CHAPTER 4
VOIR DIRE
Table of Contents

CHAPTER 4
VOIR DIRE

I. VOIR DIRE – IN GENERAL

A. OPEN TO PUBLIC

Under the First Amendment, voir dire proceedings in criminal trials are presumptively open to the public. Can be closed only by specific findings: (1) closure essential; and (2) alternatives inadequate. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 502, 104 S.Ct. 819, 820 (1984).

Privacy interests of prospective jurors may be protected by allowing juror to request *in camera* consideration but with counsel present and on record.

B. JEOPARDY DOES NOT ATTACH UNTIL JURY SWORN

Voir dire is not part of trial; trial begins when jury impaneled, and cause submitted. Nix v. State, 240 Ind. 392, 166 N.E.2d 326 (1960), Bardonner v. State, 587 N.E.2d 1353, 1357 (Ind. Ct. App. 1992).

C. ACCEPTING JURY AS CHOSEN SUPPORTS INFERENCE OF WAIVER

Acceptance of jury is one factual circumstance supporting inference of waiver, in conjunction with: (1) voir dire not recorded; (2) defendant did not object to voir dire procedures used by trial court; or (3) defendant's peremptory challenges not exhausted. Emmons v. State, 492 N.E.2d 303, 304 (Ind. 1986).

Marbley v. State, 461 N.E.2d 1102 (Ind. 1984) (court asked defendant in open court whether he accepted jury as constituted, defendant claimed question prejudiced jury against him because jury may have presumed, he did not accept them; defendant's contention speculative and not supported by record).

D. PURPOSES OF VOIR DIRE

1. Determine whether prospective jurors are able to deliberate fairly

Article I, § 13 of Indiana Constitution guarantees a defendant's right to an impartial jury. Voir dire determines whether prospective jurors are able to deliberate fairly on the issue of guilt. Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995). The function of voir dire examination is not to educate jurors but to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence. Coy v. State, 720 N.E.2d 370 (Ind. 1999).

2. Elicit information to establish challenges to prospective jurors

Ferret out possible bias and prejudice existing in minds of jurors and ascertain whether prospective jurors can render a fair and impartial verdict in accordance with law and evidence. Both parties are permitted to discover grounds upon which to predicate challenges for cause and peremptory challenges. Emmons v. State, 492 N.E.2d 303, 305 (Ind. 1986).

3. Restore impartial attitude

Most jurors are likely to have a strong predisposition about criminal cases.

- Acquaint the jury with yourself and theory of case.

- Expose distasteful aspects of case to defuse the shock value of revelations during trial.
- Ask questions regarding burden of proof, presumption of innocence, and proof beyond reasonable doubt in non-legal terms.
- Bring home to jurors' responsibility they are being vested with.

CAVEAT: Indiana courts have held that it is improper to:

(1) Inform about various legal theories and principles involved in case. Reith-Riley Constr. Co. v. McCarrell, 163 Ind. App. 613, 325 N.E.2d 844, 853 (1975);

(2) Deliberately expose jurors to substantive issues. Davis v. State, 598 N.E.2d 1041, 1047 (Ind. 1992); and

(3) Condition jurors toward your view. McCormick v. State, 437 N.E.2d 993, 996 (Ind. 1982).

4. Build rapport

Establish rapport with jurors to reveal their emotions, attitudes and feelings—jurors must feel their answers affect you, have the power to occasion human response in you.

Powers v. Ohio, 499 U.S. 400, 413, 111 S.Ct. 1364, 1372 (1991) (voir dire permits party to establish relationship, if not bond of trust, with jurors).

E. DOUBLE JEOPARDY

1. Prosecutor brings about false statements by juror with intent to cause termination of trial

Ind. Code § 35-41-4-3 provides in pertinent part:

(a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and…(2) the former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless…(vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred.

2. Discharge without jeopardy attaching

Ind. Code § 35-41-4-3(a)(2)(vi) allows court to discharge the jury without jeopardy attaching if the juror's false statements during voir dire prevents a fair trial.

Ried v. State, 610 N.E.2d 275, 277 (Ind. Ct. App. 1993), *affirmed* 615 N.E.2d 893 (second day of trial, court properly exercised discretion and *sua sponte* granted mistrial where juror had misstated truth on jury questionnaire and during voir dire; IC 35-41-4-3 identifies several categories of extraordinary circumstances which meet requirement of manifest necessity to declare mistrial).

Note: It is improper to move for mistrial during voir dire. Roller v. State, 602 N.E.2d 165, 168 (Ind. Ct. App. 1992) (move to strike or discharge jury panel).

3. Defendant not placed in jeopardy until entire jury sworn

Selection of jury not complete and jeopardy does not attach until regular jury panel and alternates are all sworn. Livingston v. State, 544 N.E.2d 1364, 1367-68 (Ind. 1989).

F. INDIVIDUAL VOIR DIRE OF JURORS

There is no absolute right to have each juror separately sequestered and questioned outside presence of other jurors. Pruitt v. State, 622 N.E.2d 469, 472 (Ind. 1993).

1. May be required in unusual or damaging circumstances

Individual voir dire may be required where circumstances highly unusual or potentially damaging to defendant. Hadley v. State, 496 N.E.2d 67, 72 (Ind. 1986).

In cases such as child sex abuse cases, jurors should be examined individually out of presence of each other to give each juror chance to give candid answers without peer pressure. Jurors may be embarrassed to disclose certain information in front of strangers; embarrassment could turn to hostility against the asking party in such circumstances.

Collins v. State, 826 N.E.2d 671 (Ind. Ct. App. 2005) (defendant did not have the right to question entire jury panel individually with a questionnaire to determine if any jurors had preconceived notions about the case; defendant failed to show that the circumstances were so highly unusual or potentially damaging as to justify individualized voir dire).

Tatusko v. State, 990 N.E.2d 986 (Ind. Ct. App. 2013) (trial counsel was not ineffective for failing to ask trial court to interrogate prospective jurors after one juror made potentially prejudicial statements about defendant during voir dire).

2. May be permitted when questioning pretrial publicity

Questions relating to pretrial publicity may elicit answers that could bias other panelists.

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961) ("[T]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.").

Edwards v. State, 479 N.E.2d 541, 544 (Ind. 1985) (individual voir dire not required where trial judge asked prospective jurors collectively whether they had heard or read about case, they indicated they would be able to make determination based solely on evidence presented at trial; general statements from jurors did not relate to any substantive facts or evidentiary matters that would have prejudiced other jurors, and judge admonished them regarding any publicity that might occur during trial).

Stroud v. State, 787 N.E.2d 430 (Ind. Ct. App. 2003) (court committed reversible error in questioning jurors exposed to prejudicial newspaper article in presence of other jurors who had not read article, thereby contaminating other jurors).

Griffin v. State, 81 N.E.3d 243 (Ind. Ct. App. 2017) (defendant was not denied his right to an impartial jury by the use of group voir dire based on media coverage in a small community; Court also affirmed denial of a motion to prohibit use of rehabilitation of prospective jurors challenged for cause and from asking the question as to whether they could set aside their biased opinions and render an impartial verdict).

3. Capital/LWOP cases

In Indiana, many capital defendants have been granted individual voir dire on publicity, and in sensitive areas such as child abuse. Small group voir dire (panels of 4 to 8) usually granted for rest of questioning.

Martinez Chavez v. State, 534 N.E.2d 731, 738 (Ind. 1989) (defendant not entitled to individual voir dire of each prospective juror, and group voir dire could be conducted of those who were not familiar with crime from news reports).

Smedley v. State, 561 N.E.2d 776 (Ind. 1990) (no error in denying defendant's motion for individualized voir dire of prospective jurors due to State's request for death penalty in murder case where defendant failed to show to trial court any highly unusual or potentially damaging circumstances requiring individualized voir dire). See also Ward v. State, 903 N.E.2d 946 (Ind. 2009).

For in depth information on capital and LWOP cases, see IPDC's *Defending a Capital Case and Handling a Life Without Parole (LWOP) Cas*e.

II. PRACTICE TIPS AND CONSIDERATIONS

A. CONSIDERATIONS

Voir dire may be the most important portion of the trial. It is the first opportunity for the jurors to see us and begin judging our credibility.

1. Generally

The purpose of voir dire is to uncover juror bias and provide basis for challenges for cause and/or intelligent exercise of peremptory challenges.

In Indiana, the court must allow attorney participation in voir dire. For capital and LWOP cases, each side has 20 peremptory challenges. For non-D felony cases, peremptories are 10 per side. For 6 person juries, each side receives five. When several defendants are tried together, they must join in their challenges. Ind. Code § 35-37-1-3 and Jury Rule 18.

2. Common areas of inquiry

Note: For discussion see IV on page 4-17.

(1) defendant not testifying;

(2) attitudes toward nature of a particular crime;

(3) preconceived ideas about possible intended defense;

(4) experiences as juror in another case;

(5) preconceived ideas about drug dealers, informants;

(6) biases regarding credibility of witnesses;

(7) hypothetical questions;

(8) provocative and unusual facts;

(9) read charging information;

(10) whether juror could act in accord with the law;

(11) prosecutor's duty to inform if didn't prove case;

(12) whether jurors know witnesses;

(13) sympathetic to police testimony;

(14) witness or victim of crime;

(15) previous service in criminal cases;

(16) type of offense charged;

(17) racism and other prejudice; and

(18) interest in serving.

3. Impermissible areas of inquiry

Note: For discussion see III on page 4-10.

(1) repetitive or argumentative;

(2) trying case before evidence presented;

(3) conditioning jurors to be receptive to your position;

(4) asking jurors to predetermine weight and credibility;

(5) counsel stating personal opinion on guilt or innocence;

(6) prosecutor comments on defendant's right not to testify;

(7) misinformation on elements of proof;

(8) role of defense counsel to hide truth/prosecutor's role to seek justice;

(9) prosecutor's personal or special knowledge proving guilt; and

(10) explain 5th Amendment absent defendant's consent.

4. Common objections

(1) asking juror to prejudge evidence;

(2) cross-examination barred;

(3) form of question improper;

(4) humiliating or embarrassing juror;

(5) hypothetical question misused;

(6) not related to any challenge for cause;

(7) prejudicial or inflammatory;

(8) protracted, repetitive or argumentative examination;

(9) indoctrinating jury;

(10) predetermining weight and credibility juror would give witness; and

(11) disparaging remarks about role of defense counsel.

B. PRACTICE TIPS

Move to discharge jury rather than for mistrial

For contaminating information, move to strike entire panel, and request instruction that panel not discuss matter with venire. Voir dire is not part of trial. Therefore, a mistrial motion may be inappropriate. Nix v. State, 240 Ind. 392, 166 N.E.2d 326 (1960).

Proper motion is to strike or discharge jury panel or to challenge the array. Roller v. State, 602 N.E.2d 165, 168 (Ind. Ct. App. 1992).

1. Insist court record voir dire

Make certain voir dire is recorded. Jury Rule 12 provides that, "[u]nless otherwise agreed by the parties, jury selection shall be recorded including all sidebar conferences." Record judge's gestures, actions, etc., if they appear to communicate to the jury.

Emmons v. State, 492 N.E.2d 303, 305 (Ind. 1986) (trial court denied fundamental appellate rights by refusing to record voir dire proceedings; deprived defendant of appellate review of specific issues which concerned him and any other errors which may have occurred).

(a) Alternate procedure to present evidence on appeal when record not made or transcript unavailable

If review of voir dire might aid your client on appeal, prepare statement of unrecorded voir dire proceedings to submit for appellate review.

Indiana Rule of Appellate Procedure 31 provides means for presenting evidence or testimony when no record made or when transcript unavailable. Failure to comply with rule waives any error attributed to non-recordation. Mulligan v. State, 487 N.E.2d 1309 (Ind. 1986).

(b) Keep track of strikes

Make certain strikes are recorded and part of the record as they may be necessary to prove prejudice from an erroneous denial of a motion to remove juror for cause.

Whiting v. State, 969 N.E.2d 24 (Ind. 2012) (defendant procedurally defaulted claim that trial court erred in not striking prospective juror for cause because defendant did not use one of her peremptory challenges to strike prospective juror).

2. Find method of striking beforehand

Find out:

(1) are the strikes written or oral;

(2) does one side go first or do they alternate;

(3) if a juror has been passed, can that juror be challenged later; and

(4) if strikes are written and both strike the same juror, are both sides charged?

3. Pre-trial questionnaire

Consider tendering pre-trial juror questionnaire. Offer to have it printed and delivered to the Clerk so that jurors will have completed it before arrival.

4. Checklist in planning voir dire

Before participating in voir dire, make sure you can answer following questions:

(1) Have you developed a theory of the case?

(2) Is your primary focus acquittal or mitigation of punishment?

(3) Familiarize yourself with local court rules and practices.

(4) Will judge conduct voir dire? If so, have you submitted written questions?

(5) How will you combat pretrial publicity?

(6) How many jurors and alternates will be selected?

(7) Consider type of jurors that should sit on your case. What are profiles of desirable and undesirable jurors? Thinking styles, feeling styles, and behavior styles. Hone in on elements of crime; theory of defense; important disputed facts; inflammatory evidence; characteristics of witnesses, attorneys, and defendant; and punishment issues;

(8) Determine strategy for eliciting information to help choose jurors who will impartially analyze evidence and conscientiously apply the law given by the judge. What topics do you need to cover when questioning jurors?

(9) Carefully prepare questions tailored to factual pattern of your case. Refine, modify, supplement, and build on pattern voir dire questions and other questions requested in prior cases.

(10) Have you prepared your questioning style to create honest and candid communication with jurors?

(11) How many challenges do you have and how will you exercise them? Decide where to use peremptories and anticipate where prosecution will use its peremptories.

5. Don't rely on your own stereotypes

"If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143, 114 S.Ct. 1419, 1429 (1994).

6. Avoid "follow-the-law" questions

Questions which ask jurors to self-assess whether they can be fair and impartial not adequate to elicit bias. Morgan v. Illinois, 504 U.S. 719, 734, 112 S.Ct. 2222, 2232-33 (1992).

"We are not ready to say that the person who has his liberty…at stake must be compelled to accept a jury on a strictly cursory, generality interrogation basis…." United States v. Lewin, 467 F.2d 1132, 1137-38 (7th Cir. 1972).

7. Common mistakes lawyers make

Giving unwitting offense to members of panel reduces your effectiveness. Usually, a lawyer's personality and method of questioning will offend jurors more than the nature of questions asked.

(1) failure to give few seconds of introduction to set context of questioning and put jurors at ease about personal privacy;

(2) failure to direct general questions to entire panel before turning to more repetitive questions of specific veniremen;

(3) mispronouncing name of prospective juror, once it has been pronounced correctly in open court;

(4) failure to have another person (paralegal, law clerk, co-counsel) take sufficient notes to avoid repetition and to permit good use of challenges;

(5) failure to keep eye contact in order to detect comments or gestures;

(6) failure to follow up leads suggesting basis for removal;

(7) failure to follow up conversational leads (hobbies, work problems) that would permit you to draw out and befriend juror;

(8) failure to identify obvious sources of prejudice in a panel or in specific person; and

(9) failure to assess jurors' reaction to your style.

8. Prior to start of voir dire – request instruction on prohibited matters

Request prosecutor be instructed not to ask about prohibited matters, or request prosecutor make a proffer of precise wording so you can object.

9. Maximizing effective voir dire

The following excerpts are from a presentation by J. Vincent Aprile II, General Counsel, Department of Public Advocacy. Reprinted with permission.

(a) Reality-based, life experience discussion

Typically, a potential juror will tell you how a situation should be handled. He may not tell you how he will likely handle that situation.

Life experiences technique uses hypothetical questions to elicit factual incidents in juror's background that are comparable to legal or factual issue to be discussed. When the juror's mental and emotional context for an answer is a memory of how he performed in a comparable everyday experience, there's much greater chance the answer will accurately predict juror's individual attitudes, opinions and actions.

(b) Example – presumption of innocence, right to silence

To generate a reality-based, life experience discussion of presumption of innocence and right to remain silent without ever mentioning legal terms ask the following:

- you are the mother of two grown sons?
- I'm sure you have strong memories of raising your two sons?
- Think back to the time your younger son was nine years old. What would you have done if you received a call from a neighbor who said she had been told that your son was seen throwing rocks and breaking windows in the vacant house two streets away?
- What action will you take when your younger son comes home?
- What if your neighbor says the person who saw the rock-throwing incident does not want her name revealed?
- What if your son, when told of this accusation, denies it but refuses to talk with you about it?

10. Questioning tips

(a) Avoid haphazard questioning

Begin with general questions on an information area, then focus on more detailed questions if necessary. When panelists understand structure of questioning, they are more likely to provide truthful, useful answers.

Haphazard questioning creates impression of disorganization. Introduce each information area with a statement. **Example:** "Now, I'd like to go over a few questions about your experience with the police."

(b) Be conversational and nonjudgmental

Talk with jurors in conversational, nonjudgmental way, projecting your interest in juror as a person.

(c) Better to receive information than give it

Primary objective to receive information, rather than give it. However, make sure you foster a human exchange – not just the giving and noting of information.

- if you are questioning jurors, do not take notes (have paralegal or co-counsel take notes);
- avoid lecturing the panel;
- use open-ended questions and careful listening. (Use probing words who, what, where, when, why, and how). Non-leading questions require panelists to explain their opinions and attitudes in their own words;
- use imperative questions: "Tell me about…" "I'd like to know more about…";
- maximize proportion of time panelists are vocal;
- reward full answers by encouragement and praise; and
- guide poor, rambling answers by appropriate and polite interruptions and offer suggestions for improvement. "Excuse me, but I was especially interested in your statements about your son's arrest. I'd like to learn more about the details."

(d) Pay attention to nuances

Pay attention to jurors' behaviors or physical expressions. How prospective jurors "see" you listening to their fellows may have a more powerful effect on how they answer you than the text of the questions themselves.

- failure of juror to respond to question may be a sign that further individual questioning is in order;
- respect that some panelists will need more time to answer questions; and
- address each panelist with same degree of formality and politeness (i.e. last name).

11. How to strike prospective juror without offending

Insist court make strikes and not indicate which party has made strikes. If you are forced to make strikes in open court, remember having a juror excused for cause, or peremptorily, is rejection. No one likes rejection.

(a) Do

- make eye contact with those you excuse; and
- thank them face-to-face for their time and trouble.

(b) Do not

- use boilerplate apology;
- speak as if it is routine;
- avoid eye contact with the person (jurors will not trust you if they see you wriggling out of an awkward moment); and
- take refuge in legalese formality.

III. SOME IMPROPER BEHAVIOR ON VOIR DIRE

A. QUESTIONS/COMMENTS BY COUNSEL

Court has considerable discretion in deciding what questions may be asked. Inquiry into the juror's preconceived notions regarding line of defense defendant may intend to use is permitted. Hopkins v. State, 429 N.E.2d 631, 635 (Ind. 1981).

1. Summary of improper inquiries and comments

(a) repetitive or argumentative;

(b) informing jury of legal theories and principles;

(c) trying case before evidence presented;

(d) conditioning jurors to be receptive to your position;

(e) deliberate exposure to substantive issues;

(f) asking jurors to predetermine weight and credibility;

(g) counsel stating personal opinion on guilt or innocence;

(h) prosecutor comments on defendant's right not to testify;

(i) fear of retribution;

(j) misinformation on elements of proof;

(k) role of defense counsel to hide truth;

(l) prosecutor's personal or special knowledge proving guilt;

(m) explain 5th Amendment absent defendant's consent; and

(n) questions after establishing opinion cannot be set aside.

(a) Repetitive or argumentative

Court may prohibit examination which is:

(1) repetitive;

(2) argumentative; or

(3) otherwise improper.

See Indiana Rules of Trial Procedure 47(D).

(b) Inform of legal theories and principles in case

Reversible error for parties, on voir dire examination, to inform prospective jurors of various legal theories and principles involved in case. Reith-Riley Constr. Co. v. McCarrell, 163 Ind.App. 613, 325 N.E.2d 844 (1975).

Timmons v. State, 500 N.E.2d 1212 (Ind. 1986) (prosecutor committed misconduct when he told the jury during voir dire that presumption of innocence merely procedural and did not mean defendant was innocent; no error, however, where judge charged jury twice with more expansive notions of presumption of innocence and comment did not represent a consistent theme by prosecution).

McCormick v. State, 437 N.E.2d 993 (Ind. 1982) (defendant not allowed to inquire about jurors' feelings toward specific intent when defendant charged with knowingly

causing death of another human being; inquiry carried potential for conditioning jurors toward defendant's view of elements of charged offense, a practice which should be scrutinized by trial court).

Dipert v. State, 259 Ind. 260, 286 N.E.2d 405 (1972) (prosecutor said defendant would go "scot free" in response to prospective juror's question about what would happen if defendant were found not guilty by reason of insanity; remark inaccurate and could have had improper influence on jury, evidence scanty as to sanity of defendant and juror's question indicated juror likely to be governed by his independent judgment rather than by law and evidence). See also Caldwell v. State, 722 N.E.2d 814, 817 (Ind. 2000).

Baer v. State, 866 N.E.2d 752 (Ind. 2007) (court disapproves of trial court or prosecutor gratuitously informing prospective jurors that varying appellate consequences may attach to different verdict choices).

(c) Indoctrinate jurors about facts in case

Indiana Supreme Court disapproves of using voir dire to implant in jurors' minds ideas about substantive facts of case being tried. Hopkins v. State, 429 N.E.2d 631, 634-35 (Ind. 1981).

Steelman v. State, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992) (prosecutor did not improperly indoctrinate jurors during voir dire about charge of dealing in marijuana within 1,000 feet of school property by seeking to elicit jurors' preconceived notions about drug dealers and dealing drugs within 1,000 feet of school property, asking jurors whether they would be offended by work of confidential informers and whether they would think defendant was wronged if State sent person wearing listening device to buy drugs from willing and knowledgeable seller, telling jurors that defendant would argue he was entrapped, and retorting that someone who was able to talk about both price and quantity was not entrapped).

Glover v. State, 179 N.E.3d 526 (Ind. Ct. App. 2021) (State did not impermissibly precondition jurors in prosecution for domestic battery and strangulation, when it presented them with abbreviated "opening statement" containing background information about charged offenses, underlying events, and relevant legal issues, or when it posed questions to prospective jurors).

But see Glover v. State, 21A-CR-01422 (Ind. March 9, 2022) (David, J., dissenting from denial of transfer). Justice David noted Jury Rule 14(b) suggests "mini opening statements" fall within the discretion of the trial court but the Supreme Court has never addressed proper procedure or scope of allowing such statements. Justice David would find that:

(1) it would best be addressed in a pretrial conference so 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 already seated;

(2) if the judge determines that it is appropriate to allow a mini opening, both sides should be given the opportunity to do one;

(3) the judge should endeavor to manage the parameters to reduce the potential for issues and abuses resulting from these mini openings; and

(4) the parties and the judge should also determine how to clearly delineate the end of the mini opening and the start of the traditional voir dire to clear up potential confusion from the potential jurors.

Questions which seek to shape favorable jury by deliberate exposure to substantive issues in case are improper. Davis v. State, 598 N.E.2d 1041, 1047 (Ind. 1992).

Improper to ask prospective jurors how they would vote in present case. Von Almen v. State, 496 N.E.2d 55, 57 (Ind. 1986).

Practice Pointer: If you are unsure about intent of prosecutor's question, ask for offer of proof. Ask him to demonstrate the question not designed to indoctrinate jury.

(d) Conditioning jurors to be receptive to your position

Interrogating jurors in order to cultivate or condition them to be receptive to cause of examiner is a practice repugnant to cause of justice and, if properly raised by a motion for mistrial at the end of the State's case-in-chief, warrants reversal. It is an unfair tactic to cause the jurors to view the prosecutor as a "good guy" and the defense counsel as a "bad guy." Bardonner v. State, 587 N.E.2d 1353, 1357 (Ind. Ct. App. 1992); Sanders v. State, 724 N.E.2d 1127, 1133 (Ind. Ct. App. 2000).

Perryman v. State, 830 N.E.2d 1005 (Ind. Ct. App. 2005) (prosecutor improperly tried State's case during jury selection, gave jury specific facts not proven at trial, and also conditioned jury with prejudicial comments suggesting they were fighting the war on drugs through this specific case).

Gregory v. State, 885 N.E.2d 697 (Ind. Ct. App. 2008) (prosecutor's reading of a poem regarding the dangers and prevalence of methamphetamine during voir dire was not an impermissible attempt to determine how jurors would act or decide case).

Adcock v. State, 933 N.E.2d 21 (Ind. Ct. App. 2010) (prosecutor did not act improperly during voir dire by using a jigsaw puzzle analogy in questioning the prospective jurors about their understanding of reasonable doubt standard; purpose of analogy was to show that jurors could recognize the picture on the puzzle even though some pieces of the puzzle were missing just as an offense could be proved beyond a reasonable doubt even though a few facts might not have been established which would have removed all possible doubt).

Emerson v. State, 952 N.E.2d 832 (Ind. Ct. App. 2011) (although prosecutor's questioning of jurors 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 juror's ability to render an impartial verdict; no error).

Lainhart v. State, 916 N.E.2d 924 (Ind. Ct. App. 2009) (prosecutor's comments during voir dire 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," constituted improper commentary on the disparate roles of defense and prosecution; prosecutor also told 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," which constituted improper indoctrination and vouching).

Robinson v. State, 260 Ind. 517, 521, 297 N.E.2d 409, 412 (1973) (in case where father charged with killing daughter, improper and highly prejudicial to ask "If a father killed his twenty-year-old daughter because she resisted his sexual advances, could you vote for the death penalty then?"; error because of innuendo of incest and no evidence presented at trial as to motive of father).

Note: In Robinson, it would have been reversible error if defendant had moved for mistrial at end of State's case-in-chief because it was within context of evidence that propriety of interrogation and probability of harm therefrom had to be made.

(e) Predetermine weight and credibility juror would give witness or evidence

It is improper to question the jurors in order to predetermine the weight and credibility the jurors may give to certain kinds of evidence or witness testimony. Underwood v. State, 535 N.E.2d 507 (Ind. 1989).

Underwood v. State, 535 N.E.2d 507 (Ind. 1989) (cannot question jurors about credibility they would give to witness who had received plea bargain in exchange for his testimony; improper because it would have given defendant opportunity to predetermine weight and credibility jurors would give to witness).

Hawn v. State, 565 N.E.2d 362, 365 (Ind. Ct. App. 1991) (prosecutor could not ask prospective jurors whether they would receive testimony of prosecution witnesses the same as testimony of police officer, despite witnesses' convictions for cocaine-related charges; question allowed prosecutor to determine weight and credibility that jurors would give to witnesses; however, harmless error because evidence of guilt overwhelming).

Deaton v. State, 999 N.E.2d 452 (Ind. Ct. App. 2013) (there was no fundamental error when prosecutor during voir dire asked potential jurors if they would hold him to a "CSI standard," as any error was cured by the multiple reminders of the proper burden of proof).

(f) Counsel stating personal opinion on guilt or innocence

Improper for attorney to state personal opinion as to guilt or innocence of accused. Ind. Rules of Professional Conduct Rule 3.4(e); Wallace v. State, 553 N.E.2d 456, 471 (Ind. 1990).

Roller v. State, 602 N.E.2d 165, 168 (Ind. Ct. App. 1992) (Rule 3.4(e) violated when prosecutor's comments suggest he has personal or special knowledge, beyond evidence presented to jury, which proves defendant guilty).

(g) Prosecutor comments on defendant's right not to testify

Neither prosecutor nor court may comment upon defendant's refusal to testify. Error occurs when prosecutor invites jury to infer evidence of guilt from defendant's decision not to take witness stand. DeBerry v. State, 659 N.E.2d 665 (Ind. Ct. App. 1995).

Solomon v. State, 570 N.E.2d 1293, 1296 (Ind. Ct. App. 1991) (comment on defendant's right to testify presses defendant to testify, thereby contaminating defendant's privilege against self-incrimination).

(h) Fear of retribution

Altmeyer v. State, 519 N.E.2d 138, 142 (Ind. 1988) (no abuse of discretion in refusing to strike jury panel after prosecutor asked prospective juror if she was worried about retribution because defendant knew her, since: (1) use of word "retribution" not so prejudicial to impaneled jury; (2) court prohibited any further questioning about juror's fear of retribution; (3) 10 of 12 jurors who heard question were excused from panel; (4) record does not reflect remaining two jurors were prejudiced in any way by statement regarding retribution; and (5) defendant failed to question those two jurors about any potential prejudice they might have had).

(i) Jury misinformed on elements of proof

If a jury is misinformed during voir dire of the elements of proof required of the State, then it will receive and evaluate evidence throughout the trial relying on this misinformation; this is reversible error without a proper correction from the judge. Hall v. State, 497 N.E.2d 916, 918 (Ind. 1986).

Steelman v. State, 602 N.E.2d 152 (Ind. Ct. App. 1992) (no reversible error where jury misinformed during voir dire; court properly identified mens rea element in its preliminary instructions and jury correctly informed about elements of offense before it heard any evidence).

(j) Role of defense counsel to hide truth

Bardonner v. State, 587 N.E.2d 1353 (Ind. Ct. App. 1992) (reversible error for prosecutor to make comment regarding various roles of prosecutor and defense counsel by taking quotes from Justice White's dissent in U.S. v. Wade, 388 U.S. 218 (1967); comments attacked integrity of defense counsel by indicating defense counsel would do anything to hide truth, comments not accurate reflection of law and served only to prejudice defendant).

Richardson v. State, 794 N.E.2d 506 (Ind. Ct. App. 2003) (prosecutor's statement during voir dire that defense attorney's job was "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).

(k) Explaining Fifth Amendment

Error for court to instruct jury concerning Fifth Amendment privilege against self-incrimination, absent consent of defendant. Hill v. State, 267 Ind. 480, 371 N.E.2d 1303 (1978).

However, court has duty to instruct jury regarding the law which Fifth Amendment is to apply when defendant adopts tactic of openly educating jurors: (1) about source, nature and scope of privilege; and (2) openly seeks its full benefit.

Conn v. State, 535 N.E.2d 1176, 1182-83 (Ind. 1989) (during voir dire, court explained Fifth Amendment to prospective jurors after defense counsel moved to excuse six jurors for cause because they said it would be hard not to hold defendant's decision not to testify against him; judge rehabilitated six jurors by further explanation of privilege).

(l) Pressing juror for reasons why he can't be impartial

Neither court nor counsel should cause juror to express any facts or reasons for having opinion, if prospective juror can satisfactorily establish he or she has formed an opinion which cannot be set aside in order to fairly or impartially try the case. Stroud v. State, 450 N.E.2d 992, 994 (Ind. 1983).

2. Must harm defendant to be reversible error

Improper question must harm defendant to be reversible error. Hopkins v. State, 429 N.E.2d 631, 635 (Ind. 1981).

(a) Common objections

(1) asking juror to prejudge evidence;

(2) cross-examination barred;

(3) form of question improper;

(4) humiliating or embarrassing juror;

(5) hypothetical question misused;

(6) not related to any challenge for cause;

(7) prejudicial or inflammatory; and

(8) protracted examination.

B. FALSE TESTIMONY AND FAILURE TO BE FORTHCOMING BY PROSPECTIVE JURORS

To a significant degree, jurors withhold information or lie during voir dire. See Seltzer, Venuti & Lopes, *Juror Honesty During the Voir Dire*, 19 CRIM.JUST. 451 (1991). 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. 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.

Easler v. State, 131 N.E.3d 584 (Ind. 2019) (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).

1. Jurors presumed to tell the truth

There is a presumption that a juror's voir dire is truthful. Ward v. State, 810 N.E.2d 1042, 1050 (Ind. 2004) and Brown v. State, 563 N.E.2d 103, 105 (Ind. 1990).

2. Entitled to new trial – prejudice standards

If juror fails to answer material voir dire question honestly, and a correct response would have provided a valid basis for challenge for cause, defendant is entitled to a new trial rather than a hearing, to avoid potential juror harassment. McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850 (1984); Lee v. State, 735 N.E.2d 1112, 1114 (Ind. 2000); and Easler v. State, 131 N.E.3d 584 (Ind. 2019).

In State v. Dye, 784 N.E.2d 469, 473 (Ind. 2003), the Indiana Supreme Court cited McDonough Power Equipment, but did not apply the prejudice standard in that case. Instead, the court held that a defendant seeking a new trial because of juror misconduct must show gross misconduct that "probably harmed the defendant." Id. The court held that Dye was probably harmed by misrepresentations that would not have resulted in challenges for cause. Id.

Loherlein v. State, 158 N.E.3d 768 (Ind. 2020) (juror's gross misconduct in failing to disclose on jury selection questionnaire that she had been previously charged with a crime was unlikely to have harmed defendant and thus did not require new trial).

3. Knowingly lies or gives incomplete answers; bias

Prejudicial and reversible error if a juror: (1) knowingly lies on voir dire; and (2) fails to give complete answers to questions on matters relating to impartiality. Lopez v. State, 527 N.E.2d 1119 (Ind. 1988); McFarland v. State, 271 Ind. 105, 390 N.E.2d 989 (1979).

State v. Dye, 784 N.E.2d 469 (Ind. 2003) (new trial required because juror concealed family's criminal histories, her history as a victim of rape, and her disposition to automatically impose death penalty; juror's deliberate dishonesty was gross and probably harmed the defendant by denying him a fair trial).

Dickenson v. State, 732 N.E.2d 238, 242 (Ind. Ct. App. 2000) (trial court erred in not granting defendant a new trial where a juror was untruthful in failing to affirmatively respond to court's inquiry on voir dire as to whether any of the potential jurors had prior knowledge of the case where the juror was friendly with the victim's wife).

Warner v. State, 773 N.E.2d 239, 246-47 (Ind. 2002) (fact that a prospective juror did not disclose that her half-sister was murdered a year or two previously was not deliberate and did not constitute reversible error because the juror testified that she was able to be impartial despite the incident and there was substantial evidence to sustain guilty verdict).

Loherlein v. State, 158 N.E.3d 768 (Ind. 2020) (juror's failure to disclose she had been charged with domestic battery, and also been a victim of it, was gross misconduct but probably didn't harm defendant so reversal not warranted).

(a) Must show prejudice from failure to disclose connection to victim or witness

A juror's failure to disclose knowing members of the victim's family may entitled defendant to a new trial if prejudice can be shown. Godby v. State, 736 N.E.2d 252, 255-57 (Ind. 2000).

Williams v. State, 891 N.E.2d 621 (Ind. Ct. App. 2008) (motion for mistrial was properly denied after a juror disclosed a prior friendship with a prosecution witness but stated that she could be an impartial juror despite the friendship).

(b) Bias may be actual or implied

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). A juror's bias may be actual or implied. Joyner v. State, 736 N.E.2d 232, 238 (Ind. 2000).

Implied bias is attributed to juror upon finding of certain relationship between juror and person connected to case, regardless of actual partiality. Lee v. State, 735 N.E.2d 1112, 1115 (Ind. 2000); Alvies v. State, 795 N.E.2d 493, 499 (Ind. Ct. App. 2003).

If implied bias, consider the nature of the connection and indications of partiality**.** If an inference of implied bias arises, the trial court should consider the nature of the connection and indications of partiality.

Alvies v. State, 795 N.E.2d 493, 499 (Ind. Ct. App. 2003) (where juror discovered that father-in-law was victim's second cousin, connection was so attenuated that it was reasonable for trial court to conclude that she was not biased or prejudiced against defendant and to refuse to remove juror).

McCants v. State, 686 N.E.2d 1281, 1285 (Ind. 1997) (proper to deny motion for mistrial where juror worked at same university as one of State's witnesses).

Ward v. State, 736 N.E.2d 265, 270 (Ind. Ct. App. 2000) (a juror's failure to disclose that she knew the defendant and that she was the widow of the defendant's fifth cousin did not raise an implication of bias per se).

4. Parties entitled to question juror regarding untruthful answers

When a hearing is held during a trial to determine if a juror gave an untruthful answer during voir dire, the trial court should permit the parties to question the juror. Jackson v. State, 728 N.E.2d 147, 150-51 (Ind. 2000); Easler v. State, 131 N.E.3d 584 (Ind. 2019). A defendant does not have the right to be present at a hearing when the judge and counsel question a juror about a failure to disclose knowing members of the victim's family. Godby v. State, 736 N.E.2d 252, 257-58 (Ind. 2000).

5. Procedure to preserve error

See Chapter 13, Juror Misconduct.

IV. LIST OF PERMISSIBLE INQUIRIES AND COMMENTS

The following are permissible comments and areas of inquiry during voir dire:

(1) defendant not testifying;

(2) attitudes toward nature of a particular crime;

(3) preconceived ideas about possible intended defense;

(4) experiences as juror in another case;

(5) preconceived ideas about drug dealers, informants;

(6) biases regarding credibility of witnesses;

(7) hypothetical questions;

(8) provocative and unusual facts;

(9) read charging information;

(10) whether juror could act in accord with the law;

(11) prosecutor's duty to inform if didn't prove case;

(12) whether jurors know witnesses;

(13) sympathetic to police testimony;

(14) witness or victim of crime;

(15) previous service in criminal cases;

(16) type of offense charged;

(17) racism and other prejudice; and

(18) interest in serving.

A. DEFENSE COUNSEL MAY ASK ABOUT DEFENDANT'S DECISION NOT TO TESTIFY

Objective is to get jurors talking about how an unschooled, understandably nervous innocent person might fear being subjected to rigorous questioning by seasoned prosecutor. Fear might keep even an innocent person off the stand. Ask "Why would a person who is innocent choose not to take the witness stand?"

> **Practice Pointer:** Some attorneys always voir dire about defendant not testifying, even if they plan for her to testify. Prosecutor likely to think you won't call your client, and may not prepare for cross-examination. Additionally, helps reveal other biases of jurors about presumption of innocence, etc.

B. ATTITUDES TOWARD NATURE OF A PARTICULAR CRIME

Proper examination includes questions designed to disclose jurors' attitudes about type of offense charged. Steelman v. State, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992).

Romack v. State, 446 N.E.2d 1346, 1357 (Ind. Ct. App. 1983) (in prosecution for drug offenses, no error in allowing inquiry into attitudes of prospective jurors on drug laws, as long as prosecutor was not attempting to inflame jury against defendant).

C. UNCOVER PRECONCEIVED IDEAS ABOUT POSSIBLE INTENDED DEFENSE

Parties may attempt to uncover jurors' preconceived notions and ideas about a defense defendant intends to use. Steelman v. State, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992).

Error to deny defendant's right to any interrogation of prospective jurors upon subject of self-defense. Everly v. State, 271 Ind. 687, 395 N.E.2d 254 (1979) *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 IND.L.J. 163, 190 (1985).

Black v. State, 829 N.E.2d 607 (Ind. Ct. App. 2005) (in murder prosecution, trial court committed fundamental error in prohibiting defendant from questioning prospective jurors during voir dire regarding law of self-defense; ability to question jurors regarding their beliefs and feelings concerning self-defense is essential to fair trial and impartial jury).

D. PREVIOUS SERVICE IN CRIMINAL CASES

Error not to ask jury whether anyone had been juror in criminal case; purpose to discover any prejudice which resulted from experiences juror had in another case. Hart v. State, 265 Ind. 145, 352 N.E.2d 712, 717 (1976).

E. PRECONCEIVED NOTIONS ABOUT DRUG DEALERS AND CONFIDENTIAL INFORMANTS

Steelman v. State, 602 N.E.2d 152, 158 (Ind. Ct. App. 1992) (prosecutor did not improperly indoctrinate jurors about facts where prosecutor sought to elicit jurors' preconceived notions about drug dealers and about dealing drugs within 1,000 feet of school property by asking: (1) whether jurors would be offended by work of confidential informers and (2) whether they would think defendant wronged if State sent person wearing listening device to buy drugs from willing and knowledgeable seller). But see Perryman v. State, 830 N.E.2d 1005 (Ind. Ct. App. 2005).

F. BIASES REGARDING CREDIBILITY OF WITNESSES

"We see nothing wrong in inquiring into jurors' minds about their biases in regard to the credibility of witnesses with an eye toward removing prospective jurors predisposed to disbelieve those with certain characteristics." Hopkins v. State, 429 N.E.2d 631, 635 (Ind. 1981).

Hopkins v. State *supra* (no abuse of discretion where prosecutor told prospective jurors that State's key witness had struck plea bargain agreement to testify against defendant in exchange for having charges dropped against him, and later in examination prosecutor asked if they would disbelieve witness because he entered into plea bargain).

However, during jury selection, a prosecutor cannot attempt to persuade potential jurors to predetermine the credibility of a witness. Hawn v. State, 565 N.E.2d 362 (Ind. Ct. App. 1991).

G. HYPOTHETICAL QUESTIONS

May properly pose hypothetical questions, provided questions do not suggest prejudicial evidence not adduced at trial. Hopkins v. State, 429 N.E.2d 631, 635 (Ind. 1981).

Robinson v. State, 260 Ind. 517, 297 N.E.2d 409 (1973) (interrogation improper and highly prejudicial and would have been reversed if properly preserved where prosecutor's hypothetical question concerning death penalty: "If a father killed his twenty year old daughter because she resisted his sexual advances, could you vote for the death penalty then?" Facts assumed by question resembled circumstances of case where father accused of killing his daughter, but no evidence was presented at trial as to motive of father).

Perryman v. State, 830 N.E.2d 1005 (Ind. Ct. App. 2005) (prosecutor's questioning about packaging of drugs and whether manner of packaging drugs would suggest dealing or use improperly sought to infer to jurors that dealing was occurring, though defendant was not charged with dealing and there was no evidence of dealing).

H. PROVOCATIVE AND UNUSUAL FACTS

Not improper to inquire if prospective jurors' personal feelings could be influenced by facts being presented so that parties might know an impartial and unprejudiced jury is trying their cause.

1. Sexual abuse

Bane v. State, 587 N.E.2d 97 (Ind. 1992) (no error where prosecutor's hypothetical asked female juror her feelings regarding 17-year-old girl who witnessed her stepfather abuse her mother, is herself victim of stepfather's physical and sexual abuse, and yet went on to later marry stepfather; questions designed to determine whether jurors would be prejudiced against victim due to her poor judgment; even though hypothetical questions outlined many of sensational facts of case, facts posed in question were presented during course of trial).

Practice Pointer: The court in Bane distinguished Robinson (see 'hypothetical questions', *supra*) because facts posed in the question were presented at trial, while facts posed in Robinson resembled the case but added an inflammatory suggestion of an incest-oriented defendant. Counsel should be on guard for comments by prosecutor or judge that provide hypotheticals similar to actual factual situation but that add inflammatory information. See, e.g., Merritt v. State, 822 N.E.2d 642 (Ind. Ct. App. 2005) (fundamental error where trial court during voir dire used an example of constructive possession that was strikingly similar to facts of defendant's case; although trial court has broad discretionary power to regulate the form and substance of voir dire, it also has a concurrent duty to remain impartial and to refrain from making unnecessary comments or remarks).

I. READ CHARGING INFORMATION

Prosecutor may read charging information to prospective jurors and discuss elements of offense with them. Eguia v. State, 468 N.E.2d 559, 566 (Ind. Ct. App. 1984).

Concepcion v. State, 567 N.E.2d 784, 788 (Ind. 1991) (rereading of charging information to prospective jurors does not cause bias toward accused).

J. ASCERTAIN WHETHER JUROR COULD ACT IN ACCORDANCE WITH THE LAW

Each party has right to discover whether prospective jurors have fixed opinions or conscientious scruples that would or might prevent them from following court-decided law of self-defense. Everly v. State, 271 Ind. 687, 395 N.E.2d 254 (1979).

Black v. State, 829 N.E.2d 607 (Ind. Ct. App. 2005) (basic fairness dictates that a defendant has the right to exclude persons who cannot be fair to his position when making a claim of self-defense).

Carter v. State, 932 N.E.2d 1284 (Ind. Ct. App. 2010) (prosecutor acted properly in questioning prospective jurors about the differences between California and Indiana law concerning the use of marijuana for medicinal purposes; the questions were proper in an effort to determine if the jurors would be able to follow the Indiana law regardless of their personal feelings about the law).

K. DUTY TO INFORM IF DOESN'T PROVE CASE

Prosecutor's voir dire comment that he had duty to inform jury if he didn't prove his case did not improperly suggest that prosecutor had any special knowledge about defendant's guilt or innocence. Roller v. State, 602 N.E.2d 165 (Ind. Ct. App. 1992).

L. WHETHER JURORS KNOW ANY WITNESSES

Sitting jurors should not know any witnesses.

Timely disclosure of a juror's casual relationship with a party or witness—coupled with assertion that juror will remain impartial - adequately protect a defendant's right to an impartial jury. McCants v. State, 686 N.E.2d 1281, 1285 (Ind. 1997).

> Creek v. State, 523 N.E.2d 425, 427 (Ind. 1988) (trial court properly denied motion for mistrial where juror and State's witness were employed at same location, had casual contact because of employment, but had no discussions concerning the trial).

Practice Pointer: Prosecution and defense should list witnesses they will call. However, jury should not be informed which side has requested any particular witness in the event the witness is not called.

M. SYMPATHETIC TO POLICE TESTIMONY

Generally, abuse of discretion to refuse inquiry whether prospective jurors would be more likely to believe or give greater weight to testimony of law enforcement witness.

> United States v. Contreras-Castro, 825 F.2d 185 (9th Cir. 1987) (reversible error where court refused to question entire panel about specific biases concerning veracity of government-agent witnesses, where court did ask about relationship with law enforcement officers and general questions regarding impartiality and State's case was uncorroborated).
>
> United States v. Powell, 932 F.2d 1337 (9th Cir. 1991) (despite judge's refusal to ask whether jurors would give more weight to police than civilian testimony, conviction was affirmed because government's case was corroborated, venire was tested for pro-police bias by other questions, and judge instructed jury to use same standard to evaluate credibility regardless of occupation).

Practice Pointer: Police officers testify in most cases and often have particular influence because of their status. Determine which jurors might be particularly sympathetic to police testimony and use peremptory challenges. Does juror's prior involvement in law enforcement, or that of family, relatives, or close friends make it difficult for juror to be impartial?

N. WITNESS OR VICTIM OF CRIME

Practice Pointer: Witness or victim to a crime may not be able to disassociate experience from issue at trial. Carefully question juror concerning nature of crime involved before deciding whether to challenge.

O. TYPE OF OFFENSE OR OFFENSES CHARGED

Some potential jurors have a closed mind relative to certain types of cases.

> Easler v. State, 131 N.E.3d 584 (Ind. 2019) (after 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 erroneously denied the request, as well as defendant's request that Juror 4 be removed for cause for not being forthcoming on her juror questionnaire).

P. RACISM AND OTHER PREJUDICE

1. Racism

Failure to conduct voir dire regarding racial bias and prejudice may violate due process.

Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 850 (1973) (denial of fair trial, failure on request to question venireman specifically about racial bias); Cf. Ristaino v. Ross, 424 U.S. 589, 96 S.Ct. 1017 (1976) (distinguishing Ham, court held that absent special circumstances, failure to inquire about racial prejudice does not violate constitutional right);

Turner v. Murray, 476 U.S. 28, 37, 106 S. Ct. 1683, 1689, 90 L.Ed.2d 27 (1986) HN 2 (capital defendant accused of interracial crime entitled to have prospective jurors questioned on issue of racial bias and informed of race of victim; violation requires vacation of death sentence but not reversal of conviction).

Inquiry is whether under all circumstances there is significant likelihood racial prejudice might infect the trial. Ristaino v. Ross, 424 U.S. 589, 596, 96 S.Ct. 1017 (1976).

Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629 (1981) (refusal of judge during jury selection to inquire, on request, about prejudice against Mexicans not reversible error except when circumstances in case indicate "reasonable possibility" that such prejudice might influence jury) (four justice plurality).

Defense counsel should be careful when attempting to uncover racial prejudice, as some methods may be inappropriate.

Middleton v. State, 64 N.E.3d 895 (Ind. Ct. App. 2016) (although it was clear that counsel was exploring possible bias among jurors, his choice of words was wholly unacceptable and amounted to deficient performance when counsel referred to his absent client as a "Negro, an African American, or Black whatever term is politically correct these days" during voir dire).

2. Anti-gay bias

Permissible to ask potential jurors whether they would be bothered by suggestion that defendant and some witnesses might be homosexual. Barnes v. State, 423 N.E. 2d 235 (Ind. 1982).

Practice Pointer: (1) Weigh potential for antagonizing jurors against probable influence of bias in the case; (2) extraction of promise to be fair isn't likely to change existing bias; (3) affirmative answer to: "Can you be fair?" may preclude challenge for cause; and (4) try to obtain individual voir dire where there are special factors suggesting potential for bias—many people will try not to admit bias, but some people, if questioned individually, will admit to racial or other bias. See Stout, *The Problem with Jury Selection, or Raise Your Hand if You are Prejudiced and Unfair*, 11 The Champion 19 (Nov. 1987).

Q. RELIGION

Request voir dire in cases where religious issues involved, or defendant's religion of concern. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968).

United States v. Daily, 139 F.2d 7, 9 (7th Cir. 1943) (court permitted voir dire regarding whether any of venire prejudiced against Jehovah's Witnesses because defendant was one).

R. INTEREST IN SERVING

Practice Pointer: Does not help defendant's cause to have juror who does not want to serve. Impatient juror will not listen well to testimony and will attempt to hurry a verdict.

V. COURT'S RESPONSIBILITIES AND DUTIES

A. ARRANGE AND CONDUCT

Trial courts are required to provide prospective jurors with an orientation prior to the voir dire process, including a standard presentation recommended by the Indiana Judicial Conference. Indiana Jury Rule 11. The trial court is required to begin the voir dire process by introducing the participants in the trial to the prospective jurors, discussing the nature of the case, and giving the jurors a number of specified instructions concerning their duties and the procedures to be followed at the trial. In addition, the court may permit the parties to give brief "mini-opening statements" to the jurors. Indiana Jury Rule 14(b). Glover v. State, 179 N.E.3d 526 (Ind. Ct. App. 2021). The court has broad discretion to regulate form and substance of voir dire. Lucas v. State, 499 N.E.2d 1090, 1094 (Ind. 1986).

The trial court must afford each party reasonable opportunity to exercise challenges intelligently. Von Almen v. State, 496 N.E.2d 55, 59 (Ind. 1986).

1. Discretion to excuse panelists

Every trial court has inherent discretion to excuse prospective jurors. Abuse of discretion only when it exercises it in illogical or arbitrary manner. Owens v. State, 659 N.E.2d 466, 476 (Ind. 1995).

2. Reversal – must be manifest abuse and denial of fair trial

Indiana Supreme Court will reverse trial court's exercise of discretion in regulating form and substance of voir dire only upon showing of: (1) manifest abuse of discretion; and (2) denial of fair trial to defendant. Conner v. State, 580 N.E.2d 214 (Ind. 1991).

B. CONTROL QUESTIONING OF POTENTIAL JURORS

Court has considerable discretion in deciding what questions may be asked. Hopkins v. State, 429 N.E.2d 631, 634 (Ind. 1981); Barber v. State, 715 N.E.2d 848, 850 (Ind. 1999).

To constitute reversible error, trial court error must impinge upon and prejudice substantial right such that fair trial not accorded.

FMC Corp. v. Brown, 551 N.E.2d 444, 447 (Ind. 1990) (not reversible error where court restrained questioning, but defendant given full opportunity to question jurors regarding defenses).

United States v. Tsarnaev, ___S.Ct.___ (2022) (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, because question wrongly emphasized what a juror knew before coming to court rather than potential bias).

1. Attorneys for both parties have right to examine prospective jurors

Indiana Rules of Trial Procedure 47(D) provides in part: "The court shall permit the parties or their attorneys to conduct the examination of prospective jurors and may conduct examination itself. The court's examination may include questions, if any, submitted in

writing by any party or attorney. If the court conducts the examination, it shall permit the parties or their attorneys to supplement the examination by further inquiry…the court…shall permit reasonable inquiry of the panel and individual prospective jurors."

Note: Indiana Criminal Rule 21 provides that the Trial Rules are generally applicable to all criminal proceedings. In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5, n.3 (Ind. 1988).

Carroll v. State, 263 Ind. 696, 338 N.E.2d 264 (1975) (rules of civil procedure apply in criminal proceedings to the extent that they do not conflict with criminal rules).

2. When court chooses to ask questions

Trial court has broad discretion in controlling voir dire examination of prospective jurors and may itself pose questions. Indiana Rules of Trial Procedure 47. Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975).

(a) Parties allowed to submit questions

Indiana Rules of Trial Procedure 47(D) provides in part: "The court's examination may include questions, if any, submitted in writing by any party or attorney."

Where the court conducts examination, parties are allowed to submit questions to the court for use in examination. The court has broad discretion to regulate the form and substance of interrogatories designed to supplement the court's voir dire. Hart v. State, 265 Ind. 145, 352 N.E.2d 712 (1976).

Johnson v. State, 272 Ind. 427, 399 N.E.2d 360 (1980) (judge may conduct voir dire sua sponte from written questions submitted through judge, then permit each side brief period to question panel orally).

Simpson v. State, 164 Ind. App. 307, 328 N.E.2d 462 (1975) (not error for judge to deny defense counsel opportunity to personally voir dire where court conducted examination and allowed parties to submit questions to court for use in examination).

Peppers v. State, 152 N.E.3d 678 (Ind. Ct. App. 2020) (no error in trial court conducting voir dire where defendant submitted written questions; defendant failed to show how the trial court's voir dire procedure denying his counsel the right to question the prospective jurors and to ask them follow-up questions led to a jury panel that was not fair or impartial or in violation of Indiana Trial Rule 47(D)),

(b) Court shall permit further inquiry

Indiana Trial Rule 47(D) provides in part: "If the court conducts the examination, it shall permit the parties or their attorneys to supplement the examination by further inquiry."

Note: The language of Trial Rule 47(D) seems to conflict with older Indiana cases which held that parties are not automatically entitled to verbally question prospective jurors. See, e.g., Sims v. Huntington, 271 Ind. 368, 393 N.E.2d 135 (1979); and Lock v. State, 273 Ind. 315, 403 N.E.2d 1360 (1980).

3. Time limitations

(a) Imposing time limitations

Indiana Rules of Trial Procedure, Rule 47(D) provides in part: "The court may impose an advance time limitation upon such examination by the parties or their attorneys."

(b) Court may restrict time for questioning

Court has considerable discretion in restricting examination time. "Some judges have attempted to expedite trials by limiting voir dire, and we have upheld these efforts when reasonable."

Lucas v. State, 499 N.E.2d 1090, 1094 (Ind. 1986) (not abuse of discretion to limit voir dire to 35 minutes for two codefendants, even though last juror and alternate seated after being questioned solely by prosecutor).

Indiana Supreme Court has frequently upheld the limitation of 20 minutes per side. Harrison v. State, 644 N.E.2d 1243, 1249 (Ind. 1995).

Lynn v. State, 271 Ind. 297, 392 N.E.2d 449 (1979) (20-minute limit did not deny due process where court stated if counsel was onto something that required further questioning such questions could be submitted in writing to court);

Hart v. State, 265 Ind. 145, 151, 352 N.E.2d 712 (1976) (trial court's rule limiting counsel to 20 minutes of oral questioning is not, on its face, and without more, an abuse of court's discretion).

Hatchett v. State, 503 N.E.2d 398 (Ind. 1987) (judge's decision within range of his discretion, where defendant did not show limiting voir dire time shared between himself and co-defendant to one hour restrained him with respect to any particular juror or any given subject).

(c) Entitled to liberal grant of more time

Indiana Rules of Trial Procedure, Rule 47(D) provides in pertinent part: "At the expiration of said limitation, the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by the prospective jurors".

Harrison v. State, 644 N.E.2d 1243, 1250 (Ind. 1995) (defendant would have been entitled to more than 20 minutes of voir dire per configuration had he requested more time under Trial Rule 47(D), however, defendant did not show error because he did not contend rule was violated).

Rutledge v. State, 525 N.E.2d 326 (Ind. 1988) (no abuse of discretion in refusing defendant's request for five more minutes to inquire whether jurors had heard anything about case or knew anyone on witness list, where defendant had already received extension of twenty minutes per side allowed by court, and court asked questions itself).

C. DUTY TO REMAIN IMPARTIAL

The trial judge has a duty to remain impartial and to refrain from making unnecessary comments or remarks. Williams v. State, 555 N.E.2d 133, 137 (Ind. 1990).

Wentz v. State, 766 N.E.2d 351 (Ind. 2002) (a trial court should not begin the voir dire process by summarizing what the court believes will be the nature of the case to be presented by the State and strategy to be employed by the defense in response to the State).

Practice Pointer: Keep careful notes on instances of judge interrupting or misinterpreting the juror's response or using intimidating or leading language. File an affidavit or request chamber conference to point out problems.

1. Remarking about counsel's questions

Thakkar v. State, 613 N.E.2d 453 (Ind. 1993) (within permitted bounds of judge's discretion and no prejudice to defendant where judge interrupted defense counsel while distinguishing civil and criminal standards of proof to prospective jurors and told counsel to stick to issues and not to confuse jurors).

Underwood v. State, 535 N.E.2d 118, 123 (Ind. 1989) (judge commented that defense counsel's line of questioning was confusing, and that judge did not understand why State did not object; "Appellant has shown us nothing to indicate that counsel was in fact interfered with to any marked degree during the voir dire of the jury").

Marbley v. State, 461 N.E.2d 1102, 1106 (Ind. 1984) (judge did not go beyond duty and authority to control proceedings and remarks did not unduly prejudice jury against defendant where judge told defense counsel that he wasted time on irrelevant questions and would not be permitted any more time).

2. Throwing temper tantrum

Thakkar v. State, 613 N.E.2d 453 (Ind. 1993) (judge's conduct inappropriate in getting visibly angry, pounding papers on bench, and throwing his glasses on bench, but did not taint venire panel to extent defendant deprived of trial before impartial jury considering voir dire as whole and trial judge's apology to counsel before jury).

3. Instructing jurors

Merritt v. State, 822 N.E.2d 642 (Ind. Ct. App. 2005) (fundamental error where trial court during voir dire used an example of constructive possession that was strikingly similar to facts of defendant's case; although trial court has broad discretionary power to regulate the form and substance of voir dire, it also has a concurrent duty to remain impartial and to refrain from making unnecessary comments or remarks).

Williams v. State, 555 N.E.2d 133, 137 (Ind. 1990) (no abuse of discretion for judge to mention during voir dire that John Hinckley shot Ronald Reagan; judge's comments contained no mention of insanity nor of verdict, case used to illustrate difference between media reports jurors may have seen and evidence they would hear at trial).

Madison v. State, 534 N.E.2d 702 (Ind. 1989) (in murder prosecution, not reversible error for trial court to inform prospective jurors that they would not be requested to consider death penalty).

Feggins v. State, 359 N.E.2d 517, 522 (Ind. 1977) (in second degree murder case, court permitted to instruct prospective jurors that while some prisoners sentenced to life were paroled, and some served full life sentence, this issue not for jury's consideration);

Owens v. State, 333 N.E.2d 745, 755 (Ind. 1975) (not reversible error where court stated that effect of premeditation could be as instantaneous as successive thoughts, and that horribleness and senselessness of crime charged did not make them any more guilty than if it were a less horrible crime).

D. SWEAR IN JURY PRIOR TO COMMENCEMENT OF TRIAL

Indiana Jury Rule 19 provides that, after the jury has been selected, but before commencement of the trial, the judge shall administer the following to the jurors:

"Do each of you swear or affirm that you will well and truly try the matter in issue between the parties, and give a true verdict according to the law and evidence?"

1. Failure to swear in

Absence of administration of oath to jury not to be taken lightly. Oath serves as safeguard of defendant's right to fair trial by impartial jury.

> Steele v. State, 446 N.E.2d 353, 354 (Ind. Ct. App. 1983) (reversible error to deny motion for mistrial based on court's failure to swear in jury prior to commencement of trial; oath given to a jury prior to commencement of trial is not a mere formality—it is intended to impress on jury its solemn duty to carefully deliberate on the matter at issue and serves as a safeguard of defendant's fundamental constitutional right to trial by an impartial jury).

If jury not sworn, court should: (1) discharge panel; (2) swear new panel, or same panel, of jurors; and (3) recommence trial at its beginning point. Leas v. Patterson, 38 Ind. 465 (1872).

E. ALTERNATE JURORS

1. Selection procedure

Designation of alternate jurors usually part of impaneling process.

Indiana Rules of Trial Procedure 47(B) provides:

> The Court may direct that no more than three (3) jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury brings in its verdict.

(a) Usually selected after regular jurors selected

Generally, alternates selected from voir dire panel after regular jurors selected. Selection procedures that depart from norm not prejudicial or harmful unless jury not qualified and not impartial.

> Lowery v. State, 640 N.E.2d 1031, 1040-41 (Ind. 1994) (no prejudice or harm to jury qualifications and impartiality where 14 jurors impaneled, court did not designate alternates until conclusion of presentation of evidence, at which time court selected 2 alternates by drawing lots).

(b) Alternates considered "jurors"

Should it become necessary to replace juror with alternate, the jury continues legally constituted. Sears v. State, 457 N.E.2d 192, 194 (Ind. 1983).

Alternate jurors have been accepted through voir dire examination and have been with jury throughout trial of case, receiving and observing various admonitions of trial judge as to jury behavior. Johnson v. State, 267 Ind. 256, 369 N.E.2d 623, 625 (1977); Griffin v. State, 754 N.E.2d 899 (Ind. 2001).

2. Court's discretion to replace juror with alternate

Courts have broad discretion in determining whether to replace a juror with an alternate. The number of alternate jurors is left to the trial court's discretion. Juror Rule 16(a); Indiana Rule of Trial Procedure 47(B) (discretion to impanel up to 3 alternate jurors).

> Harris v. State, 659 N.E.2d 522 (Ind. 1995) (defendant not placed in substantial peril when court refused to replace juror with alternate because juror said she would like to

think she could be objective but didn't know for certain; trial court concluded she was kind of conscientious juror that courts want).

Hyppolite v. State, 774 N.E.2d 584 (Ind. Ct. App. 2002) (fact that juror failed to disclose during voir dire that her mother-in-law was employed at county jail did not require juror to be dismissed and replaced by alternate juror because the juror assured the court that she could continue to be a fair and impartial juror).

Blevins v. State, 259 Ind. 618, 291 N.E.2d 84, 87 (1973) (during trial juror had asthma attack; sufficient to immediately replace juror with alternate, if one has been provided).

3. Order of seating

Indiana Rule of Trial Procedure 47(B) provides in pertinent part: "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties."

If the vacancy is filled from the jury pool, the defendant must show purposeful exclusion or harm for reversible error.

Williams v. State, 555 N.E.2d 133, 137 (Ind. 1990) (No reversal because defendant showed neither purposeful exclusion nor harm; 14 prospective jurors called to box, 2 of which were designated as alternates, one of regular prospective jurors excused and vacancy filled from jury pool rather than by alternates).

4. Circumstances where substitution warranted

(a) Personal knowledge of material fact or unable to perform duties

Substitution warranted where regular juror has personal knowledge of material fact, or otherwise becomes or found to be unable or disqualified to perform duties.

Burtley v. State, 476 N.E.2d 835 (Ind. 1985) (not error to discharge and replace juror who had developed high state of anxiety and physical condition rendered her unable to perform duties).

Barnett v. State, 916 N.E.2d 280 (Ind. Ct. App. 2009) (regular juror had an adverse physical reaction to testimony about child abuse which later produced hives on the juror's neck and face).

Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001), *superseded by statute on another issue* as stated in Townsend v. State, 793 N.E.2d 1092 (Ind. Ct. App. 2003) (juror was properly removed before second phase of trial involving serious offender allegation when juror advised trial court that he knew the victim of the rape in the earlier offense being proved to establish the serious violent offender charge).

Hampton v. State, 873 N.E.2d 1074 (Ind. Ct. App. 2007) (trial court properly excused alternate juror who told the other jurors during trial that defendant might have been involved in other murders; trial court also properly excused a regular juror who said he could not be impartial after hearing the comment).

(b) Juror about to be arrested and prosecuted

Not abuse of discretion to replace juror who was about to be arrested and face prosecution by same prosecutor in case in which juror sitting. Ferry v. State, 453 N.E.2d 207, 213 (Ind. 1983).

(c) Socializing with witnesses

More than simple exchange of pleasantries between witnesses or parties and jurors can be sufficient to replace the juror from the panel.

May v. State, 716 N.E.2d 419 (Ind. 1999) (trial court should have replaced juror with alternate who exchanged pleasantries with officer in restaurant during lunch recess, where officer had testified in morning and was to continue testifying after lunch and juror invited officer to visit juror's home to watch pay-per-view boxing match the following weekend).

(d) Sleeping

Excessive sleeping during trial may be grounds for removal of a juror. Slate v. State, 798 N.E.2d 510 (Ind. Ct. App. 2003).

Slate v. State, 798 N.E.2d 510 (Ind. Ct. App. 2003) (trial court properly replaced juror with alternate when juror had fallen asleep fifteen or twenty times during the trial).

5. Reversible error only where accused placed in substantial peril

Abuse of discretion occurs only if decision placed defendant in substantial peril. Harris v. State, 659 N.E.2d 522, 525 (Ind. 1995).

Defendant must object in order to preserve the error. Defendant can object at time the juror is dismissed and show the alternate is prejudiced to preserve error. Creek v. State, 523 N.E.2d 425, 427 (Ind. 1988).

Alternatively, the defendant may object to the selection of an alternate during voir dire. Campbell v. State, 500 N.E.2d 174 (Ind. 1986).

6. Discharged after jury brings in verdict

Indiana Rule of Trial Procedure 47(B) provides in part: "An alternate juror who does not replace a regular juror shall be discharged after the jury brings in its verdict." If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate.

7. May retire to jury room if proper instruction given

Alternate juror may retire with jury and listen to deliberations, if properly instructed not to participate in deliberations unless called upon to replace one of original jurors. Indiana Rule of Trial Procedure § 47(B).

Wilcoxen v. State, 619 N.E.2d 574 (Ind. 1993) (alternates could retire to jury room during deliberations without defendant's consent so long as they were instructed not to participate).

Griffin v. State, 754 N.E.2d 899, 903 (Ind. 2001) (although alternate may not participate in deliberations, where alternate only added "me, too" to collective voice of jury majority when asked about opinion, it was not gross misconduct and did not create probable harm so as to require reversal of conviction).

Note: Indiana is one of few States allowing this procedure.

VI. PRETRIAL PUBLICITY

Prejudicial publicity contains either: (1) inflammatory material not admissible at trial; or (2) misstatements or distortions of evidence. Ward v. State, 810 N.E.2d 1042, 1049 (Ind. 2004); Evans v. State, 563 N.E.2d 1251, 1258 (Ind. 1990).

A. CHANGE OF VENUE

1. File change of venue motion

File verified change of venue motion alleging bias or prejudice against defendant exists in county. Indiana Criminal Rule 12(B) and Ind. Code § 35-36-6-1(a). Judge may reserve ruling on change of venue motion until after voir dire to determine if jurors really prejudiced.

(a) Defendant must show prejudicial publicity and partial jury

For a change of venue motion to be granted, defendant must show: (1) prejudicial pretrial publicity and (2) inability of jurors to render impartial verdict. Ward v. State, 810 N.E.2d 1042, 1049 (Ind. 2004); White v. State, 687 N.E.2d 178, 179 (Ind. 1997).

Practice Pointer: Alternative measure for court is to permit continuance until pretrial publicity subsides. Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S.Ct. 1507 (1966). Even if motion for change of venue and/or continuance denied, motions will focus judge on problem of prejudice and judge may compensate by providing extensive *voir dire*. Be alert for signs of bias and prejudice during voir dire and try to develop challenges for cause against specific jurors. Renew the motion for change of venue if voir dire reveals additional evidence of bias and prejudice by members of the venire.

B. VOIR DIRE CRITICAL STAGE IN SHOWING PREJUDICE

Voir dire is a critical stage in showing prevalence of prejudice and that its effects are unavoidable. Appellate court often rejects claims of abuse of discretion where prejudicial effects on members of venire are not shown.

Sage v. State, 419 N.E.2d 1286, 1287 (Ind. 1981) (court could not determine whether potential jurors unable to set aside preconceived notions of guilt because no transcript of voir dire examination contained in record).

Ashby v. State, 486 N.E.2d 469 (Ind. 1985) (30 minutes allotted to parties to conduct additional voir dire gave ample opportunity to delve into possible racial prejudice among jurors).

C. WHERE PREJUDICE EXISTS IN COUNTY TO PREVENT FAIR TRIAL

Defendant bears burden of showing community prejudice exists which would prevent obtaining fair trial in that community. Clemens v. State, 610 N.E.2d 236, 240 (Ind. 1993).

Defendant must demonstrate adverse publicity made potential jurors unable to: (1) set aside their preconceived notions of guilt; and (2) render verdict based upon evidence only. Tabor v. State, 461 N.E.2d 118 (Ind. 1984).

(a) Clear and convincing buildup of prejudice

Defendant must establish clear and convincing buildup of prejudice against defendant throughout community.

Ward v. State, 810 N.E.2d 1042 (Ind. 2004) (defendant met burden of showing community prejudice where juror questionnaires reflected "deep and bitter hostility,"

over 65% of prospective jurors said they had formed a belief on defendant's guilt, 80% said they had knowledge of the case, and six of twelve jurors who were seated expressed belief in defendant's guilt).

Brown v. State, 563 N.E.2d 103 (Ind. 1990) (presumption juror's voir dire truthful overcome by showing of general atmosphere of prejudice throughout community).

Daniels v. State, 453 N.E.2d 160 (Ind. 1983) (defendant failed to establish clear and convincing buildup of prejudice throughout community where 15 newspaper articles appeared in local paper four months before trial containing some details of the crime).

(b) Inability to set aside prejudice and render verdict based on evidence

If jurors have preconceived notion of guilt, judge must be convinced they will put them aside and render verdict on the evidence. Hopkins v. State, 582 N.E.2d 345, 351 (Ind. 1991).

Showing that even just one juror felt it would be difficult to be impartial is sufficient to require new trial, at least in a capital case. Ward v. State, 810 N.E.2d 1042, 1050 (Ind. 2004).

Ward v. State, 810 N.E.2d 1042, 1050 (Ind. 2004) (even if defendant had not made sufficient showing of community prejudice, new trial in capital case was required where one juror said she thought defendant was guilty and admitted "I don't know" when asked if she was willing to base decision solely on evidence presented at trial).

Johnson v. State, 472 N.E.2d 892, 906 (Ind. 1985) (even if potential jurors had been exposed to pretrial publicity concerning defendants' case, that alone was insufficient to establish local prejudice warranting change of venue, absent additional demonstration that jurors were unable to set aside any preconceived notions they may have had).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (although defendant proved prejudicial pretrial publicity, he failed to prove that jurors were prejudiced by publicity; no empaneled juror expressed uncertainty about his or her ability to set aside an opinion of guilt).

D. SHOWING RACIAL PREJUDICE

1. Indiana law

Motions alleging racial bias as basis for change of venue have been difficult to prove. When parties do not agree on county, Indiana Criminal Rule 12 provides court shall submit list of adjoining counties to parties for striking. The court has discretion to add non-adjoining counties to panel of receiving counties.

James v. State, 613 N.E.2d 15, 29 (Ind. 1993) (nothing in record to suggest court's decision to follow mandates of Indiana Criminal Rule 12 in any way demonstrated purposeful discrimination or systematic exclusion of African Americans from juries).

Ashby v. State, 486 N.E.2d 469, 472 (Ind. 1985) (no showing jurors not able to put aside their prejudices in black-on-white rape, even where burned cross and skinned raccoon were placed on jail house lawn).

Trevino v. State, 428 N.E.2d 263 (Ind. Ct. App. 1981) (Mexican American defendant in county with minority population of less than 1% presented no evidence to show community bias or prejudice).

2. U.S. Supreme Court

Although a defendant has no right to have a jury which includes members of his race, religion, sex, ethnic background, etc., the cases below signal that challenges to jury venires on basis of racial prejudice should and will be given scrutiny by State and Federal courts.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 1717 (1986) (equal protection clause guarantees defendant that State will not exclude members of his race from jury venire on account of race);

Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (automatic reversal where Black people are systematically excluded from grand jury);

Turner v. Murray, 476 U.S. 28, 36-37, 106 S.Ct. 1683, 1689 (1986) (defendant accused of interracial capital offense entitled to have prospective jurors informed of race of victim and questioned on issue of racial bias).

J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994) (Batson rule forbids exclusion of prospective jurors on the basis of gender as well as race).

Williams v. State, 669 N.E.2d 1372, 1378 (Ind. 1996) (while trial courts need not require each side to present race-neutral justifications for each of its peremptory challenges absent extraordinary circumstances, once opposing counsel objects the court should: (1) decide whether a prima facie case of discrimination is made; and (2) demand a race-neutral explanation).

E. GATHERING EVIDENCE OF PREJUDICIAL PRETRIAL PUBLICITY

The best "how-to" guide for gathering evidence is *Jury work – Systematic Techniques*, by the National Jury Project Litigation Consulting (2014-15, Thompson Reuters).

Investigation and review of whether there was prejudicial publicity should include news reports, circulation and audience share figures, statistical surveys, community witness statements, and other counties.

1. News reports

Copies of offending articles or tapes of broadcasts needed to show they were inflammatory, false, misleading, or contained inadmissible and incriminating evidence. Close analysis of content of news report important to show likely prejudicial effects of such reports (analysis of recurring patterns of word usage in descriptions of incident).

Ward v. State, 810 N.E.2d 1042, 1049 (Ind. 2004) (extensive, detailed, and graphic news reports of murder, because largely accurate, were not necessarily prejudicial; however, parts of articles recounting defendant's criminal history were inflammatory, inadmissible information, and therefore defendant established existence of prejudicial pretrial publicity).

Schoffstall v. State, 488 N.E.2d 349, 353 (Ind. Ct. App. 1986) (introduction of voluminous and inaccurate media reports does not rise to *per se* showing of prejudice; jurors need not be totally ignorant of facts).

Drollinger v. State, 274 Ind. 5, 13, 408 N.E.2d 1228, 1235 (1980) ("we cannot presume, merely from the amount 'of pretrial publicity the case generated, that the trial setting was inherently prejudicial, in the absence of evidence of a 'trial atmosphere…utterly corrupted by press coverage.'"). See also Murphy v. Florida, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035 (1975).

(a) Circulation and audience share figures

Obtain general idea as to percentage of county residents affected by publicity.

Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417 (1963) (defense relied on television reports of audience shares to graphically document reach of prejudicial publicity).

Practice Pointer: TV and radio stations usually have circulation and audience share figures. Newspapers generally keep circulation records by county. State keeps county-by-county population figures, which are broken down by race. See Indiana's Census 2020 statistics and analysis at http://www.stats.indiana.edu/topic/census.asp.

2. Statistical surveys

Surveys alone not sufficient to show that prejudice infects particular jury venire, but they are persuasive. May be convincing and useful in establishing existence of bias in general population. Use experts in designing and conducting survey.

Kappos v. State, 465 N.E.2d 1092 (Ind. 1984) (no pattern of deep and bitter prejudice present throughout community sufficient to warrant change of venue where survey conducted by defense showed 82% of population sample had knowledge of case and 50% of the 82% believed defendant guilty [no one expressed an opinion on innocence]).

3. Proof of widespread community sentiment

(a) Community witness statements

In some cases, local attorneys have been used to express opinion on whether defendant could obtain impartial jury. Ashby v. State, 486 N.E.2d 469, 472 (Ind. 1985).

Public officials, clergy, doctors, bartenders, barbers, mail carriers, beauticians and store owners qualify because of their frequent contact with public. Their observations could be introduced either by affidavit or testimony.

(b) Community reaction to crime/defendant

Showing community's reaction to crime and/or defendant may provide inference of prejudice. Ward v. State, 810 N.E.2d 1042 (Ind. 2004).

Ward v. State, *supra* (court noted that evidence presented at hearing on change of venue included testimony about vigil held for victim that nearly 1200 people attended, that 500 people attended her funeral, and that audience gathered at courthouse yelled at Ward as he was escorted to a hearing; all presumably contributed to "pattern of deep and bitter hostility" in community).

4. Other counties

If prejudicial pretrial publicity has extended beyond county where charges filed, attempt to demonstrate: (1) which alternative counties are unacceptable, and (2) appropriateness of county which defense counsel suggests.

F. JUDGE'S ROLE

In order to determine whether defendant could receive fair trial, a judge should: (1) weigh evidence of potential community bias; and (2) assess credibility of jurors during voir dire examination. Gillie v. State, 465 N.E.2d 1380 (Ind. 1984), *Appeal after remand* 512 N.E.2d 145. The trial court is in the best position to evaluate the jurors' testimony. Jackson v. State, 925 N.E.2d 369 (Ind. 2010).

Ward v. State, 810 N.E.2d 1042 (Ind. 2004) (court abused discretion in failing to grant motion for change of venue, or in alternative drawing jury from another county, when media reports and juror questionnaires showed clear community prejudice and one juror expressed doubt about ability to overcome partiality).

Baniszewski v. State, 256 Ind. 1, 261 N.E.2d 359, 360 (1970) (court found strong case for change of venue taking into consideration nature of charge, penalty, and totality of incident surrounding crime; newspaper headlines included "courtroom jammed as torture trial opens," "slain girl's parents in courtroom," "sickening case details told"). See also Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966).

Brown v. State, 563 N.E.2d 103, 105 (Ind. 1990) (even assuming defendant showed adverse publicity prior to trial, court properly denied defendant's motion for change of venue where record showed jurors who were selected said they were able to set aside preconceived notions of guilt and able to render decision based only upon evidence; allegation insufficient that many prospective jurors knew victim, prosecutor and defense counsel).

Bauer v. State, 456 N.E.2d 414 (Ind. 1983) (no abuse of discretion in denying motion for change of venue where defendant offered photo static copies of some articles and argued use of "silver compact car rapist" burned into subconscious of residents to point they could not detach name from their mental processes; trial judge meticulous in conducting questioning of prospective jurors, and mere knowledge of crime not enough).

Judge has discretion to postpone ruling on motion for change of venue pending voir dire. Davidson v. State, 580 N.E.2d 238, 244 (Ind. 1991).

Lindsey v. State, 485 N.E.2d 102, 106 (Ind. 1985) (motion need not be granted where voir dire reveals potential jurors able to set aside preconceived notions of guilt and render verdict based solely on evidence).

G. REMEDIES

1. Change of venue

See Ind. Code § 35-36-6-1(a).

2. Change of venire – imported juries

Change of venire may be sought in alternative to change of venue. Drawing venire from another county is less expensive and less disruptive to the court and easier to obtain than change of venue. See *Use of Imported Juries Gains in Popularity*, 68 ABA JOURNAL 668 (1982).

Practice Pointer: Although Ind. Code § 35-36-6-11 expressly authorizes selection of jurors from residents of other counties in cases where murder or Class A felonies are charged, the trial court has discretion to implement this procedure in other cases.

3. Test jury

Objective of test jury is to determine whether prejudicial publicity exists and, if so, extent to which it has influenced prospective jurors. Court is neither obligated nor prohibited from granting request for test jury to quantify community bias.

It is logical to allow trial courts, if they choose, to consider evidence from objective group of community residents summoned to court as a "test jury."

Clemens v. State, 610 N.E.2d 236 (Ind. 1993) (no abuse of discretion in denying motion for test jury to quantify community bias in support of motion for change of venue where defendant did not show harm by court's failure to conduct test jury and no showing of prejudice on part of seated jurors).

H. PRESERVING ERROR/APPELLATE REVIEW

To preserve an error for appeal, defendant should:

(1) Submit verified motion. Carter v. State, 451 N.E.2d 639 (Ind. 1983).

(2) Submit motion within thirty days of the initial hearing. Indiana Criminal Rule 12(D)(1).

(3) Record voir dire examination and include transcript with Record of Proceedings.

Neal v. State, 506 N.E.2d 1116, 1123 (Ind. Ct. App. 1987) (voir dire not recorded; neither made part of record on appeal by defendant pursuant to Indiana Rule of Appellate Procedure 7.2(A)(3)(c)).

(4) Exhaust peremptory challenges. U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000); Bixler v. State, 471 N.E.2d 1093 (Ind. 1984).

(5) Assert all rights relating to questioning prospective jurors on areas of prejudice.

(6) Challenge jurors for cause. Morris v. State, 266 Ind. 473, 364 N.E.2d 132 (1977).

(7) Do not accept jury.

Brewer v. State, 271 Ind. 122, 390 N.E.2d 648 (1979) (when defendant fails to raise question of possible community bias by challenging jurors either for cause or peremptorily, and defendant accepts jury, no question presented on appeal on this issue).

(8) Show prejudice despite diligent assertion of rights.

Bauer v. State, 456 N.E.2d 414 (Ind. 1983) (show that despite defendant's best efforts, at least one juror infected with prejudice from pretrial publicity was left on jury).

(9) Move for mistrial.

Jackson v. State, 925 N.E.2d 369 (Ind. 2010) (trial court is not required to admonish the jury or attempt other curative measures before declaring a mistrial for publicity; here, although five jurors claimed they were not influenced by newspaper article that ran on same day jury was sworn quoting letter Defendant wrote to prosecutor, trial court was in best position to evaluate jurors' testimony and did not abuse discretion in granting State's motion for mistrial).

1. Decision may be reversed only for abuse of discretion

Ruling on motion for change of venue may be reversed only if abuse of discretion shown. Ward v. State, 810 N.E.2d 1042 (Ind. 2004); Davidson v. State, 580 N.E.2d 238, 244 (Ind. 1991).

To establish an abuse of discretion based upon prejudicial pretrial publicity, appellant must demonstrate both prejudicial pretrial publicity and juror inability to render an impartial verdict on the evidence. Clemens v. State, 610 N.E.2d 236, 240 (Ind. 1993).

PRACTICE POINTER: The two-part test described in Ward v. State 810 N.E.2d 1042 (Ind. 2004) is constitutionally suspect; proof that prejudicial pretrial publicity existed should not be required in all cases. A juror who is unable to render an impartial verdict should not be empaneled, regardless of the reason for the partiality. Dye v. State, 784 N.E.2d 469 (Ind. 2003). The Court appeared to back away from the first part of the test later in the Ward opinion: "[E]ven if Ward ['s criminal history] had not been reported, we nonetheless would be confronted with the question of whether jurors were able to render an impartial verdict." Ward v. State, 810 N.E.2d 1042 (Ind. 2004).