, as here it is accompanied by a contemporaneous instruction informing jury that it is judge of law & facts as provided in Art. 1, § 19).

TITLE: Holliday v. State
INDEX NO.: D.9.g.2.f.
CITE: (3rd Dist., 10-26-92), Ind. App., 601 N.E.2d 385
SUBJECT: Instruction did not create impermissible presumption
HOLDING: Ct. found burden of proof instruction, which stated inter alia, that [y]ou may, however, infer that every person intends the natural & probable consequences of his voluntary acts, unless the circumstances are such to indicate the absence of such intent. A determination of the D's intent may be arrived at by the jury from a consideration of the D's conduct & the natural & usual consequences to which such conduct logically & reasonably points. Where an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the State in the absence of justifying or excusing facts. did not constitute fundamental error. Unlike instruction condemned in Sandstrom v. Montana, (1979), 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, & Francis v. Franklin, (1985), 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344, instruction only created permissive inference where suggested conclusion was one that reason & common sense justified. Ct. also found final paragraph did not impermissively shift burden of production to D to disprove specific intent after State presented evidence that breaking & entering was done knowingly, relying on Warner, App., 577 N.E.2d 267, where identical instruction was upheld.

TITLE: Johansen v. State
INDEX NO.: D.9.g.2.f.
CITE: (3rd Dist., 1-24-97), Ind. App., 675 N.E.2d 1132
SUBJECT: Murder instruction - no fundamental error
HOLDING: In affirming denial of post conviction relief, Ct. held that following instruction did not constitute fundamental error:...In order to prove the charge of murder, as set forth in the charging information, the State must prove beyond a reasonable doubt that the D knowingly or intentionally inflicted...injuries upon victim which either caused her death or which contributed to the cause of her death.

Focusing upon phrase "as set forth in charging information," D argued that instruction permitted jury to find her guilty of murder without finding that she knowingly or intentionally killed victim. Although taken in isolation, instruction may be considered misleading concerning necessary intent, jury in this case was instructed on necessary mens rea to convict for murder & on lesser offenses. Any error contained in instruction was harmless when considered together with other instructions. Thus, D was not denied effective assistance of trial or appellate counsel. Held, judgment affirmed.

TITLE: Lee v. State
INDEX NO.: D.9.g.2.f.
CITE: (03-13-12), 964 N.E.2d 859 (Ind. Ct. App. 2012)
SUBJECT: Inadequate jury instruction on presumption of innocence - reversible error
HOLDING: In criminal confinement prosecution, Tr. Ct. abused its discretion by rejecting D's proposed instruction regarding presumption of innocence and witness credibility. D tendered following instruction, *citing* to Indiana Supreme Court's decision in Robey v. State, 454 N.E.2d 1221 (Ind. 1983):

> **Under the law of this state, a person charged with a crime is presumed to be innocent. This presumption continues in favor of the accused throughout the trial of this cause. To overcome the presumption of innocence, the [S]tate must prove the D guilty of each essential element of the crime charged, beyond a reasonable doubt.**
>
> **The D is not required to present any evidence to prove his/her innocence or to prove or explain anything.**
>
> **You should attempt to fit the evidence to the presumption that the D is innocent.**
>
> **If the evidence in this case is susceptible of two (2) constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the D, and the other to his/her innocence, it is your duty, under the law to adopt that interpretation which is consistent with the D's innocence, and reject that which points to his/her guilt.**

The Tr. Ct.'s instructions did not adequately instruct the jury on the presumption of innocence. In particular, Court did not find that an instruction was given to the jury adequately explaining the jury's duty to "reconcile the evidence upon the theory of the D's innocence if they could do so." To the extent that the jury was instructed that it had to find each element beyond a reasonable doubt and that it was up to each juror to decide whom to believe regarding conflicting testimony, Court found that such instructions do not satisfy Robey's dictate that a jury be specifically instructed, if requested by a D, "that the jury should fit the evidence to the presumption that a D is innocent..." Simpson v. State, 915 N.E.2d 511 (Ind. Ct. App.. 2009). Robey held that when such an instruction "which advises the jury that the presumption of innocence prevails until the close of trial, and that it is the duty of the jury to reconcile the evidence upon the theory of the D's innocence if they could not do so, must be given if requested. Held, convictions reversed and remanded for new trial.

RELATED CASES: Brakie, 999 N.E.2d 989 (Ind. Ct. App.. 2013) (unlike Lee, the instruction tendered by D did not include the advisement that the presumption of innocence prevails until the close of trial); Santiago, 985 N.E.2d 760 (Ind. Ct. App. 2013).

TITLE: Mardis v. State
INDEX NO.: D.9.g.2.f
CITE: (3/16/2017), 72 N.E.3d 936 (Ind. Ct. App. 2017)
SUBJECT: Defendant's burden to request presumption of innnocence instruction
HOLDING: In murder prosecution, trial court did not commit fundamental error in failing to sua sponte instruct the jury that it was required to maintain the presumption of innocence in favor of Defendant throughout the course of trial. Defendant is entitled to request this instruction and the trial court must give the instruction if requested. McCowan v. State, 27 N.E.3d 760 (Ind. 2015). But Defendant made no such request, and McCowan did not place burden on trial court to give this instruction. Held, judgment affirmed.

TITLE: Martin v. Ohio
INDEX NO.: D.9.g.2.f.
CITE: 480 U.S. 228 (1987)
SUBJECT: Due process - burden of proof; defenses
HOLDING: Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt (BRD) of every fact necessary to constitute the crime with which he is charged." In re Winship, (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. Because states are primarily responsible for preventing & dealing with crime, Court is reluctant to disturb state's definition of criminal conduct & procedure, including burden of producing evidence & allocating burden of persuasion. Patterson v. NY, (1977), 432 U.S. 197, 201-02, 97 S.Ct. 2319, 53 L.Ed.2d 281. In Patterson, Court held that where state had proved BRD, each element of murder, but placed on D burden of proving extreme emotional disturbance, which, if proved, reduced crime from murder to manslaughter. Here, D was charged with aggravated murder which was defined under Ohio law as "purposely & with prior calculation & design, caus[ing] the death of another." [Citation omitted.] D raised self-defense. Jury was instructed that to convict it had to find, in light of all evidence, that each element of murder was proven BRD & that burden, with respect to these elements, did not shift. Jury was instructed that to convict it had to be convinced that none of the evidence, whether offered by state or D, raised a reasonable doubt as to any element of murder. Jury was further instructed that it could acquit if it found by preponderance of evidence that D acted in self defense. Held, burden of proof on elements of offense was not unconstitutionally shifted to D. Instructions, when read as whole, are adequate to convey that all evidence, including evidence going to self-defense, must be considered in deciding whether state met its burden of proof. Powell, joined by Brennan & Marshall & joined in part by Blackmun, DISSENTS.

TITLE: Matheny v. State
INDEX NO.: D.9.g.2.f.
CITE: (3/7/2013), 983 N.E.2d 672 (Ind. Ct. App.. 2013)
SUBJECT: Instructions - presumption of innocence
HOLDING: Although the Tr. Ct. abused its discretion by refusing to give one of D's two tendered instruction that the jury "should attempt to fit the evidence to the presumption that the accused is innocent," the error was harmless. An 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 D's innocence if they could do so, must be given, if requested. In fact, the Tr. Ct.'s rejection of such an instruction may result in reversible error. Here, D tendered two proposed instructions including language that the jury should attempt to fit the evidence to the presumption that the accused is innocent, which the Tr. Ct. refused to give. In the first tendered instruction, the jury was also told: "If the evidence in this case is susceptible to two constructions or interpretations, each of which appears to be reasonable, and one of which points to the guilt of the D, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which is consistent with his innocence and reject that which points to his guilt." The Tr. Ct. properly refused to give this instruction because it was incomplete. In order to be complete, the instruction must have also included a second paragraph explaining that the rule only applies when both of the two possible opposing conclusions appear to be reasonable. To the contrary, D's second proposed instruction was a complete statement of the law and not covered by the other instructions, including the instruction that stated: "where proof of guilt is by circumstantial evidence only, it must be so conclusive and point so convincingly to the guilt of the accused that the evidence excludes every reasonable theory of innocence." But, when considering all the instructions as a whole and the evidence against the D, the failure to give the D's second proposed instruction was harmless. Held, judgment affirmed.

Note: On rehearing at 987 N.E.2d 1169, Court reiterated that jury was not instructed that the presumption of innocence prevails throughout the trial.

RELATED CASES: Brakie, 999 N.E.2d 989 (Ind. Ct. App.. 2013) (unlike Matheny, the instruction tendered by D did not include the advisement that the presumption of innocence prevails until the close of trial).

TITLE: McCorker v. State
INDEX NO.: D.9.g.2.f.
CITE: (10-16-03), Ind., 797 N.E.2d 257
SUBJECT: Jury instruction - accomplice liability; permissible mandatory presumption
HOLDING: Although in artfully worded, following instruction did not relieve State of its burden of proof by creating impermissible mandatory presumption, & was correct statement of law: "it is fundamental principle of law that each person is criminally responsible for actions of each other person which were probable & natural consequence of their common plan even though not intended as part of original plan."

In so holding, Ct. disapproved of decision in Walker v. State, 779 N.E.2d 1158 (Ind. Ct. App.. 2002), which granted post-conviction relief due to almost identical instruction. Ct. App.. decision in this case, as in Walker, hinged on Sandstrom v. Montana, 442 U.S. 510 (1979), which held that jury instruction that shifts burden to D violates due process under 14th Amendment. There was no Sandstrom violation here, despite "fundamental principle of law" language which unnecessarily highlighted this instruction over others. Ideally, instruction would also note that it is State's burden to prove beyond a reasonable doubt that D knowingly & intentionally aided, induced, or caused the Co-D to commit unlawful acts. However, Ct. concluded that a general instruction on State's burden & other instructions given in this case lessened this problem.

Ct. expressed concern that instruction used many of the same words that were used in unconstitutional instruction disapproved in Sandstrom. However, Sandstrom did not outlaw "mandatory presumptions," but outlawed mandatory presumptions that advise a jury that the State has met its burden of proof on an element of the charged offense. Here, instruction did not instruct jury to presume or otherwise find intent from the consequences of D's acts. Rather, it instructed jury that it could impose liability or guilt if it found that D "knowingly aided, supported, helped or assisted" the co-D in the charged crimes. While S.Ct. directed Tr. Ct.s. to no longer use this instruction, the Ct. found it a correct statement of the law & noted it had beneficial language to D to effect that mere presence at scene of crime & knowledge that it was being committed were not enough to establish his participation. Held, transfer granted, Ct. App..' memorandum decision reversed & judgment of Tr. Ct. affirmed.

RELATED CASES: Specht, App., 838 N.E.2d 1081 (while not all four of instructions relating to accomplice liability mentioned the required *mens rea*, when read as a whole, instructions put jury on sufficient notice that it was required to find that D knowingly or intentionally aided accomplice in commission of crimes in order to find him guilty of crimes as an accomplice); Pinkins, App., 799 N.E.2d 1079 (Tr. Ct. did not commit fundamental error in giving accomplice liability instruction disapproved in McCorker).

TITLE: Palmer v. State
INDEX NO.: D.9.g.2.f.
CITE: (06/18/91), Ind., 573 N.E.2d 880
SUBJECT: Burden of proof - voluntary manslaughter; sudden heat
HOLDING: In D's murder trial, counsel's failure to object to Tr. Ct.'s lesser included offense (LIO) instruction on voluntary manslaughter which advised jury that sudden heat was element of that offense, constituted ineffective assistance of counsel & therefore warranted reversal. D was convicted of murder, & conviction was upheld on direct appeal, Palmer, 425 N.E.2d 640. On PCR, D challenged for first time, LIO instruction listing sudden heat as element of voluntary manslaughter. Jury was also instructed that state must prove beyond reasonable doubt every essential element of charged offense, & was informed that burden of proof is on state alone & never shifts to D.

After denial of PCR, Ct. App. found that taken together, these instructions create impression that jury must find proof of sudden heat beyond reasonable doubt, Palmer, Ind. App., 553 N.E.2d 1256. Crux of D's contention was that jury was misled as to quantum of evidence necessary to reduce murder to manslaughter. Ct. found sudden heat is mitigating factor with regard to conduct which would otherwise constitute murder, & that once issue of sudden heat has been injected, burden is on state to negate existence of sudden heat beyond reasonable doubt. Although Ct. App. held jury was improperly instructed, & error was fundamental, warranting PCR, S.Ct. reversed, Palmer, 563 N.E.2d 601.

On petition for rehearing, however, S.Ct. determined that D's counsel's failure to object to & appeal from incorrect instruction rendered assistance ineffective, & summarily reaffirmed Ct. App. decision granting post-conviction relief, Givan, J., dissenting.

RELATED CASES: Sanders, 7th Cir., 398 F.3rd 572 (federal habeas relief was granted in a case where jury instructions failed to properly identify prosecution's burden of proving absence of sudden heat in order to convict D of murder & attempted murder; see full review at K.3.b.4); Moore, App., 649 N.E.2d 686 (erroneous voluntary manslaughter instruction harmless error); Bane, 587 N.E.2d 97 (card at K.3.b.4); Joshua, 553 N.E.2d 1202.

TITLE: Powers v. State
INDEX NO.: D.9.g.2.f.
CITE: (7/13/89), Ind., 540 N.E.2d 1225
SUBJECT: Burden of proof - affirmative defenses
HOLDING: Tr. Ct. committed fundamental error in instructing jury that D had burden of proving defense of voluntary intoxication beyond reasonable doubt. D was charged with burglary, & at trial he presented evidence that he was intoxicated at time of offense. D contended that it was impossible for him to form necessary mens rea to commit crime. Once affirmative defense of intoxication is raised by D, state has burden to prove that D was not so intoxicated as to negate ability to form *mens rea*. Raising of affirmative defense does not relieve state of its burden of proof. Smith, 249 N.E.2d 493. Instruction placing burden of proof on D was fundamental error. Held, reversed & remanded.

RELATED CASES: Seeley, App., 678 N.E.2d 1137 (fundamental error found).

TITLE: Reed v. State
INDEX NO.: D.9.g.2.f.
CITE: (4/7/86), Ind., 491 N.E.2d 182
SUBJECT: Instructions - "greatest weight of the evidence"
HOLDING: Tr. Ct. did not err in giving "greatest weight of the evidence" instruction [set forth in opinion]. Here, D objected that instruction is similar to "preponderance of the evidence" instruction in a civil case; therefore, instruction confused jury as to "proof beyond a reasonable doubt" standard. Ct. finds instruction does not discuss standard of proof required for conviction. It merely stresses truthfulness of evidence is more important than quantity of evidence. Construing instructions as a whole, Ct. finds jury was clearly instructed as to proper standard of proof. Held, no error.

TITLE: Rogers v. State
INDEX NO.: D.9.g.2.f.
CITE: (4/21/87), Ind., 506 N.E.2d 481
SUBJECT: Instructions - burden of proof; motive
HOLDING: Although instruction that "state is not required to prove that accused had motive - that is, some understandable reason - for committing crime with which he is charged" concerned subject law prefers to leave to summation of counsel, mistake in giving it does not warrant reversal. Here, D approached cashier, stabbed her, dropped knife, & fled. D was apprehended. Victim testified she did not know D & D said nothing to her. Held, conviction affirmed.

TITLE: Simmons v. State
INDEX NO.: D.9.g.2.f.
CITE: (11/14/83), Ind. App., 455 N.E.2d 1143
SUBJECT: Instruction - reasonable doubt
HOLDING: Giving of reasonable doubt instruction, specifically disproved of in US v. Shaffner, (CA7 1975) 524 F.2d 1021, was not error where evidence of D's guilt was of sufficient magnitude that jury could not have been affected by instruction. Here, Ct. finds D waived any error by objecting on one ground at trial & arguing a different issue on appeal. CA7 opinion did not require reversal. Held, conviction affirmed. INSTRUCTION GIVEN: "While the State must, in a criminal case, prove the D guilty beyond a reasonable doubt, it need not be proven beyond all possible doubt for such proof could seldom, if ever, be produced."

RELATED CASES: Hansford, 490 N.E.2d 1083, (Crim L 778(2); Tr. Ct. properly rejected D's tendered instruction that it is a fundamental rule of law that all doubts must be resolved in favor of D; instruction was incorrect statement of law, *citing* Lewis, 342 N.E.2d 859); Bell, 610 N.E.2d 229, (Instruction using terms "fair" & "actual" doubt to describe reasonable doubt did not impermissibly require too great degree of doubt pursuant to Cage v. Louisiana, (1990), 498 U.S., 111 S.Ct. 328, 112 L.Ed.2d 339.).

TITLE: Simmons v. State
INDEX NO.: D.9.g.2.f.
CITE: (12/20/2013), 999 N.E.2d 1005 (Ind. Ct. App.. 2013)
SUBJECT: Jury adequately instructed on presumption of innocence
HOLDING: Tr. Ct. did not abuse its discretion by instructing jury only in preliminary instructions and not again in final instructions that the presumption of innocence continues throughout the trial. In final instruction number 28, jury was told "You should attempt to fit the evidence to the presumption that the D is innocent and the theory that every witness is telling the truth." As it is "throughout the trial" that the jury receives evidence, Court concluded that instruction 28 covered, in substance, the instruction that the presumption of innocence continues throughout the trial. Held, judgment affirmed; Shepard, Sr. J., concurring, believed the jury instructions given by the court were erroneous, but it did not rise to level not reversible error, “particularly in light of the fact that the full three-part instruction was given during preliminary instructions.”

TITLE: Sims v. State
INDEX NO.: D.9.g.2.f.
CITE: (7/26/84), Ind., 466 N.E.2d 24
SUBJECT: Instruction - "mere subsidiary evidence"
HOLDING: Tr. Ct. did not err in instructing jury that "reasonable doubt applies only to ultimate question of D's guilt or innocence & the essential facts which establish it, & the mere fact that some subsidiary matters are but imperfectly proved does not make it the duty of the jury to acquit." Here, D contends instruction was confusing & reduced significance of elements of crime. Identical instruction was approved in Gramm, 376 N.E.2d 1120. Tr. Ct. gave several other instructions informing jury that state must prove every element of crime beyond a reasonable doubt. Held, no error.

RELATED CASES: Burris, 465 N.E.2d 171.

TITLE: Smith v. Horn
INDEX NO.: D.9.g.2.f.
CITE: 120 F.3d 400 (3rd Cir. 1997)
SUBJECT: Jury Instructions - Intent; Burden of Proof
HOLDING: Flawed instructions on intent given at capital murder trial relieved state of its burden to prove accused's intent to kill, and thus deprived him of due process. D and co-D were charged with committing robbery that left one person dead from gunshot. Evidence tended to prove that shot was fired by D, rather than co-D, but state did not attempt to prove that definitively. D was convicted of first-degree murder and conspiracy to commit murder (although not first-degree murder) and sentenced to death. Tr. Ct. gave homicide instruction that told jury that if they found that D and co-D were accomplices, it did not matter who pulled the trigger. Instruction on murder described first- degree murder as a killing committed intentionally/with malice, and told jury that if it found these elements established beyond reasonable doubt, on theory that "one was the perpetrator and the other the accomplice," they could find D guilty of first-degree murder. Court's conspiracy instruction told jury it could convict D if it found that he entered into agreement to commit robbery which in turn led to killing. Finally, court instructed jury that distinction between first and second degree murder was whether perpetrator "or his accomplice" acted with malice/intent. Fair reading of these instructions, taken as a whole, permitted jury to convict D of first-degree murder without finding that he had specific intent to kill. Federal court is not bound by state supreme court's determination that these instructions did not mislead jury. State court's misapplication of its own law generally does not raise constitutional claim. However, when that misapplication has effect of depriving person of life, liberty, or property without due process, resulting federal constitutional error can be corrected by federal habeas court. By removing burden of proof from state as to intent element of first-degree murder, these instructions violated due process.

TITLE: Smith v. State
INDEX NO.: D.9.g.2.f.
CITE: (4-29-97), Ind., 681 N.E.2d 687
SUBJECT: OWI jury instruction - no fundamental error
HOLDING: S.Ct. granted transfer of divided Ct. App..' opinion in Smith v. State, 674 N.E.2d 217 (Ind. Ct. App. 1996), which held that following instructions impermissibly shifted burden of proof to D & constituted fundamental error: Evidence that there was ten-hundredths percent (.10%) or more, by weight of alcohol in [Smith's] blood constitutes prima facie evidence that he was intoxicated.

You are instructed that prima facie evidence is evidence which is sufficient to prove a fact standing alone, until contradicted or overcome by evidence to the contrary.

D did not object to these instructions at trial. S. Ct. agreed with Judge Staton's dissenting opinion, which characterized any error in instructions as "innocuous." Moreover, Tr. Ct. did not err in instructing jury that it could relate results of D's blood alcohol test back to time he operated vehicle if jury found test was given within three hours of that time. Ind. Code 9-30-6-2, 15. Held, transfer granted & Tr. Ct. affirmed.

TITLE: Spradlin v. State
INDEX NO.: D.9.g.2.f.
CITE: (04/15/91), Ind., 569 N.E.2d 948
SUBJECT: Instructions - reasonable doubt/presumption of innocence
HOLDING: While finding it unnecessary to decide issue because of error on attempted murder instruction (see Spradlin at K.2.b), S.Ct. stated that following instruction which was similar to that previously upheld in Heald Ind., 492 N.E.2d 671, tended to be prejudicial & should be avoided in future: "[t]he rule of law which clothes every person accused of the commission of crime with the presumption of innocence, & imposes upon the State the burden of establishing guilt beyond a reasonable doubt, is not intended to aid any one [sic] who is actually guilty of the commission of the crime to escape from just & merited punishment, but it is a humane provision of the law, which is intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly accused & punished."

RELATED CASES: Malone, App., 660 N.E.2d 619 (although presumption of innocence instruction was not "ideal," Tr. Ct. did not commit fundamental error; taken together, instructions fully informed jury of nature/operation of presumption of innocence); Hancock, App., 585 N.E.2d 1371 (instruction stating proof need not be beyond all possible doubt because such proof could seldom be produced, again disapproved, but error was harmless); Timmons, 584 N.E.2d 1108 (instruction not error); Cheney, 486 N.E.2d 508 (Crim L 768 (1); instruction reminding jury that erroneous acquittal breeds contempt of law among criminal classes & weakens safeguards of society was approved in Murray, 442 N.E.2d 1012 & is upheld here); Golden, 485 N.E.2d 51 (Crim L 822(16); instruction that "mere possibility D may be innocent does not raise reasonable doubt" was proper, *citing* Choate, 462 N.E.2d 1037, Harrison, 382 N.E.2d 920, & Carter, 361 N.E.2d 1208).

TITLE: Strong v. State
INDEX NO.: D.9.g.2.f.
CITE: (5th Dist., 04-27-94), 633 N.E.2d 296
SUBJECT: Reasonable doubt instruction not fundamental error
HOLDING: Instruction defining reasonable doubt as "fair, actual, & logical doubt, was not erroneous & Tr. Ct.'s attempt to define reasonable doubt at all, did not rise to level of fundamental error. Ct. distinguished instruction, contained verbatim in opinion, from that condemned in Cage v. Louisiana, (1990), 498 U.S. 39, by finding words "fair, actual & logical doubt" did not suggest too high a standard of doubt for acquittal, & that words "substantial" & "grave" (used in Cage) are different definitionally from "reasonable," while fair, actual & logical are synonymous with reasonable. Ct. also rejected argument that equating reasonable doubt with juror's own decision-making trivialized concept. Ct. acknowledged criticism of this kind of language, but declined to find fundamental error, & noted language was very similar to that in pattern instruction that has been approved by Ind. S.Ct. See, also, Coleman, App., 630 N.E.2d 1376, finding following instruction was not fundamental error. A reasonable doubt is an actual & substantial doubt that arises in the mind after a fair & impartial consideration & weighing of all the evidence & circumstances in the case... [I]t is your personal duty to vote for conviction as long as you are convinced beyond a reasonable doubt of the D's guilt as charged. D did not object to instruction & giving of mandatory instructions concerning duty to convict is not fundamental error, so any error in second emphasized section was waived. As to section equating "reasonable doubt" to "substantial doubt". Based on Cage v. Louisiana, (1990), 498 U.S. 39, instruction may have been erroneous, but error harmless because of overwhelming evidence of guilt. Hoffman, J., dissenting. Dissent questions opportunity to object, and discusses reasonable doubt standard, & finds that because instruction misstated law, portion regarding duty to convict was more erroneous.

TITLE: Sturgeon v. State
INDEX NO.: D.9.g.2.f.
CITE: (1st Dist. 07/31/91), Ind. App., 575 N.E.2d 679
SUBJECT: Jury instruction, impermissible mandatory presumption
HOLDING: Instruction in Operating Motor Vehicle While Intoxicated (OWI) trial which fails to inform jury that it has choice or might infer desired conclusion, & which nowhere informs jury that presumption of blood alcohol content (BAC) at time of operation is rebuttable, is erroneous because it is both mandatory & conclusive. Ct. noted that instruction faithfully tracking language of Ind. Code 9-11- 4-15 did not create conclusive presumption. However, if unaccompanied by other advisement that jury was free to accept or reject presumption if D didn't rebut it, it could constitute error on that basis. Hall, App., 560 N.E.2d 561. Ct. found instruction here even more erroneous than that in Hall because it departed from statutory language in that nowhere in instruction or charge as whole was jury informed that presumption of BAC at time of operation of vehicle was rebuttable. Additionally, instructions taken as whole required jury to find both presumed fact, BAC level at time of operation, & element of intoxication, from proof of BAC level at time of testing. Error was not harmless due to inconclusive nature of other evidence. Held, judgment reversed & remanded.

RELATED CASES: Carter, App., 734 N.E.2d 600 (instruction which stated that jury could find D guilty even if evidence did not establish that he was operating in manner other than ordinary prudent & cautious person was not unconstitutional mandatory instruction but should have been worded more clearly); Shaw, App. 595 N.E.2d 743 (Ct. found instruction did not suffer from conclusive presumption found erroneous in Sturgeon); Regan, App., 590 N.E.2d 640 (Instructions similar to those in Sturgeon not erroneous because other instructions clearly required burden of proof to remain with State, & stated that presumption was disputable, etc.).

TITLE: Sullivan v. Louisiana
INDEX NO.: D.9.g.2.f.
CITE: 508 U.S. 275 (1993)
SUBJECT: Jury instructions - reasonable doubt; harmless error
HOLDING: Jury instruction misleading jury regarding reasonable doubt standard is not subject to harmless error analysis. Because jury was wrongly instructed, it did not reach conclusion that D was guilty beyond reasonable doubt. Thus, there was no jury verdict within meaning of 6th amend and reviewing court cannot analyze effect this instruction had on jury verdict.

RELATED CASES: Vanwanzeele, 910 N.E.2d 240 (Ind. Ct. App. 2009) (erroneous reasonable doubt instruction that failed to inform jury that reasonable doubt can be based on lack of evidence or from conflict in evidence was harmless).

TITLE: Thomas v. State
INDEX NO.: D.9.g.2.f.
CITE: (4th Dist. 10/28/82), Ind. App., 442 N.E.2d 700
SUBJECT: Instruction - standard of proof; fundamental error
HOLDING: Two characteristics of fundamental error cases: (1) proceedings below as a whole were void of any indicia of fairness; (2) errors were result of mistake/misconduct by Tr. judge in exercise of affirmative duties. Pedigo, App., 412 N.E.2d 132. Here, effect of jury instruction was to change standard of proof from beyond a reasonable doubt to preponderance of evidence. Fundamental due process requires that a criminal charge be proven beyond a reasonable doubt (In re Winship, (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368); therefore, proceedings below lacked any indicia of fairness. Error clearly resulted from mistake by Tr. judge in exercise of affirmative duty. Cf. Lacy, 438 N.E.2d 968 (failure to instruct on elements of offense is fundamental error). Held, fundamental error; denial of PCR reversed. INSTRUCTION GIVEN: "By burden of proof is meant that, considering all of the evidence in the cause, the evidence tending to establish a given fact must outweigh [sic] the evidence to the contrary. If, after considering all the evidence in the cause, you shall find that the evidence upon any question is evenly balanced, you should answer such question against the party who has the burden of proof on that issue, for in such a case there would be no preponderance in favor of such proposition."

TITLE: Turner v. State
INDEX NO.: D.9.g.2.f.
CITE: (6-24-97), Ind., 682 N.E.2d 491
SUBJECT: Presumption of innocence instruction - no fundamental error
HOLDING: Although following instruction was erroneous & has been disapproved, D's failure to object waived any claim of error on appeal: In clothing those charged with crime with the presumption of innocence, the law does not contemplate that thereby the guilty should be shielded from merited punishment. Its object is to protect the innocent, so far as human agencies can, from the effects of unjust verdicts. The effect of this presumption is to withhold punishment from one charged with crime until all facts necessary to constitute the offense charged have been proved to that degree of certainty fixed by law as beyond reasonable doubt.

Instruction is slightly different from that disapproved in Spradlin v. State, 569 N.E.2d 948 (Ind. 1991), but both contain potential for insidious interference with right to fair trial, as jury receiving either instruction is likely to infer that presumption of innocence applies only to innocent Ds, & not those actually guilty. Heald v. State, 492 N.E.2d 671 (Ind. 1986) (Dickson, J., dissenting). Ct. recommended that in future no such instruction be used. However, in this case, there was no indication that D was denied right to due process or that any type of egregious error occurred at trial. Held, conviction affirmed.

TITLE: Vaughan v. State
INDEX NO.: D.9.g.2.f.
CITE: (2d Dist. 2/28/83), Ind. App., 446 N.E.2d 1
SUBJECT: Instruction - presumption of innocence
HOLDING: Tr. Ct. did not err in refusing D's tendered instruction that presumption of innocence remains with D throughout trial, step by step. Here, D tendered detailed instruction (set forth in opinion). D contends instruction was mandated by Farley, (1891) 127 Ind. 419. Ct. finds instructions given by Tr. Ct. sufficiently covered presumption of innocence. Held, no error. DISSENT by Sullivan finds precedent of Farley & Ridge, (1923) 192 Ind. 639, binding. Sullivan would hold Tr. Ct.'s refusal to give D's tendered instruction reversible error.

RELATED CASES: Woods, 484 N.E.2d 3 (Crim L 778(3), 788; Tr. Ct. properly rejected D's request to re-read preliminary instruction re presumption of innocence/D not required to prove/explain anything as final instruction where D testified, thus rendering instruction misleading); Taylor, 468 N.E.2d 1378 (pattern instructions deemed as thorough/even better than D's, all set forth in opinion); Sanders, 466 N.E.2d 424 (adopting Vaughan).

TITLE: Victor v. Nebraska
INDEX NO.: D.9.g.2.f.
CITE: 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)
SUBJECT: Jury Instructions - Reasonable Doubt Definition
HOLDING: Jury instructions that defined "reasonable doubt" with references to "moral certainty," "substantial doubt," & "strong probabilities," did not, in light of context of instructions taken as whole, create reasonable possibility that jury applied standard of guilt below that which is required by due process clause. In Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), S.Ct. struck down reasonable doubt instruction containing above-quoted language. However, problem with Cage instruction was insufficient context from which jurors could interpret language to arrive at proper understanding of reasonable doubt. Instructions in instant case provide that context, i.e., by further defining doubt precluding moral certainty as doubt which would cause reasonable person to hesitate to act, & by contrasting substantial doubt with mere fanciful doubt. Majority writes that language has evolved such as to render these terms confusing on their own, & consequently writes that they cannot countenance use of such words. However, in light of total context provided for jurors, court cannot say that challenged instructions were constitutionally deficient.

TITLE: Walker v. State
INDEX NO.: D.9.g.2.f.
CITE: (Ind., 04-08-94) (on petition for rehearing), 632 N.E.2d 723
SUBJECT: Sandstrom error fundamental and reversal required
HOLDING: On rehearing & reversal of prior decision at 621 N.E.2d 627, regarding Sandstrom v. Montana, 442 U.S. 510, error, Ct. found fundamental error & violation of due process rights had occurred, requiring vacation of convictions for murder. Original decision established that if Sandstrom error occurred it was fundamental error but found that instructions as whole did not create unconstitutional presumption condemned in Sandstrom.

D was tried for two counts of first-degree murder & one count of first-degree murder in perpetration of robbery (which would now be two counts of murder & one of felony murder). Instruction stated: "Every man is presumed to intend the natural consequences of his acts, and where one does an illegal act, he is responsible for all the consequences that legitimately flow therefrom." In concurrence & dissent to original decision, DeBruler, & Dickson, JJ., agreed that error should be reviewed as fundamental, but found error had occurred because other instructions did not clarify State's burden to prove intent. In decision on rehearing, much of earlier dissent was adopted verbatim as majority decision, & two decisions should be read in conjunction with each other. Held, felony murder conviction affirmed, Tr. Ct. ordered to modify judgment to reflect one single life sentence for felony murder, Givan, J., dissenting.

RELATED CASES: Williams, App., 782 N.E.2d 1039 (unlike Walker, another instruction given by Tr. Ct. stated that some conduct of an affirmative nature is required for D to be found criminally liable & that D's knowledge of & participation in crime must be proven beyond reasonable doubt; taken together, instructions required that intent to participate must be proven); Geiger, App., 721 N.E.2d 891 (other instructions did not cure Sandstrom error); Matthews, App., 718 N.E.2d 807 (where D's ability to determine whether victim could consent was at issue, instruction that D can be presumed to know consequences of his actions reversible error); Winegeart, 665 N.E.2d 893 (specific-intent instruction did not mandate that jury employ any particular presumptions but merely permitted it to draw appropriate inferences from evidence).

TITLE: Wheeler v. United States
INDEX NO.: D.9.g.2.f.
CITE: 930 A.2d 232 (D.C. 2007)
SUBJECT: Instruction on fingerprints invaded province of jurors
HOLDING: District of Columbia Court of Appeals held a Tr. Ct.'s instruction to a jury that a lack of fingerprint evidence cannot, as a matter of law, constitute reasonable doubt impermissibly invaded the province of the jurors to weigh the evidence against the reasonable-doubt standard. The portion of the instruction prohibiting a finding of reasonable doubt based on the lack of fingerprints invaded the province of the jury, thereby infringing on D's Sixth Amendment right to a jury trial and his due process right to be convicted only upon proof beyond reasonable doubt. Although Court reversed D's conviction on the basis of the erroneous instruction prohibiting acquittal for lack of fingerprint evidence, it also found fault with the instruction telling the jury that the State had no duty to collect fingerprints. Court noted that the purpose of a "no duty" instruction is to counter an inference that the State deliberately failed to collect evidence that would have undermined its case. Therefore, such an instruction can be appropriate when the defense has argued that jurors should draw an inference against the government from its failure to gather certain evidence. However, no such argument was made by defense in this case.

TITLE: Winegeart v. State
INDEX NO.: D.9.g.2.f.
CITE: (5-24-96), Ind., 665 N.E.2d 893
SUBJECT: Reasonable doubt instruction - no reversible error
HOLDING: Although jury instruction which used "moral certainty" phrase to explain reasonable doubt was "less effective" than Indiana S.Ct. would prefer, it was not so deficient as to be constitutionally defective. Ct. disapproved of continued use of instruction in future but found no reasonable likelihood that jurors in this case applied instruction to convict D upon less proof of guilt than that required by Due Process Clause. *Citing* numerous studies & recommendations from academic & judicial authorities, Ct. also acknowledged shortcomings in Indiana Pattern Jury Instruction 1.15 & in various other reasonable-doubt explanations commonly in use. Three Justices endorsed for use in Indiana Cts. following reasonable-doubt instruction proposed by Federal Judicial Center: [T]he government has the burden of proving the D guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the D's guilt. There are very few things in this world that we know with absolute certainty, & in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the D is guilty of the crime charged, you must find [him/her] guilty. If on the other hand, you think there is a real possibility that [he/she] is not guilty, you must give [him/her] the benefit of the doubt & find [him/her] not guilty.

Ct. authorized & recommended, without mandating, that Indiana trial Cts. instruct regarding reasonable doubt by giving above instruction. Held, transfer granted, Ct. App. decision at 644 N.E.2d 180 vacated & Tr. Ct. affirmed. DeBruler, J., & Shepard, C.J., concurring, found Indiana Pattern Jury Instruction preferable.

RELATED CASES: Williams, 724 N.E.2d 1093 (Ct. rejected argument that instruction usurped presumption of innocence & violated D's right to due process); Young, 696 N.E.2d 386 (instruction sufficiently establishes requisite degree of certainty); Hendrickson, App., 690 N.E.2d 765 (in light of Winegeart, Ct. could not conclude that Federal Judicial Center's pattern instruction violates Art. 1, §9 of Ind. Constitution); Tobias, 666 N.E.2d 68 (claim of error in reasonable doubt instruction was procedurally defaulted because of D's failure to assert timely, proper objection at trial).

D. TRIAL

D.9. Jury trial

D.9.g.2.g. Defenses (see, also L categories)

TITLE: Burns v. State
INDEX NO.: D.9.g.2.g.
CITE: (1st Dist. 7/17/90), Ind. App., 556 N.E.2d 955
SUBJECT: Voluntary intoxication instruction - leaving scene of property damage accident
HOLDING: Tr. Ct. erred in refusing D's tendered instruction on defense of voluntary intoxication, as to offense of leaving scene of property damage accident. D was charged with leaving scene of property damage accident, driving while suspended, & driving while intoxicated. Tr. Ct. refused D's tendered instruction on voluntary intoxication as defense, & D challenges this on appeal. Factors Ct. considers on appeal include (1) whether tendered instruction correctly states law; (2) whether evidence supports giving instruction; & (3) whether substance of tendered instruction was covered by other instructions given. Hughes, 546 N.E.2d 1203. Where D is charged with leaving scene of personal injury accident, under Ind. Code 9-4-1-40, knowledge that such accident has occurred is element of offense. Micinski, 487 N.E.2d 150. Prosecution for leaving scene of property damage accident, under same statute, also requires proof of knowledge. Any factor which serves to negate existence of mens rea must be considered by trier of fact, & voluntary intoxication may be such factor. Terry, 465 N.E.2d 1085. To negate mens rea, intoxication must be of such degree as to deprive D of power to deliberate or to form necessary state of mind, & this is question of fact for trier of fact. Melendez, 511 N.E.2d 454. Because D's knowledge that property damage had occurred was element of offense, instruction on effect of voluntary intoxication as to that element was correct statement of law. Further, evidence supported giving of instruction, & substance of instruction was not otherwise covered. Held, reversed & remanded for new trial on this charge.

RELATED CASES: Hayden, 19 N.E.3d 831 (Ind. Ct. App.. 2014) (evidence didn't support D's instruction regarding "dwelling" because even though victim was ill and had not lived at home for one year, there was evidence he might return to his home once released from hospital).

TITLE: Bailey v. State
INDEX NO.: D.9.g.2.g.
CITE: (4th Dist., 12-07-92), Ind. App., 603 N.E.2d 1376
SUBJECT: Giving entrapment instruction not fundamental error
HOLDING: In trial for dealing cocaine within 1,000 feet of school, it was not fundamental error for Tr. Ct. to allow defense counsel to insert entrapment instruction in case where no evidence of entrapment was presented. Ct. rejected D's argument that giving instruction where no evidence was presented took away his presumption of innocence by admitting guilt to jury. Instruction did not state D admitted charged conduct. Because decision to seek instruction was matter of strategy, doing so was not ineffective assistance of counsel, absent showing that tactical decision altered outcome of case. This was true even though upon giving instructions, trial judge stated that he was giving entrapment instruction primarily at D's request. Held, conviction affirmed.

TITLE: Battles v. State
INDEX NO.: D.9.g.2.g.
CITE: (11-24-97), Ind., 688 N.E.2d 1230
SUBJECT: Refusal to instruct on defense of accident - no error
HOLDING: In murder prosecution, Tr. Ct. did not err in finding no evidentiary basis for D's tendered instruction on defense of accident. Evidence on which D relied to support instruction was his out-of-Ct. statement to police that he intended to place "sleeping hold" on victim, & physician's testimony that victim's death from manual strangulation could have resulted from misapplication of martial arts technique known as "shime waza." Neither D's statement nor physician's testimony constituted substantive evidence tending to prove elements of defense of accident set forth in instruction. D is not entitled to instruction on defense of accident when only support for instruction was D's own out of Ct. self-serving statement & medical evidence introduced at trial showed that victim's death was not accidental. Clemens, 610 N.E.2d 236. Extreme force exerted upon victim's neck & described by physician tends to negate any inference that D's conduct was unintentional, or that "sleeper hold" was not applied recklessly, carelessly, or in wanton disregard of consequences. Ct. also found that Tr. Ct. did not err in refusing D's tendered instruction regarding voluntariness of his statement to police. Held, no error.

TITLE: Clark v. State
INDEX NO.: D.9.g.2.g.
CITE: (4-25-23), Ind. Ct. App., 209 N.E.3d 444
SUBJECT: No error in denying request for jury instruction on defense of entrapment
HOLDING: Predator Catchers, Inc. ("PCI") is a 501(c)(3) organization founded by Eric Schmutte. PCI's mission is "exposing men and women that are looking to engage in sexual activity with minors." To expose child predators, PCI uses images from adult volunteers to create decoy online profiles and pose as minors online. PCI then posts online videos of PCI confronting individuals who solicit sex from the decoy profiles. Defendant, a police officer with the Portland Police Department, messaged a PCI decoy named "Mackenzie" operated by Schmutte. Defendant and the decoy communicated over text and chat for several weeks. When the decoy told Defendant she was 14, Defendant replied instructing her to delete the message and say she was 18. Defendant sent sexually explicit messages to the decoy. He arranged to meet "Mackenzie" at an Olive Garden. When Defendant arrived, Schmutte and several PCI volunteers confronted him and live-streamed the encounter on Facebook. Schmutte and the volunteers stated several times that Defendant was free to leave, but he chose to speak with them for several minutes in the Olive Garden parking lot. A detective with the Avon police department saw the live stream and began his own investigation. Schutte turned over to the detective the communications between Defendant and "Mackenzie." Defendant was charged with Level 4 felony child solicitation. At his jury trial, Defendant sought an instruction on the defense of entrapment. The trial court denied the instruction, finding insufficient evidence that PCI and Schmutte were agents of law enforcement. The jury returned a guilty verdict. Defendant argued on appeal that denying the entrapment instruction was an abuse of discretion because PCI and Schmutte were "apparent agents" of law enforcement. The Court of Appeals disagreed, finding no facts in the record to support an apparent agency relationship. Law enforcement did not become involved until after PCI live streamed its encounter with Defendant. Law enforcement agencies routinely rely on the general public for tips, evidence, and other information. The mere collection of that information says nothing about whether the State has authorized an individual to act on its behalf. Although PCI does not operate in jurisdictions where law enforcement agencies do not wish them to operate, the Court held that PCI's strategic decisions are at most manifestations by PCI but are not manifestations by law enforcement. The Court of Appeals reasoned that Defendant's communications with the decoy, such as telling her to say she was 18 and not have cops waiting on him at Olive Garden, suggests he knew the communications were illegal. Therefore, it was not error to deny the request for a jury instruction on entrapment. Held: judgment affirmed.

TITLE: Crose v. State
INDEX NO.: D.9.g.2.g.
CITE: (4th Dist., 5-30-95), Ind. App., 650 N.E.2d 1187
SUBJECT: Insanity - jury instructions
HOLDING: Tr. Ct. did not err in instructing jury on insanity defense. D argued that he never injected insanity defense & therefore it was misleading & erroneous to give insanity instruction. Insanity instruction was relevant & appropriate because both parties presented substantial evidence that placed D's mental instability at issue. D claimed that he introduced evidence of his mental instability solely for purpose of showing that, although his actions were eccentric & annoying, he did not possess requisite intent to harass complaining witnesses. First paragraph of challenged instruction set forth insanity defense & informed jury that mental disease or defect, not amounting to insanity, is not defense in Ind. Second paragraph informed jury that it could consider D's mental condition for purpose of determining whether he was able to form requisite intent to commit crimes charged. Ct. noted that substance of specific intent instruction tendered by D & rejected by Tr. Ct. was adequately covered by instructions given. Held, judgment affirmed.

TITLE: Dayhuff v. State
INDEX NO.: D.9.g.2.g.
CITE: (4th Dist. 11/6/89), Ind. App., 545 N.E.2d 1100
SUBJECT: Instructions - self-defense
HOLDING: Tr. Ct. erred in refusing D's tendered instruction on self-defense. Un-contradicted evidence showed that victim, to whom D had been engaged, went to D's trailer to retrieve roto-tiller D had borrowed. During conversation, D asked victim to return Wholesale Club membership card he had given her during engagement. When victim was unable to produce card, altercation ensued, & D struck victim in face with portable telephone. Victim testified that D had become angry & chased her, ultimately reaching inside her car & hitting her with phone. D, on other hand, testified that when he got angry about card, victim picked up bucket & began hitting him on head, arms, & shoulders with it. He stated that after he took bucket away, victim got into her car, & that he reached inside & hit her only after she had rammed D's car & driven within inches of him. Tr. Ct. refused D's tendered instructions on self-defense, finding no evidence to support finding of self-defense. D has right to have jury instructed on any theory of defense that has some foundation in evidence. Lockridge, App., 359 N.E.2d 589. This is true even if evidence is weak & inconsistent. Harrington, App., 413 N.E.2d 622. D's testimony here constitutes some evidence, however weak, that he may have acted in self-defense. It was for jury to determine whether D's evidence was credible & whether it was sufficient to warrant use of force. Held, Tr. Ct. erred in refusing to instruct jury on self-defense. Chezem, J., DISSENTS, arguing that evidence did not show that D was in imminent danger when he struck victim.

RELATED CASES: Bragg, App., 695 N.E.2d 179 (D's testimony was enough to justify giving of instruction).

TITLE: Dixon v. United States
INDEX NO.: D.9.g.2.g.
CITE: 548 U.S. 1, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006)
SUBJECT: Duress defense, burden of proof instructions
HOLDING: Petitioner was charged with receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(n), and with making false statements in connection with acquisition of the firearm. She admitted knowledge of her indictment when she purchased the firearm and that it was a crime, but claimed she was acting under duress through threats by her boyfriend toward herself and her children if she did not buy the firearms for her boyfriend. The Tr. Ct. declined her request for a jury instruction placing the burden on the government to disprove, beyond a reasonable doubt, her duress defense. Instead, the jury was instructed that Petitioner had the burden to establish her defense by a preponderance of the evidence. The jury instruction did not run afoul of the Due Process Clause. The crime required that Petitioner acted "knowingly" which "merely requires proof of knowledge of the facts that constitute the offense" or "willfully" which requires acting "with knowledge that the conduct was unlawful." Bryan v. U.S., 524 U.S. 184 (1998). The government bore the burden of proving beyond a reasonable doubt that Petitioner knew that she was violating the law which was met through Petitioner's own testimony. Court rejected Petitioner's claim that she could not have formed the necessary *mens rea* because she did not freely choose to commit the crimes. While the duress defense may excuse conduct that would otherwise be punishable, the existence of duress normally does not controvert any of the elements of the offense itself. The jury instructions were consistent with the requirement that the government prove the mental states specified and did not run afoul of due process by placing the burden on Petitioner to establish duress by a preponderance of the evidence. Further, modern common law does not require the government to bear the burden of disproving Petitioner's duress defense beyond a reasonable doubt. This burden on the defense was not upset by Davis v. U.S., 160 U.S. 469 (1895), where the Court interpreted a D's insanity to controvert the necessary *mens rea* for a murder committed "feloniously, willfully, and of his malice aforethought," and required the government to prove the D's sanity beyond a reasonable doubt because tending to prove insanity also tended to disprove an essential element of the offense. Petitioner's duress evidence does not contradict or tend to disprove any element of her statutory offenses. She is also not helped by the resulting "Davis rule," which was not constitutionally mandated, and which Congress *overruled* by statute, requiring a D to prove insanity by clear and convincing evidence. Petitioner's reliance on Davis also ignores that federal crimes are solely creatures of statute, and thus the Court must effectuate the duress defense as Congress may have contemplated it in the context of the specific offenses. The Court can assume that, when passing the relevant 1968 Act, Congress was familiar with long established common-law rule and the rule of McKelvey v. U.S., 260 U.S. 353 (1922) that the one relying on an affirmative defense must set it up and establish it, and would have expected federal courts to apply a similar approach to any affirmative defense. To accept Petitioner's contrary hypothesis that Davis dramatically upset well-settled law would require a consensus among federal courts that does not exist. Held, judgment affirmed; Kennedy, J. filed a concurring opinion to note the question how to proceed when Congress has enacted a criminal statute, the Omnibus Crime Control and Safe Streets Act of 1968, without explicit instructions regarding the duress defense. He would not stringently follow the law of the time as it seems unlikely Congress would want the burden of proof to vary from different statutes depending on when they were enacted. Good reason exists here to maintain the usual rule of placing the burden of production and persuasion together on the party raising the issue; Alito, J. filed a concurring opinion in which Scalia, J.

joined noting that he joined the opinion of the Court with the understanding that it does not hold that the allocation of the burden of persuasion on the defense of duress may vary from one federal criminal statute to another, basing his concurrence on a common law approach; Breyer, J. filed a dissent, in which Souter J. joined, agreeing that the burden of production lies on the D in relation to a duress defense, that here the burden of persuasion issue is not constitutional, and that Congress may allocate that burden as it sees fit. But, in the absence of any different congressional intent, the burden of persuading the jury beyond a reasonable doubt for federal crimes should lie where such burdens normally lie in criminal cases, upon the prosecution.

TITLE: Dixson v. State
INDEX NO.: D.9.g.2.g.
CITE: (12/17/2014), 22 N.E.3d 836 (Ind. Ct. App. 2014)
SUBJECT: Self -defense jury instruction - harmless error
HOLDING: In battery prosecution which did not involve deadly force, Tr. Ct. erred in instructing jury that D had to have a reasonable fear of death or serious bodily harm. This contradicted the correctly-given instruction which stated the D could use reasonable force to protect himself from what he reasonably believed to be the imminent use of unlawful force. When taken as a whole, the instructions misled the jury with respect to D's self-defense claim. However, the error was harmless because uncontradicted evidence negated the self-defense claim. D was not in a place he had the right to be when he disregarded the work release facility's protocols by entering undesignated door of cafeteria and when he disregarded security guard's commands to leave and return through the correct door. This evidence also shows that D did not act without fault. Because uncontradicted evidence negates D's self-defense claim, the jury instruction error did not affect the verdict. Held, judgment affirmed.

TITLE: Ervin v. State
INDEX NO.: D.9.g.2.g.
CITE: (11/28/2018), 114 N.E.3d 888 (Ind. Ct. App.. 2018)
SUBJECT: Failure to instruct jury on defense of property and others affirmed
HOLDING: D, finding his iPad to be missing, used an "App" to locate it. Following the App, D arrived at an intersection where the App informed him the iPad was to be located. D blocked the intersection with his vehicle and approached a truck, also at the intersection, pointing a gun at the driver and then shot at the truck as the truck backed up and made a U-turn and drove away. At trial, D argued he was acting in defense of property (retrieving his missing iPad) and defense of others (when the truck drove away erratically it had potential to harm others) and the jury should have been instructed accordingly. Court of Appeals held that evidence was sufficient to support D's Level 5 criminal recklessness conviction and that the State negated claims of defense of property and defense of others. D instigated the altercation and blocked the intersection he was not in a place he had a right to be.

The Court *sua sponte* vacated D's conviction for Level 6 felony pointing a firearm on double jeopardy grounds. Held, judgment affirmed in part and vacated in part.

TITLE: French v. State
INDEX NO.: D.9.g.2.g.
CITE: (4-29-80), Ind., 403 N.E.2d 821
SUBJECT: Specific instructions - Self-defense; instructing jury about reasonable force
HOLDING: Tr. Ct. committed reversible error by failing to instruct jury that, as to self-defense, D may repel force by reasonable necessary force & that D will not be accountable for any error in judgment as to amount of force necessary, provided D acted honestly. It was also error to fail to apprise jury that existence of danger, necessity or apparent necessity, as well as amount of force required to resist attack can only be determined from D's standpoint at time & under existing circumstances. Lastly, Tr. Ct. erred in failing to instruct jury that D's testimony that he acted in fear of his life & that gun discharged prematurely when D bumped into car was not required to be believed. Held, judgment reversed & remanded; Pivarnik, J., dissenting.

TITLE: Gravens v. State
INDEX NO.: D.9.g.2.g.
CITE: (2nd Dist., 11-3-05), Ind. App., 836 N.E.2d 490
SUBJECT: Abandonment instruction properly given
HOLDING: In attempted robbery prosecution, Tr. Ct. did not abuse its discretion in instructing jury on defense of abandonment. D sought to have pattern jury instruction on abandonment given, while State sought same instruction but with an additional paragraph taken primarily from appellate cases that explained that voluntary abandonment cannot be influenced by extrinsic circumstances that increase the probability of detection or make the criminal act more difficult. Ct. acknowledged that preferred practice is to use the pattern jury instructions & that mere fact that language is used in appellate Ct. opinions does not make it proper language for instructions to a jury. Ludy v. State, 784 N.E.2d 459 (Ind.2003). However, there is no blanket prohibition against the use of appellate language. Hurt v. State, 553 N.E.2d 1243 (Ind. Ct. App..1990) *overruled* on other grounds by Ham v. State, 826 N.E.2d 640 (Ind. 2005). D argued that the additional paragraph was an "impermissible judicial comment" on particular evidence & it expressed an appellate standard of review that was irrelevant to the jury's role as finder of fact under Art. I, ' 19 of Indiana Constitution. Ct. found instruction allowable as "whether abandonment caused by extrinsic factors is voluntary for purposes of abandonment statute" emphasizes the applicable law & not a specific fact as in Ham or Ludy. Instruction in Ludy related to the sufficiency of evidence presented at trial whereas the instruction here aided the jury in "determining in the first instance whether the State proved beyond a reasonable doubt that a D committed a charged crime." *Quoting* Ludy. Ct. also found sufficient evidence existed that D only abandoned his attempted bank robbery because of extrinsic circumstances where evidence showed D placed a note before a teller telling her to give him the money from two tellers & only left after teller asked him in louder than usual voice (to bring attention to D) what he wanted & D became flustered & left the bank. Held, judgment affirmed.

TITLE: Harvey v. State
INDEX NO.: D.9.g.2.g.
CITE: (3rd Dist., 6-30-95), Ind. App., 652 N.E.2d 876
SUBJECT: Self-defense - erroneous instruction
HOLDING: Tr. Ct. committed reversible error in giving the following instruction concerning self defense: A person who is not in his home or fixed place of business & is carrying a handgun without a license cannot by law claim the protection of the law of self-defense.

Undisputed evidence at trial disclosed that D admitted to police that he did not have license to carry handgun used to commit homicide. Ct. rejected State's argument that since carrying handgun without license is criminal offense, literal application of self-defense statute, Ind. Code 35-41-3-2(d)(1), both authorizes & requires instruction. Ct. found that statute, read as a whole, refutes such narrow construction. Its intent is to preclude defense where it is sought by one who has actively engaged in perpetration of crime, & that criminal activity produced confrontation wherein force was employed. Jones v. State, Ind., 491 N.E.2d 999. In Jones, Ct. held that whether D was justified in firing illegal sawed-off shotgun in self defense was question for jury. Here, instruction was in error because it ignored any nexus between crime & shooting, & conclusively denied D consideration of his claim of self-defense. Held, judgment reversed & remanded for new trial.

RELATED CASES: Davis, App., 691 N.E.2d 1285 (Ind. Pattern Jury Instruction 10.03 properly informed jury of self-defense standard); Lacey, 670 N.E.2d 1299 (identical instruction did not constitute fundamental error).

TITLE: Hayes v. State
INDEX NO: D.9.g.2.g.
CITE: (8/11/2014), 15 N.E.3d 82 (Ind. Ct. App.. 2014)
SUBJECT: Evidence did not support defense of property instruction
HOLDING: In pointing a firearm and intimidation prosecution, Tr. Ct. did not abuse its discretion in denying D's proposed instruction on defense of his dwelling. Although complaining witness (C.W.) had knocked on D's front door in an effort to serve him with legal documents, she had returned to her truck and was completing paperwork when D arrived in the front yard with two guns. At that point, C.W. got out of her truck to talk to D but remained on the public sidewalk at all times. Witness testified she was 100% sure that C.W. did not try to open the gate again. There is simply no evidence that C.W. was attempting to attack or unlawfully enter D's property when D pointed two guns at her. Thus, Ind. Code 35-47-4-3 (use of force to protect property) does not apply and Tr. Ct. properly rejected proposed instruction because it was not supported by the evidence.

Even if "no trespassing" signs in front windows were sufficient to prohibit C.W. from knocking on front door, C.W. had returned to her truck when D approached with a gun in each hand. D's conduct was not necessary to prevent or terminate C.W.'s entry onto his property. Held, judgment affirmed.

TITLE: Henderson v. State
INDEX NO.: D.9.g.2.g.
CITE: (5th Dist., 9-11-03), Ind. App., 795 N.E.2d 473
SUBJECT: Self-defense jury instruction - contemporaneous crime limitation
HOLDING: In murder & robbery prosecution, Tr. Ct. committed harmless error in failing to instruct jury that criminal activity by an accused must have causal connection to confrontation in which force was used in order to preclude use of self-defense. Under self-defense statute, Ind. Code 35-41-3-2, there must be immediate causal connection between a crime in which D was engaged & the confrontation resulting in injury to victim in order for D's criminal activity to preclude a finding of self-defense. Mayes v. State, 744 N.E.2d 390 (Ind. 2001). In this case, jury instruction mirrored Ind. Code35-41-3-2 & was a correct but incomplete statement of law because it did not explain to jury that a causal connection between crime & confrontation was necessary in order to preclude a finding of self-defense. However, failure to instruct jury did not require reversal because instructions as a whole did not mislead jury, & defense counsel's closing argument *clarified* that not every instance of criminal activity by an accused would preclude use of self- defense. Held, convictions affirmed.

RELATED CASES: Fuentes, 952 N.E.2d 275 (Ind. Ct. App. 2011) (erroneous instruction was harmless because jury could not have properly found that D acted in self-defense when he shot victim a second time; after the first shot, victim went to his knees and put his arms and hands up in a defenseless position; D's right to self-defense therefore ceased); Randolph, App., 802 N.E.2d 1008 (any error in self-defense jury instructions was harmless & court could not say that D's trial or appellate counsel was ineffective in failing to object to them).

TITLE: Hensley v. State
INDEX NO.: D.9.g.2.g.
CITE: (2/27/86), Ind., 489 N.E.2d 62
SUBJECT: Instructions - defenses; inconsistent with evidence
HOLDING: Tr. Ct. did not err in refusing D's tendered entrapment instruction. Here, D filed alibi notice & presented alibi evidence at trial. Ct. finds evidence does not support entrapment instruction. Tr. Ct. has discretion to refuse any instruction if evidence does not support giving it. Gary, 471 N.E.2d 695. Held, no error.

RELATED CASES: Green, App., 650 N.E.2d 307 (where there was no evidence to support D's tendered instruction on intervening, superseding causation, Tr. Ct. did not err in refusing it).

TITLE: Hernandez v. State
INDEX NO.: D.9.g.2.g.
CITE: (11/10/2015), 45 N.E.3d 373 (Ind. 2015)
SUBJECT: Evidence warranted giving defense of necessity instruction
HOLDING: Tr. Ct. abused its discretion in refusing to give D's tendered jury instruction on the affirmative defense of necessity. A criminal D is entitled to have a jury instruction on "any theory or defense which has some foundation in the evidence," even if the evidence is weak and inconsistent, so long as there is some probative value to support it. Here, trial testimony supported each of the six necessity factors set forth in Toops v. State, 643 N.E.2d 387 (Ind. Ct. App. 1994). Even if there is only a "scintilla" of evidence in support of a criminal D's proposed defense instruction, it should be left to the province of the jury to determine whether that evidence is believable or unbelievable.

Court concluded the failure to give an instruction on the defense of necessity may have impacted the jury's decision on D's guilt or innocence. Based on the instructions that were given, the jury could have returned a guilty verdict even if it believed D's testimony that supported his lawful defense. Therefore, the error could not have been harmless. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment reversed and remanded for a new trial.

TITLE: Munford v. State
INDEX NO.: D.9.g.2.g.
CITE: (03-10-10), 923 N.E.2d 11, (Ind. Ct. App. 2010)
SUBJECT: Abandonment - proper instruction
HOLDING: Tr. Ct.'s defense-of-abandonment instruction did not constitute fundamental error, and State presented sufficient evidence to disprove Munford's defense beyond reasonable doubt.
Instruction provided:

> **Abandonment that may relieve one of criminal responsibility exists where a criminal enterprise is cut short by a change of heart, desertion of criminal purpose, change of behavior, and rising revulsion for the harm intended. Abandonment must occur before the criminal act charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed.**

Here, D took three liquor bottles from grocery store shelf and put them in his coat. Store employee followed D into restroom, where he removed bottles from coat, put them on floor, and said to others in restroom, "They're on to us; we need to get out of here." D was charged with attempted theft. Portion of instruction stating abandonment must be product of rising revulsion for intended crime was not erroneous. Rising revulsion is not in abandonment statute, but Indiana Supreme Court has often used phrase in describing abandonment defense. Instruction's failure to tell jury that State had to disprove defense beyond reasonable doubt did not make instruction fundamentally erroneous because Tr. Ct. instructed jury that: 1) State must prove each element of attempted theft beyond reasonable doubt; 2) State carried burden to prove guilt beyond reasonable doubt; 3) D was presumed innocent and was not required to present evidence of innocence; and 4) jury was to consider all instructions together. Where D is charged with attempted crime, phrase stating "abandonment must occur before the criminal act charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed is, at worst, an incomplete statement of law. In attempted crimes, abandonment must occur after inchoate crime of attempt has been committed but before underlying crime is completed. Instruction correctly told jury that abandonment must occur before completion of the crime.

State presented sufficient evidence to disprove D's abandonment defense, which required D to voluntarily abandon his efforts. Only evidence regarding abandonment was testimony that D removed bottles from his coat, placed them on restroom floor, and said, "They're on to us; we need to get out of here." Jury could readily conclude D's abandonment was not voluntary but product of extrinsic factors that increased probability of detection or made it more difficult to accomplish the attempted theft. Held, judgment affirmed.

TITLE: Nordstrom v. State
INDEX NO.: D.9.g.2.g.
CITE: (5th Dist., 02-09-94), Ind. App., 627 N.E.2d 1380
SUBJECT: Erroneous mistake of fact instruction not fundamental error
HOLDING: In trial for reckless homicide, mistake of fact instruction was erroneous, but did not constitute fundamental error. After D removed clip from gun, he picked it up, aimed it at wife & pulled trigger. Gun fired & bullet hit wife in neck, killing her. At trial D tendered instruction that was not given, but did not object to instruction given by Tr. Ct. Mistake of fact defense has three parts; mistake must: 1) be honest & reasonable, 2) be about matter of fact, & 3) negate culpability required for offense. State must disprove defense beyond reasonable doubt.

Tr. Ct.'s instruction did not require State to disprove defense beyond reasonable doubt & informed jury that mistake must negate criminal intent, even though culpability of offense was only recklessness. Therefore, instruction was erroneous, but D did not object to instruction & Ct. found error was not fundamental. Even assuming D reasonably believed gun would not fire without clip, his belief did not establish lack of recklessness. Acting recklessly is acting in plain, conscious, & unjustifiable disregard of harm, involving substantial deviation from acceptable standards of conduct. Ct. concluded it was not acceptable standard of conduct to point handgun & pull trigger, because such conduct is inherently reckless whether gun is loaded or not. Because State was able to prove elements of reckless homicide beyond reasonable doubt, Ct. found correct instruction would not have altered outcome of trial. Held, conviction affirmed.

Note: Two other decisions distinguished between loaded & unloaded guns when considering recklessness, although those decisions did not involve actual firing of the gun, see, Reynolds, App., 573 N.E.2d 430, & Warren, App., 615 N.E.2d 500.

RELATED CASES: Huls, 971 N.E.2d 739 (Ind. Ct. App. 2012) (although D presented evidence that he believed someone was on his property and was coming toward him, it could not have created a reasonable doubt as to whether D acted recklessly, where he fired handgun into the night without determining who was there or whether the person posed a threat); Ringham, 768 N.E.2d 893 (no error in failing to instruct jury re: State's burden of disproving mistake of fact defense beyond reasonable doubt).

TITLE: Patton v. State
INDEX NO.: D.9.g.2.g.
CITE: (2nd Dist., 11-22-05), Ind. App., 837 N.E.2d 576
SUBJECT: Self-defense instruction - omission of "no duty to retreat" language
HOLDING: In light of overwhelming evidence before jury that D's claim of self-defense was without merit, Tr. Ct.'s failure to instruct jury that D had no duty to retreat was harmless. Where evidence is in conflict upon question of, who was the aggressor, fairness seems to demand that it be balanced with an advisement that one, who is not the aggressor is not required to retreat. French v. State, 403 N.E.2d 821, 825 (Ind. 1980). Here, language in instruction that a person has no duty to retreat before defending himself was not included in Tr. Ct.'s self-defense instruction, but D did not object at trial on that ground. D's defense at trial was that he was defending himself in a situation where he was confronted with deadly force. Although witnesses disagreed on whether D was the aggressor, three of the four witnesses testified D shot first, & twenty-three of thirty-two bullet casings recovered from scene were linked to gun D was using. Seven more casings were linked to the gun later found in residence of accomplice's girlfriend. In light of that evidence, Ct. could not say an instruction that D had no duty to retreat would have impacted jury's verdict. Held, judgment affirmed.

TITLE: Patton v. State
INDEX NO.: D.9.g.2.g.
CITE: (1-10-02), Ind. App., 760 N.E.2d 672
SUBJECT: Necessity instruction improperly refused by Tr. Ct.
HOLDING: In carrying handgun without license prosecution, D was entitled to jury instruction regarding necessity. D's theory of case was that, acting in self-defense, he picked up victim's gun & shot it. Tr. Ct. refused tendered instruction regarding necessity on grounds that it was covered by self-defense instruction. D in criminal case is entitled to have jury instructed on any theory or defense which has some foundation in evidence. Toops v. State, 643 N.E.2d 387 (Ind. Ct. App. 1994). Here, D presented evidence with regard to handgun charge that raised necessity defense. Instruction was not covered by another instruction, & self-defense instruction alone did not accurately advise jury as to D's theory or evidence. Furthermore, instruction correctly stated law that prerequisites must be found in order to use defense & that State has burden of disproving defense beyond reasonable doubt. Judge v. State, 659 N.E.2d 608 (Ind. Ct. App. 1995); Dozier v. State, 709 N.E.2d 27 (Ind. Ct. App. 1999). Therefore, D was entitled to instruction & Tr. Ct. erred in refusing to give it. Held, conviction reversed & remanded.

TITLE: Phillips v. State
INDEX NO.: D.9.g.2.g.
CITE: (12/10/2014), 22 N.E.3d 749 (Ind. Ct. App.. 2014)
SUBJECT: No error to instruct jury about voluntary intoxication
HOLDING: In child molesting prosecution, there was sufficient evidentiary basis to support Tr. Ct.'s decision to instruct jury that voluntary intoxication is not a defense and cannot be considered in determining whether D acted intentionally as alleged in charging information. A postcard written by D to his next door neighbor was admitted into evidence as State's exhibit at trial. In postcard, D discussed allegations against him, claiming that complaining witness (C.W.) instigated incident, and that D was "passed out on prescription drugs." D further claimed that his wife sent C.W. into bedroom while D was passed out and that he awoke to hear wife yelling at him and to observe that C.W.'s head was under the covers. If believed, this evidence could create a reasonable doubt in minds of jury about requisite specific intent. D argued for first time on appeal that he did not raise intoxication defense and there was no evidence to support instruction. Waiver of issue notwithstanding, Tr. Ct. did not abuse its discretion in giving the instruction. Held, judgment affirmed.

TITLE: Russelburg v. State
INDEX NO.: D.9.g.2.g.
CITE: (10/24/88), Ind., 529 N.E.2d 1193
SUBJECT: Voluntary intoxication - failure to give instruction
HOLDING: Tr. Ct. did not err in failing to give D's tendered instruction on voluntary intoxication defense. D was charged with criminal recklessness, attempted murder, & robbery. Tr. Ct. admitted testimony from D's psychiatric expert that D was at least intoxicated & may have been undergoing stress-induced "psychogenic fugue." According to expert, this alcoholic disorder involves splitting of personality, so that individual is able to perform complicated intellectual & physical functions while lacking ability to form intent. D tendered instruction on defense of voluntary intoxication, which was refused. On appeal, D acknowledges rule that voluntary intoxication will not excuse D who is capable of devising plan, operate equipment, instruct others or perform acts requiring physical skill, all of which D did in course of alleged offenses. Terry, 465 N.E.2d 1085. However, he argues that testimony of expert supported giving instruction in his case. Ind. S. Ct. reasons that expert's testimony supported instruction on insanity defense, which was given here. However, Tr. Ct. instructed jury that it must find D acted "knowingly," & other instructions defined that term. Held, no error in refusing instruction on voluntary intoxication defense. DeBruler, J., DISSENTS, arguing that insanity & voluntary intoxication defenses are not mutually exclusive.

RELATED CASES: Orta, 940 N.E. 2d 370 (Ind. Ct. App. 2011) (Tr. Ct. did not abuse its discretion in instructing jury that voluntary intoxication is not a defense; See Sanchez v. State at L.1.e).

TITLE: Smith v. State
INDEX NO.: D.9.g.2.g.
CITE: (10-22-02), Ind. App., 777 N.E.2d 32
SUBJECT: Self-defense jury instruction - contemporaneous crime limitation did not apply
HOLDING: Tr. Ct. erred in refusing to tender D's instruction, which stated that person who was actively engaged in perpetration of crime may assert self-defense if criminal activity he was engaged in did not produce confrontation wherein force was employed. Harvey v. State, 652 N.E.2d 876 (Ind. Ct. App. 1995). D had been engaged in drug deal when things went sour & victim was killed. In reviewing Tr. Ct.'s decision to give or refuse tendered jury instruction, Ct. considers: (1) whether instruction correctly stated law; (2) whether there is evidence in record to support giving instruction; & (3) whether substance of tendered instruction is covered by other instructions that are given. Chambers v. State, 734 N.E.2d 578 (Ind. 2000). Here, instruction was correct statement of law following Harvey & Mayes v. State, 744 N.E.2d 390 (Ind. 2001). Also, evidence supported giving of instruction & was not covered by any other instruction. Error was not harmless because without giving of instruction, D was deprived of his defense. Held, conviction reversed & remanded for new trial. Mathias, J., concurs with separate opinion. Barnes, J., dissents with separate opinion distinguishing Harvey & Mayes & noting that it is bad public policy to hold that one who kills another during a drug deal gone bad is entitled to such an instruction.

TITLE: Tyson v. State
INDEX NO.: D.9.g.2.g.
CITE: (2nd Dist., 08-06-93), Ind. App., 619 N.E.2d 276
SUBJECT: Instruction on belief in consent to sex not required
HOLDING: In trial for rape & criminal deviate conduct, Tr. Ct. did not commit reversible error in refusing D's tendered instructions on reasonable belief in complaining witness' (CW) consent & mistake of fact. Although recognizing difference in instructions, Ct. treated them together & found that assuming they correctly stated law, instructions did not meet requirement that there be evidence in record to support them. Ct. determined there was no evidence from which reasonable juror could conclude D reasonably believed CW consented. To necessitate instruction, D must provide evidence he had both honest & reasonable, although mistaken, belief in victim's consent to sex. Ct. found D's testimony provided some evidence he honestly believed CW was consenting, but it was not evidence his belief was reasonable. Ct. found D's testimony asserted actual consent, not equivocal conduct which could reasonably lead to misunderstanding. While such evidence could lead to negation of one of elements of offense, it did not support giving instruction on mistake of fact. Ct. rejected argument that some of CW's testimony supported D's belief that she was consenting, finding that in context of her unequivocal description of assault, it could not lead reasonable person to believe he was reasonably mistaken as to consent. Ct. also noted these statements occurred after act, & so could not support mistake of fact defense. Ct. concluded that evidence supported either finding of unequivocal consent or compelled sexual conduct, not any equivocal conduct that could lead to mistake of fact, & therefore Tr. Ct.'s refusal of instructions was proper, Sullivan, J., dissenting on this issue with extensive argument to contrary. *Trans. denied*.

TITLE: Washington v. State
INDEX NO.: D.9.g.2.g.
CITE: (11/12/2013), 997 N.E.2d 342 (Ind. 2013)
SUBJECT: Tr. Ct. correctly gave pattern jury instruction on defense of another person
HOLDING: Tr. Ct. did not abuse its discretion in using pattern jury instruction on defense of another because it appropriately balanced jury's duty to consider D's perception of danger against the reasonableness of his perception. See Shaw v. State, 534 N.E.2d 745, 747 (Ind. 1989).

Here, D's girlfriend went to a club to confront D because he was with another woman. The girlfriend took her and D's infant son to the scene. Once the girlfriend and the other woman began to fight, an officer pinned the girlfriend face down on a car hood. D jumped on the officer, put his arm around the officer's neck, and yelled, "Get off my baby mama," explaining at trial that he thought his son was pinned under the girlfriend.

D's tendered instruction correctly stated that the jury was to consider his perception of the dangerousness of the situation, but it did not state that his perception must have been reasonable. Held, transfer granted, Court of Appeals opinion vacated, and judgment affirmed.

Note: Court said that Shaw *clarified* French v. State, 403 N.E.2d 821 (1980), not impliedly overrule it. Court issued companion case, addressing same instruction issue; see Russell v. State, 997 N.E.2d 351 (Ind.2013).

TITLE: Weida v. State

INDEX NO.: D.9.g.2.g.

CITE: (11-21-02), Ind. App., 778 N.E.2d 843

SUBJECT: Withdrawal of conspiracy - improper not to give jury instruction; same as abandonment defense

HOLDING: Tr. Ct. abused its discretion when it refused to give D's tendered instruction regarding defense of withdrawal of conspiracy. D's instruction stated, to withdraw from conspiracy, D must cease his activity in the conspiracy & take affirmative act to defeat or disavow conspiracy's purposes either by making full confession to authorities or by communicating his withdrawal in a manner reasonably calculated to inform co- conspirators, & his withdrawal must be both complete & in good faith.

Withdrawal from conspiracy is affirmative defense under federal law, of which D's instruction adequately set forth elements of defense but is not recognized under Indiana law. However, D argued that instruction is correct statement of abandonment defense, which was not covered by any other instructions. State argued that pursuant to Ind. Code 35-41-3-10, abandonment is defense that person who engaged in prohibited conduct voluntarily abandoned effort to commit underlying crime & voluntarily prevented its commission. Comparing defenses of withdrawal & abandonment, it is clear that both consist of same concepts because they require D to forsake the conspiracy. State further argued that tendered instruction would have reduced D's burden in establishing affirmative defense. Ct. disagreed, noting that defense of withdrawal requires D to affirmatively act to defeat conspiracy, whereas abandonment requires only that D voluntarily abandon effort to commit crime. Good analogy is that abandonment is lesser-included defense of withdrawal. While withdrawal has never been recognized as defense in Indiana & D bears additional burden of demonstrating that he took affirmative act to defeat goals of conspiracy to establish withdrawal defense, withdrawal & abandonment are essentially same defense. Further, instruction was not covered by other instructions & there was evidence in record that would support giving it, therefore Tr. Ct. abused its discretion by refusing instruction. Held, conspiracy to commit murder conviction reversed & remanded.

TITLE: Wilson v. State
INDEX NO.: D.9.g.2.g.
CITE: 842 N.E.2d 446 (Ind. Ct. App. 2006)
SUBJECT: Erroneous refusal of jury instruction on right to resist excessive force during arrest
HOLDING: Tr. Ct. committed reversible error when it declined to give a proposed instruction that informed jury about a D's right to protect himself when arresting officers use excessive force. An arrestee has the right to resist an arrest to avoid personal injury or death when the arresting officers engage in excessive force. Shoultz v. State, 735 N.E.2d 818 (Ind. Ct. App. 2000); Wise v. State, 401 N.E.2d 65 (Ind. Ct. App. 1980). Here, there was evidence that supported the giving of an instruction addressing D's right to resist arrest, & proposed instruction was a correct statement of law not covered by any other instruction. Police officers who had stopped D on outstanding arrest warrant fired multiple shots at D's truck while he was an occupant therein. Two officers testified that shooting occurred after D attempted to escape. However, another officer testified that he observed the truck begin to accelerate after shooting started. It was undisputed that once shooting began, a bullet passed through cab window & D sustained a head injury. Error in refusing instruction was not harmless, because prosecutor's closing argument emphasized the Tr. Ct.'s erroneous decision to not give the proposed instruction. Had instruction been given, jury would have been properly informed of a D's right to protect himself against great bodily harm or death & could have made a well-informed decision as to whether right was available to D. Held, conviction reversed & remanded.

RELATED CASES: Burton, 978 N.E.2d 520 (Ind. Ct. App. 2012) (although officers testified to different versions of what occurred, DVD provided a strong evidentiary foundation to warrant the giving of tendered instruction on right to defend against perceived excessive force; error in refusing instructions was not harmless).

D. TRIAL

D.9. Jury trial

D.9.g.2.h. Evidence

TITLE: Boothe v. State
INDEX NO.: D.9.g.2.h.
CITE: (4th Dist. 9/13/82), Ind. App., 439 N.E.2d 708
SUBJECT: Instruction - evidence; bifurcated trial
HOLDING: It is error in bifurcated DWI trial (Class D felony - prior DWI conviction) to instruct jury in second stage that it can consider any evidence presented in first stage of the proceeding regarding guilt of latest offense. Here, D objected to such instruction arguing it permitted jury to consider irrelevant evidence. Ct. on appeal requires D to show prejudice. Held, no prejudice shown, thus no error.

TITLE: Brendel v. State
INDEX NO.: D.9.g.2.h.
CITE: (3/13/84), Ind., 460 N.E.2d 919
SUBJECT: Instructions - evidence; circumstantial
HOLDING: Tr. Ct. did not err in refusing to give D's final instruction re circumstantial evidence. Instruction of jury is largely discretionary. Buttram, 382 N.E.2d 166. Where there is direct evidence sufficient to convict, any instruction on circumstantial evidence may be refused. Turner, 258 N.E.2d 641; Wolfe, (1928) 200 Ind. 557. Here, there was sufficient direct evidence of D's identification from rape/robbery victim. Held, no error.

RELATED CASES: Jackson, App., 758 N.E.2d 1030 (voice identification evidence that places D at crime scene at precise time & place of crime's commission is direct evidence); Thompson, 728 N.E.2d 155 (D need not use explicit language, "I killed X," in order for less than explicit admission of guilt to be considered direct evidence); Cox, 475 N.E.2d 664 (D's admissions to others constituted direct evidence of guilt, therefore, evidence was not "wholly circumstantial;" refusal of instruction (set forth in opinion) was not error); Galbraith, App., 468 N.E.2d 575 (case notes when all evidence at trial is circumstantial, it is reversible error not to advise jury that it must conclude every reasonable hypothesis of innocence is excluded beyond a reasonable doubt, *citing* Spears, 401 N.E.2d 331 & Nelson, App., 413 N.E.2d 988).

TITLE: Byrd v. State
INDEX NO.: D.9.g.2.h.
CITE: (3rd Dist., 12-30-92), Ind. App., 605 N.E.2d 251
SUBJECT: Instruction on circumstantial evidence required
HOLDING: Because evidence that D committed theft was entirely circumstantial, it was error for Tr. Ct. to deny his tendered instruction on resolving inconsistencies in his favor, see, e.g., Nichols, 591 N.E.2d 134. Evidence consisted of testimony of four witnesses. Officer testified he saw D driving car matching description of stolen vehicle & that D claimed car had been purchased by his father. Other witness identified recovered car as his & stated he gave no one but his daughter permission to drive it. D's foster & biological fathers each denied buying car for D. Ct. found there was no direct evidence as to how D came into possession of car, & evidence merely supported inference he stole it. Therefore, tendered appropriate instruction was erroneously denied. Held, theft conviction reversed & remanded for retrial.

TITLE: Chandler v. State
INDEX NO.: D.9.g.2.h.
CITE: (11/26/91), Ind., 581 N.E.2d 1233
SUBJECT: Possession as evidence of intent to deliver - Erroneous Instruction
HOLDING: In prosecution for dealing in cocaine, instruction which stated: "[p]ossession of a large amount of narcotics is circumstantial evidence of intent to deliver...," was erroneous. Although instruction was direct quotation taken from Montego, Ind., 517 N.E.2d 74 dealing with sufficiency of evidence, it was erroneously employed as jury instruction in at least 3 respects: 1) it erroneously implied that evidence proved beyond reasonable doubt that D was in fact in possession of large quantity of narcotics; 2) it is categorical statement, rather than suggestion, of what possession of large amount of narcotics proves; & 3) it commands, rather than invites, jury to consider evidence of large quantity as proof of intent to deliver. Because possession & intent were key issues involved, error was not harmless. Held, conviction of dealing count reversed & cause remanded, Givan & Krahulik, JJ., dissenting.

RELATED CASES: David, 669 N.E.2d 390 (instruction did not constitute fundamental error. See full review, this section); Morgan, 675 N.E.2d 1067 (following David, challenged instruction did not constitute fundamental error); Custard, App., 629 N.E.2d 1289 (Following Chandler in finding Tr. Ct. erred in giving instruction that said "Possession of a large quantity of cocaine is circumstantial evidence of intent to deal.").

TITLE: Crawford v. State
INDEX NO.: D.9.g.2.h.
CITE: (3/8/90), Ind., 550 N.E.2d 759
SUBJECT: Jury instruction - inference of guilt from unexplained possession of stolen property
HOLDING: Jury instruction that unexplained possession of recently stolen property "may raise an inference" of guilt on theft charge was erroneous. Identical instruction was condemned in Underwood, App., 367 N.E.2d 4, & similar instructions have been repeatedly condemned. [*Citations* omitted.] In Gann, 269 N.E.2d 381, majority approved instruction that such possession may be considered along with other facts & circumstances in determining guilt or innocence. Instruction there further cautioned jury that no presumption of guilt arises merely by reason of such possession, that D has no burden to account for or explain possession, & that burden of proving guilt beyond reasonable doubt rests entirely upon state. In Sansom, 366 N.E.2d 1171, Ind. S. Ct. addressed instruction similar to one here. Although not part of ratio decidendi, lead opinion expressed concern that instruction may have contributed to weight accorded to evidence of possession, invading province of jury. Other separate opinions indicated that majority of Ct. would have approved instruction. Ct. here expressly approves views expressed in lead opinion of Sansom, & reaffirms precedential vitality of Underwood, etc. Instruction here was erroneous, but error was harmless. Held, conviction affirmed.

RELATED CASES: Fortson, Ind., 919 N.E.2d 1136 (mere unexplained possession of stolen property is no longer sufficient for conviction of theft; see full review at K.4.r).

TITLE: David v. State
INDEX NO.: D.9.g.2.h.
CITE: (7-10-96), Ind., 669 N.E.2d 390
SUBJECT: Possession as evidence of intent to deliver - jury instruction
HOLDING: In prosecution for dealing in heroin, instruction which stated: "[p]ossession of a large amount of a controlled substance is circumstantial evidence of... intent to deliver...," did not constitute fundamental error. In Chandler v. State, 581 N.E.2d 1233 (Ind. 1991), Ct. held that use of this language is misleading & erroneous, because it relieves State of its burden of proving elements of possession & intent to deliver. However, Chandler did not apply in this case because D waived issue by failing to make contemporaneous objection at trial. Townsend v. State, 632 N.E.2d 727 (Ind. 1994). Considering totality of instructions, Ct. held that they did not implicitly or explicitly inform jury that evidence proves beyond reasonable doubt that D was in possession of large amount of heroin, & they did not comprise categorical statement of intent to deliver. Jury was instructed extensively on burden of proof, presumption of innocence, & element of intent to deliver. Challenged instruction did not bind conscience of jury & did not relieve State of its burden of proof on any of elements of charged crime. Held, transfer granted, Ct. App..' opinion at 646 N.E.2d 83 vacated, judgment affirmed; DeBruler, J., dissenting; Sullivan, J., dissenting, would deny transfer.

RELATED CASES: Whitney, 750 N.E.2d 342 (reversal was not required because second sentence of instruction offset error identified in Chandler in that it saved jury from operating under incorrect proposition that evidence showing possession of large amount of cocaine invariably proves intent to deliver); Murray, App., 798 N.E.2d 895.

TITLE: Dill v. State
INDEX NO.: D.9.g.2.h.
CITE: (2-7-01), Ind., 741 N.E.2d 1230
SUBJECT: Flight instruction - harmless error
HOLDING: Tr. Ct. erred in instructing jury that flight & other actions calculated to hide crime, though not proof of guilt, are evidence of consciousness of guilt & are circumstances which may be considered along with other evidence. Implementing its directive in Bellmore v. State, 602 N.E.2d 111 (Ind. 1992), Ct. concluded that instruction is confusing, contradictory, unduly emphasizes certain evidence, & misleads jury. Although evidence of flight may, under appropriate circumstances, be relevant, admissible, & proper subject for counsel's closing argument, it does not follow that Tr. Ct. should give discrete instruction highlighting such evidence. Instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of case have long been disapproved. Perry v. State, 541 N.E.2d 913 (Ind. 1989). Ct. found that instruction error in this case did not require reversal because reasonable jury could not properly have acquitted D & would have rendered guilty verdict even if erroneous instruction had not been given. Held, transfer granted, Ct. App. opinion at 727 N.E.2d 22 summarily affirmed as to all other issues, convictions affirmed; Shepard, C.J., dissenting.

RELATED CASES: Keister, 203 N.E.3d 548 (Ind. Ct. App. 2023) (reversible error to instruct jury in attempted murder/SVF trial that "discharging a weapon in the direction of a victim can be substantial evidence from which the jury could infer intent to kill); McQuinn, 197 N.E.3d 348 (Ind. Ct. App. 2022) (reversible error to instruct jury in attempted murder/SVF trial that "discharging a weapon in the direction of a victim can be substantial evidence from which the jury could infer intent to kill); Reese, 939 N.E. 2d 695 (Ind. Ct. App. 2011) (instruction on intent did not emphasize a specific fact or testimony by stating that intent to kill may be inferred from nature of the attack, the circumstances surrounding the crime, or the deliberate use of a deadly weapon in a manner likely to cause death or serious bodily injury); Townsend, 934 N.E.2d 118 (Ind. Ct. App. 2010); Fowler, App., 900 N.E.2d 770 (instruction that presence at scene and failure to oppose crime are factors that can be considered in determining whether D aided was proper; it did not highlight particular evidentiary facts offered to establish elements of crime, but. informed jury of proper matters for consideration in determining accomplice liability); Marks, App., 864 N.E.2d 408 (instruction listing seven evidentiary facts that can establish impairment in OWI case was erroneously give as it emphasized certain evidence).

TITLE: Hansford v. State
INDEX NO.: D.9.g.2.h.
CITE: (4/1/86), Ind., 490 N.E.2d 1083
SUBJECT: Instructions - evidence of escape
HOLDING: Tr. Ct. did not err in refusing D's instruction re flight of accused (set forth in opinion). Instead, Tr. Ct. charged jury re D's escape from jail. Instruction (set forth in opinion) was approved in Reno, 228 N.E.2d 14 & Torphy, 28 N.E.2d 70. Ct. rejects D's contention that phrase "and thus of guilt itself" erroneously charged jury that escape alone is proof of guilt. Jury was correctly charged that D's escape did not constitute proof of guilt but could be considered by them as circumstantial evidence of guilt. Held, no error.

RELATED CASES: Walker, 607 N.E.2d 391 (Evidence of flight - No error to refuse D's instruction including statement that flight might give rise to inference that person simply was scared & did not know how to respond, as substance of instruction was adequately covered in instructions given.).

TITLE: Ikemire v. State
INDEX NO.: D.9.g.2.h.
CITE: (1st Dist., 08-18-06), Ind. App., 852 N.E.2d 640
SUBJECT: Failure to give "mere presence" instruction - no error
HOLDING: In dealing in controlled substance prosecution, Tr. Ct. did not err in declining to give "mere presence" instruction, as evidence presented at trial did not support such an instruction. D tendered the following instruction: During the course of this trial, evidence was presented to you that brought into issue the D's participation in the crime he is charged with committing. Both the State of Indiana & the D brought forth evidence for your consideration as to the D's participation.

The mere presence at the scene of the crime, with nothing more, is insufficient to sustain a conviction for participation in the crime. However, presence at the scene in connection with other circumstances tending to show participation in the crime may be sufficient to sustain a conviction.

Even if D's instruction is a correct statement of law, it was not supported by evidence in record. D was more than "merely present" at the scene. For at least an hour, while police pounded on doors & windows & announced their presence, D walked around inside a house filled with highly irritating fumes, all while failing to respond to the police. When police entered the house, he pretended he was sleeping. In light of this evidence, Tr. Ct. did not abuse its discretion in declining this instruction. Held, judgment affirmed.

TITLE: Kriner v. State
INDEX NO.: D.9.g.2.h.
CITE: (9-22-98), Ind., 699 N.E.2d 659
SUBJECT: Refusal to instruct on absence of motive - no error
HOLDING: Tr. Ct. did not err in refusing D's tendered jury instruction stating that absence of motive "may be considered by the jury as a circumstance favorable to the accused." Jury instructions should not single out specific evidence or particular witnesses & comment upon weight or consideration to be given such matters. Robinson, 262 Ind. 463, 317 N.E.2d 850. Ct. has upheld refusal to give similar instructions because they amount to unfair judicial comment upon weight of evidence. Id.; Reburn, 421 N.E.2d 604. Generally, jury instructions in criminal case should lay out legal principles & rules that are relevant to adjudicating matter at hand, including elements of crime, burdens of production & persuasion, & any defenses. They are not designed to suggest, even remotely, what facts may be. D's tendered instruction advised jurors that they "may" weigh lack of motive in particular fashion as opposed to instructing that they "should" or "must" do so. Nonetheless, it singled out one circumstance & identified it as exculpatory. D was free to argue without interference in his opening & closing statements that D had no motive for killing. Although there may be circumstances when defense instruction on absence of motive is appropriate, in this case Tr. Ct.'s rejection of tendered instruction presented no reversible error. Held, conviction affirmed.

TITLE: Matthews v. State
INDEX NO.: D.9.g.2.h.
CITE: (4/21/202), 186 N.E.3d 603 (Ind. Ct. App. 2022)
SUBJECT: No error in giving pattern jury instruction on motive
HOLDING: In murder prosecution, the trial court did not err in giving the State's proposed Indiana pattern jury instruction on motive, which stated that "[m]otive is what causes a person to act. The State is not required to prove a motive for the crime charged." Defendant argued that this instruction invaded the province of the jury, was incomplete, and that the trial court should have stuck with its own proposed jury instruction, which read: "Motive is what causes a person to act. Motive is not an element of the crime and therefore does not have to be proven beyond a reasonable doubt. However, presence of motive may tend to establish guilt, and absence of motive may tend to establish innocence. You may therefore give its presence or absence the weight you believe it should have as evidence." In Cook v. State, 544 N.E.2d 1359 (Ind. 1989), the Court found that the pattern jury instruction on motive was sufficient, and the Defendant's more elaborate instruction, although "even-handed," did not require reversal of the jury's verdict. "That reasoning applies here." Although the trial court's original proposed instruction correctly stated the law and there was sufficient evidence to support giving it, the jury received ample information about motive through counsel's arguments and could weigh the evidence accordingly. See Kriner v. State, 699 N.E.2d 659 (Ind. 1998). Court concluded that both the trial court and the State's instruction would have produced the same verdict.

The Court also found no abuse of discretion in excluding testimony from one of the murder victim's friends, who tried to contact police with information that a man named Wilson was the real killer. The testimony was not relevant to show the police's failure to investigate other suspects because there is no evidence that a detective or any other officer actually received the information about Wilson. The Court also found that Wilson's statement during cross-examination that he would take a polygraph test to prove he did not commit the murder did not amount to fundamental error requiring a mistrial. And because the Court found no errors in the three issues Defendant raised on appeal, reversal based on a theory of cumulative error was not warranted. Held, judgment affirmed.

TITLE: Miles v. State

INDEX NO.: D.9.g.2.h.

CITE: (2/8/2016), 51 N.E.3d 305 (Ind. Ct. App. 2016)

SUBJECT: Instruction permitting inference of knowing killing from use of deadly weapon in a way likely to cause death - no error

HOLDING: In murder prosecution, trial court did not abuse its discretion by instructing the jury that "[a] knowing killing may be inferred from the use of a deadly weapon in a way likely to cause death." Although not all language from judicial opinions is appropriate for jury instructions, a similar instruction was upheld in Bethel v. State, 730 N.E.2d 1242 (Ind. 2000). Held, no error.

TITLE: Nichols v. State

INDEX NO.: D.9.g.2.h.

CITE: (04/27/92), Ind., 591 N.E.2d 134

SUBJECT: Instruction on excluding all reasonable hypotheses of innocence - circumstantial evidence

HOLDING: Only where evidence is "wholly circumstantial," is D entitled to instruction advising jury that to convict, it must exclude all reasonable hypotheses of innocence. D was convicted of reckless homicide & OWI, & Ct. App. reversed his conviction, holding that Tr. Ct. erred in refusing his tendered instruction on circumstantial evidence. S. Ct. agreed that if evidence against D is wholly circumstantial, he is entitled to such instruction, but granted transfer & found evidence was not entirely circumstantial. Direct evidence immediately establishes main fact to be proved, while circumstantial evidence immediately establishes collateral facts from which main fact may be inferred, & in cases based solely on circumstantial evidence, there are generally no witnesses to alleged crime. Ct. reviewed several decisions involving either solely circumstantial evidence or direct evidence & noted differences. Because instant case involved both circumstantial & direct evidence, & therefore it was not error for Tr. Ct. to refuse D's tendered instruction. Held, conviction affirmed. **Note:** In discussing D's tendered instruction, Ct. noted that it was not incorrect, but was potentially confusing, & recommended use of Ind. Pattern Jury Instruction 12.01 (Criminal) (1991 Edition).

TITLE: Rhoton v. State
INDEX NO.: D.9.g.2.h.
CITE: (10/2/85), Ind., 483 N.E.2d 51
SUBJECT: Instruction - evidence; inferences; possession of stolen goods
HOLDING: Instruction that possession of stolen property "shortly after theft raises presumption possessor is thief" was incorrect, but reversal is not required where instructions taken as a whole did not mislead jury. Here, D argues instruction curtailed jury's responsibility to derive its own presumptions from all of the evidence, *citing* Gann, 269 N.E.2d 381 (mere possession of stolen goods, standing alone, is insufficient to support conviction). Ward, 439 N.E.2d 156 modified Gann, holding that unexplained exclusive possession of recently stolen property, standing alone is sufficient evidence to sustain conviction on appeal. However, Gann, also held no presumption of guilt arose from such possession. 269 at 383. See also Hughes, App., 446 N.E.2d 1017. Held, conviction affirmed. DeBruler CONCURS IN RESULT. Prentice DISSENTS without opinion.

RELATED CASES: Fortson, Ind., 919 N.E.2d 1136 (mere unexplained possession of stolen property is no longer sufficient for conviction of theft; see full review at K.4.r); Sims, App., 482 N.E.2d 1182 (Tr. Ct. erred in giving instruction re possession of stolen property which placed emphasis on state's evidence; case contains excellent review of law, setting forth instructions from other cases).

TITLE: State v. Willis
INDEX NO.: D.9.g.2.h.
CITE: (3d Dist. 4/11/90), Ind. App., 552 N.E.2d 512
SUBJECT: Instructions - prior inconsistent statements - substantial evidence of guilt
HOLDING: Jury instruction that prior inconsistent statements could be considered as substantial evidence of guilt was not error. D was convicted of theft & conviction was affirmed on appeal. At his trial, jury was given Ind. Pattern Jury Instruction 12.17, indicating that prior inconsistent statements could be considered both in determining weight to be given testimony & as substantial evidence of guilt. On PCR, D claimed that giving of this instruction was fundamental error, & Tr. Ct. granted relief. State appeals granting of PCR. D argues that instruction unduly chilled confrontation right, because inconsistent statements of any witness could be considered as substantial evidence of guilt. Similar argument was rejected by Ind. S. Ct. in Smith, 490 N.E.2d 300. Although Smith instruction used word "substantive" rather than "substantial," Smith is controlling. Held, grant of PCR relief reversed. Shields, J., CONCURS IN RESULT, noting disagreement that Smith in any way addressed substantial difference in meaning between "substantive" & "substantial."

TITLE: Tanner v. State
INDEX NO.: D.9.g.2.h.
CITE: (12/7/84), Ind., 471 N.E.2d 665
SUBJECT: Instruction - evidence; weight of confession
HOLDING: Tr. Ct. did not err in giving instruction: "You have before you evidence that D confessed that he committed crime charged in information. It is for you to decide whether D confessed, & if so, what weight should be given to confession..." Here, D contends instruction is mandatory in nature, invades province of jury, calls attention to one portion of evidence & indicates Ct.'s opinion on credibility of witnesses. Instruction has withstood similar attacks. See Long, 422 N.E.2d 284; Jones, 363 N.E.2d 959. Held, no error.

RELATED CASES: Shanabarger, App, 846 N.E.2d 702 (Sullivan, J., concurring to note that Tr. Ct. would have been better advised to give D;'s instruction that "confessions, even those found to be voluntary, are not conclusive of guilt" rather than modifying instruction to read "confessions, even those found to be voluntary, may be conclusive of guilt"); Grey 404 N.E.2d 1348 (Tr. Ct. is required to specifically instruct jury on weight to be given confession).

TITLE: Tawney v. State
INDEX NO.: D.9.g.2.h.
CITE: (9/2/82), Ind., 439 N.E.2d 582
SUBJECT: Instruction - weighing evidence
HOLDING: Instructions that single out particular evidence & exhort jury to receive evidence with caution or indicate an opinion of credibility or weight invade province of jury & should be refused. Hackett, 360 N.E.2d 1000; Taylor, 278 N.E.2d 273. "Instructions generally should state propositions of law & those that do not but are mere statements for the philosophical guidance of the jury are rarely beneficial, frequently troublesome & best avoided." Walker, 349 N.E.2d 164. Here, D's tendered instruction purported to advise jury of weight it should give D's pre-trial statement & specific factors it should consider (e.g., age, training, sex, education, etc.) in determining whether statement was made knowingly. Held, tendered instruction properly refused.

TITLE: Taylor v. State
INDEX NO.: D.9.g.2.h.
CITE: (6-12-97), Ind., 681 N.E.2d 1105
SUBJECT: Lying in wait instruction upheld
HOLDING: Tr. Ct. did not commit reversible error in instructing jury that: "[l]ying in wait with a deadly weapon can be proof of a D's specific intent to commit the crime of murder..." Because evidence demonstrated that D placed gun against victim's head & fired, there was little issue over his intent to kill. Instruction was at best circular, as it permitted inference of intent to kill from fact that perpetrator lay in wait with intent to kill. Jury had evidence from which it could find lying in wait to have been for purpose of killing victim. Ct. also held that instruction did not impermissibly shift burden of persuasion from State to D as to intent required for murder conviction. Use of term "can," a permissive term, does not require jury to reach any particular conclusions, but merely permits jury to draw appropriate inferences from evidence. Held, no error.

RELATED CASES: McDowell, 885 N.E.2d 1260 (reversible error to instruct jury that "intent to kill may be inferred from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused"; see full review at D.9.g.2.d.)

D. TRIAL

D.9. Jury trial

D.9.g.2.i. Credibility of witnesses (identification witnesses, see R.1.c.)

TITLE: Grossenbacher v. State
INDEX NO.: D.9.g.2.i.
CITE: (10/12/84), Ind., 468 N.E.2d 1056
SUBJECT: Instructions - witness credibility
HOLDING: Tr. Ct. did not err in reading state's instruction re witness credibility (set forth in opinion). Here, instruction listed considerations in determining weight/credit to give witness testimony. D objected at trial on general grounds & simply reiterated objection on appeal, without citation to authority. Ct. finds instruction did not misstate law. Held, no error. **Note:** IN Pattern Jury Instructions (Criminal) #1.23 lists different considerations/uses different language & is preferable to instruction set forth in opinion.

RELATED CASES: Smith, 490 N.E.2d 300 (Crim L 783(2); instruction (set forth in opinion) re attacking credibility of witness by evidence of inconsistent statements was approved in Limp 431 N.E.2d 784 & properly given in this case); Wallace, 474 N.E.2d 1006 (no error in denial of D's instruction re witness giving false testimony; subject matter was adequately covered by instructions given by Tr. Ct.; both instructions set forth in opinion); Pearson, 441 N.E.2d 468 (Tr. Ct. properly refused tendered instruction re possible effects of hypnotic session on credibility of rape prosecutrix's testimony); Hopper, App., 489 N.E.2d 1209 (D's tendered instruction (set forth in opinion) re credibility of 2 1/2-year-old victim, whose statement was admitted through an adult, was incorrect statement of law; Tr. Ct. determines competency of witness to testify, thereafter, jury decides credibility, *citing* Ware, 376 N.E.2d 1150).

TITLE: Harden v. State
INDEX NO.: D.9.g.2.i.
CITE: (11/5/82), Ind., 441 N.E.2d 215
SUBJECT: Instruction - witness credibility; accomplice
HOLDING: It is improper to give instruction commenting on witness competency or weight to be given to testimony of any particular witness, because it invades province of jury. Gadacz, 426 N.E.2d 376; Drollinger, 408 N.E.2d 1228 (both involving rejected accomplice instruction). D did not tender accomplice instruction but argued Tr. Ct. erred in not giving instruction sua sponte. Many federal courts approve such instructions but generally do not find error absent request. US v. Fortes, (CA1 1980) 619 F.2d 108. Any alleged error regarding instructions is waived when D fails to tender own correct instruction. Clemons, 424 N.E.2d 113. Tr. Ct. gave instruction on credibility & weighing evidence, & so there was error.

RELATED CASES: Washington, App., 840 N.E.2d 873 (no error in excluding D's proffered jury instruction dealing with a co-D's benefits received from the State for testifying & asking the jury to "give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution & great care"); Tidwell, 644 N.E.2d 557 (see card at D.9.g.3); Custard, App., 629 N.E.2d 1289 (Ct. properly refused both of D's tendered instructions on accomplice testimony, because substance of instruction was covered. Generic instruction given regarding bias or prejudice, corroboration, etc.); Fox, 497 N.E.2d 221 (Instruction unduly disparaged & emphasized accomplices' testimony, but because testimony was inculpatory to D, error was harmless); Collier, 470 N.E.2d 1340 (No error in giving instruction "accomplice is competent witness & person may be convicted on uncorroborated testimony of accomplice;" Ct. considers instructions as whole & finds no undue emphasis; Prentice & DeBruler dissenting); Terrell, App., 507 N.E.2d 633 (final instructions adequately instructed jury to consider interest, bias, or prejudice of witnesses or their relationship with other witnesses or interested parties; facts of plea agreements were fully disclosed & D was not deprived of opportunity to attack their credibility on such basis.); Farmer, App., 481 N.E.2d 154 & Gibbs, App., 471 N.E.2d 20 (No error in denial of accomplice credibility instructions, set forth in respective opinions).

TITLE: Henderson v. State
INDEX NO.: D.9.g.2.i.
CITE: (4th Dist., 11-7-97), Ind. App., 686 N.E.2d 911; summarily affirmed 690 N.E.2d 706
SUBJECT: Jury instruction - judging witness credibility
HOLDING: Tr. Ct. properly instructed jury when it stated that jury should attempt to fit evidence to theory that every witness is telling truth. D argued that this instruction is particularly harmful to criminal Ds who choose not to testify or put on evidence because it suggests jury should consider State's witnesses as truthful, thereby invading jury's province as exclusive judge of credibility. In rejecting D's argument, Ct. noted that this instruction is correct statement of law & has been explicitly approved by Indiana S. Ct. Holmes, 671 N.E.2d 841; Sweany, 607 N.E.2d 387. Held, no error.

TITLE: King v. State
INDEX NO.: D.9.g.2.i.
CITE: (12/8/77), Ind., 369 N.E.2d 1076
SUBJECT: Jury instruction on witness testimony
HOLDING: In Indiana, credibility & weight given to evidence is within province of trier of fact. Jury may be instructed that it may disregard entire testimony of witness who is believed to have testified falsely, but false testimony about one matter does not render all other testimony of witness incompetent. Here, witness gave contradictory testimony & D sought continuance. Tr. Ct. denied continuance. D argued that Ct. should adopt theory whereby falsehood told by witness would require discarding of all her testimony regardless of purpose of testimony in relation to falsehood. Ct. held that no harm had been suffered by D & that failure to give instruction presented no ground for reversal. Held, judgment affirmed.

RELATED CASES: Chambers, 734 N.E.2d 578 (no error in refusing to give proposed jury instruction that would have informed jury that it had right to reject uncorroborated testimony of witnesses whose credibility had been impeached by prior inconsistent statements; instructions given by Tr. Ct. as whole were adequate); Norton, 408 N.E.2d 514 (jury has right to reject witness' testimony, & jury may disregard all or part of testimony of witness whom they believe has testified falsely).

TITLE: Ludy v. State
INDEX NO.: D.9.g.2.i.
CITE: (3-6-03), Ind., 784 N.E.2d 459
SUBJECT: Erroneous instruction - conviction based solely on uncorroborated testimony of a single person
HOLDING: Tr. Ct. erred in instructing jury that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt." Instruction is problematic for at least three reasons. First, it unfairly focuses jury's attention on & highlights a single witness's testimony. Instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of case have long been disapproved. Dill v. State, 741 N.E.2d 1230 (Ind. 2001).

Second, instruction presents a concept used in appellate review that is irrelevant to jury's function as fact finder & invites jury to violate its obligation to consider all evidence. Third, by using technical term "uncorroborated," instruction may mislead or confuse jury. Jurors may interpret this instruction to mean that baseless testimony should be given credit & that they should ignore inconsistencies, accept without question witness's testimony, & ignore evidence that conflicts with witness's version of events. Noting that instruction has substantial history of appellate approval, Court *overruled* prior decisions inconsistent with its new holding. Although challenged instruction was erroneous, error did not affect D's substantial rights & thus did not require reversal. Held, transfer granted, judgment affirmed.

RELATED CASES: Weis, App., 825 N.E.2d 896 (Ct. rejected argument that prosecutor's repeated references to jury's right to convict based only on victim's testimony prejudiced D as a jury instruction on the subject would); Smith, App., 804 N.E.2d 1246, *sum. aff'd* 825 N.E.2d 783 (D failed to object at trial & additional evidence supported the victim's statement, making any error in giving the instruction harmless); Foster, App., 795 N.E.2d 1078 (error was harmless because victim's testimony was corroborated & jury would have properly convicted D absent erroneous instruction); Bayes, App., 791 N.E.2d 263 (Tr. Ct. committed reversible error by instructing jury that sole & uncorroborated testimony of CW, if believed beyond reasonable doubt, is sufficient to sustain a conviction); Manual, App., 793 N.E.2d 1215 (Because D did not object to the instruction at trial, the issue was not preserved; fundamental error not found because jury was properly instructed on all elements of the offenses, the State's burden of proof, & the assessment of witness credibility); Anderson, App., 790 N.E.2d 146 (D was entitled to new trial based on Ludy, because his case was on direct appeal at time Ludy was decided); Tinkham, App., 787 N.E.2d 440 (erroneous instruction required reversal because it was not cured by other instructions & D's guilt was not corroborated by any physical evidence or any other witness statements or testimony).

TITLE: Sweany v. State
INDEX NO.: D.9.g.2.i.
CITE: (02-08-93), Ind., 607 N.E.2d 387
SUBJECT: Instruction on D's prior consistent statement
HOLDING: It was not error for Tr. Ct. to refuse following instruction tendered by D: The D testified in the (Defense's) case during the trial. You will recall that it was brought out that before this trial he or she made statements which were the same as, or similar to, what he or she said in the Ct. room. These earlier statements were brought to your attention to help you decide whether you believe the D's testimony. If the D said essentially the same thing on more than one occasion, it may be reason for you to believe the D's testimony. because it addressed issue of credibility already adequately covered in other instructions, & improperly commented on credibility of a witness. Held, conviction affirmed.

D. TRIAL

D.9. Jury trial

D.9.g.2.j. Missing witnesses

TITLE: Gossmeyer v. State
INDEX NO.: D.9.g.2.j.
CITE: (8/28/85), Ind., 482 N.E.2d 239
SUBJECT: Instructions - missing witness
HOLDING: Tr. Ct. did not err in refusing D's tendered instruction that state's failure to produce informant at trial supported inference that informant's testimony would have been unfavorable to state. "Missing witness" instruction is not generally favored in IN. Hedrick, 430 N.E.2d 1150; Bruce, 375 N.E.2d 1042. Instruction calling for adverse inference to be drawn from failure to produce certain evidence is appropriate only where evidence withheld is material to trial issues & not cumulative. Id. Here, Ct. finds D made no such showing. Held, no error.

RELATED CASES: Ray, App., 838 N.E.2d 480 (no error in denying D's jury instruction placing a presumption that evidence not produced by the State would be unfavorable to the State; State's experts provided an explanation for the missing evidence & the instruction misled & invaded the province of the jury); Whitehair, App., 654 N.E.2d 296 (no error in refusing missing witness instruction; appropriate only when witness is available to be produced by one party but not the other, Metcalf, 451 N.E.2d 321).

D. TRIAL

D.9. Jury trial

D.9.g.2.k. Testimony of D/failure to testify

TITLE: Bush v. State
INDEX NO.: D.9.g.2.k.
CITE: (9-20-02), Ind., 755 N.E.2d 309
SUBJECT: Instructing jury on D's failure to testify over objection - reversible error
HOLDING: Tr. Ct. erred in giving final jury instruction, over D's objection that addressed D's failure to testify. D moved to strike first paragraph of pattern instruction 13.21, arguing that it calls attention to fact that D could have testified if he chose to testify. Giving instruction that highlights D's failure to testify violates D's State constitutional right against self-incrimination, if instruction is given over D's objection. Ind.Const. art. I, § 14; Hill v. State, 371 N.E.2d 1303 (Ind. 1978). Thus, giving this instruction over objection violated D's right against self-incrimination provided by Article I, § 14 of Indiana Constitution. Ct. could not conclude that error was harmless beyond reasonable doubt. Held, conviction reversed & remanded.

TITLE: Heiser v. State
INDEX NO.: D.9.g.2.k.
CITE: (3d Dist. 07/29/92), Ind. App., 596 N.E.2d 965
SUBJECT: Instruction on D's silence - multiple Ds
HOLDING: It was not error to give modified instruction on one D's silence where that D requested it & coD objected, because 5th Amendment constitutional right to instruction outweighs right under Ind. Constitution to have instruction precluded. Co-Ds were tried together & neither testified. One D requested instruction that jury was not to consider D's failure to testify when reaching its verdict. Other D objected to giving of instruction, & Ct. modified it to include references only to D requesting it. Modified instruction was also objected to by other D, but given, & wherever instruction mentioned D, it specifically named D requesting it. Although giving instruction over D's objection violates Article I, 14 of Ind. Constitution; 5th & 14th Amendments of the U.S. Constitution require giving instruction at D's request. Where multiple Ds are involved, right of D requesting instruction prevails over right of objecting D. Fact that instruction as given singled out only one D, thus implying that co-D's silence was proper consideration for jury, did not constitute reversible error, because co-D invited error by objecting to more general instruction. Ct. did not discuss effect of co-D's objection to modified instruction on invited error, or whether D was able to opt for original instruction when objection was *overruled*.

TITLE: Lucas v. State
INDEX NO.: D.9.g.2.k.
CITE: (11/14/86), Ind., 499 N.E.2d 1090
SUBJECT: Instruction - D's right not to testify
HOLDING: In joint trial in which neither D testified, D1's 5th Amend. right to instruction warning jury not to draw any adverse inferences from his silence must prevail over right of D2 to object to such instruction. Here, Tr. Ct. read instruction over D2's objection. On appeal, D2 argues giving instruction over his objection violated his right not to be a witness against himself. Giving instruction over D's objection does not violate 5th Amend. rights, Lakeside v. OR (1978), 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319, but Ind. S. Ct. in Priest 386 N.E.2d 686 held that doing so violates Ind.Const. Art. 1, Section 14. Carter v. KY (1981), 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 provides that D has right under 5th & 14th Amends. to require such instruction be given. D may assert right so long as D does not testify. Smith, 474 N.E.2d 973 (no error in Tr. Ct.'s refusal to give instruction, requested by co-D who testified, but objected to by co-Ds who did not testify). Held, instructions properly given.

RELATED CASES: Horan, 642 N.E.2d 1374 (D in joint trial had absolute right to instruction); Brown, App., 446 N.E.2d 354 (where state fails to demonstrate beyond reasonable doubt that Tr. Ct.'s refusal to give sole D's instruction concerning adverse inference did not contribute to D's conviction, conviction must be reversed, *citing* Carter v. KY; held, conviction reversed; cause remanded; DISSENT by Buchanan would hold error harmless because of overwhelming evidence of D's guilt).

TITLE: Manning v. State
INDEX NO.: D.9.g.2.k.
CITE: (3d Dist. 2/20/84), Ind. App., 459 N.E.2d 1207
SUBJECT: Instruction - D's right not to testify
HOLDING: Tr. Ct. did not err in giving preliminary instruction (set forth below) which simply informed jury of procedure trial might follow & contained no direct reference to D's right not to testify. Neither Tr. Ct. nor prosecutor may comment directly or indirectly upon D's failure to testify. Williams, 426 N.E.2d 662. Tr. Ct. must instruct jury to disregard D's failure to testify if requested by D but may not give such an instruction over D's timely objection. Parker, 425 N.E.2d 628. Rule applies to both preliminary & final instructions. Lee, 424 N.E.2d 1011. See Rowley, 285 N.E.2d 646 & Long, (1877), 56 Ind. 182 (prosecutor's statements constituted reversible error). Held, no error.

INSTRUCTION: "The D then has the option to also call witnesses & present evidence if he so desires."..."If he chooses to he may call witnesses & present exhibits in the same manner as the state's witnesses; ..."

RELATED CASES: Moore, 669 N.E.2d 773 (where D refuses to permit curative instruction State should not be prejudiced by absence of instruction when it argues on appeal that improper prosecutorial comment was harmless error).

D. TRIAL

D.9. Jury trial

D.9.g.2.l. Penalty/sentence (insanity, see L.1.b.1)

TITLE: Goodwin v. State
INDEX NO.: D.9.g.2.l.
CITE: (9/7/82), Ind., 439 N.E.2d 595
SUBJECT: Instruction - penalty; habitual offender
HOLDING: Jury need not be informed of consequences of finding D a habitual offender. Refusal to advise jury of penalty does not constitute invasion by Ct. of province of jury to determine law & facts under Ind. Const. Art. 1, Section 19. Griffin, 415 N.E.2d 60; Comstock, 406 N.E.2d 1164. Tr. Ct.'s refusal to so instruct jury upheld.

RELATED CASES: Baer, 866 N.E.2d 752 habeas relief granted, Baer v. Neal, 2018 U.S. app. Lexis 693 (9th Cir. 2018) (Ct. disapproves of Tr. Ct. or prosecutor gratuitously informing jury or prospective jurors that varying appellate consequences may attach to different verdict choices before the jury); Maier 437 N.E.2d 448 (it is improper to inform jury of habitual offender penalty; held, Tr. Ct. properly refused D's tendered instructions which included portion of Ind. Code 35-50-2-8 dealing with penalty).

TITLE: Kelly v. South Carolina
INDEX NO.: D.9.g.2.l.
CITE: 534 U.S. 246 (2002)
SUBJECT: Death penalty, future dangerousness, jury instructions, due process
HOLDING: At D's capital trial, the defense requested a jury instruction that life without parole meant that D would never be eligible for parole, as required by Simmons v. South Carolina, 512 U.S. 154 (1994), in cases where the D's future dangerousness was at issue. The prosecution objected to the instruction, claiming that the State did not plan to argue future dangerousness. The Tr. Ct. refused the instruction. The state supreme court held that Simmons did not apply for two reasons: state law provided the jury with a third sentencing alternative (term of years) and future dangerousness was not at issue.

The U.S. Supreme Court held that both reasons were erroneous. Once the jurors found an aggravating circumstance, a term of years was not an option and the only possible sentences were death or life without parole. See Shafer v. South Carolina, 532 U.S. 36 (2001). Also, the state had introduced considerable evidence relating to D's future dangerousness and institutional adjustment, including evidence that he had tried to escape and that he had made a "shank," or homemade knife, in prison. Held, even where the state does not expressly argue future dangerousness, it becomes an issue where the state introduces evidence of it.

RELATED CASES: Lynch, 136 S.Ct. 1818 (U.S. 2016) (Tr. Ct. erred in not allowing capital D to instruct jury that under his circumstances, a life without parole sentence would actually never allow him to be released).

TITLE: Kimble v. State
INDEX NO.: D.9.g.2.l.
CITE: (7/21/83), Ind., 451 N.E.2d 302
SUBJECT: Instruction - sentence reduction; sua sponte
HOLDING: Tr. Ct. did not commit fundamental error by sua sponte giving instruction that informed jury of possible ways sentence could be reduced. Bailey, 412 N.E.2d 56 (such an instruction aids jury in "forgetting any concerns over potential punishment"). Instruction given appears in opinion. See also Cooper, 359 N.E.2d 532; Feggins, 359 N.E.2d 517. Here, Tr. Ct. specifically informed jury it should not consider actual time D would spend in prison. Held, no error in denial of PCR.

TITLE: Majors v. State
INDEX NO.: D.9.g.2.l.
CITE: (12/6/82), Ind., 441 N.E.2d 1375
SUBJECT: Instruction - penalty
HOLDING: It is improper to instruct jury as to penalties applicable to an offense. Smith, 432 N.E.2d 1363; Morgan, 419 N.E.2d 964. See also Cobb, 412 N.E.2d 728 (providing jury information regarding sentences invites compromise verdict as jurors attempt to increase/decrease sentence in accordance with their own concepts of fairness of statute measured against facts/circumstances surrounding D's alleged criminal act). Here, D maintained trial counsel's failure to object to preliminary instruction containing information regarding presumptive sentence for Class B felony constituted ineffective representation. Ct. rejects argument finding that it was possible counsel held tongue as strategic move (Ct. observes request for such instruction to jury invariably comes from D, not state). Held, counsel not ineffective in failing to object to instruction regarding penalty.

RELATED CASES: Hatchett, 503 N.E.2d 398 (Crim L 796; Tr. Ct. did not err in giving instruction (set forth in opinion) explaining absence of sentencing information); Smith, 502 N.E.2d 485 (in cases involving insanity defense, there will be increased speculation by jury re differences in sentencing between verdicts of guilty, GBMI, & NRBRI; in order to dispel speculation & to focus jury on guilt, rather than possible punishment, instruction explaining consequences of each verdict in general way can be appropriate & beneficial to accused; here, Ct. rejected D's contention that because Tr. Ct. gave such an instruction, defense counsel should have been allowed to comment on it during final argument).

TITLE: Petty v. State
INDEX NO.: D.9.g.2.l.
CITE: (1/11/89), Ind., 532 N.E.2d 610
SUBJECT: Jury Instructions - penalty; inaccurate sentencing information
HOLDING: Discussion of possible sentencing options in instructions to jury, at least one of which was clearly wrong, did not affect jury's decision & was harmless error. Tr. Ct. might better have used Ind. Pattern Jury Instr. (Crim.) 13.25 to instruct jury that penalty for charged offenses should have no role in jury deliberations. However, Tr. Ct.'s references to possibility of "restitution, probation, or having judgment entered as misdemeanor" as possible sentencing options was not prejudicial to D. Restitution & probation were available additional terms of D's 20 year prison sentence under Ind. Code 35-50-2-2, & reference to misdemeanors (clearly inaccurate, because of D's prior record) was unlikely to affect jury's decision on burglary charge, Koehler, 499 N.E.2d 196, & harmless, since conviction was clearly sustained by evidence. Walker, 497 N.E.2d 543. Affirmed.

TITLE: Shafer v. South Carolina
INDEX NO.: D.9.g.2.l.
CITE: 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001)
SUBJECT: Jury instructions, parole ineligibility
HOLDING: Whenever future dangerousness is at issue, a capital D who would be ineligible for parole if sentenced to life in prison has the right to inform the jury of that ineligibility. Parole eligibility becomes critical when the jury makes the moral judgment whether to impose a death sentence.

D. TRIAL

D.9. Jury trial

D.9.g.2.m. Verdicts

TITLE: Scruggs v. State
INDEX NO.: D.9.g.2.m.
CITE: (4th Dist. 4/1/85), Ind. App., 475 N.E.2d 1194
SUBJECT: Instructions - verdicts; deliberation process
HOLDING: Tr. Ct. did not err in refusing to give D's tendered instruction (set forth in opinion) re jury deliberations. Here, D argues instruction, approved in Lewis, 424 N.E.2d 107, must be given if tendered. Ct. finds essence of instruction was included in Tr. Ct.'s final instruction No. 10 (set forth in opinion). Held, no error.

D. TRIAL

D.9. Jury trial

D.9.g.2.n. Allen (dynamite) instruction

TITLE: Bailey v. State
INDEX NO.: D.9.g.2.n.
CITE: (8/7/96), Ind., 669 N.E.2d 972
SUBJECT: Modified Allen charge - rereading ABA standard instruction on jury deliberation
HOLDING: During jury deliberations, Tr. Ct. committed reversible error when it reread only one final instruction, the ABA standard instruction dealing with manner of deliberations. Ct. provided comprehensive history of Allen charge in Indiana beginning with Guffey, App., 386 N.E.2d 692 (elements of Allen charge: (1) jurors should candidly deliberate, giving deference to views of other jurors with disposition towards being convinced; (2) minority jurors should reconsider reasonableness of their convictions when concurred in by majority; &, (3) no juror should abandon conviction scrupulously held). Ct. reaffirmed rule set out in Lewis, 409 N.E.2d 1276 which disapproved giving of any supplemental instructions to deadlocked juries other than rereading all original final instructions. ABA Standard in allowing Tr. Ct. to separate ABA standard instruction or parts of it from other instructions & to re-give it to jury during deliberations recreates problem of Allen charge situation. Id. Proper procedure is for Tr. Ct. to call jury back into open court in presence of parties & reread all instructions given prior to deliberations, without emphasis or further comment. Id. Allen charge constitutes embellishment on final instructions & can only be read if part of rereading of all final instructions. Ct. expressly rejected case law in other jurisdictions, including 7th Cir., that wording of ABA standard instruction differs in its impact on juries from original Allen charge. Held, convictions reversed. **Note:** See also Bailey card at D.9.e.6.

RELATED CASES: Desjardines, App., 751 N.E.2d 323, *sum. aff'd* 759 N.E.2d 1036 (there was no evidence that jury was deadlocked).

TITLE: Bowen v. State
INDEX NO.: D.9.g.2.n.
CITE: (5-29-97), Ind., 680 N.E.2d 536
SUBJECT: Instruction - juror disagreement; no fundamental error
HOLDING: Tr. Ct.'s instruction regarding juror disagreement did not constitute fundamental error. Instruction was identical to one which Ct. recently upheld as "a request that jurors attend to the views of others & re-examine their own." Edgecomb, 673 N.E.2d 1185. However, Edgecomb was not positive endorsement for use of this instruction, but rather rejection of specific defense objection made at trial. To extent Tr. Ct.s. address possibility of juror disagreement in preliminary or final instructions, Ct. adopted use of following general Indiana pattern instruction regarding jury deliberations: It is your duty, as jurors, to consult with one another & to deliberate with a view toward reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views & change your opinion if convinced if it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Failure of defense counsel to object to instructions & to prosecution's improper statement during closing argument did not result in fundamentally unfair or unreliable proceeding. Held, judgment affirmed.

TITLE: Clark v. State
INDEX NO.: D.9.g.2.n.
CITE: (8/4/92), Ind. App., 597 N.E.2d 4
SUBJECT: Allen charge - must show jury is deadlocked
HOLDING: Allen charge is supplemental instruction suggesting to apparently deadlocked jury to reach verdict, or similar admonishment which might encourage jury to unduly compromise verdict. Fultz, App., 473 N.E.2d 624; Lewis, 424 N.E.2d 107. Allen charges carefully scrutinized to assure that deadlocked jury is not coerced by Tr. Ct. into reaching verdict which is not truly unanimous. Id. This danger not present when Tr. Ct. has no reason to believe jury is deadlocked. Ct. concluded there could be no Allen charge violation in absence of evidence suggesting jury was deadlocked when alleged Allen charge was read. Here, Ct. found jury was not deadlocked. Question "how long are we given to deliberate?", merely expresses jury's inability to agree upon verdict at time question was asked, but not jury's expectancy that it would be unable to reach verdict. See Maxwell, 260 N.E.2d 787. Further, jury's three questions concerning clarification of attempted murder instruction did not indicate inability to reach verdict. Held, no error & attempted murder conviction reversed on other grounds.

RELATED CASES: Broadus, 487 N.E.2d 1298 (Harmless error to give modified Allen charge in initial instructions; instruction given is identical to that given in Lewis, 424 N.E.2d 107); Parish, App., 838 N.E.2d 495 (unlike in Broadus, Ct. did not find error harmless as jury deliberated for nine hours & submitted several questions to the Ct. during that time with many focusing on identification testimony, which was only issue at trial).

TITLE: Dowell v. State
INDEX NO.: D.9.g.2.n.
CITE: (08-27-12), 973 N.E.2d 58 (Ind. Ct. App. 2012)
SUBJECT: Giving special instruction during deliberations - reversible error
HOLDING: In robbery prosecution, Tr. Ct. erred by providing jury with additional instruction after it had begun deliberating and by failing to call jury back into courtroom or re-read entire set of final instructions. Once jury deliberations commence, Tr. Ct. should not give any additional instructions. Crowdus v. State, 431 N.E.2d 796 (Ind. 1982). Limited and narrow "legal lacuna" exception allows supplemental final instruction when jury has question which coincides with error or omission in final instructions.

Here, D and two others beat and robbed victim. Tr. Ct. instructed the jury as to the elements of robbery, but there was no instruction concerning accomplice liability. The jury asked a question and Tr. Ct. returned their note with the handwritten statement “Indiana law provides that a person who aids another person to commit an offense commits that offense.”Giving jury an accomplice liability instruction after deliberations had begun gave that instruction improper emphasis because Tr. Ct. did not re-read the entire set of final instructions contemporaneously with the giving of the additional instruction. As in Graves v. State, 714 N.E.2d 724 (Ind. Ct. App. 1999), the additional instruction tended to “emphasize that issue as being of primary importance and . . . to tell the jury what it ought to do.” Hero v. State, 765 N.E.2d 599 (Ind. Ct. App. 2002). Held, judgment reversed and remanded.

RELATED CASES: Ramirez, 174 N.E.3d 181 (Ind. 2021) (consistent with IC 34-36-1-6, an error or legal lacuna — a gap in final instructions — is no longer required for trial courts to supplement final instructions in responding to a jury’s question on a point of law).

TITLE: Long v. State
INDEX NO.: D.9.g.2.n.
CITE: (4th Dist. 5/12/83), Ind. App., 448 N.E.2d 1103
SUBJECT: Allen instruction - error
HOLDING: Tr. Ct. erred in sua sponte instructing jury, after 2 hours of deliberation that "[t]he issues are not very complicated" & that he "would like" them to "reach a verdict." D's failure to object to instruction does not waive error. Here, neither D nor prosecutor saw a written copy of the instruction before it was given. State argues D waived error by not objecting, but Ct. holds that TR 46 (failure to object does not constitute waiver when a party has no opportunity to object) & Kennedy, 280 N.E.2d 611 (no waiver under similar circumstance) controlling. Proper procedure for instructing jury once deliberations have begun is to reread all instructions given to them prior to deliberations, without emphasis or further comment. Lewis, 424 N.E.2d 107. Held, judgment reversed, new trial ordered.

RELATED CASES: Cabell, 461 N.E.2d 1101 (Tr. Ct. erred in giving supplemental instruction, set forth in opinion, after jury began deliberations & indicated deadlock; held, reversed); Lowenfield v. Phelps, (1988), U.S., 108 S.Ct. 546, 98 L.Ed.2d 568 (Const L 268(2); Crim L 865(1), 874, 1213.7; federal constitution permits giving noncoercive supplemental charge to jury which has indicated it is deadlocked).

TITLE: Mosley v. State
INDEX NO.: D.9.g.2.n.
CITE: (2nd Dist., 1-22-96), Ind. App., 660 N.E.2d 589
SUBJECT: Supplemental instruction - reversible error
HOLDING: Tr. Ct. committed reversible error when it read supplemental instruction to jury after deliberations had commenced & jury indicated that it was deadlocked. Proper procedure for instructing jury once deliberations have begun is to reread all instructions given to them prior to deliberations, without emphasis or further comment. Lewis, Ind., 424 N.E.2d 107. Here, Tr. Ct. read following supplemental instruction to jury, over D's objection: [T]he Ct. further instructs you that all verdicts must be unanimous. While it is the duty of each Juror to act upon his...own individual judgment and determine for himself the issue of guilt or innocence...it is likewise the duty of each Juror to consult honestly, freely & fairly with his fellow Jurors and endeavor with them...to arrive at a just conclusion as to the guilt or innocence of the D. No Juror, through carelessness or indifference, should yield his own judgment...to the judgment of his fellow Jurors. Neither should he, on the other hand, allow mere pride or personal opinion to prevent him from consulting and reasoning and deliberating...in an honest & good faith effort to arrive at a just verdict in this cause.

Jury was then told to continue its deliberations, & thereafter returned guilty verdicts on all three counts. Ct. found that although language of instruction was not as strong as true Allen charge, its intent was to procure verdict from otherwise deadlocked jury. Once deliberations commence, Tr. Ct. should not give any additional instructions. Crowdus v. State (1982), Ind., 431 N.E.2d 796. Held, reversed & remanded.

RELATED CASES: Graves, App., 714 N.E.2d 724 (although Tr. Ct. properly provided jury with additional instruction, it committed reversible error by failing to re-read entire set of final instructions contemporaneously with giving of additional instruction).

D. TRIAL

D.9. Jury trial

D.9.g.2.o. Jury nullification/right to determine law and facts (Ind. Const. Art. I, Sec. 19)

TITLE: Barker v. State
INDEX NO.: D.9.g.2.o.
CITE: (10/14/82), Ind., 440 N.E.2d 664
SUBJECT: Instruction - jury nullification
HOLDING: Instruction in criminal case which orders jury to return guilty verdict upon finding certain facts invades jury's constitutional prerogative. Ind. Const. Art. 1, Section 19; Pritchard, 230 N.E.2d 416. Here, jury was instructed: "If you find the state has proven beyond reasonable doubt the material allegations of either of the charges against the D, or of any offense included thereunder, then you must find the D guilty of that charge." Ct. deems instruction mandatory in nature but finds "must" language does not require reversal, *citing* Taylor, 420 N.E.2d 1231. In Taylor, D had not objected to instruction (almost identical to one given here) & argued fundamental error on appeal. DISSENT by Hunter contends Barker preserved claim for review by objecting at trial, thus claim must be assessed outside context/principles of fundamental error doctrine. Mandatory language requires reversal, curative instructions cannot save mandatory instruction (Pritchard; Brewer, 252 N.E.2d 429; Mundy, 214 N.E.2d 389; Harrington, App., 413 N.E.2d 622). Dissent distinguishes Loftis, 269 N.E.2d 746 in which "should" deemed nonmandatory language, curable by other instructions. Majority opinion points to preliminary instructions on elements of crimes (burglary, theft) & jury as "judge of law & fact in IN," & finds these instructions ameliorate alleged defect in mandatory instruction. Held, no error.

RELATED CASES: Jackson, App., 657 N.E.2d 131 (jury was properly instructed as to their role in relation to determining law); Mitchem, 503 N.E.2d 889; Travis, 488 N.E.2d 342 (Tr. Ct. did not err in refusing D's instruction & giving its own re being judge of both law & facts); Greer 9 N.E.2d 26 (same as Travis, but see instructions); Jennings, App., 503 N.E.2d 906 (instruction, set forth in opinion, did not mislead jury re its power to decide law & facts, *citing* Beavers, 141 N.E.2d 118).

TITLE: Bridges v. State
INDEX NO.: D.9.g.2.o.
CITE: (10-12-05), Ind., 835 N.E.2d 482
SUBJECT: Jury nullification instruction - failure to include with final instructions
HOLDING: Although Tr. Ct. incorrectly failed to read instruction on jury's right to decide both law & facts among the other final instructions, reversal was not required because this instruction was given to jurors both orally & in writing among preliminary instructions only a day before, & instruction was also provided to them in written form for use during deliberations. Value in instructing jury of its role as finder of fact & law is not limited to preliminary instructions. Warren v. State, 725 N.E.2d 828 (Ind. 2005). However, Tr. Ct.'s omission of Article I, Section 19 instruction when it re-read its preliminary instructions among final instructions did not warrant reversal in this case. Held, transfer granted, Ct. App.' memorandum opinion summarily affirmed except as to jury instruction issues, judgment affirmed.

TITLE: Fuquay v. State
INDEX NO.: D.9.g.2.o.
CITE: (1st Dist. 12/18/91), Ind. App., 583 N.E.2d 154
SUBJECT: Instruction on jury's right to determine law
HOLDING: While D has right to have jury instructed on its constitutional right to determine law, instruction must not lend credence to view that jury is free to determine law in accordance with its own personal opinion. Tr. Ct. properly rejected D's instruction which included statement that while Ct. had duty to instruct on law, & jury should give instructions respectful attention, "the instructions of the Ct. are not necessarily binding on you. You have the right to independently determine the law to be different from the instruction of the Ct. The instructions given are for your guidance & information & you should give the instructions such consideration & respect as to which you deem they are entitled..." Ct. found this instruction was tantamount to telling jury it could do whatever it wanted in determining law. Two instructions dealing with this area were approved in Hoffa, Ind., 142 N.E. 653, & State v. Willis, Ind. App., 552 N.E.2d 512. Held, judgment affirmed, Robertson, J., dissenting on this issue with extensive discussion.

RELATED CASES: Tyson, App., 619 N.E.2d 276, *trans. denied*. (Instruction stating: "While the jury is the judge of the facts, I am the judge of the law. You must accept my instructions as to the law that governs this case, & then apply that law to the facts as you find them..." directly conflicted with Ind. Constitution, Art. I, 19, stating jury has right to determine law & facts, & therefore Tr. Ct. did not err in refusing it.)

TITLE: Gantt v. State
INDEX NO.: D.9.g.2.o.
CITE: (3rd Dist., 04-19-05), Ind. App., 825 N.E.2d 874
SUBJECT: Jury questions during deliberations - improper instruction on jury right to determine facts
HOLDING: Tr. Ct. acted appropriately under new Jury Rule 28 in providing an additional jury instruction to address a disagreement among jury members. However, the instruction given was an erroneous statement of the law & invaded the province of the jury to determine credibility & accept or reject evidence as it sees fit. Jury was confused as to whether they must believe one witness or the other & if they could reach a verdict if they did not believe either party. Tr. Ct. instructed the jury that "you must decide who you believe & who you disbelieve if you can't believe two or more" & "a thing cannot both be & not be at the same time." Tr. Ct. then orally provided a lengthy explanation of the principle with hypotheticals demonstrating that if misperception or ambiguity are not involved, one person must be telling the truth.

Under Ind. Const. Art. I, § 19, juries have the right to determine the law & the facts of a case. Tr. Ct. has no right to invade the province of the jury as the sole judge of the credibility of a witness. Pritchard v. State, 230 N.E.2d 416 (Ind. 1967). When two witnesses give contradictory accounts, it is not true that the jury must believe one or the other. The jury may choose to believe neither witness, believe aspects of the testimony of each, or believe the testimony but also believe in a different interpretation of the facts than espoused by the witnesses. The error in this case was not harmless. Held, judgment reversed & remanded for new trial.

TITLE: Hancock v. State
INDEX NO.: D.9.g.2.o.
CITE: (4th Dist., 10-23-00), Ind. App., 737 N.E.2d 791
SUBJECT: Habitual offender - jury nullification; instructions
HOLDING: Tr. Ct. did not err when it refused to read D's tendered jury instruction during habitual phase of trial which would have informed jury of its power to nullify under Article I, ' 19 of Indiana Constitution. Tendered instruction provided that jury "may find that the D is not a habitual offender even if [the jury] find[s] that the State has proven beyond a reasonable doubt that the D has accumulated two prior unrelated felony convictions." Any error in refusing D's tendered instruction was cured by Tr. Ct.'s reading & re-reading of following instructions during habitual offender phase of trial: Under the Constitution of Indiana, the jury is given the right to decide both the law & the facts. In fulfilling this duty, you are to apply the law as you actually find it & you are not to disregard it for any reason. The instructions of the Ct. are your best source in determining what the law is.

You are the exclusive & sole judges of what facts have been proven & you may also determine the law for yourselves. This statement does not mean that you have the right to disregard the law or to set it aside & make your own law. You should determine the law as it is enacted by the legislature of this state & considered & interpreted by the higher Cts. of record, & in that way you have the right to determine the law for yourselves, but not make your own laws.

When D requests Tr. Ct. to instruct jury on its role as finders of law & fact during habitual phase of trial, it is reversible error for Tr. Ct. to refuse request. Warren, 725 N.E.2d 828. Although D's proposed instruction informed jury of their power to nullify & is correct statement of law under Article I, § 19 of Indiana Constitution, tendered instruction was adequately covered by other instructions given by Tr. Ct. as preliminary & final instructions during habitual phase of trial. Held, no error.

RELATED CASES: Shouse, App, 849 N.E.2d 650 (where D read instruction during closing of HO phase, judge instructed jury concerning nullification during final instructions of guilt phase &nullification instruction was brought into jury room, Tr. Ct.'s refusal to re-read nullification instruction during HO phase was not reversible error, although Ind. S. Ct. Has held refusal to re-read jury nullification instructions is reversible error. See Warren, 725 N.E.2d 828).

TITLE: Holden v. State
INDEX NO.: D.9.g.2.o.
CITE: (5-30-03), Ind., 788 N.E.2d 1253
SUBJECT: Nullification instruction inviting jury to refuse to enforce law's harshness improper
HOLDING: Article I, Section 19 of Indiana Constitution provides "In all criminal cases whatever, the jury shall have the right to determine the law & the facts." Tr. Ct. properly refused to give instruction advising jury that "[w]hile this provision does not entitle you to return false verdicts, it does allow you the latitude to refuse to enforce the law's harshness when justice so requires." Instruction was inspired at least in part by Justice Rucker's Law Review Article, The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation, 33 Val. U. L. Rev. 449 (1999). General thrust of article is that Article I, Section 19 amounts to a constitutionally permissible form of jury nullification. That is, under Indiana Constitution the jury has right to return verdict of not guilty despite law & evidence where a strict application of law would result in injustice & violate moral conscience of community.

Early Indiana case authority stood for proposition that jury's law determining function meant that jury could "disregard" instructions of Tr. Ct. However, on closer examination, it appears that right to disregard Tr. Ct.'s instructions has never been equated as a right to disregard "the law." Blaker v. State, 130 Ind. 203 (1892). In Sparf v. United States, 156 U.S. 51 (1895), U.S. S.Ct. rejected any notion of a jury's right to determine law, & even dissent maintained that jury was required to "decide by the law as they know or believe it to be."

Although there may be some value in instructing Indiana jurors that they have a right to "refuse to enforce the law's harshness when justice so requires," source of that right cannot be found in Article I, Section 19 of Indiana Constitution. Thus, it is improper for Tr. Ct. to instruct jury that they have right to disregard the law. Bivins v. State, 642 N.E.2d 928 (Ind. 1994). Notwithstanding Article I, Section 19, a jury has no more right to ignore the law than it has to ignore the facts in a case. Id. Held, transfer granted, judgment affirmed.

RELATED CASES: Walden, 895 N.E.2d 1182 (Rucker, J., dissenting and suggesting that the following instruction be given in guilt phase of trials, "Even where the jury finds that the State has proven the statutory elements of the offense beyond a reasonable doubt, the jury still has the unquestioned right to determine whether in this case returning a verdict of guilty promotes fairness and the ends of justice).

TITLE: Madison v. State
INDEX NO.: D.9.g.2.o.
CITE: (2/28/89), Ind., 534 N.E.2d 702
SUBJECT: "Should" instruction - jury nullification
HOLDING: Instruction that jury "should" find D guilty if state proves each element of offense beyond reasonable doubt did not improperly nullify self-defense claim. D was charged with murder, & raised self-defense claim. Tr. Ct. instructed jury that state had to prove each element beyond reasonable doubt, then instructed them that if they found that the state had done so, they should find D guilty of murder. D argues that this instruction improperly nullifies his self-defense claim, *citing* Mundy, 214 N.E.2d 389. In Mundy, jury was instructed that despite finding of sudden heat, killing was still unlawful & would constitute manslaughter. Ind. S. Ct. reversed, finding that this instruction nullified Mundy's self-defense claim. However, Ind. S. Ct. here does not agree that use of word "should" has effect of precluding self-defense. Word "should" is not improper as long as jury is instructed upon material allegations which state must prove & that they are judges of law as well as facts. Mitchem, 503 N.E.2d 889. Dickson, J., DISSENTS, arguing that instruction failed to include elements of self-defense, on which state had burden of proof.

TITLE: Walker v. State
INDEX NO.: D.9.g.2.o.
CITE: (2/24/83), Ind., 445 N.E.2d 571
SUBJECT: Instruction - jury nullification
HOLDING: D's tendered instruction conveying to jury belief that it had power of nullification was an incorrect statement of law & was properly refused by Tr. Ct. Here, D tendered an instruction in habitual offender proceeding that essentially told jury if they determined that the mandatory punishment was excessive under Ind.Const. Art. I, Section 18 (reformation) & the 8th Amend & Ind.Const. Art. I, Section 16 (cruel & unusual punishment), they should consider this finding in rendering a verdict. The Tr. Ct. instructed jury that the Ind.Const. made them judges of law & fact; jury determines law but this did not mean that jury can make, repeal, disregard or ignore existing law. Ct. finds D's tendered instruction was an incorrect statement of law & thus properly refused. Held, no error.

D. TRIAL

D.9. Jury trial

D.9.g.3. Limiting/cautionary instructions

TITLE: Cardine v. State
INDEX NO.: D.9.g.3.
CITE: (3/27/85), Ind., 475 N.E.2d 696
SUBJECT: Instruction to set aside sympathy - adequacy re inflammatory photographs
HOLDING: Tr. Ct. did not err in refusing to voir dire juror re her ability to remain fair after viewing photographs of murder victim. Here, juror "reacted strongly" to photographs. Ct. finds photographs were properly admitted. Once properly admitted, extent to which evidence legitimately influences jury is not properly subject for investigation by defense counsel or Tr. Ct. Tr. Ct. instructed jury to set aside sympathy/sentiment in reaching verdict. Held, no error.

TITLE: Tidwell v. State
INDEX NO.: D.9.g.3.
CITE: (12-16-94), Ind., 644 N.E.2d 557
SUBJECT: Cautionary instruction - weight of accomplice's testimony
HOLDING: In conspiracy/murder prosecution, D was not entitled to cautionary instruction on weight of testimony of accomplice. Instruction would have told jury to receive co-conspirator's testimony with caution due to his agreement with State to testify in exchange for lenient treatment in his own case. Although Ind. follows minority rule, danger of convictions resulting from "purchased testimony" is alleviated where, as here, jury is fully apprised of terms of any plea agreement struck between accomplice & State, Fox v. State, Ind., 497 N.E.2d 221. Jury had sufficient information to assess credibility of accomplice's testimony without editorial comment necessarily implied by cautionary instruction. Held, convictions affirmed.

RELATED CASES: Washington, App., 840 N.E.2d 873; Brown, 671 N.E.2d 401.

TITLE: Tucker v. State
INDEX NO.: D.9.g.3.
CITE: (3/10/89), Ind., 534 N.E.2d 1110
SUBJECT: Cautionary instruction - co-D refuses to testify
HOLDING: Tr. Ct. erred in refusing to instruct jury to disregard co-D's refusal to testify. When accomplice refuses to testify, inference raised for jury is that withheld testimony would have been damaging to both D & co-D. Aubrey, 310 N.E.2d 556. When co-D refuses to testify in presence of jury, D is entitled to have jury admonished to disregard refusal. Cox, 493 N.E.2d 151; Hovis, 455 N.E.2d 577; Pitman, 436 N.E.2d 74. Here, Tr. Ct. erred in allowing co-D to be called as witness when all parties knew in advance that he would invoke 5th Amend. Tr. Ct. further erred in refusing to admonish jury to disregard situation. Held, reversed & remanded.

RELATED CASES: Johnson, 719 N.E.2d 812 (counsel was not ineffective in failing to ask Tr. Ct. for immediate limiting instruction when alleged accomplice called by State refused to testify; whether to ask for instruction is decision for defense to make); Brown, 671 N.E.2d 401 (Tucker inapplicable because: 1) Tr. Ct. & parties did not know in advance that co-D would refuse to testify when he took stand; 2) co-D's testimony from prior trial was available & used, so jury was not placed in position of speculating about what co-D would say; & 3) D did not object to co-D being brought before jury); Brewster, 450 N.E.2d 507 (harmless error - witness was not co-D & statement was read into evidence).

D. TRIAL

D.9. Jury trial

D.9.g.4. Duty to request

TITLE: Grove v. State
INDEX NO.: D.9.g.4.
CITE: (4th Dist. 6/9/83), Ind. App., 449 N.E.2d 1122
SUBJECT: Instruction - duty to request in writing
HOLDING: Where D failed to submit limiting instruction (that testimony concerning witness' phone conversations with D was not offered to prove truth of conversations), evidence was available for consideration for all purposes. Franklin v. Duckworth, (N.D. Ind. 1982) 530 F.Supp. 1315; Turentine, App., 384 N.E.2d 1119. Here, D challenged sufficiency of evidence (theft), contending testimony regarding phone conversations could not be used to sustain verdict. He had orally requested cautionary instruction, but Ct. finds failure to tender writ-ten instruction waived error in failure to give instruction. Ct. holds contents of telephone conversations, although hearsay, could be considered. Ct. notes evidence was sufficient to support conviction even without telephone conversation. Held, conviction affirmed.

D. TRIAL

D.9. Jury trial

D.9.g.6. Duty to instruct sua sponte

TITLE: Deamus v. State
INDEX NO.: D.9.g.6.
CITE: (7/11/85), Ind., 479 N.E.2d 1319
SUBJECT: Duty to instruct sua sponte
HOLDING: Tr. Ct. had no duty to instruct jury sua sponte re credibility of eyewitness identification. Alexander, 449 N.E.2d 1068. Here, Tr. Ct. did give sufficient general instruction re credibility of witnesses. Held, no error.

D. TRIAL

D.9. Jury trial

D.9.g.7. Rereading/supplemental instructions

TITLE: Downs v. State
INDEX NO.: D.9.g.7.
CITE: (5th Dist., 10-24-95), Ind. App., 656 N.E.2d 849
SUBJECT: Supplemental jury instructions - no error
HOLDING: Where there was variance between evidence at trial & dates in charging information, Tr. Ct. did not err in providing additional instruction to jury after deliberations had commenced. Prosecutor neither amended information nor requested jury instruction permitting jury to disregard dates contained in information, & trial judge did not include instruction on his own. Tr. Ct. realized omission when jury asked whether State had to prove act occurred within dates alleged in information. Generally, any additional instruction to jury once deliberations have begun is impermissible. Crowdus v. State, (1982), Ind., 431 N.E.2d 796. However, Ct. held that instruction given in this case fits legal lacuna exception recognized in Crowdus, *supra*, & Jenkins v. State (1981), Ind., 424 N.E.2d 1002. Legal lacuna exception allows supplemental final instruction when necessary to proper deliberation of jury, when jury question coincides with error or omission in final instructions. Ct. noted that variance between dates of offense was not material & rejected argument that instruction was prejudicial. Final arguments & other jury instructions centered on State's burden of proving that victim was under-age of 12 at time of offense. Held, no error.

RELATED CASES: Ramirez, 174 N.E.3d 181 (Ind. 2021) (consistent with IC 34-36-1-6, an error or legal lacuna — a gap in final instructions — is no longer required for trial courts to supplement final instructions in responding to a jury's question on a point of law); Fields, 972 N.E.2d 977 (Ind. Ct. App. 2012) (no abuse of discretion in answering jury question about one instruction, instead of re-reading all instructions, where question involved question of law and Tr. Ct. answered question succinctly and without elaboration); Hero, 765 N.E.2d 599 (App.) (giving additional instruction for jury as part of re-reading all of original instructions did not have prejudicial effect on D & was not abuse of discretion).

TITLE: Mellott v. State
INDEX NO.: D.9.g.7.
CITE: (11/20/86), Ind., 500 N.E.2d 173
SUBJECT: Instructions - re-reading preliminary as final instructions
HOLDING: Where an issue is pertinent in a cause & is given to jury in preliminary instruction, it is important that this instruction be re-read to jury as part of final instructions. Jury has different perspective as to application of instruction after entire case has been presented to it. This is particularly true of lengthy N.E.2d complex trials. Here, D contends Tr. Ct. did not re-read preliminary instruction concerning self-defense as final instruction. Ct. finds record does not clearly disclose whether Tr. Ct. re-read preliminary instructions along with final instructions given to jury (2-day trial). Ct. finds an indication in record that Tr. Ct. did resubmit preliminary instructions. Held, no error. **Note:** Opinion clarifies earlier opinion appearing at 496 N.E.2d 396, in which Dixon & Shepard dissented, arguing that majority opinion condoned Tr. Ct.'s refusal to include as final instruction its preliminary instruction re D's key issue of self-defense. DISSENT likened situation to Brannum, 366 N.E.2d 1180 in which Ct. reversed murder conviction because Tr. judge gave additional special instruction to jury during deliberations. In Brannum, Pivarnik noted "It is fundamental that a Ct. should not, by an instruction, cast suspicion on any defense or evidence offered."

D. TRIAL

D.9. Jury trial

D.9.g.8. Appellate review

TITLE: Coats v. State
INDEX NO.: D.9.g.8.
CITE: (2nd Dist.; 6-18-98), Ind. App., 697 N.E.2d 1261
SUBJECT: Jury instruction on knowledge of license suspension - no prejudice
HOLDING: Tr. Ct. erred in refusing to give D's proposed instruction advising that, in prosecution for operating motor vehicle while suspended, State must prove D's knowledge of suspension of his license. However, error did not prejudice substantial rights of D. When reviewing Tr. Ct.'s failure to give instruction, appellate Ct. must consider whether tendered instruction correctly stated law, whether there is evidence in record to support giving of instruction, & whether substance of instruction is covered by other instructions. Fields, 679 N.E.2d 1315. In addition, D must demonstrate that substantial rights have been prejudiced in order to obtain reversal for Tr. Ct.'s failure to instruct jury. Here, instruction was correct statement of law, & failure to give instruction was not cured by other instructions. However, State introduced at trial Bureau of Motor Vehicles' records showing that notice of D's suspension had been mailed to him. Thus, Tr. Ct.'s refusal to give instruction did not require reversal. Held, conviction affirmed.

TITLE: Cox v. State
INDEX NO.: D.9.g.8.
CITE: (3/21/85), Ind., 475 N.E.2d 664
SUBJECT: Appellate review - giving unnecessary instruction; harmless error
HOLDING: Instruction re deadly weapon was unnecessary; however instruction was surplusage & giving of instruction was harmless error. Underhill, 428 N.E.2d 759 (instruction on attempted escape improper, but held to be surplusage/harmless error). See also McNary, 428 N.E.2d 1248. Held, conviction affirmed.

TITLE: Forrester v. State
INDEX NO.: D.9.g.8.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Instruction - appellate review; brief should contain verbatim objection
HOLDING: When error is predicated on giving/refusing to give an instruction, instruction must be set out verbatim in argument section of brief with verbatim objections, if any. AR 8.3(A)(7). Failure to follow rule waives error. Here, D failed to set forth verbatim objections made at trial. Ct. declines to entertain issue but does state instructions, objections & authority cited were reviewed. Held, no error.

TITLE: Hack v. State
INDEX NO.: D.9.g.8.
CITE: (1st Dist. 7/14/82), Ind. App., 437 N.E.2d 486
SUBJECT: Instructions - refusal; appellate review
HOLDING: Three-point test to determine whether Tr. Ct. erred in refusing to give instruction: (1) whether tendered instruction correctly states law; (2) whether there is evidence in record to support giving of instruction; (3) whether substance of tendered instruction is covered by other instructions. Richey, 426 N.E.2d 389. Here, Ct. uses test to find refusal of D's tendered instruction (presumption of innocence operates as evidence in favor of D) was proper. Held, no error.

RELATED CASES: Albores, Jr., 987 N.E.2d 98 (Ind. Ct. App. 2013) (no abuse of discretion in refusing D's instruction on presumption of innocence because other instructions adequately advised jury about the presumption); Jones, 445 N.E.2d 92 (Tr. Ct. properly modified D's tendered instruction listing attempted involuntary manslaughter (no such offense) as lesser included of attempted murder); Sedelbauer, App., 455 N.E.2d 1159 (no evidence in record bearing on film's prurient appeal to male homosexuals; thus, instruction re contemporary community standards of male homosexuals properly refused); Goodwin, 439 N.E.2d 595.

TITLE: Hoskins v. State
INDEX NO.: D.9.g.8.
CITE: (11/4/82), Ind., 441 N.E.2d 419
SUBJECT: Instruction - appellate review
HOLDING: Failure to submit instruction to Tr. Ct. to add what Ct.'s instruction lacks waives any alleged error. Swan, 375 N.E.2d 198. Here, D contends reasonable doubt instruction given by Tr. Ct. was incomplete & suggests satisfactory completion in appellate brief. State contends error is waived because D did not submit instruction on reasonable doubt. Held, D waived any error; however, Tr. Ct.'s instruction sufficient.

D. TRIAL

D.9. Jury trial

D.9.h. Jury verdict

TITLE: Baker v. State
INDEX NO.: D.9.h.
CITE: (06-23-11), 948/1169 (Ind. 2011)
SUBJECT: Jury verdict - unanimity instruction or election of specific incidents
HOLDING: Indiana has long required that a verdict of guilty in criminal cases must be unanimous. Fisher v. State, 291 N.E.2d 76 (Ind. 1973). But applying the rule of jury unanimity can be difficult in child sex offense cases. There can be no joinder of separate and distinct offenses in one and the same count, but State may allege alternative means or theories of culpability when prosecuting the D for a single offense. Vest v. State, 930 N.E.2d 1221 (Ind. Ct. App. 2010). Thus, a disjunctive instruction, which allows jury to find a D guilty if he commits either of two or more underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the D committed one particular offense.

Adopting reasoning in People v. Jones, 792 P.2d 643 (Cal. 1990), Court held that, in cases where evidence is presented of a greater number of separate criminal offenses than the D is charged with, the State may in its discretion designate a specific act (or acts) on which it relies to prove a particular charge. However, if State decides not to so designate, then jurors should be instructed that in order to convict the D they must either unanimously agree that the D committed the same act or acts or that D committed all of the acts described by the victim and included within the time period charged. Here, D neither objected to Tr. Ct.'s erroneous jury unanimity instruction nor offered an instruction on his own, thus issue was waived. Court concluded D failed to show fundamental error. Held, transfer granted, Court of Appeals' opinion on all other issues summarily affirmed, judgment affirmed.

Note: Court encouraged Legislature to adopt statute criminalizing ongoing pattern of sexual abuse when victim is unable to reconstruct the specific circumstances of any one incident.

RELATED CASES: Benson, 73 N.E.3d 198 (Ind. Ct. App. 2017) (no fundamental error by failing to instruct jury on jury unanimity because two crimes were really one crime per continuing crime doctrine), Carter, 31 N.E.3d 17 (Ind. Ct. App. 2015) (as in Baker, the instructional error in case that turned largely on credibility was not fundamental).

TITLE: Batalis v. State
INDEX NO.: D.9.h.
CITE: (4th Dist., 05-27-08), Ind. App., 887 N.E.2d 106
SUBJECT: Use of special verdict forms - harmless error
HOLDING: In murder and attempted murder prosecution, Tr. Ct. committed harmless error by giving the jury special verdict forms. Unbeknownst to State and D, Tr. Ct. gave jury two sets of guilty verdict forms: one set stated he was guilty of the offenses, and the other specified he was guilty as an accomplice. In concluding that use of special verdict forms was harmless, Court noted that the forms did not remove any issues from the jury. Jury was asked to distinguish between liability as a principal and an accomplice, and there was some confusion about accomplice liability, but that distinction has no practical consequence. McQueen v. State, 711 N.E.2d 503 (Ind. 1999). Moreover, in light of overwhelming evidence of D's guilt, Court could not say that separate forms likely had any significant impact on jury. Held, murder conviction affirmed, attempted murder conviction vacated on double jeopardy grounds.

TITLE: Benson v. State
INDEX NO.: D.9.h.
CITE: (3/30/2017), 73 N.E.3d 198 (Ind. Ct. App. 2017)
SUBJECT: Jury unanimity instruction unnecessary where continuing crime doctrine applies
HOLDING: The Tr. Ct. did not commit fundamental error by failing to instruct the jury on jury unanimity because under the continuing crime doctrine, Defendant committed only one crime, not two.

Officer stopped the vehicle in which Defendant was a passenger for an improper turn. Defendant exited the vehicle and moved his hands toward his belt, as if he was hiding a weapon. Defendant fled, and officer gave chase. Defendant turned to face officer and fired several times. Defendant again fled, running through an intersection and then around one side of a house where he encountered officer one more time. Defendant fired more shots at officer. The entire incident lasted about 90 seconds. The State filed, inter alia, one count of Attempted Murder, simply contending that Defendant discharged his gun at officer. However, at trial the State pointed to both times Defendant shot at officer.

Where a person is charged with one single count of a criminal act, but a jury hears evidence of multiple acts, a basic unanimity instruction is insufficient. Baker v. State, 948 N.E.2d 1169, 1175 (Ind. 2011). This is so because, absent a more particular instruction, the jury could unanimously agree that the defendant was guilty, yet, in doing so, rely on different acts in evidence. See id. at 1177. In other words, the State could point to multiple, separate criminal acts and the jury could convict, despite it being divided about which acts occurred. When this occurs, a Tr. Ct. should instruct a jury that they must unanimously agree on which incident results in criminal liability. However, where, as here, the defendant's acts are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," the defendant's conduct amounts to only a single chargeable crime. Walker v. State, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010) (continuous crime doctrine). Under such circumstances, the concerns addressed by a jury unanimity instruction are not at issue, so the Tr. Ct. did not commit error, let along fundamental error, in not instructing on jury unanimity. Held, judgment affirmed.

RELATED CASES: Calvert, 177 N.E.3d 107 (Ind. Ct. App. 2021) (no fundamental error in not giving a special unanimity instruction; because the State was permitted to present the jury with alternative ways to find D guilty as to one element, the jury did not have to unanimously decide which crime (battery or criminal recklessness) D assisted in the charge for Level 6 felony, assisting a criminal).

TITLE: Blevins v. State
INDEX NO.: D.9.h.
CITE: (3d Dist. 04/27/92), Ind. App., 591 N.E.2d 562
SUBJECT: Erroneous Acceptance of verdict after mistrial
HOLDING: It was error for Tr. Ct. to accept verdict on one D after declaring mistrial due to hung jury. Two Ds were jointly tried for robbery. After approximately 7 hours of deliberation, jury foreman informed Tr. Ct. that verdict could not be reached, & judge declared mistrial. As jury was being escorted out, one of jurors said that verdict had been reached on one of Ds, & judge instructed them to return to jury room & complete verdict form on that D. Jury returned with verdict finding D guilty of robbery. Ct. held that any action of jury after discharge is null & void, West, 228 Ind. 431, 92 N.E.2d 852, & judge's declaration of mistrial discharged jury. Held, reversed & remanded for new trial.

TITLE: Castillo v. State
INDEX NO.: D.9.h.
CITE: (2nd Dist.; 4-31-00), Ind. App., 734 N.E.2d 299
SUBJECT: Jury verdict - must be able to show it is unanimous
HOLDING: Tr. Ct. erred in allowing State to introduce evidence of two controlled buys that occurred on same day but only one of which was charged & to argue that jury could find D guilty of either offense. Jury must unanimously agree regarding which crime D committed. Richardson v. U.S., 526 U.S. 813, 119 S.Ct. 1707 (1999). Here, over D's objection, State was permitted to present evidence of two controlled buys between D & confidential informant although State charged D with only one count of dealing. State argued in closing that although it had proved D dealt cocaine on two occasions, jury only had to find that D dealt cocaine on one of two occasions. Moreover, Tr. Ct. did not instruct jurors that they were required to render unanimous verdict regarding which dealing crime D committed. Because it is possible that some jurors believed that D committed first dealing crime while other jurors believed that D committed second dealing offense, it is possible that jury's verdict of guilty regarding charge of dealing in cocaine was not unanimous. Thus, D's conviction for dealing in cocaine must be vacated. Held, judgment reversed in part & affirmed in part.

RELATED CASES: Giddings, 928 N.E.2d 886 (Ind. Ct. App. 2010) (because of special difficulties in child molest cases, especially where abuse occurs over an extended period, the Castillo requirement for unanimous verdicts does not apply); Lainhart, App., 916 N.E.2d 924 (Tr. Ct. should have instructed jury that they had to reach a unanimous verdict as to which crime, if any, the D committed where the D was charged in one count with threatening three alternative victims at different times); Scuro, App, 849 N.E.2d 682 (where State charged D with 3 counts of dissemination of materials harmful to minors based on 3 different victims, but presented evidence that one of the victims was shown materials on more than one occasion, Ct. cannot know whether jury convicted D based on incidents involving only the one victim or incident involving all three victims); Taylor, 840 N.E.2d 324 (jury had to determine only whether D committed one act of murder; there were two different theories upon which jury could have found that D committed this one act -- either as principal or accomplice).

TITLE: Dougherty v. State
INDEX NO.: D.9.h.
CITE: (4th Dist. 7/28/83), Ind. App., 451 N.E.2d 382
SUBJECT: Jury verdict - D must tender form
HOLDING: Tr. Ct. did not commit fundamental error in failing to give jury a verdict form which included battery, a lesser included crime upon which jury had been instructed. It is D's duty to tender form of verdict he/she wants given to jury. Bowman, (1934) 207 Ind. 358; Jeffries, (1925) 195 Ind. 649. See also Clemons, 424 N.E.2d 113 (D waived any error when Ct. gave incomplete verdict form because he failed to tender proper/complete form). Held, conviction affirmed.

TITLE: Evans v. State
INDEX NO.: D.9.h.
CITE: (4/30/2015), 30 N.E.3d 769 (Ind. Ct. App. 2015)
SUBJECT: Inadequate jury unanimity instruction - no fundamental error
HOLDING: In dealing in narcotic drug prosecution, jury unanimity instruction that failed to mention jurors had to rely on the same sale of heroin to support D's conviction did not constitute fundamental error. State presented evidence of multiple acts of dealing on same day as a controlled buy, so it was unclear what sale the jury relied on. Although no unanimity instruction was tendered or given, D waived issue by failing to object to Tr. Ct.'s instructions or offer his own. Any error was not fundamental because the overwhelming majority of evidence at trial was about the controlled buy. It is clear that this was the act of dealing that supported the jury's guilty verdict. To avoid this issue in the future, Court noted "that the better practice for the State is to be more specific in their charging information as to which act is the basis of the charge."

D also waived claim of Tr. Ct. error in admitting evidence of large amount of cash (beyond buy money) found on him when searched after the controlled buy. He objected in motion in limine and when a photo of the cash was offered into evidence, but not before, when the detective testified about the cash. Held, judgment affirmed.

TITLE: Street v. State
INDEX NO.: D.9.h.
CITE: (1st Dist. 9/12/90), Ind. App., 559 N.E.2d 375
SUBJECT: General verdict - degree of offense not specified
HOLDING: Tr. Ct. did not err in finding that voluntary manslaughter verdict was for Class A felony, although neither jury instructions or verdict forms specified degree. D was charged with murder, & evidence showed that he stabbed victim to death with knife. Jury returned general verdict finding D guilty of voluntary manslaughter. D argues on appeal that Tr. Ct. *sua sponte* elevated conviction from Class B felony to Class A, invading province of jury. Voluntary manslaughter is Class B felony, which is elevated to Class A if committed by means of deadly weapon. Ind. Code 35-42-1-3. Generally, where information fails to include specific degree of offense, general verdict is sufficient to sustain conviction of highest degree. Rose, (1882), 82 Ind. 344; 76 Am.Jur.2d Trial Sec. 1169 (1975). D *cites* Rodriguez, App., 385 N.E.2d 1208, in which D was charged with armed robbery, Class B, but instructions did not contain element of "armed with a deadly weapon" & verdict stated only that Rodriguez was guilty of "robbery." Ct. App. vacated armed robbery sentence, concluding from record that Rodriguez was prosecuted only for lesser offense of robbery. Here, information charged D with murder by "striking, cutting or stabbing... with a knife." Record reflects that D was prosecuted for murder & voluntary manslaughter by means of deadly weapon. D admitted use of knife, & instructions set forth language of information & elements of murder & voluntary manslaughter. In light of record, jury's verdict of guilty of voluntary manslaughter can only reasonably be interpreted as conviction for Class A felony. Held, conviction affirmed.

TITLE: Vest v. State
INDEX NO.: D.9.h.
CITE: (07-21-10), 930 N.E.2d 1221 (Ind. Ct. App. 2010)
SUBJECT: Duplicitous charging information and failure to instruct on unanimity - no error
HOLDING: Where D was accused of fleeing from three police officers all within a single episode of pursuit and arrest, and charging information alleged alternative officers, Tr. Ct. did not err in failing to instruct jurors that, in order to return a guilty verdict, they would have to agree unanimously as to which officer D fled. In a single, continuous episode of resisting arrest by flight, only one offense is committed regardless of the number of police officers involved. Touchstone v. State, 618 N.E.2d 48 (Ind. Ct. App. 1993). The State may allege alternative means or theories of culpability when prosecuting D for a single offense. Taylor v. State, 840 N.E.2d 324 (Ind. 2006).

Here, State alleged that D "did knowingly flee" from Officers "Geoffrey Barbieri and/or Josh Taylor and/or Joel Anderson." The State charged D with resisting law enforcement only by flight, and the alleged acts of evasion all took place in less than two minutes within one uninterrupted episode of pursuit and arrest. State prosecuted D for only a single instance of resisting law enforcement and properly joined all allegations into a single count. Jurors were not required to agree on which particular officer D fled. The State's information therefore was not duplicitous for naming all three officers and Tr. Ct. did not err when it did not issue a more specific unanimity instruction to the jury. Held, judgment affirmed.

TITLE: Womack v. State
INDEX NO.: D.9.h.
CITE: (3rd Dist.; 11-16-00), Ind. App., 738 N.E.2d 320
SUBJECT: Verdict form - must comply with Art. I, Sec. 19
HOLDING: Article I, Section 19 of Indiana Constitution provides that "in all criminal cases whatever, jury shall have right to determine law & facts." Here, D was charged with possession of marijuana as class D felony based on prior conviction for possession of marijuana. At close of enhancement phase of trial, Ct. submitted to jury verdict form that gave jury two choices: (1) finding D guilty of crime of possession of marijuana, class A misdemeanor, having not been convicted of previous offense involving marijuana, hash oil or hashish; or (2) finding D guilty of crime of possession of marijuana, class D felony, having been convicted of previous offense involving marijuana, hash oil or hashish. Because verdict form contained only these two choices, it placed absolute limitation on jury's Article I, section 19 discretion, effectively precluding conclusion that D was guilty of class A misdemeanor possession despite his prior marijuana convictions. Fact that Ct. instructed jury of its responsibility to determine law & facts did not cure error in verdict form that mandated jury find D guilty of class D felony if it finds D had prior conviction for possession of marijuana. Held, judgment affirmed in part & reversed in part.

Note: Ct. is not holding that verdict form must give jury third choice that it has power to ignore law. Rather, verdict form would have been acceptable if it simply gave jury option of convicting D of possession as class A misdemeanor or class D felony without specific reference to whether D had prior marijuana conviction.

RELATED CASES: Smock, App., 766 N.E.2d 401 (erroneous verdict form utilized during habitual offender phase did not constitute fundamental error).

D. TRIAL

D.9. Jury trial

D.9.h.1. Defective

TITLE: Jones v. State
INDEX NO.: D.9.h.1.
CITE: (4th Dist. 8/28/84), Ind. App., 467 N.E.2d 1236
SUBJECT: Jury verdict - defective
HOLDING: Jury's verdict omitting phrase "as charged in the information" was not contrary to law. Here, D contends verdict indicates state did not prove crime charged. Verdict need not recite entire charge for which D is convicted. Rowan, 431 N.E.2d 805. Verdict is only defective if so uncertain that no judgment can be rendered. Rowan. If verdict shows on its face crime for which D is convicted, & that crime is same offense alleged in information, then it is not defective. Polson, (1893) 137 Ind. 519. Jury convicted D of "theft, a Class D felony" which is what information charged. Held, affirmed.

RELATED CASES: King, App., 469 N.E.2d 1201 (Crim L 878(1); verdict forms reflected dates of transactions but reversed count numbers; Tr. Ct. corrected verdict when first returned, but repeated verdict form error when it sentenced D; held, remanded with instructions to correct judgment).

TITLE: Manns v. State
INDEX NO.: D.9.h.1.
CITE: (4th Dist. 2/14/84), Ind. App., 459 N.E.2d 435
SUBJECT: Jury verdict - defective; timeliness of objection
HOLDING: Although Tr. Ct. erred in discharging jury (which returned a defective verdict), D waived any double jeopardy claim that he could not be retried by failing to object to jury's discharge. Moyer, App., 379 N.E.2d 1036. To preserve issue, D must have acted prior to jury's discharge & separation. Here, jury verdict found D guilty of possession of stolen property. D objected to verdict after jury had been discharged. Tr. Ct. requested attorneys to brief issue of verdict form. Tr. Ct. sua sponte entered a mistrial 29 days later. D was retried & found guilty of theft. Held, issue waived.

RELATED CASES: Broadus, 487 N.E.2d 1298 (Crim L 1175; where typographical error on verdict form resulted in Ds being found guilty of burglary, rather than robbery with a deadly weapon, it was harmless error if error at all, for Tr. Ct. to poll jurors instead of sending them back for further deliberation).

TITLE: Peek v. State
INDEX NO.: D.9.h.1.
CITE: (3d Dist. 9/29/83), Ind. App., 454 N.E.2d 450
SUBJECT: Jury verdict - defective; verdict on crime not charged
HOLDING: Where charging information (robbery Class A felony) did not charge elements necessary for conviction of battery, Class C felony, D's conviction on latter offense as lesser included of original charge was improper; however, because jury was instructed on battery, Class A misdemeanor & because elements of that crime were alleged in information & tried before jury, D's conviction may be modified & conviction entered on battery, Class A misdemeanor. Garcia, App., 433 N.E.2d 1207. Here, information alleged D caused bodily injury to robbery victim. D was convicted of battery, Class C felony (serious bodily injury). Information did not allege serious bodily injury, the element which raises seriousness of battery from Class A misdemeanor to Class C felony. Ct. rejects D's contention that error requires reversal. Held, reversed & remanded with instructions to modify conviction & resentence D.

RELATED CASES: Proffit, App., 817 N.E.2d 675 (Tr. Ct. did not abuse its discretion in giving instructions on conspiracy to jury despite fact that D was not charged with conspiracy but rather murder, voluntary manslaughter & robbery. Although D was not charged with conspiracy, neither was he convicted of it); Maynard, App., 508 N.E.2d 1346 (Const L 265; Crim L 889; jury, apparently still confused by improper instruction which was later corrected, returned verdict on crime not charged (theft); Tr. Ct. should have sent jury back for more deliberations to correct defect, *citing* Manns, App., 459 N.E.2d 435; remedy is to remand to Tr. Ct. to correct verdict to conform with charge (attempted theft), *citing* McFarland, App., 384 N.E.2d 1104).

TITLE: U.S. v. Southwell

INDEX NO.: D.9.h.1.

CITE: 2005 U.S. App. LEXIS 29037 (9th Cir. 2005)

SUBJECT: Jury Must Unanimously Reject Affirmative Defense to Return Conviction

HOLDING: The 9th Circuit Court of Appeals has held that jurors must unanimously reject an affirmative defense in order to return a conviction. Where jury unanimously agreed that the government had proved the elements of the offense, but did not unanimously reject the affirmative defense of insanity, the jury's guilty verdict is reversed. U.S. Supreme Court Justices have disagreed on this issue when discussing it by analogy in dicta, McCoy v. North Carolina, 494 U.S. 433 (1990). Several state courts have reached conclusion that a D's inviolable right to a unanimous jury verdict includes a unanimous decision regarding an affirmative defense. See, e.g., State v. Miyashiro, 989 P.2d 85 (Haw. Ct. App. 1999); State v. Harris, 152 A.2d 106 (R.I. 1959); People v. McIntyre, 271 Cal. Rptr. 467 (Cal. Ct. App. 1990). The 9th Circuit finds this reasoning persuasive. "Since a jury verdict must be unanimous," the Court wrote, "a jury united as to guilt but divided as to an affirmative defense (such as insanity) is necessarily a hung jury."

D. TRIAL

D.9. Jury trial

D.9.h.3. Inconsistent verdict

TITLE: Beattie v. State
INDEX NO.: D.9.h.3.
CITE: (04-8-10), 924 N.E.2d 643 (Ind. 2010)
SUBJECT: Inconsistent verdicts - no longer an appellate issue
HOLDING: *Overruling* Marsh v. State, 271 Ind. 454, 460, 393 N.E.2d 757, 761 (1979) and disapproving of outlier case of Owsley v. State, 769 N.E.2d 181 (Ind. Ct. App. 2002), *trans. denied*, Court held that jury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable. Here, jury acquitted D of dealing in cocaine and possession of cocaine but found him guilty of possession of cocaine within 1000 feet of family housing complex.

Insulating verdicts from appellate review is consistent with Indiana's historic overwhelming refusal to interfere with jury verdicts allegedly inconsistent or irreconcilable and jurisprudence of United States Supreme Court. See Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189, 76 L.Ed. 356 (1932) and United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d (1984). Reviewing verdicts for consistency would require appellate courts to speculate about reasons for jury's decision. Dunn, 284 U.S. at 394, 52 S. Ct. at 191, 76 L.Ed. at 359.

Irreconcilable verdicts usually show jury exercised lenity. A jury's right to decline to convict is well-recognized, see Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994), and is consistent with Article 1, Section 19 of Indiana Constitution, which gives juries the right to "determine the law and the facts." Juries may sometimes return inconsistent verdicts as compromise between disputing jurors, to expedite lengthy deliberations, or avoid all-or-nothing verdict. To remedy these concerns, "a criminal D is afforded protection against jury irrationality or error by the independent review of . . . sufficiency of the evidence." Held, transfer granted, Court of Appeals' opinion at 903 N.E.2d 1050 vacated, but summarily affirmed on other evidentiary error claims and judgment affirmed.

RELATED CASES: Woods, 963 N.E.2d 632 (Ind. Ct. App. 2012) (allegedly inconsistent guilty verdicts of robbery and assisting a criminal do not necessitate a new trial or reversal of the robbery conviction; Tr. Ct. properly entered judgment of conviction and sentenced D for robbery only); Garcia, 936 N.E. 2d 361 (Ind. Ct. App. 2010) (*citing* Beattie, court declined to address claim that appellate counsel was ineffective for failing to argue child molesting convictions were inconsistent with convictions for attempted sexual misconduct with a minor).

TITLE: Douglas v. State
INDEX NO.: D.9.h.3.
CITE: (11/17/82), Ind., 441 N.E.2d 957
SUBJECT: Jury verdict (JV) - inconsistency
HOLDING: JVs do not have to be consistent in cases where one criminal transaction gives rise to criminal liability for separate & distinct offenses. Tillman, 426 N.E.2d 1149. Ct. will not attempt to interpret thought process of jury in arriving at verdict. Hicks, 426 N.E.2d 411. Here, D argues verdicts of guilty of incest & not guilty of child molesting are inconsistent, *citing* Herman, 397 N.E.2d 978 & Marsh, 393 N.E.2d 757 ("While perfectly logical verdicts should not be demanded, extremely contradictory & irreconcilable verdicts warrant corrective action by" Ct.; case contains review of law). Ct. refuses to hold JVs inconsistent. Held, convictions for rape & incest affirmed.

RELATED CASES: May, App., 810 N.E.2d 741 (no fatal inconsistency in jury's convicting D of burglary but acquitting him of theft); Causey, App., 808 N.E.2d 139 (there was no fatal inconsistency where D in bifurcated proceeding was found not guilty of robbery in first proceeding & then guilty of being a serious violent felon in possession of a firearm in the second); Martin, App., 657 N.E.2d 430 (acquittal on attempted murder charge was not contradictory of irreconcilable with conviction on 2nd attempted murder charge involving different victim); Spann, App., 632 N.E.2d 741 (Verdicts finding D not guilty of attempted murder & guilty of aggravated battery were not inconsistent. Although D argued conduct in both was same, i.e., shooting victim in stomach, jury could have concluded that although D didn't shoot victim with intent to kill, he did inflict injury on him that created "substantial risk of death or [caused] serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ."); US v. Powell, (1984), U.S., 105 S.Ct. 471, 83 L.Ed.2d 461 (D, convicted by jury on 1 count, could not attack conviction because it was inconsistent with JV of acquittal on another count; reasoning: government's inability to invoke review, general reluctance to inquire into workings of jury, & possible exercise of lenity); Dubinion, 493 N.E.2d 1245 (Crim L 260.11(6); acquittal on confinement count does not mean evidence was insufficient to sustain rape conviction, *citing* Wallace, 492 N.E.2d 24, which discusses inconsistency in JVs); Dorsey, 490 N.E.2d 260 (Ct. rejects D's contention that conviction on LIO of theft (criminal conversion) was inconsistent); Totten, 486 N.E.2d 519 (Rape 53(1); Ct. rejects D's contention that JV of guilty of Class B rape means he did not have knife & therefore did not use force); Sylvester, 484 N.E.2d 1 (JV finding D possessed knife during only one of several offenses perpetrated in continuing transaction was not inconsistent); Hopper, 475 N.E.2d 20 (Crim L 200(6); Ds' acquittal on kidnapping count does not bar conviction for conspiracy to commit kidnapping, *citing* Weekley, App., 415 N.E.2d 152); Davenport, 464 N.E.2d 1302 (see card at K.3.b.1); Dixon, 437 N.E.2d 1318 (Crim L 886; return of verdict forms finding D guilty of crime charged (theft) & 2 lesser includeds (trespass & conversion) is neither inconsistent nor an impeachment of jury's verdict of theft; LIO verdicts were surplusage); Williams, App., 501 N.E.2d 1146 (acquittal of burglary is not inconsistent with conviction for theft of property from home; case discusses proper scope of review re inconsistent verdicts & whether reversal is required upon finding inconsistent verdicts); Brinker, App., 491 N.E.2d 223 (Crim L 866, 878(1); D's acquittal on engaging in a speed contest is not inconsistent with guilty verdict on criminal recklessness; each count is regarded as if charged separately; Ct. will not speculate whether verdict might have been result of compromise).

TITLE: Jones v. State
INDEX NO.: D.9.h.3.
CITE: (12-17-97), Ind., 689 N.E.2d 722
SUBJECT: Inconsistent verdict claim rejected
HOLDING: Verdicts of not guilty on attempted murder charge & guilty on murder charge were not inconsistent or irreconcilable. Charges were based on gunshots D fired which killed one victim & injured another. If jury found that D did not act with specific intent to kill but that he was aware of high probability that his actions could result in death, it could quite logically find him guilty of murder & not guilty of attempted murder. Held, conviction affirmed, remanded to correct sentencing error.

RELATED CASES: Carmona, App., 827 N.E.2d 588 ("admittedly questionable" conviction for battery on law enforcement officer & acquittal on resisting charges may be explained by jury determining that D committed battery, but not in context of resisting his own arrest; while perfect logical consistency is lacking, these are not irreconcilable verdicts warranting corrective action); Robinson, App., 814 N.E.2d 704 (D's conviction for battery on police officer was not inconsistent with his acquittal for resisting law enforcement); Slate, App., 798 N.E.2d 510 (D's acquittal of public intoxication charge was not inconsistent with his conviction for OWI; different definitions of "intoxicated" were given in jury instructions for each charge, & it was possible & reasonable for jury to associate different definitions for each charged offense); Edwards, App., 724 N.E.2d 616 (if jury found D did not intend to deprive victim of any value or use of home but that D did exercise control for her own profit or advantage, it could logically find her guilty of exploitation of endangered adult & not guilty of theft); Hodge, 688 N.E.2d 1246 (because jury was not required to find that robbery was committed in order to return verdict of guilty as to murder & attempted murder, its verdicts were not inconsistent).

TITLE: McKnight v. State
INDEX NO.: D.9.h.3.
CITE: (11-16-95), Ind., 658 N.E.2d 559
SUBJECT: Mandated consistency of verdicts - assisting criminal
HOLDING: After alleged principal is acquitted in separate trial, accessory after fact cannot be found guilty under Indiana's Assisting a Criminal statute, Ind. Code 35-44-3-2. Unlike Aiding, Inducing, or Causing statute, which explicitly changes common law rule that principal must be tried before accessory, Assisting Criminal statute is silent on issue. Although Ind. Code 35-44-3-2 does not make person found guilty of assisting criminal guilty of same crime as principal, classification of crime is still dependent on level of guilt of person assisted. Here, D was acquitted of murder but convicted of Assisting a Criminal. Principal in alleged crime had already been acquitted in separate trial. Ct. mandated consistency between two verdicts, noting that one cannot be convicted of Assisting a Criminal if there is no criminal to assist. Held, conviction reversed, remanded with instructions to discharge D.

Note: Ind. Code 35-44-3-2 (amended effective July 1, 1999) no longer requires State to prove that the assisted person has been prosecuted for and convicted of a Class A felony.

TITLE: Misztal v. State
INDEX NO.: D.9.h.3.
CITE: (3d Dist. 09/17/92), Ind. App., 598 N.E.2d 1119
SUBJECT: Murder & Voluntary Manslaughter (VM)-consistency
HOLDING: Where D was charged with murder & VM for same killing, guilty verdicts on both counts were not inconsistent & Tr. Ct. erred in refusing to accept verdicts & enter conviction for VM. Instructions allowed jury to find D guilty of murder in one count & VM in other, without any indication that verdicts would be inconsistent. Jury returned guilty verdicts on both counts. Ct. refused to accept verdicts & sent jury back with instruction that finding D guilty on one count was inconsistent with guilty finding on other. Jury then returned verdicts of guilty on murder, & not guilty on VM. Murder & VM are not LIOs of each other, but merely parallel each other, with VM having additional element of presence of sudden heat. Guilty verdicts on both counts are not inconsistent unless jury is made aware that double jeopardy precludes conviction on both for same homicide. In murder count, jury decided that D knowingly or intentionally killed victim, & in VM count they decided he was also acting under sudden heat. Instead of being contradictory, verdicts merely accumulated on one another. Because verdicts were not defective, Tr. Ct.'s setting them aside violated D's right to fundamental fairness & due process. Because VM included all elements of murder, plus finding of sudden heat, judgment on that verdict should be entered.

RELATED CASES: Butler, 647 N.E.2d 631.

TITLE: Nelson v. State
INDEX NO.: D.9.h.3.
CITE: (2nd Dist., 4-30-96), Ind. App., 664 N.E.2d 386
SUBJECT: Inconsistent verdict claim rejected
HOLDING: Vacation of voluntary manslaughter conviction did not render conviction for robbery resulting in death inappropriate or inconsistent. On appeal, Ct. found that D could not be convicted of voluntary manslaughter as lesser-included offense of felony murder. However, Ct.'s decision in no way exonerated D for homicide. Perfect, logical consistency in verdicts is not required & only extremely contradictory & irreconcilable verdicts warrant corrective action. Harrison v. State, 644 N.E.2d 1243 (Ind. 1995).

TITLE: Nelson v. State
INDEX NO.: D.9.h.3.
CITE: (7/5/88), Ind., 525 N.E.2d 296
SUBJECT: Jury verdicts - when inconsistent
HOLDING: Although jury rejected victim's testimony re sexual intercourse, her testimony re fondling & deviate sexual conduct was sufficient to support conviction of those offenses. D was charged with child molest (sexual intercourse), child molest (fondling), & child molest (deviate sexual conduct). Victim testified in detail re each offense. Examining physician, however, testified that there was no indication that she had ever had sexual intercourse. D was acquitted on that charge, but convicted on other 2. D argues on appeal that since victim testified in similar detail re all 3 offenses, & since jury rejected her testimony re sexual intercourse, her testimony was inherently incredible & cannot support convictions. Trier of fact may believe one part of witness' testimony & reject another part. Thomas, 451 N.E.2d 651. If there is substantial probative evidence from which trier of fact can infer guilt beyond reasonable doubt, conviction must stand. Gleman, 490 N.E.2d 711. Conviction may stand solely on uncorroborated testimony of minor witness, Pearson, 486 N.E.2d 540, but may not stand solely on basis of inherently unbelievable testimony. Hill, 497 N.E.2d 1061. In case at bar, jury undoubtedly chose to reject victim's testimony re sexual intercourse in light of examining physician's testimony. However, it was jury's prerogative to weigh other aspects of testimony & to infer from them guilt on other charges. Victim's testimony re those offenses was not inherently incredible, & was sufficient to support convictions. Held, convictions affirmed.

TITLE: Radick v. State
INDEX NO.: D.9.h.3.
CITE: (5th Dist.; 03-27-07), Ind. App., 863 N.E.2d 356
SUBJECT: Inconsistent verdicts upheld when both supported by sufficient evidence
HOLDING: Although the jury verdicts were inconsistent, reversal was unnecessary because both verdicts were supported by sufficient evidence. Despite any inconsistency in the verdicts, the convictions are permissible because they are supported by sufficient evidence. Here, State charged D with two Class C felonies based on his operation of a vehicle with a controlled substance & alcohol in his blood causing death. The jury should have found D guilty of both class C felonies if it found that he was driving while intoxicated, that he was driving the THC in his system, & that the way in which he was driving caused the death. However, because both the Class C felony OWI causing death & the Class C misdemeanor driving with a controlled substance were supported by sufficient evidence, the acquittal on the Class C felony driving with a controlled substance causing death did not invalidate the verdicts. Held, judgment affirmed. Sullivan, J., dissenting on basis that the Class C misdemeanor OWI based on a controlled substance & the Class C felony OWI based on alcohol violated double jeopardy when only one person died due to the driving. The fact of killing one person is unaffected by the perpetrator's degree of intoxication or the number or classification of the particular intoxicants leading to D's impaired condition.

D. TRIAL

D.9. Jury trial

D.9.h.4. Impeachment

TITLE: Berkman v. State
INDEX NO.: D.9.h.4.
CITE: (4th Dist. 1/23/84), Ind. App., 459 N.E.2d 44
SUBJECT: Jury verdict - impeachment by affidavit
HOLDING: Tr. Ct. properly found affidavit of venire man, alleging juror's "predisposition of guilt towards individuals charged with drug related cases," was insufficient to entitle D to a new trial or to warrant an evidentiary hearing. Generally, proof that a juror was biased against D or lied on voir dire entitles D to a new trial. McFarland, 390 N.E.2d 989; McDaniel, 375 N.E.2d 228; Barnes, 330 N.E.2d 743. When D presents evidence juror was possibly biased & concealed this bias on voir dire, Tr. Ct. generally must hold an evidentiary hearing to determine whether juror was in fact biased. McFarland; Barnes; Atkinson, App., 391 N.E.2d 1170. Ct. finds D may not force evidentiary hearing on juror's bias after jury has been discharged based upon conclusory allegations of misconduct. Such hearings, if granted without some showing of good cause, could become means for harassing jurors who have returned guilty verdicts. Affidavit in McDaniel, (juror told third party she was juror in trial of that "nigger who killed the cop") was insufficient to warrant hearing. Although Tr. Ct. is required to take as true facts alleged in an un-contradicted affidavit (Harris, 427 N.E.2d 658), it is not required to accept affiant's conclusions. Held, no error.

RELATED CASES: Robinson, App., 720 N.E.2d 1269 (affidavit of juror claiming that jury considered fact that D did not testify could not be considered because it did not fall under exceptions set forth in Ind. R. Evid. 606(b)); Stader, App., 453 N.E.2d 1032 (it is improper to solicit affidavits from jurors to impeach their verdict; Ct. notes strong disapproval of D's solicitation of affidavits & dismisses issue).

TITLE: Karlos v. State
INDEX NO.: D.9.h.4.
CITE: (4/17/85), Ind., 476 N.E.2d 819
SUBJECT: Jury verdict - impeachment
HOLDING: Tr. Ct. did not err in denying D's request to permit post-verdict interrogation of jurors re their exposure to publicity. Fox, 457 N.E.2d 1088. Here, D made request after verdict, but during jury's deliberations on habitual. D contends procedures outlined in Lindsey, 295 N.E.2d 819 apply: Tr. judge must question jury upon showing of substantial possibility of jury's exposure to extraneous material having clear potential to taint verdict. In Fox, Ct. held Lindsey procedures are not required if jury has returned verdict. Fox had requested discharged jury be reassembled & questioned about influence of Newsweek (cover story: "Epidemic of Violent Crime") found in jury room by bailiff morning after discharge. Lindsey inquiry following verdict would allow jurors to impeach their own verdict "which has never been permitted in [IN]." Held, no error.

RELATED CASES: Ferguson, 489 N.E.2d 508 (counsel's failure to pursue possible juror coercion was not ineffective because second-hand information came to him after jury was discharged & because only issue jury considered was habitual offender).

TITLE: Pena-Rodriguez v. Colorado
INDEX NO.: D.9.h.4.
CITE: (3/6/2017), 137 S. Ct. 855 (S.Ct. 2017)
SUBJECT: Sixth amendment allows impeachment of verdict based on racial stereotypes
HOLDING: Where a juror relies on racial stereotypes to convict a defendant, the normal prohibition against impeaching a verdict should be set aside, and a trial court may consider evidence regarding the juror's discriminatory statement to decide if the Sixth Amendment right to jury trial has been violated.

Defendant, a Hispanic, was convicted of unlawful sexual misconduct with two teenage girls. Two jurors later told Defendant's attorney that another juror made racially derogatory comments about Defendant, who is Hispanic, and his alibi witness, who is also Hispanic. Two such statements were, "Nine times out of ten Mexican men were guilty of being aggressive toward women and young girls," and "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." Defendant requested a new trial. The trial court acknowledged the juror's bias, but denied the request based on Colorado's Rule of Evidence 606(b), which generally prohibits a juror from testifying as to statements made during deliberations. Colorado's appellate courts denied relief on the same grounds.

Colorado's "no impeachment" rule does serve important interests. It allows "full and vigorous discussions" among jurors, who need not worry about later efforts to pry into those deliberations, and it "gives stability and finality to verdicts." However, these considerations must yield when there is evidence that a juror has relied on racial stereotypes to convict a defendant. Racial bias in jury deliberations threatens not only the proceeding in which it occurs but also the administration of justice more broadly. Thus, the Sixth Amendment must allow judicial inquiry into racial bias, even after a jury has returned a verdict, to maintain faith in jury verdicts. However, "[n]ot every offhand comment indicating racial bias . . . or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." Instead, a defendant must show that a juror made a statement of overt racial bias that casts serious doubt on the fairness and impartiality of the jury's deliberations and verdict.

Here, the juror's statements unmistakably show racial bias. The juror not only used a racial stereotype to conclude Defendant was guilty and that his alibi witness was not credible, he encouraged other jurors to adopt his reasoning to find Defendant guilty. In dissent, Justice Alito characterized the majority's decision as "well-intentioned," but predicted the ruling would undermine the purposes behind the no-impeachment rule. Jurors will not be completely open and honest in their deliberations if they fear that their deliberations might later be disclosed. Jurors may face harassment from the losers in a case, who will "seek fodder with which to obtain a new trial." The majority's ruling also undermines the finality of jury verdicts. Held, cert. granted, opinion at 350 P.3d 278 reversed, and remanded for further proceedings. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ; Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.; Thomas, J., dissenting.

TITLE: Tanner v. U.S.
INDEX NO.: D.9.h.4.
CITE: 483 U.S. 107 (1987)
SUBJECT: Juror misconduct - right to competent jury
HOLDING: D has right to "tribunal both impartial & mentally competent to afford a hearing." Jordan v. MA (1912), 225 U.S. 167, 176, 32 S.Ct. 651, 56 L. Ed 1038. Here, D requested new trial following convictions based upon evidence of drug/alcohol use by jurors during trial. Court found juror testimony on intoxication was inadmissible pursuant to Fed. R. Evid. 606(b) to impeach jury's verdict. D alleges his right to impartial & competent jury was violated by court's failure to hold evidentiary hearing to consider evidence deemed inadmissible by Federal Rules. Fed. R. Evid. 606(b) is based upon common law & is supported by substantial policy considerations, including need to assure full & frank jury room discussion, to prevent harassment of jurors by losing parties & to preserve community's trust in system that relies upon decisions of lay people. D's 6th Amend. interests in unimpaired jury are protected by other aspects of trial process. D may discuss suitability of individual for jury service during voir dire. Jury is observable during trial by court, court personnel, & by counsel. Jurors are observable by each other & may report juror misconduct before they render verdict. D is permitted to present nonjuror evidence concerning misconduct. Held, in light of these other sources of protection of D's right to competent jury, court did not err in refusing to grant evidentiary hearing to consider inadmissible juror testimony concerning juror misconduct. Marshall, joined by Brennan, Blackmun, & Stevens, DISSENTS.

RELATED CASES: Schultz v. Valle, 464 N.E.2d 354 (card at D.9.e.2); verdict invalid per se if rendered by jury which has consumed alcoholic beverages.

D. TRIAL

D.9. Jury trial

D.9.i. Polling of jury (Ind. Code 35-37-2-7)

TITLE: Crain v. State
INDEX NO.: D.9.i.
CITE: (3d Dist. 6/16/86), Ind. App., 493 N.E.2d 827
SUBJECT: Polling of jury - redeliberations
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial. Here, after jury returned written verdict of guilty, D requested that jurors be polled. One juror responded by saying: "There really isn't a lot of evidence." Tr. Ct. then asked jury to return to jury room for further deliberations. During second deliberation, jury asked Tr. Ct. what would happen if all jurors except one found D guilty. Tr. Ct.'s response was to reread instructions to jury. D moved for mistrial. After guilty verdict was again returned, jury was again polled & all jurors responded this was their verdict. Ct. finds no evidence that Tr. Ct. tried to influence verdict or prevent a juror from exercising free choice. Case is unlike others which were reversed because Tr. Ct. exerted undue pressure on jurors. Matthews v. US (D.C. App. 1969), 252 A.2d 505 (juror stated that his verdict was "conditional"); People v. Kellogg (IL 1979), 397 N.E.2d 835 (juror being polled asked to change his vote). Ct. notes that civil statute, made applicable to criminal law by Ind. Code 35-35-2-2 provides for jury redeliberations. Held, no error.

RELATED CASES: Randall, 495 N.E.2d 171 (Crim L 1175; Ct. holds Tr. Ct.'s error of misstating offense when polling jury de minimus; Dickson, CONCURS IN RESULT; DISSENT by DeBruler finds verdict contrary to law & contends new trial is required); Brown, 457 N.E.2d 179 (Crim L 874, 894; D's failure to object to verdict when juror expressed dissent during poll (not perceived by Tr. judge) waives any error).

TITLE: Jelks v. State
INDEX NO.: D.9.i.
CITE: (3rd Dist.; 12-13-99), Ind. App., 720 N.E.2d 1171
SUBJECT: Polling of jury - Tr. Ct. must not engage in colloquy
HOLDING: Tr. Ct. placed D in position of grave peril by engaging in extended colloquy during polling of jury about elements of crime, State's burden, & role of juror. When returned into Ct., foreman shall deliver verdict, & either party may poll jury. If juror dissents from verdict, jury shall be sent out to deliberate. Ind. Code 35-35-2-2. Here, when Tr. Ct. polled jury after verdict, juror number three stated that guilty was not her verdict & she thought reasonable doubt existed. Ct. then engaged in colloquy concerning elements of crime, State's burden, & role of juror. After colloquy, judge sent jurors back to deliberate. Statute clearly provides that remedy for juror dissent that arises during polling procedure is to return jury for deliberations, not engage in extended colloquy. Thus, Tr. Ct. committed reversible error by questioning juror before sending jury back to deliberations. Held, conviction reversed.

D. TRIAL

D.10. Opening statements

TITLE: Berry v. State
INDEX NO.: D.10.
CITE: (10/22/85), Ind., 483 N.E.2d 1369
SUBJECT: Opening statement (O.S.) - waiver of; ineffective assistance of counsel (IAC)
HOLDING: Counsel's decision to reserve O.S. until close of state's case-in-chief (C-I-C) was a strategy decision, consistent with local custom & counsel's past practice. Here, state objected to reservation, *citing* controlling statute. Ind. Code 35-1-35-1 [now Ind. Code 35-37-2-2]. Tr. Ct. reserved judgment & at close of state's C-I-C, ruled it would permit D's O.S. State again objected *citing* statute & case law. Tr. Ct. reversed its ruling. Ct. distinguishes case from Smith, 396 N.E.2d 898 (IAC where D compelled to stand trial in jail garb because of counsel's ignorance of controlling statute). Here, counsel knew state of law. Ct. finds no prejudice; record shows counsel presented framework for evidence to jury in other ways. D was not denied due process - D had opportunity to give O.S., but waived it. Holland, 421 N.E.2d 77. Held, no error. DeBruler CONCURS IN RESULT.

TITLE: Maynard v. State
INDEX NO.: D.10.
CITE: (1st Dist. 6/17/87), Ind. App., 508 N.E.2d 1346
SUBJECT: Opening statements - sharing time with co-Ds
HOLDING: Tr. Ct. did not err by limiting opening argument to one hour per side. Here, 3 co-Ds were tried jointly for theft related to chopshop. They objected to being required to share peremptory challenges, time for voir dire, & opening argument. Scope & content of opening statements are within sound discretion of Tr. judge & will not be reversed absent clear abuse of discretion. Vanyo, 450 N.E.2d 524. Ct. finds D fails to demonstrate who he has harmed by this time limitation. Held, no error.

TITLE: McWherter v. State
INDEX NO.: D.10.
CITE: (4/23/91), Ind., 569 N.E.2d 958
SUBJECT: Opening statements - right to present theory of case
HOLDING: Tr. Ct. committed harmless error in denying D opportunity to include his theory of reckless homicide in his opening statement. Tr. Ct. granted State's Motion in Limine prohibiting defense counsel from mentioning any evidence of reckless homicide in his opening statement in murder case. D argued motion in limine foreclosed his presenting theory of his case to jury prior to their hearing evidence. In concluding that D suffered no prejudice, Ct. noted that D was permitted full latitude in recitation of his version of fatal wounding of his grandmother. Moreover, at close of evidence, Tr. Ct. gave D's final instruction defining reckless homicide, included forms on reckless homicide with verdict forms that went to jury, & permitted D to argue that he was guilty of reckless homicide in closing argument. D was in no way deprived of right to present theory of reckless homicide to jury. Held, no prejudicial error.

TITLE: Morrison v. State
INDEX NO.: D.10.
CITE: (12/9/87), Ind., 516 N.E.2d 14
SUBJECT: Giving preliminary instructions following opening statements
HOLDING: Tr. Ct. erred in requiring counsel to make their opening statements before it indicated what preliminary instructions would be given, & again erred in holding conference to settle instructions after counsel had made their final arguments. Tr. Ct.'s procedure is in direct violation of Ind. R. Cr. P. 8, which requires written instruction as to issues for trial, BOP, credibility of witnesses, & manner of weighing testimony when jury is sworn, & Ind.R.Tr. P. 51 which contains language similar to Ind. R. Cr. P. 8. However, Ct. found D waived issue by failing to object to this procedure & failing to tender any instructions or object to instructions given by Tr. Ct. Suggs, 428 N.E.2d 226. Although Tr. Ct.'s procedure was highly irregular & violated rules, Ct. concluded that violation did not amount to fundamental error. Held, conviction affirmed.

TITLE: Vanyo v. State
INDEX NO.: D.10.
CITE: (7/7/83), Ind., 450 N.E.2d 524
SUBJECT: Opening statements (O.S.)
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial made during prosecutor's O.S. where D failed to show how he was prejudiced. Here, in controlled substance case prosecutor referred in his O.S. to 300 "little blacks" D had offered to sell undercover agent. D moved for mistrial. Black capsules were not illegal. Judge later admonished jury to this effect when undercover agent testified concerning capsules. Purpose of O.S. is to inform jury of charges & contemplated evidence. Scope & content are within sound discretion of Tr. judge; reversal only upon showing of abuse of discretion. Held, no error.

RELATED CASES: Jorgensen, App., 567 N.E.2d 113 (by deciding not to call prospective defense witness to testify, D invited any error by prosecutor, who in opening statement informed jury prospective witness had been convicted for crimes of dishonesty & witness had alleged coconspirator draft letter in which coconspirator confessed to charged murder, even though such evidence was not presented at trial).

D. TRIAL

D.11. Presentation of evidence

D.11.a. Order of presentation (Ind. Code 35-37-2-2)

TITLE: Book v. State
INDEX NO.: D.11.a.
CITE: (5th Dist., 02-25-08), Ind. App., 880 N.E.2d 1240
SUBJECT: Tr. Ct.'s ability to restrict when D testifies
HOLDING: While the judge has the power to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand. Under certain circumstances, such a practice could result in a violation of a D's Fifth Amendment right to remain silent and right to due process. Brooks v. Tennessee, 406 U.S. 605 (1972). Here, at 4:45 p.m. on the fifth day of trial, the State rested. D had one witness, a doctor who could only testify on the next morning, Saturday. D requested that he be able to wait until the doctor testifies and he confers with counsel before deciding whether to testify. Because Tr. Ct. did not want the case to proceed into Monday, the Tr. Ct. refused, but told D he may reconsider if he presents case law on the subject after the doctor testifies. D decided not to testify. After the doctor testified, D did not offer to testify, present case law or ask for reconsideration. Although Tr. Ct.'s conduct was not unconstitutional under Brooks, it may have approached it. However, because the record does not indicate D decided he wanted to testify after the doctor, the issue is waived and not fundamental error. Held, judgment affirmed.

TITLE: Buhring v. State
INDEX NO.: D.11.a.
CITE: (9/19/83), Ind., 453 N.E.2d 228
SUBJECT: Insanity - closing argument
HOLDING: Tr. Ct. did not err in denying D's request to open & close final argument on insanity issue. Here, D argues that he bore burden of proving his insanity defense by a preponderance of the evidence, he should have had right to open & close on that issue. D's brief contends no statute governs order of final argument in criminal cases; therefore, party carrying burden should open & close argument. Ct. resolves issue by finding Ind. Code 35-1-35-1 [now 35-37-2-2] dictates state open & close final argument to jury in criminal cases on all issues. Held, no error.

RELATED CASES: Sills, 463 N.E.2d 228 (insanity & intoxication).

D. TRIAL

D.11. Presentation of evidence

D.11.b. Rebuttal evidence

TITLE: McCullough v. Archbold
INDEX NO.: D.11.b.
CITE: (01-06-93), Ind., 605 N.E.2d 175
SUBJECT: Pretrial discovery of rebuttal witnesses
HOLDING: Ct. adopted criminal law standard requiring disclosure of rebuttal witnesses. In so holding, Ct. said, "we hold that the Chatman v. State (1975), 263 Ind. 531, 334 N.E.2d 673] line of cases expressed the better rule: the nondisclosure of a rebuttal witness is excused only when that witness was unknown & unanticipated; known & anticipated witnesses, even if presented in rebuttal, must be identified pursuant to a Ct. order, such as a pre-trial order, or to a proper discovery request."

RELATED CASES: Cliver, 666 N.E.2d 59 (declining to apply McCullough retroactively, although disclosure is required, issue of whether to impose sanction is within Tr. Ct.'s discretion); Hackett, App., 661 N.E.2d 1231 (no appellate IAC for failure to raise issue of State's nondisclosure of known & anticipated rebuttal witness; at time of D's trial, State was under no obligation to disclose); Sloan, App., 654 N.E.2d 797 (State's failure to disclose its known potential rebuttal witness to D was error; conviction reversed on other grounds); Jenkins, 627 N.E.2d 789 (Ct. rejected D's argument that rebuttal expert witness should not have been allowed to testify because he was not disclosed until 45 minutes before his testimony. McCullough would not apply to D, because it was only to be applied prospectively. Additionally, D did not move for continuance when faced with witness, & therefore waived any alleged error regarding discovery noncompliance. But, see, Tyson v. State, App., 619 N.E.2d 276, *trans. denied*); Dorsey, 490 N.E.2d 260 (rebuttal witnesses need not be disclosed by State when it is impossible to anticipate such witnesses would be called to testify at trial).

TITLE: State v. Williams
INDEX NO.: D.11.b.
CITE: (12/15/2006), N.C., 637 S.E.2d 523; 118A06,
SUBJECT: Defense given insufficient time after State rested
HOLDING: The North Carolina Supreme Court held that a trial judge presiding over a first-degree murder trial abused his discretion when he limited the defense to a five-minute recess to decide whether to present evidence after the State had rested its case. Prior to trial, D's attorney sought to have the State disclose which witnesses it would call from the 20 to 30 on its disclosure form. The trial judge refused to order the State to specify which of those witnesses it intended to present. In the end, the State presented 12 witnesses. Following the State's resting, the defense sought a recess to decide whether it would present evidence. The trial judge limited the defense to five minutes, even though defense counsel argued that he had not known what the State's evidence would be prior to trial. D ultimateley did not present any evidence and was convicted.

The Court ruled that it was an abuse of discretion for the judge to allow such an abbreviated recess. Granting a recess to a D at the close of the State's case in order to allow him to determine whether to present evidence "is a matter of paramount importance" and could find no reasonable basis for the Tr. Ct.'s limitation. A trial judge's decision about how to conduct a trial must balance the D's right to a fair trial against the court's interest in administrative efficiency. In this case, the balance "unquestionably tips" toward granting D a reasonable amount of time for the recess. Two justices dissented from the opinion.

TITLE: Wells v. State
INDEX NO.: D.11.b.
CITE: (11/12/82), Ind., 441 N.E.2d 458
SUBJECT: Rebuttal evidence - scope
HOLDING: Rebuttal evidence is limited to that which tends to explain, contradict or disprove evidence offered by the adverse party. Norton, 408 N.E.2d 514. Scope of rebuttal is within discretion of Tr. Ct. Here, D objected to state using rebuttal to rehash case-in-chief. Record reflects numerous objections during rebuttal; some *overruled*, some sustained. Held, no abuse of discretion in conduct of rebuttal.

RELATED CASES: Isaacs, 659 N.E.2d 1036 (no abuse of discretion to admit rebuttal testimony concerning battered woman's syndrome at trial of D accused of murdering wife; purpose of testimony was to refute notion that D & victim had friendly relationship prior to her death). Blacknell, 502 N.E.2d 899 (Crim L 358; surrebuttal is limited to matters refuting rebuttal; D was properly prohibited from introducing evidence discussed in opinion); Bell, 495 N.E.2d 526 (Crim L 1168(2); permitting testimony relating to case in chief during rebuttal is not reversible error unless D was prevented from presenting rebuttal evidence thereto, *citing* Shelby, 281 N.E.2d 885 & Griffith, 157 N.E.2d 191); Richardson, 481 N.E.2d 1310 (rebuttal testimony re informal tests conducted on rifle during recess were proper to explain/contradict/disprove D's version of shooting); Music, 448 N.E.2d 1082 (rebuttal witness properly testified that D asked her to lie about where he was when crime occurred even though D did not interpose alibi defense; irregularity in rebuttal evidence not reversible if D has opportunity to counter (Griffith, 157 N.E.2d 191)).

TITLE: Mauricio v. Duckworth

INDEX NO.: D.11.b.

CITE: 840 F.2d 454 (7th Cir. 1987)

SUBJECT: Discovery by D - rebuttal witnesses

HOLDING: State's knowing failure to disclose identity of alibi rebuttal witness violated due process. Due Process Clause of 14th Amend. forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal Ds. Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208. Indiana's criminal discovery procedure, Ind. Code 35-36-4 et al., is not unconstitutionally non-reciprocal on its face. See Bruce. Duckworth, 7th Cir., 659 F.2d 776. Notwithstanding constitutionality of Indiana's discovery scheme, Ct. found that discovery procedures were not applied evenhandedly in D's case & violated D's due process rights. Although alibi statutes do not explicitly impose upon parties affirmative obligation to disclose alibi & rebuttal witnesses, Tr. Ct.'s discovery order requiring D to list all his witnesses should have triggered corresponding & reciprocal obligation by State to list all its potential witnesses, including likely rebuttal witnesses. Ct. rejected State's claim that it should be excused from having to disclose identity of its alibi rebuttal witness because D did not specifically identify his alibi witnesses. Due process was violated because Tr. Ct.'s discovery order permitted State access to information it did not also afford D. In assessing whether constitutional errors require reversal, Cts. must determine whether there is reasonable possibility errors complained of might have contributed to conviction. U.S. ex rel. Savory v. Lane, 7th Cir., 832 F.2d 1011. Other evidence of guilt must be overwhelming before Cts. will conclude constitutional error was harmless. Id. Ct. found, absent rebuttal witness' tainted rebuttal testimony, State's case was not "overwhelming," & thus failure to disclose rebuttal witness was not harmless error. Held, reversed & remanded.

D. TRIAL

D.11. Presentation of evidence

D.11.c. Other

TITLE: Dixon v. State
INDEX NO: D.11.c.
CITE: (10/18/93), Ind. App., 621 N.E.2d 1152
SUBJECT: Reopening case to present proof of venue
HOLDING: Tr. Ct. did not err in allowing State to reopen its case to prove venue. Granting permission to reopen case is within Tr. Ct.'s discretion. Ford, 523 N.E.2d 742. Factors considered to determine whether there has been abuse of discretion include whether there is any prejudice to opposing party, whether party seeking to reopen appears to have rested inadvertently or purposely, stage of proceedings at which request is made, & whether any real confusion or inconvenience would result from granting request. Id. Tr. Ct. does not abuse its discretion when reopening of case-in- chief merely grants State opportunity to properly present proof of venue. Warrenburg, 298 N.E.2d 434.

Here, after State rested its case-in-chief, Tr. Ct. denied D's motion for judgment on evidence based on failure to prove venue & allowed State to reopen its case. Ct. found D failed to demonstrate that he was unfairly prejudiced by reopening of case where victim testified that location of crime was city within county of trial, police from that city testified at trial, & superior court sat in that city. Held, judgment affirmed.

RELATED CASES: Moss, 13 N.E.3d 440 (Ind. Ct. App. 2014) (no abuse of discretion denying request to reopen case to admit transcript of victim's prior inconsistent statement, which supported D's claim that accomplice coerced him into robbing victim; statement was hearsay and cumulative); Saunders, App., 807 N.E.2d 122 (identification evidence offered after case was reopened was evidence that could have been part of State's case-in-chief; it is not apparent that undue emphasis could have been placed on witness's return to stand to identify D.

TITLE: Flynn v. State
INDEX NO.: D.11.c.
CITE: (10/19/86), Ind., 497 N.E.2d 912
SUBJECT: Presentation of evidence - reopening case
HOLDING: Tr. Ct. did not abuse discretion by refusing to allow D to reopen case. Among factors which weigh in exercise of discretion are whether there is any prejudice to opposing party, whether party seeking to reopen appears to have rested inadvertently or purposely, stage of proceedings at which request is made, and whether any real confusion or inconvenience would result from granting request. After D rested case without presenting evidence, prosecution sent all of its witnesses' home & Tr. Ct. adjourned until next day. Next morning, D moved pro se to reopen his defense so that he could testify. Ct. found D clearly understood nature of trial procedure & intentionally waived his right to present evidence. Witnesses already had been inconvenienced by D, who called for lineup & then refused to participate after witnesses arrived. Ct. noted that where D seeks to reopen case for purpose of testifying, D's request is buttressed by constitutional right to testify. Ind. Const. Art. I, §13. Held, transfer granted, opinion at 488 N.E.2d 735 vacated, & Tr. Ct. affirmed. DeBruler, J., dissenting.

RELATED CASES: Komyatti, 490 N.E.2d 279 (no error in denying Ds' motion to reopen case to allow testimony of witness who had appeared but became ill & then did not respond to subpoena until after State's closing argument); Tobias, 479 N.E.2d 508 (no error in allowing State to reopen case to allow witness to elaborate about weight of pills sold); Gorman, 463 N.E.2d 254 (party should be afforded opportunity to reopen case to submit evidence which could have been part of its case-in- chief).

TITLE: Gilman v. State
INDEX NO.: D.11.c.
CITE: (12/28/2016), 65 N.E.3d 638 (Ind. Ct. App. 2017)
SUBJECT: Reopening case after closing argument – no error
HOLDING: In prosecution for leaving the scene of an accident resulting in death, trial court did not abuse its discretion in allowing the State to reopen its case after closing argument. During an interview, Defendant admitted to police that at the time of the accident, he knew of an outstanding warrant for his arrest in an unrelated case. The State filed a notice of intent to introduce evidence of Defendant's knowledge of the outstanding warrant depending on his defense. Trial court issued an order stating this evidence could only be introduced "should Defendant place intent at issue by presenting a claim of particular contrary intent." The State rested without presenting the arrest warrant evidence, but during closing arguments, the defense argued that Defendant fled the scene "out of necessity" because he believed the victim would hurt him. Trial court sustained the State's objection and granted permission to reopen its case to present additional evidence of Defendant's prior knowledge of the outstanding warrant, because Defendant had made a necessity claim.

Court concluded that under these circumstances, allowing the State to reopen its case was not unreasonable. Defendant failed to show how he was unduly prejudiced by the reopening. The police officer who testified to Defendant's knowledge of the warrant and who interviewed him after the accident was not a surprise witness because he testified in the State's case-in-chief. Defense counsel chose not to cross-examine the officer and did not supplement his closing argument after the State re-rested. Further, defense counsel had been forewarned and was well aware of the consequences of arguing Defendant's motive for fleeing the scene of the accident. Held, judgment affirmed.

TITLE: Izaguirre v. State

INDEX NO.: D.11.c.

CITE: (9/14/2022), 194 N.E.3d 1224 (Ind. Ct. App. 2022)

SUBJECT: Defendant unable to show prejudice from presence of comfort animal in courtroom during victim's testimony

HOLDING: Defendant was convicted of two counts of child molesting and sentenced to forty-five years. On appeal, Defendant argued the trial court erred by permitting the complaining witness to testify with a comfort animal (dog) pursuant to IC 35-40-5-13. First, the Court of Appeals finds the arguments waived for failure to make cogent argument, failing to cite a standard of review or legal standard to be applied and failure to cite legal authority in support of arguments. Waiver notwithstanding, the Court found Defendant was not prejudiced by having a dog in the courtroom. The trial court gave instructions to minimize any impact of the dog's presence and Defendant had confessed to the two crimes of which the jury found him guilty.

D. TRIAL

D.12. Witnesses/securing attendance/separation

D.12.a. Subpoena

TITLE: Davis v. State
INDEX NO.: D.12.a.
CITE: (4th Dist. 10/4/88), Ind. App., 529 N.E.2d 112
SUBJECT: Compulsory process - subpoena of witness who will invoke 5th Amend.
HOLDING: Tr. Ct. did not err in quashing D's subpoena of witness who would invoke 5th Amend. privilege against self-incrimination. D sought to subpoena alleged co-D to testify at his trial for burglary. Co-D successfully moved to quash, arguing at hearing on issue that he would invoke 5th Amend. if called as witness. D appeals, arguing quashing of subpoena denied his 6th Amend. right to compulsory process. In reviewing claim of denial of compulsory process, Ct. must make 2 inquiries: (1) whether Tr. Ct. acted arbitrarily, & (2) whether witness was competent to testify & testimony would have been relevant & material to defense. Washington v. TX, (1967), 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019. Here, Tr. Ct.'s decision was not arbitrary; it conducted hearing solely on this issue, & heard arguments of D, witness, & state. Further, while witness would have been competent to testify, his testimony would have been immaterial & irrelevant. Evidence against D was overwhelming, & he fails to argue how co-D's testimony would have materially affected outcome. See US v. Valenzuela-Bernal (1982), 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193. D argues Gadacz 426 N.E.2d 376 controls. In Gadacz, Ind. S. Ct. upheld state's use of witness who invoked 5th Amend. privilege, while describing it with disfavor. Ct. App. distinguishes Gadacz, noting that testimony there was relevant & material, & that it did not involve 6th Amend. claim. *Citing* numerous jurisdictions which do not allow either state or D to call witness who will claim 5th Amend. privilege, [*citations* omitted], Ct. App. adopts this rule. Held, conviction affirmed.

RELATED CASES: Hunt, App., 546 N.E.2d 1249 (D was not denied 6th Amend. right to compulsory process when Tr. Ct. quashed subpoena ordering Director of Toxicology Dept. to testify in DWI case; Tr. Ct. conducted hearing solely for purpose of resolving issue & was thorough in examining ramifications of subpoena, & director's testimony would not have been material & was available from lesser ranking official.).

TITLE: Dillon v. State
INDEX NO.: D.12.a.
CITE: (5/6/83), Ind., 448 N.E.2d 21
SUBJECT: Witnesses - subpoena; contempt powers under TR 45(F)
HOLDING: Tr. Ct.'s refusal to exercise contempt powers did not deny D right to compel attendance of witnesses on his behalf where D failed to show subpoena was served. Ct. distinguishes present case from Jordan, 432 N.E.2d 9 (subpoena had been served). Here, D delivered subpoena to sheriff 3 days before trial & moved for continuance at trial to secure attendance of witness to testify concerning D's defense of intoxication. D did not file an affidavit in compliance with Ind. Code 35-1-26-1 (continuance to secure presence of absent witness), now Ind. Code 35-36-7-1. Tr. Ct. did not abuse discretion in denying oral motions for continuance where D failed to show harm (no showing of materiality of witness' testimony). Held, no error.

TITLE: Ferguson v. State
INDEX NO.: D.12.a.
CITE: (9/17/96), Ind. App., 670 N.E.2d 371
SUBJECT: Compulsory process - procuring testimony of prosecutor
HOLDING: D has right to compulsory process for obtaining witnesses in his behalf guaranteed by 6th Amend. U.S. Const. & Art. I, §13 Ind. Const. Klagiss, App., 585 N.E.2d 674. Right to offer testimony of witnesses, & to compel their attendance is in plain terms right to present defense, right to present D's version of facts as well as prosecution's to jury so it may decide where truth lies. Washington v. Texas, 87 S.Ct. 1920. This right to present own witnesses is fundamental element of due process. Id. Under Washington, 2 inquiries are made when D asserts denial of compulsory process: (1) whether Tr. Ct. arbitrarily denied 6th Amend. rights of person calling witness, & (2) whether witness was competent to testify & his testimony would have been relevant & material to defense. Omission must be evaluated in context of entire record. If there is no reasonable doubt about guilt whether or not additional evidence is considered, there is no justification for new trial. Davis, App., 529 N.E.2d 112. However, if verdict is already of questionable validity, additional evidence of minor importance may be sufficient to create reasonable doubt. Id. quoting U.S. v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440.

Here, Tr. Ct. quashed murder D's subpoena of deputy prosecutor with respect to any understanding he had with uncharged coconspirator, who testified she had not entered into any agreement with State in exchange for her testimony. Though prosecutors are ordinarily not subject to being called as witnesses, ct. concluded prosecutor's testimony was essential to get at truth. See Worthington, 405 N.E.2d 913. Ct. concluded quashing of subpoena violated D's right to compulsory process & was reversible error, because there was compelling evidence that some understanding existed between co-conspirator & State. Held, judgment reversed.

RELATED CASES: Paschall, App., 717 N.E.2d 1273 (D failed to show that prosecutor's testimony would have been both material & favorable to his defense); Hunt, App., 546 N.E.2d 1249 (D not denied right to compulsory process when Tr. Ct. quashed subpoena ordering director of toxicology dept. to testify in DWI case; Tr. Ct.'s decision to quash subpoena was not arbitrary, & testimony would not have been favorable to defense, was not material & was available from lesser ranking official).

TITLE: Medlock v. State
INDEX NO.: D.12.a.
CITE: (1st Dist. 12/19/89), Ind. App., 547 N.E.2d 884
SUBJECT: Failure to issue subpoenas to D's witnesses - PCR; voluntariness of guilty plea
HOLDING: Failure to issue subpoenas to D's witnesses was reversible error where their testimony at PCR hearing may have had impact on issue of whether D's guilty plea was voluntary. D pled guilty to both state & federal charges arising from financial transactions, & now challenges voluntariness of state plea. D properly requested subpoenas for 2 witnesses for his PCR hearing, but clerk failed to issue them. D asserts that witnesses would have testified that they promised him that federal sentence would be 5 years, concurrent with state sentence, & that he could serve sentence in federal custody. Record shows that D read & signed state plea agreement, which included sentencing recommendation of 6-year executed term to be served in state custody. D's attorney on federal charge testified that he informed D that federal judge could not order concurrent sentences, & that state sentence would be served in state custody. At guilty plea hearing, D responded that he understood sentencing recommendation, it was complete & accurate, & no other promises had been made to him. Generally, in face of such unequivocal record, D will likely not be able to prevail on claim that plea was induced by unfulfilled promises. LaFave, Criminal Procedure, Sec. 202. However, one federal Ct. has allowed habeas corpus petitioner to present evidence to substantiate similar claim. US v. Unger (CA8 1981), 665 F.2d 251. Same result should prevail here. Proper forum for determining voluntariness of plea is Tr. Ct., & D should have opportunity to present witnesses there. Held, reversed & remanded for new PCR hearing, with subpoenas granted.

D. TRIAL

D.12. Witnesses/securing attendance/separation

D.12.b. Out-of-state witnesses (Ind. Code 35-37-5-5)

TITLE: Bartruff v. State
INDEX NO.: D.12.b.
CITE: (9/14/88), Ind. App., 528 N.E.2d 110
SUBJECT: Securing attendance of out-of-state witness - good faith effort
HOLDING: D has 6th Amend. right to confront witnesses against him. Witness is not unavailable unless State makes good-faith effort to secure his presence at trial. Ohio v. Roberts, 100 S.Ct. 2531. If no possibility of procuring witness's attendance exists, "good faith" requires nothing of State; however, if there is remote chance affirmative measures will be successful, good faith may demand their effectuation. Id. Extent State must go to produce witness is question of reasonableness. Id. Before hearsay statements are admissible against D, State must show, (1) witness was subject to cross-examination by D at time hearsay statement was taken, & (2) it made good faith effort to secure witness's attendance at trial. Mere fact State's witness is out-of- state is not sufficient to warrant admission of hearsay statement. Tr. Ct., upon request, may issue certificate to judge in reciprocal state's county where witness resides compelling such witness's appearance at trial, & subpoenaed witness is subject to sanctions by Tr. Ct. if he fails to testify. Ind. Code 35-37-5-5. Here, witness's home state was reciprocal state. Ct. held minimum required to show good faith effort to secure attendance is evidence State filed petition for subpoena under Ind. Code 35-37-5-5 & made continuing reasonable attempts to procure witness's attendance at trial before his deposition is admissible. Mere statements by witness he will not attend & testify even if subpoenaed do not satisfy good faith effort requirement or demonstrate witness is unavailable. Ct. concluded Tr. Ct. erred by admitting witness's deposition into evidence. However, constitutional error was deemed harmless beyond reasonable doubt. Hewell, App., 471 N.E.2d 1235. Held, convictions affirmed.

RELATED CASES: Garner, 777 N.E.2d 721 (mere vacation is not sufficient to circumvent D's right to confrontation); Jackson, 735 N.E.2d 1146 (State failed to demonstrate that witness was unavailable for live testimony; see full review at O.9.c.11)

TITLE: Gorman v. State
INDEX NO.: D.12.b.
CITE: (5/18/84), Ind., 463 N.E.2d 254
SUBJECT: Securing attendance of out of state witnesses
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss (for absence of informant) where D knew informant's name & address in NY. Ind. Code 35-6-2-2 [now Ind. Code 35-37-5-5] allows Tr. Ct. to compel nonresident witnesses to appear if state in which witness resides has statute permitting such process. Burden of seeking Ct. order is on D. Here, D provided police & prosecutor with subpoena to compel witness' appearance. D contends Ortez, App., 333 N.E.2d 838 requires reversal. Ct. distinguishes Ortez - there D did not know name/address of informant. Ct. holds such action created no duty to produce witness. D should have followed statutory procedure for obtaining witness' presence at trial. Held, no error.

RELATED CASES: Adkins, 561 N.E.2d 787 (denial of D's request to summon out-of-state witness pursuant to Ind. Code 35-37-5-5 at public expense to testify at sentencing hearing after he entered guilty plea was not abuse of discretion, where Tr. Ct. allowed D to furnish affidavits from witnesses).

D. TRIAL

D.12. Witnesses/securing attendance/separation

D.12.c. Imprisoned or institutionalized witnesses (Ind. Code 35-37-5-3)

TITLE: Eubank v. State
INDEX NO.: D.12.c.
CITE: (12/16/83), Ind., 456 N.E.2d 1012
SUBJECT: Securing attendance of witnesses in custody
HOLDING: Tr. Ct. did not err in denying D's motion to order issuance of subpoena for several witnesses held in custody where testimony would have been cumulative of other subpoenaed witnesses who did testify. Here, D contends Tr. Ct.'s refusal to issue subpoenas denied him due process, *citing* Washington v. TX, (1967) 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (D has right to present witnesses to establish defense). Right to compel attendance of witnesses is not without limitation. See Owens, 427 N.E.2d 880. Fed. R. Crim. P. 17(b) grants Tr. Ct.s. discretion to determine when subpoena will issue. Tr. Ct. need not grant 17(b) motion if requested witness would provide only cumulative testimony (citations omitted). Ind. Code 35-1-33-1 (repealed) governs subpoena of witnesses held in custody. D must show testimony of incarcerated witness is material to case. Owens, 427 N.E.2d 880. Tr. Ct. then may order a subpoena issued. Held, no error. **Note:** Subpoena of institutionalized/incarcerated witness is governed by Ind. Code 35-37-5-3 (when testimony of person who is imprisoned or institutionalized within this state is necessary in any criminal proceeding, subpoena shall be delivered or mailed to official in charge of institution).

RELATED CASES: Stevenson, 656 N.E.2d 476 (ruling on motion for subpoena for incarcerated witness is within sound discretion of Tr. Ct.; standard applicable to ruling upon motion to produce incarcerated witness is whether D has shown that testimony of witness is material to case).

D. TRIAL

D.12. Witnesses/securing attendance/separation

D.12.d. Separation

TITLE: Childs v. State
INDEX NO.: D.12.d.
CITE: (1-30-02), Ind. App., 761 N.E.2d 892
SUBJECT: Exclusion of testimony - witness tainted due to violation of separation order
HOLDING: In criminal recklessness prosecution, Tr. Ct. did not abuse discretion in excluding defense witness's testimony. D's fiancee told defense attorney that she knew that D's sister had shot at victim's car & not D. D sought to add her to witness list. State objected on grounds that she had been in Ct. room during entire trial in violation of separation order, spoke with D, & reviewed D's sister's deposition. Although separation order was not violated because fiancee had never been listed as witness, as soon as D knew he might want to call her, he should have ensured that she gained no further knowledge of testimony that had been given, pursuant to separation order. Witness's testimony was relevant & important to D's case because it would have impeached victim's credibility. Nevertheless, witness was tainted & exclusion of her testimony was not abuse of discretion. Held, judgment affirmed; Sullivan, J., concurring

TITLE: Harris v. State

INDEX NO.: D.12.d.

CITE: (3/24/2021), Ind., 165 N.E.3d 91

SUBJECT: Parent of a child defendant can remain in courtroom despite a witness separation order if shown to be essential

HOLDING: Children being tried for a crime as an adult do not have an automatic right to have a parent with them during the trial. Where the parent is subject to a witness separation order, the child defendant can identify the parent's presence as "essential" to presentation of the child's defense pursuant to Evidence Rule 615(c) to allow the parent to remain in the courtroom despite a witness-separation order. To prove that the parent is "essential," the child can offer any number of reasons, such as the child's special needs, that the child is struggling with communicating with counsel, or that the child needs parental guidance when making life-altering decisions, like whether to pursue a line of questioning, take the stand, or accept a plea agreement. However, Defendant did not make that showing here by stating that his parent would like to remain in the courtroom "as much as possible" because of his age and the seriousness of the offense. "In fact, there was no mention that Harris himself wanted his mother present." Therefore, the issue of whether Defendant's mother was essential to his defense, pursuant to Evid. R. 615(c) was waived.

Likewise, Defendant did not argue to the trial court that he had a due process right to the presence of his mother during his trial. Certain rights held by children in the juvenile system do not carry over when children find themselves in adult court. With that said, because Defendant did not raise the issue of a due process right to parental presence before the trial court, the argument that due process provided a right to parental presence was waived.

Further, the trial court did not abuse its discretion by not ordering alternative sentencing under I.C. 31-30-4-2. The alternative sentencing statute does not provide factors for the court to consider, but the factors in determining whether to waive a child are instructive, including: the severity of the act and whether it is part of a pattern of repetitive acts; whether the child is beyond rehabilitation under the juvenile justice system; and whether it is in the best interests of the community that the child be tried as an adult. Because Defendant's crime was serious (attempted murder), part of a pattern of repetitive acts, and he had failed many rehabilitative programs previously, the trial court did not abuse its discretion by declining to sentence him under the alternative sentencing scheme. Finally, Defendant's 37-year sentence was not inappropriate under Appellate Rule 7(B) analysis. While Defendant was only fifteen at the time of the crime, he already had accumulated a history of delinquent adjudications, some of which were for violent offenses involving weapons. Defendant had a history of mental health problems but did not explain why those affected his behavior or his propensity for breaking the law.

TITLE: Heeter v. State
INDEX NO.: D.12.d.
CITE: (2/27/96), Ind. App., 661 N.E.2d 612
SUBJECT: Separation of witnesses - exemptions; investigating officers
HOLDING: Separation of witnesses is governed by Ind. Evid. Rule 615 which provides: At request of party, Tr. Ct. shall order witnesses excluded, & it may make order sua sponte. Rule does not authorize exclusion of: 1) party who is natural person; 2) officer/employee of party that is not natural person designated as its representative; or 3) person whose presence is essential to presentation of party's cause. Ind. R. Evid 615. Prior to Rule 615, separation of witnesses was within discretion of Tr. Ct. Wisehart, 484 N.E.2d 949. Now, Tr. Ct. is required to grant party's request for order except as to witnesses that are expressly identified in rule. Smiley, 649 N.E.2d 697. If witness falls within exemption under Rule 615, witness shall be allowed to remain in courtroom. Fourthman, App., 658 N.E.2d 88.

Here, witness was detective assisting prosecutor & qualified for second exemption. U.S. v. Crabtree, 7th Cir., 979 F.2d 1261; Fourthman. Exemption continues long-standing Indiana tradition of permitting police officers to remain in courtroom. Id. Better practice would have been for State to designate officer as its representative prior to presentation of evidence. Because officer would reasonably fit within exemption, Ct. found no error in allowing testimony. Notwithstanding Rule 615, prior case law holds that when there is violation of witness separation order, Tr. Ct. has discretion to allow witness to testify unless D can show connivance by State. Halbig, 525 N.E.2d 288. Here, there was no evidence State connived to have officer violate separation order. Considering Rule 615 & lack of evidence showing State's connivance, Ct. concluded D did not establish prejudice. Held, judgment affirmed.

RELATED CASES: Julian, App., 811 N.E.2d 392 (Tr. Ct. did not violate its separation of witnesses order by permitting State to call detective, who remained in courtroom as State's representative to return to witness stand twice to testify after hearing testimony of other witnesses).

TITLE: Hernandez v. State
INDEX NO.: D.12.d.
CITE: (10-1-99), Ind., 716 N.E.2d 948
SUBJECT: Separation of witness - exemptions; essential parties
HOLDING: Tr. Ct. did not err in allowing attempted murder victim to remain at prosecutor's table as essential witness to presentation of case despite separation of witness order. Indiana Evidence Rule 615, which requires Tr. Ct. to grant motions for separation of witnesses, exempts witness whose presence is shown to be essential to presentation of party's cause. Ind. Evid. R. 615(3). In this case, attempted murder victim had unique ability to assist State in that he was only person who had personal knowledge of all particulars of case, & witness was able to assist in cross-examination of witnesses who testified for defense that D acted in self-defense. Held, no error. Shepard, C.J., concurring, believing that while this witness may be "essential," many complaining witnesses would not meet test under Rule 615. Boehm & Dickson, JJ, dissenting.

RELATED CASES: Osborne, 754 N.E.2d 916 (three justices believed that trial Ct. should not have allowed officers to remain in Ct. room after granting separation of witnesses order pursuant to Rule 615, & that burden of showing harmless error falls on State).

TITLE: Hudgins v. State
INDEX NO.: D.12.d.
CITE: (8/12/83), Ind., 451 N.E.2d 1087
SUBJECT: Witnesses - separation; violation
HOLDING: Tr. Ct. did not commit reversible error by failing to inquire whether witness who violated separation order & testifying witness had discussed their testimony previously where D demonstrated neither prejudice nor abuse of discretion. Here, Tr. Ct. allowed witness who violated separation order to testify after D agreed there was no connivance by prosecutor. Tr. Ct. has discretion to allow/exclude testimony of such witness absent connivance or collusion by party calling witness. Cox, 419 N.E.2d 737; O'Conner, 399 N.E.2d 364. D did not (but could have) questioned witness about any discussions & about any discrepancy between statement to police & in-Ct. testimony. Held, no error.

RELATED CASES: Wardlaw, 483 N.E.2d 454 (unforeseen necessity for foundation witness' testimony plus lack of connivance plus state's explanation to jury re violation of separation order equals no error); Clark, 480 N.E.2d 555 (no abuse of discretion in denial of motion for mistrial & to strike witnesses' testimony where they conferred for 2 hours in violation of separation order; discussion took place prior to either testifying; opportunity to adjust testimony was not present; any prejudice resulting from possible collusion did not survive rigorous cross-exam of each witness); Hill, 478 N.E.2d 65 (Crim L 867; held, no error of denial of D's mistrial motion based upon violations of separation order where 1 witness who had testified spoke with press about crime & another watched T.V. accounts before testifying); Gorman, 463 N.E.2d 254 (no abuse of discretion in allowing officer to testify when state reopened case, even though he had heard other witnesses' testimony); Resnover, 460 N.E.2d 922 (no abuse of discretion in allowing officer, present during guilt phase, to testify during penalty phase); Murphy, App., 475 N.E.2d 42 (D's mother's affidavit re observed violation of separation order does not convince Ct. of impropriety).

TITLE: Jiosa v. State
INDEX NO.: D.12.d.
CITE: (10-2-01), Ind., 755 N.E.2d 605
SUBJECT: Violation of witness separation order - erroneous exclusion of witness
HOLDING: In child molesting prosecution, trial Ct. erred in excluding testimony of defense witness as sanction for violation of pretrial witness separation order. Indiana Evidence Rule 615 sets out circumstances in which separation order is to be given but does not address remedy for violation. It has long been held abuse of discretion to refuse to permit testimony of witness due to violation of separation of witnesses' order if party seeking to call witness is without fault in violation. Thomas v. State, 420 N.E.2d 1216 (Ind. 1981). This common law presumption was not changed by adoption of Rules of Evidence & does not eliminate effective tools for enforcement of separation orders. Trial Ct.'s may issue contempt citations & permit evidence of witnesses' noncompliance to impeach their credibility. They may exclude witnesses if party is at fault or testimony does not directly affect party's ability to present its case. Rowan v. Owens, 752 F.2d 1186 (7th Cir. 1984).

Here, through no fault of her own, complaining witness's (CW's) mother was in Ct. house hall, where she had every right to be, when she overheard D's father shouting details of testimony given in Ct. that day. She realized that CW's physical symptoms were relevant to case & approached defense counsel with information that, if credited, would offer alternative explanation for those symptoms. It is not obvious that this incident constituted violation of separation order, but assuming there was violation, there is no suggestion D had anything to do with it. Given absence of fault on part of D & extreme significance of excluded evidence, it was abuse of discretion to exclude testimony based on order. Held, conviction reversed; Sullivan, J. & Shepard, C.J., dissenting.

Note: Ct. noted that separation order does not prohibit counsel from consulting with witnesses. Although it is appropriate for attorneys to discuss factual matters with their witnesses, Ct. declined to address whether counsel may describe testimony of other witnesses in face of separation order. See United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000); Lutz v. State, 536 N.E.2d 526 (Ind. Ct. App. 1989).

TITLE: Jordan v. State
INDEX NO.: D.12.d.
CITE: (10-18-95), Ind., 656 N.E.2d 816
SUBJECT: Separation of witnesses - remedy for violation
HOLDING: Despite violation of separation order, Tr. Ct. did not err in allowing decedent's mother to testify as rebuttal witness for State. In response to D's objection to witness's testimony, State argued that it had not expected D's testimony that decedent had pulled knife out of his right pocket. Only then, State explained, did it become necessary to demonstrate that victim was left-handed. Ct. noted that even when confronted with clear violation of separation order, Tr. Ct. has discretion to permit violating witness to testify at trial. Goolsby v. State, (1987), Ind., 517 N.E.2d 54. Held, judgment affirmed.

RELATED CASES: Tavake, 131 N.E.3d 696 (Ind. Ct. App. 2019) (no error in letting a police officer testify in violation of separation of witness order when the officer sat at counsel table with prosecutor but had not been designated as an assisting witness); Morell, 933 N.E.2d 484 (Ind. Ct. App. 2010) (where there was no evidence that witnesses talked about case when they went to lunch with one another, it was not error to allow the witnesses to testify).

TITLE: Kuchel v. State
INDEX NO.: D.12.d.
CITE: (12/22/86), Ind., 501 N.E.2d 1045
SUBJECT: Separation of witnesses - timing of motion
HOLDING: Announcing new rule of law, Ind. S.Ct. holds when there is to be a separation of witnesses, motion must be made & ruled upon before any witnesses have testified. Here, Tr. Ct. granted state's motion to separate witnesses following its own presentation of evidence, made without separation of witnesses. D objected. Ct. finds constitutional mandate that D is entitled to fair trial dictates determination that Tr. Ct. abused discretion. Ct. distinguishes Brown, 265 N.E.2d 699, in which D moved for separation of witnesses after jury was sworn, but Tr. Ct. held matter under advisement until after opening statements were made by respective sides. Witnesses were then sworn & motion for separation was granted. Held, reversed.

RELATED CASES: Anderson, App., 743 N.E.2d 1273 (although ideally, motion for separation of witnesses should be made before any witness testifies, a motion sometime after testimony has begun may be permissible as long as basic notions of fundamental fairness are not offended); Bell, 495 N.E.2d 426 (no error in denying D's motion for separation of witnesses made prior to jury selection; timing of separation order is discretionary).

TITLE: L.B. v. State
INDEX NO.: D.12.d.
CITE: (3rd Dist., 12-23-96), Ind. App., 675 N.E.2d 1104
SUBJECT: Separation of witnesses - delinquency fact-finding hearing
HOLDING: Parents of juvenile D are parties to delinquency action involving their child & may not be prohibited from attending Juvenile Ct. proceedings. Here, Tr. Ct. excluded parents from substantial portion of fact-finding hearing pursuant to separation of witnesses' order. Ct. found that child's & parents' interests are indistinguishable in delinquency actions, & exclusion of parents must be accompanied by knowing & voluntary waiver of right to be present. Further, child has standing to assert parents' right to be present in Courtroom because parental presence may assist in protection of child's due process rights. Held, delinquency adjudication reversed & remanded. Chezem, J., concurring, noted that child's & parents' rights are not coextensive in all Ct. actions involving children & suggesting that Juvenile Ct. should have power to exclude parent if parental presence is not in best interests of child.

RELATED CASES: In re Termination of K.L. and K.J.L., 137 N.E.3d 301 (Ind. Ct. App. 2019) (harmless error to deny motion for separation of witnesses in TPR proceeding); K.S., 849 N.E.2d 538 (juvenile's mother, who was also mother of victim, was not subject to separation of witnesses order); C.T.S., App., 781 N.E.2d 1193 (where D's mother was present during each hearing Tr. Ct. did not err in excluding D's stepfather due to witness separation order).

TITLE: McDonald v. State
INDEX NO.: D.12.d.
CITE: (8/27/87), Ind., 511 N.E.2d 1066
SUBJECT: Separation of witnesses' orders - application to rebuttal witnesses
HOLDING: Tr. Ct. did not abuse discretion in refusing to permit defense witness to testify on rebuttal where witness was not listed as potential witness on defense witness list, was present in courtroom in violation of separation order, and was present when witness he was called to refute was testifying. Tr. Ct. granted wide discretion in determining whether to allow testimony from witnesses not listed on pre-trial discovery witness list. Wagner, 474 N.E.2d 476; Murray, 442 N.E.2d 1012. Normal remedy for failure to disclose witness is granting of continuance. Morgan, 440 N.E.2d 1087; Allen, 439 N.E.2d 615. Here, witness was not listed on D's witness list & was present in courtroom in violation of separation order during testimony of witness he was to refute. Ct. concluded that D failed to show Tr. Ct. abused its discretion. Held, judgment affirmed.

RELATED CASES: See Jordan, this section; Lane, App., 539 N.E.2d 488 (where D failed to show connivance by State, no abuse of discretion in failing to exclude testimony of rebuttal witness because of her presence in courtroom where witness did not testify in State's case-in-chief & was not listed as prospective witness); Bartuff, App., 528 N.E.2d 110 (no err in permitting State's first witness to testify as rebuttal witness despite his presence in courtroom during other testimony in violation of prior separation order; no evidence witness altered testimony, fabricated his additional testimony, or connivance by State in calling witness on rebuttal); U.S. v. Bramlet, 7th. Cir., 820 F.2d 851 (rationale for excluding adverse witness who violates separation order is premised on concern that once having heard testimony of others, witness may inappropriately tailor his/her testimony to prior evidence. By contrast, very function of rebuttal witness is challenging prior testimony of opposing witnesses, thereby enhancing fact finder's ultimate determination of an objective "truth").

TITLE: Rutledge v. State
INDEX NO.: D.12.d.
CITE: (3d Dist. 8/24/83), Ind. App., 452 N.E.2d 1039
SUBJECT: Witnesses - separation; investigating officer
HOLDING: Tr. Ct. did not abuse discretion in refusing to require state to call as its first witness police officer who remained in Ct. room to aid prosecution in order to comply with witness separation order. Gee, 389 N.E.2d 303; Hilligoss, 255 N.E.2d 101. Here, officer was familiar with case & statements of witnesses who preceded him. D made no showing of prejudice. Separation of witnesses' rests within sound discretion of Tr. Ct. Kizer, App., 395 N.E.2d 841. Held, no error.

RELATED CASES: Abercrombie, 478 N.E.2d 1236 (Crim L 665(2); each party has right to one person in Ct. room to aid counsel & it is accepted procedure in IN to have police officer remain even though he/she is also a witness, *citing* Gee).

TITLE: Smiley v. State
INDEX NO.: D.12.d.
CITE: (1st Dist., 4-28-95), Ind. App., 649 N.E.2d 697
SUBJECT: Disqualification for violating witness separation order - no prejudice
HOLDING: Although Tr. Ct. erred in excluding testimony from alibi witness who violated separation of witnesses' order, error was harmless because D suffered no prejudice. Judge's extreme frustration with repeated violations of his order alone was not enough to preclude witness from testifying. Disqualification of witness is drastic sanction that has severe impact on constitutional right to present witnesses on D's behalf. Borst, App., 459 N.E.2d 751. Ct. may disqualify witness for violating separation order if violation was caused by connivance or fault of party calling witness, or where witness' testimony would have been cumulative or inadmissible. Rinard, 351 N.E.2d 20. Here, there was no evidence that D connived to have witness violate separation order, & no evidence was presented that witnesses actually discussed testimony. However, disqualification did not result in prejudice to D because testimony would have been cumulative, not crucial to defense, & proposed testimony regarding Co-D's veracity would have been inadmissible. Held, judgment affirmed.

Note: See Ind. Evidence Rule 615, effective 1/1/94, which requires Tr. Ct. to grant a party's request for witness separation order, except as to certain necessary witnesses that are expressly identified in the rule.

RELATED CASES: Cordray, App., 687 N.E.2d 219 (prejudice shown & reversible error where excluded witness was only person, besides D, who could corroborate D's testimony); Heeter, App., 661 N.E.2d 612; Fourthman, App., 658 N.E.2d 88 (investigating officer may remain in courtroom at prosecution's table as its designated representative under second exemption to Indiana Evidence Rule 615).

TITLE: Solomon v. State
INDEX NO.: D.12.d.
CITE: (9/1/82), Ind., 439 N.E.2d 570
SUBJECT: Witness separation orders - remaining in courtroom after testifying
HOLDING: Tr. Ct. did not abuse discretion in permitting victim to remain in courtroom after testifying. Here, victim was never recalled by State to further testify after she heard other witnesses testify. Principal reason for separation orders is to keep later witnesses from hearing questioning & testimony of earlier witnesses. Dixon, 348 N.E.2d 401. In absence of procurement or connivance, it is within Tr. Ct.'s discretion to allow testimony of witness who has violated separation order. Tr. Ct.'s discretionary ruling will not be disturbed unless there is manifest abuse of discretion. Rinard, 351 N.E.2d 20. Here, purpose of separation order was not violated so Ct. found no manifest abuse of discretion. Held, judgment affirmed.

RELATED CASES: Myers, App., 887 N.E.2d 170 (there is no presumption of prejudice where the witnesses who violated separation order after their testimony by making statements to the media were not present during testimony of any other witness and D was unable to identify how specific future witnesses were affected by the statements to the media); Chandler, 419 N.E.2d 142 (no error in permitting witness' son to remain in courtroom following his testimony after assurance he would not testify again).

TITLE: Stafford v. State
INDEX NO.: D.12.d.
CITE: (5th Dist., 10-12-00), Ind. App., 736 N.E.2d 326
SUBJECT: Separation of witnesses - exemptions; State representatives & essential witnesses
HOLDING: Tr. Ct. erred in allowing two police representatives to remain in Ct. room despite witness separation order & without any designation that second officer's presence was required as essential witness. Purpose of Ind. Evidence Rule 615, which governs separation of witnesses, is to authorize Tr. Ct. to exclude witnesses from Ct. room so that they cannot hear testimony of other witnesses & to thereby prevent witnesses from basing their testimony, consciously or unconsciously, on testimony of other witnesses. Rule does not authorize exclusion of: 1) party who is natural person; 2) officer or employee of party that is not natural person designated as its representative; or 3) person whose presence is essential to presentation of party's cause.

Ct. rejected State's argument that more than one officer should be able to serve as State's representative under Rule 615(2) & held that Rule 615 permits only one person as representative of State. However, language of Rule 615 does not preclude designation of second individual as "essential" witness. Thus, it is not error to permit one witness to remain in Ct. room under Rule 615(2) as party's designated representative & to permit one witness to remain under Rule 615(3) where party can show that witness is essential to presentation of party's cause. Here, there was no showing that police officer who was not designated as State's representative was "essential" witness, thus second officer should not have been permitted to remain in Ct. room. There was no prejudice to D from presence of two officers because testimony of officers was primarily background & foundational. Held, convictions affirmed in part, reversed in part & remanded on other grounds.

RELATED CASES: Ray, App., 838 N.E.2d 480 (no error in denying mistrial based on prosecutor's violation of witness separation order; Ct. did not find grave peril because jury was provided information concerning the conversations between doctor & prosecutor & subject of conversation was a relatively minor part of the evidence presented); Hayden, App., 830 N.E.2d 923 (superintendent of Logansport Juvenile Diagnostic Facility fit definition of "an officer or an employee of a party" exempted under IRE 615 from separation of witness order); Kirby, App., 774 N.E.2d 523 (no error to permit 2 officers to remain at State's table during trial); Osborne, 754 N.E.2d 916 (3 justices believed that Tr. Ct. should not have allowed officers to remain in courtroom after granting witness separation order, & that burden of showing harmless error falls on State); Long, 743 N.E.2d 253 (permitting party to retain more than one witness in courtroom under Rule 615(3) to assist during trial would be especially questionable).

TITLE: Thakkar v. State
INDEX NO.: D.12.d.
CITE: (5/17/93), Ind. App., 613 N.E.2d 453
SUBJECT: Violation of separation order - Inconsistent rulings on exclusion of testimony
HOLDING: Tr. Ct. erred in making inconsistent rulings in favor of State based on separation of witnesses order, thereby preventing D from impeaching State witness while allowing State to bolster its case. Here, during direct examination of witness, defense counsel sought to discredit State's witness' testimony by asking witness question that referred to part of State's witness' testimony. Though State did not object, Tr. Ct. precluded question because question was improper due to separation of witnesses order. Upon cross, State was permitted to bolster State witness' testimony by asking question that referred to testimony previously given. D objected on grounds that if he could not refer to another witness' testimony, neither could State. Tr. Ct. erred in its disparate treatment. However, Ct. concluded error was harmless. Purpose of separation orders is to prevent testimony of one witness from influencing another. Phillips, 550 N.E.2d 1290. That danger was not present in case. Although Tr. Ct. unfairly allowed State to pursue its questioning after erroneously preventing D from pursuing his, discrepancy in testimony was before jury, & D was merely precluded from having another witness acknowledge that medical evidence did not support State witness' testimony. Held, no reversible error.

TITLE: Townsend v. State
INDEX NO.: D.12.d.
CITE: (2/12/2015), 26 N.E.3d 619 (Ind. Ct. App. 2015)
SUBJECT: Barring testimony violated right to compulsory process - harmless error
HOLDING: Tr. Ct. violated D's Sixth Amendment right to compulsory process by barring defense witness Ashley Jackson from testifying - even though D had not earlier listed Jackson as a witness and despite Jackson's violation of a witness separation order by sitting through almost the entire trial. Court concluded that: 1) D was not at fault for calling Jackson late, 2) letting Jackson testify would not have prejudiced the State, and 3) Jackson's testimony would have challenged the credibility of the co-D, who, after accepting a plea deal, testified against D on charges of vicarious sexual gratification and possession of child pornography. See Farris v. State, 818 N.E.2d 63 (Ind. Ct. App. 2004). However, the error was harmless.

S.W. (13) and C.S. (14) were visiting the co-D, D's girlfriend. D had previously made sexual advances toward S.W. D was on the job driving his truck in Kentucky when he called the co-D and urged her to commit various sexual acts with S.W. and C.S. and make a videotape, to which he later masturbated once he returned home. D first learned about Jackson's potential testimony on the day of trial. Jackson would have testified that while she was in the same jail as the co-D, the co-D told Jackson that "in order to have her plea reduced . . . she would have to bring [the D] down to make herself look better."

Not allowing Jackson to testify was harmless error because: 1) the co-D acknowledged she was testifying pursuant to a plea deal, and 2) the evidence of guilt was overwhelming, with five witnesses other than the co-D testifying against D. See Farris, 818 N.E.2d at 70. Held, judgment affirmed.

D. TRIAL

D.12. Witnesses/securing attendance/separation

D.12.e. Attire/uniforms

TITLE: Galmore v. State
INDEX NO.: D.12.e.
CITE: (8/24/84), Ind., 467 N.E.2d 1173
SUBJECT: Witness attire - military uniform
HOLDING: Tr. Ct. did not err in allowing victim to testify in full dress military uniform. Here, D contends this biased jury in victim's favor & bolstered victim's credibility. Ct. notes jury was informed victim joined military 6 weeks prior to trial, after instant offenses (criminal deviate conduct, battery) occurred. Ct. *cites* case holding no error in appearance of police officers in uniform. Brown, 269 N.E.2d 377. Held, no error.

RELATED CASES: Hall, App., 634 N.E.2d 837 (No error in allowing someone to sit with child complaining witness during her testimony in child molest trial).

D. TRIAL

D.13. Motion for directed verdict/judgment on evidence (TR 50)

TITLE: Caudle v. State
INDEX NO.: D.13.
CITE: (5/15/80), Ind. App., 404 N.E.2d 57
SUBJECT: Judgment on evidence - failure to identify D
HOLDING: Tr. Ct. committed reversible error when it denied D's motion for directed verdict. Directed verdict (now judgment on evidence) should be granted only where there is total lack of evidence on some essential issue or where there is no conflict in evidence, that is, where evidence is susceptible to only one inference in favor of accused. Francis, App., 387 N.E.2d 66. Here, D claimed State failed to present any evidence identifying her as person who committed check deception. At outset, Ct. noted that identification can be established by circumstantial evidence alone if the evidence meets burden of proof required. See Mason, 191 N.E.2d 705. Here, State attempted to prove its case by use of prima facie provisions of check deception statute, Ind. Code 35-43- 5-5, but there was no identification of D either directly or circumstantially. Prima facie identity rule in Ind. Code 35-43-5-5 was enacted to prevent need for expert witnesses to compare handwriting samples, & merely creates presumption maker of check is person identified on check. However, prima facie rule does not obliterate need to prove that D is person identified on check. Court concluded that D could not be convicted of check deception absent any evidence identifying her as person who committed offense. Held, judgment reversed.

RELATED CASES: Dunn, 293 N.E.2d 32 (reversible error to deny directed verdict where no evidence to link accused to murder, D identified by victim of assault & robbery in same location where decedent took walk from which he did not return but who was not shown to have been in area on day decedent did not return).

TITLE: McGraw v. State
INDEX NO.: D.13.
CITE: (11/2/2016), 62 N.E.3d 1239 (Ind. Ct. App. 2016)
SUBJECT: Remand for to correct sentencing order was not necessary
HOLDING: It was not necessary to correct the sentencing order on remand to show that the dismissal of one of D's charges constituted an adjudication of the charges on the merits. D was charged with battery resulting in bodily injury to a pregnant woman, a level 5 felony, and domestic battery, a Class A misdemeanor. At trial, the court found that the victim was unavailable so dismissed the felony charge, pursuant to Trial Rule 41(B), and allowed the State to proceed on the lesser included misdemeanor charge, for which D was convicted and sentenced. Remand was unnecessary because Trial Rule 41(B) clearly states that unless the Tr. Ct.'s order specifies otherwise, a dismissal under Trial Rule 41(B) "operates as an adjudication upon the merits." Held, judgment affirmed.

TITLE: Miller v. State
INDEX NO.: D.13.
CITE: (5/6/83), Ind., 448 N.E.2d 293
SUBJECT: Motion for judgment on evidence - MCE
HOLDING: Tr. Ct. did not err in denying D's motion for judgment on the evidence made in his motion to correct errors (MCE) where there was evidence of child molesting. TR 50(A)(4) authorizes this motion which should be granted only where there is a total absence of evidence on some essential issue or where evidence is without conflict & susceptible to only one inference - in D's favor. Lewis, 429 N.E.2d 1110. Here, affidavit by attorney appended to MCE relates informal comment by Tr. judge that state had failed to prove sexual molestation of the victim. Ct. must examine ruling on motion for judgment on the evidence, not Tr. judge's thoughts about the evidence. Held, ruling on motion upheld; conviction for felony-murder (child molesting) affirmed.

TITLE: Paige v. State
INDEX NO.: D.13.
CITE: (11/10/82), Ind., 441 N.E.2d 438
SUBJECT: Motion for directed verdict (MDV)
HOLDING: Introduction of evidence following denial of MDV waives error. Ingram, 426 N.E.2d 18. MDV will be granted only if there is an absence of evidence upon an essential element or if evidence supports only one inference & that inference is in favor of D. Harris, 425 N.E.2d 154; Estep, 394 N.E.2d 111. Here, Ct. finds substantial evidence of probative value from which jury could find D shot victims without legal justification. D had altercation with off-duty Fort Wayne police officer in bar. Owner requested officer & another to eject D, which they did. D shot these 2 people as they left bar. D maintained he shot officer because half full beer bottles carried by officer were intended to be used as weapons against D. Held, convictions for commission of felony while armed with deadly weapon (aggravated assault; battery) affirmed.

RELATED CASES: Harrison, App., 469 N.E.2d 22 (Ct. finds D's actual argument attacks sufficiency of evidence, not denial of MDV; held, evidence insufficient, conviction for possession of paraphernalia reversed).

TITLE: State v. Barnack
INDEX NO.: D.13.
CITE: (3d Dist. 9/12/83), Ind. App., 453 N.E.2d 348
SUBJECT: Judgment on the evidence ("JOE") - TR 50
HOLDING: Tr. Ct. erred in granting JOE for D. Here, Ct. finds Tr. Ct. weighed the evidence when it held S.B. was not a credible witness in D's child molesting trial & granted JOE for D. JOE is proper only if there is total absence of evidence on some essential issue or if evidence is without conflict & susceptible to only one inference & that inference is in favor of D. Lewis, 429 N.E.2d 1110. Tr. Ct. stated 4 reasons for determining S.B. was not a credible witness. Ct. concludes Tr. Ct. was within its power in acting as "seventh juror" to determine S.B. was not a credible witness, but only insofar as determination is supported by record. Tr. Ct.'s findings are not necessarily supported by record. Tr. Ct. should have ordered new trial, rather than granted JOE for D. Held, JOE for D reversed.

RELATED CASES: Kelly, 719 N.E.2d 391 (JOE proper where D had left scene prior to shooting & there was complete lack of evidence that confrontations & murders were anything other than spontaneous & spur of moment); Goodrich, App., 498 N.E.2d 994 (Tr. Ct. stated wrong standard in deciding D's motion for JOE (referring to weighing of evidence), but Ct. affirms JOE, finding state failed to introduce evidence of recklessness).

TITLE: State v. McKissack
INDEX NO.: D.13.
CITE: (4th Dist., 12-15-93), Ind. App., 625 N.E.2d 1246
SUBJECT: Judgment on Evidence (JOE) entry inappropriate
HOLDING: Tr. Ct. erred in granting D's Motion for JOE, because it can be granted only where there is total absence of evidence on some essential issue, or where evidence is without conflict & susceptible only to inference of innocence. Here State presented some evidence to support every element of offense & record clearly indicated judge improperly weighed evidence rather than using proper standard. D was charged with rape & alleged victim said he refused to take her home despite her requests, that he forcibly kissed her, pushed her down into car by shoulders & inserted his penis when she refused to do so, & that she resisted physically by trying to knee him, but finally just gave up. There was also evidence gun was visible on car seat, although not handled by D.

In granting JOE, Tr. Ct. pointed to inconsistencies among witness statements & lack of credible evidence to convict, but this was improper weighing of evidence. Judge also relied on Jones, 589 N.E.2d 241, regarding force necessary for rape conviction, but that case dealt with sufficiency of evidence to sustain conviction, not lack of evidence of elements of crime. Ct. found for State on reserved question of law concerning propriety of JOE entry, but because judgment had been granted to D, even erroneously, it acted as acquittal & barred retrial.

RELATED CASES: Hill, App., 688 N.E.2d 1280 (Tr. Ct. erred in granting D's motion for JOE, where State presented evidence which supported inference that D either constructively possessed, actually possessed or knew of presence & nature of handgun).

TITLE: State v. Vowels
INDEX NO.: D.13.
CITE: (4th Dist. 3/13/89), Ind. App., 535 N.E.2d 146
SUBJECT: Motion for involuntary dismissal - bench trial
HOLDING: In bench trial, when D seeks judgment on evidence at close of state's case, proper procedure is TR 41(B) motion for involuntary dismissal. Here, D filed TR 50 motion for judgment on evidence. Tr. Ct. determined that state had not met burden of proof beyond reasonable doubt & granted motion. State appealed on reserved question whether Tr. Ct. applied correct standard. State argues that Tr. Ct. must deny motion for judgment on evidence unless there is "total absence of evidence on some essential issue or where the evidence is without conflict & susceptible to only one inference... in favor or D. State v. Goodrich, 504 N.E.2d 1023. However, where Tr. Ct. sits as trier of fact, without jury, TR 50 does not apply. TR 41(B) applies, even in criminal cases. See State v. Seymour, App., 379 N.E.2d 535. Under this rule, Tr. Ct. is permitted to weigh evidence, believe or disbelieve testimony or other evidence, & find against party presenting it, even if there is no evidence to contrary. Ferdinand Furniture Co., Inc. v. Anderson, App., 399 N.E.2d 799; 3 Ind.Pract., Rules of Procedure Annot. (Harvey), Section 41.6, p. 147. Motion measures both quantity & quality of evidence, Benefit Trust Life Ins. Co. v. Waggoner, App., 473 N.E.2d 646, & establishment of prima facie case does not require Tr. Ct. to find in favor of party with burden of proof. Held, judgment affirmed.

Note: See also State v. Mayfield, 356 N.E.2d 294.

TITLE: State v. Vorm
INDEX NO.: D.13.
CITE: (4/25/91), Ind. App., 570 N.E.2d 109
SUBJECT: Judgment on evidence - State's failure to show possession
HOLDING: Judgment on evidence is proper in criminal proceeding only where there is total absence of some essential element or where evidence is without conflict & susceptible only to inference in favor of D. State v. Goodrich, 504 N.E.2d 1023. To avoid directed verdict, State must present prima facie case against D. Pinkston, 436 N.E.2d 306. If evidence is sufficient to support guilty verdict, it is proper for Tr. Ct. to deny directed verdict. Harris, App., 416 N.E.2d 902. Here, Tr. Ct. properly granted D's Motion for judgment on evidence in possession of cocaine prosecution. Ct. concluded mere presence of cocaine metabolites in urine sample, without additional evidence, does not constitute prima facie evidence of knowing & voluntary possession of cocaine. Absence of evidence showing D knowingly/intentionally possessed cocaine mandated D's acquittal. Held, judgment affirmed.

RELATED CASES: Miller, App., 616 N.E.2d 750 (error to deny directed verdict at close of State's case where D charged with confinement with deadly weapon (handgun); record indicated pellet gun used to commit crime); Crowder, App., 398 N.E.2d 1352 (error in failing to sustain motion for acquittal at close of State's case; no evidence D was in possession of marijuana in prosecution for possession in Posey County; only possible possession of marijuana established by evidence was D smoked "joint" in Vanderburgh County); State v. Cox, App., 297 N.E.2d 920 (proper to direct verdict against State where D charged with carrying gun without license in motor vehicle; total lack of evidence showing D "carried" pistol in vehicle where officer merely testified pistol found in tackle box in trunk of D's car at time of search car parked adjacent to residence & where State failed to show car had been driven or moved while pistol was in it).

TITLE: Taylor v. State
INDEX NO.: D.13.
CITE: (1st Dist., 04-04-07), Ind. App., 863 N.E.2d 917
SUBJECT: Erroneous grant of judgment on evidence - "thirteenth juror" principle does not apply
HOLDING: In prosecution for possession of methamphetamine & marijuana, Tr. Ct. erroneously granted D's motion for judgment on evidence, but Court affirmed judgment because double jeopardy bars Court from remanding for new trial. Tr. Ct. may grant a motion for judgment on evidence only where there is a total absence of evidence upon some essential issue, or where there is no conflict in evidence & it is susceptible of but one inference...in favor of D. State v. Patsel, 240 Ind. 240, 163 N.E.2d 602 (1960). Tr. Ct. may not invade province of jury by weighing evidence presented or credibility of witnesses, & in a criminal case is not authorized under Trial Rule 50 to consider whether evidence presented could be viewed by a reasonable jury as constituting proof beyond a reasonable doubt. State v. Goodrich, 504 N.E.2d 1023 (Ind. 1987).

Here, Tr. Ct. stated that "evidence presented does not rise to level [of] proof beyond a reasonable doubt," which is incorrect standard for granting a directed verdict. Further, from record it appears that Tr. Ct. improperly engaged in weighing evidence in considering D's motion for directed verdict. Finally, Tr. Ct. confused motion for judgment on evidence, governed by Trial Rule 50, with "thirteenth juror" principle grounded in Trial Rule 59(J)(7), which applies when reviewing a motion to correct error. Where, as here, D moves for a directed verdict under Trial Rule 50, Tr. Ct. may not act as a "thirteenth juror" & weigh evidence or judge witness credibility. Thirteenth juror principle is not intended to allow Tr. Ct. to invade province of jury by undertaking role of jury in weighing evidence & judging credibility of witnesses. Held, judgment affirmed.

RELATED CASES: Hollars, App., 877 N.E.2d 197 (in attempted murder prosecution, Tr. Ct. abused its discretion by granting D's motion to correct error and ordering a new trial based on "thirteenth juror" principle; see full review at D.21).

D. TRIAL

D.14. Misconduct by judge

D.14.a. In general

TITLE: Abney v. State
INDEX NO.: D.14.a.
CITE: (6/22/2017), 79 N.E.3d 932 (Ind. Ct. App. 2017)
SUBJECT: Recusal of judge not required
HOLDING: It was unnecessary for judge to recuse himself, even though the elected prosecutor served on his campaign committee, because the prosecutor had yet to take any action on behalf of the judge and his role on the committee was not significant.

Defendant was charged in Howard County with drug-related offenses. He asked Judge William Menges to recuse himself because the Howard County elected prosecutor, Mark McCann, served on Judge Menges' campaign committee and had publicly endorsed him.

Even the mere appearance of bias may require recusal if an objective person, knowing all the circumstances, would have a "rational basis for doubting the judge's impartiality." Bloomington Magazine, Inc. v. Kiang, 961 N.E.2d 61, 64 (Ind. Ct. App. 2012). A party seeking recusal need not show "actual bias." In Bloomington Magazine, recusal was necessary because one of the attorneys had served as the chairman of the judge's election campaign, which would give a reasonable person a rational basis for doubting the judge's impartiality. Id. at 66. But here, McMann was not the campaign chairman and had yet to perform any election committee activities on behalf of Judge Menges. Moreover, Judge Menges noted that Defendant's counsel was a deputy public defender and that two members of his attorney's private law firm were the Chief Public Defender and the Chief Deputy Public Defender, who had also agreed to serve in the same role in the judge's campaign as had Prosecutor McMann. Under these circumstances, an objective person would not have a rational basis for doubting Judge Menges' impartiality. Held, judgment affirmed.

Note: Interestingly, the Court's decision did not discuss two recent U.S. Supreme Court cases on judicial bias and recusal, which stated, like here, that a party seeking recusal need not show actual bias. See Rippo v. Baker, 137 S. Ct. 905 (2017) and Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

RELATED CASES: Williams, 136 S. Ct. 1899 (U.S. 2016) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

TITLE: Cheek v. State
INDEX NO.: D.14.a.
CITE: (6/22/2017), 79N.E.3d 388 (Ind. Ct. App. 2017)
SUBJECT: Recusal of judge not required
HOLDING: In a companion appeal to Abney v. State, the Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann had yet to do anything as a committee member. Cf. Zaias v. Kaye, 643 So.2d 687 (Fla. Dist. Ct. App. 1994) ("The fact that an attorney made a campaign contribution to a judge or served on a judge's campaign committee does not, without more, require disqualification." Id. Rather, sufficient grounds for disqualification include "a specific and substantial political relationship between the parties." Id.). Held, judgment affirmed.

RELATED CASES: Williams, 136 S. Ct. 1899 (U.S. 2016) (In companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member).

TITLE: Cook v. State
INDEX NO.: D.14.a.
CITE: (2nd. Dist., 04-27-93), Ind. App., 612 N.E.2d 1085
SUBJECT: Crying of judge at sentencing not bias or prejudice requiring recusal
HOLDING: When at sentencing hearing, judge began crying after victim testified, it was not error to refuse to recuse herself. D pled GBMI to attempted murder, rape & confinement, & received sentence of 80 years. During sentencing hearing, victim stated she was not interested in punishing D, but wanted to be sure he was imprisoned long enough to be rehabilitated so that he would not be threat to others. Judge began crying & stated that reason for tears was victim's forgiving nature, that such forgiveness was rare from person who was victim of such vicious crime, & that although she was presently emotional, D had nothing to fear. Judge then called brief recess, & after returning, denied D's request that she recuse herself for lack of impartiality. In sentencing D, judge cited three aggravators: his use of subterfuge to get into victim's home; his return after rape with specific intent to kill victim to evade detection; & fact he was in need of corrective treatment that could be found only in prison. Amended sentencing order also found mitigators of D's youth & remorse to be outweighed by aggravators. Ct. rejected D's argument that appearance of partiality required judge to recuse herself. Such disqualification is discretionary unless actual bias or prejudice exists, & therefore even if appearance of partiality existed, that alone was not enough. Presumption is that judge is unbiased & unprejudiced, & D bears burden of proving from judge's conduct that real bias or prejudice placed him in jeopardy. Such bias exists only where claim is undisputed, or where judge has expressed opinion on merits of pending controversy, Smith, 535 N.E.2d 1155, Resnover, 507 N.E.2d 1382. Mere fact judge has emotional reaction does not demonstrate bias or prejudice. Held, judgment affirmed.

RELATED CASES: Rippo, 137 S.Ct. 905 (2017) (D need not show actual bias to disqualify judge but merely that “the risk of bias is too high to be constitutionally tolerable”).

TITLE: Duffit v. State
INDEX NO.: D.14.a.
CITE: (7/11/88), Ind., 525 N.E.2d 607
SUBJECT: Misconduct by judge - hanging children's pictures in Ct. room
HOLDING: While Tr. Ct. acted inappropriately, it did not commit reversible error by hanging children's posters in Ct. room before D's trial for child molesting. Tr. Ct. explained that posters were hung to lessen anxiety of young witnesses. D argues hanging posters denied him fair trial by causing jurors to react in parental fashion & by undermining presumption of innocence. Ct. App. affirmed, finding Tr. Ct.'s actions acceptable. Duffit, App., 519 N.E.2d 216. Ind. S. Ct. grants transfer to express disapproval of Tr. Ct.'s actions. Such decorations may emphasize testimony of young witnesses & may convey to jurors that it is more credible than others. Testimony of child under 10 years old is admissible only upon express finding that child understands nature & obligation of oath. Ind. Code 34-1-14-5 [other citations omitted.] Uncertain capacity of young children to treat seriously duty to tell truth should not be undermined by converting courtroom into casual play area. This practice is inappropriate & should not be used. Ct.'s observations have prospective application only. In totality of circumstances of present case, reversal is not warranted. Held, conviction affirmed.

TITLE: Everling v. State
INDEX NO.: D.14.a.
CITE: (07-08-10), 929 N.E.2d 1281 (Ind. 2010)
SUBJECT: Violation of D's right to impartial judge - reversible error
HOLDING: D's three class A felony convictions for child molesting and two class B felony convictions for sexual misconduct with a minor were reversed because Tr. Ct. denied D's right to an impartial judge. Evidentiary rulings, uneven tolerance for late filings, and court's comments to defense counsel showed actual bias and prejudice.

A trial before an impartial judge is an essential element of due process, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009), especially because of respect jury accords a judge and the added importance a jury might give to any showing of partiality by a judge. Cook v. State, 734 N.E.2d 563 (Ind. 2000). To rebut presumption that a judge is not biased or prejudiced, a D must establish from judge's conduct actual bias or prejudice that places D in jeopardy. Smith v. State, 770 N.E.2d 818 (Ind. 2002).

Here, Tr. Ct. questioned defense counsel's claim that flare up of Crohn's disease was basis for several continuance requests and belated filings. Trial judge said, "Well, I thought you were ill . . . but when it serves your interest, you're not ill." Court also challenged counsel's ethics: "You've done unethical things before, and you know you have." While defense counsel cross-examined alleged victim about whether she had told her aunt that D had a gun, court cut off questioning and told counsel the gun was a collateral issue: "You ever been in a knife fight? It doesn't matter. They'll both kill you. Move on please. That is collateral." Tr. Ct. also made inappropriate comment to jury. Because jury had questions during deliberations, parties agreed court would re-read instructions without comment. After reading instructions, court told jury there were no lesser included offenses, essentially commenting on D's final argument.

Court barred all defense witnesses because D did not file a notice of alibi and failed to advise State that other witnesses were going to testify about alleged victim's reputation for truthfulness. Because alleged victim's reputation for truthfulness was central to D's case, excluding the witnesses was prejudicial.

Court abused its discretion by excluding D's medical witness because doctor's testimony would have given alternative explanation for physical evidence. While the State did not know about doctor until eve of trial, it had not begun its case-in-chief. Its opening statement could have been altered, and a short continuance would have remedied any surprise.

Taken together, court's comments and rulings demonstrated lack of impartiality. Held, transfer granted, convictions reversed and remanded for new trial.

RELATED CASES: Rippo, 137 S.Ct. 905 (2017) (D need not show actual bias to disqualify judge but merely that "the risk of bias is too high to be constitutionally tolerable"); In re J.K., 30 N.E.3d 695 (Ind. 2015) (the right to an impartial judge is no less vital in CHINS cases than any other proceeding; here, Ct. reversed CHINS adjudication where judge's comments deprived Father of a fair tribunal and coerced his admission that his daughter was a CHINS).

TITLE: Ferrer v. State
INDEX NO.: D.14.a.
CITE: 718 So.2d 822 (Fla. Ct. App. 1998)
SUBJECT: Starting Jury Selection in Evening Denied D Fair Trial
HOLDING: Starting jury selection in D's trial at 7:30 p.m., when his attorney was tired and not performing at his usual level of competency, denied D a fair trial. Counsel objected to Court's order to begin jury selection at that time, stating that he had been working since 8 a.m., had been in court for 6 hours, and was tired. The Tr. Ct. denied counsel's motion to continue, and to strike the jury panel, its only stated reason for doing so being, "Because I say [so]." The appellate court noted from the record that during jury selection, which lasted one hour, defense counsel "was often unclear, sometimes abrasive and antagonistic...rambled and did not always seem to make sense." Given the circumstances -- objection by the defense, the absence of reasons for continuing so late, and a showing of some prejudice to the D, the appellate court finds that the Tr. Ct. abused its broad discretion, denying the D a fair trial.

TITLE: Gordon v. State
INDEX NO.: D.14.a.
CITE: (1st Dist., 1-9-95), Ind. App., 645 N.E.2d 25
SUBJECT: Ruling in jury's presence did not prejudice D
HOLDING: D failed to show prejudice or improper influence from Tr. Ct.'s ruling in presence of jury. At trial, D's motion for directed verdict for robbery resulting in serious bodily injury was granted. In presence of jury, Tr. Ct. permitted robbery charge to remain as Class C felony. Ct. rejected D's claim that Tr. Ct.'s action improperly created impression that D was guilty of lesser included offense. To show denial of fair trial, D must show that judge's statements resulted in actual prejudice, Harrington v. State, Ind., 584 N.E.2d 558. Held, Tr. Ct. affirmed.

TITLE: Guinn v. State
INDEX NO.: D.14.a.
CITE: (3/27/86), Ind., 490 N.E.2d 328
SUBJECT: Misconduct by judge - smoking in Ct. room
HOLDING: Although Tr. judge's announcement that "smoking lamp's lit" (he began smoking after 5 p.m. & passed ashtrays to jury during break in D's CX of police officer) "represents less than level of decorum... appropriate for trial proceedings," Ct. finds no actual harm to D. Here, D argues that judge's conduct was prejudicial because it distracted jury from presentation of his case & interjected levity into Tr. proceedings. Held, conviction affirmed.

TITLE: Hall v. State
INDEX NO.: D.14.a.
CITE: (9/25/86), Ind., 497 N.E.2d 916
SUBJECT: Misconduct by judge - leaving Ct. room during proceedings
HOLDING: On transfer. Tr. judge erred in leaving Ct. room during voir dire & allowing state to continue questioning prospective jurors in his absence. Here, judge absented himself from Ct. room twice during state's voir dire, leaving no bailiff, Ct. reporter, or other Ct. personnel present at proceedings. Defense counsel's view was blocked by blackboard & he did not notice that judge had left Ct.-room until he rose to make objection to state's questioning. Defense counsel left Ct. room to find judge to make objection, found judge in adjoining room acting on emergency petition, & voiced his objection to state's voir dire questioning. Judge responded he was familiar with prosecutor's usual style of voir dire & *overruled* D's objection." Incredibly, prosecutor continued to question prospective jurors in absence of both judge & defense counsel." It was later learned that Ct. room recording equipment malfunctioned & no record was made of proceeding. Ct. distinguishes present case from McBrady, 459 N.E.2d 719 in which judge's absence was determined to be harmless error. In McBrady, judge was absent from Ct. room twice. During first absence, all proceedings stopped & jury merely remained in Ct. room. During second absence, jury examined defense exhibits. At all times, jury was in charge of bailiff; & both prosecutor & defense counsel agreed that "nothing out of the ordinary" occurred. Ct. rejects state's contention that any harm which arose from misstatement at voir dire was cured by Ct.'s proper instructions on elements (D's objection related to burden of proof of predisposition on entrapment defense). Held, conviction reversed; cause remanded for new trial.

TITLE: Hollinsworth v. State
INDEX NO.: D.14.a.
CITE: (06-03-10), 928 N.E.2d 201 (Ind. 2010)
SUBJECT: Judicial misconduct - comments showing partiality
HOLDING: Per Curiam. Tr. Ct.'s comments during bench trial for operating while suspended showed judge was not impartial, objective, open minded and Apatient, dignified and courteous to litigants" as required by Ind. Judicial Canons 2, 2.2 (comment 1), and 2.8(B). As the trial began, the court recessed so the parties could discuss a plea agreement, but no agreement resulted. After the State called its first witness, D said she now wanted to accept the State's plea offer. In response, the Tr. Ct. said, "I don't know if I want to take your plea[;] I'd rather just go to trial, I think. I don't like being jerked around at all, all right?" and that if D was found guilty, "she's going to jail for a year." At sentencing, Tr. Ct. noted that D had been charged with theft and battery while this case was pending. When D's attorney said, "Those are only alleged charges," the Tr. Ct. responded, "Sure they are." Held, transfer granted, Court of Appeals' opinion at 920 N.E.2d 679 vacated, conviction reversed and remanded for new trial. Justice Boehm agreed with majority's analysis but would deny transfer because D's executed sentence had already expired.

TITLE: Lampitok v. State
INDEX NO.: D.14.a.
CITE: (5th Dist., 11-16-04), Ind. App., 817 N.E.2d 630
SUBJECT: Allegation that judge slept during closing argument
HOLDING: On appeal of D's carjacking conviction, D argued that because judge allegedly slept during a portion of his counsel's closing argument, he was deprived of a fair trial because it implied to jury that D's position was not worthy of attention. Ct. rejected D's argument because: 1) there was no direct evidence in record that judge was, in fact, asleep; 2) if judge was asleep or appeared to be asleep, there was no evidence that jurors knew or even noticed this fact; 3) D waived issue by failing to object, request a recess or ask for mistrial; & 4) D was not prejudiced by alleged sleeping. Held, conviction affirmed.

TITLE: Marbley v. State
INDEX NO.: D.14.a.
CITE: (4/19/84), Ind., 461 N.E.2d 1102
SUBJECT: Judicial misconduct - improper comments to defense counsel
HOLDING: Considering facts/circumstances surrounding trial of cause, D was not prejudiced by judge's remarks. Here, judge reminded counsel he was running over time allotted for cross-examination of pathologist (from Seattle, WA who performed autopsy) & exhorted counsel to look at his watch "once in a while." State contends judge made remarks & admonishments to prosecution as well as defense to maintain control & keep 5-day emotional trial moving. Tr. Ct. should refrain from making unnecessary comments & should remain impartial; judge's remarks/apparent attitude should not impart appearance of partiality. However, Tr. Ct. must control proceedings by taking responsible steps to insure that proper discipline/order exist in Ct. room. Lawson, 412 N.E.2d 759. Held, no error.

RELATED CASES: Hackney, App., 649 N.E.2d 690 (Ct. rejected claim that trial judge failed to conduct trial in impartial manner. See lengthy dissenting opinion by Sullivan, J.); Williams, App., 600 N.E.2d 962 (judge's comments to defense counsel during heated discussion about testimony he sought to admit, were not considered prejudicial or to place D in position of grave peril).

TITLE: O'Neal v. State
INDEX NO.: D.14.a.
CITE: (4th Dist., 9-16-99), Ind. App., 716 N.E.2d 82
SUBJECT: Consideration of D's pretrial statements to assess credibility at trial
HOLDING: Any error in Tr. Ct.'s alleged consideration of D's pretrial statements outside trial record for purposes of assessing his credibility was harmless in light of other overwhelming evidence of D's guilt. During sentencing hearing, Tr. Ct. referred to untruthful statements that D made while on pretrial release which were not formally admitted into evidence at bench trial. In concluding that Tr. Ct. did not improperly rely on D's pretrial statements in reaching its guilty verdict, Ct. noted that Tr. Ct. specifically stated that D's pretrial veracity was merely one factor it has considered in reaching its judgment, in addition to amounts of cocaine & money recovered after his arrest. Tr. Ct. neither prejudged D's guilt nor disregarded his testimony at trial, but simply formed opinion regarding his credibility on basis of his prior statements to Ct., which D failed to provide for appellate review. Held, convictions affirmed.

TITLE: Rippo v. Baker
INDEX NO.: D.14.a.
CITE: (3/6/2017), 137 S. Ct. 905 (S.Ct. 2017)
SUBJECT: "Actual bias" not required to disqualify a judge
HOLDING: Due process requires recusal of a judge based on bias, even if there is no evidence of "actual bias," when, considering all the circumstances under an objective standard, "the risk of bias is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975).
During trial, D received information that the federal government was investigating the presiding judge for bribery. D surmised that the local district attorney, who was prosecuting him, was helping the government investigate the judge. D sought to disqualify the judge, on 14th Amendment due process grounds, contending the judge could not impartially adjudicate a case in which one of the parties was investigating him. The judge denied the request, and D was convicted of capital murder. D later filed a post-conviction action, where he established that the local district attorney had, in fact, helped the government investigate the judge during D's trial. The Nevada Supreme Court ruled D was not entitled to discovery or an evidentiary hearing in his post-conviction matter because his allegations "did not support the assertion that the trial judge was actually biased in this case."

The Nevada Supreme Court applied the wrong standard. Due process may sometimes require a judge to recuse herself even if she has no actual bias. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). Here, on remand, the Nevada courts shall determine if the risk of bias by the judge was too high to be constitutionally tolerable. Held, cert. granted, opinion at 368 P.3d 729 reversed, and remanded for further proceedings. Per Curiam.

RELATED CASES: Cheek, 79 N.E.3d 388 (Ind. Ct. App. 2017) (in companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member), Abney, 79 N.E.3d 932 (Ind. Ct. App. 2017) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

TITLE: Rosendaul v. State
INDEX NO.: D.14.a.
CITE: (4th Dist., 04-24-07), Ind. App., 864 N.E.2d 1110
SUBJECT: Judge's interrogation of D during bench trial - Ind. Evidence Rule 614(b)
HOLDING: On appeal of his theft conviction, D argued that his Fourteenth Amendment Right to due process was violated because Tr. Ct., by asking him questions during bench trial & essentially cross-examining him, abandoned its role as a neutral & detached fact finder & assumed role of advocate. Indiana Evidence Rule 614(b) provides that "[t]he court may interrogate witnesses, whether called by itself or by a party." The purpose of this rule is to aid court in its fact-finding responsibilities. Trotter v. State, 733 N.E.2d 527, 532 (Ind. Ct. App. 2000). Interrogation of witnesses alone does not make a judge biased, & a judge's discretion to question witnesses is greater in bench trials than in trials before juries. Jones v. State, 847 N.E.2d 190 (Ind. Ct. App. 2006).

Here, after State cross-examined D, Tr. Ct. asked him a series of questions related to his use of "military style" dating. After confirming with D that he "always" uses "military style" dating, Tr. Ct. confronted him with several filings in this case in which D signed the filings but did not use "military style" dating. Because Tr. Ct. took judicial notice of these filings pursuant to Ind.Evidence Rule 201(a), which contradicted D's testimony, the court's interrogation of D gave him an opportunity to explain why the filings he had signed were not dated in "military style." This, in turn, aided Tr. Ct. in ascertaining the truth. In fact, interrogation revealed that D's attorney dated one of the filings & D's mother may have dated another one. Court concluded that interrogation did not reveal any bias on part of Tr. Ct., but rather aided Tr. Ct. in its fact-finding responsibilities & was done in an impartial manner. Held, judgment affirmed.

TITLE: Strowmatt v. State
INDEX NO.: D.14.a.
CITE: (9-29-97), Ind. App., 686 N.E.2d 154
SUBJECT: Holding up notepad during closing argument - no prejudice
HOLDING: Tr. Ct. did not err when it held up notepad to prosecutor during defense counsel's closing argument which indicated how much time prosecutor had left for rebuttal. Tr. Ct. has duty to remain impartial & refrain from making unnecessary comments or remarks, as well as duty to control proceedings by taking responsible steps to insure proper order & discipline. Taylor, App., 602 N.E.2d 1056. Because judge explained to jury that prosecutor could reserve some time during closing arguments for rebuttal & few jurors saw note which was "no more than a passing notion," jurors knew purpose of note was to inform prosecutor of amount of time left for rebuttal. Thus, judge's actions were reasonable, impartial, neutral & did not cause D unfair prejudice. Held, no error.

TITLE: U.S. v. Rowe
INDEX NO.: D.14.a.
CITE: 106 F.3d 1226 (5th Cir. 1997)
SUBJECT: Punishment of Veniremembers by Judge for Admitting Bias -- Abuse of Discretion
HOLDING: Trial judge's treatment of two venire persons who revealed bias stemming from relationships with law enforcement officials effectively intimidated rest of panel into silence and constituted abuse of discretion. When venire persons stated that because of relationships, they would have trouble being fair and impartial, and putting aside personal beliefs that if police arrested D and prosecutor brought him to trial, they must "know what they're talking about," judge responded by stating in front of entire panel that she would put them on jury duty for several months, and they could come back "again and again and again" until they learned to put their personal opinions aside and do their duty as citizens. Twice thereafter, trial judge asked panel if anyone else would be unable to follow court's instruction that indictment was not evidence of guilt, and no venire members responded. Fifth Circuit finds that assumption that potential jurors answer voir dire questions truthfully does not hold when jurors are given reason to fear reprisals for truthful answers. Judge's actions cut off vital flow of information from venire to court. Tr. Ct. abused discretion in denying D's motion to dismiss panel.

TITLE: Wagner v. State
INDEX NO.: D.14.a.
CITE: (2/14/85), Ind., 474 N.E.2d 476
SUBJECT: Misconduct by judge - comments
HOLDING: Tr. judge's remark did not prejudice D to extent he was denied a fair trial. Here, during defense counsel's cross-exam of murder victim's wife (present at murder), confusion arose re witness' prior statement re D's order that she not turn lights on. Tr. judge interrupted questioning & said: "That is the list of statements read at the voice identification, not necessarily exactly what her statement was, am I correct?" During bench conference, D objected. Tr. judge told counsel he would continue to straighten out witnesses if counsel confused them. Tr. judge has duty to remain impartial/to refrain from making unnecessary comments/remarks. Cornett, 450 N.E.2d 498. D contends prosecutor, not judge, has duty to protect witnesses/make objections. Held, conviction affirmed.

TITLE: Ware v. State
INDEX NO.: D.14.a.
CITE: (4th Dist. 10/9/90), Ind. App., 560 N.E.2d 536
SUBJECT: Misconduct by judge - questioning witnesses
HOLDING: Tr. Ct.'s questioning of D's witness did not establish that judge was biased against D & denied him fair trial. D was convicted in bench trial of driving while suspended. Evidence indicated that D was employed repossessing cars, & that he was in process of repossessing car at time of arrest. Tr. Ct. said to D's counsel, "... if your client had no license, it seems to me, admitting that he was in the repossession business is in fact admitting that he has been violating the law." D offered testimony of his employer that D had assistant, so that he did not actually have to drive. During employer's testimony, Tr. Ct. made following remarks: "I'm going to listen at this ... because it sounds fascinating... I want to see how creative this is." Tr. Ct. also asked D's employer whether he had ever seen D drive away to perform repossession, to which he replied that he had, & Tr. Ct. questioned another witness as well. On appeal, D argues that Tr. Ct.'s sarcastic comments about creativity of his defense demonstrate that judge had made premature resolution of credibility of defense & of question of guilt. D further argues that when Tr. Ct. questioned his witnesses, judge abandoned neutral role, denying D fair trial. Ct. App. does not agree, finding that Tr. Ct.'s first inquiry concerned relevance of evidence of repossession activities. Beyond that, Tr. Ct. was merely expressing natural confusion as to how 2 people could go out to repossess car without both having to drive at some point. See 46 Am. Jur.2d Judges, Sec. 170. Further, D was not prejudiced by Tr. Ct.'s questioning of witnesses. Only fact elicited was that D's employer had seen D drive, but this did not indicate that he was driving at time of arrest. Held, conviction affirmed. Conover, J., DISSENTS.

RELATED CASES: N. v. K.G., 3 N.E.3d 989 (Ind. Ct. App. 2014) (Tr. Ct. did not act as an advocate by asking K.G. foundational questions regarding photograph; Tr. Ct.'s questions were neutral, served to clarify K.G.'s testimony, and did not discredit A.N. or her defense); Trotter, App., 733 N.E.2d 527 (Tr. Ct. does not improperly take on adversarial role in questioning witness about ability to answer juror's question, even if Tr. Ct. lays foundation for witness to answer); Griffin, App., 698 N.E.2d 1261 (questioning was performed in impartial manner & served to complete factual background presented by witnesses).

TITLE: Williams v. Pennsylvania
INDEX NO.: D.14.a.
CITE: (6/9/2016), 136 S. Ct. 1899 (U.S. 2016)
SUBJECT: Judge must recuse for death penalty decision as prosecutor 30 years earlier
HOLDING: The 14th Amendment's Due Process Clause requires a judge to recuse himself where, previously, he was "significantly and personally" involved as a prosecutor in a critical decision in a D's case. Here, the Pennsylvania Supreme Court Chief Justice, who was considering D's post-conviction appeal, thirty years earlier made the decision to seek the death penalty against D. The inquiry is objective, that is, whether the average judge is likely to be neutral or whether there is an unconstitutional potential for bias. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009). The fact that the judge was just one of several judges on the Pennsylvania Supreme Court does not overcome the constitutional infirmity: "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." Held, cert. granted, opinion of Pennsylvania Supreme Court vacated, and case remanded. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.; Roberts, C.J., dissenting, joined by Alito, J., Thomas, J., dissenting.

TITLE: Williams v. State
INDEX NO.: D.14.a.
CITE: (6/6/90), Ind., 555 N.E.2d 133
SUBJECT: Misconduct by judge - comments during voir dire
HOLDING: Tr. Ct.'s reference to John Hinckley during voir dire in murder trial in which D raised insanity defense was not abuse of discretion. D was charged with murder & interposed insanity defense. During voir dire, Tr. Ct. was questioning jury about effects of pretrial publicity & used example of John Hinckley's alleged shooting of President Reagan. Tr. Ct. reminded jury of media coverage regarding Hinckley, then reminded them that none of them had seen Hinckley shoot Reagan, they had only seen media coverage. Tr. Ct. then explained that they should decide case on cold, hard law & facts, not on media coverage. On appeal, D argues that because of "nationwide furor" that erupted after Hinckley was found not guilty by reason of insanity, mention of that case tended to taint entire jury panel with regard to insanity defense. Tr. Ct. has broad discretionary power to regulate voir dire, concurrent with duty to remain impartial & to refrain from making unnecessary comments or remarks. Whitehead, 511 N.E.2d 284. Here, Tr. Ct.'s comments contained no actual mention of insanity nor of verdict in Hinckley case. Tr. Ct. merely used case to illustrate difference between media reports jurors may have seen & evidence they would hear at trial. Ct. dismisses D's claim that jury panel was tainted with regard to insanity defense as "speculative at best, & certainly insufficient to demonstrate an abuse of the Tr. Ct.'s discretion." Held, conviction affirmed.

RELATED CASES: Cheek, 79 N.E.3d 388 (Ind. Ct. App. 2017) (in companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member), Abney, 79 N.E.3d 932 (Ind. Ct. App. 2017) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

D. TRIAL

D.14. Misconduct by judge

D.14.b. Commenting on Testimony

TITLE: Blaize v. State
INDEX NO.: D.14.b.
CITE: (3/1/2016), 51 N.E.3d 97 (Ind. 2016)
SUBJECT: Judge's comments regarding cell tower evidence did not deprive D of fair trial
HOLDING: In excusing the jury for lunch, the trial court commented on cell phone sectors in apparent reference to the testimony of a cell tower expert who had just testified in support of State's theory of events placing D at or near victim's residence when he was killed. No objection was raised concerning the trial court's comment.

Trial judge's comments, though "perhaps ill-advised," did not constitute fundamental error. The comment was not made during the presentation of evidence by either party or during the questioning of a witness, but during a break. The comment did not vouch for the accuracy of the expert's testimony, but was an acknowledgement of the complexity of cellphone tower evidence. In any event, the convictions were supported by other evidence. Held, judgment affirmed.

TITLE: Poortenga v. State
INDEX NO.: D.14.b.
CITE: (4/10/2018), 99 N.E.3d 691 (Ind. Ct. App. 2018)
SUBJECT: Improper admonishment to ignore relevant evidence
HOLDING: In operating while intoxicated (OWI) prosecution, Tr. Ct. abused its discretion in admonishing the jury during defense counsel's closing argument to ignore evidence that D's alcohol concentrate equivalent (ACE) was under the legal limit at the time of his arrest. D was charged with and found guilty of both Class C misdemeanor and Class A misdemeanor operating while intoxicated ("OWI"). At trial, defense counsel repeatedly noted that the results of a chemical test showed D tested below the legal limit of an ACE of 0.08, meaning he was not intoxicated at the time he was stopped and arrested. However, trial judge admonished the jury to ignore similar statements made during closing arguments, telling jurors "(t)hat is not part of this case. Do not put any weight into that." Court reversed, concluding that evidence of a person's ACE is relevant and should be considered when determining whether a person was intoxicated, regardless of whether the individual's ACE was more or less than 0.08. Thus, when the judge admonished the jury to ignore evidence of D's ACE of 0.069 during closing arguments, she committed reversible error by admonishing the jury to ignore relevant evidence.

Court concluded that evidence presented at trial was sufficient to sustain a finding that that D was intoxicated at time of his arrest but not that he endangered anyone. Thus, on remand, State may elect to retry D on the Class C misdemeanor OWI charge but not the Class A misdemeanor charge. Held, judgment reversed and remanded.

D. TRIAL

D.14. Misconduct by judge

D.14.c. Questioning witnesses/examining evidence

TITLE: Abernathy v. State
INDEX NO.: D.14.c.
CITE: (6/9/88), Ind., 524 N.E.2d 12
SUBJECT: Misconduct by judge - questioning witnesses
HOLDING: Tr. Ct. committed reversible error by abandoning position of neutrality & impartiality in questioning witness. Fair trial before impartial judge is essential element of due process. Kennedy, 280 N.E.2d 611. Judge may question witness if done in manner that will not improperly influence jury. Thomas, 230 N.E.2d 303. Appraising weight & value of testimony is province of jury, & trial judge should refrain from imposing opinions on jury. Brannum, 366 N.E.2d 1180. This is so because juries accord "decisive significance to the judge's every word & intimation." Kennedy. Here, D was charged with molesting his stepdaughter. During testimony of D's wife & victim's mother, judge asked her about prior inconsistent statement & asked if she went to church. Finally, judge turned his chair away from witness & sat with feet on wall. When victim's sister testified, judge asked her to repeat & explain certain details of her testimony & asked if she was absolutely sure. Because of difficulty in objecting to judge's conduct in presence of jury, Ind. S. Ct. has treated such conduct as fundamental error. Kennedy. Here, D objected outside presence of jury to preserve error. Actions complained of tended to discredit testimony of D's wife & to emphasize testimony of victim's sister. Held, reversed & remanded for new trial.

RELATED CASES: Tharpe, 955 N.E.2d 836 (Ind. Ct. App. 2011) (trial judge's comments during voir dire, adverse rulings, a single incidence of sarcasm, and inappropriate facial gestures insufficient to establish bias of trial judge).

TITLE: Beech v. State
INDEX NO.: D.14.c.
CITE: (1st Dist. 12/19/85), Ind. App., 486 N.E.2d 606
SUBJECT: Misconduct by judge - measuring shotgun
HOLDING: Tr. Ct. (in bench trial) did not err in measuring length of shotgun after D moved for directed verdict based upon state's failure to prove length of weapon (D charged with dealing in sawed-off shotgun). Here, Ct. does not endorse Tr. Ct.'s decision to measure gun, but finds no reversible error. Tr. Ct. could have allowed state to reopen case. See, e.g., Tobias, 479 N.E.2d 508 (reopen to prove weight of controlled substance); Jones, 381 N.E.2d 1064 (reopen to prove D's age). State should have opportunity to remedy insufficiency even after resting because trial is search for facts/truth, not game of technicalities. Estridge, 281 N.E.2d 490. Tr. Ct. is allowed greater latitude in role as fact-finder in bench trial than would be allowed when it sits as judge in jury trial. Belcher v. Buesking, App., 371 N.E.2d 417. Held, conviction affirmed.

TITLE: Decker v. State
INDEX NO.: D.14.c.
CITE: (2d Dist. 11/30/87), Ind. App., 515 N.E.2d 1129
SUBJECT: Misconduct by judge - comments; questioning witness
HOLDING: Tr. Ct. committed fundamental error by abandoning position of neutrality & impartiality in questioning witness. Fair trial by impartial judge & jury is essential element of due process. Kennedy, 280 N.E.2d 611. Not all claims of judicial intervention, however, constitute fundamental error. Williams, 464 N.E.2d 893. D did not testify at trial, but D's brother testified as state's witness. Witness had pled guilty to same charges D was tried on. During his testimony, however, witness testified that he entered guilty plea to avoid habitual offender charge, & that he was seeking to have it set aside. Tr. judge questioned witness at length about why he lied under oath, at guilty plea hearing. He also questioned witness about statements in PCR petition to set plea aside, pointing out that they were also made under oath. D's counsel twice tried to object, but Tr. judge told him to be quiet. During witness' testimony about what he & D were doing on night of alleged offense, Tr. judge interrupted to advise him that if he told a different story than when he entered guilty plea, he was presumptively guilty of perjury. Tr. judge's opinion as to lack of credibility of witness' testimony was clear to jury. Tr. judge abandoned position of neutrality & impartiality, committing error. Because of great respect accorded to judges by juries, & because witness' testimony was critical to D's defense, error was fundamental & reversible. Held, reversed & remanded for new trial.

TITLE: Lahrman v. State
INDEX NO.: D.14.c.
CITE: (4th Dist. 7/17/84), Ind. App., 465 N.E.2d 1162
SUBJECT: Misconduct by judge - comments; questioning experts
HOLDING: Although several of Tr. judge's interjections were inappropriate, D was not denied fair trial. Here, remarks are set forth in opinion (comments re evidence, prosecutor's "good" witnesses, questioning expert witness). D's counsel moved for mistrial re good witnesses' comment; lengthy admonition was given. Final instruction re role of Tr. judge was given. Held, no error. Garrard CONCURS. Counsel waived any error by failing to make specific timely objections. **Note:** Opinion discusses Kennedy, 280 N.E.2d 611 (Tr. judge's questioning of defense experts reviewed despite lack of objection; strict impartiality required of Tr. judge) & Wilson, 51 N.E.2d 848 (judicial misconduct reviewed despite lack of objection because counsel inadequate). Garrard's concurring opinion cites simple objections to judicial misconduct: (1) Questions/comments disclose lack of impartiality impinging right to due course of law. Ind.Const. Art. 1, Section 12; Kennedy, 280 at 615. (2) Comments reflect upon weight/credibility of witnesses, invading province of jury. Ind.Const. Art. 1, Section 19 (criminal) or Section 20 (civil); Wilson. (3) Counsel disparaged/orderly presentation of case disrupted, implicating due course of law & assistance of counsel. Ind. Const. Art. 1, Section 13.

RELATED CASES: A.N. v. K.G., 3 N.E.3d 989 (Ind. Ct. App. 2013) (while trial judge committed some improper conduct during protective order hearing, Ct. affirmed the order of contempt against A.N., holding that Tr. Ct. did not improperly act as an advocate).

TITLE: Owens v. State.

INDEX NO.: D.14.c.

CITE: (2nd Dist., 6-14-01), Ind. App., 750 N.E.2d 403

SUBJECT: Ineffective assistance of counsel - failure to object to judge's assumption of adversarial role

HOLDING: Tr. Ct. overstepped its bounds as neutral & passive arbiter when it questioned witnesses & ordered further discovery after both State & defense had rested. Trial judge clearly acted as advocate & intervened in proceedings. Through his questioning he allowed inadmissible hearsay to be introduced by police officer & prosecutor. Fair trial by impartial judge & jury is essential element in due process. Decker v. State, 515 N.E.2d 1129 (Ind. Ct. App. 1987). Failure to object at trial made trial counsel's actions ineffective & failure to raise these issues on direct appeal made appellate counsel's actions ineffective. Held, denial of post-conviction relief reversed & remanded for new trial.

TITLE: Peek v. State
INDEX NO.: D.14.c.
CITE: (3d Dist. 9/29/83), Ind. App., 454 N.E.2d 450
SUBJECT: Misconduct by judge - aiding prosecutor in questioning witness
HOLDING: Tr. Ct. did not err in directing prosecutor (out of jury's hearing) to ask witness to identify D. Here, after cross-exam of state's witness, judge asked prosecutor to ask witness to identify D. State was allowed to reopen direct exam for this purpose. D contends judge exceeded his authority by assisting state in proving its case. Tr. judge must maintain impartial manner & refrain from acting as either party's advocate. Judge may intervene to promote clarity/dispel obscurity & may interrogate a witness provided questioning is impartial. Bruce, 375 N.E.2d 1042; Kennedy, 280 N.E.2d 611. Judge's duty to guide trial with fairness/integrity includes discretion to give technical assistance to attorney. Musick, 352 N.E.2d 717. Judge has discretion to allow state to reopen case. Lewis, App., 406 N.E.2d 1226. D was not prejudiced by judge's action because D had been identified by another witness & admitted he was present. Held, no error.

RELATED CASES: Cook, 734 N.E.2d 563 (judge making objections on behalf of prosecutor was not judicial misconduct).

TITLE: Stellwag v. State
INDEX NO.: D.14.c.
CITE: (2nd Dist.; 09-19-06), Ind. App., 854 N.E.2d 64
SUBJECT: Partial Judge- questioning & objections by court was fundamental erro
HOLDING: Tr. Ct.'s intervention into a jury trial illustrated his partiality & was fundamental error. A trial judge must be given latitude to run the courtroom & maintain discipline & control of the trial. However, if the trial judge's action & demeanor crosses the barrier of impartiality & prejudices the D's case, reversal is required. Although a judge can aid the jury by asking questions of a witness, the judge exceeds the fact-finding role when the judge asks questions calculated to impeach or discredit a witness. Here, in front of the jury, the judge called the D before him & admonished the D that he would go to jail if he did not stop whispering to his attorney & making gestures. Admonishment in front of the jury was not a function necessary to controlling the courtroom. Further, the judge interrupted D's testimony & a defense witness= testimony to tell them not to argue with the prosecutor but answer the question, after the D & the witness had both already answered the question. The judge also limited permissible re-direct examination of the same defense witness by objecting before the State objected. D was prejudiced by the trial judge's intervention. Held, judgment reversed.

TITLE: U.S. v. Filani
INDEX NO.: D.14.c.
CITE: 74 F.3d 378 (2nd C ir. 1996)
SUBJECT: Judicial Misconduct - Questioning D
HOLDING: Conviction reversed because trial judge's numerous questions of D and prosecution witnesses "targeted the D's credibility and challenged his story more in the manner of a prosecutor than an impartial judge." Although defense did not object to questioning at trial, Court of Appeals finds it plain error.

TITLE: U.S. v. Saenz
INDEX NO.: D.14.c.
CITE: 134 F.3d 697 (5th Cir. 1998)
SUBJECT: Trial Judge's Questioning of Witnesses
HOLDING: Trial judge's questioning of witnesses during trial violated duty to appear impartial and required reversal. Trial was short, not complex, and attorneys were handling case adequately. Nevertheless, judge interrupted examination of both D and key government witness with series of questions designed to elicit important details counsel had not yet had chance to bring out. Manner and extent of judge's questioning created appearance that he was assisting government in proving its case. Fifth Circuit gave particular weight to circumstances that trial boiled down to credibility battle between D and key government witness, that judge asked questions during D's direct testimony, and asked questions during direct examination of government's key witness which tended to bolster witness' credibility before defense counsel had had opportunity to impeach witness.

TITLE: U.S. v. Tilghman
INDEX NO.: D.14.c.
CITE: 134 F.3d 414 (D.C. 1998)
SUBJECT: Trial Judge's Questioning of D
HOLDING: Trial judge's questioning of D created impression that judge did not believe D's testimony, and required reversal. D was charged with failing to report income on Department of Labor forms required for collecting disability pay. He testified that one reason he failed to include income was that DOL employee told him during telephone conversation that reporting as not required. Judge asked D, twice, "We just have to take your word for it?" Later, when D testified that bank official directed him to report income on bank loan application that official knew did not reflect D's actual income, judge asked, "Do you think that any sane bank would give somebody a loan on figures that are totally made up?" Court of Appeals concludes that jury could reasonably have interpreted judge's comments as reflecting personal disbelief of D, and cannot find beyond reasonable doubt that judge's comments did not contribute to verdict.

D. TRIAL

D.14. Misconduct by judge

D.14.d. Objections to/waiver of/ cure for

TITLE: Spaulding v. State
INDEX NO.: D.14.d.
CITE: (2/2/89), Ind. App., 533 N.E.2d 597
SUBJECT: Waiver of judicial misconduct
HOLDING: D argued that Tr. Ct.'s comments during voir dire & during D's testimony constituted reversible error. Tr. Ct. may, by conduct & demeanor, improperly impose himself into trial & thereby deny D fair trial. Where judge's personal intervention in favor of State is pervasive throughout entire trial or is reasonably calculated to impeach or discredit witness or his testimony, & issue is close, such intervention or abandonment of impartiality constitutes fundamental error & necessitates new trial. See, e.g., Kennedy, 280 N.E.2d 611; Brannum, 366 N.E.2d 1180; Decker, this section. However, isolated exchanges or innocuous remarks, unaccompanied by specific & contemporaneous objections, requests for admonishment & motions for mistrial are subject to usual rules of appellate procedure & are deemed waived. See, e.g., Lawson, 412 N.E.2d 759; Horne, 445 N.E.2d 976; Brackens, 480 N.E.2d 536. Here, Ct. concluded Tr. Ct.'s comment, while perhaps unnecessary, was not so egregious as to deny D fair trial; hence, any allegation of error with respect to remark is deemed waived because no objection was timely made.

RELATED CASES: Abernathy, 524 N.E.2d 12 ("We recognize that an attorney may be reluctant to object to the judge's actions in the presence of the jury, fearing that an apparent conflict with the judge would cause more damage. In such a case, we have treated the alleged error on the merits.").

D. TRIAL

D.15. Misconduct by prosecutor

TITLE: Impson v. State

INDEX NO.: D.15.

CITE: (2nd Dist.; 1-6-00), Ind. App., 721 N.E.2d 1275

SUBJECT: Prosecutorial misconduct - calling witness in order to impeach & arguing impeachment evidence as substantive

HOLDING: Prosecutor did not commit misconduct by impeaching victim with prior inconsistent statement or by arguing statement as substantive evidence in closing argument. It would be abuse of Evid.R. 607, impeachment of own witness, for prosecutor to call witness whom he knew would not give useful evidence, just so prosecutor could introduce otherwise inadmissible hearsay evidence against D in hope that jury would miss subtle distinction between impeachment & substantive evidence--or, if it didn't miss it, would ignore it. U.S. v. Webster, 734 F.2d 1911, 1192 (7th Cir. 1984). In determining whether abuse of rule has occurred, Ct. determines whether prosecutor examined witness for primary purpose of placing before jury otherwise inadmissible evidence. Rafferty, App., 610 N.E.2d 880, 885. Here, although prosecutor suspected that victim would give testimony that was inconsistent with her prior statements, victim was only percipient witness to battery & was essential to State's case. In addition, victim's statements were admissible as substantive evidence under Ind.R.Evid. 803(2), excited utterance exception to hearsay rule, because victim made statements immediately after battery occurred, while she was crying & still upset because of stress of attack. Thus, because prosecutor's primary purpose for calling victim was not to impeach her but to explain battery & her statements were admissible as substantive evidence, prosecutor did not commit misconduct. Held, judgment affirmed; Sullivan, J., concurring to state that prior inconsistent statement was not admissible under Ind.R.Evid. 803(5) as recorded recollection.

TITLE: Smith v. State
INDEX NO.: D.15.
CITE: (6/26/2015), 34 N.E.3d 1211 (Ind. 2015)
SUBJECT: State's use of perjured testimony did not violate due process
HOLDING: In determining whether to vacate a conviction because of the State's solicitation of false evidence or knowing use of it without correction, an appellate court is not restricted to consider only the State's use of evidence that would prove the crime of Perjury under Ind. Code § 35-44.1-2-1. Instead, the proper question is: did the State impermissibly use false testimony to obtain a conviction in violation of a D's due process rights? The main thrust of the case law in this area focuses 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 D.

Here, D's girlfriend pleaded guilty to burglarizing the Dollar General store where she worked, stating she acted alone. The State later charged D for the same crime and offered the girlfriend immunity in exchange for her testimony. At trial, she said D broke into the store while she served as an accomplice. Court of Appeals reversed because the girlfriend's testimony constituted perjury under Ind. Code § 35-44.1-2-1(a)(2). On transfer, the Supreme Court held that the State did not impair D's due process rights because the jury was made aware of the "discrepancies" in the girlfriend's testimony and thus was able to "fully function as an informed fact finder." Held, transfer granted, Court of Appeals' opinion at 22 N.E.3d 620 vacated, conviction affirmed.

TITLE: State v. Ramey
INDEX NO.: D.15.
CITE: 721 N.W.2d 294, (Minn. 2006)
SUBJECT: Prosecutorial misconduct - State must show lack of prejudice
HOLDING: The Minnesota Supreme Court departed from the usual standard for conducting plain-error review by holding that, once a D has demonstrated on appeal that un-objected to prosecutorial misconduct was "error" that was "plain," the burden shifts to the State to show that the error did not affect D's substantial rights. The Court *clarified* confusing precedent that applying the plain-error doctrine to prosecutorial misconduct. The majority decided that "prosecutorial misconduct is the type of error that justifies" a departure from its past precedent. "When prosecutorial misconduct reaches the level of plain or obvious error - conduct the prosecutor should know is improper - the prosecution should bear the burden of demonstrating that its misconduct did not prejudice the D's substantial rights." The "overarching concern" with prosecutorial misconduct is that it may deprive a D of his right to a fair trial. While prosecutors have a duty to ensure that the D's fair trial right is not violated, the Court identified numerous examples of re-occurring "off-limits conduct" by prosecutors and observed that the problem is a perennial one. "Placing the burden on the D to show prejudice has not been adequate to deter prosecutorial misconduct" since its precedent established such, the Court noted. The Court noted that this more D-friendly approach is not novel, as prosecutorial misconduct of a constitutional magnitude where a proper objection exists is reversible unless the State can prove beyond a reasonable doubt that it was harmless. See Chapman v. California, 386 U.S. 18 (1967). The Court also noted at least two other states that had adopted such a position. See Wilson v. State, 874 So.2d 1155 (Ala.Crim.App.2003); State v. King, 555 N.W.2d 189 (Wis.Ct. App.1996). Concurring opinions were filed questioning the burden shifting change of the majority based on the doctrine of *stare decisis* or believing that while the change has merit that the Court should signal to future litigants it is open to addressing the issue and deal with the issue where it has been more completely briefed.

TITLE: Vasquez v. State

INDEX NO.: D.15.

CITE: 174 N.E.3d 623 (Ind. Ct. App. 2021) 07/30/2021

SUBJECT: Prosecutor's improper closing argument did not require reversal -- arguing appellate standard of review for sufficiency claims

HOLDING: In child molesting prosecution, trial court erred in allowing the prosecutor to argue an appellate standard of review in closing argument. Trial court allowed the prosecutor to construe the evidence in light of legal precedent holding that the uncorroborated testimony of a child victim is sufficient to support a child molesting conviction. Defendant argued the prosecutor's argument created the real risk of confusing the jury into thinking they do not have the ability to question the complaining witnesses' credibility and reject it. Court agreed with Defendant that permitting this argument to continue was improper. The prosecutor's argument repeatedly used the term "uncorroborated," which may confuse or mislead the jury. See Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). Moreover, the argument focused the jury away from how the evidence met the elements required for conviction and toward the appellate standard, which Ludy made clear "is irrelevant to a jury's function as fact-finder." While inappropriate, the argument did not create reversible error because the trial court's instructions made clear to the jury that the court's instructions were its best source for controlling law and that counsels' arguments were not evidence. Thus, the prosecutor's improper argument was harmless error.

The Court of Appeals also found no abuse of discretion in denying Defendant's motion to sever the counts involving one victim from those involving the second victim. Defendant exploited his position as a trusted member of his girlfriend's household to sexually abuse young female family members who stayed in the house, which actions resulted in overlapping investigations. Thus, the trial court properly denied Defendant's motion for severance as of right under Ind. Code 35-34-1-11. Although there were ten charges, eight of them involved one victim and only two of them involved the other. The evidence regarding crimes against the second victim was straightforward, as there was only one incident, which made the evidence as to each victim easily distinguishable.

TITLE: Washington v. State
INDEX NO.: D.15.
CITE: 902 N.E.2d 280 (Ind. Ct. App. 2009)
SUBJECT: Prosecutorial misconduct - not fundamental error
HOLDING: In dealing in cocaine prosecution, deputy prosecutor committed misconduct in his closing argument by disparaging D's counsel, stating that defense counsel was unethical, inappropriate, ignorant, and improper. Prosecutor's statements were uninvited by any comment made by defense counsel, and his behavior "was clearly unprofessional and unacceptable. Even more disturbing was the deputy prosecuting attorney's statement that: 'I could get just as improper and I get jury verdicts returned all the time on this very evidence. All the time. Guilty.'" However, error was not fundamental because D made no specific showing that the prosecutor's comments denied him a fair trial or likely had any effect on the jury that prejudiced him. Almost all of the inappropriate comments related to charges for which D was acquitted. Held, judgment affirmed.

RELATED CASES: Shoultz, 995 N.E.2d 647 (Ind. Ct. App. 2013) (where prosecutor said D "murdered" his parent's pets and mentioned the high cost of trial, there was no misconduct, let alone misconduct rising to fundamental error).

D. TRIAL

D.15. Misconduct by prosecutor

D.15.a In general

TITLE: Adcock v. State
INDEX NO.: D.15.a.
CITE: (08-27-10), 933 N.E.2d 21 (Ind. Ct. App. 2010)
SUBJECT: Prosecutorial misconduct - comparing reasonable doubt to jigsaw puzzle
HOLDING: In trial for child molesting and related charges, prosecutor did not commit misconduct or fundamental error during voir dire by using analogy about a twenty-piece jigsaw puzzle with just two pieces missing to explain difference between "proof beyond a reasonable doubt" and "proof beyond all possible doubt." D waived issue by not seeking an admonishment or moving for mistrial. D questioned jurors during voir dire and emphasized that jury should follow Tr. Ct.'s definition of reasonable doubt. Tr. Ct. properly instructed jury on reasonable doubt and the State's burden of proof. However, even though court affirmed D's convictions, it warned prosecutors who are "tempted to enliven voir dire and/or opening and closing arguments with visual aids or *analogies such as the one here*" (emphasis added) to illustrate the reasonable doubt standard is "dangerous and unwise." See also People v. Wilds, 529 N.Y.S.2d 325, 327 (N.Y. App. Div. 1988) (conviction reversed where Tr. Ct. said that as a person could recognize that a jigsaw puzzle depicted Abraham Lincoln even if the puzzle was missing a few pieces, so the State may meet its burden of proof even if some questions remain unanswered; illustration was improper because "the average American juror would recognize a jigsaw puzzle of Abraham Lincoln long before all of the pieces are in place"[] and "[o]bviously, this is not the quantum of proof required in a criminal case.") Held, judgment affirmed.

RELATED CASES: Bailey, 131 N.E.3d 665 (Ind. Ct. App. 2019) (prosecutor's suggestion to jurors during closing arguments that the volume of fentanyl in a habitual drug dealer's possession had the potential to kill thousands of people did not constitute fundamental error).

TITLE: Bailey v. State
INDEX NO.: D.15.a.
CITE: (9/1/89), Ind., 542 N.E.2d 1008
SUBJECT: Prosecutorial misconduct - comment re D's failure to deny guilt at scene
HOLDING: Prosecutor's comment in closing argument that officer who arrested D did not say that D denied guilt at scene did not deny D fair trial. Comment was as follows: "[officer] didn't say the D stayed there & said, 'Hey, you have the wrong man.' Didn't hear any testimony like that. 'Hey, I didn't do it. It was the other guy.' " Tr. Ct. sustained D's objection to comment. No motion for admonishment or mistrial was made. On appeal, D argues that comment concerned D's failure to testify, but concedes that it could be interpreted simply as reference to officer's testimony re D's statements at scene. Ind. S. Ct. finds that latter interpretation is correct. Even had D moved for mistrial, Tr. Ct. could have properly denied it, since D was not placed in grave peril. Evidence of D's guilt is overwhelming, & comment could not have unduly influenced jury. Held, conviction affirmed.

RELATED CASES: Stettler, 70 N.E.3d 874 (Ind. Ct. App. 2017) (prosecutor's final argument did not constitute misconduct or fundamental error; prosecutor did not impermissibly comment on D's decision to not testify or vouch for S.Y.'s truthfulness about her claim that D molested her); Shoultz, 995 N.E.2d 647 (Ind. Ct. App. 2013) (D was not put in grave peril when, during trial, prosecutor said D "murdered" his parent's pets and mentioned the high cost of trial).

TITLE: Goudy v. State
INDEX NO.: D.15.a.
CITE: (11-26-97), Ind., 689 N.E.2d 686
SUBJECT: Prosecutorial misconduct - refusal to grant immunity
HOLDING: To meet responsibility of prosecuting crimes, State, not D, must have authority to grant immunity. Walters, 394 N.E.2d 154. To support claim of prosecutorial misconduct regarding use of that authority, D must prove that State's decisions were made with deliberate intention of distorting fact-finding process. Moore, App., 655 N.E.2d 1251. Distortion of fact-finding process may be established by showing: (a) prosecutorial overreaching, through threats, harassment, or other forms of intimidation, has effectively forced witness to invoke Fifth Amendment, or prosecutor has engaged in discriminatory use of immunity grants to gain tactical advantage; (b) witness's testimony is also material, exculpatory, & not cumulative; & (c) D has no other way to obtain evidence. Id. at 1253.

In this case, D's alibi witnesses were charged prior to trial with murder & prosecutor refused to grant them immunity from prosecution. D contended at trial that arrests & refusal to grant immunity denied him right to compel witnesses on his own behalf & constituted prosecutorial misconduct. Ct. found no evidence of prosecutorial overreaching with regard to charging & arrests of these witnesses. Moreover, D failed to establish that he had no other way to obtain evidence in support of his alibi defense or that testimony of these witnesses would be anything but cumulative. Held, no error.

RELATED CASES: Baxter, 727 N.E.2d 429 (State's decision to prosecute co-D and refuse to give him immunity 6 days before trial was not prosecutorial misconduct).

TITLE: Inman v. State
INDEX NO.: D.15.a.
CITE: (2/11/2014), 4 N.E.3d 190 (Ind. 2014)
SUBJECT: State's ex parte submission of exhibit list did not require change of judge or mistrial
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motions for change of judge and mistrial, which D claimed were appropriate because before trial, the State gave the Tr. Ct. an exhibit log, but did not provide a copy to D. The log listed the exhibits the State intended to introduce and the witnesses who would authenticate the exhibits.

The value of the exhibit log was only in its administrative value, allowing Tr. Ct. to track the exhibits at trial. Further, during discovery, the State provided D with a list of exhibits and witnesses. Thus, the denial of the motion for change of judge was not clearly erroneous. See Sturgeon v. State, 719 N.E.2d 1173, 1182 (Ind. 1999).

Likewise, denial of the motion for mistrial was not an abuse of discretion because D was not put in a position of grave peril. See Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000). D does not show how lack of possession of the exhibit log had a probable effect on the jury's verdict. See Clark v. State, 695 N.E.2d 999, 1004 (Ind. Ct. App. 1998).

Even though allowing the State to submit the exhibit list ex parte was not erroneous, the better practice is for Tr. Ct.s to refuse to accept exhibit logs tendered ex parte unless the opposing party is given notice and has an opportunity to be heard. Held, judgment affirmed.

TITLE: Lainhart v. State
INDEX NO.: D.15.a.
CITE: (1st Dist., 11-23-09), (Ind. App. 2009) 916 N.E.2d 924
SUBJECT: Prosecutorial misconduct - cumulative error rose to level of fundamental error
HOLDING: Prosecutor's repeated misconduct during a jury trial constituted fundamental error. In order for prosecutorial misconduct to constitute fundamental error, the misconduct must constitute a clearly blatant violation of basic and elementary principles of due process, present an undeniable and substantial potential for harm, and make a fair trial impossible. Additionally, the alleged misconduct must have subjected the D to grave peril and have a probable persuasive effect on the jury's decision. Here, during voir dire in a trial for Intimidation, the prosecutor explained that his job was "to seek the truth" whereas the role of defense counsel was to defend their client to the best of their ability, whatever that may be." These remarks constituted improper commentary on the disparate roles of defense and prosecution. The prosecutor also told the jury that D could get a slap on the hand, no fine, no jail time and just probation or could get some time "with a ceiling that's not that high because it's a Misdemeanor." Although the prosecutor did not cite the exact range of punishment, the prosecutor's explanation of the penalties was inappropriate. During the cross of D, the prosecutor asked whether multiple people were going to testify to corroborate the D's story and alibi. Likewise, in closing, the State argued that D failed to call these allegedly favorable witnesses. The prosecutor's comments were improper because they suggested D shouldered the burden of proof.

Moreover, during voir dire, the prosecutor told the jury that "it would take an awful lot to get an officer [to lie]" and that "there's no place for it in our society." The prosecutor argued in closing that "if any officer would even come close to not putting out exactly what happened telling the truth, they're out. I would never, ever, put them in front of a Jury, if I suspected anything." These comments constituted improper indoctrination, vouching and commentary on the justness of the cause. Although each instance of prosecutorial misconduct alone may not have constituted reversible error, the cumulative effect of the State's misconduct made a fair trial impossible. Because the case involved so much competing testimony and because most of the State's misconduct went straight to the credibility of the witnesses, the misconduct placed D in grave peril and together constituted fundamental error. Held, judgment reversed.

RELATED CASES: Brummett, 10 N.E.3d 78 (Ind. Ct. App. 2014) *aff'd on reh'g*, 21 N.E.3d 841 *summ. aff'd*, 24 N.E.3d 965 (with exception of rehearing opinion's potentially misleading reference to fundamental error; Ryan did not alter doctrine of fundamental error) (cumulative effect of prosecutorial misconduct placed D in grave peril and constituted fundamental error; prosecutor improperly distinguished the roles of the prosecution and defense, vouched for the credibility of witnesses and the justness of the cause, and asked argumentative and inflammatory questions).

TITLE: Murray v. State
INDEX NO.: D.15.a.
CITE: (12/14/82), Ind., 442 N.E.2d 1012
SUBJECT: Misconduct by prosecutor - standard
HOLDING: Standard for determining significance of prosecutorial misconduct: (1) did prosecutor, in fact, engage in misconduct as defined by case law of jurisdiction, disciplinary rules, & code of professional responsibility (see Swope, 325 N.E.2d 193); (2) did misconduct, when viewed from totality of circumstances of case, place D in position of grave peril to which D should not have been subjected (White, 272 N.E.2d 312); (3) probable persuasive effect of misconduct on jury's decision, rather than degree of impropriety of conduct is considered in determining whether D was subjected to grave peril by prosecutor's misconduct (Swope); (4) repeated instances of misconduct evidencing deliberate attempt to improperly prejudice D may require reversal (Robinson, 297 N.E.2d 409). Maldonado, 355 N.E.2d 843. Here, D alleged numerous instances of prosecutorial misconduct, including violation of motion in limine (which Ct. found was inadvertent) & comment on failure to call 6 of 10 listed witnesses (which Ct. found was stated to judge as reason prosecutor was not prepared to proceed immediately with rebuttal). Ct. finds that taken individually or together, instances of misconduct neither demonstrated deliberate attempt to improperly prejudice D nor placed D in grave peril. Held, no error.

RELATED CASES: Booher, 773 N.E.2d 814 (appellate claim of prosecutorial misconduct presented on appeal in absence of contemporaneous trial objection will not succeed unless D establishes not only grounds for prosecutorial misconduct but also additional grounds for fundamental error); Reid, App., 719 N.E.2d 451 (prosecutor recording interview with defense witness shortly before trial & offering to compensate witness for missed work did not place D in grave peril).

TITLE: Penley v. State
INDEX NO.: D.15.a.
CITE: (2nd Dist., 8-30-00), Ind. App., 734 N.E.2d 287
SUBJECT: Prosecutorial misconduct - Failure to disclose exculpatory evidence
HOLDING: In pointing a firearm prosecution, State's representation that there were two unnamed eyewitnesses who supported complaining witness's version of incident & its failure to provide defense with eyewitness's correct name prior to trial constituted misconduct. After trial, D learned for first time eyewitness's correct name. Eyewitness provided D with affidavit indicating that she had observed incident & did not see weapon. Prosecutor has duty to learn of any favorable evidence known to others acting on government's behalf in case, & thus is charged with knowledge of potentially exculpatory evidence of which police are aware. Turner, App., 684 N.E.2d 564. State is thus charged with knowledge of information eyewitness provided to investigating police officer who interviewed her at scene, despite its assertion after trial that State never had any information from eyewitness. Ct. held that unavailability of this evidence at trial due to State's misconduct undermined confidence in verdict, because jury's verdict was premised solely on witness credibility, & testimony of independent eyewitness who did not see gun could have created reasonable doubt that did not otherwise exist. Held, denial of D's motion to correct error reversed.

Note: See also Watkins v. Miller, 92 F.Supp.2d 824 (S.D. Ind. 2000) (petitioner entitled to federal writ of habeas corpus setting aside murder conviction because prosecution failed to disclose exculpatory material tending to show his innocence, & petitioner came forward with compelling DNA evidence that he was actually innocent of murder; State Ct. opinions denying post-conviction relief reflect clear misunderstanding of DNA evidence).

TITLE: Perryman v. State
INDEX NO.: D.15.a.
CITE: (4th Dist., 7-19-05), Ind. App., 830 N.E.2d 1005
SUBJECT: Improper questions/conditioning by prosecutor during voir dire - reversible error
HOLDING: Ct. reversed D's convictions for possession of cocaine in excess of three grams, a Class A felony, & possession of marijuana due to improper questions by the prosecutor during voir dire. Ct. agreed with D's contention that prosecutor improperly tried State's case during jury selection & gave jury specific facts not proven at trial, & also conditioned jury with prejudicial comments suggesting they were fighting the war on drugs through this specific case. Prosecutor asked jurors questions about packaging of drugs & whether manner of packaging drugs would suggest dealing or use. D was not charged with dealing, there was no evidence of dealing, & Ct. found the prosecutor's questioning improperly sought to infer to the jurors that dealing was occurring. This tactic was comparable to Robinson v. State, Ind., 297 N.E.2d 409 (1973), where Ct. held that it was improper to ask jurors if they could impose death penalty if a father killed his 20-year-old daughter because she resisted his sexual advances. As in Robinson, voir dire in this case was prejudicial as "the seeds of suspicion [were] firmly planted & anxiously awaiting germination." Ct. also found it improper to "brainwash or attempt to condition the jurors to receive the evidence with a jaundiced eye" through references placing them in the position of the police fighting the drug war. Robinson v. State, 365 N.E.2d 1218 (Ind. 1977). Held, judgment reversed.

TITLE: Ramsey v. State
INDEX NO.: D.15.a.
CITE: (2nd Dist., 09-01-06), Ind. App., 853 N.E.2d 491
SUBJECT: Prosecutorial misconduct - comment on lack of defense witnesses
HOLDING: In closing argument of dealing in methamphetamine case, prosecutor's comment on lack of defense witnesses did not improperly shift burden of proof from State to the defense and did not constitute misconduct. During closing, D opened his argument by contending that State failed to meet its burden of proof because it did not subpoena certain witnesses, saying that those witnesses were "missing in action, MIA." Defense counsel argued that State's decision not to subpoena those witnesses indicated that their testimony would not have corroborated State's witnesses. In its closing, State said, "...[defense counsel] complained about these MIAs, not here, not here, not here, not here. He has the same power as we do..." D objected, saying, "The D has no duty to prove or explain anything. That's the law." Tr. Ct. *overruled* objection and refused to admonish the jury.

As in Reliford v. State, 436 N.E.2d 313 (Ind. 1982), Court rejected D's claim of error, noting that State was explaining the subpoena power given to both parties in the case. Moreover, Tr. Ct. instructed the jury properly on the burden of proof and the fact that the defense is not required to present any evidence. Held, no error.

TITLE: Ryan v. State
INDEX NO.: D.15.a.
CITE: (6/3/2014), 9 N.E.3d 663 (Ind. 2014)
SUBJECT: Prosecutorial misconduct - not fundamental error
HOLDING: Although some of the prosecutor's remarks during closing argument were improper, reversal is not warranted because the D did not object. When a D properly objects on grounds of prosecutorial misconduct, the court is to determine: (1) whether misconduct occurred, and if so, (2) "whether the misconduct, under all of the circumstances, placed the D in a position of grave peril to which he or she would not have been subjected" otherwise. But to constitute fundamental error, the D must show that, under the circumstances, the trial judge erred in not sua sponte raising the issue because alleged errors: (a) "constitute clearly blatant violations of basic and elementary principles of due process" and (b) present an undeniable and substantial potential for harm." Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

Here, during the prosecutor's closing argument in a jury trial on multiple counts of Class C felony Sexual Misconduct with a Minor, she made multiple comments that D, on appeal, claims to be misconduct but were not objected to at trial. First, the prosecutor stated: "I want to be really clear, we are here because everyone has a right to have a jury trial. We're not here because he didn't do it, we're here because he wants to get away with it. So don't let him, thank you." Contrary to D's argument, this comment did not negatively implicate D's exercise of his right to a jury trial. Second, the prosecutor argued that the defense argument is "how guilty people walk" and "a classic defense attorney trick." Although these comments, without question, violate the Rules of Professional Conduct, they did not placed D in a position of grave peril and as such did not constitute misconduct. Finally, the prosecutor asked the jury to look at the "bigger picture" and told them that they are in "an incredible position to stop" this type of behavior and "send the message that we're not going to allow people to do this." This clearly invited the jury to convict for reasons other than guilt and constituted improper conduct. However, it did not constitute fundamental error because it did not have an undeniable and substantial effect on the jury's decision that made a fair trial impossible. Although Court does not endorse the prosecutor's tactics, it affirms the judgment. Held, judgment of Tr. Ct. affirmed and Court of Appeals' Opinion vacated; Rucker, J., concurring in result.

RELATED CASES: Jerden, 37 N.E.3d 494 (Ind. Ct. App. 2015) (prosecutor's statements in closing argument about D's reckless driving did not result in fundamental error 1) as statements were fair characterizations of the evidence, 2) Tr. Ct. instructed the jury that closing statements weren't evidence, and 3) evidence of guilt was overwhelming); Brummett, 24 N.E.3d 965 (Ind. 2014) (Ryan did not alter the doctrine of fundamental error or change the standard; prosecutor's misconduct here was more egregious, and did rise to the level of fundamental error); Phillips, 22 N.E.3d 749 (Ind. Ct. App. 2014) (rather than improperly vouching for State witnesses' testimony, prosecutor just connected her commentary on their credibility with evidence in the record that supported that testimony; prosecutor's plea to jury to further support C.W.'s cause for justice by rendering a jury verdict crosses the line into prosecutorial misconduct, but Ct. found no fundamental error because the possible persuasive effect on jury is minimal); Stephens, 10 N.E.3d 599 (Ind. Ct. App. 2014) (prosecutor's references to D as a "knucklehead," "yahoo," "bully," and "not a noble heroic guy" during closing argument were not misconduct, but were "forceful argument" of the type permitted by Indiana precedent; some of prosecutor's argument could have been construed as a request to convict D for other reasons than the

evidence, i.e., that his conviction would be a "community service." That argument was improper, but there was no objection, and the error was not fundamental).

TITLE: State v. Larkin
INDEX NO.: D.15.a.
CITE: (6/27/2018), 100 N.E.3d 700 (Ind. 2018)
SUBJECT: Outright dismissal is not appropriate remedy for State's misconduct
HOLDING: Trial court abused its discretion by granting D's Motion to Dismiss for a pattern of pretrial government misconduct. After being charged with voluntary manslaughter, D submitted to questioning by police regarding his wife's death. During a break in questioning, police recorded privileged communications between D and his attorney. The recording was transcribed and distributed to the prosecutor and others. There was also evidence in the record reflecting potential evidence tampering. Although the State committed misconduct, the remedy is not outright dismissal, but suppression of tainted evidence for which the State cannot rebut the presumption of prejudice pursuant to State v. Taylor, 49 N.E.3d 1019 (Ind. 2016). Under Taylor, the State is entitled to a hearing to look at each piece of evidence and determine what, if any, evidence was tainted by the State's misconduct, and if so, whether the State can rebut prejudice beyond a reasonable doubt. Dismissal is an extreme remedy. As the U.S. Supreme Court has held, for constitutional violations committed by the government, "the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence' gained from the violation." U.S. v. Morrison, 449 U.S. 361, 365 (1981). Held, transfer granted, Court of Appeals' opinion at 77 N.E.3d 237 vacated, judgment reversed and remanded to hold a hearing or proceed to trial pursuant to Taylor.

TITLE: Stettler v. State
INDEX NO.: D.15.a.
CITE: (2/22/2017), 70 N.E.3d 874 (Ind. Ct. App. 2017)
SUBJECT: No prosecutorial misconduct
HOLDING: Prosecutor's final argument did not constitute misconduct or fundamental error by allegedly commenting on Defendant's decision to not testify and by supposedly vouching for S.Y.'s truthfulness about her claim that Defendant molested her. During closing argument, the prosecutor referred to Defendant's videotaped statement to police and suggested that Defendant might have objected more strenuously during questioning and also asked why Defendant did not object more aggressively during voir dire about why witnesses might choose to not testify. These statements did not suggest that Defendant's decision to not testify implied his guilt. See Cameron v. State, 22 N.E.3d 588, 592 (Ind. Ct. App. 2015); Thomas v. State, 9 N.E.3d 737, 742 (Ind. Ct. App. 2015). Also, the State was not attempting to vouch for S.Y.'s truthfulness when it asked the jury to consider whether it appeared easy for S.Y. to testify. Because S.Y. cried several times during her testimony, and at least once suffered what appeared to be a panic attack, the prosecutor's statements about S.Y.'s difficulties in testifying "were at most restatements to the jury of what they had already seen during the trial." See Brummett v. State, 10 N.E.3d 78, 86 (Ind. Ct. App. 2014), affirmed, 24 N.E.3d 965 (Ind. 2015). Held, judgment affirmed.

TITLE: Thornton v. State
INDEX NO.: D.15.a.
CITE: (2/5/2015), 25 N.E.3d 800 (Ind. Ct. App. 2015)
SUBJECT: Prosecutorial misconduct - requesting jury to convict D for reasons other than guilt
HOLDING: In opinion reversing criminal confinement conviction for Confrontation Clause violation, Court warned prosecution against making certain statements at retrial during closing arguments as it did during the first trial. To blame a shortcoming in State's evidence on a D's invocation of a fundamental constitutional right (here, speedy trial) is prosecutorial misconduct and likely also constitutes fundamental error. On rebuttal, prosecutor also asked jury to consider "that we re-victimize these people who come forward with rape." It is improper to invoke sympathy for a victim as a basis for conviction, or to urge jury to convict a D to encourage other victims to come forward. Woolston v. State, 453 N.E.2d 965 (Ind. 1983); Hand v. State, 863 N.E.2d 386 (Ind. Ct. App. 2007). Held, conviction reversed and remanded on other grounds.

TITLE: U.S. v. Golding
INDEX NO.: D.15.a.
CITE: 168 F.3d 700 (4th Cir. 1999)
SUBJECT: Prosecutorial Misconduct -- Threatening Witness, Commenting on Lack of Testimony
HOLDING: Prosecutor who threatened to prosecute witness, and who commented in final argument about the lack of testimony from that witness, who also had privilege not to testify, violated D's 6th Amendment right to compulsory process. D was charged with being convicted felon in possession of a firearm. He and his wife told police that the gun, together with the ammunition and a small amount of marijuana found with it, belonged to the wife. The prosecutor told D's attorney that she would federally prosecute the wife for possessing the gun and the marijuana if she testified at trial to that effect. D's wife did not testify at his trial. In final argument, the prosecutor argued that if the gun truly belonged to D's wife, she surely would have testified, and then she feigned ignorance of any reason why D's wife would not testify. 4th Circuit finds the combination of threatening a witness and then commenting on her failure to testify, together with commenting on the lack of testimony from a witness with a privilege not to testify, violated the D's 6th amendment right to obtain witnesses in his favor.

TITLE: Van Cleave v. State
INDEX NO.: D.15.a.
CITE: (12/30/87), Ind., 517 N.E.2d 356
SUBJECT: Prosecutorial misconduct - interference with discovery
HOLDING: Any prosecutorial misconduct was waived by D's failure to raise issue before Tr. Ct. D alleges state interfered with his counsel's attempts to interview state's witness & to have D take polygraph in jail. D's investigator was told that deputy prosecutor would have to attend interview with state's witness, & that witness could not be taken to scene of crime. Further, deputy prosecutor "nixed" polygraph scheduled for D because D was in "administrative lock-up" following jail disturbance. However, because of D's failure to seek Tr. Ct.'s assistance in these matters, Ind. S. Ct. concludes that D's counsel's preparation & investigation were not hindered. It is not clear what additional information counsel may have learned absent this interference. Held, D's assertions of prejudice do not overcome waiver or warrant reversal.

TITLE: Williams v. State
INDEX NO.: D.14.a.
CITE: (6/6/90), Ind., 555 N.E.2d 133
SUBJECT: Misconduct by judge - comments during voir dire
HOLDING: Tr. Ct.'s reference to John Hinckley during voir dire in murder trial in which D raised insanity defense was not abuse of discretion. D was charged with murder & interposed insanity defense. During voir dire, Tr. Ct. was questioning jury about effects of pretrial publicity & used example of John Hinckley's alleged shooting of President Reagan. Tr. Ct. reminded jury of media coverage regarding Hinckley, then reminded them that none of them had seen Hinckley shoot Reagan, they had only seen media coverage. Tr. Ct. then explained that they should decide case on cold, hard law & facts, not on media coverage. On appeal, D argues that because of "nationwide furor" that erupted after Hinckley was found not guilty by reason of insanity, mention of that case tended to taint entire jury panel with regard to insanity defense. Tr. Ct. has broad discretionary power to regulate voir dire, concurrent with duty to remain impartial & to refrain from making unnecessary comments or remarks. Whitehead 511 N.E.2d 284. Here, Tr. Ct.'s comments contained no actual mention of insanity nor of verdict in Hinckley case. Tr. Ct. merely used case to illustrate difference between media reports jurors may have seen & evidence they would hear at trial. Ct. dismisses D's claim that jury panel was tainted with regard to insanity defense as "speculative at best, & certainly insufficient to demonstrate an abuse of the Tr. Ct.'s discretion." Held, conviction affirmed.

RELATED CASES: Cheek, 79 N.E.3d 388 (Ind. Ct. App. 2017) (in companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member), Abney, 79 N.E.3d 932 (Ind. Ct. App. 2017) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

D. TRIAL

D.15. Misconduct by prosecutor

D.15.b. Conduct

TITLE: Alexander v. State

INDEX NO.: D.15.b.

CITE: 509 S.E.2d 56 (Ga. 1998)

SUBJECT: Prosecutorial Misconduct -- Failure to Offer Promised Evidence; Burden on State to Show Good Faith

HOLDING: Where prosecutor, in opening statement, has promised evidence of specific fact, and then makes no attempt to introduce evidence in support of such fact at trial, burden is on state to show good faith in order to avoid mistrial. D here was charged with murder, and during opening statement, prosecutor told jury he would not only prove that D committed murder, but would prove that it was gang-related. He went on to explain in detail D's gang membership and gang activities. However, no evidence regarding gangs was offered at trial. Tr. Ct. gave standard jury instruction that opening statements were not evidence. Generally, mistrial or reversal are not required if curative instruction is given and prosecutor acted in good faith. Court holds that burden is on state to make affirmative showing of good faith, since his/her reasons for failing to tender evidence generally will be known to him/her alone. Further, Court points out that instruction here was not specific enough to cure prejudice to D.

TITLE: Bryant v. State
INDEX NO.: D.15.b.
CITE: (8/7/2015), 41 N.E.3d 1031 (Ind. Ct. App. 2015)
SUBJECT: Prosecutor's comments constituted impeachment, not burden-shifting
HOLDING: D, a pawnshop owner, was convicted of aiding receiving stolen property and corrupt business influence after police discovered he had been receiving stolen items and not uploading the information about these purchases to LEADS, the state database used to recover stolen goods. At trial, D's employee testified that he had not uploaded the information because he was having technical difficulties with LEADS. During cross-examination, the prosecutor asked the employee whether it would have "been helpful to explain these upload problems occurred to other people by bringing in these other records to show their property didn't get uploaded." D moved for mistrial, arguing that the comment constituted an attempt to shift the burden of producing evidence onto D. Court disagreed, holding that the prosecutor's comments were not "improper burden-shifting but rather permissible impeachment of a defense witness, arising from the evidence the D introduced." Held, judgment affirmed.

TITLE: Gall v. Parker
INDEX NO.: D.15.b.
CITE: 231 F.3d 265 (6 Cir. 2000)
SUBJECT: Prosecutorial Misconduct -- Denigrating Insanity Defense
HOLDING: Prosecutor committed misconduct where he presented no evidence to counter insanity defense, and instead denigrated the defense as the desperate act of a guilty D, described it as conveniently located inside the D's head and not based on facts like the state's case, mischaracterized and denigrated the testimony of the three defense experts, and made "know-nothing appeals to ignorance." Capital murder conviction set aside.

TITLE: Lewis v. State
INDEX NO.: D.15.b.
CITE: (1st Dist., 03-02-94), Ind. App., 629 N.E.2d 934
SUBJECT: Prosecutorial misconduct denied D fair trial
HOLDING: Prosecutor's failure to disclose agreement with felon-witness (FW) in exchange for her testimony, as well as subornation of perjurious testimony, was violation of due process. After D was charged, but before trial, prosecutor entered into written agreement with FW that required her cooperation & testimony against D, in exchange for dismissal of 6 other charges & minimum sentence recommendation. FW testified to rebut D's alibi & denied any agreements or promises to induce her testimony, but she did receive consideration for testimony & prosecutor also joined in petition for sentence reduction, specifically noting cooperation in D's case. There were also affidavits from 2 prospective defense witnesses who said prosecutor had threatened them with prosecution or vindictive sentencing if they testified for D. Prosecutor admitted communications & most of affidavits' substance but denied threatening or discouraging witnesses from testifying.

Use of false testimony invokes highest level of scrutiny, & prosecutor has duty to voluntarily disclose any deals with State's witnesses. Credibility of FW is highly suspect, & jury must have all evidence related to any consideration in exchange for testimony. D established prosecutorial misconduct because State had express agreement for FW's testimony prior to D's trial, & agreement was not disclosed & witness denied its existence under oath. Evidence against D was supplied almost entirely by FWs who received non-disclosed consideration for their testimony. Held, judgment reversed. **Note:** Although Ind. S.Ct. has held disclosure is only required for express agreements, Lopez, 527 N.E.2d 1119, Ct. noted U.S.S.Ct. seems to hold otherwise, Giglio v. U.S., 405 U.S. 153, 155. See also, McCord, 622 N.E.2d 504, at M.2.b.6.

RELATED CASES: Sigler, App., 700 N.E.2d 809 (D failed to establish that State denied him due process by failing to inform him of offers of consideration to & agreements with State's chief witness against him & by failing to correct false trial testimony by that witness); Wright, 690 N.E.2d 1098 (D did not meet burden of establishing that prosecutor failed to disclose secret agreement that was made prior to trial).

TITLE: McBride v. State
INDEX NO.: D.15.b.
CITE: (1st Dist., 3-20-03), Ind. App., 785 N.E.2d 312
SUBJECT: Prosecutorial misconduct - telling jury to put their children in victim's place
HOLDING: During closing argument of attempted murder trial, it was not prosecutorial misconduct for State to comment on D's testimony regarding weapon & asking jury to put their child in victim's place. State made comments regarding functioning of revolver, specifically in reference to bullets & chambers & how they line up with barrel when trigger is pulled. State also made remark that D had lied. D argued that this constituted prosecutorial misconduct because prosecutor was imparting own knowledge about functioning of revolvers to jury & in turn used personal knowledge to argue that D had lied. Court disagreed because prosecutor's comments were about evidence already in record. D testified to functioning of revolver & prosecutor was simply pointing out inconsistency in that testimony. Comments to jury that they should put their children or themselves in victim's place was ill-advised & inappropriate, but did not rise to level of reversible error because D was not placed in grave peril as it was unlikely that misconduct had persuasive effect on jury in light of strength of evidence against D. Held, judgment affirmed.

TITLE: Seide v. State
INDEX NO.: D.15.b.
CITE: (4th Dist., 2-26-03), Ind. App., 784 N.E.2d 974
SUBJECT: Prosecutorial misconduct - referring to D's character in closing argument
HOLDING: Prosecutor did not commit misconduct during closing argument by referring to D's character & credibility in robbery trial. D argued that State improperly compared D & victim's character, inappropriately urging jury to consider D's inability to maintain steady employment, unfaithfulness to live-in girlfriend, parasitical dependence on girlfriend who worked two jobs to support him & herself, & fact that D was friends with a man convicted of cocaine offense. Prosecutor did make favorable mention that victim was hardworking & supported his wife - not a live-in girlfriend, but this mention of victim's character was in response to defense counsel's insinuation during opening argument that victim was involved in drug deal when he was robbed. As for D's character, prosecutor summarized only what D's own witnesses said about him during his case-in-chief & used those facts to construct a theory about his motives for robbing victim. Reading all these statements in context, Ct. found no prosecutorial misconduct, let alone any fundamental error, which D would have to show to succeed, as there was no objection made during State's closing argument. Held, judgment affirmed.

TITLE: Smith v. Groose
INDEX NO.: D.15.b.
CITE: 205 F.3d 1045 (8th Cir. 2000)
SUBJECT: Use of Conflicting Factual Theories Against Different Ds
HOLDING: Due process clause does not permit prosecutors to use inherently contradictory factual theories in order to convict two Ds of same crime in separate trials. Habeas petitioner was charged with felony murder for death of homeowner during residential burglary. Apparently home was burglarized twice by two different groups on same night. At petitioner's trial, a witness testified that he had been with petitioner and others when they entered home, that they encountered another group in process of burglarizing home, that homeowner was dead when he and petitioner arrived, and that member of first group said, "we took care of it," in reference to the homeowner. State impeached witness with prior statement that a member of his and petitioner's group had killed homeowner, and pursuant to state law, used prior statement as substantive evidence as well. Petitioner was convicted of felony murder. State later prosecuted member of first burglary group for homeowner's intentional murder, and presented testimony from above-described witness, similar to testimony presented at petitioner's trial, but without offering conflicting statement. That D was convicted, as well. Eighth Circuit framed issue as "whether the Due Process Clause forbids a state from using inconsistent, irreconcilable theories to secure convictions against two or more Ds in prosecutions for the same offenses arising out of the same event." Here, the witness gave conflicting stories about the timing of the victim's death, and the state embraced one version as the truth at one trial, and the conflicting version as the truth at the second trial. Timing of the killing was essential, since the petitioner could not have been convicted of felony murder under both theories. Further, the witness' testimony was the sole basis for the two convictions. Although the state is not required to use the same evidence and theories in trying different Ds, a due process violation occurs when it uses "inherently factually contradictory theories." Applying the pre-AEDPA standard to petitioner's claim, the Court finds that the prosecution's conduct rendered his conviction unreliable. Further, the rule that the state may not use inherently factually theories is not a new rule barred by Teague, or to the extent that it is new, it fits within the Teague exception for rules that are necessary to fundamental standards of fairness and accuracy.

TITLE: State v. Finley
INDEX NO.: D.15.b.
CITE: 268 Kan. 557, 998 P.2d 95 (Kan. 2000)
SUBJECT: Prosecutorial Misconduct -- Intimidating Witness
HOLDING: Potential defense witness was driven from stand, in violation of D's constitutional right to present a defense, when prosecutor asked Tr. Ct. to supplement its instruction regarding the privilege against self-incrimination with an instruction that the witness would be subject to cross-examination and could not selectively invoke 5th Amendment, and also asked

Court to inform witness that evidence against her had grown stronger than it was at time decision was made to dismiss charges against her. Witness was D's girl-friend, who had initially been charged together with D in victim's murder before charges against her were dismissed. At trial, she took stand to offer alibi evidence, when above-described exchanges took place. When defense counsel expressed uncertainty about prosecutor's intentions, the judge said that his understanding was that the state would only charge the witness if she testified, to which prosecutor responded, "That's right." After witness decided not to testify, defense counsel complained to judge that prosecutor had intimidated witness. Judge asked prosecutor whether she wished to respond, to which she answered," [i]t's not a threat job -- Judge, this is my job." The appellate court here found prosecutor's conduct "sufficiently troubling" to warrant reversal. It would have been appropriate to point out to Tr. Ct. that prospective witness might unknowingly incriminate herself, but prosecutor's actions here went far beyond that. Prosecutor gave witness additional reasons not to testify, acquiesced in trial judge's statement that state would charge witness with murder if she testified, and failed to clear up any confusion after defense counsel complained that she had intimidated witness. Although it is possible that prosecutor was acting in good faith, her remarks themselves were of such a nature as to exert duress on the witness so as to preclude her from freely and voluntarily deciding whether to testify.

TITLE: U.S. v. Vavages

INDEX NO.: D.15.b.

CITE: (8/3/98), 9th Cir., 151 F.3d 1185 (9th Cir. 1998)

SUBJECT: Prosecutor's Warnings to Witness' Lawyer Re Perjury Prosecution Interfered with D's Rights

HOLDING: Prosecutor's repeated warnings to defense witness' lawyer that he believed her testimony on D's behalf would be perjured, and that as a result he would prosecute her for perjury and would withdraw her plea agreement in related charges, violated D's right to compulsory process by preventing witness from testifying. Factors leading to this conclusion include manner in which prosecutor broached subject, language of warnings, and prosecutor's expression of expectation of perjury.

D. TRIAL

D.15. Misconduct by prosecutor

D.15.b.1. Failure to advise/prevent prosecution witness from offering inadmissible evidence

TITLE: Stewart v. State
INDEX NO.: D.15.b.1.
CITE: (2nd Dist., 10-08-92), Ind. App., 601 N.E.2d 1
SUBJECT: No violation of motion in limine for State to question witness re relationship with other man
HOLDING: Although in rape trial, State filed motion in limine to prevent inadmissible Rape Shield testimony, it was not reversible error for State to then present evidence of complaining witness's relationship with other man, in violation of its own motion in limine. During direct exam, State inquired of witness concerning her relationship with another reservist. At one point State asked, "Was that a sexual relationship?" & witness replied, "Oh no. Not at all." D objected on grounds motion in limine was violated & moved for mistrial. Ct. denied mistrial & D was permitted to x-examine witness about same relationship. Motion in limine is not final ruling on admissibility of evidence, & error occurs only when evidence is improperly admitted at trial. Ct. found D failed to demonstrate that evidence admitted was so prejudicial & inflammatory that he was placed in position of grave peril. Therefore, denial of mistrial was not erroneous. Held, conviction affirmed.

TITLE: Stowers v. State
INDEX NO.: D.15.b.1.
CITE: (2nd Dist., 11-16-95), Ind. App., 657 N.E.2d 194
SUBJECT: No evidentiary harpoon
HOLDING: Prosecutor's question regarding D's knowledge of robbery victims' race, even assuming it was improper, did not contribute to verdict. Therefore, question did not constitute fundamental error & D waived issue by failing to raise it upon direct appeal. Tr. Ct. ruled that detective could not testify concerning what D had said about race of victims. Prosecutor sought to inform jury that D had made statement evincing knowledge of race of victims at time when D claimed he had no knowledge of crime whatsoever. During D's cross-examination, prosecutor asked whether D knew whether victims were white. D objected when prosecutor asked about making statement to detective. In PCR petition, D argued that prosecutor purposefully interjected evidentiary harpoon into evidence, & that Tr. Ct. should have given curative instruction directing jury to disregard question. Ct. noted that instruction would have likely called attention to question & would have been more likely to create inference of prior knowledge than question itself. In view of strength of identification evidence, Ct. concluded that question did not affect jury's decision & did not place D in position of grave peril. Held, denial of PCR affirmed.

D. TRIAL

D.15. Misconduct by prosecutor

D.15.b.2. Using witness who will assert 5th Amend or testimonial privilege

TITLE: Brown v. State
INDEX NO.: D.15.b.2.
CITE: (8-7-96), Ind., 671 N.E.2d 401
SUBJECT: Calling co-D who refuses to testify in presence of jury - no due process violation
HOLDING: It was not error to permit co-D to take stand in front of jury & refuse to testify. D relied on Tucker v. State, 534 N.E.2d 1110 (Ind. 1989) & Aubrey v. State, 310 N.E.2d 556 (Ind. 1974), where Ct. found reversible error in permitting co-D to be called before jury when all parties knew in advance that he would invoke Fifth Amendment. Ct. held that Tucker & Aubrey were not applicable here because: 1) Tr. Ct. & parties did not know in advance that co-D would refuse to testify when he took stand; 2) co-D's testimony from prior trial was available & used, so jury was not placed in position of speculating about what co-D would say; & 3) D did not object to co-D being brought before jury. Held, no error.

RELATED CASES: Eubanks, App., 729 N.E.2d 201 (prosecutor's calling of accomplices who he knew would assert their 5th Amend. privilege was not fundamental error due to overwhelming evidence; Darden, J., dissenting); Steele, 672 N.E.2d 1348 (see card at D.17).

TITLE: Cox v. State
INDEX NO.: D.15.b.2.
CITE: (5/19/86), Ind., 493 N.E.2d 151
SUBJECT: Misconduct by prosecutor - using witness who asserts 5th Amend
HOLDING: Tr. Ct. did not err in forcing witness to assert 5th Amend right in presence of jury. D contends such action is reversible error, *citing* People v. Poma, (Mich App. 1980), 294 N.W.2d 221. Ct. sets forth following rules: (1) prior to testimony, state must be aware of fact witness will invoke right, *citing* Speers, 383 N.E.2d 282; (2) contemporaneous objection is required, *citing* Gurley, 384 N.E.2d 16; & (3) admonishment is sufficient curative action, *citing* Hovis, 455 N.E.2d 577. Ct. finds D's failure to seek admonishment constitutes waiver & D's argument was rendered moot when witness took stand. Ct. finds jury was not ex-posed to "impermissible inferences" at issue in Aubrey, 310 N.E.2d 556. Held, no error.

TITLE: State v. Whitt
INDEX NO.: D.15.b.2.
CITE: 220 W.Va. 685, 649 S.E.2d 258 (W.Va. 2007)
SUBJECT: Strong exculpatory evidence may allow calling of co-D to invoke Fifth Amendment
HOLDING: West Virginia Supreme Court of Appeals held that a D who is able to present strong exculpatory evidence that a third party actually committed the crime with which he is charged may be entitled to have the Tr. Ct. compel the other person to take the witness stand to invoke the Fifth Amendment privilege against self-incrimination in front of the jury. Court joined several others that have recognized an exception in this situation to the general rule against compelling a witness to take the stand solely for the purpose of invoking the Fifth Amendment in open court. D maintained that the Tr. Ct. violated his rights to compulsory process and to present a defense when it refused to make his former girlfriend testify. Court recognized that tension exists between the Sixth Amendment rights asserted by D and the Fifth Amendment right against self-incrimination. As a general rule, a witness may not be forced to invoke the Fifth Amendment before the jury. However, this case presented a situation in which it was appropriate to recognize an exception. D's girlfriend had been acquitted for the same murder. D proferred testimony from several witnesses who claimed she had admitted to the murder and to duping D into taking the blame. Court noted the potential for prejudice to D was very high, since it was clear that the former girlfriend - who had been acquitted and granted immunity - could not validly invoke the Fifth Amendment. Also, it was possible that, had she been forced to take the witness stand and been apprised that she was not entitled to invoke the privilege, she would have testified in D's favor.

D. TRIAL

D.15. Misconduct by prosecutor

D.15.b.3. Violation of court ruling/motion in limine

TITLE: Bean v. State
INDEX NO: D.15.b.3.
CITE: (7/29/2014), 15 N.E.3d 12 (Ind. Ct. App. 2014)
SUBJECT: Vouching and prosecutorial misconduct resulted in funamental error
HOLDING: In retrial of child molesting case, improper vouching testimony from complaining witness's (C.W.'s) mother and DCS investigator, combined with two instances of prosecutorial misconduct, resulted in fundamental error. Court of Appeals reversed D's first conviction, holding that his Fifth Amendment rights were violated during his pretrial interview with sheriff, making the substance of the interview inadmissible. By eliciting testimony about D's pretrial interview, the prosecutor did not merely stumble into error; despite being warned, he defied Tr. Ct.'s instructions. Sheriff's testimony about interviewing D was not relevant course-of-investigation evidence, as development and quality of his investigation were not in issue. But most importantly, sheriff's testimony invited the jurors to speculate about what occurred during his interview with D - implying either that D invoked his right to silence or that D spoke during the interview but for some unknown reason, jurors were not permitted to hear what he said. Both implications are improper - a prosecutor may not make a statement that a jury may reasonably interpret as an invitation to draw an adverse inference from a D's silence.

In addition, two key witnesses vouched for C.W.'s credibility and invaded the province of the jury. As in Bradford v. State, 960 N.E.2d 871 (Ind. Ct. App. 2012), DCS investigator testified that after interviewing C.W., he substantiated the allegation, thereby violating Indiana Evidence Rule 704(b). Prosecutor reinforced this vouching testimony during closing argument, telling jurors that numerous other people believed C.W. and suggesting they should as well. When viewed cumulatively, instances of vouching testimony and prosecutorial misconduct constituted fundamental error. Held, conviction reversed and remanded for new trial.

RELATED CASES: Hamilton, 43 N.E.2d 628 (Ind. Ct. App. 2015) *aff'd* on rehearing, 49 N.E.3d 554, (admitting forensic interviewer's testimony that neither complaining witness showed any indicators of being coached was impermissible vouching testimony).

TITLE: Hovis v. State
INDEX NO.: D.15.b.3.
CITE: (10/31/83), Ind., 455 N.E.2d 577
SUBJECT: Misconduct by prosecutor - comment re testimony ordered stricken
HOLDING: Where prosecutor did not comment on testimony ordered stricken, no prosecutorial misconduct exists. Reference in final argument to facts not in evidence or to testimony ordered stricken is improper. Buffkin, (1914) 182 Ind. 204. Here, prosecutor asked witness if she had been warned not to testify. D's objections to testimony were *overruled* until prosecutor asked what person who threatened her had said; hearsay objection was sustained & answer was ordered stricken. In final argument, prosecutor referred only to testimony of witness that she had been threatened; he did not refer to specific remark ordered stricken. Held, no error. Prentice DISSENTS without opinion.

TITLE: Moore v. State
INDEX NO.: D.15.b.3.
CITE: (6-22-95), Ind., 652 N.E.2d 53
SUBJECT: Prosecutorial misconduct - violation of court order
HOLDING: Despite prosecutor's repeated use of word "murder" after being directed by Tr. Ct. to use word "homicide," misconduct did not have probable persuasive effect on jury that placed D in position of grave peril that warranted declaration of mistrial. D objected to prosecutor's several references to "murder," & Tr. Ct. subsequently ordered prosecutor to "stay away from the term." After third & fourth violation of Tr. Ct.'s instructions, D twice moved for mistrial outside presence of jury. Tr. Ct. denied both motions & admonished jury to disregard remarks of prosecutor. Ct. held that prosecutor engaged in misconduct in not complying with Tr. Ct.'s instructions. However, because there was ample evidence that murder had occurred, Tr. Ct. did not abuse its discretion in denying D's mistrial motions. Held, judgment affirmed.

TITLE: Riley v. State
INDEX NO.: D.15.b.3.
CITE: (2/27/86), Ind., 489 N.E.2d 58
SUBJECT: Misconduct by prosecutor (P) - motion in limine (MIL)
HOLDING: Despite MIL prohibiting P from mentioning prior drug use or sale by D (charged with delivery of cocaine), P repeatedly questioned snitch about prior drug-related contacts with D. Defense objections were repeatedly sustained, but motion for mistrial was denied. Ct. finds prosecution "persisted in its attack by harpoon." P's "obvious goal" was to reveal D's drug use as well as similar drug transactions, which is impermissible. Gaston, App., 451 N.E.2d 360 (card at O.4.d.1). Ct. distinguishes case from English, 485 N.E.2d 93 (vacating Ct. App. opinion which held P intentionally elicited evidence of prior offense by D). Here, P deliberately violated D's rights & violation prejudiced D. Held, conviction reversed; remanded for new trial.

RELATED CASES: Kinser, 501 N.E.2d 1041 (prosecutor's CX of D was improper in light of Tr. Ct.'s ruling on MIL, but admonishment cured any error); Stonebraker, 505 N.E.2d 55 (Crim L 719(4), 1171.1(3); "P's remark was quite simply, improper, & in the face of the numerous reminders not to refer to any statement of Sigler's, bordered on unethical conduct. Ind. R. Adm. & D. 1-102(A)(1) & 7-106(A) & (C);" Ct. affirms conviction, finding remedy (sustaining D's objection to P's remark) adequate; Dickson DISSENTS without opinion); King, 468 N.E.2d 226 (distinct possibility that MIL knowingly breached requires high level of assurance that admonition erased all residuum of prejudice; held, conviction affirmed); Rose, 437 N.E.2d 959 (Crim L 1170.5(6); P's questioning was not deliberate interjection of inadmissible evidence (unrelated drug charge vs. D); DISSENT by DeBruler contends pattern of questioning was probably deliberate violation of MIL); White, 272 N.E.2d 312 (deliberate interjection of inadmissible evidence of other crimes was misconduct by P; held, conviction reversed).

D. TRIAL

D.15. Misconduct by prosecutor

D.15.b.4. Improper Contact with Jurors/Witnesses/D

TITLE: Collins v. State
INDEX NO.: D.15.b.4.
CITE: (2nd Dist., 2-9-05), Ind. App., 822 N.E.2d 214
SUBJECT: Prosecutorial misconduct - threatening defense witness; harmless error
HOLDING: A prosecutor may not prevent or discourage a defense witness from testifying. Diggs v. State, 531 N.E.2d 461 (Ind. 1988). A fundamental element of due process of law is right of an accused to present witnesses in his own defense without fear of governmental retaliation. United States v. Hooks, 848 D.2d 785 (7th Cir. 1988). A prosecutor's warning of criminal charges during a personal interview with a witness improperly denies D the use of that witness's testimony regardless of prosecutor's good intentions. Diggs. Here, prosecutor admitted that he told one of defense witnesses that he would arrest her on three charges if she testified that guns found in house belonged to her. Prosecutor's threat led to witness's refusal to testify at trial. Although this type of threat violates Sixth Amendment right to call witnesses, error was harmless because witness's proffered testimony did not relate to possession of cocaine conviction & did not mention handgun found in bedroom. Moreover, regardless of guns' ownership, there was substantial evidence that D constructively possessed the guns. Held, denial of motion for mistrial affirmed.

RELATED CASES: Dorelle-Moore, 968 N.E.2d 287 (Ind. Ct. App. 2012) (any error in prosecutor discouraging witness from testifying was harmless where offer of proof was not made and no showing was made of how testimony would have been materially favorable to the defense).

TITLE: Greer v. State

INDEX NO.: D.15.b.4.

CITE: (12/13/2018), 115 NE 3d 1287 (Ind. Ct. App. 2018)

SUBJECT: Prosecutor's warning during deposition did not constitute misconduct or deny D the right to present witnesses on his behalf

HOLDING: During deposition of a 13 year-old complaining witness (C.W.) in child molesting case, prosecutor's warnings of "trouble" if C.W. failed to testify truthfully was not improper and did not constitute misconduct. C.W. radically changed his story two weeks before a trial in which he was expected to be one of the State's leading witnesses. The prosecutor was entitled to fully explore this change, including informing C.W. that there could be consequences for lying on the stand. Prosecutor had an objective, good-faith basis for believing that C.W. was lying, given his earlier statements to DCS that were corroborated by his mother's self-incriminating statements. Distinguishing Diggs v. State, 531 N.E.2d 461 (Ind. 1988), Court noted prosecutor did not explicitly threaten C.W. with prosecution for perjury and reminded him that he would be in trouble only if he did not tell the truth, not if he testified on D's behalf. His conduct struck Court "much more as a reasonable inquiry into why a prosecution witness had suddenly changed his story two weeks before trial than an attempt to browbeat him into not testifying for the defendant." Held, judgment affirmed.

TITLE: Matter of Winkler & Goode
INDEX NO.: D.15.b.4.
CITE: (09-13-05), Ind., 834 N.E.2d 85
SUBJECT: Prosecutorial misconduct - taking notes from defense counsel's table
HOLDING: Ct. suspended prosecutor & her chief deputy for 120 & 60 days, respectively, for their parts in surreptitiously taking notes from defense counsel's table during a hearing & then denying they did so. By their conduct, respondents infringed upon the D's right to communicate freely with his counsel by improperly seizing his deposition notes, which he had shared with his attorney. This conduct is contrary to requirements of Indiana Prof. Cond. R. 4.4, which prohibits a lawyer from obtaining evidence by means that violate the rights of a third person. Respondents also violated PCR 4.1(a), which provides that a lawyer shall not make a false statement of material fact to a third person. Winkler directly misled the D by stating that she did not know where the missing notes were located, while Goode failed to inform the D he had taken the notes & stood by without revealing the deception. This same conduct also violates PCR 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Finally, respondents' conduct was prejudicial to the administration of justice in violation of PCR 8.4(d). Ct. found hearing officer's recommendation for punishment as to Goode appropriate, but added 30 days of suspension to Winkler. Respondents' taking the notes concerned the Ct., but their attempts to conceal their misconduct were even more distressing. Ct. was troubled by Winkler's insistence that she had done nothing wrong. It is this lack of insight that led Ct. to conclude that a more significant sanction is necessary to ensure that the seriousness of Winkler's misconduct is impressed upon her, considering her 20 years of experience as an attorney. Held, suspensions ordered to commence on date to be decided after a temporary prosecuting attorney is arranged; Boehm, J., concurring, would dissent as to Goode's punishment as clear & convincing evidence was not produced to justify discipline more serious than public reprimand.

TITLE: Patch v. State
INDEX NO: D.15.b.4.
CITE: (7/25/2014), 13 N.E.3d 913 (Ind. Ct. App. 2014)
SUBJECT: Mistrial not warranted; prosecutor didn't violate separation order
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion for mistrial, as prosecutor did not commit misconduct by conferring with a State's witness during a recess before trial resumed and D cross-examined the witness. The State's witness also conferred with her counsel during the recess.

The witness separation order in effect during trial did not apply to the prosecutor or the witness's counsel. See Jiosa v. State, 755 N.E.2d 605, 608 (Ind. 2001). See also Perry v. Leeke, 488 U.S. 272, 284 (1989). Thus, there was no misconduct, and the Tr. Ct. properly denied the motion for mistrial. Held, judgment affirmed.

TITLE: State v. Aponte
INDEX NO.: D.15.b.4.
CITE: 738 A.2d 117 (Conn. 1999)
SUBJECT: Prosecutor Misconduct -- Giving Child Abuse Complainant Toy
HOLDING: Prosecutor in child abuse case infected trial with unfairness deprived D of due process by giving 4-year-old complainant stuffed toy to hold while she testified. Court's focus is on trial as whole, rather than simply conduct of prosecutor and intent behind it. Here, prosecutor's conduct in giving child stuffed toy and amusing child by pushing her around courthouse on wheeled chair, however well-intended, may have influenced young child's testimony. Prosecutor was further allowed to ask many leading questions, and defense was precluded from asking child who gave her toy and when. Evidence on one charge was weak, and Court reverses conviction on that charge.

D. TRIAL

D.15. Misconduct by prosecutor

D.15.b.5. Offering inadmissible evidence (see, also D.17)

TITLE: Benson v. State
INDEX NO.: D.15.b.5
CITE: (2-15-02), Ind., 762 N.E.2d 748
SUBJECT: Impeachment by unsubstantiated allegation - harmless error
HOLDING: Tr. Ct. erred in allowing State to confront its own witness with unsubstantiated suggestion that his reluctance to testify was due to threats received while witness was incarcerated. Over objection, Tr. Ct. also permitted State to present testimony of police detective that testifying inmates in some cases are subjected to abuse & physical assault by other inmates. *Citing* Cox v. State, 422 N.E.2d 357 (Ind. Ct. App. 1981), D argued that State's questioning constituted extremely prejudicial evidentiary harpoon because there was no evidence that D, who was also incarcerated in same jail, even knew that witness was also incarcerated there.

Ind. Professional Conduct Rule 3.4(e) prohibits lawyer from alluding at trial to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. Ct. noted that there was no evidence that witness received any threats whatsoever, which makes State's trial strategy particularly questionable. Prosecutor's questions & evidence encouraged jury to unfairly speculate, without any evidentiary support or foundation, that any unfavorable aspects of witness's testimony were attributable to his fear of inmate retribution. To condone this improper trial tactic would put at risk credibility of every witness who testifies during incarceration. Any party seeking to discredit such a witness would be able, without substantiation, to unfairly imply to jury that witness was being less than truthful. Despite State's improper tactics, Ct. declined to order new trial because these tactics did not affect D's substantial rights & were not inconsistent with substantial justice. Held, conviction affirmed.

RELATED CASES: Jerden, 37 N.E.3d 494 (Ind. Ct. App. 2015) (prosecutor's statements in closing argument about D's reckless driving did not result in fundamental error 1) as statements were fair characterizations of the evidence, 2) Tr. Ct. instructed the jury that closing statements weren't evidence, and 3) evidence of guilt was overwhelming).

TITLE: Collins v. State
INDEX NO.: D.15.b.5.
CITE: (7/2/84), Ind., 464 N.E.2d 1286
SUBJECT: Misconduct by prosecutor - misstating D's prior convictions
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial, made because prosecutor on cross-examination asked D if he had been convicted of assault & battery with attempt to commit robbery in 1957. D had been charged with but not convicted of this offense. Prior arrests not resulting in convictions are not admissible for impeachment. Jarvis, 441 N.E.2d 1. Tr. judge found prosecutor's question was not in bad faith & was based on record unclear as to disposition. D requested & judge gave admonition. Ct. finds admonition sufficient in this case. D had already recited long list of prior felony convictions on direct exam. D was not place in grave peril. Held, no error.

RELATED CASES: Null, App., 690 N.E.2d 758 (witness's improper mentioning of D's previous felony conviction did not require mistrial).

TITLE: Cox v. State
INDEX NO.: D.15.b.5.
CITE: (1st Dist., 10-11-06), Ind. App., 854 N.E.2d 1187
SUBJECT: Prosecutorial misconduct - referring to evidence outside record
HOLDING: On appeal of murder conviction, D claimed that during State's closing argument, prosecutor referred to evidence outside record when she put quotations made by police officer on a slide projector and read quotations to jury. Quotations were taken from a transcript of officer's interrogation of D, but transcript was never introduced into evidence at trial. Prosecutor had assured D that transcript had been admitted into evidence, but when it became apparent that transcript was not entered into evidence, she denied that she was referring to it in closing. D never objected to reading of quotations as being outside of the evidence, thus forfeited the issue for appeal.

Waiver notwithstanding, Court noted that officer testified at trial regarding substance of what D said during the interrogation. Thus, this evidence was before jury in one form, and D did not explain how she was prejudiced by prosecutor's use of slides even if they were taken from transcript which was not entered into evidence. Further, prosecutor's comments in this regard were directed toward conspiracy charge for which D was acquitted. Court noted: "[i]n no way, however, do we condone the prosecutor's erroneous and misleading assurances to defense counsel and the court that the transcript of the interrogation was in evidence." Held, judgment affirmed.

TITLE: Ex Parte Sparks

INDEX NO.: D.15.b.5

CITE: 730 So.2d 113 (Ala. 1998)

SUBJECT: Prosecutorial Misconduct -- Improper Question On Prior Conviction; Not Cured by Instruction

HOLDING: Alabama S. Ct. reverses DUI conviction on prosecutorial misconduct grounds, finding that prosecutor's improper question regarding D's prior conviction placed D in grave peril. Crossing D, who had offered innocent explanation for failure to pass field sobriety tests, prosecutor asked D if he recalled having been convicted of DUI on a prior occasion. Defense counsel objected and asked for mistrial, which was denied. Instead, Tr. Ct. gave jury curative instruction. Court of Criminal Appeals affirmed, *citing* state's string cite to cases holding that curative instruction is adequate in such a situation. Alabama S. Ct. begins its analysis by observing, "cases involving such improper questioning- -and a subsequent denial of the D's motion for a mistrial- -are all too common, as demonstrated by the number of such cases cited in the City's brief and in the Court of Criminal Appeals' memorandum affirming Sparks' convictions. Consequently, it appears to this Court that the current approach to these situations is inadequate insofar as it allows prosecutors a "free shot" at asking an improper question about a D's prior criminal record while providing little means to protect the D's right to a fair trial other than a mere corrective instruction to jurors, which is administered only after the D has been exposed to the prejudice caused by the prosecutor's questioning." The Court goes on to find that because the D had presented an innocent explanation tending to create a reasonable doubt of his guilt, and because the prior conviction was for another DUI, the prejudice to him was significant and required a mistrial.

TITLE: Henson v. State
INDEX NO.: D.15.b.5.
CITE: (4th Dist. 11/30/88), Ind. App., 530 N.E.2d 768
SUBJECT: Irrelevant evidence re D's adultery
HOLDING: Tr. Ct. erred in admitting rebuttal testimony concerning D's adulterous affairs. D was convicted of voluntary manslaughter in killing of her husband. D testified at trial. On cross-examination, although D properly objected that such questions exceeded scope of direct examination, state was allowed to question D re adulterous acts. Ct. App. notes error in this regard. Further, state was allowed to present rebuttal witnesses who testified about D's alleged adulterous acts. D argues on appeal that this testimony was improper as impeachment evidence because question of adulterous acts was collateral. Impeachment by matters collateral to case is prohibited. Smith, 455 N.E.2d 346; Gaston, App., 451 N.E.2d 360. Matter is collateral if party seeking to introduce it would not be entitled to prove it as part of case-in-chief. Id. Testimony re D's adulterous acts was not directly admissible in state's case-in-chief. Further, only purpose for introducing it was to prejudice jury. Use of improper evidence in this manner constitutes "evidentiary harpoon," & its admission is improper. Hooper, 443 N.E.2d 822. Held, reversed & remanded.

RELATED CASES: Camm, App., 812 N.E.2d 1127 (in murder prosecution, Tr. Ct. committed reversible error by allowing State to present extensive evidence of extramarital sexual activity by D; see full review at O.4.c.3).

TITLE: State v. Liberte and Sims
INDEX NO.: D.15.b.5.
CITE: 336 S.C. 648, 521 S.E.2d 744 (S.C. Ct. App. 1999)
SUBJECT: Prosecutorial Misconduct - Jury Argument
HOLDING: South Carolina Court of Appeals reverses conviction due to prosecutorial misconduct based largely on jury argument demeaning reasonable doubt standard. Prosecutor asked jury, in listening to reasonable doubt instruction, to consider whether it is "being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets." Court found that this argument encouraged jury to disregard most fundamental aspect of criminal justice system. This argument was bolstered by prosecutor's comments that he was "tired of seeing law enforcement officers attacked for no reason," and that he thought such attacks were "beneath contempt." Taken together, the Court found that this conduct may have prevented the jury from "fairly considering and evaluating the defense put forth by the D," and required reversal.

TITLE: United States v. Cunningham
INDEX NO.: D.15.b.5.
CITE: 462 F.3d 708 (7th Cir. 2006)
SUBJECT: All steps taken to get wiretap equals improper bolstering testimony
HOLDING: Seventh Circuit Court of Appeals held that a prosecution witness's account to jurors of the various bureaucratic hurdles that had to be overcome before a wiretap could be approved for a D's phone was irrelevant and improperly bolstered the prosecution's case against D. The effect of the testimony was to drive home to the jury that numerous law enforcement officers and agents believed the Ds were guilty. The witness testified that "there are many levels of approval that have to be gained in order to initiate an electronic surveillance or wire tap" that involve "outlining all the probable cause." He also testified that "once the United States Attorney's Office here has reviewed the affidavit and approved it at their level, it is then sent . . . to the Attorney General's office in Washington D.C. where . . . a panel of attorneys . . . again serve as another level of review." "The obvious purpose of the evidence was to show the jury there were several senior government attorneys and agents who all believed there was probable cause that the Ds were involved in a drug conspiracy, and, indirectly, that they all believed, in their professional judgment, the Ds were in fact committing drug-related crimes," the opinion stated. The Court found that the testimony went beyond what was necessary to establish a foundation for the recording. Nor was the testimony admissible simply because the legality of a wiretap warrant is always relevant. The testimony here belonged in a hearing on a suppression motion, not a trial. Lastly, the Court disagreed that the testimony was necessary to quell speculation among jurors as to the legality of the wiretaps as it was not convinced the jury would speculate in such a way. The Court reversed and remanded for a new trial. Among those arguing the case involving three separate Ds was Bill Marsh of the Indiana Federal Community Defenders in Indianapolis. Marsh represented David Hardin.

TITLE: Williams v. State
INDEX NO.: D.15.b.5.
CITE: (5/11/78), Ind., 375 N.E.2d 226
SUBJECT: Reference to polygraph
HOLDING: Tr. Ct. erred in refusing to grant mistrial after prosecutor asked State's witness if he had taken polygraph exam prior to making statement to police regarding D's involvement in crime. Granting of mistrial is within Tr. Ct.'s discretion & will not be disturbed unless D shows that his rights were substantially prejudiced so as to deny him fair trial. Cooper, 359 N.E.2d 532. Absent waiver or stipulation, results of polygraph examination are inadmissible in criminal prosecution. Tope, 362 N.E.2d 137. Here, witness was State's primary witness linking D to crime, & jury's determination of his credibility was essential to State's case. Though prosecutor stated that he knew polygraph evidence was inadmissible, he still asked witness if he had taken examination for purpose of reinforcing witness's credibility. State argued that no error was committed in asking witness if he had taken examination, because only admission of results are prohibited, not mere fact that examination was given. In rejecting this argument, Ct. noted that witness's failure to answer question in either affirmative or negative would not change prejudice caused by question. Held, convictions reversed.

RELATED CASES: Speer, 995 N.E.2d 1 (Ind. Ct. App. 2013) (prosecutor's asking witness if his plea agreement required him to take a polygraph if requested did not place D in grave peril where witness testified that he was never asked to take polygraph); Willoughby, 660 N.E.2d 570 (State did not implicitly refer, in any manner detectable to jury, to police attempts to have D submit to polygraph exam during prosecutor's cross-examination of D's mother regarding police officer's visit to D's home, during which officer had asked about polygraph exam).

D. TRIAL

D.15. Misconduct by prosecutor

D.15.c. Comments as to law/facts/evidence/sentence

TITLE: Bixler v. State
INDEX NO.: D.15.c.
CITE: (12/17/84), Ind., 471 N.E.2d 1093
SUBJECT: Misconduct by prosecutor - characterizing evidence
HOLDING: Where Tr. Ct. (1) requested attorneys to refrain from characterizing evidence & testimony & (2) instructed jury that comments of counsel are not/should not be considered evidence by jury (IN Pattern Jury Instr. 1.25 - criminal) & where prosecutor ceased his comments, reversal is not required. Here, prosecutor commented "if D doesn't want jury to see [report], just exclude it." D contends statement forced defense counsel to waive objection in order to prevent jury from feeling he was trying to hide something. Prosecutor made 2 additional, similar statements. D contends Tr. Ct. should have directly admonished prosecutor & instructed jury to disregard prosecutor's objectionable comments. D did not request direct jury admonishment or move for mistrial. Held, no error.

TITLE: Burris v. State
INDEX NO.: D.15.c.
CITE: (6/29/84), Ind., 465 N.E.2d 171
SUBJECT: Misconduct by prosecutor - state entitled to rebut defense inferences
HOLDING: Prosecutor's comment during penalty phase rebuttal that he had personal knowledge re why death penalty (DP) was being charged & that D should be used as example for rest of community did not constitute misconduct. Merritte, 438 N.E.2d 754. Here, D contends comment was calculated to inflame passions & prejudices of jury. It is improper for counsel to imply superior/inside knowledge of case. Kocher, 389 N.E.2d 18. Ct. finds prosecutor did not imply inside knowledge. Prosecutor had stated DP was charged because victim (of robbery) was executed with no cause. Defense counsel in closing argument charged prosecutor with "freakish application" of DP because accomplices had not faced DP. During rebuttal, state is entitled to respond to allegations/inferences by defense counsel, even when such arguments might otherwise be objectionable. Marshall, 438 N.E.2d 986. Held, no error.

TITLE: Commonwealth v. Pearce

INDEX NO.: D.15.c.

CITE: 43 Mass. App. 78, 681 N.E.2d 296 (Mass. App. Ct. 1997)

SUBJECT: Prosecutorial Misconduct -- Argument -- Vouching for Witness, Suggesting Knowledge of Facts Not in Evidence

HOLDING: In child molest case, prosecutor's statements in final argument that complainant told truth, did not manufacture allegations, was credible, and was not sexually active, were misconduct requiring reversal of D's conviction. It is improper for prosecutor to vouch for witnesses, and comments here went too far over the line. The Court was even more troubled by prosecutor's statement that complainant was not sexually active since no evidence had been presented on this point. In deciding to reverse, Court pointed out that misconduct were objected to, that they went to key issues, that Tr. Ct.'s conventional instructions did not go far enough to cure error, and that evidence against D was not particularly strong.

RELATED CASES: Neville, 976 N.E.2d 1252 (Ind. Ct. App. 2012) (it was improper, but not fundamental error, for prosecutor, in closing, to describe the D as gloating over the victim's dead body where there was no evidence supporting such).

TITLE: Cox v. State
INDEX NO.: D.15.c.
CITE: (5/19/86), Ind., 493 N.E.2d 151
SUBJECT: Misconduct by prosecutor - misstating law
HOLDING: Prosecutor's misstatement of law did not result in D being placed in grave peril. Here, prosecutor incorrectly stated during closing argument that statements of 2 witnesses could be used as substantive evidence, rather than simply for impeachment. Ct. agrees statement was incorrect; however, in light of standard of review set forth in Maldonado, 355 N.E.2d 843, Ct. finds error is not reversible. Held, conviction affirmed.

RELATED CASES: Hollowell, App., 707 N.E.2d 1014 (prosecutor's alleged mis-statement did not have persuasive effect on jury's verdict); Timmons, 500 N.E.2d 1212 (prosecutor's statement during voir dire that presumption of innocence (POI) "is merely procedural & does not mean that D is innocent" minimized & mischaracterized POI & thus constituted misconduct; however, Ct. finds that because comment was solitary reference & because Tr. Ct. gave correct instruction, remark did not deprive D of fair trial).

TITLE: Deaton v. State
INDEX NO.: D.15.c.
CITE: (11/27/2013), 999 N.E.2d 452 (Ind. Ct. App. 2013)
SUBJECT: Prosecutor's voir dire on "CSI effect" & closing argument was not misconduct
HOLDING: In child molesting prosecution, D failed to demonstrate fundamental error in State's comments during voir dire regarding the "CSI effect" and the State's comments during closing arguments regarding the evidence presented. During voir dire, the prosecutor asked whether any of the jurors would expect the State to present fingerprint or DNA evidence in a case like this and whether anyone would "hold [the State] to a CSI standard." D argued that the State sought to reduce its burden by eliminating any negative inferences to be drawn from any lack of evidence on the State's side. D failed to object, and failed to demonstrate that the State's comments made a fair trial impossible.

During closing argument, the prosecutor stated that the complaining witness's testimony alone was sufficient to convict D, and that no other evidence was necessary to corroborate her testimony. Court held that this comment was a correct statement of law, not prosecutorial misconduct. In so holding, Court distinguished Gaby v. State, 949 N.E.2d 870 (Ind. Ct. App. 2011) and Ryan v. State, 992 N.E.2d 776 (Ind. Ct. App. 2013), *trans. granted*, which involved prosecutorial misconduct because of statements during closing arguments vouching for the victim. The jury was reminded multiple times of the State's burden of proof and that D was innocent until proven guilty. These instructions and reminders are sufficient to cure any allegedly improper comments. Held, judgment affirmed.

TITLE: Keller v. State
INDEX NO.: D.15.c.
CITE: (1st Dist. 8/12/85), Ind. App., 481 N.E.2d 1109
SUBJECT: Misconduct by prosecutor - argument upon analysis of evidence/personal knowledge
HOLDING: Prosecutor may summarize & analyze evidence & make related statements but may not infer to jury he/she has some undisclosed evidence pointing toward D's guilt. Merritte, 438 N.E.2d 754. See also DR 7-106(C)(4). Here, prosecutor argued he felt jury could draw only one conclusion from evidence presented. Ct. finds prosecutor based his comments on evidence, consistent with DR 7-106(C)(4). Held, no error.

RELATED CASES: Evans 497 N.E.2d 919 (Crim L 719(3); prosecutor violated DR 7-106(C)(3) during final argument by imparting his personal knowledge of evidence not admitted at trial (D's initial statement); however, because defense counsel failed to request admonition/mistrial, & in light of strength of evidence against D, Ct. finds error is not reversible).

TITLE: Norris v. State
INDEX NO.: D.15.c.
CITE: (11/14/2018), 113 N.E.3d 1245 (Ind. Ct. App. 2018)
SUBJECT: Prosecutor's improper argument was harmless error
HOLDING: In trial for unlawful possession of a firearm by a serious violent felon, it was improper for prosecutor to tell the jury during closing argument that "there's a gun that [D] is not allowed to possess - that is unlawful for him to have." Misconduct was adequately addressed by Tr. Ct.'s immediate admonishment to the jury, and D failed to show that the prosecutor's statements placed him in grave peril. Regarding prosecutor's statement in rebuttal that D "was not supposed to have a gun," Court found that D invited any error, as statement was designed to counter D's closing argument that he had motives to flee other than the crime charged. In light of jury instructions, admonishment and overall strength of the State's case, error was harmless.

Court also vacated D's misdemeanor resisting law enforcement conviction, holding that his actions of fleeing by a vehicle and then on foot constitute one continuous act of resisting law enforcement. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: People v. Estrada

INDEX NO.: D.15.c.

CITE: 63 Cal. App. 4th 1090 (Cal. Ct. App. 1998)

SUBJECT: Misconduct of Co-D's Counsel

HOLDING: Improper conduct of counsel for jointly tried co-D rendered D's trial fundamentally unfair and denied him due process. Tr. Ct. had denied co-D's severance motion. At joint trial, counsel for co-D made improper references to D's prior arrests and convictions, suggested that suppressed evidence pointed to D's guilt, suggested that D's refusal to testify at co-D's preliminary hearing was relevant to credibility of his trial testimony, and suggested that D's own attorney did not believe him. California Court of Appeals likens this conduct to misconduct by prosecutor, and finds that it was so egregious as to have rendered D's trial fundamentally unfair.

TITLE: Pritcher v. State

INDEX NO.: D.15.c.

CITE: (04/20/92), Ind. Ct. App., 208 N.E.3d 656

SUBJECT: Prosecutor committed misconduct during closing argument, but it did not rise to fundamental error

HOLDING Defendant was convicted of murder after beating his 7-year-old son, L.P., resulting in the child's death. He was sentenced to the maximum sentence of 65 years. In closing argument, the prosecutor argued "He doesn't have to know that when he hits that kid on the back of the head it's gonna kill him . . . . He doesn't have to know this is gonna result in this death. He has to know . . . what he's doing. And then the other element is, that did result in his death. He doesn't have to know that that's what's gonna happen." Defendant argued that in misstating the law, the prosecutor committed misconduct that amounted to fundamental error. Rejecting the State's argument to the contrary, the Court of Appeals held it was "clear" that the prosecutor misstated the law by arguing that the jury need find only that Defendant was aware of a high probability that he was beating L.P., not that he was aware of a high probability that he would kill L.P. But to convict Defendant of murder, the State had to prove that he was aware of a high probability that his conduct would kill L.P. However, given the proper jury instructions regarding the State's burden of proof and the elements of the crime, the Court of Appeals concluded that the misstatements did not amount to fundamental error. The Court rejected an argument that the State's evidence was insufficient to prove Defendant knowingly killed L.P. There was testimony that the injuries were caused by repeated, forceful blows to the boy's head and Defendant, who was 6'2" and weighed over 240 lbs, admitted to "whipping [L.P.'s] ass." The nature and severity of the child's injuries led to a reasonable inference that Defendant was aware of a high probability his beating might kill L.P. Finally, the Court held that Defendant's maximum sentence for murder was not inappropriate given the nature of the offense and character of the offender. The Court found no compelling evidence that would portray the nature of the offense in a positive light. Defendant's juvenile history of sexual battery and criminal confinement reflected poorly on his character. Defendant's girlfriend testified that he had punched and choked her several times. Considering the brutal and heinous nature of the offense, lack of good character, and giving due deference to the trial court's sentencing decision, a sixty-five-year sentence is not inappropriate. Held: judgment affirmed.

TITLE: Sailors v. State
INDEX NO.: D.15.c.
CITE: (2d Dist. 06/08/92), Ind. App., 593 N.E.2d 202
SUBJECT: Improper comment on grand jury by prosecutor
HOLDING: Prosecutor's remarks during closing that case had been investigated, that grand jury had already returned indictment, & that trial jury was actually second jury to consider matter, denied D right to fair trial.

Ct. App. found remarks highly prejudicial to D. Ind. has condemned attempts to minimize seriousness of jurors' tasks by informing them of suspendability of sentence, D's eligibility for parole, or possibility of reversal on appeal. Dailey, 406 N.E.2d 1172; Kelley, 3 N.E.2d 65; Davis, 161 N.E. 375; Hadley, App., 332 N.E.2d 269.

Prosecutor's comments clearly "exhorted" jury to convict D because others thought he was guilty. Because D was convicted on basis of inferences drawn solely from circumstantial evidence, even though statements were not objected to, reversal was mandated because of fundamental error.

RELATED CASES: Baer, 866 N.E.2d 752 habeas relief granted, Baer v. Neal, 2018 U.S. App. Lexis 693 (9th Cir. 2018) (Ct. disapproves of Tr. Ct. or prosecutor gratuitously informing jury or prospective jurors that varying appellate consequences may attach to different verdict choices before the jury).

TITLE: Vasquez v. State

INDEX NO.: D.15.c.

CITE: (07/30/21), Ind. Ct. App., ___ N.E.3d ____

SUBJECT: Prosecutor's improper closing argument did not require reversal -- arguing appellate standard of review for sufficiency claims

HOLDING: In child molesting prosecution, trial court erred in allowing the prosecutor to argue an appellate standard of review in closing argument. Trial court allowed the prosecutor to construe the evidence in light of legal precedent holding that the uncorroborated testimony of a child victim is sufficient to support a child molesting conviction. Defendant argued the prosecutor's argument created the real risk of confusing the jury into thinking they do not have the ability to question the complaining witnesses' credibility and reject it. Court agreed with Defendant that permitting this argument to continue was improper. The prosecutor's argument repeatedly used the term "uncorroborated," which may confuse or mislead the jury. See Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003). Moreover, the argument focused the jury away from how the evidence met the elements required for conviction and toward the appellate standard, which Ludy made clear "is irrelevant to a jury's function as fact-finder." While inappropriate, the argument did not create reversible error because the trial court's instructions made clear to the jury that the court's instructions were its best source for controlling law and that counsels' arguments were not evidence. Thus, the prosecutor's improper argument was harmless error.

The Court of Appeals also found no abuse of discretion in denying Defendant's motion to sever the counts involving one victim from those involving the second victim. Defendant exploited his position as a trusted member of his girlfriend's household to sexually abuse young female family members who stayed in the house, which actions resulted in overlapping investigations. Thus, the trial court properly denied Defendant's motion for severance as of right under Ind. Code 35-34-1-11. Although there were ten charges, eight of them involved one victim and only two of them involved the other. The evidence regarding crimes against the second victim was straightforward, as there was only one incident, which made the evidence as to each victim easily distinguishable.

D. TRIAL

D.15. Misconduct by prosecutor

D.15.d. Comments as to witnesses

TITLE: Commonwealth v. Pearce

INDEX NO.: D.15.d.

CITE: 43 Mass. App. 78, 681 N.E.2d 296 (Mass. App. Ct. 1997)

SUBJECT: Prosecutorial Misconduct -- Argument -- Vouching for Witness, Suggesting Knowledge of Facts Not in Evidence

HOLDING: In child molest case, prosecutor's statements in final argument that complainant told truth, did not manufacture allegations, was credible, and was not sexually active, were misconduct requiring reversal of D's conviction. It is improper for prosecutor to vouch for witnesses, and comments here went too far over the line. The Court was even more troubled by prosecutor's statement that complainant was not sexually active, since no evidence had been presented on this point. In deciding to reverse, Court pointed out that misconduct were objected to, that they went to key issues, that Tr. Ct.'s conventional instructions did not go far enough to cure error, and that evidence against D was not particularly strong.

TITLE: Farmer v. State
INDEX NO.: D.15.d.
CITE: (1st Dist. 8/1/85), Ind., 481 N.E.2d 154
SUBJECT: Misconduct by prosecutor - comments re witnesses/credibility
HOLDING: Prosecutor's statement in rebuttal argument that jury should give greater weight to testimony of state's witnesses constituted misconduct. However, Ct. finds D did not suffer grave peril as result. Tr. Ct. admonished jury to disregard statement. Held, conviction affirmed.

RELATED CASES: Quarles, 493 N.E.2d 1247 (Crim L 720(5); prosecutor may comment on credibility of witnesses as long as assertion is based on evidence, *citing* Beard, 428 N.E.2d 772 & Hubbard, 313 N.E.2d 346; Ct. finds prosecutor's comments paralleled witness' testimony that she was drug addict & became informant in order to help other addicts; as such, comments were "clearly permissible").

TITLE: Flowers v. State
INDEX NO.: D.15.d.
CITE: (8/2/85), 481 N.E.2d 100 (Ind. 1985)
SUBJECT: Misconduct by prosecutor - comment re D's failure to call witnesses
HOLDING: Prosecutor's question on cross-exam of D whether he intended to subpoena the people he said he had been with on day crime occurred did not constitute comment on D's failure to provide information explaining his conduct. See Williams, 426 N.E.2d 662 (D has constitutional & statutory right against such comments). Here, Ct. believes jury would regard question as prosecutor's assertion that D's testimony should be given little weight, since D chose not to corroborate it. Any danger that jury would interpret question as placing burden of proof on D would be cured by instructions. Held, no error.

RELATED CASES: Harrison, 901 N.E.2d 635 (Ind. Ct. App. 2009) (prosecutor's argument drawing attention to the fact that D did not call certain witnesses who could corroborate his story was misconduct; however, error was harmless in light of overwhelming evidence); Pettiford, 506 N.E.2d 1088 (Crim L 1171.1(5); although prosecutor's comment "where is [alibi witness]" was improper, in light of preliminary & final instructions & evidence (including failure of D's evidence to establish alibi), Ct. finds error harmless).

TITLE: Hossman v. State
INDEX NO: D.15.d.
CITE: (4th Dist. 2/12/85), Ind. App., 473 N.E.2d 1059
SUBJECT: Misconduct by prosecutor - comments re witnesses/credibility
HOLDING: Prosecution's "fabricated defense" theme put D in position of grave peril. Even had D not objected to final argument remarks, Ct. would view them as fundamental error & reverse. [Citations omitted.] Here, prosecutor's comments during opening statement re personal dealings with witnesses, that they were "burglars & thieves," "Ct. room regulars" & witnesses in prior Ct. actions were irrelevant because comments referred to inadmissible evidence/prosecutor's personal dealings with witnesses. Comments violated DR 7-106(C)(1). Prosecutor called all of D's witnesses in case-in-chief. Prosecutor may not impeach his own witnesses absent showing of hostility/surprise/indispensable witness. Comments also violated DR 7-106(C)(4) (prosecutor may not assert personal opinion re witness' credibility which suggests personal knowledge of facts not before jury). [Citations omitted.] D objected to prosecutor's comments. Immediately before recess, prosecutor stated he wished to proceed with witnesses before anyone had opportunity to talk with them. Tr. Ct. immediately recessed & D had no opportunity to object; thus, issue is not waived. TR 46; Long, App., 448 N.E.2d 1103. Nothing appears in record to justify comment, which violated DR 7-106(C)(1). During final argument, prosecutor ignored Tr. Ct.'s repeated rulings & argued that defense counsel requested witnesses to lie; such argument was not supported by evidence. Held, D did not receive fair trial; reversed & remanded.

RELATED CASES: Walker, 988 N.E.2d 341 (Ind. Ct. App. 2013) (prosecutor's acknowledgment of victim's father's emotional distress was not an endorsement of father's truthfulness); Gaby, 949 N.E.2d 870 (Ind. Ct. App. 2011) (prosecutor’s argument that she was “confident” that the jury “would come to the same conclusion” that she and the detectives had come to, that “I cannot and would not bring charges that I believe were false” and that “I can tell you with a guilty verdict on this case I will be able to sleep fine tonight. Just fine. In fact, better than fine. You will be able to also” were impermissible vouching; the cumulative effect of the misconduct and an evidentiary error required reversal); Birari, 968 N.E.2d 827 (Ind. Ct. App. 2012) (prosecutor improperly informed jury that CW was telling the truth and improperly intimated that D wanted two-year-old to watch him having sex with CW; however, Ct. could not say that such conduct resulted in fundamental error).

TITLE: State v. Mussey
INDEX NO.: D.15.d.
CITE: 153 N.H. 272, 893 A. 2d 701 (N.H. 2006)
SUBJECT: Prosecutorial Argument That Officers Would Be Fired for Lying was Improper
HOLDING: The New Hampshire Supreme Court has held that a prosecutor who argued to the jury that if it was determined that the police officers who testified were determined to have lied and conspired to convict an innocent man, their careers would be over. The state argued that the Defense counsel invited the error during his own jury argument when he argued that the police officer witnesses "think it is okay to bend the rules to get a conviction... If you're not a good liar, you're not a good detective." The Court found that the prosecutor could have countered this argument by arguing that the officers had no motive to lie, but that he went too far by not only vouching for the officers' credibility, but encouraging jurors to speculate on the effect the verdict might have on the officers' careers.

TITLE: U.S. v. Weatherspoon
INDEX NO.: D.15.d.
CITE: 406 F.3d 636 (9th Cir. 2005), as amended 410 F.3d 1142 (9th Cir. 2005)
SUBJECT: Improper Vouching - Officers' Testimony
HOLDING: Prosecutor who argued to jury that police officers who testified for state risked losing their jobs if they lied committed misconduct requiring reversal. See also State v. Spain, 872 A.2d 25 (2005).

D. TRIAL

D.15. Misconduct by prosecutor

D.15.e. Comments as to D/defense/defense attorney/D's family

TITLE: Bardonner v. State
INDEX NO.: D.15.e.
CITE: (4th Dist. 03/12/92), Ind. App., 587 N.E.2d 1353
SUBJECT: Misconduct by prosecutor - comments about defense counsel
HOLDING: Reversible error for prosecutor to make comments during voir dire, interspersed with quotes from Justice White's dissent in US v. Wade, (1967), 388 U.S. 218, regarding various roles of prosecutor & defense counsel. Such comments were not accurate reflections of law & served only to prejudice D. During voir dire, after receiving affirmative response from juror as to whether both sides in criminal trial have obligation to seek truth, prosecutor made following comment: "Does everybody feel that way? Both sides in this courtroom have an obligation to seek the truth. How many people would be surprised if I told you that wasn't the law?..."

Prosecutor went on to quote from Wade dissent, adding comments about prosecutor's duty to seek only truth, & concluded with following comments regarding defense counsel from Wade dissent: "If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course... Undoubtedly, there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, & impeach him if he can, even if he thinks the witness is telling the truth...we countenance or require conduct which in many instances has little, if any, relation to the search for truth." *citing* Wade, at 257, 258.

Defense counsel moved that statements be stricken & moved for mistrial. Tr. Ct. denied both, & defense attempted to overcome statement by engaging in discussion with jurors about his role. After 6 jurors were stricken, new prospective jurors who had been in courtroom during statements were seated, but judge did not question them about whether they had heard earlier statements. At close of State's case-in-chief, D renewed motion for mistrial, which was denied. After finding issue was not waived because of renewed motion at end of State's case, despite fact first motion should have been to admonish & possibly to discharge jury, Ct. went on to find that D had been placed in position of grave peril.

Ct. distinguished case from Hubbard, 262 Ind. 176, 313 N.E.2d 346, where prosecutor's use of quotes from Wade during closing argument was found not to be reversible error, by noting that in Hubbard, the statements came at the close of the case when jurors had also received evidence without prejudice, not during voir dire. Comments were improper & did not accurately state law, Thornton, 38 N.J. 380, 185 A.2d 9, Pierce, 34 Md. App. 654, 369 A.2d 140, People v. Pic'l & Martin, 114 Cal. App.3d 824, 171 Cal. Rptr. 106.

Ct. also noted importance of voir dire in assuring 6th Amend. right to impartial jury, & that misinformation received during voir dire can contaminate reception of evidence to extent final charge would be ineffective in removing contamination. Hall, 497 N.E.2d 916. Prosecutor was likely aware that certain testimony of state's witnesses was subject to attempts to impeach, & therefore remarks were

especially significant. Comments also interfered with both D's right to confrontation & cross-examination, & with right to effective assistance of counsel. Held, conviction reversed & remanded for new trial, Chezem, J., DISSENTING. Transfer denied. But compare Roller, App., 602 N.E.2d 165.

RELATED CASES: Sanders, App., 724 N.E.2d 1127 (Prosecutor's description of her position as "ethic minister of justice" constituted prosecutorial misconduct because it conveyed to jury that seeking justice was her paramount concern, & by negative implication, conveyed idea that defense counsel's job was something else altogether); Coy, 720 N.E.2d 370 (although prosecutor referred to prosecutors as “ministers of justice” as did prosecutor in Bardonner, prosecutor did not degrade role of defense attorney as in Bardonner).

TITLE: Brumfield v. State
INDEX NO.: D.15.e.
CITE: (12/7/82), Ind., 442 N.E.2d 973
SUBJECT: Misconduct by prosecutor - summation; reference to D's testimony
HOLDING: In final argument it is proper to state & discuss evidence & all reasonable inferences which may be drawn therefrom so long as prosecutor does not imply personal knowledge independent of the evidence. Barnes, 435 N.E.2d 235. Here, D moved for mistrial alleging that prosecutor made some improper statements about D's testimony. Ct. finds comments did not place D in position of "grave peril." Maldonado, 355 N.E.2d 843. Held, no error in denial of mistrial. See Roose, 449 N.E.2d 594 for examples of inferences approved by Ct.

TITLE: Darden v. Wainwright
INDEX NO.: D.15.e.
CITE: 477 U.S.168 (1986)
SUBJECT: Prosecutorial misconduct - closing argument
HOLDING: Relevant question in analyzing allegation of prosecutorial misconduct in closing argument is whether prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo (1974), 416 U.S. 637, 94 S. Ct. 1868, 40 L.Ed.2d 431. Here, prosecutor argued at close of guilt-innocence stage of a capital trial that part of blame for crime was on DOC because D was on weekend furlough when crime occurred & that imposition of death penalty was only guarantee against future similar act. Other comments referred to D as an "animal." Still other "offensive comments reflect[ed] an emotional reaction to the case" & prosecutor's wish that D would commit suicide or that victims had killed him. Court notes that prosecutor's argument "deserves the condemnation that it has received from every court to review it." However, much of argument was invited by or responsive to opening summation by D. Court instructed jury that their decision was to be made on basis of evidence alone, & that arguments of counsel were not evidence. Additionally, weight of evidence against D was overwhelming & defense counsel effectively turned these statements against prosecutor in rebuttal. Held, D's trial was not rendered fundamentally unfair by objectionable comments. Burger CONCURS; Brennan DISSENTS; Blackmun, joined by Brennan, Marshall & Stevens, DISSENTS.

TITLE: Gaines v. State
INDEX NO.: D.15.e.
CITE: (4th Dist. 12/12/83), Ind. App., 456 N.E.2d 1058
SUBJECT: Misconduct by prosecutor - comment re D's family
HOLDING: Prosecutor's remark in response to objection during cross-exam of D that he was trying to show "entire family is engaged" in cocaine sales was improper; however, D was not placed in grave peril because cross-exam continued & D denied other family members were involved. Tr. Ct. did not err in denying D's mistrial motion. Held, conviction affirmed.

RELATED CASES: Goodman, 479 N.E.2d 513 (Crim L 726; no error in reference to alibi testimony of family members as "conspiracy").

TITLE: Harris v. State
INDEX NO.: D.15.e.
CITE: (12-16-94), Ind., 644 N.E.2d 552
SUBJECT: Prosecutor's comments during rebuttal argument permissible
HOLDING: Prosecutor's remarks during rebuttal argument fell within normal ambit of prosecutorial advocacy. During final argument, D claimed that State really had no case against him but was merely inducing witness to lie about D's participation in robbery by offering favorable "deal" in exchange for testimony. In response, prosecutor argued that State would not bring charges against an innocent man, & made reference to fact that after his arrest in facing truth of guilt, D "did not have gumption to do what [witness] did & that's to tell the truth." This was not improper comment on D's failure to testify. Prosecutor may respond to allegations & inferences raised by defense even if prosecutor's response would be otherwise objectionable, Lopez v. State, Ind., 527 N.E.2d 1119. Held, conviction affirmed.

RELATED CASES: Hand, App., 863 N.E.2d 386 (D opened door to prosecutor's comments of D's failure to testify by arguing D need not testify because he already told his story through out-of-court statements).

TITLE: Hilliard v. State
INDEX NO.: D.15.e.
CITE: (3rd Dist., 03-08-93), Ind. App., 609 N.E.2d 1167
SUBJECT: Prosecutor's closing comments did not require reversal
HOLDING: Comments during prosecutor's closing rebuttal concerning D's silence when first confronted by police, although possibly ill-advised, did not require reversal because fifth amend. isn't violated by use of prearrest silence to impeach D's credibility, Jenkins v. Anderson, (1980), 447 U.S. 231, 100 S. Ct. 2124, 65 L.Ed.2d 84. Following comments were apparently addressed to D's behavior when officers approached him on his porch prior to his arrest: Course you heard Mr. Cowen ask the officers too who initially detained Mitchell Hilliard, `Did he say anything to you?' No. If he'd just been on a front porch & -- wouldn't you be saying, 'It's not me,' saying something? But he just stood there, kind of makes you wonder. But now today, it's August, he comes in here, tells us somebody must have borrowed his jacket. Who's got a reason to lie here? Ct. found that while comments may have been ill-advised, they were not in violation of fifth amend. right to silence because D was not under arrest at time of silence. Held, conviction affirmed.

TITLE: Johnson v. State
INDEX NO.: D.15.e.
CITE: (4th Dist. 9/15/83), Ind. App., 453 N.E.2d 365
SUBJECT: Misconduct by prosecutor - comment re defense counsel
HOLDING: Prosecutor's improper summation probably had a persuasive effect on jurors & placed D in position of grave peril where evidence of specific intent supporting attempted rape conviction was close & Tr. Ct. did not admonish jury to disregard improper statements. Adler, 175 N.E.2d 358; Flynn, App., 379 N.E.2d 548. Prosecutor's statement that defense attorney's job is to "get his client off" by bringing out "insignificant facts" & "legal technicalities" was irrelevant to issues & should not be allowed, Craig, 370 N.E.2d 880. Prosecutor made other improper comments (implying he possessed evidence of guilt not known to jury & seeking to inflame passions/prejudices of jury). Once comments are deemed improper, question remains whether misconduct placed D in position of grave peril. D need not show he/she would have been acquitted absent improper argument, White, 272 N.E.2d 312. Reversal is required where evidence is close & Ct. does not admonish jury.

RELATED CASES: Paschall, App., 825 N.E.2d 923 (although prosecutor's conduct was inappropriate, unprofessional, objectionable & potentially sanctionable, his misconduct did not place D in a position of grave peril to warrant reversal); Donnegan, App., 809 N.E.2d 966 (prosecutor's remark that D's entire defense was "smoke & mirrors" was not at all similar to remark in Johnson, but concerned quality of D's defense & was permissible comment on evidence); Nevel, App., 818 N.E.2d 1 (on a case-by-case basis, a prosecutor may characterize defense arguments as "smoke & mirrors" if warranted, but such a blanket indictment of defense techniques was improper here & in a more "marginal" case might warrant reversal); Richardson, App., 794 N.E.2d 506 (prosecutor's statement during voir dire that defense attorney's "job is to do whatever it takes to get you to believe he didn't do it" was not prosecutorial misconduct in context of defense counsel's statements to jury about role of defense attorney); Brown, 746 N.E.2d 63 (prosecutor was entitled to respond to defense counsel's accusation in closing argument that State had overlooked or even covered up evidence that could vindicate D); Miller, 623 N.E.2d 403 (Ct. disapproved of prosecutor's reading from U.S. v. Wade (1967), 388 U.S. 218. While finding prosecutor's comments, taken as whole, did not constitute prosecutorial misconduct, & distinguishing Bardonner, App., 587 N.E.2d 1353, where error was found in reading from case on voir dire, Ct. appeared to disapprove of reading in any circumstance); Abercrombie, 478 N.E.2d 1236 (no error in prosecutor reading excerpt from US v. Wade, re role of defense counsel); Stewart, 474 N.E.2d 1010 (disparaging comments re counsel violated requirement of fairness & courtesy to opposing counsel; however, in light of relative innocuousness/infrequency/general competent defense presented, probable persuasive effect of conduct on jury's decision was negligible).

TITLE: Ludack v. State
INDEX NO.: D.15.e.
CITE: (04-25-12), 967 N.E.2d 41 (Ind. Ct. App. 2012)
SUBJECT: Fifth Amendment right against self-incrimination not violated where D opened door
HOLDING: Detective's comment that D neither admitted nor denied allegations of child molesting and "just asked to stop speaking" did not violate Fifth Amendment right against compulsory self-incrimination resulting in fundamental error. Because it was defense counsel who first questioned the detective as to what D did not say during the interview, no error occurred as a result of the prosecutor's follow-up questions. Moreover, D opened the door for prosecutor to question detective as to scope of interview by first asking him on cross-examination whether D admitted to molesting his girlfriend's daughter, thus State's evidence was a fair response to the evidence elicited by D.

Thus, State may introduce evidence that might otherwise be a violation of the Ds' Fifth Amendment right against self-incrimination if the State's evidence is a fair response to evidence elicited by D. To open the door, the D's evidence must use his or her pre-trial silence as probative of the D's innocence and leave the trier of fact with a false or misleading impression. Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004). Held, judgment affirmed.

RELATED CASES: Cameron, 22 N.E.3d 588 (Ind. Ct. App. 2014) (State did not violate D's 5th amendment right against self-incrimination by eliciting testimony that D didn't answer arresting officer's question about whether victim stabbed him; D opened door to State's testimony by making allegation unsupported by evidence that victim stabbed him; State was permitted to respond to correct misperception).

TITLE: Miles v. State
INDEX NO.: D.15.e.
CITE: (2/8/2016), 51 N.E.3d 305 (Ind. Ct. App. 2016)
SUBJECT: Closing argument error not fundamental
HOLDING: In murder prosecution, it was not fundamental error when prosecutor presented a slide during closing argument suggesting D had not presented any evidence against his conviction and that he was obligated to present proof of his innocence. As soon as the slide appeared before the jury, trial court stopped the State's argument and, after conferring with both attorneys, admonished the jury that D did not have the burden to prove his innocence or explain anything. D did not request a mistrial or an additional admonition. Although some of the jurors may have seen the slide's contents, the prosecutor never read the slide aloud to the jury. In light of the jury instructions, the admonition and the abundant evidence of guilt, D did not demonstrate the slide had "such an undeniable and substantial effect on the jury's decision that a fair trial was impossible." Held, judgment affirmed.

TITLE: Mitchell v. State
INDEX NO.: D.15.e.
CITE: (11/23/83), Ind., 455 N.E.2d 1131
SUBJECT: Misconduct by prosecutor (P) - comment re D's failure to testify (FTT)
HOLDING: P erred in commenting during final argument on D's FTT; error may have been fundamental but for D's failure to object & his lengthy references during final re his FTT. Jones, 372 N.E.2d 1182. Thereafter, in rebuttal, P made additional references to D's FTT. Here, D failed to preserve error or to raise error in direct appeal. Ct. employs fundamental error doctrine to review denial of PCR petition. Ind. Code 35-1-31-3 (repealed, now Ind. Code 35-37-4-1) prohibited counsel from commenting on D's FTT. Ct. notes P's error was cured by preliminary & final instructions. Ct. concludes D's argument re prejudice resulting from P's comments is "clear & convincing," but misplaced in this case. Held, denial of PCR affirmed. DeBruler CONCURS IN RESULT without opinion.

RELATED CASES: Price, App., 656 N.E.2d 860 (closing statement was merely summary of evidence, not comment on D's failure to testify); Hopkins, 582 N.E.2d 345 (statement that "`it is certainly worthy of comment that you never heard any testimony during this trial that the D was anywhere else' than the victim's home when he was murdered," was not impingement on D's right not to testify, because it focused not on absence of testimony from D, but on evidence from other witnesses to whom D made admissions, Krahulik, J., dissenting); Harper, 474 N.E.2d 508 (held P's statement (set forth in opinion) was "close to line of impropriety" but not error); Parsons, 472 N.E.2d 915 (held, P's comment during voir dire - "would it bother you if 1 of 2 people involved in rape did not testify" was not a comment on D's FTT); Didio, 471 N.E.2d 1117 (held, D waived any error by failing to object; case contains discussion of Williams, 426 N.E.2d 662 (reversal not required because D failed to request admonition), Rowley, 285 N.E.2d 646 (sets forth test for determining impropriety & reverses conviction based upon P's comment)); Mayes, 467 N.E.2d 1189 (Crim L 721 (3,5); P's comment during closing argument of habitual phase that D "is not precluded from presenting evidence" was not comment on D's silence; denial of mistrial affirmed); Dack, App., 479 N.E.2d 96 (Crim L 721(3); P's comment, set forth in opinion, re pro se D's FTT, constituted fundamental error; held, conviction reversed); Brooks, 598 N.E.2d 519 (Tr. Ct. erred in denying D's objection to deputy prosecutor's remarks during closing argument that "[t]he D chose to exercise his Fifth Amendment rights which he has an absolute right to do. The only words that we have heard from the D throughout this trial. . . ." Comments were direct reference to D's exercise of his constitutional right to refuse to testify, & therefore were clearly erroneous).

TITLE: Moore v. State
INDEX NO.: D.15.e.
CITE: (7-18-96), Ind., 669 N.E.2d 733
SUBJECT: Prosecutor's comments re D's failure to testify
HOLDING: Prosecutor's remark which literally & directly referred to D's silence was not improper, & even if it were, error was harmless. In response to D's criticism that State's evidence was imprecise, prosecutor remarked: ".[D] didn't choose to testify which is his right, & he certainly doesn't, isn't compelled to testify but he did choose to put on witnesses..." Fifth Amendment privilege against compulsory self-incrimination is violated when prosecutor makes statement that is subject to reasonable interpretation by jury as invitation to draw adverse inference from D's silence. Rowley v. State, 285 N.E.2d 646 (Ind. 1972); United States v. Robinson, 485 U.S. 25 (1988). When prosecutor inadvertently mentioned D's decision not to testify & then immediately attempted to correct that slip of tongue, reasonable jury could not have interpreted statement as suggestion to infer guilt from D's silence. State met burden of proving that, even if statement was improper, jury would have convicted D absent comment. United States v. Hastings, 461 U.S. 499 (1983). Where prosecutor makes improper comment on D's silence, State must demonstrate beyond reasonable doubt that remark did not alter jury's verdict. In assessing question of prejudice or harmless error from improper comment, Cts. should consider: 1) persuasiveness of comment; 2) relative strength of State's case; & 3) effectiveness of trial judge's response to comment. Here, persuasive caliber of prosecutor's remark was minimal at best, State's case was fairly strong, & trial judge took immediate & responsible action to mitigate any potential prejudice. Held, transfer granted, convictions affirmed; Sullivan, J., concurring.

RELATED CASES: Zamani, 33 N.E.3d 1130 (Ind. Ct. App. 2015) (prosecutor's comments about "no explanation" and "no alternative theory" about State's case were addressed to the evidence rather than D's failure to testify); Carter, 686 N.E.2d 1254 (repeated references to D's failure to offer "explanation" were reasonable comments on uncontradicted nature of State's case); Isaacs, 673 N.E.2d 757 (prosecutor's statements properly focused on uncontradicted nature of witnesses' testimony, not on D's silence & failure to testify).

TITLE: People v. Eaton
INDEX NO.: D.15.e.
CITE: 307 Ill.App.3d 397, 718 N.E.2d 1020 (Ill. Ct. App. 1999)
SUBJECT: Prosecutorial Misconduct -- Jury Argument
HOLDING: Illinois Court of Appeals reverses attempted murder conviction based on prosecutor's comment during closing argument that if the D were innocent, he would have submitted to a polygraph exam. The state argued that the comment was an "invited response" to defense counsel's reference to the absence of any scientific evidence of the D's guilt. The Court disagreed, holding that defense could comment on absence of reliable, admissible scientific evidence without inviting prosecutorial references to unreliable, inadmissible evidence.

TITLE: Portuondo v. Agard
INDEX NO.: D.15.e.
CITE: 529 U.S. 61; 120 S. Ct. 1119, 146 L.Ed.2d 47 (2000)
SUBJECT: Credibility of testifying D
HOLDING: Prosecutor's argument in closing, that the testifying D was less credible because he had been present in the courtroom and heard the testimony of the other witnesses before testifying himself, was not an unconstitutional burden on D's right to be present at trial, to testify, and to confront his accusers under the Fifth, Sixth, and Fourteenth Amendments. A prosecutor may not encourage the jury to infer guilt from D's silence at trial because that inference would violate the D's right to remain silent. Griffin v. California, 380 U.S. 609 (1965). However, Justice Scalia wrote, it is "natural and irresistible" for a jury, in evaluating the D's credibility, to weigh the fact that the D had the opportunity to hear the testimony of all the other witnesses before testifying himself. In Brooks v. Tennessee, 406 U.S. 605 (1972), the Court suggested that arguing the D's credibility to the jury was the best way to counteract tailoring of the D's testimony.

TITLE: Reynolds v. State
INDEX NO: D.15.e.
CITE: (5th Dist., 10-27-03), Ind. App., 797 N.E.2d 864
SUBJECT: Prosecutorial misconduct - reference to D's invocation of Fifth Amendment at trial
HOLDING: In attempted murder & burglary prosecution, State engaged in prosecutorial misconduct by commenting in closing argument about D's invocation of Fifth Amendment at trial during cross examination. During closing, prosecutor stated: "You take the 5th Amendment when you got something to be concerned about ... My constitutional right not to incriminate myself...So in order for that to apply you have to have done something to incriminate yourself." State argued that although D objected to this comment, error was waived because he did not request an admonishment. Ct. disagreed, concluding that prosecutor's argument included a direct & deliberate comment upon D's exercise of his right against self-incrimination, & constituted fundamental error. Griffin v. California, 380 U.S. 609 (1965). Held, judgment reversed & remanded for new trial.

RELATED CASES: Thomas, 9 N.E.3d 737 (Ind. Ct. App. 2014) (State committed prosecutorial misconduct during closing argument when it made a direct reference to D's decision not to testify, but error was harmless given strength of State's case and Tr. Ct.'s firm admonishment); Nichols, 974 N.E.2d 531 (Ind. Ct. App. 2012) (jury instructions did not mitigate peril or cure the harm that prosecutor created by so obviously suggesting to jury that D did not testify so as not to incriminate himself); Ludack, 967 N.E.2d 41 (Ind. Ct. App. 2012) (detective's comment that D neither admitted nor denied allegations of child molesting and "just asked to stop speaking" did not violate Fifth Amendment right against compulsory self-incrimination because it was defense counsel who first questioned detective as to what D did not say during the interview; State's evidence was fair response to evidence elicited by D; see full review, this section); Herron, App., 801 N.E.2d 761 (in attempted murder trial, prosecutor committed fundamental error when he stated during closing argument, "but as for not presenting the gun to you, that actually fired those bullets, members of the jury, right over there at that table, that's the only one in the courtroom that can certainly tell us where that gun is").

TITLE: Taylor v. State
INDEX NO.: D.15.e.
CITE: (4th Dist., 2-25-97), Ind. App., 677 N.E.2d 56
SUBJECT: Prosecutor's comments on un-contradicted evidence - no error
HOLDING: Prosecutor's statements as to un-contradicted nature of State's evidence was not improper & did not constitute prosecutorial misconduct. Fifth Amendment privilege against compulsory self-incrimination is violated when prosecutor makes statement that is subject to reasonable interpretation by jury as invitation to draw adverse inference from D's silence. Moore v. State, 669 N.E.2d 733 (Ind. 1996). Comment on lack of evidence by defense concerning otherwise incriminating evidence against him is proper as long as State focuses on absence of any evidence to contradict State's evidence & not on accused's failure to testify. Martinez v. State, 549 N.E.2d 1026 (Ind. 1990). Here, two comments made by prosecutor during final argument were: (1) "the evidence is uncontroverted, there's no evidence before you to the contrary;" (2) "when they sit there on couch, they then talk about the quarter-pound [of marijuana], according to testimony of [informant], & there is nothing to the contrary whatsoever, that is uncontroverted..." Ct. found that first statement was clearly comment on evidence as whole, & was general enough not to constitute impermissible reference to D's failure to testify. Ct. rejected D's argument that because he & informant were only ones present in room before sale, second comment was impermissible reference to D's failure to testify. D was not only person who could have contradicted testimony given. Totality of comments focused on evidence presented, not on D's silence. Held, no error.

RELATED CASES: Feyka, 972 N.E.2d 387 (Ind. Ct. App. 2012) (prosecutor's improper comments were not fundamental error because D vigorously cross-examined the witnesses, including C.W.; jury could have considered the prosecutor's comments as commentary on the nature of the evidence presented, which is permitted); Owens, 937 N.E. 2d 880 (Ind. Ct. App. 2010) (prosecutor's single, vague statement that "other than the D, [the victim] is the only one who knows what happened" did not constitute fundamental error); Schmidt, App., 816 N.E.2d 925 (prosecutor's statement that arresting officer's testimony regarding D's driving behavior was the "sole testimony" presented is a comment on lack of any contradictory evidence presented by defense, not a direct or indirect reference to D's decision not to testify); Livermore, App.,777 N.E.2d 1154 (prosecutor merely commented on un-contradicted nature of State's evidence that D's confession was voluntary & did not invite jury to draw adverse inference from his silence at trial); Davis, App., 685 N.E.2d 1095 (because officer made no direct reference to D's decision to remain silent, D was not placed in grave peril by improper comments).

TITLE: Ruiz v. State
INDEX NO.: D.15.e.
CITE: 743 So.2d 1 (Fla. 1999)
SUBJECT: Prosecutorial Argument -- Inviting Jury to Convict D Because He Lied on Stand
HOLDING: Prosecutor who argued that D had lied during testimony, and that because of that, jury should convict him of murder, committed misconduct. Prosecutor referred to D as "Pinocchio," then argued, "truth equals justice, and the truth is he [committed the murder] and justice is that you can convict him of it." Court characterizes this argument as invitation to jury to convict D for reasons other than his guilt of the charged offense.

TITLE: State v. Feal

INDEX NO.: D.15.e.

CITE: 194 N.J. 293, 944 A.2d 599 (N.J. 2008)

SUBJECT: Retroactive effect for N.J. decision forbidding prosecutor's mentioning D's tailored testimony

HOLDING: New Jersey Supreme Court held its decision in State v. Daniels, 76 CrL 238 (N.J. 2005), forbidding prosecutors to draw attention to Ds' opportunity to tailor their testimony to the evidence at trial applies retroactively to all cases not yet final on direct review. Daniels reversed a long-standing state judicial rule that allowed prosecutors to comment upon Ds' opportunity to craft their testimony to the evidence already presented at trial, which was consist with the federal practice approved in Portuondo v. Agard, 529 U.S. 61 (2000). Court decided to give the Daniels rule "pipeline" retroactive effect. Court acknowledged that the Daniels court's exercise of its supervisory authority effected a "sea-change" in New Jersey jurisprudence that amounted to a new rule of law for retroactivity purposes.

TITLE: State v. Palenkas
INDEX NO.: D.15.e.
CITE: 933 P.2d 1269 (Ariz. Ct. App. 1996)
SUBJECT: Prosecutor's Comments on Refusal to Consent to Search -- Due Process Denial
HOLDING: Comments in prosecutor's jury argument pointing out that hit-and-run D had refused to consent to warrantless search of car and had contacted his attorney violated the D's due process rights. Prosecutor's comments created impermissible inference that the D's invocation of constitutional rights was evidence of his guilt.

TITLE: State v. Shinn
INDEX NO.: D.15.e.
CITE: 47 Conn. App. 401; 704 A.2d 816 (Conn. App. Ct. 1997)
SUBJECT: Prosecutor's Comment on D's Decision to Testify
HOLDING: Prosecutor deprived D of his constitutional right to testify by commenting during closing argument that D would not have testified unless he felt the state's case was strong. State may not use D's exercise of constitutional right as evidence of guilt.

TITLE: State v. Ward
INDEX NO.: D.15.e.
CITE: 354 N.C. 231, 555 S.E.2d 251 (N.C. 2001)
SUBJECT: Prosecutor's Comments on D's Silence
HOLDING: Prosecutor's comments about D's silence, made during closing argument at capital penalty phase, violate 5th amendment privilege against self-incrimination and require new penalty phase. During argument, the prosecutor described D's conduct while hospitalized after arrest for mental evaluation. "We know [D] could talk, but he decided to just sit quietly. He didn't want to say anything that would 'incriminate himself.' So he appreciated the criminality of his conduct all right. He was mighty careful with whom he would discuss that criminality, wasn't he? He wouldn't discuss it with the people at [the hospital.]" State argued comments were intended to undermine defense's reliance on statutory mitigating factor relating to impairment of D's capacity to appreciate criminality of his conduct, but majority disagreed. Despite lack of objection from defense, majority finds that Tr. Ct. abused its discretion by not intervening on its own.

TITLE: Valdez v. State
INDEX NO.: D.15.e.
CITE: (7/22/2016), 56 N.E.3d 1244 (Ind. Ct. App. 2015)
SUBJECT: Admonishment cures prosecutorial misconduct
HOLDING: The Tr. Ct. properly denied D's motion for mistrial even though the Delaware County deputy prosecutor committed misconduct during closing argument by claiming that defense counsel manipulated the testimony of D's expert to get him to testify that D was insane when he committed his offenses. See Ind. Professional Rule Misconduct 3.4(e). The Tr. Ct.'s prompt admonishment cured the effect of the misconduct. See Hubbard v. State, 313 N.E.2d 346, 350 (Ind. 1974). Held, judgment affirmed.

Note: In an unusual move, the Court identified the Delaware County deputy prosecutor by name no less than eight times. Why the Court did this is a matter of speculation, but perhaps the Court found prosecutor's behavior especially egregious or perhaps it has reviewed other appeals where prosecutor also engaged in questionable trial tactics.

TITLE: Walker v. State
INDEX NO.: D.15.e.
CITE: (2/9/87), Ind., 503 N.E.2d 883
SUBJECT: Misconduct by prosecutor - comments re D
HOLDING: Prosecutor's reference to Ds as "professional burglars" did not refer to previous acts of Ds (i.e., criminal records) but to their conduct in this case. Such comment was proper. Cox, App., 306 N.E.2d 107. Held, no error.

RELATED CASES: Castillo, 947 N.E.2d 458 (Ind. 2012) (fundamental error in LWOP case where prosecutor at closing argument at penalty phase told jurors “do not compare what you’re evaluating, the aggravating factor and these mitigating factors that the defense has brought”; prosecutor then described D as “a problem,” “uncontrollable,” “violent, vicious, manipulative,” and told the jury, “She is broken. She has been broken since she was a kid and there is no fixing her.”); Emerson, 952 N.E.2d 832 (Ind. Ct. App. 2011) (the prosecutor's requests that the jury should "stand up to this bully" by convicting was improper; but, because the requests were fleeting and the jury was instructed that the prosecutor's arguments were not evidence, they did not rise to fundamental error); Bass, 947 N.E.2d 456 (Ind. Ct. App. 2011) (in molest case, prosecutor did not commit misconduct by calling D a pervert in closing because pervert is slang for child molester); Cooper, 854 N.E.2d 831 (prosecutor's remarks concerning D's prior acts that were admitted into trial were at least approaching, if not improper, comments on D's character); Sanders, App., 724 N.E.2d 1127 (no misconduct from prosecutor's repeated reference to D as "liar" during closing); Ellison, App., 717 N.E.2d 211 (reference to D in closing argument as Amurderer@ fell into gray area between fair comment & personal expressions of belief; error was not fundamental because evidence against D was strong & probable impact of prosecutor's remark was slight & jury was instructed about proper use & consideration of prosecutor's argument); Marshall, App., 505 N.E.2d 853 (although D waived error by failing to timely file affidavits with motion to correct error in case where summation was not recorded, Ct. finds prosecutor's comment that D was a thief & a liar did not place D in grave peril; here, prosecutor impeached D with prior theft convictions; Ct. does not condone statements but finds they added nothing); Oldham, App., 779 N.E.2d 1162; Flynn, 379 N.E.2d 548 (reference to D during final argument as “drug dealer” required reversal); Surber, App., 884 N.E.2d 856 (given evidence presented and D's arguments at trial, prosecutor did not commit misconduct by arguing that CW was telling truth & D was lying).

TITLE: U.S. v. Velarde-Gomez
INDEX NO.: D.15.e.
CITE: 269 F.3d 1023 (9th Cir. 2001)
SUBJECT: Testimony Regarding D's Lack of Reaction to Accusation
HOLDING: A prosecutor who elicited testimony regarding the fact that D did not respond when told at police station that 63 pounds of marijuana had been found in his car violated D's 5th amendment privilege against self-incrimination. State argues this was "demeanor" evidence, rather than comment on D's post-arrest silence. However, witness' testimony was that D "just sat there," didn't respond, and did not "say anything" or "deny knowledge." Each of these comments described D's silence.

TITLE: United States v. Robinson
INDEX NO.: D.15.e.
CITE: 485 U.S. 25 (1988)
SUBJECT: Comment re failure to testify - invited response
HOLDING: 5th Amend. "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. CA (1965), 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L.Ed.2d 106. Here, during closing, D's counsel argued that government had not allowed D to explain his side of story. Prosecutor then told jury that D "could have taken the stand & explained it to you..." "Griffin prohibits the judge & prosecutor from suggesting to the jury that it may treat the D's silence as substantive evidence of guilt." Baxter v. Palmigiano (1976), 425 U.S. 308, 319, 96 S. Ct. 1551, 47 L.Ed.2d 810. Here, prosecutorial comment did not treat D's silence as substantive evidence of guilt, but instead referred to possibility of testifying as one opportunity D was afforded, contrary to statement of D's counsel, to explain D's side of case. Where prosecutor on own initiative asks jury to draw adverse inference from D's silence, privilege against self-incrimination is violated. Griffin. Held, where prosecutor's reference to D's opportunity to testify is fair response to claim made by D or D's counsel, there is no violation. Kennedy, not participating; Blackmun, CONCURS & DISSENTS; Marshall, joined by, Brennan, DISSENTS.

TITLE: U.S. v. Johnston
INDEX NO.: D.15.e.
CITE: 127 F.3d 380 (5th Cir. 1997)
SUBJECT: Prosecutorial Misconduct -- Sending a Message
HOLDING: In multiple D drug case, 5th Circuit Court of Appeals reverses conviction of D against whom evidence is weakest in order to send a message to prosecutors. During questioning of police officers, prosecutors repeatedly used questioning technique which was intended to circumvent Tr. Ct.'s hearsay rulings. Further, during questioning of one witness, and in final argument, prosecutors commented on Ds' right to remain silent. Court found these actions harmless for the most part, and affirmed convictions of two Ds. As to third D, although they were "reluctant to do so", they reversed conviction because "at some point we must draw the line and send a message to prosecutors that the Constitution governs their actions at trial."

TITLE: Zenthofer v. State
INDEX NO.: D.15.e.
CITE: (05-11-93), Ind., 615 N.E.2d 31
SUBJECT: Prosecutor's closing argument improper but not fundamental error
HOLDING: Following comments by prosecutor during closing argument were improper, but did not constitute fundamental error, & therefore lack of contemporaneous objection waived error. In his closing, defense counsel refuted assertion that he knew his client was guilty, & stated he knew his client did not commit crimes charged.

I'm trying to find out & prove something the D already knows. You need a little help for that and, of course everything we gather, all of the information we find, we turn right over to Mr. Gooden to help Mr. Zenthofer defend himself from what he already knows he did. Of course, they have the information that we don't have. They know that he did it. They know that he's guilty. Held, conviction affirmed.

RELATED CASES: Bradley, 113 N.E.3d 742 (Ind. Ct. App. 2018) (prosecutor's argument that D had "a guilty look on his face because he's guilty" was not fundamental error); Brown,799 N.E.2d 1064 (prosecutor's comparison during closing argument of lesser offense of reckless homicide to other class C felony offenses was improper but did not constitute fundamental error); Borders, 688 N.E.2d 874 (although prosecutor's reference to Co-D's guilty plea in closing argument was improper attempt to use guilty plea as substantive evidence of D's guilt, D was not placed in position of grave peril).

D. TRIAL

D.15. Misconduct by prosecutor

D.15.f. Appeals to passion or prejudice

TITLE: Ashby v. State
INDEX NO.: D.15.f.
CITE: (12/12/85), Ind., 486 N.E.2d 469
SUBJECT: Misconduct by prosecutor
HOLDING: Prosecutor's comment that jurors could do something for victims by finding D guilty (made in response to defense counsel's statement that "if we could do anything for victims, we would") constituted improper conduct. However, admonition cured error. Wagner, 474 N.E.2d 476. Held, convictions affirmed.

RELATED CASES: Gentry, App., 625 N.E.2d 1268 (Ct. very strongly condemned prosecutor's closing remarks stating that only God could take human life & that while D looked like typical deacon or boy scout, maybe it would be easier to convict him if he were brutish or black. Comments were improper appeals to racial prejudice & religious beliefs, & were "outrageous, deplorable, & intolerable." Ct. advised prosecutor to review constitution & basic principles at root of system of justice. Ct. concluded, however, that despite outrageous conduct of prosecutor, D's counsel was not ineffective for failing to object to them, because D portrayed himself as religious, etc., & lack of objection may have been tactical decision. In light of D's confession as to acts committed, conduct did not affect outcome of case.

TITLE: Caldwell v. State
INDEX NO.: D.15.f.
CITE: (6/4/87), Ind., 508 N.E.2d 27
SUBJECT: Misconduct of prosecutor - appeals to passion/prejudice
HOLDING: Prosecutor engaged in misconduct by framing final argument in terms calculated to inflame passion/prejudice of jury. Limp, 431 N.E.2d 784. Here, in rebuttal argument, prosecutor alluded to fact D had fired shots at state trooper. D's objection was *overruled*. Ct. finds that because D did not request Tr. judge to admonish jury to disregard prosecutor's statement or move to strike statement or for a mistrial, issue is considered waived. Lambert, 448 N.E.2d 288; Brown, App., 464 N.E.2d 361. Nonetheless, Ct. addresses merits, finding D was not placed in grave peril. D was stopped for driving erratically, marijuana was found in his pocket, & D was arrested. As officer attempted to handcuff D, D drew gun & began firing shots at officer. Prosecutor's comment reminding jury of incident did not prejudice D beyond situation in which evidence already placed him. Held, conviction affirmed.

TITLE: Gasaway v. State

INDEX NO.: D.15.

CITE: (4th Dist. 12/27/89), Ind. App., 547 N.E.2d 898

SUBJECT: Appeal to passion & prejudice - reading poem about offense while showing autopsy slides

HOLDING: Prosecutor's reading of poem about death of D's child while showing autopsy slides during closing argument did not warrant mistrial. D was charged with murder & neglect of dependent in death of her 13-month-old child. During final argument, prosecutor showed 10 or 11 autopsy slides of child while reading poem that described victim as having been "[b]urned & beaten, literally, from the soles of his feet, to the top of his head," referred to D as having pursued one man while married to another, & ended with line, "But no matter, she can always have more." Jury found D guilty of neglect & involuntary manslaughter. On appeal, D argues that reading of poem in conjunction with slide show was prosecutorial misconduct warranting mistrial. It is misconduct to frame final argument so as to inflame passions or prejudices of jury. Limp, 431 N.E.2d 784. Danger inherent in this is that jury, because it is controlled by emotions, will find guilt regardless of evidence presented. Reviewing Ct. must focus on probable effect prosecutor's actions would have on jury's ability to judge evidence fairly. "Hard blows" are part of adversarial system, & question is whether D was deprived of fair trial. [Citations omitted.] Actions here did not place D in grave peril or deny her fair trial. Jury had heard extensive testimony re victim's injuries & had viewed autopsy slides during state's case in chief. Poem made no reference to facts not in evidence. Presentation of two in combination was innovative, but was nothing more than permissible "hard blow." That presentation did not inflame jury is apparent from fact that jury found D guilty of lesser offense of involuntary manslaughter. Held, conviction affirmed.

TITLE: Hughes v. State
INDEX NO.: D.15.f.
CITE: (1st Dist. 6/8/87), Ind. App., 508 N.E.2d 1289
SUBJECT: Misconduct by prosecution - preventing future crime
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial. Here, prosecutor stated during final argument: "perhaps we cannot prevent this world from being a world in which children are tortured, but we can reduce the number of tortured children & if you don't help us, who else in the world..." Ct. notes similar comment was held "unnecessary," "unprofessional," & an "improper exaggeration" in Warner, 354 N.E.2d 178. However, comment did not require reversal in Warner & does not require reversal here. Held, conviction affirmed.

TITLE: Johnson v. State
INDEX NO.: D.15.f.
CITE: (4th Dist. 9/15/83), Ind. App., 453 N.E.2d 365
SUBJECT: Misconduct by prosecutor - appeals to passion/prejudice
HOLDING: Prosecutor's improper summation probably had a persuasive effect on jurors & placed D in a position of grave peril where evidence of specific intent supporting attempted rape conviction was close & Tr. Ct. did not admonish jury to disregard improper statements. Adler, 175 N.E.2d 358; Flynn, App., 379 N.E.2d 548. Here, prosecutor's statement that a defense attorney's job is to "get his client off" by bringing out "insignificant facts" & "legal technicalities" was irrelevant to issues & should not be allowed. See Craig, 370 N.E.2d 880. Prosecutor's request that jury remember evidence that was excluded on D's objection, implying he possessed evidence of guilt not known to jury, was improper. Merritte, 438 N.E.2d 754; Marsh, 396 N.E.2d 883; CPR DR7-106(C)(3). It was improper for prosecutor to address one juror by name & ask if he wanted his wife raped in her own home. This comment sought to inflame passions/prejudices of jury (Limp, 431 N.E.2d 784) & asked them to convict D not because he was guilty but because he was dangerous. Maldonado, 355 N.E.2d 843). See ABA Standard 3-5.8(c) & (d). A juror should not be addressed by name during summation. (Citations omitted). Once comments are deemed improper, question remains whether misconduct placed D in position of grave peril. Maldonado; Roberts, App., 419 N.E.2d 803. D need not show he/she would have been acquitted absent improper argument. White, 272 N.E.2d 312. Reversal is required where evidence is close & Ct. does not admonish jury. Adler; Flynn. Held, attempted rape conviction reversed; battery & criminal trespass affirmed.

RELATED CASES: Flynn, 379 N.E.2d 548 (where evidence was “close,” prosecutor’s reference to D in closing argument as “drug dealer” & comment that jury could deduce that from evidence required reversal). See also, Oldham, App., 779 N.E.2d 1162 (full review at O.4.c.3).

TITLE: Parker v. State
INDEX NO.: D.15.f.
CITE: (1st Dist. 12/30/86), Ind. App., 501 N.E.2d 1131
SUBJECT: Misconduct by prosecutor - introduction of irrelevant, prejudicial evidence
HOLDING: Although pictures of D's wife (a white woman) & his child should have been excluded because they were irrelevant to any issue, Ct. finds D was not prejudiced thereby. Here, D contends photos were admitted merely to show his biracial marriage. Photos were found in his wallet at time of his arrest for murder of his cocaine supplier. Ct. analogizes case to cases holding that question about victim's spouse or surviving family are not proper part of state's case, bear no relationship to guilt/innocence of accused, & ordinarily are calculated only to prejudice D with jury. See Kelley, 470 N.E.2d 1322; Rowe, 237 N.E.2d 576. Nonetheless, Ct. finds jury's verdict on lesser included offense indicates it found D's account of events to be persuasive & credible; therefore, D's biracial marriage did not have substantial impact on jury's verdict. Held, conviction affirmed.

RELATED CASES: Wells, App., 848 N.E.2d 1133 (under Rule of Professional Conduct 3.4(e), it was improper for prosecutor to express his personal opinion as to merits or justness of case against D, when during closing he stated: "If there had been a slightest bit of credible evidence that [officers] conspired... to arrest [D], I wouldn't have prosecuted this;" D did not suffer grave peril as result of this conduct); Rodriguez, App., 795 N.E.2d 1054 (during closing argument in rape & confinement trial, neither prosecutor's display of shotgun never admitted into evidence, nor her comments that victim acted in way she wished her daughter would if attacked constituted sufficient grounds for reversal of D's convictions)

TITLE: Samaniego v. State
INDEX NO.: D.15.f.
CITE: (2nd Dist., 5-12-97), Ind. App., 679 N.E.2d 944
SUBJECT: Misconduct by prosecutor - racial prejudice
HOLDING: Although prosecutor engaged in misconduct by making improper remarks about D's race & religion, comments were not likely to have unfairly prejudiced jury & therefore did not constitute fundamental error. During closing argument, prosecutor attacked D's Native- American heritage by analogizing his defense to General Custer's Last Stand, & referring to various "gods in the sky." Constitutional principles of equal protection & due process forbid prosecutor from making racially-biased prosecutorial arguments, or from attempting to gain conviction on basis of racial prejudice. McClesky v. Kemp, 107 S.Ct. 1756 (1987); Smith v. Farley, 59 F.3d 659 (7th Cir. 1995). In Indiana, reviewing Cts. will closely scrutinize allegations concerning wrongful injection of race into criminal proceedings. Tompkins, 669 N.E.2d 394. Ct. strongly condemned prosecutor's "foul," "reprehensible" comments in this case, but misconduct did not constitute fundamental error because evidence of D's guilt was overwhelming. Under standard of review for prosecutorial misconduct, focus is not on degree of impropriety, but on probable persuasive effect of comments on jury's decision. Lowery, 640 N.E.2d 1031. D did not receive ineffective assistance of trial & appellate counsel for failing to object to prosecutor's conduct & raise issue on direct appeal. Held, denial of post-conviction relief affirmed; Sullivan, J., concurs in result.

TITLE: Turnbow v. State
INDEX NO.: D.15.f.
CITE: (1st Dist., 07-19-94), Ind. App., 637 N.E.2d 1329
SUBJECT: Prosecutorial misconduct did not require mistrial
HOLDING: Although prosecutor's closing argument was improper because it arguably asked jury to convict D for reasons other than guilt or innocence, because it could be construed in several ways, Ct. could not say probable persuasive effect was prejudicial enough to warrant new trial. At trial, D raised self-defense, & in rebuttal closing prosecutor told jury that if it believed victim deserved to die, they should find D not guilty. On D's objection & mistrial motion, Tr. Ct. denied mistrial & cautioned prosecutor to argue only facts & law. Prosecutor then repeated comment & concluded argument.

To show right to new trial based on prosecutorial misconduct D must show actions were misconduct & that resulting prejudice placed D in position of grave peril. Once misconduct is shown whether grave peril results is determined by probable persuasive effect of misconduct, not degree of impropriety, Everroad v. State, Ind., 571 N.E.2d 1240. Ct. found prosecutor's statement was ill-advised & inappropriate because it could be construed to mean jury should determine guilt based on whether victim was blameless or evil person, & therefore misrepresented law & was misconduct. However, statement could have been construed to mean that if victim's conduct created reasonable belief in D that force was necessary to protect himself, verdict of not guilty was justified, i.e., exaggerated allusion to D's self-defense claim. Because comment was susceptible to both permissible & impermissible interpretations, probable impact of statement was minimal, thus Tr. Ct. did not err in denying mistrial. Held, conviction affirmed.

RELATED CASES: Oldham, App., 779 N.E.2d 1162 (prosecutor's statements during closing argument, in which he alleged that D was a drug dealer, & his continued efforts to obtain conviction on basis of D's character & irrelevant, unsupported evidence, constituted misconduct).

TITLE: White v. State
INDEX NO.: D.15.f.
CITE: (1st Dist. 7/25/89), Ind. App., 541 N.E.2d 541
SUBJECT: Prosecutor's final argument - "send message"
HOLDING: In total context, prosecutor's reference in final argument to reputation of county & need to set trend was not so misleading as to require reversal. D was charged with murder & presented defense of voluntary intoxication. In final argument, prosecutor told jury that their county had become subject of jokes as place where one could go to commit murder. Prosecutor told jury that acquittal would send message that in Greene County one could get away with murder as long as they were drunk enough. Prosecutor has duty to present persuasive final argument, as long as he/she makes no deliberate distortions or improper comments. Morris, 384 N.E.2d 1022. Here, prosecutor's remark urging jury to set trend is misleading, since each jury must make decision based solely on evidence before it. Cf. Clark, 348 N.E.2d 27. However, it was proper to draw jury's attention to broader question of accountability for acts committed while voluntarily intoxicated. Counsel may argue law as well as facts. Fassoth, 525 N.E.2d 318. Prosecutor prefaced challenged remarks by urging jury to base decision upon evidence as they heard it & followed them with appeal for conviction because evidence warranted it. Prosecution's showing on intent element was strong. Finally, Tr. Ct. instructed jury to base verdict solely on evidence & to ignore unsworn statements of counsel. In this context, prosecutor's remarks were not so misleading as to move jury to disregard evidence. Held, conviction affirmed.

RELATED CASES: Neville, 976 N.E.2d 1252 (Ind. Ct. App. 2012) (prosecutor's comparison of D's trial with the victim's murder, argument that D did not give the victim the same treatment he is receiving, request to convict in order to provide justice for the victim's family and repeated reference to the prosecutors as "powerless" to do any more than put the D on trial were improper, but not fundamental error); Gregory, App., 885 N.E.2d 697 (prosecutor's closing concerning the dangers and prevalence of methamphetamine were only his opinions and not misconduct) Wiggins, App., 727 N.E.2d 1 (comments about sending message to community did not constitute fundamental error); Impson, App., 721 N.E.2d 1275 (prosecutor arguing that jury should convict because it is domestic violence awareness month was improper, but did not place D in grave peril).

TITLE: Williams v. State

INDEX NO.: D.15.f.

CITE: (3/31/2015), 29 N.E.3d 144 (Ind. Ct. App. 2015); *sum. aff'd*, 43 N.E.3d 578 (Ind. 2015)

SUBJECT: Prosecutorial misconduct claim preserved, but no error - proper response to D's argument

HOLDING: In dealing in cocaine prosecution, prosecutor's statements during closing argument that drugs are a serious problem did not constitute reversible error. D argued that State's declaration was an attempt to persuade the jury to convict D for a reason other than guilt. See Coleman v. State, 750 N.E.2d 370 (Ind. 2001). But prosecutor was responding to an implicit request by defense counsel for jury nullification and that D was an addict whose small-time drug deal did not warrant punishment. Prosecutors are entitled to respond to allegations and inferences raised by the defense, even if the prosecutor's response would otherwise be objectionable. Ryan v. State, 9 N.E.3d 663 (Ind. 2014).

Regarding the State's argument that D waived this issue for appeal, Court held that D's *overruled* objection is sufficient to preserve his prosecutorial misconduct claim. "It makes absolutely no sense" to require a D to "request an admonishment or a mistrial after having been told by the Tr. Ct. that no misconduct occurred." Held, judgment affirmed.

RELATED CASES: Craft, 187 N.E.3d 2004 (Ind. Ct. App. 2022) (D need not request jury admonishment before mistrial to preserve prosecutorial misconduct claim).

D. TRIAL

D.15. Misconduct by prosecutor

D.15.g. Remedies available to D

TITLE: Hedges v. State
INDEX NO.: D.15.g.
CITE: (12/27/82), Ind., 443 N.E.2d 62
SUBJECT: Misconduct by prosecutor - remedies available
HOLDING: To be reversible error, alleged prosecutorial misconduct must have been so inflammatory & prejudicial in its effect as to place D in position of grave peril. Riley, 427 N.E.2d 1074. Prompt admonition to disregard testimony usually is sufficient to protect rights of D. Downs, 369 N.E.2d 1079. Mistrial is not required. Morris, 398 N.E.2d 1284. Here, D alleges Tr. Ct. erred in denying motion for mistrial or alternatively admonishing jury to disregard prosecutor's improper question referring to "mugshots." Pointing out that defense counsel had opened door to questioning (as in Bayer, App., 303 N.E.2d 678), Ct. finds mistrial not required. Further, Tr. Ct. agreed to admonish jury, but did not do so. D failed to pursue remedy by requiring Tr. Ct. to admonish jury. Held, no error.

RELATED CASES: Moore, App., 652 N.E.2d 53 (Despite prosecutor's repeated use of word "murder" after being directed by Tr. Ct. to use word "homicide," misconduct did not have probable persuasive effect on jury that placed D in position of grave peril that warranted declaration of mistrial); Johnson, App., 453 N.E.2d 365 (reversal is required where evidence is close & Ct. does not admonish jury concerning prosecutor's improper argument; card at D.15.f).

D. TRIAL

D.16. Misconduct by defense counsel

TITLE: Hill v. State
INDEX NO.: D.16.
CITE: (1/11/88), Ind., 517 N.E.2d 784
SUBJECT: Defense counsel misconduct - improper statement during closing argument
HOLDING: Tr. Ct. did not err in admonishing defense counsel during closing argument where counsel referred to co-D as State's "key witness, whom they bribed by using a plea bargain..." Conduct of final argument lies within sound discretion of Tr. Ct., and conviction will not be reversed unless there has been clear abuse of discretion resulting in prejudice to accused. Kalady, 462 N.E.2d 1299. D argued that Tr. Ct.'s admonition prejudiced D, and that it was not unfair to categorize plea bargain as bribe, since substantial benefits were exchanged between co-D and State. Ct. found that term "bribe" denotes improper transaction, and because co-D's plea bargain with State was not shown to be improper, Tr. Ct. acted within its discretion when it admonished defense counsel. Held, judgment affirmed.

RELATED CASES: Dutton, App., 405 N.E.2d 560 (Statement made by counsel for D during final argument that jurors could themselves be subject of false charges of criminal misconduct and should acquit D for such reason was improper); Bozarth, App., 520 N.E.2d 460 (Tr. Ct. did not err in sustaining State's objection to defense counsel's statement that State's psychiatric witness was in same profession that "managed to convince a jury that it was okay for Hinkley to shoot the President," since comment was not in reference to any fact in evidence).

TITLE: People v. Estrada

INDEX NO.: D.16.

CITE: 63 Cal. App.4th 1090 (Cal. Ct. App. 1998)

SUBJECT: Misconduct of Co-D's Counsel

HOLDING: Improper conduct of counsel for jointly tried co-D rendered D's trial fundamentally unfair and denied him due process. Tr. Ct. had denied co-D's severance motion. At joint trial, counsel for co-D made improper references to D's prior arrests and convictions, suggested that suppressed evidence pointed to D's guilt, suggested that D's refusal to testify at co-D's preliminary hearing was relevant to credibility of his trial testimony, and suggested that D's own attorney did not believe him. California Court of Appeals likens this conduct to misconduct by prosecutor, and finds that it was so egregious as to have rendered D's trial fundamentally unfair.

D. TRIAL

D.16. Misconduct by defense counsel

D.16.a. Presentation of evidence

TITLE: Kiner v. State
INDEX NO.: D.16.a.
CITE: (3d Dist., 12-8-94), Ind. App., 643 N.E.2d 950
SUBJECT: Misrepresenting facts to challenge identification
HOLDING: D may not misrepresent facts to witness in order to obtain misidentification. Defense counsel submitted photograph of person who was not D to identification witness, & affirmatively represented to witness that picture was that of D. There was no evidence connecting person depicted in photograph to commission of crime in question. Tr. Ct. properly admonished jury not to consider any reference to photograph & did not admit it into evidence. While counsel is not to be prevented from engaging in true test of witness's identification, Cts. cannot condone blatant misrepresentation & deceit to achieve this goal. Ct. cited cases from other jurisdictions finding contempt for substituting another person for D at counsel table. If identification is at issue, counsel may test witness's credibility by seeking Ct.'s permission to: (1) seat two or more persons at counsel table without identifying D; (2) have no one at counsel table; (3) hold in-court lineup.

D. TRIAL

D.16. Misconduct by defense counsel

D.16.c Testimony of D

TITLE: State v. McDowell
INDEX NO.: D.16.c.
CITE: 2004 WI 70, 681 N.W.2d 500 (Wis. 2004)
SUBJECT: "Narrative" Testimony - Level of Knowledge D Will Perjure Self
HOLDING: The Wisconsin Supreme Court holds that defense counsel must actually "know" client will commit perjury before it is proper to present client's testimony in narrative fashion. Client told counsel, "I'll say what I need [to] say to help myself out and if I have something untruthful I'll say that." Court holds this did not meet bright line test of actually knowledge client would lie on stand, and as a result, counsel's performance in resorting to narrative testimony was deficient. However, D here was not prejudiced.

D. TRIAL

D.17. Mistrial (as affected by DJ, see, also, J.10.b)

TITLE: Adams v. State
INDEX NO.: D.17.
CITE: (3rd Dist., 07-25-08), Ind. App., 890 N.E.2d 770
SUBJECT: Witness's refusal to testify because of fear for his life did not require mistrial
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion in denying D's motion for mistrial, after one of State's eyewitnesses took the stand and commented that he would not testify because he feared for his safety and that of his family. A mistrial is an extreme sanction that is warranted only when no other cure can be expected to rectify the situation. Agilera v. State, 862 N.E.2d 298 (Ind. Ct. App. 2007). In Keyser v. State, 160 Ind. App. 566, 312 N.E.2d 922 (1974), Court reversed voluntary manslaughter conviction when a witness testified about threats and fear, but there was no evidence D made the threats. See also Cox v. State, 422 N.E.2d 357 (Ind. Ct. App. 1981). Unlike circumstances in Keyler and Cox, where prosecutor purposefully elicited the threat testimony, the prosecutor and trial judge here were surprised when witness volunteered his comments. Additionally, there was no evidence suggesting that D knew of the alleged threats made to witness or that D was in any way connected to them when witness made the statements in open court. Witness did not mention any specific threats that were made against him in front of jury and at least three witnesses testified D pulled a gun and shot victim. It is apparent that the admonishment to jurors, coupled with juror's acknowledgment to Tr. Ct. that they could disregard witness's comments in reaching a verdict, sufficiently removed any prejudice that might have inured to D. Held, judgment affirmed; Riley, J., dissenting, notes that "[s]ince threats tend to show guilty knowledge or an admission of guilt on the part of the D, a proper foundation must be laid showing the threats were made either by the D or with his or her knowledge or authorization.

RELATED CASES: Woods, 98 N.E.3d 656 (Ind. Ct. App. 2017) (D not entitled to mistrial despite Juror 108's statement to other jurors that he was afraid of D's family, who lived in his neighborhood, and despite Juror 108's eventual removal, because D didn't show prejudice and trial court instructed remaining jurors to disregard Juror 108's removal).

TITLE: Alexander v. State

INDEX NO.: D.17.

CITE: 509 S.E.2d 56 (Ga. 1998)

SUBJECT: Prosecutorial Misconduct -- Failure to Offer Promised Evidence; Burden on State to Show Good Faith

HOLDING: Where prosecutor, in opening statement, has promised evidence of specific fact, and then makes no attempt to introduce evidence in support of such fact at trial, burden is on state to show good faith in order to avoid mistrial. D here was charged with murder, and during opening statement, prosecutor told jury he would not only prove that D committed murder, but would prove that it was gang-related. He went on to explain in detail D's gang membership and gang activities. However, no evidence regarding gangs was offered at trial. TrCt. gave standard jury instruction that opening statements were not evidence. Generally, mistrial or reversal are not required if curative instruction is given and prosecutor acted in good faith. Court holds that burden is on state to make affirmative showing of good faith, since his/her reasons for failing to tender evidence generally will be known to him/her alone. Further, Court points out that instruction here was not specific enough to cure prejudice to D.

TITLE: Baker v. State
INDEX NO.: D.17.
CITE: (4/20/87), Ind., 506 N.E.2d 817
SUBJECT: Mistrial required following mention of polygraph
HOLDING: Tr. Ct. erred in refusing to grant mistrial after police officer testified, he had asked D to take polygraph. Here, prosecutor admitted that comment was improper; however, Tr. judge opted to instruct jury to disregard officer's comment. State *cites* Beal, 453 N.E.2d 190 & Farmer, App., 481 N.E.2d 154 to support contention that admonition was sufficient to cure remark. Ct. distinguishes cases, finding officer's testimony was not inadvertent & that error could not be considered harmless because no corroborating evidence supported testimony of child molest victim. D's credibility was necessarily placed in jeopardy in eyes of jury by officer's comment. Held, reversed & remanded for new trial. See also O.12.j. cards on this issue.

RELATED CASES: Pavey, App., 764 N.E.2d 692 (no abuse of abuse its discretion in granting State's motion for mistrial following D's opening statement; admonishment was insufficient to cure error); Wright, 593 N.E.2d 1192 (no error in granting State's motion for mistrial over D's objection, where defense counsel for a co-D intentionally referred to witness's polygraph examination); Smith, 537 N.E.2d 496 (mistrial was required where 2 alleged victims referred at trial to having taken polygraph exam, in response to question from prosecutor regarding why they returned to police station). Cf. Bixler, 537 N.E.2d 21.

TITLE: Craft v. State

INDEX NO.: D.17.

CITE: (5/12/2022), Ind. Ct. App., 187 N.E.3d 340

SUBJECT: Defendant need not request jury admonishment before mistrial to preserve prosecutorial misconduct claim

HOLDING: In a murder trial, Defendant objected four times during the State's closing argument and moved for a mistrial, which the trial court twice denied. The State argued Defendant waived the claim of prosecutorial misconduct by not first requesting an admonishment before seeking a mistrial, *citing* Ryan v. State, 9 N.E.3d 663 (Ind. 2014), in which the Supreme Court stated, "[t]o preserve a claim of prosecutorial misconduct, the defendant must—at the time the alleged misconduct occurs—request an admonishment to the jury, and if further relief is desired, move for a mistrial." But in Dresser v. State, 454 N.E.2d 406 (Ind. 1983), the Court previously said: "Where it is obvious, from the nature and degree of misconduct, that no admonishment could suffice, the motion for one may be dispensed with." Thus, it is quite plain that an admonishment is not required when it would not be effective. The Court of Appeals did not read Ryan as intending to fundamentally alter that foundation. The Court also saw no rationale for refusing to review a claim of prosecutorial misconduct when defense counsel believes the prosecutor's conduct is so egregious that only mistrial, and not admonishment, is the proper redress. "The defense is not forced to beg for relief it believes to be fruitless." In reviewing the claim on the merits, the Court determined that the prosecutor's statements did not tip the scales towards grave peril. Held: convictions affirmed.

TITLE: Evans v. State
INDEX NO.: D.17.
CITE: (11-23-94), Ind., 643 N.E.2d 877
SUBJECT: No evidentiary harpoon
HOLDING: Tr. Ct. did not err in denying mistrial when State's witness testified that when D was booked, baggie with white residue was found in his shirt pocket. To prove D possessed cocaine, prosecution relied primarily on friend's testimony & also solicited testimony from jailer who testified about finding baggie & substance on D's person. Although test was never performed on residue & no one knew where baggie was at time of trial, testimony was admissible to corroborate friend's testimony, & there was therefore no evidentiary harpoon. Jury was capable of discounting value of evidence in light of possibility that it was manufactured by jailer after fact or that white substance was not cocaine. Value of evidence was not substantially outweighed by danger of unfair prejudice. Held, transfer granted, Ct. App. decision at 627 N.E.2d 832 reversed, conviction affirmed. DeBruler & Dickson, JJ., dissenting.

RELATED CASES: Jewell, App., 672 N.E.2d 417 (no evidentiary harpoon or improper reference to D's post-Miranda silence); DeBerry, App., 659 N.E.2d 665 (state trooper's comments simply indicated that another criminal investigation had been pending, & did not implicate D in any collateral criminal conduct).

TITLE: Ex Parte Sparks

INDEX NO.: D.17.

CITE: 730 So.2d 113 (Ala. 1998)

SUBJECT: Prosecutorial Misconduct -- Improper Question on Prior Conviction; Not Cured by Instruction

HOLDING: Alabama S. Ct. reverses DUI conviction on prosecutorial misconduct grounds, finding that prosecutor's improper question regarding D's prior conviction placed D in grave peril. Crossing D, who had offered innocent explanation for failure to pass field sobriety tests, prosecutor asked D if he recalled having been convicted of DUI on a prior occasion. Defense counsel objected and asked for mistrial, which was denied. Instead, Tr. Ct. gave jury curative instruction. Court of Criminal Appeals affirmed, *citing* state's string cite to cases holding that curative instruction is adequate in such a situation. Alabama S. Ct. begins its analysis by observing, "cases involving such improper questioning- -and a subsequent denial of the D's motion for a mistrial- -are all too common, as demonstrated by the number of such cases cited in the City's brief and in the Court of Criminal Appeals' memorandum affirming Sparks' convictions. Consequently, it appears to this Court that the current approach to these situations is inadequate insofar as it allows prosecutors a "free shot" at asking an improper question about a D's prior criminal record while providing little means to protect the D's right to a fair trial other than a mere corrective instruction to jurors, which is administered only after the D has been exposed to the prejudice caused by the prosecutor's questioning." The Court goes on to find that because the D had presented an innocent explanation tending to create a reasonable doubt of his guilt, and because the prior conviction was for another DUI, the prejudice to him was significant and required a mistrial.

TITLE: Firestone v. State
INDEX NO.: D.17.
CITE: (1st Dist., 12-01-05), Ind. App., 838 N.E.2d 468
SUBJECT: Denial of motion for mistrial - D's actions & outbursts
HOLDING: In rape & criminal deviate conduct prosecution, Tr. Ct. did not abuse its discretion in denying D's motion for mistrial. Immediately following jury verdicts, while jury was still in Ct. room, D demanded to be removed from Ct. room & stood up. When trial judge directed D to sit down, he refused & began shouting profanities at jury & judge. Sheriff's deputies eventually had to force D to the ground & remove him from Ct. room in restraints. On appeal, D argued that habitual & sentencing phases of his trial should be vacated & a new jury empaneled because his fit of loud outbursts & refusal to be seated resulted in unfair prejudice to himself in the eyes of the jury. However, a D who creates his own cause for mistrial presents no error. Avant v. State, 528 N.E.2d 74 (Ind. 1988). Therefore, D cannot complain of any prejudice that he himself may have created. To hold otherwise would encourage Ds to disrupt judicial proceedings in order to get a new jury empaneled. Held, judgment affirmed.

TITLE: Forrester v. State
INDEX NO.: D.17.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Mistrial - testimony re item not in evidence
HOLDING: Regardless of admissibility of evidence, witness may testify concerning it. Dixon, 62 N.E.2d 629 (witnesses may testify that certain items were stolen, even if items not admitted into evidence); Holler, 38 N.E.2d 242 (witnesses allowed to identify plate similar to ones alleged stolen, which were not available). Here, D contends Tr. Ct. erred in not granting his motion for mistrial or alternatively his request to admonish jury not to consider witness' references to jacket allegedly worn by D on night of attack & when arrested. Jacket was identified by victim & by police officer as belonging to D. Jacket was not allowed to be entered into evidence. Held, no error. Held, rape, deviate conduct & confinement convictions affirmed.

RELATED CASES: Seay, 529 N.E.2d 106 (no error in denying D's motion for mistrial after State witness testified regarding State exhibits which had not been admitted into evidence; such testimony served to establish chain of custody).

TITLE: Garcia v. State
INDEX NO.: D.17.
CITE: (3d Dist. 7/7/87), Ind. App., 509 N.E.2d 888
SUBJECT: Mistrial - D placed in position of grave peril
HOLDING: Tr. Ct. erred in refusing to grant mistrial. Here, prosecutor attempted to impeach D with prior conviction. D denied he had such a conviction. Docket sheet of prior was not admitted into evidence (lack of foundation); however, neither social security number nor date of birth of individual on docket sheet were same as D's. Probation officer who counseled person named on docket sheet could not identify D. Ultimately, it was determined prior conviction was inadmissible under Ashton v. Anderson, 279 N.E.2d 210. D moved for mistrial several times. Ct. denied motion, but struck probation officer's testimony & instructed jury to disregard all questions to D except whether he had a prior & his reply that he did not. Ct. compares case to White, 272 N.E.2d 312 (instruction to disregard police officer's reference to D's prior offense held inadequate & D granted new trial; case lists 13 points to consider in granting/denying mistrials). D has burden to show harm but is not required to establish that error caused verdict. It is enough to show by circumstances that error placed D in grave peril. White. Substantial credibility issue existed. D, his wife, & their neighbor, told different story from that told by officer. Prosecution opened its final argument by stating that someone was lying. Injecting & repeating accusation of prior felony conviction against D placed him in position of grave peril to which he should not have been subjected. Held, reversed & remanded for new trial.

TITLE: Glenn v. State
INDEX NO.: D.17.
CITE: (2nd Dist., 9-24-03), Ind. App., 796 N.E.2d 322
SUBJECT: Reference to polygraph did not require mistrial
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial after witness mentioned during cross-examination by D that she had taken polygraph. Prejudice to D was mitigated by admonishment given by Tr. Ct. Question whether D is so prejudiced by statement to warrant mistrial is case specific. Here, Ct. concluded that D invited error through his own questioning; statement did not appear intentional with no mention of results; & jury may not have associated polygraph to this case, as witness noted being involved in several cases.

Ct. noted studies showing admonishments are not very effective & suggests a more specific admonishment as to the unreliability & inadmissibility of polygraph tests rather than the more general one that Tr. Ct. used to ignore witness' last remark. Ct. suggested following admonishment be given in this situation: A suggestion has been made that the witness took a polygraph examination, yet there has been no suggestion as to what the subject matter of the polygraph test was. Because scientific research has found that polygraph tests are not reliable, they are inadmissible. I would ask that you disregard the last comment made by the witness.
Held, judgment affirmed.

RELATED CASES: Shriner, App., 829 N.E.2d 612 (because D opened door to polygraph evidence, Tr. Ct. did not err in allowing prosecutor to ask D questions about whether he took a polygraph & to use his previous incorrect answer for impeachment purposes before the jury).

TITLE: Gordon v. State
INDEX NO.: D.17.
CITE: (3/3/93), Ind., 609 N.E.2d 1085
SUBJECT: Mistrial - violent outburst of D
HOLDING: Tr. Ct. did not err in refusing to grant D's motion for mistrial where D was placed in physical restraints following violent outburst in courtroom. Mistrial lies within sound discretion of Tr. Ct. judge. Didio, 471 N.E.2d 1117. Here, D threw water pitcher in direction of his wife as she left witness stand. Following outburst and in absence of jury, judge ordered sheriff to shackle D's hands in order to avoid possible injury to jurors. Defense counsel argued that D's outburst would have tendency to prejudice jury against him and that it would be difficult for them to be objective in their judgment. Ct. found that Tr. Ct. properly took those steps necessary to control obstreperous D whose conduct was disruptive of trial, and to proceed with trial under those conditions. Illinois v. Allen, 90 S.Ct. 1057 (1970). Held, judgment affirmed.

TITLE: Greenlee v. State
INDEX NO.: D.17.
CITE: (9-18-95), Ind., 655 N.E.2d 488
SUBJECT: References to prior misconduct did not warrant mistrial
HOLDING: D's right to fair trial was not violated when Tr. Ct. refused to order mistrial after police officer testified about prior, unrelated arrest & witness testified about uncharged act of misconduct. When prosecutor asked police officer if he was familiar with D, officer replied that he had arrested him in past. Tr. Ct. denied D's motion for mistrial & directed jury to disregard testimony about prior arrest. Tr. Ct. also directed jury to disregard testimony regarding witness's knowledge that D had taken stick & "busted a windshield" on car. Given prompt admonishment to jury & strong eyewitness testimony against D, Ct. concluded it was likely jury would have returned guilty verdict even without improper testimony. Further, there was no evidence of deliberate attempt to inject testimony into trial, as police officer's testimony had relevance well beyond his mere knowledge of D's earlier arrest. Held, judgment affirmed.

RELATED CASES: Lucio, 907 N.E.2d 1008 (Ind. 2009) (fact that State sought life imprisonment does not alter analysis of whether Tr. Ct. was required to grant mistrial).

TITLE: Hale v. State
INDEX NO.: D.17.
CITE: (5th Dist., 10-30-07), Ind. App., 875 N.E.2d 438
SUBJECT: Denial of motion for mistrial - waiver
HOLDING: In dealing in cocaine prosecution, Tr. Ct. did not err in denying D's motion for mistrial. During confidential informant's testimony, prosecutor asked him whether he had been threatened about his testimony at trial. Informant said yes & explained that Dustin Slone, who was sitting in Ct. room, called him that morning & instructed him not to testify at trial or else he would "whip [his] a***." D did not object to informant's testimony regarding Slone's threat & thereby did not give Tr. Ct. a chance to rule on admissibility of such evidence at trial, & D's motion for mistrial came after informant's testimony was completed. Moreover, defense counsel cross-examined informant on very issue he contends should have resulted in a mistrial, which waived issue for review. Fleener v. State, 648 N.E.2d 652 (Ind. Ct. App. 1995), *sum. aff'd* on this issue by 656 N.E.2d 1140 (Ind. 1995). Waiver notwithstanding & even assuming informant's testimony regarding Slone's threat was inadmissible because State failed to connect D to that threat, D was not placed in grave peril because there was convincing evidence of D's guilt, & defense counsel's cross-examination of informant permitted inference that Slone's threat to informant was not directly related to D. Held, judgment affirmed.

TITLE: Houchen v. State
INDEX NO.: D.17.
CITE: (5th Dist., 04-19-94), Ind. App., 632 N.E.2d 791
SUBJECT: Mention of polygraph requires mistrial
HOLDING: Although defense failed to object to first mention of polygraph offer, statements about polygraph were so damaging, it was fundamental error not to grant mistrial. During direct exam in child molest trial, officer stated he asked D to take polygraph. D didn't object, but on CX, asked officer if he told D he would come looking for him if he didn't come in next day, & officer said, "I also explained to him that he had the right to take a polygraph if he wanted to or asked him if he wanted." D moved for mistrial. Tr. Ct. denied motion & admonished jury to disregard any reference to polygraph. Although failure to object didn't preserve error for review, Ct. found admission of evidence fundamental error. Given facts of case, no remedy short of mistrial could cure error, because jury had to assume either: D took test & failed it, or he refused test because he was being untruthful.

Officer & welfare worker testified D confessed to molestation, but confession wasn't recorded or transcribed & its contents & extent were contested. D's wife testified that D, on prompting by officer, confessed, but didn't describe acts involved. Complaining witness' testimony was very limited & inconsistent. Officer was not naive witness unaware of prohibition of this kind of testimony but was 19-year veteran of police department. Ct. found entire case hinged on credibility of officer & D & in finding error required reversal, stated: "This court will simply not tolerate such a blatant & deliberate attempt to improperly influence the jury. Because one police officer took it upon himself to guarantee a conviction by tossing out an evidentiary harpoon that the jury could not ignore, the time & expense of this jury trial was for naught." Held, conviction reversed.

RELATED CASES: Sandifur, App., 815 N.E.2d 1042 (Tr. Ct. did not err in admitting D's audiotaped statement to police, which contained references to a proposed polygraph test; officer's statements here did not have the same prejudicial effect as the detective's in Houchen); 659 N.E.2d 1005 (because witness's testimony did not imply that he had taken polygraph test & because mention of witness's agreement to take polygraph test did not guarantee conviction, testimony was not fundamental error requiring reversal).

TITLE: James v. State
INDEX NO.: D.17.
CITE: (4/29/93), Ind., 613 N.E.2d 15
SUBJECT: Mistrial - when appropriate; evidence of criminal history
HOLDING: Tr. Ct. did not err in refusing to grant mistrial where State twice introduced evidence of D's criminal history. Evidence of D's prior criminal history is highly prejudicial & should not be admitted. Roche, 596 N.E.2d 896, but mistrial is extreme remedy warranted when no other curative measure will rectify situation & is matter committed to sound discretion of Tr. Ct. Szpyrka, 550 N.E.2d 316. When determining whether mistrial is warranted, Ct. considers whether D was placed in position of grave peril to which he should not have been subjected. Gravity of peril is determined by probable persuasive effect on jury's decision. Jackson, 518 N.E.2d 787. Trial judge is in best position to gauge surrounding circumstances & potential impact on jury when deciding whether mistrial is appropriate. Timely & accurate admonition is presumed to cure any error in admission of evidence. Green, 587 N.E.2d 1314. Here, two police officers made improper references to D's prior criminal history while testifying for State. In both instances, Tr. Ct. promptly admonished jury to disregard references to D's criminal history but denied motions for mistrial. Ct. found that independent evidence of guilt was overwhelming & there was no substantial likelihood that improper evidence played part in D's conviction; any error in admission of prior criminal history was harmless. Jaske, 539 N.E.2d 14. Held, conviction affirmed, death penalty sentence reversed on other grounds, case remanded for either new death sentence determination or imposition of sentence of term of years.

RELATED CASES: Beer, 885 N.E.2d 33(Ind. Ct. App. 2008) (overwhelming evidence of guilt and prompt admonishment were sufficient to cure any prejudice resulting from D's prior drug dealing); Hampton, App., 873 N.E.2d 1074 (mistrial properly denied where jurors heard alternate juror state that D might be a suspect in other murders); Orta, 940 N.E. 2d 370 (Ind. Ct. App. 2011) (no error in denying mistrial, where Tr. Ct. excused juror on second day of trial because her brother was struck by a drunk driver the night before, even though D's charges included operating vehicle with a controlled substance in the blood and failure to stop at the scene of an accident resulting in death; although remaining jurors were aware of the accident, they said they could remain impartial and Tr. Ct.'s admonishment presumably cured any potential prejudice); Strowmatt, App., 686 N.E.2d 154 (no prejudice from judge's misreading of D's prior criminal history during voir dire, where judge took extensive corrective action); Small, App., 632 N.E.2d 779 (Factors considered in determining whether circumstances place D in grave peril & warrant mistrial include: (1) degree of materiality of improper testimony or comment, (2) other evidence of guilt, (3) whether prosecutor deliberately presented improper material to jury, (4) whether D or D's counsel played part in presenting improper material & (5) whether improper material was repeatedly placed before jury); Moore, 652 N.E.2d 53 (mistrial properly denied even though prosecutor repeatedly used word "murder" after being directed by Ct. to use word "homicide" instead).

TITLE: Jarrett v. State
INDEX NO.: D.17.
CITE: (7/17/84), Ind., 465 N.E.2d 1097
SUBJECT: Mistrial - curative admonishment/instruction
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial made after officer testified D had had homosexual relations with own nephew several times. Here, D, on trial for molesting 5-year-old boy, contends testimony was highly prejudicial hearsay. Tr. judge admonished jury & gave final jury instruction not to consider stricken evidence. Admonishment, coupled with instruction, dispelled any prejudice. Held, conviction affirmed.

RELATED CASES: Boner, App., 796 N.E.2d 1249 (Tr. Ct. did not err in denying D's motion for mistrial after arresting officer testified that driver said drugs found in car belonged to D; trial judge's timely, specific & accurate admonishment to jury re inadmissible & potentially prejudicial hearsay testimony was sufficient & recommended for future cases); Fleener, App., 648 N.E.2d 652 (where State repeatedly suggests that D must prove something, or that he has some burden of proof, D is not automatically entitled to mistrial; curative admonishment may be sufficient); Norcutt, App., 633 N.E.2d 270 (No abuse of discretion in Tr. Ct.'s denial of D's 4 different motions for mistrial. Admonitions were sufficient, no prejudice was found, & Tr. Ct. was merely guiding parties); Roland, 501 N.E.2d 1034 (Rape victim testified that D molested his son; her testimony was not responsive to prosecutor's questioning; Tr. Ct. admonished jury that response was improper & repeated admonition in final instruction; held, conviction affirmed); Edwards, 466 N.E.2d 452 (Prejudicial statement made by prosecutor in closing argument cured by admonishment).

TITLE: Kemper v. State
INDEX NO.: D.17.
CITE: (6/17/2015), 35 N.E.3d 306 (Ind. Ct. App. 2015)
SUBJECT: Denial of mistrial affirmed - no intentional misconduct shown & effective remedy
HOLDING: In robbery and possession of firearm by serious violent felon (SVF) prosecution, Tr. Ct. did not abuse discretion in denying D's motion for mistrial. After State witness's in-court identification of D, the defense became aware that the State was in possession of two videotaped interviews with witness in which he identified someone other than D as the robber. There was no evidence the State had intentionally withheld the interviews and Tr. Ct. remedied situation by allowing the defense time to review and making the witness available for further cross-examination. Held, judgment affirmed, reversed in part on other grounds.

TITLE: Komyatti v. State
INDEX NO.: D.17.
CITE: (3/25/86) Ind., 490 N.E.2d 279
SUBJECT: Mistrial - alleged discovery violation
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial, alleging State should have disclosed private conversation between witness & her husband (co-Ds tried separately) during discovery so that D could have used information to impeach witness' credibility. Here, D contends evidence was exculpatory & State was bound to furnish it to D because opportunity to converse allowed co-Ds to concoct story implicating others. D was not made aware of meeting until after witness had testified. Tr. Ct. has wide discretionary latitude in discovery matters & absent clear error, its rulings will not be overturned. Hunt, 455 N.E.2d 307; Parrish, 453 N.E.2d 234. State's duty to disclose matter in response to discovery order is measured by whether evidence is so obviously exculpatory that failure to turn it over is tantamount to denial of fair trial. Murray, 442 N.E.2d 1012. Ct. distinguishes case from Reid, 372 N.E.2d 1149 (although state failed to disclose existence of witness who would totally refute testimony of alibi witness, conviction was affirmed). Ct. finds evidence at issue here is much less exculpatory & less deserving of mistrial. Ct. notes Ds could have requested continuance. Held, no error.

RELATED CASES: Houser, App., 661 N.E.2d 1213 (Tr. Ct. did not err in denying D's motion for new trial, where undisclosed witness's testimony would not have added anything material to case); Norcutt, App., 633 N.E.2d 270 (no error in denying D's motion for mistrial where State failed to disclose D's statement to police that D acted as a look-out for accomplice; although statement resulted in surprise during cross-examination of police officer, D was not prejudiced).

TITLE: Leavell v. State
INDEX NO.: D.17.
CITE: (11/17/83), Ind., 455 N.E.2d 1110
SUBJECT: Mistrial - co-Ds plead guilty during joint trial
HOLDING: Tr. Ct. did not err in denying D's mistrial motion made after 2 co-Ds (joint trial) pled guilty & agreed to testify against D. Here, D contends he was unduly prejudiced by absence of 2 former co-Ds in Ct. (admission of guilt imputed to him). Change of plea by co-D does not occasion substantial prejudice to remaining Ds' rights. Webb, App., 403 N.E.2d 359; Winker, App., 367 N.E.2d 26. Test: whether, under circumstances (including strength of evidence of guilt & sufficiency of cautionary instruction, if one is given) D was deprived of fair trial by plea change. Scott, App., 409 N.E.2d 1184; Webb. Ct. finds in light of cautionary instruction (set forth in opinion) & evidence presented against D, effect of any inference drawn by jury re co-Ds' absence was inconsequential. Held, no error.

RELATED CASES: Gordon, 609 N.E.2d 1085 (no error in denying D's motion for mistrial after co-D pled guilty during joint trial; Tr. Ct. Instructed jury to disregard the absence of Co-D for remainder of trial).

TITLE: Mack v. State
INDEX NO.: D.17.
CITE: (2nd Dist., 10-19-00), Ind. App., 736 N.E.2d 801
SUBJECT: Detective's reference to pre-assembled photo array required mistrial
HOLDING: In dealing in cocaine prosecution, detective's comment that he identified D out of group of people known to deal drugs in area where D was arrested subjected D to grave peril. Thus, Tr. Ct. erred when it denied D's motion for mistrial after detective's reference to photo array. Detective's identification of D as someone known to deal drugs in area of undercover drug buy was highly material, as he was State's only witness & State's case rested wholly upon his identification. Because there was no independent evidence of D's guilt, there was substantial likelihood that evidence in question played part in D's conviction. Critical importance of detective's ability to identify D combined with absence of corroborating evidence & prejudice presumed from being labeled in front of jury by only identifying witness as a known drug dealer, required reversal. Held, conviction reversed & remanded for new trial.

TITLE: Owens v. State
INDEX NO.: D.17.
CITE: (2nd Dist., 6-30-99) Ind. App., 714 N.E.2d 250
SUBJECT: Denial of mistrial subjected D to grave peril - conflict of interest
HOLDING: Tr. Ct. erred in denying D's motion for mistrial when D's attorney became aware, during trial, that another of his clients was going to be called as rebuttal witness to testify against D. Defense counsel was prevented from effectively cross-examining rebuttal witness due to rules of professional conduct protecting lawyer-client confidentiality & prohibiting representation of client when such representation might be materially limited by attorney's responsibilities toward another client. State's evidence apart from this witness's testimony was clearly not sufficiently overwhelming or even substantial to convince jury of Ds' guilt. Thus, denial of D's motion for mistrial subjected D to grave peril, as measured by probable persuasive effect on jury of testimony by rebuttal witness who could not be subjected to effective cross-examination. Held, conviction reversed & remanded.

TITLE: Ramirez v. State
INDEX NO.: D.17.
CITE: (4/29/2014), 7 N.E.3d 933 (Ind. 2014)
SUBJECT: D failed to show prejudice from juror's extra-judicial comment
HOLDING: In clarifying its precedent, Court held that D was not entitled to rebuttable presumption of prejudice from communication from one juror to other jurors because D failed to prove by preponderance of evidence that incident juror shared with other jurors related to his trial.

Five days into D's trial for murder and criminal gang activity, Juror 282 wrote a note to the judge about an incident at her home where a neighbor heard gunshots. Juror 282 also told the other jurors about the incident. "Ds 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. Currin v. State, 497 N.E.2d 1045, 1046 (Ind. 1986)."

Because D failed to make such showings, Tr. Ct. properly denied his motion for mistrial. Held, transfer granted, Court of Appeals' opinion summarily affirmed on all other issues, judgment affirmed.

RELATED CASES: Hambel, 119 N.E.3d 1142 (Ind. Ct. App. 2019) (Tr. Ct. did not abuse its discretion in denying mistrial based on juror's extrajudicial communication, where each juror was questioned, Tr. Ct. admonished the jurors and dismissed the offending juror; no evidence that juror's remarks, which were harmless and favorable to D, impacted the jurors' ability to remain impartial); Wahl, 51 N.E.3d 113 (Ind. 2016) (Erroneous denial of motion for mistrial based on alternate juror's misconduct, based on fact he immediately involved himself in the jury deliberations and manipulated physical evidence and a DVD; juror's affidavit established by preponderance of the evidence that the alternate juror's participation in deliberations was an external influence that pertained to the case, and under Ramirez, the assertions in the affidavit result in a presumption of prejudice to the defendants. Because the State has not rebutted the presumption by showing that the jury was nevertheless impartial, a new trial is required);); Pribie, 47 N.E.3d 629 (Ind. Ct. App. 2015) (Ct. will not reweigh credibility of two jurors' conflicting accounts to displace Tr. Ct.'s fact finding of no extraneous information); Beasley, 30 N.E.3d 56 (Ind. Ct. App. 2015) *sum. aff'd* 46 N.E.3d 1232 (Ind. 2016) (no error in denying D's motion for mistrial after juror told other jurors she recognized someone in the gallery and was concerned for her safety; nothing about the juror's conduct fundamentally compromised the appearance of neutrality).

TITLE: Romack v. State
INDEX NO.: D.17.
CITE: (4th Dist. 3/31/83), Ind. App., 446 N.E.2d 1346
SUBJECT: Mistrial - prejudice of juror
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial because of juror prejudice where prejudice was discovered & juror was replaced by alternate before jury was sworn. Here, before jury was sworn, Tr. Ct. discovered that one of the jurors knew of D, had heard he did drugs & had tried drugs herself. With approval of both parties she was excused & an alternate juror substituted. D moved for a mistrial contending denial of due process & of right to pick a fair & impartial jury. D *cites* Stevens, 354 N.E.2d 727, on *reh'g* 357 N.E.2d 245, in arguing mistrial is only appropriate remedy. Ct. distinguishes Stevens holding (Tr. Ct. should excuse juror & declare mistrial if bias is discovered): here bias was discovered before trial commenced & alternate juror substituted before jury sworn; thus, D was not injured (no evidence other jurors were influenced; D had participated in voir dire of alternate; an additional alternate was not required during trial). Held, no error.

RELATED CASES: Wilson, App., 865 N.E.2d 1024 (Tr. Ct. removed only juror who expressed doubt about her ability to remain fair & impartial, thereby remedying situation & making extreme action of declaring mistrial unnecessary); Timm, 644 N.E.2d 1235 (mistrial not required because Tr. Ct. questioned juror at length re: her knowledge of D's prior conviction, & determined that she remained qualified to serve; information was not shared with other jurors).

TITLE: Smith v. State
INDEX NO.: D.17.
CITE: (4th Dist. 12/12/84), Ind. App., 471 N.E.2d 733
SUBJECT: Mistrial - intentional evidentiary harpoon
HOLDING: Tr. Ct. erred in denying D's motion for mistrial where: (1) prosecutor intentionally elicited evidence of unrelated burglaries (after Tr. Ct.'s ruling that he should not do so); (2) Tr. judge did not question jurors to determine whether they would obey her admonition to disregard officer's testimony; & (3) evidence re D's guilt was in conflict. White, 272 N.E.2d 312. "In assessing an evidentiary harpoon's impact on jury's verdict, we must consider whether there was serious conflict in evidence, whether witness implicated D in other crimes directly or only indirectly & extent [of admonishment] see Davis, 418 N.E.2d 203." Here, officer testified D told him he broke into another garage earlier that morning. Ct. finds jury may have been influenced by improper testimony. Ct. rejects state's contention that evidence is admissible to prove felonious intent or to complete story of crime charged. Ct. finds evidence was not admissible to impeach D because his whereabouts earlier that morning was "wholly collateral" to crime charged. Impeachment on collateral matters is improper. Gaston, app. 451 N.E.2d 360. Held, reversed.

RELATED CASES: Myers, App., 887 N.E.2d 170 (detective's statement that he, the D and another person know facts about the case no one else knows inferred the detective's opinion that the D was guilty and violated Rule 704, but was not an intentional evidentiary harpoon); Perez, 728 N.E.2d 234 (although prosecutor did not elicit officer's testimony that D was convicted felon, officer who was experienced & has in other cases injected inadmissible evidence, intentionally tried to prejudice jury); Roberts, App., 712 N.E.2d 23 (DISSENT argues that repetitive questioning of D about cruelty to animals in rape & child molesting case constituted evidentiary harpoon); Ballin, App., 610 N.E.2d 846 (No error in refusing mistrial motion when prosecutor asked witness if D didn't have prior conviction for battery, because defense was first to elicit information about their stormy relationship, question remained unanswered, & probable persuasive effect of information was greatly diminished.); Stewart, App., 601 N.E.2d 1 (complaining witness' unsolicited statements that, "you deserve to die, do you know that?" [directed to D], "Mike wanted to kill him.," & "Your honor - you're asking the same questions over & over.'" [directed to defense counsel] did not require granting of motion for mistrial); Dalton, 504 N.E.2d 568 (see card at O.4.d.1); Riley, 489 N.E.2d 58 (Tr. Ct. erred in denying D's motion for mistrial where prosecutor repeatedly attempted to introduce evidence of D's prior drug use); English, 485 N.E.2d 93 (Ct. finds evidence does not clearly indicate that prosecutor intentionally elicited inadmissible testimony re D's prior robbery of same business, in violation of motion in limine; in light of evidence against D, admonition cured any error; opinion reverses 4th Dist. opinion at 481 N.E.2d 413); Asbell, 468 N.E.2d 845 (prosecutor's vague reference in question to witness re D's prior conviction, objected to by D, did not require mistrial); Davenport, 464 N.E.2d 1302 (prosecutor's question to officer on rebuttal whether he had examined D's girlfriend's arms (implying drug addiction) did not require mistrial where jury was admonished to disregard question & answer).

TITLE: Starks v. State
INDEX NO.: D.17.
CITE: (3rd Dist., 09-20-93), Ind. App., 620 N.E.2d 747
SUBJECT: No error in refusal to grant mistrial
HOLDING: Tr. Ct. did not err in refusing to grant mistrial when prosecutor attempted to elicit statements, not disclosed during discovery, made by D to officer during transport to hospital. During direct exam in prosecution for murder, officer testified that D began talking during ride, & that he was unsure whether D was talking to himself or officer. At hearing outside presence of jury, officer explained that he had not mentioned statements during his deposition, but one or two days before trial, he told prosecutor that D had said "she had gotten under his skin," & there "is a fine line between love & hate." Tr. Ct. excluded statements & denied D's motion for mistrial.

Ct. rejected D's argument that mistrial was proper because prosecutor had previously violated discovery order in another case, & that due to nondisclosure of statements, counsel could not fully assess its impact on insanity & sudden heat defenses. Tr. Ct. precluded only State from using statements & indicated that if defense believed statements were exculpatory, it could use them. Because evidence was not admitted & D was given option to use it if it desired, Ct. found D was not placed in position of grave peril due to prosecutor's actions, & therefore denial of mistrial was not error.

RELATED CASES: Jackson, App., 698 N.E.2d 809 (no error in denying D's motion for mistrial following prosecutor's remarks during closing argument that D was represented by public defender).

TITLE: Steele v. State
INDEX NO.: D.17.
CITE: (11-4-96), Ind., 672 N.E.2d 1348
SUBJECT: Co-D's refusal to testify in jury's presence - mistrial not required
HOLDING: Tr. Ct. did not abuse discretion by denying D's motion for mistrial, after co-D took stand in front of jury & refused to testify. In so holding, Ct. distinguished Aubrey v. State, 261 Ind. 692, 310 N.E.2d 556 (1974), & Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074 (1965). D was not subjected to grave peril in this case because: 1) jury exposure to co-D's refusal to testify was minimal; 2) jury did not hear full reading of co-D's confession or even an express assertion of his constitutional privilege against self-incrimination; 3) prosecutor did not engage in repetitive interrogation of co-D; & 4) Tr. Ct. properly admonished jury to disregard co-D's appearance on stand, his refusal to testify, & anything jurors might imagine that he would have said had he testified. Held, judgment affirmed.

RELATED CASES: Sides, 693 N.E.2d 131 (failure to object waived issue).

TITLE: Steele v. State
INDEX NO.: D.17.
CITE: (3d Dist. 3/16/83), Ind. App., 446 N.E.2d 353
SUBJECT: Mistrial - failure to swear jury
HOLDING: Motion for mistrial predicated upon Tr. Ct.'s failure to swear in the jury prior to commencement of trial must be granted. Whitehead, 444 N.E.2d 1253 [see card at J.10.b]. Here, opening statements & 5 witness's testimony were presented on the first day of trial. On the second day, D moved for a mistrial based upon failure to swear jury. Motion denied. Jury was sworn at that time & the introduction of evidence continued. The Ct. finds that oath given to jury prior to commencement of trial is not a mere formality. It is intended to impress upon the jury its solemn duty of careful deliberation. It also serves as safeguard of D's constitutional right to trial by an impartial jury. Ct. *cites* Leas et al. v. Patterson, (1872) 38 Ind. 465 for proposition that Tr. Ct. should have granted mistrial, sworn in new (or same) panel of jurors & begun the trial anew. Leas involved incorrect naming of parties when jury was sworn. Held, robbery conviction reversed; cause remanded for retrial.

TITLE: Valdez v. State
INDEX NO.: D.17.
CITE: (7/22/2016), 56 N.E.3d 1244 (Ind. Ct. App. 2015)
SUBJECT: Admonishment cures prosecutorial misconduct
HOLDING: The Tr. Ct. properly denied D's motion for mistrial even though the Delaware County deputy prosecutor committed misconduct during closing argument by claiming that defense counsel manipulated the testimony of D's expert to get him to testify that D was insane when he committed his offenses. See Ind. Professional Rule Misconduct 3.4(e). The Tr. Ct.'s prompt admonishment cured the effect of the misconduct. See Hubbard v. State, 313 N.E.2d 346, 350 (Ind. 1974). Held, judgment affirmed.

Note: In an unusual move, the Court identified the Delaware County deputy prosecutor by name no less than eight times. Why the Court did this is a matter of speculation, but perhaps the Court found prosecutor's behavior especially egregious or perhaps it has reviewed other appeals where prosecutor also engaged in questionable trial tactics.

D. TRIAL

D.18. Closing argument (other than misconduct or ineffective assistance of counsel)

TITLE: Dixey v. State
INDEX NO.: D.18.
CITE: (11-07-11), 956 N.E.2d 776 (Ind. Ct. App. 2011)
SUBJECT: Restriction on scope of closing argument - reversible error
HOLDING: Although D's tendered lesser-included offense instructions on utility fraud and criminal deception were properly refused, Tr. Ct. erred when it refused to allow D to discuss these lesser offenses during closing argument. D was charged with theft after an investigation revealed he had diverted and used electricity without paying for it. The charging information did not allege the means by which D exerted unauthorized control over Vectren's electricity and/or electrical equipment. More particularly, the charging information did not allege that D exerted unauthorized control by utilizing any device or scheme as required for utility fraud or by tampering with Vectren's facilities or equipment as required for deception. Consequently, neither utility fraud nor criminal deception were factually lesser included offenses of theft, and Tr. Ct. did not err by refusing to give D's proffered instructions on these offenses. Court also affirmed Tr. Ct.'s refusal to instruct jury that specific statutes prevail over general statutes.

However, Tr. Ct. impermissibly foreclosed D from presenting his defense when it prevented him from arguing that the evidence presented was more consistent with one of the lesser offenses. The jury would have been aided had D been able to explain that the legislature had enacted other offenses directly related to the use of utility bypass schemes or devices that do not require proof of the same requisite mens rea as theft. As in Taylor v. State, 457 N.E.2d 594 (Ind. Ct. App. 1983), without the ability to discuss these other statutes, D was prejudiced because he was deprived of presenting his theory of defense. Held, judgment reversed and remanded for a new trial.

TITLE: Jefferson v. State
INDEX NO.: D.18.
CITE: (4th Dist., 07-29-08), Ind. App., 891 N.E.2d 77
SUBJECT: Limitation of pro se D's closing argument did not violate right to present defense
HOLDING: In prosecution for dealing in cocaine, Tr. Ct. did not fail to permit D to present a defense. D exercised his right to proceed pro se, and was therefore held to the rules of evidence and trial procedure. Piper v. State, 770 N.E.2d 880 (Ind. Ct. App. 2002). To the extent D attempted to state that he used to be a drug dealer, had changed his life, and admitted to possessing the drugs, he was commenting on matters not in evidence and Tr. Ct. correctly sustained prosecutor's objections that he was testifying. Despite the prosecutor's objections, D was still able to argue that he was a user and not a dealer.

Court also held that, although search warrant and supporting affidavit were filed with the Tr. Ct. fifteen days late, "there was no evidence that the affidavit was not filed with the judge" when signed by the judge and as stated on the search warrant. In so holding, Court distinguished Rucker v. State, 861 N.E.2d 1240 (Ind. Ct. App. 2007). Held, judgment affirmed.

TITLE: Jones v. State
INDEX NO.: D.18.
CITE: (5th Dist., 04-22-05), Ind. App., 825 N.E.2d 926
SUBJECT: Denial of request for surrebuttal closing argument - no error
HOLDING: In murder & attempted murder prosecution, Ct. rejected D's contention that he should have been granted a surrebuttal argument. D argued that since he carried the burden to prove insanity, he should have an opportunity to sum up after the State pursuant to Jury Rule 27, which states the party with the burden of going forward shall open & close the argument. Ind. Code 35-37-2-2(4) establishes the order of argument in a criminal case. Relying on Green v. State, 469 N.E.2d 1169 (Ind.1984) & Sills v. State, 463 N.E.2d 228 (Ind. 1984), Ct. determined D's questions had previously been decided against him. Green held that while a D did have the burden of proof on insanity, the State had the ultimate burden of proving that the D knowingly & intentionally killed the victim. Sills held that while burden of proof in insanity proceedings is a civil standard, this did not "talismanically transform" the entire criminal proceeding into a civil one. Also, Ct. found that surrebuttal was not allowed to address prosecutorial comments raised by the State for the first time in its concluding statement. Ct. found this challenge waived due to D's failure to object to them prior to conclusion of the State's argument. Cox v. State, 696 N.E.2d 853 (Ind.1998). Waiver notwithstanding, Ct. determined the State's rebuttal was invited by defense counsel's closing. Held, judgment affirmed.

TITLE: Nelson v. State
INDEX NO.: D.18.
CITE: (2nd Dist., 7-31-03), Ind. App., 792 N.E.2d 588
SUBJECT: Restriction on scope of closing argument - harmless error
HOLDING: In prosecution for conspiracy & dealing in cocaine, Tr. Ct. abused its discretion when it prohibited D from commenting on reliability of State expert witnesses' testing methods in his closing argument. It is within exclusive province of jury to determine credibility of expert witnesses' testimony. D's questions on cross-examination were designed to establish doubts as to reliability of expert witnesses' testing methods. D thoroughly cross-examined forensic chemist about blind testing of his results by outside agencies, possible contamination during testing process, & calibration of machines he used to test cocaine. D also questioned park ranger about calibration of measuring wheel he used in his measurement to determine distance from drug buy to nearby park.

It is proper for counsel to argue both law & facts in his closing argument, including any argument as to position or conclusions based on attorney's analysis of the evidence. Taylor v. State, 457 N.E.2d 594 (Ind. Ct. App. 1983). Tr. Ct. erred in sua sponte instructing D that he could not assert his theory that testing was unreliable in his closing argument. Tr. Ct.'s stated basis for limiting D's closing argument, i.e., that tests were per se reliable, was unfounded & erroneous as matter of law. However, error was harmless because D conducted extensive cross-examination of State's witnesses to establish his theory & Ct. could not say that jury would have believed D's theory of defense if he had reiterated it in his closing argument. Held, judgment affirmed in part & reversed on other grounds.

Note: Ct. also held that Tr. Ct. committed harmless error when its limited D's cross-examination of State's fingerprint expert in habitual phase of trial & denied his request to make offer of proof.

D. TRIAL

D.18. Closing argument (other than misconduct or ineffective assistance of counsel)

D.18.a. Reading/arguing law

TITLE: Schlabach v. State
INDEX NO.: D.18.a.
CITE: (3d Dist. 2/15/84), Ind. App., 459 N.E.2d 740
SUBJECT: Closing argument - reading law
HOLDING: Tr. Ct. did not err in refusing to allow D's attorney to quote from IN entrapment cases during closing argument. Here, state objected, arguing D was trying to demonstrate meaning of predisposition, a matter better handled through instruction (avoid misleading jury). Ct. quotes at length from Lax, 414 N.E.2d 555. Counsel may read law to jury but has no "right" to do so. If counsel does read law to jury, he/she should preface attempted quotation with a statement that it is argument. Sizemore, 391 N.E.2d 1179, 1182; Lax at 557. Held, no error.

RELATED CASES: Harrison, 32 N.E.3d 240 (Ind. Ct. App. 2015) (no error in permitting prosecutor to read from a published court of appeals opinion during closing argument, where it was clear she was reading or referring to a separate case); Abercrombie 478 N.E.2d 1236 & Johnson, 475 N.E.2d 17 (Crim L 808; no error in allowing prosecutor to read passage from dissent in US v. Wade, re defense attorney's role; reading of passage upheld in Hubbard 313 N.E.2d 346); Hernandez, 439 N.E.2d 625 (no error in allowing prosecutor to read from Lewis, App., 346 N.E.2d 754).

TITLE: Taylor v. State
INDEX NO.: D.18.a.
CITE: (4th Dist. 12/19/83), Ind. App., 457 N.E.2d 594
SUBJECT: Closing argument - arguing law to jury
HOLDING: Tr. Ct. erred in prohibiting (on relevancy grounds) defense counsel from arguing difference between negligence & recklessness to jury in D's trial for DWI & reckless homicide. Counsel may argue both law & facts (Ind.Const. Art. I, Section 19; Inman, 393 N.E.2d 767; Horn, App., 376 N.E.2d 512), including any argument re conclusions based on counsel's analysis of evidence (Flynn, App., 379 N.E.2d 548). Here, argumentative comparison of negligence & recklessness was relevant. See Bryant, (1933) 205 Ind. 372. Finding no valid basis for exclusion of argument (such as resulting prejudice to state or confusion of jury) Ct. finds Tr. Ct. abused discretion. Ct. finds D was denied a fair trial because D's counsel was precluded from arguing law relevant to theory of proximate cause. Bryant. See also Wilson v. State, (Md. 1965) 210 A.2d 824. Held, reversed & remanded for new trial.

D. TRIAL

D.18. Closing argument (other than misconduct or ineffective assistance of counsel)

D.18.b. Sentence

TITLE: Clifford v. State
INDEX NO.: D.18.b.
CITE: (1/3/84), Ind., 457 N.E.2d 536
SUBJECT: Closing argument - sentence
HOLDING: Tr. Ct. did not err in sustaining state's objection to comment by defense attorney that D might spend rest of life "behind those high gray stone walls..." Here, Ct. finds comment was reference to a specific penalty. Defense counsel may argue in general terms about the seriousness of the offense, but may not mention specific penalties. Bailey, 412 N.E.2d 56. Held, no error.

TITLE: Taylor v. State
INDEX NO.: D.18.a.
CITE: (4th Dist. 12/19/83), Ind. App., 457 N.E.2d 594
SUBJECT: Closing argument - arguing law to jury
HOLDING: Tr. Ct. erred in prohibiting (on relevancy grounds) defense counsel from arguing difference between negligence & recklessness to jury in D's trial for DWI & reckless homicide. Counsel may argue both law & facts (Ind.Const. Art. I, Section 19; Inman, 393 N.E.2d 767; Horn, App., 376 N.E.2d 512), including any argument re conclusions based on counsel's analysis of evidence (Flynn, App., 379 N.E.2d 548). Here, argumentative comparison of negligence & recklessness was relevant. See Bryant, (1933) 205 Ind. 372. Finding no valid basis for exclusion of argument (such as resulting prejudice to state or confusion of jury) Ct. finds Tr. Ct. abused discretion. Ct. finds D was denied a fair trial because D's counsel was precluded from arguing law relevant to theory of proximate cause. Bryant. See also Wilson v. State, (Md. 1965) 210 A.2d 824. Held, reversed & remanded for new trial.

D. TRIAL

D.18. Closing argument (other than misconduct or ineffective assistance of counsel)

D.18.b. Sentence

TITLE: Clifford v. State
INDEX NO.: D.18.b.
CITE: (1/3/84), Ind., 457 N.E.2d 536
SUBJECT: Closing argument - sentence
HOLDING: Tr. Ct. did not err in sustaining state's objection to comment by defense attorney that D might spend rest of life "behind those high gray stone walls..." Here, Ct. finds comment was reference to a specific penalty. Defense counsel may argue in general terms about the seriousness of the offense, but may not mention specific penalties. Bailey, 412 N.E.2d 56. Held, no error.

TITLE: Taylor v. State
INDEX NO.: D.18.a.
CITE: (4th Dist. 12/19/83), Ind. App., 457 N.E.2d 594
SUBJECT: Closing argument - arguing law to jury
HOLDING: Tr. Ct. erred in prohibiting (on relevancy grounds) defense counsel from arguing difference between negligence & recklessness to jury in D's trial for DWI & reckless homicide. Counsel may argue both law & facts (Ind.Const. Art. I, Section 19; Inman, 393 N.E.2d 767; Horn, App., 376 N.E.2d 512), including any argument re conclusions based on counsel's analysis of evidence (Flynn, App., 379 N.E.2d 548). Here, argumentative comparison of negligence & recklessness was relevant. See Bryant, (1933) 205 Ind. 372. Finding no valid basis for exclusion of argument (such as resulting prejudice to state or confusion of jury) Ct. finds Tr. Ct. abused discretion. Ct. finds D was denied a fair trial because D's counsel was precluded from arguing law relevant to theory of proximate cause. Bryant. See also Wilson v. State, (Md. 1965) 210 A.2d 824. Held, reversed & remanded for new trial.

D. TRIAL

D.18. Closing argument (other than misconduct or ineffective assistance of counsel)

D.18.b. Sentence

TITLE: Clifford v. State
INDEX NO.: D.18.b.
CITE: (1/3/84), Ind., 457 N.E.2d 536
SUBJECT: Closing argument - sentence
HOLDING: Tr. Ct. did not err in sustaining state's objection to comment by defense attorney that D might spend rest of life "behind those high gray stone walls..." Here, Ct. finds comment was reference to a specific penalty. Defense counsel may argue in general terms about the seriousness of the offense, but may not mention specific penalties. Bailey, 412 N.E.2d 56. Held, no error.

TITLE: Warfel v. State
INDEX NO.: D.18.b.
CITE: (10/21/83), Ind., 454 N.E.2d 1218
SUBJECT: Closing argument - sentence; prosecutor's comment on
HOLDING: Tr. Ct. did not err in overruling D's objection to prosecutor's rebuttal argument (stating D might not spend a day in jail if convicted) where defense counsel provoked comment by stating in closing argument that D could receive 20-year sentence. Grassmyer, 429 N.E.2d 248 (where defense counsel paraphrased tape recording of D's confession in closing argument, prosecutor properly permitted to play tape during rebuttal argument). Held, no error.

D. TRIAL

D.18. Closing argument (other than misconduct or ineffective assistance of counsel)

D.18.c. Exhibits

TITLE: Radford v. State
INDEX NO.: D.18.c.
CITE: (9/19/84), Ind., 468 N.E.2d 219
SUBJECT: Closing argument - exhibits
HOLDING: Tr. Ct. did not err in permitting state to replay audio tape during its final argument. Newland, 459 N.E.2d 384 (videotape shown during final argument). Exhibits properly admitted into evidence may be shown to jury during final arguments. Jenkins, 335 N.E.2d 215. Held, no error.

D. TRIAL

D.18. Closing argument (other than misconduct or ineffective assistance of counsel)

D.18.d. Other

TITLE: Allen v. State
INDEX NO.: D.18.d.
CITE: (11/28/83), Ind., 456 N.E.2d 384
SUBJECT: Closing argument - comments by judge
HOLDING: Tr. Ct. did not err in denying D's motion for mistrial based upon judge's admonishment during closing argument that record did not support attorney's conclusions. Adler, 175 N.E.2d 358. Here, carbon copy of waiver form bore unintended duplication of writing from another source ("has changed," "he originally said a 30-30 shotgun but (undecipherable) 22 rifle"). Defense counsel attempted to impeach witness' identification of gun used in robbery based on this information. Witness & investigating officer testified that writing might be related to this case. In closing argument, defense counsel said evidence showed witness had changed his mind. Tr. judge has wide discretion re scope/conduct of final argument (Scott, 413 N.E.2d 902; Morris, 398 N.E.2d 1284) & may take action without waiting for objection by opposing counsel (Jaske, 379 N.E.2d 451). Held, no abuse of discretion.

TITLE: Goodman v. State
INDEX NO.: D.18.d.
CITE: (03/24/92), Ind., 588 N.E.2d 507
SUBJECT: D's right to additional closing argument
HOLDING: Although Ind. Code 35-37-2-2(4) provides in part: [T]he prosecuting attorney shall disclose in the opening all the points relied on in the case, & if in the closing he refers to any new point or fact not disclosed in the opening, the D or his counsel may reply to that point or fact, & that reply shall close the argument of the case..., where defense counsel raised issue of voluntary manslaughter in his closing argument, prosecutor was not precluded from discussing voluntary manslaughter in his rebuttal closing, even though not referred to previously. D's closing invited prosecutor's comments, & therefore it was not error for Tr. Ct. to deny D's request for additional time to respond to prosecutor's rebuttal closing. Held, conviction affirmed.

RELATED CASES: Inman, 4 N.E.3d 190 (Ind. 2014) (State's rebuttal to D's closing argument about self-defense did not raise new facts but simply tried to rebut D's allegations; thus, D was not entitled to surrebuttal).

TITLE: Inman v. State
INDEX NO.: D.18.d.
CITE: (2/11/2014), 4 N.E.3d 190 (Ind. 2014)
SUBJECT: No error in denying D's request for surrebuttal in closing argument
HOLDING: In closing, D argued he acted in self-defense when he shot and killed a jewelry store owner. On rebuttal, the State refuted D's self-defense claim, highlighting blood spatter evidence and evidence that the vicitm was on his knees when D shot him. The State's rebuttal did not raise new facts or new argument, so D was not entitled to surrebuttal. See Goodman v. State, 588 N.E.2d 507, 508 (Ind. 1992); see also Ind. Jury Rule 27 and Ind. Code § 35-37-2-2(4) (2008). Held, judgment affirmed.

TITLE: Nickels v. State
INDEX NO.: D.18.d.
CITE: (8/3/2017), 81 N.E.3d 1092 (Ind. Ct. App. 2017)
SUBJECT: Error in denying right to closing argument in bench trial
HOLDING: The Tr. Ct. committed reversible error in preventing D from making a final argument in his bench trial. D was charged with domestic battery and interference with reporting a crime. At the close of evidence, the Tr. Ct. offered the State the opportunity to make an argument, interrupted the argument to announce it was finding for the State, and asked for argument from D only after it had already announced its intention to find against her. Defense counsel responded with a one-sentence statement that the State failed to meet its burden of proof. The Tr. Ct. then immediately asked for sentencing recommendations. The opportunity to make a closing argument is a basic element of the criminal process. See Herring v. New York, 422 U.S. 853, 864-65 (1975). The premise of the adversary system is that partisan advocacy will best promote the ultimate objective that the guilty be convicted and the innocent go free. King v. State, 467 N.E.2d 726, 728-29 (Ind. 1984).

The State is incorrect that the Tr. Ct. only "preliminarily" found for the State and then invited closing argument from D; the court asked for sentencing recommendations as soon as D's counsel finished his brief statement, and therefore, the Tr. Ct.'s "invitation" for defense counsel to give closing argument was at best an empty formality. Cf. U.S. v. King, 650 F.2d 534, 536-37 (4th Cir. 1981) (D was denied any real opportunity to present closing argument when Tr. Ct. immediately announced judgment but told defense counsel to "[g]o ahead if you want to argue it. I have already made my finding. It's not going to change anything."). Held, judgment reversed.

TITLE: Roach v. State
INDEX NO.: D.18.d.
CITE: (4th Dist. 7/28/83), Ind. App., 451 N.E.2d 388
SUBJECT: Closing argument - statistical probabilities
HOLDING: Tr. Ct. did not abuse discretion in allowing prosecutor to argue statistical probabilities of D's innocence based on circumstantial evidence linking D to crime during closing argument where D failed to show prosecutor misapplied rules of probability (People v. Collins, (Cal. 1968), 438 P.2d 33) or improperly equated mathematical probability with proof beyond a reasonable doubt (US v. Massey (CA8 1979), 594 F.2d 676). Here, Ct. does not condone/encourage use of statistical arguments (reprinted in opinion) & notes several Cts. have flatly forbidden them because they might confuse/unduly sway jurors ill-equipped to evaluate such arguments critically. Massey; State v. Carlson (Minn. 1978), 267 N.W.2d 170. See also Collins. Held, conviction affirmed.

RELATED CASES: Davis, App., 476 N.E.2d 127 (mathematical probability of parentage is admissible; see card at O.12.a).

TITLE: Whitehead v. State
INDEX NO.: D.18.d.
CITE: (7/22/87), Ind., 511 N.E.2d 284
SUBJECT: Closing argument - time limit
HOLDING: Tr. Ct. did not err in allotting 1 hour & 15 minutes per side for closing argument. Here, Tr. Ct. originally allotted 45 minutes per side. D asked for more time & did not object to new limitation. Amount of time allotted for closing argument is within sound discretion of Tr. Ct. Hashfield, 210 N.E.2d 429. In order to show abuse of discretion, D must object to time limitation & must show manner in which he/she was prejudiced by limitation. Barnes, 378 N.E.2d 837. D claims he was unable to completely summarize testimony of 2 key witnesses from trial that lasted 7 days & included testimony from 37 witnesses. Ct. finds inability to summarize testimony was more result of D's poor planning than of time limitation imposed by Tr. Ct. Held, no abuse of discretion.

D. TRIAL

D.19. Contempt (Ind. Code 34-4-7-1)

TITLE: Allee v. State
INDEX NO.: D.19.
CITE: (1st Dist. 4/26/84), Ind. App., 462 N.E.2d 1074
SUBJECT: Contempt - enforce payment of paternity test costs
HOLDING: Tr. Ct. did not err in holding D in contempt for non-payment of blood test costs assessed against him in paternity judgment. Here, pursuant to Ind. Code 31-6-6.1-18, D was ordered to reimburse DPW $935, payable in $30 monthly installments. State brought contempt proceedings after D failed to make payments. D contends non-payment is in nature of debt & Ind.Const. Art. I, Section 22 prohibits imprisonment for debt. Ct. traces use of contempt to enforce payment of money judgments. Ct. compares situation to non-payment of child support, which can be enforced by contempt. In both cases, child is benefactor of state's action. Held, affirmed.

TITLE: Andrews v. State
INDEX NO.: D.19.
CITE: (1st Dist. 3/31/87), Ind. App., 505 N.E.2d 815
SUBJECT: Direct contempt - specificity of order
HOLDING: Although there is "little doubt that D's obstreperous conduct was contemptuous," Ct. finds convictions cannot stand because Tr. Ct.'s orders did not meet specificity requirement of Ind. Code 34-4-7-7. Statute & case law required Tr. Ct. to issue order explicitly detailing contemptuous conduct. Here, memorandum stated that D continued to "issue questions & make statements of particular nature" after having been told to cease. Tr. Ct. held D in contempt for "continued like statements including labeling proceedings as `Kangaroo Ct.';" & for further "statements made on record." Held, 3 of 4 contempt convictions reversed.

RELATED CASES: In Re Steelman, App., 648 N.E.2d 366 (contempt order complied with specificity requirements of Ind. Code 34-4-7-7).

TITLE: Andrews v. State
INDEX NO.: D.19.
CITE: (1st Dist. 3/31/87), Ind. App., 505 N.E.2d 815
SUBJECT: Direct versus indirect contempt
HOLDING: Where judge had immediate personal knowledge of D's disobedience of order not to leave courtroom, which constituted blatant disrespect for Tr. Ct.'s authority, D's conduct was properly punishable as direct contempt of Ct. Tr. Ct. did not err in failing to follow procedure for adjudication of indirect contempt. Here, D contends his conduct amounted to indirect contempt & Tr. Ct. ignored requirements of Ind. Code 34-4-7-8, Ind. Code 34-4-7-9, & Ind. Code 34-4-8-1, thereby denying him due process of law. D argues he was not in direct contempt because courtroom proceedings were over & judge had left courtroom. Direct contempt usually refers to conduct directly interfering with court proceedings while court is in session. Ind. Code 34-4-7-1 & 2. Indirect contempt is willful disobedience of any lawfully entered court order of which offender has notice, e.g., failure to obey court order or process. Ind. Code 34-4-7-3. Direct contempt may result from act committed within personal knowledge of judge. La Grange, 153 N.E.2d 593. Trial judge returned to courtroom to find D had left in violation of order. Held, D's conduct was indirect contempt.

TITLE: Buford v. State

INDEX NO.: D.19.

CITE: (12-23-19) 139 N.E.3d 1074 (Ind. Ct. App.)

SUBJECT: Double jeopardy prohibited contempt finding for violation of same No Contact Order serving as basis for invasion of privacy conviction in separate cause

HOLDING: Defendant was charged with domestic battery and at trial his jail calls where admitted into evidence. In the calls, Defendant could be heard speaking with the complaining witness in violation of a No Contact Order. Defendant was found guilty of domestic battery. After the trial, the court set the matter for a hearing on a rule to show cause and found Defendant to be in contempt of court for violation of the court's No Contact Order. Under a separate cause number, the State charged Defendant with several more counts of Invasion of Privacy, including for the same jail phone call for which he was found to be in Contempt of Court. The Court of Appeals found the Contempt of Court was punitive and therefore the Contempt of Court and Invasion of privacy conviction for the same conduct violated double jeopardy. Held, Contempt of Court finding vacated.

TITLE: C.F. v. State
INDEX NO.: D.19.
CITE: (4th Dist. 4/25/88), Ind. App., 521 N.E.2d 1338
SUBJECT: Contempt - refusal to testify
HOLDING: Grand jury target witness was not properly subject to contempt for answering "I don't know why I started the fire, "when repeatedly asked "what was your reason or motive for starting the fire?" D was granted use & derivative immunity before grand jury. During testimony, D was asked more than 20 times why she started fire, & each time D gave above response. Tr. Ct. found D in contempt & sentenced her to 90 days in jail. Witnesses who refuse to testify under grant of immunity are to be treated as if they refused in open Ct. Ind. Code 35-34-2-8(c). See also Ind. Code 34-4-7-2. Tr. Ct. determined that D's response that she did not know why she had set fire was tantamount to refusal to testify. However, act complained of must constitute both perjury & obstruction of judicial duty. Ex Parte Hudgings (1919), 249 U.S. 378, 39 S.Ct. 337. Otherwise, Cts. would have power to impose contempt sanctions for purpose of exacting testimony Ct. deems truthful. Id. See also In Re Michael (1945), 326 U.S. 224, 66 S.Ct. 78. Here, there is no substantial evidence that D gave perjured testimony. Further, D's answers did not impede grand jury's investigation, since motive is not element of arson. Held, reversed & remanded.

TITLE: Carroll v. State
INDEX NO.: D.19.
CITE: (5/19/2016), 54 N.E.3d 1081 (Ind. Ct. App. 2016)
SUBJECT: Unruly behavior for contempt need not occur inside courtrooom
HOLDING: D's contempt citation was permissible, even though his unruly conduct during his initial hearing did not occur in the courtroom but instead in the Grant County Jail, where he participated by video conference. Ind. Code § 34-47-2-1(a) says that a person is guilty of contempt if they "disturb[] the business and proceedings of a court: 1) by creating any noise or confusion; 2) in a court of record; and 3) while the court is open for and engaged in the transaction of business." The statute does not require the offending party to be present in the court room. Read as a whole, it requires that the disturbance cause noise or confusion in the court while the court is conducting business, not that the person causing the disturbance be physically present in the courtroom. "To constitute direct contempt, the act must be within the judge's personal knowledge, though it does not necessarily have to occur inside the court or during a judicial proceeding." Williams v. State ex rel. Harris, 690 N.E.2d 315, 317 (Ind. Ct. App. 1997). Held, judgment affirmed.

RELATED CASES: Rochefort, 177N.E.3d 113 (Ind. Ct. App. 2021) (judge telling D in front of jury if he did not stop interrupting the judge he would be held in contempt of court and face a $1000.00 fine or six months in jail did not place D in grave peril because he failed to show the trial court exhibited partiality in its comment; even if it had, Tr. Ct. issued an admonishment to the jury explaining the reason for the court's comments and instructing the jury not to take its comments into account when determining Defendant's guilt).

TITLE: Chanley v. State
INDEX NO.: D.19.
CITE: (1st Dist. 2/19/90), Ind. App., 550 N.E.2d 764
SUBJECT: Contempt - petition for use immunity during pretrial discovery
HOLDING: Tr. Ct. properly granted state's petition for use immunity for D when D refused to testify during pretrial deposition in another criminal proceeding. D appeals 2 contempt citations, based on his refusal to answer questions at deposition & at trial in criminal prosecution of another individual. After D refused to answer question at deposition, state petitioned for use immunity, & D objected that state had no standing to do so at that point. Petition was granted, & when deposition was resumed, D again refused to answer question. Tr. Ct. found D in contempt & sentenced him to 6 months in jail. Later at trial of same individual, D refused to answer certain questions resulting in 2d 6-month sentence. On appeal, D argues that state's original petition for use immunity was premature. According to D, when petition was filed, state had no reason to believe that D would refuse to testify at trial, & thus state had no standing to seek use immunity. D further argues that since first petition was invalid, state's "renewal" of petition at trial was invalid, & thus both contempt findings are void. Ct. App. disagrees, finding that D's refusal to answer questions at deposition gave state sufficient reason to believe that D would refuse to testify at trial. It is not speculative to assume that D's counsel & prosecutor would be seeking same or similar information at trial as at deposition, & that if D refused to answer questions on behalf of individual D, he would likewise refuse to answer them when asked by prosecutor. First petition for use immunity was valid, & consequently so was renewal at trial, & D's contempt citations are valid. Held, contempt findings affirmed.

TITLE: Curtis v. State
INDEX NO.: D.19.
CITE: (2nd Dist., 12-14-93), Ind. App., 625 N.E.2d 496
SUBJECT: Contempt - Attorney's absence from Ct.
HOLDING: It is improper to summarily treat attorney's absence from scheduled Ct. hearing as direct contempt, & hybrid approach should be used. Both prosecutor & defense failed to appear for trial previously scheduled at pre-trial conference, & neither could be reached at their offices. Thirty minutes after scheduled start time, Ct. found both in contempt, fined them, & ordered reimbursement of witnesses who had appeared for trial. Direct contempt involves disruptive actions essentially occurring in presence of Ct., within personal knowledge of judge, & that show disrespect to Ct. It can be immediately & summarily punished because if not immediately suppressed, demoralization of Ct.'s authority will follow. In any other situation, i.e., indirect contempt, due process requires procedural safeguards & opportunity for contemptor to explain or defend actions, see, e.g., Ind. Code 34-4-7-8 to 34-4-8-1. D argued he had been punished improperly for direct contempt. Ct. looked to In re Yengo, 417 A.2d 533, *cert. denied*, for proper solution. There Ct. found that deciding whether contempt is direct or indirect should be deferred until attorney has opportunity to explain absence. Procedure first asks attorney who failed to appear for explanation. If it is adequate, there is no contempt. If explanation is inadequate, insulting, or frivolous, action occurs in presence of Ct. & attorney can be *cited* for direct contempt. If explanation has some adequacy, but it is not totally sufficient, matter is treated as indirect contempt. Ct. adopted this approach. Because D had not been given opportunity to explain absence, & there was sufficient evidence to trigger need for hearing & safeguards, Ct. reversed for further consistent proceedings regarding indirect contempt. Sullivan J., dissenting on need for further proceedings, finding reliance on Ct. calendar sufficient to explain away any contempt.

TITLE: Davidson v. State
INDEX NO.: D.19.
CITE: (3rd Dist., 11-10-05), Ind. App., 836 N.E.2d 1018
SUBJECT: Obscenities to probation officer constitute indirect, not direct contempt
HOLDING: Tr. Ct. erred in entering direct contempt finding against D, who at county jail refused to sign his probation terms & shouted obscenities at his probation officer & told him "you can tell the Judge f*** him, too." Direct contempt requires two inquires: (1) whether the act stands in disregard of judicial authority, thereby threatening the integrity of the Ct. & impeding its work & (2) whether the judge possessed immediate & personal knowledge of the contemptuous act. In re Nasser, 644 N.E.2d 93 (Ind.1994). In present case, D's actions showed disregard for judicial authority, but the judge did not possess immediate & personal knowledge of the contemptuous act. Because knowledge is the critical issue, it is not dispositive that D's act occurred in the county jail & not in the Ct. room. However, trial judge's personal knowledge of the incident was not immediate as the details did not come out until a hearing on the matter four days later. Ct. remanded for indirect contempt proceedings with the due process requirements provided by Ind. Code 34-47-3-5. However, because the case "grows out of willfully resisting, hindering, delaying, or disobeying" a lawful process or order of Ct., a special judge does not have to be appointed. See Ind. Code 34-37-37(b), (d). Held, judgment reversed & remanded for indirect contempt proceedings.

RELATED CASES: Warr, App., 877 N.E.2d 817 (direct contempt finding upheld where D failed to heed trial judge's warning & continued to disrupt court by using vulgar & profane language).

TITLE: Davis v. State
INDEX NO.: D.19.
CITE: (3rd Dist., 02-15-93), Ind. App., 608 N.E.2d 995
SUBJECT: Direct Contempt of Ct.
HOLDING: Tr. Ct. erred in finding D in direct contempt of Ct. where his conduct did not directly interfere with Ct. proceedings & judge did not have personal knowledge of his actions. Additionally, Tr. Ct. erred in failing to afford D opportunity to speak in his behalf during proceedings. D was found in direct contempt for attempting to bring loaded firearm into Ct. & was sentenced to 10 days in jail. In contempt hearing, judge noted that when gun was detected, D offered no resistance & didn't attempt to do anything about it, & that he had license for gun. D twice asked for permission to speak, but judge did not respond to requests, & prosecutor indicated it was up to judge.

Ct. first noted that direct contempt usually refers to conduct that directly interferes with Ct. proceedings while Ct. is in session, Ind. Code 34-4-7-1, & that it must generally take place in way that allows judge in official capacity to have personal knowledge of conduct, Andrews, App., 505 N.E.2d 815. Ct. found D's actions did not directly interfere with Ct. proceedings, noting Ct.'s own judgment & affidavits filed by D indicating someone else informed judge that D had entered building with gun, but had taken it outside before entering Ct. room. Therefore, Tr. Ct.'s finding of direct contempt was erroneous. Ct. also noted that even if D's actions had constituted direct contempt, Tr. Ct. erred in not affording him opportunity to respond to allegation of contempt, as required by Ind. Code 34-4-7-7. Held, judgment reversed.

RELATED CASES: Hunt, App., 864 N.E.2d 425 (Tr. Ct. clerk's alleged misrepresentation that Tr. Ct.'s order to release bond to D had been complied with did not constitute direct contempt because it did not disturb the business of the Ct.).

TITLE: Downs v. State
INDEX NO.: D.19.
CITE: (2nd Dist., 05-24-05), Ind. App., 827 N.E.2d 646
SUBJECT: Two-year sentence for contempt upheld
HOLDING: Both the old & new standard for revising sentences apply to sentences "authorized by statute." Since there is no longer a statute setting out punishment for contempt, it is unclear whether Appellate Rule 7(B) should apply in reviewing contempt sentences. Nevertheless, under an inappropriateness, manifestly unreasonable, or simple reasonableness test, D's two-year sentence for contempt passes muster. D committed direct contempt in a murder trial when he refused to testify, & two-year sentence seems appropriate & reasonable given the particular offense & his substantial criminal history. Held, judgment affirmed.

RELATED CASES: Warr, App., 877 N.E.2d 817 (180-day sentence was proportionate to D's consistently disrespectful & outrageous behavior in court); Jones, App., 847 N.E.2d 190 (under any standard, 102-day sentence for indirect contempt was proper).

TITLE: Eller v. State
INDEX NO.: D.19.
CITE: (4th Dist., 05-06-93), Ind. App., 613 N.E.2d 66
SUBJECT: Multiple contempt convictions proper
HOLDING: Four separate contempt convictions for four successive refusals to be sworn & testify in criminal cause not improper. D, State's witness, was called to testify in another's drug case. After refusing to testify, he was found in contempt, sentenced to 90 days, & fined $500. Next day he said he would testify, but when called, refused. He was again found in contempt & given same sentence, to be served consecutively to first. Person on trial was retried due to MCE, & D again refused to testify, found in contempt, & sentenced as before. When person on trial got retrial through appeal, D still refused to testify, was again found in contempt, & given additional 90-day sentence plus $5,000 fine. Although in Yates v. U.S. (1957), 78 S.Ct. 128, & In re the Contempt Findings Against Schultz (1981), App., 428 N.E.2d 1284, multiple contempt convictions were found violative of double jeopardy, Ct. found these cases not dispositive, instead defining issue as whether witness called in separate proceedings could be convicted for each failure to testify. Only one contempt may be found where separate questions try to establish single fact or relate to single subject, but this was not case here. While second contempt was assessed during same trial as first, D had given Tr. Ct. reason to believe he would testify second time, & therefore second contempt finding was proper. Third & fourth contempts were assessed at separate proceedings, & so did not constitute double jeopardy violations. Similar conduct on occasions separated by appreciable periods of time has been held to constitute separate punishable contempts, U.S. ex rel. Ushkowitz v. McCloskey (2nd Cir. 1966), 359 F.2d 788. Ct. found holding also promoted policy of inducing testimony, because witness already in contempt at one trial would have no incentive to testify subsequently if he knew he could not be punished again.

RELATED CASES: Wine, 147 N.E.3d 409 (Ind. Ct. App. 2020) (Multiple contempt citations for disruptive behavior in court affirmed).

TITLE: Fearman v. State
INDEX NO.: D.19.
CITE: (12/14/2017), 89 N.E.3d 435 (Ind. Ct. App. 2017)
SUBJECT: 910-day sentence for direct contempt violates right to jury trial
HOLDING: By sentencing D to 910 days for direct criminal contempt, the trial court denied D's 6th Amendment right to jury trial. D was convicted of attempted murder and other offenses. The victim's family attended the sentencing hearing. When advised of their presence, D said, "Who gives a f*ck if they're in the f*cking room." The judge told Defendant his behavior could affect his sentencing. Defendant rolled his eyes and said, "I'll be out long enough to walk. B*tch is [sic] still got to worry about me." When asked to repeat what he said, Defendant said, "Read my lips, when I get out I'm going to wring his f*cking neck."

The 910-day sentence violated D's right to jury trial. "[I]n the absence of legislative authorization of serious penalties for contempt, a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months." Taylor v. Hayes, 418 U.S. 488, 496 (1974). Sentences exceeding six months may not be imposed absent a jury trial or waiver thereof. Holly v. State, 681 N.E.2d 1176, 1177-78 (Ind. Ct. App. 1997).

The State argues the trial court could have been imposing sanctions for multiple counts of contempt. However, this assumes the trial court could have stacked multiple six-month sentences. Although a trial court may find a person in contempt multiple times arising out of a single proceeding, the sentence, without a jury trial, may not exceed six months. Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974); Mockbee v. State, 80 N.E.3d 917, 921 (Ind. Ct. App. 2017), *trans. denied*. Held, judgment reversed and remanded for trial court to enter a six-month sentence for criminal contempt, to run consecutive to D's convictions.

TITLE: Herron v. City of Indianapolis
INDEX NO.: D.19.
CITE: (8/31/2016), 59 N.E.3d 319 (Ind. Ct. App. 2015)
SUBJECT: Erroneous $1,000 fine for indirect contempt in civil proceeding
HOLDING: The primary objective of a civil contempt proceeding is not to punish the contemnor but to coerce actionor to compensate the aggrieved party. Evans v. Evans, 766 N.E.2d 1240 (Ind. Ct. App. 2002). Here, the City of Indianapolis filed a complaint against Herron regarding the treatment of her animals, and she was ordered not to own or keep animals in Marion County. Animal Care and Control officers subsequently visited Herron, found her with multiple dogs, and the City filed a motion to find her in contempt for violating the court order. Tr. Ct. abused its discretion when it ordered Herron to pay a $1,000 fine, because there was no basis for its determination that the fine would compensate the City for is losses. The fine "was punitive rather than compensatory or coercive in nature, which is impermissible in a civil contempt proceeding." Held, judgment reversed and remanded with instructions to vacate the sanction.

TITLE: Hicks v. Feiock

INDEX NO.: D.19.

CITE: 485 U.S. 624 (1988)

SUBJECT: Contempt - civil or criminal?

HOLDING: Criminal penalties may not be imposed on person who has not been afforded protections that Constitution requires, including requirement that offense be proved beyond reasonable doubt. Whether punishment is civil/criminal turns on whether relief is remedial or punitive. If relief provided is sentence of imprisonment, it is remedial (& hence, civil) if "the D stands committed unless & until he performs the affirmative act required by the court's order." Gompers v. Bucks Stove & Range Co. (1911), 221 U.S. 418, 441, 31 S. Ct. 492, 55 L. Ed. 797. Relief is punitive (& hence criminal) if "the sentence is limited to imprisonment for a definite period." Id. Here, D was convicted of contempt for failure to comply with court's child support order. D was placed on probation & ordered again to make support payments of $150 per month. Additionally, D was ordered to pay $50/mo. on arrearage. State court found, & S.Ct. bound to accept, that State contempt statute shifted to D burden of proving element of offense. Court remands for determination of whether D could purge contempt finding by paying arrearage. If so, relief is civil in nature & burden of proof may be shifted to D on elements of contempt consistent with Constitution. If relief is determined to be punitive/criminal, then burden of proof may not constitutionally be shifted to D. Kennedy, not participating; O'Connor, joined by Rehnquist, & Scalia DISSENTING.

TITLE: Highbaugh v. State
INDEX NO.: D.19.
CITE: (8-15-02), Ind., 773 N.E.2d 247
SUBJECT: Contempt finding upheld - self-incrimination
HOLDING: Privilege against self-incrimination exists until possibility of further incrimination ceases, i.e., when sentence has been fixed & judgment of conviction has become final. Mitchell v. United States, 526 U.S. 314 (1999). Here, in exchange for dismissal of charges, D pled guilty to murder & attempted murder. Plea agreement contained provision requiring D "to appear & be interviewed to give sworn & unsworn statements or testimony as required." After D was sentenced, he declined to answer any questions beyond his name, date of birth, & place of residence, & indicated that he would be appealing imposition of a life sentence. Attorney for Co- D moved that D be held in contempt for his refusal to answer any questions. Affirming Tr. Ct.'s finding of contempt, Ct. held that because D expressed his intent to appeal his life sentence, he may have retained his Fifth Amendment privilege with regard to statutory aggravator, but privilege only extended to questions that could incriminate him on that matter. D could have answered any number of questions without further incriminating himself. Held, judgment affirmed; Boehm, J., dissenting on this issue.

TITLE: Hopping v. State
INDEX NO.: D.19.
CITE: (08-01-94), Ind., 637 N.E.2d 1294
SUBJECT: Direct Criminal Contempt finding upheld
HOLDING: D's actions supported convictions for direct criminal contempt of Ct. D had appeared at Ct. office & tried to get all his civil cases set for same day. When informed by Ct. personnel & then by judge he could not, D became loud, boisterous, & bullying. After committing above acts & being asked to leave, D was ordered into Ct. under arrest for contempt. D went but quickly left, ignoring judge's order to return. He was brought back by deputy & judge found him in direct contempt for verbal abuse & attacking reputation & integrity of Ct. & judge, attempting to intimidate Ct. personnel, & failure to follow Ct.'s orders. D denied allegations but was found guilty & sentenced to 30 days. As he was being led out, he said he had a lot of friends who were killed in World War II, & that some of judge's ancestors (judge was Japanese American) may have killed them. Judge found D in direct contempt again, after giving him chance to respond, retract, or apologize. Direct criminal contempt does not require finding of disruption of actual Ct. proceeding, but need only involve acts occurring near Ct., interfering with Ct. business, of which judge has personal knowledge. After reviewing several previous decisions from both Ind. & other jurisdictions, Ct. concluded that any act that manifests disrespect & defiance of Ct. may constitute direct criminal contempt. Because here Ct. had firsthand & immediate knowledge of acts showing clear disregard for Ct.'s authority that threatened to undermine integrity of judicial process & interfere with Ct.'s work, using summary criminal contempt proceedings was proper. Ct. noted judge was working on legal matters in his office & secretary was trying to organize docket, & D's acts interrupted those activities, questioned integrity of process, & showed disrespect & disobedience toward Ct. Held, transfer granted & Tr. Ct. upheld, Sullivan, J., dissenting.

TITLE: Hunter v. State
INDEX NO.: D.19.
CITE: (5/16/2018), 102 N.E.3d 326 (Ind. Ct. App. 2018)
SUBJECT: Bail revocation, not criminal contempt, is appropriate remedy for violation of bail condition
HOLDING: Tr. Ct. abused its discretion by imposing a 180-day criminal contempt sanction for D's violation of a condition of bail. After agreeing to bail condition prohibiting him from being around anyone under the age of 18, D defied Tr. Ct.'s order by leaving the courthouse with minors. D testfied that he did not know whether he was supposed to wait while his girlfriend drove the minors back and returned to pick him up, or first leave without the minors. In imposing a punitive contempt sanction, Tr. Ct. determined that D "contemptuously ignored" its orders "because to comply would have been inconvenient for him." But D's conduct did not affect the dignity or operation of the court, which is required in order to punish for criminal contempt. State v. Heltzel, 552 N.E.2d 31 (Ind. 1990). Ultimately, D failed to comply with a condition of his bail. Under such circumstances, an appropriate remedy was to revoke bail-- a remedy the State should have sought in accordance with Ind. Code § 35-33-8-5, the controlling statute. In footnote, Court reminded judges to "exercise their extraordinary contempt powers with the utmost sense of responsibility and circumspection," and in selecting contempt sanctions, "exercise the least-possible power adequate to the end proposed." (*quoting* Matter of Craig, 552 N.E.2d 53, 56 (Ind. Ct. App. 1990) and Mockbee v. State, 80 N.E.3d 917, 921 (Ind. Ct. App. 2017)). Held, judgment reversed.

TITLE: In re A.S.
INDEX NO.: D.19.
CITE: (5/13/2014), 9 N.E.3d 129 (Ind. 2014)
SUBJECT: Tr. Ct. lacked authority to find contempt and impose sanctions
HOLDING: IC § 34-47-3-2 did not give Tr. Ct. authority to find Respondent committed indirect civil contempt and fine her, even though the Tr. Ct. found that the Respondent misled it into issuing an emergency warrant so her co-worker could be detained and treated for a purported psychiatric crisis.

Indirect contempt involves acts committed outside the court's presence but that nevertheless tend to interrupt, obstruct, embarrass or prevent the due administration of justice. State v. Heltzel, 552 N.E.2d 31, 34 (Ind. 1990). See IC 34-47-3 (chapter on indirect contempt). Judicial power to punish for contempt is inherent; the legislature cannot take it away or materially impair it, but it may regulate its exercise by prescribing rules of procedure. LaGrange v. State, 153 N.E.2d 593, 595 (1958).

In her application for the emergency warrant, the Respondent said her co-worker was mentally ill and dangerous or gravely disabled and had threatened to commit suicide. As required by statute, a physician also signed the application, concurring that the co-worker was a danger to herself or others. The next morning, acting on a call from the co-worker's boyfriend, the judge called the hospital to determine if the co-worker's behavior matched the behavior alleged in Respondent's application. Hospital staff told the judge that the co-worker's did not match the symptoms the Respondent alleged the day before. The trial judge eventually found Respondent in indirect civil contempt, fined her, and ordered her to pay some of the co-worker's medical expenses.

The Tr. Ct. erred in grounding its ruling in IC 34-47-3-2 because the statute allows a finding of indirect civil contempt only when a "person . . . willfully resists, hinders, or delays the execution of any lawful process, or order of any court of record." Respondent could not have willfully resisted an order because there was no lawful order in place when she acted; in fact, her actions led to issuance of the order. "It is axiomatic that [Respondent] could not resist, hinder, or delay the execution of something that did not yet exist."

The Tr. Ct. also erred in fining Respondent but not because the contempt finding was improper. Though the inherent power of a Tr. Ct. to impose sanctions is not always tied to a contempt finding, the power serves the same purpose for a Tr. Ct.: to enforce obedience to its lawful orders against parties who have been subjected properly to its jurisdiction." Noble County v. Rogers, 745 N.E.2d 194, 198 (Ind. 2001). And where Indiana's courts have upheld sanctions in situations not explicitly involving contempt, a commonality of such cases is that the offending behavior arose within an ongoing judicial process. See, e,g, Rogers, 745 N.E.2d at 197-98 and Allied Prop. & Cas. Ins. Co. v. Good, 919 N.E.2d 144, 155 (Ind. Ct. App. 2009). But here, Respondent's role began and ended with her completion of the application for emergency detention. This action did not occur in the courthouse and did not occur "within" an already ongoing legal proceeding. "The inherent power of the judiciary to impose sanctions, while flexible and significant, begins and ends with the courtroom and the judicial process." Held, transfer granted, Court of Appeals memorandum decision vacated, and judgment reversed.

TITLE: In re Contempt Hearing of Nasser
INDEX NO.: D.19.
CITE: (12-8-94), Ind., 644 N.E.2d 93
SUBJECT: Direct contempt conviction proper - failure to appear
HOLDING: Tr. Ct.'s finding of direct contempt by attorney's failure to appear for trial was proper, granting transfer of Ct. App. decision at 627 N.E.2d 1338. When attorney appeared in Ct. & provided insufficient explanation for his absence from scheduled jury trial, Tr. Ct. obtained personal knowledge of contemptuous act, which satisfied one of two elements of direct contempt. Second element was satisfied by failure to appear, which manifested disregard for judicial authority, thereby threatening integrity of Ct. & impeding its work. Evidence was sufficient to sustain Tr. Ct.'s findings. Held, transfer granted & Tr. Ct. affirmed, Sullivan, J., concurring.

RELATED CASES: Rice, App., 874 N.E.2d 988 (layperson, unlike attorney, does not commit direct contempt by failing to appear at court hearing); Bellamy, 952 N.E.2d 263 (Ind. Ct. App. 2011) (distinguishing Rice, Ct. held that, despite D's status as a layperson, Tr. Ct. properly found him in direct contempt for failure to timely appear for trial after receiving an express prior warning from Tr. Ct. that such a failure would result in a contempt finding).

TITLE: In re Craig
INDEX NO.: D.19.
CITE: (2d Dist. 4/10/90), Ind. App., 552 N.E.2d 53
SUBJECT: Contempt - length of sentence
HOLDING: 270-day sentence, representing 90 days for refusal to answer each of 3 questions, is erroneous in that D cannot be punished for each refusal to answer. D had been called to testify at murder trial but persisted in refusing to answer each of 3 questions posed by prosecutor after being granted use immunity. State conceded error in sentencing for 3 separate acts but argued that total sentence of 270 days is proper. Ind. Code 35-37-3-3(c) provides that witness who refuses to testify after being granted use immunity may be found in direct, criminal contempt, punishable by determinate sentence or fine. Former Ind. Code 34-4-7-6 limited such fines to $500, & terms of imprisonment to 3 months, but this statute was repealed prior to D's sentencing. State argued that repeal reflected legislative intent to leave sentencing to discretion of Tr. Ct. However, Tr. Ct.'s contempt powers are inherent as well as statutory & are limited by reasonableness. Where legislature has prescribed no maximum sentence for criminal contempt, Cts. have special duty to exercise contempt powers with "utmost sense of responsibility & circumspection," & sentence should reflect "least possible power adequate to the end proposed." US v. Misenheimer, (N.D. 1988), 677 F. Supp. 1386 (10-year sentence reasonable where refusal to comply with order to produce handwriting exemplars deprived state of necessary evidence & D was already facing 265-year sentence on criminal charges). Held, reversed & remanded for resentencing.

RELATED CASES: Matter of Cudworth, App., 815 N.E.2d 1019 (D's six month sentence was not inappropriate although it was the maximum sentence available absent a jury trial); Matter of Gardner, App., 713 N.E.2d 346 (11 ½ year sentence for contempt was manifestly unreasonable); In re Steelman, App., 648 N.E.2d 366 (one-year sentence was reasonable, not disproportionate & excessive).

TITLE: In re Steelman
INDEX NO.: D.19.
CITE: (2nd Dist., 3-16-95), Ind. App., 648 N.E.2d 366
SUBJECT: Contempt finding affirmed - co-conspirator awaiting trial
HOLDING: Tr. Ct.'s grant of use & derivative use immunity under Ind. Code 35-37-3-3(a) provided Co-conspirator/D awaiting his own trial with protection coextensive with right against self-incrimination. Although immunity does not extend to unresponsive answers or volunteered information, argument that State might use his testimony to obtain witnesses against him is speculative & premature. Jackson v. State, App., 644 N.E.2d 607. Proper procedure for D to raise his concerns regarding use of evidence gained from testimony is pretrial hearing during which State must prove that evidence it presents has independent, legitimate source. Held, judgment affirmed.

RELATED CASES: Brown, 725 N.E.2d 823 (oral argument of counsel was insufficient to establish that evidence used against D was obtained wholly through independent sources & not through any of his immunized testimony; see full review at O.5.c).

TITLE: In re Troutt

INDEX NO.: D.19

CITE: 460 F.3d 887 (7th Cir. 2006)

SUBJECT:

HOLDING: The U.S. Court of Appeals for the Seventh Circuit held a federal district judge whom a lawyer criticized in court filings could not summarily find the lawyer in criminal contempt and suspend him from practicing before the court, as suspension is not a permissible sanction for criminal contempt. The Court also questioned the procedures the district used, stating that the judge should have handled the problem either as a disciplinary matter or as indirect criminal contempt, requiring a hearing before a different judge. The contempt arose after an attorney spoke in motions about the court using "secret information" and "illusory references" among other references. As the district court clearly characterized the proceeding as criminal contempt, the Court analyzed it under the federal criminal contempt statute, 18 U.S.C. ' 401, rather than as an attorney disciplinary matter. The Court noted it read the statute to permit either a fine, or imprisonment, or both as a penalty for criminal contempt, but not to permit any other penalty. Further, the district court did not follow the requirements outlined in its local rule on professional discipline to impose a disciplinary sanction. The Court characterized the attorney's conduct as indirect contempt although it was "right on the margin" as certain acts such as not appearing for hearings on the contempt action did occur in the trial judge's presence and could be characterized as disrupting the court. The Court also noted the procedures under Fed. R. Crim. P. 42(a), which addresses indirect contempt, were not followed by the district court here. Notably, since the contempt involved disrespect and criticism toward a judge, the judge is disqualified from presiding over the contempt hearing unless the D consents. The Court suggested that on remand, the district court should consider whether writing vituperative letters is a form of contempt, or if instead it is professional misconduct better addressed in a disciplinary proceeding. The Court further noted that attorneys are not permitted to meet a judge's use of intemperate language with mudslinging of their own.

TITLE: Jackson v. State
INDEX NO.: D.19.
CITE: (3d Dist., 12-20-94), Ind. App., 644 N.E.2d 607
SUBJECT: Contempt - refusal to testify after grant of use immunity
HOLDING: Tr. Ct. did not err when it found D to be in indirect contempt of Ct. After D refused to testify during deposition conducted by co-D, State petitioned for Tr. Ct. to grant use immunity pursuant to Ind. Code 35-37-3-3. D again refused to testify in deposition, & after hearing, Tr. Ct. found D in indirect contempt of Ct. Ind. Code 35-37-3-3(c) gives Tr. Ct. discretion to make contempt finding after witness refuses to give evidence after being granted use immunity. Compelling D to testify under grant of immunity does not violate constitutional privilege against self-incrimination, Kastigar v. United States, 406 U.S. 441; In re Caito, Ind., 459 N.E.2d 1179. Ct. declined to reverse contempt charge based on speculation that D's immunized testimony could be used against him during new trial, pending grant of PCR petition. Held, judgment affirmed.

TITLE: Knowles v. State
INDEX NO.: D.19.
CITE: (02-07-23), Ind. Ct. App., 202 N.E.3d 2133
SUBJECT: Contempt finding reversed -- days ordered credited toward Defendant's sentence
HOLDING: Defendant entered a guilty plea in which she and the State agreed to leave sentencing to the court's discretion, with a limit of five years executed time. After the change of plea hearing, the trial court ordered Defendant to report to the probation department for an interview to prepare a pre-sentence investigation report and scheduled a sentencing hearing for the next month. When the sentencing hearing began, the State informed the court, "this defendant failed to cooperate in any way with the pre-sentence investigation" and asked for Defendant to be remanded and for the time it took to generate the report to be a sanction for her contempt. The Court remanded Defendant who spent the next twenty-eight days in jail. After finding aggravating and mitigating circumstances, the trial court imposed a seven-year sentence, with five years executed and two years suspended to probation. The court concluded, "I am not going to allow you to get credit for [the twenty-eight days] that you served...I will consider that as contempt of court."

The Court of Appeals concluded the trial court could not have found Defendant guilty of direct contempt because the alleged act of disobedience was not an act of which the judge had personal knowledge. The Court also found the trial court's finding of contempt is not sustainable under the theory of indirect contempt. The trial court did not comply with or even appear to consider, Indiana Code section 34-47-3-5, which codifies the due-process requirements for notice and opportunity to be heard on an indirect contempt allegation, and the court's failure to comply with the statute is not excusable under the "clear notice exception." The Court reversed the contempt finding and remanded with instructions for the court to award the twenty-eight days, along with any earned good-time credit, against her sentence.

TITLE: Macon v. State
INDEX NO.: D.19.
CITE: (3rd Dist., 02-28-94), Ind. App., 629 N.E.2d 883
SUBJECT: Contempt of Ct. - Insufficient evidence
HOLDING: D's remarks to judge were impolite but failed to rise to level to disrupt or disturb proceedings, & gun in her purse was never shown during proceedings, so evidence was insufficient to support convictions for direct contempt. In traffic Ct. D was asked to tell her side of story, & she started to talk about previous case. Judge interrupted her, but she wanted to go on, & judge said if she interrupted him one more time she would go to jail. When he asked if she understood, she at first said nothing, then said yes. After more exchange, judge said she had to be deferential & respectful, & that if she raised voice in way he found contemptuous, he would send her to jail for 30 days. D said "I know you have the power." When judge found for State, D said, "I knew that," & judge said she had just bought two days in jail. D said, "Fine," & judge made it 4 days. He also said she was in direct contempt for rude, disruptive & disrespectful behavior demeaning to position of Ct., & fined her $250. After booking, it was discovered that D had handgun in her purse, & she was brought back into Ct. She admitted having gun, & Ct. found her in contempt for violating local rule prohibiting weapons in Ct., sentencing her to 90 days. Ct. found statements were made by D unrepresented in traffic Ct., & nothing showed they were loud, accompanied by unruly physical conduct, or disruptive. Ind. Code 34-4-7-1 focuses on disruptive nature of conduct as critical to direct criminal contempt. "[I]t is of the utmost importance in a free society that the power to punish for contempt be not misused as in cases when it is utilized to protect the personal or individual feelings of the judge." Grimm, 162 N.E.2d 454, 456. While comments were impolite, they did not constitute contempt, & as to handgun in purse, Ct. found circumstances did not warrant conviction because gun caused no disruption or disturbance. Held, reversal & discharge ordered.

TITLE: McCollum v. FSSA
INDEX NO.: D.19.
CITE: (8/31/2017), 2017 Ind. App., 82 N.E.3d 368 (Ind. Ct. App. 2017)
SUBJECT: 150-week civil contempt sanction "inconceivable"
HOLDING: The Court of Appeals reversed the Tr. Ct.'s sanction for D's civil contempt citation. Because D is 150 weeks in arrears on child support, the Tr. Ct. imposed a 150-week term of imprisonment, to be served on work release. The Tr. Ct. stayed D's child support obligation and provided that she could be released from custody if she were able to reduce the arrearage to below $7,500.

Civil contempt sanctions must be coercive or remedial, not punitive. See Duemling v. Fort Wayne Cmty. Concerts, Inc., 188 N.E.2d 274, 276 (Ind. 1963). Here, the 150 weeks of work release is improperly punitive. "We find it inconceivable that a court could properly sanction a D in a civil contempt proceeding, where the D has lesser constitutional protections, with a longer prison sentence than the maximum they could receive if charged criminally with all of a criminal proceeding's constitutional protections...We cannot in good faith find such a sanction appropriate." Held, judgment reversed and remanded for Tr. Ct. to impose a contempt sanction consistent with Court's opinion.

TITLE: McIntyre v. State
INDEX NO.: D.19.
CITE: (2d Dist. 2/23/84), Ind. App., 460 N.E.2d 162
SUBJECT: Contempt - threat of jail
HOLDING: Tr. Ct. did not err in threatening to jail 13-year-old child molesting victim unless she testified. Absent a claim of privilege, a witness' refusal to testify constitutes contempt. Bryant, 271 N.E.2d 127; 17 Am. Jur.2d Contempt Section 29 (1964). See also Aguilar, App., 416 N.E.2d 887. Here, Ct. decides issue is whether coercing child to testify denied D a fair trial, not whether Tr. Ct. could put child in jail until she testified. Ind. S. Ct. in Bryant held such coercion does not deprive D of a fair trial. Bryant was an incest case in which 15-year-old stepdaughter of D refused to testify. Held, no error; conviction reversed on other grounds.

RELATED CASES: Clark, 480 N.E.2d 555 (Crim L 662.6, 662.7; Tr. Ct. did not err in refusing to strike testimony of witness held in contempt for failure to answer questions; rigorous, thorough, & lengthy cross-exam was conducted; Ct. finds D was not denied right to confront witness).

TITLE: Metzger v. State
INDEX NO.: D.19.
CITE: (3/31/2014), 6 N.E.3d 485 (Ind. Ct. App. 2014)
SUBJECT: Contempt - willfully resisting, hindering or delaying execution of warrant for blood draw
HOLDING: Tr. Ct. did not abuse its discretion when it concluded that D's actions amounted to contempt of court. After D refused to take a certified breath test, police officer obtained a search warrant for blood draw. He gave D a copy of the warrant to read and explained to him the consequences of his refusal, including the possibility of being held in contempt of court. After D was put on notice that a court order had been issued for him to submit to a blood draw and prior to nurse's arrival, D became very anxious and started to threaten and move toward officer while holding a chair. D continued to advance, refused to comply when officer ordered him to stay seated, and was eventually subdued and handcuffed. Based on his uncooperative actions, it can reasonably be inferred that D had no intent to comply with Tr. Ct.'s order to submit to a blood draw even though it was called off prior to nurse's arrival. Held, judgment affirmed.

TITLE: Mockbee v. State
INDEX NO.: D.19.
CITE: (7/19/2017), 80 N.E.3d 917 (Ind. Ct. App. 2017)
SUBJECT: One contempt citation vacated; only one "single contemptuous episode"
HOLDING: The Tr. Ct. should have found D in direct contempt only once, even though D directed profanity and other disruptive comments at the judge several times, because these discrete acts all occurred within a "single contemptuous episode." See State v. North, 978 A.2d 435, 436 (Vt. 2009); Ind. Code § 34-47-2-1. Thus, one of the two contempt citations must be vacated, and on remand the Tr. Ct. shall resentence D to six months for the one valid contempt citation. Here, D repeatedly interrupted the Tr. Ct., made faces and hand gestures that were disruptive, taunted opposing counsel, used profanity, and refused to respect the dignity and authority of the Tr. Ct. However, his behavior occurred within a single proceeding, lasted a short time, was not interrupted by another proceeding, and flowed from a single criminal intent – to disrespect and disrupt the administration of justice. Even though D continued to behave in a contemptuous manner after the initial contempt citation, his behavior was in response to the Tr. Ct.'s initial contempt citation and flowed from the same criminal objective. Held, judgment reversed in part.

RELATED CASES: Grogg, 156 N.E.3d 744 (Ind. Ct. App. 2020) (10/21/2020) (450-day sentence affirmed for four separate findings of contempt of court resulting from D's repeated attempts to contact person with whom he was court-ordered to have no contact).

TITLE: Peterson v. State
INDEX NO.: D.19.
CITE: (4th Dist. 9/18/84), Ind. App., 468 N.E.2d 556
SUBJECT: Contempt - standard of review; due process
HOLDING: Standard of review in contempt matters: contempt judgment may be set aside only if it clearly appears alleged acts do not constitute contumacious conduct. In re Caito, 459 N.E.2d 1179. Here, Ct. finds judge's admonition that application for emergency 72-hour mental health detention must be signed by residential care facility administrator himself did not conform to law on subject & thus was not an enforceable order of Ct. In a footnote, Ct. also finds Tr. judge failed to follow prescribed procedures for indirect (or direct) contempt, including written notice & judge's duty to disqualify self. Skolnick, App., 388 N.E.2d 1156. Held, reversed & remanded with instructions to vacate contempt judgments & dismiss all proceedings.

RELATED CASES: Brumbaugh, 491 N.E.2d 983 (Cont 2; contempt includes any act which pertains to a pending proceeding & tends to deter Ct. from performance of its duties, *citing* State v. Shumaker (1927), 200 Ind. 623; Ct. finds D was in contempt of Ct., therefore, police had authority to pursue & arrest him).

TITLE: Reynolds v. Reynolds
INDEX NO.: D.19.
CITE: (12/6/2016), 64 N.E.3d 829 (Ind. 2016)
SUBJECT: Strict compliance with contempt statute not required if sufficient notice is given
HOLDING: Ind. Code § 34-37-3-5 requires that a contemnor be "served with a rule of the court" that "clearly and distinctly set forth the facts that are alleged to constitue the contempt." Strict compliance with the statute can be excused if the party in contempt has been sufficiently notified of their contempt. Here, in dissolution proceeding, Father failed to provide income and tax documents available for inspection as ordered. Mother field a Verified Motion for Rule to Show Cause, alleging Father should be held in contempt for failing to comply with the dissolution decree and the agreed modification order regarding production of certain income and tax documents. Although Tr. Ct. did not provide Father with a proper rule to show cause, Court concluded that Mother's motion for rule to show cause was specific enough to excuse strict compliance with the contempt statute and protect Father's due process rights. Held, transfer granted, Court of Appeals' memorandum opinion vacated, contempt judgment affirmed. Slaughter, J., dissenting on grounds that the plain language of the statute required Tr. Ct. to issue a rule to show cause detailing the factual basis for Father's alleged contempt.

TITLE: Rice v. State
INDEX NO.: D.19.
CITE: (07-24-07), Ind. App., 874 N.E. 2d 988
SUBJECT: Layperson's failure to attend scheduled court date is not direct contempt
HOLDING: Tr. Ct. erred in holding D in direct contempt for missing a scheduled plea agreement and sentencing hearing. Whereas courts can punish acts of direct contempt without formal charges or evidentiary hearings, acts of indirect contempt require appointment of a special judge and other due process protections. Direct contempt includes actions occurring near the court, interfering with the business of the court, of which the judge has personal knowledge. Although an attorney's failure to appear at a scheduled court date can constitute direct contempt, a layperson's failure does not. Williams v. State ex rel. Harris, 690 N.E.2d 315 (Ind. Ct. App. 1997). Thus, the contempt citation was reversed. Further, when D was arrested and eventually had his plea agreement and sentencing hearing, the Tr. Ct. erred by allowing D to waive counsel and proceed without first advising him of the disadvantages of proceeding without an attorney. Thus, D did not knowingly, intelligently, and voluntarily waive his right to an attorney. Held, judgment reversed.

RELATED CASES: Carroll, 54 N.E.3d 1081(D's contempt citation was permissible even though he was not in the courtroom for his initial hearing but participated by video conference. See full review, this section); Bellamy, 952 N.E.2d 263 (Ind. Ct. App. 2011) (distinguishing Rice, Court held that, despite D's status as a layperson, Tr. Ct. properly found him in direct contempt for failure to timely appear for trial after receiving an express prior warning from Tr. Ct. that such a failure would result in a contempt finding).

TITLE: State v. Heltzel
INDEX NO.: D.19.
CITE: Ind., 552 N.E.2d 31 (3/27/1990)
SUBJECT: Indirect contempt - attempt to encourage disclosure of grand jury (GJ) proceedings
HOLDING: Tr. Ct. did not err in dismissing indirect contempt charges alleging that 2 newspaper reporters questioned 2 men in 1987 regarding their service on GJ impaneled in 1984. Because Ds were not charged with inducing or causing violation of Ind. Code 35-34-2-10, making it misdemeanor for person present at GJ proceedings to disclose evidence given, grand juror statements, or votes, Ind. S. Ct. does not review constitutionality of that statute. Instead, Ds are charged with indirect contempt of Ct. under Ind. Code 34-4-7-3 through 5, defined as act committed outside presence of Ct. "which nevertheless tends to interrupt, obstruct, embarrass or prevent the due administration of justice." 6 I.L.E. Contempt, 2. Ds argue that 1st Amend. protections require compelling state interest, specifically that threat to administration of justice is extremely serious & imminent. First Amend. protections extend to news gathering activities, [citations omitted], but case law does not suggest that they extend to unlawful news gathering activities. However, while conduct alleged is not subject to 1st Amend. protection, it still does not rise to level of indirect criminal contempt. GJ secrecy is of great importance in preventing escape of those who may be indicted, preventing improper influence, encouraging free disclosure by witnesses, & protecting innocent accused who is later exonerated. [Citations omitted.] However, these concerns drop off dramatically once GJ is discharged. Conduct alleged here did not impede administration of justice & Tr. Ct. did not err in dismissing charges. Givan & Pivarnik, JJ., DISSENT.

TITLE: State v. Johnson
INDEX NO.: D.19.
CITE: (2nd Dist.; 8-9-99), Ind. App., 714 N.E.2d 1209
SUBJECT: Ct.'s duty to inquire into effective assistance of counsel - use of thirteenth juror
HOLDING: Tr. Ct. properly set aside jury's verdict & ordered new trial by using thirteenth juror rule. Ind. Cts. have inherent power to grant new trials sua sponte & are expressly authorized to do so by Ind. Trial Rule 59(B). Preamble to T.R. 59(J) provides in relevant part: "Ct., if it determines that prejudicial or harmful error has been committed, shall take such action as will cure error. . ." Although Tr. Ct. must enter special finding of facts when it grants new trial based on weight of evidence, there is no Ind. authority requiring Tr. Ct. to enter special findings when it grants new trial on grounds that do not contemplate weighing & sifting evidence. Appellate Ct. will reverse Tr. Ct.'s decision to grant new trial only if decision is without reason or is based upon impermissible reasons or considerations. Here, twenty days after verdict, defense counsel moved for mistrial based on his ineffective representation. Ct. set aside verdict based on manifest injustice created by defense counsel's performance. Tr. Ct. was not required to enter special finding of facts because it did not vacate judgment & order new trial based upon finding that verdict was against weight of evidence. Rather, on its own motion Tr. Ct. determined that new trial was warranted to prevent manifest injustice. Because record presented ample evidence of trial counsel's deficient performance, Tr. Ct. did not abuse its discretion by granting new trial in order to cure prejudicial or harmful error that was committed. Held, judgment affirmed; Brook, J., concurring on basis that criminal defense attorneys may not purposely provide ineffective assistance & expect new trial granted.

TITLE: Tunis v. State
INDEX NO.: D.19.
CITE: (07-16-2019) 129 N.E.3d 258 (Ind. Ct. App.)
SUBJECT: Direct contempt finding and sentence upheld
HOLDING: Defendant refused to testify even after the trial court granted use immunity and derivative use immunity under Indiana Code section 35-37-3-3. The Court of Appeals rejected the argument he did not willfully refuse to testify and held the trial court did not abuse its discretion by holding him in direct contempt and sentencing him to 180 days. The Court suggested that even if he had established his refusal to testify was on the advice of counsel, he could still be found in contempt and deferred to the trial court's findings regarding the defendant's gestures and demeanor in court. Additionally, the Court of Appeals declined to decide whether Appellate Rule 7(B), a "reasonableness" or "manifestly unreasonable" standard would apply in reviewing his contempt sentence. Because the defendant's refusal to testify interfered with the prosecution of four felony offenses and after reviewing similar cases of contempt, the court concluded his 180 day sentence was reasonable and not inappropriate.

TITLE: United Mine Workers v. Bagwell

INDEX NO.: D.19.

CITE: 512 U.S. 821, 114 S. Ct. 2552, 129 L.Ed.2d 642 (1994)

SUBJECT: Contempt - fines; criminal proceedings

HOLDING: Non-compensatory contempt fines totaling $52 million, levied against union pursuant to schedule previously established to coerce compliance with injunction barring strike- related activities, are serious criminal fines that may constitutionally be imposed only through criminal proceedings with due process rights. Contempt is civil if it is meant to coerce future conduct, & criminal if meant to punish past conduct. Application of this test is not so simple, however, Majority looks at several factors. First, violations of injunction did not implicate court's ability to maintain order & adjudicate proceedings. Second, actions for which union was cited involved widespread & ongoing violations of complex injunction, rather than simple, affirmative acts. Size of fines was also important. Scalia, J., CONCURS, noting that complexity of such injunctions makes questions about whether party has complied more difficult to answer, & therefore more appropriate for treatment under standard criminal procedures.

D. TRIAL

D.21. Motion to correct error (TR 59; CR 16)

TITLE: State v. Hollars
INDEX NO.: D.21.
CITE: (2nd Dist., 06-03-08), Ind. App., 887 N.E.2d 197
SUBJECT: Erroneous grant of motion to correct errors based on "thirteenth juror" principle
HOLDING: In attempted murder prosecution, Tr. Ct. abused its discretion by granting D's motion to correct error and ordering a new trial based on "thirteenth juror" principle. Indiana Trial Rule 59(J) mandates special findings that "relate the supporting and opposing evidence to each issue upon which a new trial is granted," but Tr. Ct. in this case did not provide parties with such findings to support its decision. Further, the "thirteenth juror" principle is not intended to invite trial judge to cavalierly substitute his or her evaluation of evidence in place of a contrary evaluation made by jury, and relief is appropriate only if jury's determination is unreasonable or improper. Ingersoll-Rand Corp. v. Scott, 557 N.E.2d 679 (Ind. Ct. App. 1990).

Here, no more than five seconds elapsed between police officers' entry into D's residence to execute search warrant and his gunshot. Tr. Ct. questioned whether an individual can form specific intent to kill within three to five seconds after being awakened in middle of the night. Court concluded that D was able to form necessary intent to kill given his intentional use of a deadly weapon in a manner likely to cause death. Before entering house, the police: 1) knocked on outer door and loudly announced their presence; 2) broke glass to unlock outer door; 3) knocked on steel door and loudly announced their presence; and 4) used a battering ram to open the steel door. In addition, after entering house but before entering bedroom, officers yelled "police, search warrant." While jury certainly could have concluded that D did not have time to form requisite intent to kill, evidence is not so lopsided that jury should have done so. Court also concluded that Tr. Ct.'s failure to give D's proposed instruction on attempted murder and State's inadvertent failure to produce an E.R. physician's diagram of D's bullet wounds during discovery likewise did not warrant a new trial. Held, judgment reversed.

RELATED CASES: Tancil, 956 N.E.2d 1204 (Ind. Ct. App. 2011) (Tr. Ct. did not abuse its discretion in denying D's T.R. 59(J)(7) motion for new trial on attempted murder count, as evidence, if believed, was more than sufficient to support jury's verdict; see full review at D.21.f).

TITLE: Koons v. State
INDEX NO.: D.21.
CITE: (10/20/89), Ind., 545 N.E.2d 826
SUBJECT: Waiver of appeal - D voluntarily absent during time for filing MCE
HOLDING: Tr. Ct. did not err in dismissing timely filed MCE where D was voluntarily absent from jurisdiction during time period for filing. D was tried & sentenced in absentia, & did not return to jurisdiction of Tr. Ct. until more than four months after sentencing. D's counsel timely filed MCE, & when D returned, he moved Tr. Ct. to rule on it, which Tr. Ct. denied. Several months later, clerk entered docket entry, pursuant to TR 53.3, overruling D's MCE. Nine days later, Tr. Ct. ordered clerk's entry expunged. State next moved to dismiss D's MCE, & Tr. Ct. did so. On appeal, D claims Tr. Ct. erred in expunging clerk's entry overruling MCE, which was made pursuant to TR 53.3(E)(2). TR 53.3 is to be used in cases where all matters are in proper time frame & Tr. Ct.'s jurisdiction properly invoked, but where Tr. Ct. has failed to rule on MCE. Rule was intended to expedite appeals, not to toll time for filing MCE where D is voluntarily absent from Tr. Ct.'s jurisdiction. During time that D is voluntarily absent, he/she is not entitled to file any plea or ask any consideration from Tr. Ct. Irvin, 139 N.E.2d 898. See also Evolga, 519 N.E.2d 532; Skolnick, 417 N.E.2d 1103. Here, D effectively waived right to appeal by absenting himself from Tr. Ct.'s jurisdiction. Tr. Ct. did not err in refusing to entertain MCE or in striking clerk's entry showing MCE to be *overruled*. Held, Tr. Ct. affirmed. DeBruler, J., DISSENTS, arguing that constitutional right to appeal ought not to be waived so easily where MCE was in fact timely filed by counsel.

TITLE: Roberts v. State
INDEX NO.: D.21.
CITE: (11/24/86), Ind., 500 N.E.2d 197
SUBJECT: MCE - judge
HOLDING: Judge who presided at trial is required to rule on MCE if that judge is available. Determination of availability is to be made by judge then presiding in the Ct. CR 9. Here, D contends presiding judge's retirement does not make him automatically "unavailable" under rule. State v. Smith, 297 N.E.2d 809. However, retired judge may be unavailable by virtue of death, sickness, absence, or unwillingness to act. Cf. TR 63(A). Judge in this case expressly determined that his predecessor was unavailable. Held, no error.

D. TRIAL

D.21. Motion to correct error (TR 59; CR 16)

D.21.a. Procedural requirements

TITLE: Calloway v. State
INDEX NO.: D.21.a.
CITE: (12/9/86), Ind., 500 N.E.2d 1196
SUBJECT: MCE - 2nd MCE permissible if promotes judicial economy
HOLDING: Tr. Ct. did not err in granting prosecution's 2nd MCE. Here, D contends there is no authority for filing 2nd MCE, & even if 2nd MCE is permitted, prosecution's motion was automatically denied after 5 days under TR 53.4(B). Tr. Ct. had granted D's PCR, finding that prosecutor improperly threatened D that multiple habitual offender enhancements could run consecutive with each other. Kelly, 452 N.E.2d 907, which allows for such consecutive habitual offender sentences, was decided same day as grant of D's PCR. Prosecution's 2nd MCE brought Kelly to Tr. Ct.'s attention. Tr. Ct. retained jurisdiction over case because record of proceedings had not been filed. If Tr. Ct. had refused/failed to correct error, & prosecution had pursued appeal from denial of first motion, that appeal would have resulted in reversal. In interest of judicial economy, Ct. holds that Tr. Ct. did not commit reversible error in correcting ruling on first MCE. Ct. notes this holding does not affect previous cases which stand for a proposition that filing of 2nd MCE after first motion has been denied is not permitted. Staples, 452 N.E.2d 985; Fancher, 436 N.E.2d 311. Given disposition of the issue, Ct. finds TR 53.4(B) is inapplicable to circumstances of case. Held, no error.

TITLE: Cobb v. State
INDEX NO.: D.21.a.
CITE: (3/16/87), Ind., 505 N.E.2d 51
SUBJECT: MCE - amendment not allowed beyond 60 days
HOLDING: PCR Ct. did not err in refusing to permit amendment to MCE following post-conviction hearing. Here, D attempted to amend MCE more than 2 weeks past 60-day deadline. TR 59 supports PCR's Ct. refusal to allow amendment. Held, denial of PCR affirmed.

TITLE: N.J.R. v. State
INDEX NO.: D.21.a.
CITE: (2d Dist. 9/16/82), Ind. App., 439 N.E.2d 725
SUBJECT: MCE - procedural requirements; juvenile
HOLDING: Date of disposition rather than date of initial hearing resulting in finding of probable cause (P.C.) is date upon which 60 days for filing MCE begins to run. Ind. Code 31-6-7-17; Ind. Code 31-6-7-1(a); CR 16. Here, State argued MCE not timely filed. State figured 60 days from initial hearing finding P.C. to believe N.J.R. was delinquent child. Ct. holds adjudication on merits did not occur until denial hearing at which N.J.R. was found to be in criminal contempt. MCE filed within 60 days of denial hearing. Held, MCE timely filed.

TITLE: Naked City v. State
INDEX NO.: D.21.a.
CITE: (3d Dist. 1/26/84), Ind. App., 460 N.E.2d 151
SUBJECT: MCE - extension of time
HOLDING: Tr. Ct. did not err in denying D's third motion for extension of time to allow his new counsel to file memorandum of law in support of MCE filed by trial counsel. D may supplement/amend MCE only until date it is due. Fancher, 436 N.E.2d 311; Junigan, App., 443 N.E.2d 325. Ct. intimates that D may file memo of law after time has run if he/she would be prohibited from claiming a ground for relief or denial would constitute abuse of discretion, *citing* AR 8.3(A)(7). D has shown neither. Held, no error.

RELATED CASES: Goodman, 581 N.E.2d 1259 (no provisions for extension of time to file MCE under new rules. D should seek to file belated ME under PCR 2).

D. TRIAL

D.21. Motion to correct error (TR 59; CR 16)

D.21.c. For trial errors

TITLE: Lowry v. State
INDEX NO.: D.21.c.
CITE: (10/27/82), Ind., 440 N.E.2d 1123
SUBJECT: MCE - trial error
HOLDING: Appellant has duty to present appellate Ct. with proper record. Pulliam, 345 N.E.2d 229. The record of trial must contain reference to alleged improper trial procedure. Simply identifying the error in MCE & in appellant's brief is not a sufficient record upon which to review claim where trial record contains no reference to a given procedure being utilized by Tr. Ct. (here, Allen instruction allegedly given during jury deliberations). Bentley, 414 N.E.2d 573. Held, alleged error waived.

RELATED CASES: Ashford, 464 N.E.2d 1298 (Crim L 1169.5(1); sustained objection cannot be basis of argument on appeal).

D. TRIAL

D.21. Motion to correct error (TR 59; CR 16)

D.21.e. For newly discovered evidence

TITLE: Becker v. State
INDEX NO.: D.21.e.
CITE: (3d Dist. 01/27/92), Ind. App., 585 N.E.2d 279
SUBJECT: Newly discovered evidence insufficient for new trial
HOLDING: Even where 4-year-old complaining witness (CW) attempted to recant allegations against D at hearing on Motion to Correct Errors (MCE), there was sufficient evidence to support conviction at trial so that new evidence would probably not result in different outcome, & therefore Ct. did not err in denying motion for new trial. During trial, evidence was presented which showed inconsistencies in allegations against D, but jury convicted.

Ct. App. noted that jury obviously believed CW's testimony that she had been molested by D, & that CW had not recanted testimony during cross-examination. While CW's testimony could be impeached at new trial, it would also be subject to rehabilitation, & would not automatically destroy State's case. Jury had been aware of CW's previous inconsistent statements at trial & still found her testimony credible. Ct. determined that new evidence would be only cumulative of other impeaching evidence already offered & therefore new trial was not warranted. Held, conviction affirmed.

RELATED CASES: Martinez, App., 917 N.E.2d 1242 (CW's pretrial interview and pretrial deposition was sufficient to counter her post-trial recantation); Denney, 695 N.E.2d 90 (D failed to carry his burden of showing that lab report indicating presence of LSD in blood 16 days after crime would probably have changed trial outcome, because there was ample opportunity for D to use LSD after shooting, & even assuming he ingested substance before crime, D did not attempt to establish what test showed as to his level of intoxication); Martin, App. 636 N.E.2d 1268 (No error in denying new trial, because new evidence was not sufficiently credible & was unlikely to produce different result. Evidence consisted of two witnesses who would testify they overheard another witness tell others that he committed murder rather than D, & Tr. Ct. held extensive hearing where prospective witnesses testified).

TITLE: Bell v. State
INDEX NO.: D.21.e.
CITE: (1st Dist., 12-29-93), 626 N.E.2d 570 (Ind. Ct. App. 1993)
SUBJECT: Insufficient newly discovered evidence
HOLDING: Because evidence regarding officer's misconduct in other drug case was merely impeaching, Tr. Ct. did not err in denying D's motion to correct error (MCE) based on newly discovered evidence. When officers executed search warrant, one officer said he looked through window & saw D place several plastic bags filled with marijuana in manila envelope just prior to officers breaking in door. No other officers saw envelope in D's possession, nor could they find envelope, but later officer who said he had seen it, found it in house when he was searching alone. Envelope contained marijuana, & D claimed he was framed by officer & that officer had planted envelope. After trial, D filed MCE alleging newly discovered evidence, including officer's arrest for attempting to take bribe, attempted theft, & theft. Officer was accused of attempting to extort $100,000 from father of another D & search of his desk revealed unmarked bag of marijuana. At hearing, Tr. Ct. denied MCE, but reduced D's sentence on its own motion, based on evidence from hearing.

Among nine requirements to support MCE based on newly discovered evidence, is requirement that evidence not be merely impeaching, Fox, 568 N.E.2d 1006; CR 16; TR 59. Ct. found evidence in D's case involved officer's misconduct in different drug case, & therefore its only possible relevance was to show officer was criminal himself, & to impeach his credibility. Because evidence was merely impeaching, Ct. found Tr. Ct. did not abuse discretion in denying MCE. Held, conviction affirmed, Najam, J., dissenting on other issue.

RELATED CASES: Whedon, App., 900 N.E.2d 498, *sum. aff'd*, 905 N.E.2d 408 (post-conviction Ct.'s finding that witness's testimony did not constitute newly discovered evidence & was not worthy of credit was not clearly erroneous); Powell, 714 N.E.2d 624 (no abuse of discretion in finding that D's subsequent & varying accounts re: his possession of handgun were not material, worthy of credit, capable of being produced at retrial or likely or produce a different result); Atherton, App., 714 N.E.2d 1116 (post-conviction Ct. did not err in concluding that affidavit, if introduced & admitted at new trial, was mostly cumulative & would not bring about different result); Webster, 699 N.E.2d 266 (record supported Tr. Ct.'s determination that newly discovered evidence was not worthy of credit).

TITLE: Fox v. State
INDEX NO.: D.21.e.
CITE: (03/19/91), Ind., 568 N.E.2d 1006
SUBJECT: New trial on basis of newly discovered evidence
HOLDING: On petition for rehearing, S. Ct. holds that testimony of 2 witnesses offered through MCE satisfied all of requirements meriting new trial on basis of newly discovered evidence, reversing prior decision in Fox, 560 N.E.2d 648. D was convicted of murder arising from boating incident in which victim died from asphyxia due to drowning, but she also had injuries on legs & arm, & 2 fresh bruises on back of head. D raised claim of newly discovered evidence & sought new trial. D submitted testimony & affidavits of the son of D & victim, & unrelated witness who had seen boat with 2 persons aboard. Son testified that on morning of incident his mother had fallen & struck back of her head, that he was not previously aware of details of head injuries found on her later, & that he had thought they were to her face. Unrelated witness testified that he learned of victim's death through newspaper after trial & realized he had been present & seen boating mishap on day of death. He was not aware of the importance of his observations prior to trial. Witness stated that about dark, he had passed boat on the lake occupied by 2 people. He saw person exit from back of boat while other person was in front & saw boat circle back to where first person had fallen out. He couldn't identity persons or their gender, & thought people were "'playing around or just having fun,'" & so continued on his way. Ct. determined that evidence satisfied all requirements for grant of new trial. See Francis, 545 N.E.2d 1385 card at D.21.e. Held, rehearing granted & remanded for new trial, J.J. Givan & Shepard dissenting.

RELATED CASES: Gillespie, App., 736 N.E.2d 770 (because new federal legislation prohibiting D from owning firearm did not cast doubt on D's guilt, it was not considered newly discovered evidence requiring vacating guilty plea).

TITLE: Francis v. State
INDEX NO.: D.21.e.
CITE: (10/26/89), Ind., 544 N.E.2d 1385
SUBJECT: Newly discovered evidence - standard
HOLDING: Tr. Ct. abused discretion in denying D's motion to correct errors based on newly discovered evidence. D was convicted of incest, based on his 16-year-old daughter's testimony that D forced her to have sexual intercourse with him. At trial, Gary Phelps had testified that he & victim had had consensual intercourse in parking lot at same time she alleged incest took place. D later filed motion to correct error based on newly discovered evidence. In support of motion, D presented 2 affidavits from individuals who said that they had been on work break at time of alleged incest & had seen Phelps & victim in car in parking lot. To entitle D to new trial, newly discovered evidence must: (1) have been discovered since trial; (2) be material & relevant; (3) not be cumulative; (4) not be merely impeaching; (5) not be privileged or incompetent; (6) not have been discoverable by time of trial despite due diligence; (7) be credible; (8) be capable of production at retrial; & (9) probably produce different result. Reed, 479 N.E.2d 1248. Affiants here indicated that they did not come forward sooner because they did not realize significance of their observation. Due diligence did not require D to poll all employees of industrial site near parking lot in hopes of finding witnesses. See Newell v. Walker, App., 478 N.E.2d 1246. State contends evidence here is merely cumulative of Phelps' testimony & impeaching of victim's. However, jury could have given it substantive weight so as to alter outcome of trial, particularly since outcome of original trial turned upon which witness jury believed. See Moredock, 441 N.E.2d 1372; Loyd, 398 N.E.2d 1260. Held, reversed & remanded for new trial.

TITLE: Moredock v. State
INDEX NO.: D.21.e.
CITE: (12/3/82), Ind., 441 N.E.2d 1372
SUBJECT: MCE - newly discovered evidence; tacit admission
HOLDING: A tacit admission consists of silence or an unequivocal response to an assertion made by another which ordinarily would be expected to be denied. Wickliffe, 424 N.E.2d 1007. Such an assertion or words/conduct are admissible if reaction is not a clear denial. Jethroe, 319 N.E.2d 133. Extrajudicial admissions of witnesses who testify & are subject to cross-exam are admissible as substantive evidence to extent relevant. Williams, 426 N.E.2d 662. Here, after D's trial, cousin of S.B. made affidavit stating S.B. tacitly admitted D did not rape her & that S.B. had emotional problems & was known to overdramatize & tell untruths. D submitted this affidavit with MCE which was denied by Tr. Ct. Ct. finds affidavit constitutes newly discovered evidence satisfying test set forth in Smith, 429 N.E.2d 956 & Emerson, 287 N.E.2d 867. Situation similar to Key, 132 N.E.2d 143 in which D's MCE was accompanied by affidavit of jailer stating that alleged accomplice (crucial witness against D) told officer he intended to take D to penitentiary with him because D had dated his wife. Ct. in Key held "significant & startling revelation" indicating perjury on part of state's crucial witness, which probably could have produced different result, required new trial. Held, denial of MCE reversed, remanded for new trial.

TITLE: Powers v. State
INDEX NO.: D.21.e.
CITE: (10/21/82), Ind., 440 N.E.2d 1096
SUBJECT: MCE - newly discovered evidence; diligence
HOLDING: Under Tungate, 147 N.E.2d 232 & TR 59(A)(6), denial of new trial is proper if D fails to show that, using reasonable diligence, the new evidence could not have been produced at trial. Here, D maintained information used to secure search warrant was based on illegal wire taps & offered to prove at suppression hearing that confidential informant (C.H.) was actually his answering service operator. C.H. was not called to testify at suppression hearing. She did testify at hearing on BMCE - newly discovered evidence. Ct. found D knew of C.H. & could have subpoenaed her testimony at suppression hearing and/or trial but did not; therefore, D failed to sustain burden of showing reasonable diligence. Held, drug convictions affirmed.

RELATED CASES: Whatley, 937 N.E. 2d 1238 (Ind. Ct. App. 2010) (D cannot raise newly discovered evidence issue in a TR 60(B)(2) motion where in the exercise of due diligence the D could have raised the newly discovered evidence claim in a motion to correct errors); Tyson, App., 626 N.E.2d 482 (finding of due diligence rests upon particularized showing that all methods of discovery reasonably available to counsel were used & could not uncover newly-found information).

TITLE: Terrell v. State
INDEX NO.: D.21.e.
CITE: (4-11-01), Ind., 745 N.E.2d 219
SUBJECT: Newly discovered evidence - when to raise
HOLDING: Ind. Criminal Rule 16(A) does not require filing of motion to correct error as prerequisite for appeal addressing newly discovered evidence if error is raised & addressed before sentencing & judgment. After Tr. Ct. has entered judgment, one who has claim of newly discovered evidence is obliged to present that claim initially to trial judge so that he or she can assess quality of newly discovered evidence & consider whether relief is warranted.

Thus, when party wishes to raise issue of newly discovered evidence while case is still before Tr. Ct., party may raise it by motion to Tr. Ct. If issue arises in thirty-day period after Tr. Ct. has entered final judgment, Rule 16(A) requires party to raise issue in post-judgment motion to correct error. Here, after verdict but before sentencing, defense counsel properly filed motion to set aside verdict & for mistrial alleging juror misconduct. Held, transfer granted, memorandum opinion of Ct. App. vacated, remanded to Ct. App. for decision on merits.

TITLE: Wilson v. State
INDEX NO.: D.21.e.
CITE: (1st Dist., 3-11-97), Ind. App., 677 N.E.2d 586
SUBJECT: New trial on basis of newly discovered evidence
HOLDING: Tr. Ct. abused discretion by denying D's motion for new trial. In motion to correct error based on newly discovered evidence, D submitted uncontroverted affidavit of one of State's witnesses who stated that he & other State witnesses engaged in conspiracy to commit perjury in order to wrongfully convict D. Ct. held that affidavit was credible because: 1) it exposed witness to criminal conviction for perjury; 2) it was corroborated by two other affidavits which stated that witness & D's ex-wife "expressed surprise" that police officer's testimony had corroborated their own; & 3) Ct. App. must accept contents of uncontradicted affidavit as true, because State did not avail itself of opportunity to submit affidavits or present testimony in rebuttal. Newly discovered evidence in this case was not merely impeaching, & mandated new trial because evidence would probably result in different outcome. Held, reversed & remanded for new trial.

RELATED CASES: Norris, 896 N.E.2d 1149 (a guilty plea may not be challenged in post-conviction proceedings by a claim of newly discovered evidence regarding the events that constituted the crime); McCraney, 719 N.E.2d 1187 (whether witness' testimony at post-conviction hearing is worthy of credit is factual determination to be made by trial judge who has opportunity to see & hear witness testify; it is not within appellate court's province to replace Tr. Ct.'s assessment of credibility with its own).

D. TRIAL

D.21. Motion to correct error (TR 59; CR 16)

D.21.f. Standards used by Tr. Ct.s

TITLE: Gibbs v. State
INDEX NO.: D.21.f.
CITE: (10/21/85), Ind., 483 N.E.2d 1365
SUBJECT: TR 59(H) - error based on evidence not presented to jury
HOLDING: Where D alleged ineffective assistance of counsel for failure to communicate plea bargain, Tr. Ct. was ruling on an error based on evidence not presented to jury. TR 59(H). Such decision is analogous to newly discovered evidence (TR 59(A)(6)) & standard of review is abuse of discretion. Augustine, 461 N.E.2d 101. Here, Ind. S. Ct. finds testimony of prosecutor at MCE hearing sufficient to support inference that D's counsel did in fact transmit offer to D on morning of trial. Held, no abuse of discretion in denying motion for new trial. DeBruler CONCURS IN RESULT.

TITLE: State v. Kleman
INDEX NO.: D.21.f.
CITE: (2/13/87), Ind., 503 N.E.2d 895
SUBJECT: MCE - standard employed by Tr. Ct.
HOLDING: On transfer. Ct. vacates that portion of 3d Dist. opinion at 491 N.E.2d 585 holding that, in granting D's MCE, Tr. Ct. was limited to granting new trial & could not enter new judgment of lesser offense not presented to jury. Here, D was convicted of murder & criminal recklessness. Tr. Ct. set aside conviction & entered new conviction & sentence for voluntary manslaughter. When Tr. Ct. uses fact-finding authority of "13th juror" principle, it is limited to granting new trial. Moore, 403 N.E.2d 335. Under "review" or "prima facie evidence" approach Ct. shall enter judgment if it determines verdict is clearly erroneous as contrary to or not supported by evidence. TR 59(J)(7). Tr. Ct. utilized latter standard. Its substitution of conviction for manslaughter does not rest upon application of "13th juror" principle. Ct. *cites* other cases in which it has upheld modification of conviction to lesser included offense. Hutchinson, 225 N.E.2d 828; Ritchie, 189 N.E.2d 575; Dickens, 295 N.E.2d 613. It does not matter whether jury was instructed on lesser included offense; Ct. finds offense was necessarily included. Held, manslaughter conviction upheld.

TITLE: Tancil v. State
INDEX NO.: D.21.f.
CITE: (11-21-11), 956 N.E.2d 1204 (Ind. Ct. App. 2011)
SUBJECT: Thirteenth juror - trial judge has duty to weigh conflicting evidence
HOLDING: Trial Rule 59(J)(1) authorizes Tr. Ct. to grant a new trial "if it determines that prejudicial or harmful error has been committed." In reviewing the evidence, Tr. Ct. shall grant a new trial if it determines that the jury's verdict is against the weight of the evidence. Ind. Trial Rule 59(J)(7). When ruling on a motion for a new trial pursuant to Trial Rule 59(J)(7) in a criminal case, Tr. Ct. should not employ the sufficiency-of-the evidence standard used on appeal. Instead, Tr. Ct. must evaluate the evidence and witnesses subjectively, in keeping with its role as the so-called thirteenth juror, and then make an objective determination whether, based on the probative and credible evidence, a reasonable juror could find the D guilty beyond a reasonable doubt.

Here, D requested a new trial on attempted murder charge on the basis that the jury's verdict was against the weight of the evidence. When victim walked toward a neighbor's house after D argued with her and broker her sunglasses, he told her, "Don't run in there. I am going to kill you. Just keep walking." He caught up with victim, pushed and hit her, then carried her into some pitch-black woods and repeatedly punched victim's head, face, and body for what seemed to her "like a real long time." Two nearby residents heard D tell victim to shut up or he would kill her, and they called 911. When police officers arrived, victim appeared to be dead. D told officers, "I know I am going away for a long time." Victim suffered significant facial injuries and a traumatic brain injury and was hospitalized for three days, after which she suffered from dizziness, hearing loss, and blurred vision. Notwithstanding Tr. Ct.'s sua sponte remark outside presence of jury that "this sounds like a battery," Court held that evidence was more than sufficient to support jury's determination that D intended to kill victim and engaged in conduct that constituted a substantial step toward doing so. Held, judgment affirmed.

D. TRIAL

D.21. Motion to correct error (TR 59; CR 16)

D.21.g. Hearing

TITLE: Douglas v. State
INDEX NO.: D.21.g.
CITE: (11/17/82), Ind., 441 N.E.2d 957
SUBJECT: MCE - evidentiary hearing
HOLDING: TR 59(H)(1) does provide a means of basing MCE on evidence outside record by supporting affidavits but does not suggest an evidentiary hearing. Harris, 427 N.E.2d 658 (no error in denial of motion for evidentiary hearing on MCE; D sought to introduce evidence regarding trial counsel's competency). Here, D claims Tr. Ct. erred in denying motion for evidentiary hearing to ascertain trial counsel's tactical reasoning. Held, no error; rape & incest convictions affirmed.

RELATED CASES: Majko, 503 N.E.2d 898 (Ct. orders ruling on MCE set aside & remands for hearing on question of probable cause for original arrest warrant & on bailiff's communication with juror with deliberation); Taylor, 469 N.E.2d 739 (where specification in MCE requires consideration of matters outside record, TR 59 (H)(1) requires averment by affidavit attached to MCE).