

CHAPTER 7

SEPARATION OF WITNESSES

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CHAPTER 7

SEPARATION OF WITNESSES

I. PRACTICE TIPS

A. MAKING THE MOTION TO SEPARATE WITNESSES

1. Mandatory, if requested (Indiana Rules of Evidence § 615)

A motion to separate witnesses is mandatory under Indiana Rule of Evidence § 615. Hernandez v. State, 716 N.E.2d 948 950 (Ind. 1999) and Smiley v. State, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995). See IPDC Trial Manual, Chapter 7 § II, *below*.

2. Make motion prior to voir dire

No time limit imposed for making motion, but it is suggested that it be done prior to jury selection. Otherwise, witnesses may develop their own agenda by listening to voir dire and/or opening statements.

3. Seek to have order limit discussions in front of other witnesses

Separation order may not prohibit counsel and her agents from talking with the witnesses. Prosecutor's practice of "interviewing" more than one witness at a time during trial is improper, but for it to cause reversal, prejudice must be shown. Wireman v. State, 432 N.E.2d 1343, 1349 (Ind. 1982). Seek to have order of separation limit discussions in front of other, known witnesses.

4. Argue exempted witnesses should be called first

Indiana Evidence Rule 611(a) may provide argument that exempted witness should have to be called first in order to preserve right to fair trial. (*Court has discretion to control order and manner of calling witnesses to "make the presentation effective for the ascertainment of the truth" under Indiana Rules of Evidence § 611*). See IPDC Trial Manual, Chapter 7 § III.E, *below*.

B. SAMPLE MOTION FOR SEPARATION OF WITNESSES

ACCUSED, by counsel, Ima Lawyer, respectfully moves this Court, pursuant to Indiana Rules of Evidence § 615, for an Order to Separate Witnesses during the trial of this case. It is ACCUSED's request that the order be entered immediately and that both sides be instructed to inform all known or suspected witnesses not to discuss this case with each other or in the presence of each other from (now – or voir dire – or opening) through the verdict of the jury and to inform all known witnesses that they are excluded from the Courtroom during trial except when they are on the stand as witnesses. In the event a mistrial is declared, ACCUSED respectfully requests that this Order include any time from the declaration of mistrial through the re-set trial of this case.

Practice Pointer: As a practical matter, the motion is usually made orally. The request is equally valid whether by oral or written motion; the probability of remembering to request that the order apply to time spent if a mistrial is declared is better if the motion is in writing. "It is not at all uncommon for trial attorneys to treat sequestration orders under Rule 615 in a nonchalant manner, but a cavalier approach is not advisable." United States v. Williams, 136 F.3d 1166, 1169 (7th Cir. 1998).

II. INDIANA RULES OF EVIDENCE § 615

Indiana Evidence Rule 615 provides:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or (c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

A. MUST GRANT IF REQUESTED, UNLESS WITNESS EXEMPT

A litigant has the right to demand separation. Trial Court has no discretion in entry of separation order, except as to the witnesses exempted under Indiana Rules of Evidence § 615. Corley v. State, 663 N.E.2d 175, 176-77 n.2 (Ind. Ct. App. 1996).

A trial court's failure to enter a separation order upon request may be harmless error in the absence of a showing of prejudice. Smiley v. State, 649 N.E.2d 697 (Ind. Ct. App. 1995). Miller, 13 *Indiana Evidence* 341 § 615.101 (3d ed.).

B. TIMING OF REQUEST AND ORDER

Indiana Evidence Rule 615 is silent on when a motion for separation of witnesses must be made.

Although the motion should be made before any witness testifies, a motion sometime after testimony has begun may be permissible as long as basic notions of fundamental fairness are not offended. Anderson v. State, 743 N.E.2d 1273 (Ind. Ct. App. 2001).

C. WITNESS NOT RECALLED MAY REMAIN IN COURTROOM AFTER TESTIFYING

No abuse of discretion in permitting earlier witnesses to remain in the courtroom following their testimony, as long as the witnesses not recalled. Solomon v. State, 439 N.E.2d 570, 576-77 (Ind. 1982).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (there is no presumption of prejudice where witness who violated separation order after their testimony by making statements to the media; was not present during testimony of any other witness; and defendant was unable to identify how specific future witnesses were affected by statements to the media).

D. CANNOT HEAR AND DISCUSS TESTIMONY, OR CONSULT WITH OTHER WITNESSES

Unless exempted from the order, witnesses who are ordered separated under Indiana Rules of Evidence 615 are forbidden to: (1) hear testimony of other witnesses; and (2) discuss any testimony with other witnesses. Indiana Rules of Evidence 615; Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002).

"If a separation order has been entered, however, the earlier witnesses, even if permitted to remain in the courtroom, should continue to be prohibited from consulting with other witnesses." See Miller, 13 *Indiana Evidence* § 615.103 at 354.

1. Purpose of Rule

Purpose of a witness separation order is "to prevent witnesses from gaining knowledge of questions actually posed to, and answers actually given, by prior witnesses, and adjusting their own testimony as a result thereof." Roser v. Silvers, 698 N.E.2d 860, 865 (Ind. Ct. App. 1998); Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000). The rule is not intended to offer a mechanism by which one party may defeat the other party's separation of witnesses' order.

“Sequestration of witnesses under Rule 615 serves two related purposes. The first purpose is to prevent a witness from tailoring his testimony in light of the testimony of other witnesses. [The] second purpose of Rule 615 is to permit the discovery of false testimony and other credibility problems.” Wright & Gold, 29 *Fed. Prac. & Proc.* 53-54 § 6242 (West 1997) (footnotes omitted).

2. Witnesses who associate with one another without discussing case

Where there is no affirmative evidence introduced that witnesses had in fact discussed their testimony, there is no reviewable question on appeal. Myslinski v. State, 275 N.E.2d 544, 546 (Ind. 1971)

Morrell v. State, 933 N.E.2d 484 (Ind. Ct. App. 2010) (where there was no evidence that witnesses who ate lunch together talked about the case, it was not error to allow the witnesses to testify).

III. EXEMPTED PERSONS

A. ONLY EXEMPTED WITNESSES MAY REMAIN IN COURTROOM

Only witnesses within the exemption categories may remain in the courtroom once a witness separation order is granted. Once a witness is determined to be within the exemption, the court has no discretion to exclude the witness. Indiana Rules of Evidence 615. See also Miller, 13 *Indiana Evidence* § 615.103 at 353.

Fourthman v. State, 658 N.E.2d 88 (Ind. Ct. App. 1995) (whether a witness fits in an exemption from exclusion under Rule 615 is within the trial court’s discretion, but if the witness is included in an exemption, the court has no discretion to exclude her).

B. THREE CATEGORIES OF EXEMPTION

Three categories of witnesses exempt from separation order: (1) party who is a natural person; (2) officer or employee of a party that is not a natural person designated as its representative by its attorney; or (3) person whose presence a party shows to be essential to presenting the party’s claim or defense. Indiana Rules of Evidence 615.

1. Party who is a natural person

Witness separation order may not include any party to action. Evid. R. 615 is consistent with prior Indiana case law. See State v. Kinder, 259 Ind. 327, 286 N.E.2d 826, 827 (1972).

(a) Defendant has constitutional right to be present

Criminal defendant has a constitutional right to be present in the courtroom during any testimony. U.S. Constitution, Amendment 6; Indiana Constitution, Article 1, § 13.

(b) Parents’ right to be present in delinquency proceedings

A child’s parents cannot be excluded from the hearing on a petition alleging delinquency. L.B. v. State, 675 N.E.2d 1104 (Ind. Ct. App. 1996). See also Indiana Code § 31-37-10-7.

K.S. v. State, 849 N.E.2d 538 (Ind. 2006) (juvenile’s mother, who was also mother of victim, was not subject to separation of witnesses’ order; Ind. Code § 31-37-10-7 designates a child’s parent as a party to the proceedings and grants the parent “all rights of parties provided under the Indiana Rules of Trial Procedure”).

C.T.S. v. State, 781 N.E.2d 1193 (Ind. Ct. App. 2003) (where the juvenile’s mother was present during each hearing, the trial court did not err in excluding the juvenile’s

stepfather due to witness separation order).

(c) State may argue that defendant is less credible due to presence

A criminal defendant has a constitutional right to be present in the courtroom during any testimony. U.S. Constitution, Amendment 6; Indiana Constitution, Article 1, Section 13.

However, in Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119 (2000), the U.S. Supreme Court approved a prosecutor's argument that a criminal defendant's testimony was less credible because the defendant had been in the courtroom and heard the testimony of all of the other witnesses before taking the stand himself.

(d) Dealing with Portuondo v. Agard argument in cases where the defendant is likely to testify.

(1) File motions *in limine* asking the trial court

- (a) to bar the prosecutor from arguing that the defendant's credibility is lessened because he has the chance to hear the other witnesses testify first, citing the Indiana Constitution, Article 1, Section 13 which guarantees the defendant the right to confront his accusers face to face,
- (b) to permit the defense an opportunity to respond to any such argument by the prosecutor, even if made for the first time in rebuttal argument,
- (c) for a ruling that any prior consistent statements by the defendant will become admissible if the prosecutor argues that the defendant's testimony is a recent fabrication.

(2) During voir dire

Educate the jury about the historical, constitutional, and commonsense reasons why the defendant is permitted to hear all of the testimony against him before deciding whether to testify.

(3) Before Separation of Witnesses motion

Before making a routine motion for separation of witnesses, weigh the value of separation of witnesses to the defense against the likely impact of the prosecutor's argument that the defendant was uniquely able to tailor his testimony.

(4) State's assisting witness/representative

Where the State has designated an assisting witness or representative, remind the jury that the assisting witness has had the opportunity to listen to the testimony of every other witness before testifying, and that the State has the option of calling that witness in rebuttal, after the defense has rested.

(5) Jury instructions on defendant's credibility

Indiana common law held that it was error to give a jury instruction on the credibility of a particular witness, because doing so invades the jury's function. Bieghler v. State, 690 N.E.2d 188 (Ind. 1997); Turner v. State, 280 N.E.2d 621 (Ind. 1972).

(e) Jury instructions on defendant's credibility

Indiana common law held that it was error to give a jury instruction on the credibility of a particular witness, because doing so invades the jury's function. Bieghler v. State, 690

N.E.2d 188 (Ind. 1997); Turner v. State, 280 N.E.2d 621 (Ind. 1972).

2. Officer or employee of party that is not a natural person designated as its representative

Evidence Rule 615 permits designation of only one person as a representative of the State in a criminal case. Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000); Joyner v. State, 736 N.E.2d 232 (Ind. 2000).

(a) Law Enforcement Officer

Evidence Rule 615 continues long-standing Indiana tradition of permitting a police officer to remain in courtroom at counsel's table even though officer may also be called to testify as witness. Fourthman v. State, 658 N.E.2d 88, 91 (Ind. Ct. App. 1995); Long v. State, 743 N.E.2d 253, 256 (Ind. 2001).

Heeter v. State, 661 N.E.2d 612 (Ind. Ct. App. 1996) (non-designated officer properly allowed to testify, but better practice would have been for State to designate officer as its representative prior to presentation of the evidence).

Julian v. State, 811 N.E.2d 392 (Ind. Ct. App. 2004) (trial court did not violate its separation of witnesses order by permitting State to call detective, who remained in courtroom as State's designated representative, to return to witness stand twice to testify after hearing testimony of other witnesses).

Fourthman v. State, 658 N.E.2d 88 (Ind. Ct. App. 1995) (DNR officer who investigated case was proper State's representative).

Tavake v. State, 131 N.E.3d 696 (Ind. Ct. App. 2019) (no error in letting a police officer testify in violation of separation of witness order when the officer sat at counsel table with prosecutor but had not been designated as an assisting witness).

(b) Other designated representatives

Hayden v. State, 830 N.E.2d 923 (Ind. Ct. App. 2005) (Superintendent of Logansport Juvenile Diagnostic Facility fit definition of "an officer or an employee of a party" exempted under Indiana Rules of Evidence § 615 from separation of witness order).

(c) State is only allowed one representative under Indiana Evidence Rule 615(2)

The Indiana Supreme Court has disapproved allowing multiple officers to remain in courtroom unless the State can show necessity of both officers. Long v. State, 743 N.E.2d 253, 256 (Ind. 2001).

Long v. State, 743 N.E.2d 253, 256 (Ind. 2001) (disapproving of "generous" reading of Ind. Evidence Rule 615 in Vinson v. State, 735 N.E.2d 828, 831 (Ind. Ct. App. 2000)).

Osborne v. State, 754 N.E.2d 916, 926-27 (Ind. 2001) (majority of Supreme Court said that only one representative may be designated under Ind. Evidence Rule 615(2)).

Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000) (trial court erred in allowing two police officers to remain in courtroom without designating the second officer's presence as an essential witness).

Joyner v. State, 736 N.E.2d 232 (Ind. 2000) (Ind. Evidence Rule 615(2) permits designation of only one person as State representative; there is no indication that more than one officer, employee, or representative is allowed when a separation of witnesses motion has been granted; however, error considered harmless unless accused can show prejudice).

An exclusion under Indiana Evidence Rule 615(3) would thus be inappropriate in cases where a person excluded under Rule 615(1) or (2) can provide the expertise and knowledge adequate to assist counsel. Long v. State, 743 N.E.2d 253, 256 (Ind. 2001).

Kirby v. State, 774 N.E.2d 523, 538 (Ind. Ct. App. 2002) (two officers permitted to sit with prosecutor where one excluded as officer of State and other as “essential witness” due to knowledge of investigation and participation in witness interviews, so that both were necessary to help question, cross-examine, and impeach witnesses).

Practice Pointer: Though two officers were permitted to remain in court in Long v. State and Kirby v. State, one as an officer of the State and one as an essential person (an FBI agent and a sheriff’s department detective, respectively), Long v. State views such a situation with disfavor. “An exclusion under clause (3) would thus be inappropriate in cases where a person excluded under clauses (1) or (2) can provide the expertise and knowledge adequate to assist counsel. Likewise, permitting a party to retain more than one witness in the courtroom under clause (3) to assist during trial would be especially questionable.” Long v. State, 743 N.E.2d 253, 256 (Ind. 2001).

3. Persons essential to presenting the party’s case

(a) Experts

This category is frequently used for expert witnesses, because they are believed to be less susceptible to alter their testimony. Arguments in favor of permitting expert to remain in courtroom: (1) essential for counsel to have expert at counsel table while State’s expert testifying; (2) assistance may be needed in connection with other technical matters which counsel lacks familiarity to try case effectively on his own; and (3) where expert intends to give opinion at trial based in part on evidence presented at trial. See Graham, *Handbook on Federal Rules of Evidence* § 615.1, at 593 (3rd ed. 1991).

R.R. Donnelley & Sons Co. v. North Texas Steel Co., 752 N.E.2d 112 (Ind. Ct. App. 2002) (including experts in separation order was error, where given the complexities of the case it appeared that the use of experts was essential under Indiana Rules of Evidence § 615(3), and in order to rebut any theory proffered by the defense it would be necessary for the plaintiff’s experts either to be present in the courtroom to witness the testimony or to be provided with daily transcripts).

Practice Pointer: If concerned about credibility issues and alteration of testimony of exempted witnesses, request that witness testify first. Rule 611(a) gives the trial court the discretion to control order of witnesses. But see Gregory v. State, 540 N.E.2d 585 (Ind. 1989) (no abuse of discretion to refuse to require officer to testify first).

(b) Victims

A victim may be considered a non-excludable “essential witness” under Indiana Evidence Rule 615. Hernandez v. State, 716 N.E.2d 948 (Ind. 1999).

Hernandez v. State, 716 N.E.2d 948 (Ind. 1999) (trial court did not abuse its discretion in allowing the attempted murder victim to sit at prosecution table and remain in courtroom as an “essential witness”; victim, who was a prison guard, had personal knowledge of incident and facts leading up to incident and was able to assist in cross-examination of inmates who testified that defendant acted in self-defense).

(c) Parents

Children being tried for crimes in adult court do not have an automatic right to have a parent with them during the trial. Where the parent is subject to a witness separation order, the child defendant can identify the parent's presence as "essential" to the presentation of the child's defense pursuant to Evidence Rule 615(c) to allow the parent to remain in the courtroom despite a witness-separation order. To prove that the parent is "essential," the child can offer any number of reasons, such as the child's special needs, that the child is struggling with communicating with counsel, or that the child needs parental guidance when making life-altering decisions, like whether to pursue a line of questioning, take the stand, or accept a plea agreement.

Harris v. State, 165 N.E.3d 91 (Ind. 2021) (child failed to make required showing by stating that his mother would like to remain in the courtroom "as much as possible" because of his age and the seriousness of the offense; defendant did not argue to the trial court that he had a due process right to the presence of his mother during his trial).

(d) Only one witness permitted

Permitting a party to retain more than one "essential" witness in the courtroom under Indiana Evidence Rule 615(3) to assist during trial would be especially questionable.

Long v. State, 743 N.E.2d 253 (Ind. 2001).

C. COURT'S DISCRETION TO EXEMPT WITNESS

The trial court has discretion to determine whether witness fits in an exemption. Long v. State, 743 N.E.2d 253, 256-57 (Ind. 2001) and Fourthman v. State, 658 N.E.2d 88, 90-91 (Ind. Ct. App. 1995). Once a witness has been found to fit within an exemption, the trial court has no discretion to exclude the witness. Hernandez v. State, 716 N.E.2d 948, 950 (Ind. 1999).

D. EXEMPTING MORE THAN ONE WITNESS PER CATEGORY

Courts may exempt more than one witness per category in rare cases. Court should consider: (1) testimony; (2) susceptibility to tailoring testimony; (3) overlap between witnesses; (4) order of witnesses; and (5) potential bias of witness. United States v. Jackson, 60 F.3d 128, 134-35 (2d Cir. 1995).

United States v. Phibbs, 999 F.2d 1053, 1072-73 (6th Cir. 1993) (court exempted one agent under federal rule 615(2) and another under Fed. Evid.R. 615(3), but ordered each to leave courtroom when the other was on the stand).

United State v. Farnham, 791 F.2d 331, 335 (4th Cir. 1986) (abuse of discretion in not excluding second government agent).

E. PRACTICE POINTERS**1. Exempted witness should testify before others – especially when credibility at issue**

Any time credibility is at issue and to prevent alteration of testimony, demand exempted witnesses go first.

(a) Authority for request

Indiana Evidence Rule 611(a) may give judges the discretion to require exempted witness to testify before other witnesses. Indiana Evidence Rule 611(a) provides in part: "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth..."

(b) Court does not have to grant request

Trial court's refusal to require law enforcement officer, who remained in courtroom to assist State, to testify first was not improper. Gregory v. State, 540 N.E.2d 585, 595 (Ind. 1989). See also Kelley v. State, 555 N.E.2d 140 (Ind. 1990).

2. Place State's experts under separation order

When State has several expert witnesses, placing them under separation order tends to increase number of inconsistencies between them.

If State's expert has never testified in court before, he may be quite nervous and be vulnerable during cross-examination. If permitted to sit through prior witnesses' testimony, nervousness may disappear. See Edward J. Imwinkelried, *The Methods of Attacking Scientific Evidence* §1-4(b), at 21 (2d ed. 1982).

IV. SCOPE OF SEPARATION ORDER

Indiana courts have not yet determined the scope of Indiana Evidence Rule 615.

Practice Pointer: Because of uncertainty of scope of Indiana Evidence Rule 615, counsel should specify desired scope of separation order in defendant's motion for separation of witnesses.

A. REBUTTAL WITNESSES

As soon as a party knows they may call a rebuttal witness, that party should prevent the witness from gaining further knowledge of other testimony. Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002).

1. Result depends upon who needs the witness**(a) State calling rebuttal witness**

Bartuff v. State, 528 N.E.2d 110 (Ind. Ct. App. 1988) (no abuse of discretion in permitting State's first witness to testify as rebuttal witness despite his presence in the courtroom during other testimony in violation of prior separation order; no evidence witness altered his testimony in any way or fabricated his additional testimony after hearing testimony by other witnesses, and no evidence of any connivance by State in calling witness on rebuttal). See also Cordray v. State, 687 N.E.2d 219 (Ind. Ct. App. 1997).

Lane v. State, 539 N.E.2d 488, 491 (Ind. Ct. App. 1989) (where defendant failed to show misconduct by the State, court did not abuse its discretion in allowing victim's sister [who had watched the trial] to testify as rebuttal witness where sister did not testify during case-in-chief and was not listed as prospective witness).

(b) Defense needing rebuttal witness

McDonald v. State, 511 N.E.2d 1066, 1069 (Ind. 1987) (no abuse of discretion by refusing to allow defendant's brother to testify as rebuttal witness; brother not listed as witness, and he violated witness separation order by remaining in courtroom during much of testimony of witness he was to refute).

Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002) (as soon as the defense became aware that defendant's fiancée, who was not listed as a witness, might be called to the stand, he should have ensured that she complied with the separation of witness order;

instead, the witness remained in the courtroom, spoke with the defendant and reviewed a state's witness's deposition; excluding her testimony was not an abuse of discretion).

2. Federal law

Federal rule is not violated by testimony of rebuttal witness not expected to testify. United States v. Hargrove, 929 F.2d 316, 320-21 (7th Cir. 1991).

United States v. Bramlet, 820 F.2d 851, 855 (7th Cir. 1987) ("The rationale for excluding adverse witnesses is premised on the concern that once having heard the testimony of others, a witness may inappropriately tailor his or her own testimony to the prior evidence. By contrast, the very function of a rebuttal witness is directing toward challenging the prior testimony of opposing witnesses, thereby enhancing the fact finder's ultimate determination of an objective 'truth'.").

Caveat: Unlike Indiana's rule, federal rule only addresses ability to hear testimony of other witnesses.

B. PRIOR TO OPENING STATEMENTS

It is unclear whether separation order may be granted prior to trial under Indiana Evidence Rule 615.

Prior to Indiana Evidence Rule 615, pretrial separation of witnesses was an "extraordinary order," left to the discretion of the trial judge. Phillips v. State, 550 N.E.2d 1290, 1296 (Ind. 1990).

Phillips v. State, 550 N.E.2d 1290, 1296 (Ind. 1990) (request made at bail hearing properly denied).

Bell v. State, 495 N.E.2d 526, 527 (Ind. 1986) (witnesses in courtroom during voir dire could testify).

Kuchel v. State, 501 N.E.2d 1045 (Ind. 1986) (court had discretion to permit witnesses to remain in courtroom during opening statements).

C. DISCUSSIONS BETWEEN WITNESSES AFTER MISTRIAL

If a mistrial declared, move to have separation order enforced during interval before new trial begins.

Lutz v. State, 536 N.E.2d 526 (Ind. Ct. App. 1989) (defendant failed to show violation of separation order where defendant had failed to request that separation order continue in effect during six-day interval between end of first trial, which ended in mistrial, and the start of second trial).

D. CONSULTATION BETWEEN WITNESSES AND COUNSEL

A separation order does not prohibit counsel from consulting with witnesses. Jiosa v. State, 755 N.E.2d 605 (Ind. 2001). Although it is appropriate for attorneys to discuss factual matters with their witnesses, the court in Jiosa declined to address whether counsel may describe testimony of other witnesses in the face of a separation order.

Lutz v. State, 536 N.E.2d 526, 530 (Ind. Ct. App. 1989) (order for witness separation may not prohibit consultation between witnesses and counsel). See also Patch v. State, 13 N.E.3d 913 (Ind. Ct. App. 2014).

Hightower v. State, 260 Ind. 481, 296 N.E.2d 654, 658 (1973) ("It is certainly not improper for any attorney to discuss the testimony of his witnesses with them before or after they have testified.").

Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) (under Sixth Amendment, a trial judge may not prohibit consultation between a criminal defendant and his attorney during an overnight recess but may prohibit such consultation during a brief recess taken during defendant's testimony).

V. REMEDIES FOR VIOLATION OF SEPARATION ORDER

Note: Indiana Evidence Rule 615 does not address remedies for violation of an order. Thus, it does not alter prior Indiana case law on point. See Indiana Evidence Rule 101(a) and Corley v. State, 663 N.E.2d 175, 176-77 n.2 (Ind. Ct. App. 1996).

A. JUDGE'S DISCRETION

If separation order violated, remedy or enforcement for such violation is left to the sound discretion of trial court. Jordan v. State, 656 N.E.2d 816, 818 (Ind. 1995) and Clark v. State, 480 N.E.2d 555, 558 (Ind. 1985). The trial court must exercise its discretion consistently with both parties.

Thakkar v. State, 613 N.E.2d 453 (Ind. Ct. App. 1993) (trial court erred in making inconsistent rulings in favor of the State based on violations of separation of witnesses order, thereby preventing the defendant from impeaching the State witness while allowing the State to bolster its case).

In exercising discretion, the court should consider the order's purpose of discouraging and exposing fabrication, inaccuracy, and collusion. See Advisory Committee's Note to Federal Rules of Evidence 615.

1. Disqualification of witness / exclude testimony

A trial court has authority to exclude the testimony of a witness who has violated an order of separation of witnesses. Cordray v. State, 687 N.E.2d 219 (Ind. Ct. App. 1997) and Murphy v. State, 475 N.E.2d 42, 50-51 (Ind. Ct. App. 1985). However, "even when confronted with a clear violation of a separation order, the trial court may choose to allow the violating witness to testify." Roser v. Silvers, 698 N.E.2d 860 (Ind. Ct. App. 1998); Jordan v. State, 656 N.E.2d 816, 818 (Ind. 1995); and Goolsby v. State, 517 N.E.2d 54, 60-61 (Ind. 1987).

Jiosa v. State, 755 N.E.2d 605 (Ind. 2001) (through no fault of her own, complaining witness' mother was in courthouse hall, where she had every right to be, when she overheard defendant's father shouting details of testimony given in court that day - mother realized that complaining witness' physical symptoms were relevant to case and approached defense counsel with information that, if credited, would offer alternative explanation for those symptoms. It is not obvious that this incident constituted violation of separation order, but assuming there was violation, there is no suggestion defendant had anything to do with it; given absence of fault on part of defendant and extreme significance of excluded evidence, it was abuse of discretion to exclude testimony).

(a) Abuse of discretion vs. Sixth Amendment rights

Disqualification of the witness is a drastic sanction that has severe impact on the constitutional right to present witnesses on the defendant's behalf. Smiley v. State, 649 N.E.2d 697 (Ind. Ct. App. 1995). Because a defendant has a Sixth Amendment right to present evidence in his favor, exclusion of a defense witness for violation of a witness separation order is not always appropriate. Id. "[W]here the excluded witness is the sole witness to corroborate the defendant's defense[,] courts have generally concluded that disqualification is an abuse of discretion. Id. at 699.

Cordray v. State, 687 N.E.2d 219 (Ind. Ct. App. 1997) (prejudice shown and reversible error where excluded witness was the only person who could corroborate the defendant's testimony).

Toth v. State, 176 Ind.App. 283, 375 N.E.2d 256, 258 (1978) (reversible error in restricting testimony of critical defense witness, an alleged accomplice, to matters not raised in State's case-in-chief because of violation where defendant did not know person was present in courtroom taking notes and discussing notes with defense witness during recess).

(b) Disqualification appropriate where party connived or caused violation

Disqualification appropriate where party calling witness somehow connived or caused witness to violate separation order. Smiley v. State, 649 N.E.2d 697, 699 (Ind. Ct. App. 1995). However, where a witness violates a separation order and the party is not at fault, the witness should be allowed to testify.

Rowan v. State, 431 N.E.2d 805, 817 (Ind. 1982) (no error in refusing to allow defense witness to testify because of violation of separation order where witness was law clerk and investigator for defense counsel and was present in courtroom while State's witness testified; defendant failed to request to have witness exempted and witness' testimony would have been used to contradict State's witness' testimony).

Wireman v. State, 432 N.E.2d 1343, 1349 (Ind. 1982) (no abuse of discretion in allowing witness to testify for State even though prosecution violated separation order by interviewing two witnesses at same time prior to calling them as witnesses; no evidence in record those witnesses were told what to say).

Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002) (although exclusion is drastic remedy, no abuse of discretion in excluding defense witness where defense counsel attempted to amend witness list to add defendant's fiancée, who had been in courtroom during entire trial, after she told defense attorney that she knew that defendant's sister had shot at victim's car and not defendant; while motion was being considered fiancée was seen talking to defendant and reading sister's deposition; although separation order was not violated because fiancée had never been listed as witness, as soon as defendant knew he might want to call her he should have ensured that she gained no further knowledge of testimony).

Heeter v. State, 661 N.E.2d 612 (Ind. Ct. App. 1996) (there was no evidence State connived to have officer violate separation order).

(c) Witness exclusion inappropriate where party is without fault

It is presumed an abuse of discretion to exclude testimony of a witness due to a violation of the separation of witnesses order if the party seeking to call the witness is without fault or knowledge of the violation. Jiosa v. State, 755 N.E.2d 605 (Ind. 2001); Townsend v. State, 26 N.E.3d 619 (Ind. Ct. App. 2015); Childs v. State, 761 N.E.2d 892 (Ind. Ct. App. 2002). This common law presumption was not changed by adoption of the Rules of Evidence and does not eliminate the effective tools for enforcement of separation orders. Jiosa v. State, 755 N.E.2d 605, 608 (Ind. 2001).

Joyner v. State, 736 N.E.2d 232 (Ind. 2000) (where it was impossible for the State to anticipate need for rebuttal witness, allowing the State to call the witness who had sat through most of trial was within trial court's discretion). See also Roser v. Silvers, 698 N.E.2d 860 (Ind. Ct. App. 1998).

Anderson v. State, 774 N.E.2d 906 (Ind. Ct. App. 2002) (witness sitting through a

portion of voir dire after a separation order was issued did not require exclusion of witness where there was no evidence of collusion by the State).

Wireman v. State, 432 N.E.2d 1343 (Ind. 1982) (no abuse of discretion in allowing State's witness to testify even though prosecution violated order by interviewing two witnesses simultaneously prior to calling them; no evidence they were told what to say).

Brannum v. State, 267 Ind. 51, 366 N.E.2d 1180, 1184 (1977) (prejudicial error to refuse to permit errant witness to testify where party calling witness not at fault for violation). See also Cordray v. State, 687 N.E.2d 219 (Ind. Ct. App. 1997).

Toth v. State, 176 Ind. App. 283, 375 N.E.2d 256, 258 (1978) (reversible error in restricting testimony of critical defense witness, an alleged accomplice, to matters not raised in State's case-in-chief because of violation of order for separation of witnesses where defendant did not know person was present in courtroom taking notes during trial and discussing notes with defense witness during recess). See also Cordray v. State, 687 N.E.2d 219 (Ind. Ct. App. 1997).

Alexander v. State, 600 N.E.2d 549 (Ind. Ct. App. 1992) (no abuse of discretion in allowing witness' testimony where witness violated separation order by sitting in court as spectator during testimony of another witness; witness did not testify as to same issue as other witness, and no evidence State tempted witness to violate order).

Townsend v. State, 26 N.E.3d 619 (Ind. Ct. App. 2015) (trial court abused discretion in excluding testimony of person who was not listed as a witness; also, level of fault on part of defense counsel is even less here where counsel was not aware of testimony witness could provide until that day, and there was no finding of bad faith or substantial prejudice to State from separation of witness violation).

Spinks v. State, 122 N.E.3d 950 (Ind. Ct. App. 2019) (trial court was within its discretion to allow testimony from witnesses who had violated witness separation order when they had conversed about the trial in hallway outside courtroom; there was no indication violation was intentional, or that witnesses' pretrial hearing testimony was different than their trial testimony, and defendant cross-examined witnesses regarding violation of separation order).

2. Contempt

A witness who knowingly violates a witness separation order may be found in contempt of court. Jiosa v. State, 755 N.E.2d 605 (Ind. 2001) and Baysinger v. State, 436 N.E.2d 96, 100 (Ind. Ct. App. 1982).

3. Mistrial

Prejudice is presumed upon violation of a witness separation order, but that presumption can be overcome upon a showing of no prejudice. Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000).

Ray v. State, 838 N.E.2d 480 (Ind. Ct. App. 2005) (no error in denying mistrial based on prosecutor's violation of witness separation order; Court did not find grave peril because jury was provided information concerning conversations between doctor and prosecutor and subject of conversation was a relatively minor part of the evidence presented). See also Clark v. State, 480 N.E.2d 555 (Ind. 1985).

Osborne v. State, 754 N.E.2d 916 (Ind. 2001) (three justices believed that trial court should not have allowed officers to remain in courtroom after granting separation of

witnesses order pursuant to Indiana Evidence Rule 615, and that burden of showing harmless error falls on State).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (presumption of prejudice does not apply where the witnesses who violated separation order after their testimony by making statements to the media were not present during testimony of any other witness and there was no identifiable effects on specific future witnesses).

4. Inform jury about violation of Order

Fact witness violated separation order should go to jury as reflecting on credibility of witness. May be error for trial court to prevent jury from learning about witness' violation of separation of witnesses order.

Smith v. State, 169 Ind. App. 71, 345 N.E.2d 851, 855 (1976) (court erroneously prevented jury from learning about witness' violation; error harmless where he was brought in only to testify as to chain of custody in regard to State's exhibit which was not admitted and witness' credibility not issue for jury).

Lutz v. State, 536 N.E.2d 526 (Ind. Ct. App. 1989) (no reversible error occurred, even assuming violation of separation order—defense counsel had opportunity to subject witness' testimony to “full-bore” cross-examination designed to reveal to jury circumstances of meeting allegedly in violation of separation).

VI. APPELLATE REVIEW

A. MUST MAKE SHOWING OF PREJUDICE

Exercise of discretion will not be disturbed unless party seeking review makes showing of prejudice “tantamount to an abuse of discretion.” Smiley v. State, 649 N.E.2d 697 (Ind. Ct. App. 1995).

Vaughn v. State, 269 Ind. 142, 150, 378 N.E.2d 859 (1978) (party seeking review must demonstrate prejudice or harm as result of judge's discretion).

Error in excluding witness not prejudicial where testimony would have been cumulative. Smiley v. State, 649 N.E.2d 697, 701 (Ind. Ct. App. 1995).

Gamble v. State, 591 N.E.2d 142, 145 (Ind. Ct. App. 1992) (no abuse of discretion in permitting police officer who violated separation order to testify in disorderly conduct prosecution where there was no evidence of procurement or connivance on part of State and admitted testimony cumulative or other evidence already before jury).

B. TRIAL COURT MUST ENFORCE ORDER EVENLY

Court may be reversed where it is clear separation order not enforced evenly.

Thakkar v. State, 613 N.E.2d 453, 459 (Ind. Ct. App. 1993) (abuse of discretion to refuse to allow defense counsel to disclose, in questions, contents of another witness' testimony on basis of separation order, while allowing prosecutor to do so on cross-examination of same witness).