

CHAPTER 13

JUROR MISCONDUCT

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CHAPTER 13

JUROR MISCONDUCT

I. TYPES OF JUROR MISCONDUCT

A. FALSE STATEMENTS ON VOIR DIRE

It is misconduct for juror to make false statements in response to questions on voir dire examination. Each juror has a duty to answer all questions on voir dire fully and truthfully. McFarland v. State, 271 Ind. 105, 390 N.E.2d 989 (1979); Whitehair v. State, 654 N.E.2d 296, 305 (Ind. Ct. App. 1995).

False statements by jurors generally cause reversible error because it impairs the right to challenge juror either peremptorily or for cause. Fuquay v. State, 583 N.E.2d 154, 157 (Ind. Ct. App. 1991); Dickenson v. State, 732 N.E.2d 238, 241 (Ind. Ct. App. 2000). However, a defendant may only be entitled to a new trial if the correct response would have provided a valid basis for challenging for cause. McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850 (1984).

1. Hearing required if defendant shows potential bias

When defendant presents specific, substantial evidence showing juror possibly biased, and concealed bias on voir dire, court must hold evidentiary hearing to determine whether juror was in fact biased. Lopez v. State, 527 N.E.2d 1119, 1130 (Ind. 1988); see also Dickenson v. State, 732 N.E.2d 238, 242-43 (Ind. Ct. App. 2000) (Vaidik, J., dissenting).

Practice Pointer: “Specific, substantial evidence” requirement of Lopez does not control when the issue of possible bias is brought to the court’s attention *before* the jury is sworn. Easler v. State, 131 N.E.3d 584 (Ind. 2019). When a party requests a hearing on possible juror bias or misconduct after the jury has been selected but before it is sworn in, a trial court should hold such a hearing if the party provides “some relevant basis, arising outside the normal course of voir dire, that indicates a juror is possibly biased or possibly committed misconduct.” Id. at 590 (holding trial court committed reversible error when it did not conduct a hearing regarding juror’s possible bias after juror had been selected to serve but before jury was sworn).

(a) New trial required if gross misconduct and defendant harmed

A defendant seeking a new trial because of juror misconduct must show gross misconduct that probably harmed the defendant. Reed v. State, 479 N.E.2d 1248, 1251 (Ind. 1985).

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).

Loherlein v. State, 158 N.E.3d 768 (Ind. 2020) (juror committed gross misconduct in failing to disclose criminal charge on juror questionnaire, but new trial not required because defendant could not demonstrate that the misconduct probably harmed him).

Warner v. State, 773 N.E.2d 239 (Ind. 2002) (after court discovered juror omitted the fact that the juror’s half-sister had been murdered a few years prior, court questioned juror and determined that this prior incident would not affect her impartiality, and thus was not gross misconduct that harmed the defendant).

McDaniel v. State, 268 Ind. 380, 375 N.E.2d 228 (1978) (comment not strong enough indication of bias to entitle defendant to hearing where juror told third party she was juror in trial of that “nigger who killed the cop”).

(b) Relationship with victim/witness not automatically bias

“It is not uncommon for jurors in small communities to be familiar with persons involved in the case. If trial courts were required to imply bias between a juror and a person involved with the case, and remove those jurors, it would be nearly impossible to seat a jury.” Alvies v. State, 795 N.E.2d 493, 503 (Ind. Ct. App. 2003) (although one-quarter of jurors had relationship to either victim or State’s witness, all jurors revealed relationships in timely manner and defendant had opportunity to question each regarding alleged bias).

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

Slaybaugh v. State, 44 N.E.3d 111 (Ind. Ct. App. 2015), *expressly adopted at* 47 N.E.3d 607 (Ind. 2016) (trial court did not abuse its discretion by accepting, as true, juror’s post-conviction testimony that she did not know witness, victim or victim’s family, despite being Facebook friends with witness; juror had over 1000 Facebook friends and the fact that they were Facebook friends, alone, did not constitute a relationship from which bias can be inferred).

Wilkinson v. State, 70 N.E.2d 392 (Ind. Ct. App. 2017) (failure of two jurors to disclose that they knew the State’s witness did not affect the jurors’ performance; defendant failed to present any specific, substantial evidence that the two jurors were biased).

2. Retrial not barred if statement prevents fair trial

Double jeopardy statute permits discharge without jeopardy attaching in the event juror’s false statements on voir dire prevented fair trial. Re-prosecution authorized by a finding of “manifest necessity” for mistrial and discharge of jury. See Ind. Code § 35-41-4-3(a)(2)(vi).

Ried v. State, 610 N.E.2d 275, 280 (Ind. Ct. App. 1993) *sum. aff’d* 615 N.E.2d 893 (trial court properly declared mistrial where juror misstated truth on her jury questionnaire and during voir dire regarding county in which her daughter’s child molest charge was prosecuted).

3. Retrial barred if prosecutor brings about false statement

If prosecutor brought about juror’s false statements with intent to cause termination of trial, another prosecution barred. See Ind. Code § 35-41-4-3(b).

B. OUT-OF-COURT COMMUNICATION OR CONTACT

Rebuttable presumption of prejudice created if jurors involved in out-of-court communications with unauthorized persons. Lee v. State, 735 N.E.2d 1112, 1115 (Ind. 2000); Timm v. State, 644 N.E.2d 1235, 1237 (Ind. 1994); and Spears v. State, 811 N.E.2d 485 (Ind. Ct. App. 2004).

1. Test to determine prejudice

(a) Defendant must show improper contact

Prejudice must be shown by preponderance of evidence: (1) extra-judicial contact or communication; **and** (2) pertained to a matter pending before jury. Currin v. State, 497 N.E.2d 1045, 1046 (Ind. 1986).

If factual conflict regarding existence or content of extra-judicial contact, trial court determines whether evidence presented showed irregularity. Currin v. State, 497 N.E.2d 1045, 1046 (Ind. 1986) and Agnew v. State, 677 N.E.2d 582, 584 (Ind. Ct. App. 1997).

Practice Pointer: Do not rely on bare assertions, support your claim with statements made under oath and/or with sworn affidavits. Driver v. State, 467 N.E.2d 1186, 1189 (Ind. 1984).

(b) State rebuts

If defendant satisfies court of improper contact, burden shifts to State for rebuttal. Butler v. State, 622 N.E.2d 1035, 1040 (Ind. Ct. App. 1993); Emery v. State, 696 N.E.2d 872, 874 (Ind. Ct. App. 1998), *aff'd* 717 N.E.2d 111 (Ind. 1999).

(c) Reversal if substantial possibility verdict prejudiced

Court must be convinced substantial possibility existed that verdict was prejudiced by improper material. Bockting v. State, 591 N.E.2d 576, 579 (Ind. Ct. App. 1992); Butler v. State, 622 N.E.2d 1035, 1040 (Ind. Ct. App. 1993).

Spears v. State, 811 N.E.2d 485, 489-90 (Ind. Ct. App. 2004) (although witness made passing comment to juror that “they are lying,” no prejudice shown where witness and juror had no prior acquaintance, comment was made in passing, juror refused to talk to witness, and juror maintained he could be impartial).

Practice Pointer: Court of Appeals in Spears v. State, *supra*, wrongly implied that contact between witness and juror must amount to a “casual-relationship” to be found to be prejudicial, *citing* McCants v. State, 686 N.E.2d 1281, 1285 (Ind. 1997). McCants dealt with a claim of prejudice due to a prior relationship between a witness and a juror - prejudicial improper contact requires a different analysis with distinct case law. If State relies on Spears to argue that contact must be substantial enough to form a casual relationship, explain that McCants dealt with a different situation and present court with proper test to determine prejudice as presented in this section.

2. Socializing/contact with State’s witnesses

Under certain circumstances, the extra-judicial juror conduct may be so harmful that it would be considered prima facie prejudicial to the defendant, irrespective of whether the communication concerned a matter pending before the jury. Woods v. State, 119 N.E.2d 558 (Ind. 1958); Kelley v. State, 555 N.E.2d 140 (Ind. 1990).

Woods v. State, 119 N.E.2d 558, 560 (Ind. 1958) (reversal was required where police officers serving as the State’s witnesses were fraternizing with the jury during intermissions and recess, even without a showing that the case was discussed during these visits).

Kelley v. State, 555 N.E.2d 140 (Ind. 1990) (reversal required because State’s only witness socialized with three of six jurors during a lunch break).

May v. State, 716 N.E.2d 419, 420-23 (Ind. 1999) (trial court should have discharged juror who exchanged pleasantries with officer in restaurant during lunch recess, where

officer had testified in morning and was to continue after lunch, and juror invited officer to visit juror's home to watch pay-per-view boxing match).

Presumption of prejudice can be overcome, such as where the contact between the jury and the witness are minimal or occur outside of the trial.

Driver v. State, 467 N.E.2d 1186, 1189 (Ind. 1984) (defendant did not show prejudice and not entitled to have entire jury panel dismissed where, prior to beginning of voir dire, State's witness sat among members of jury panel and stated that he was there as a witness, but he did not discuss defendant or any particulars of case).

Majors v. State, 773 N.E.2d 231 (Ind. 2002) (court did not err in denying defendant's post-verdict request to depose jurors, alternates, and bailiffs to explore further his allegations of juror misconduct related to jurors' alleged alcohol consumption on evening after third day of deliberations and fraternization with supervising law enforcement officers not involved in murder investigation; defendant failed to demonstrate defense interest sufficient to overcome interests of finality of verdicts and avoidance of juror harassment).

Buchanan v. State, 169 Ind. App. 287, 348 N.E.2d 70, 73 (1976) (no harm demonstrated where State's witness made neutral or favorable remarks about defendant to jurors who were in women's restroom; judge questioned jurors separately and they replied their decision would not be influenced in any manner by communications from State's witness).

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

(a) Mistrial if contact enhances credibility of State's witness

If contact has probable persuasive effect on jury's ability to assess witness credibility, accused is in a position of grave peril. Defendant has burden of showing mistrial is necessary to remedy perilous situation in which he was placed.

Turner v. Louisiana, 379 U.S. 466, 473, 85 S.Ct. 546, 550, 13 L.Ed.2d 424, 429 (1965) (extreme prejudice inherent where two police witnesses ate with, conversed with, and performed errands for jurors during three-day trial).

Kelley v. State, 555 N.E.2d 140 (Ind. 1990) (during one-day trial, State's only witness had lunch with three out of six jurors, including the eventual foreman; where critical issue for jury was evaluation of credibility of that witness, court noted that "the enhancement of credibility of State's only witness seems highly probable, regardless of whether the jurors themselves realized it at the time.").

3. Discovering prior convictions of defendant

Where the jury discovers inadmissible records of a defendant's convictions, the improper consideration of such is not harmless. Schlabach v. State, 842 N.E.2d 411 (Ind. Ct. App. 2006).

Franklin v. State, 533 N.E.2d 1195 (Ind. 1989) (jury's consideration of inadmissible fingerprint record which revealed defendant's prior record was not harmless error);

Schlabach v. State, 842 N.E.2d 411 (Ind. Ct. App. 2006) (court remanded for new trial where, after jury verdict, defendant learned that a juror had found inside a notebook entered into evidence a folded-up summons alleging that defendant violated probation on

a prior conviction for possession of marijuana).

4. Reading newspaper article

Reading of newspaper article pertaining to case not grounds for reversal unless it is shown jurors were influenced thereby. Harris v. State, 249 Ind. 681, 231 N.E.2d 800, 807 (1967).

Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819 (1973) (defendant was entitled to have jury polled to determine exposure to and prejudice resulting from newspaper article, and trial court's failure to detect possible prejudice subjected defendant to grave peril where news article was not factual, mentioned rape even though rape was not charged, and eight jurors were exposed to article but only two who read entire article were questioned after verdict with respect to whether exposure had influenced decisions - when threat of prejudice is substantial, primary consideration of judge should be to protect integrity of trial, not salvage it).

Jackson v. State, 925 N.E.2d 369 (Ind. 2010) (trial court acted within its discretion in ordering a mistrial due to jury being exposed to letter written by defendant to prosecutor in aggravated battery prosecution; five of the 12 jurors were exposed to a newspaper article citing defendant's letter implying that he was prosecuted because of his race and that the prosecutor had not been truthful in dealing with the victim's family, and jurors were exposed to article the day they were impaneled and mistrial was declared before introduction of any evidence or opening statements; although all jurors claimed they were not influenced by the article, trial court was in the best position to evaluate their testimony and was not required to admonish the jury or attempt other curative measures before declaring a mistrial).

5. Telling someone "I am serving as a juror" in a case

A juror merely informing another person that they are serving as a juror in a case is not enough, in and of itself, to warrant a mistrial. Gee v. State, 389 N.E.2d 303 (Ind. 1979).

Williams v. State, 755 N.E.2d 1128, 1133-34 (Ind. Ct. App. 2001) (where evidence surfaced that juror disparaged defendant during conversation with mother, dismissal of juror and replacement with alternate was adequate remedy, no mistrial need and court did not err in not questioning remaining jurors about any comments made by dismissed juror).

Gregory v. State, 540 N.E.2d 585, 590 (Ind. 1989) (no juror misconduct where juror allegedly told another person that she was on jury in case in which a boy killed his mother; alleged misconduct merely descriptive of broad nature of case and defendant admitted he killed his mother). See also Everroad v. State, 570 N.E.2d 38, 49 (Ind. Ct. App. 1991), *reversed on other grounds*, 590 N.E.2d 567 (Ind. 1992).

Gee v. State, 271 Ind. 28, 389 N.E.2d 303, 313 (1979) (no prejudice shown from juror making a phone call and saying that he was a juror; court held hearing to interrogate juror individually, admonished him, and determined juror did not act improperly).

6. Contact with Defendant

For example, see Leslie v. State, 978 N.E.2d 486 (Ind. Ct. App. 2012) (no fundamental error in denying request to remove juror who stood in hallway for 5-10 seconds as defendant and counsel discussed trial strategy; juror testified she did not recognize defendant or his lawyer as she stood nearby and did not overhear their conversation).

7. Misconduct with social media

For example, see Sluss v. Commonwealth, 381 S.W.3d 215 (Ky. 2012) (defendant was

entitled to an adequate post-trial hearing to determine whether jurors who had “friended” victims’ mother on Facebook accounts and misled court about this during voir dire were exposed to information that biased them against defendant).

8. Contact with bailiffs and other court personnel

When communication between a bailiff and a jury occurs outside of the defendant’s presence, there is a presumption of harm to the defendant that the State must rebut to avoid reversal. Azania v. State, 730 N.E.2d 646 (Ind. 2000).

“[I]t is important that trial courts instruct bailiffs to refrain from communicating about the case with jurors. Further, when jurors ask questions of the bailiff, the bailiff’s response should be limited to an indication that he will forward the question to the judge.... [W]e will continue to examine closely communication between bailiffs and juries.” Farris v. State, 732 N.E.2d 230, 235 (Ind. Ct. App. 2000).

Sowers v. State, 988 N.E.2d 360 (Ind. Ct. App. 2013) (bailiff’s comment to jury foreperson that the jurors had to be 100 percent in agreement resulted in fundamental error, because prosecutor indicated that it was his impression from one of the juror’s statements that she had to make a decision with the jury rather than hold out and she might have proceeded differently had she known of option of hung jury).

Ward v. State, 736 N.E.2d 265, 270 (Ind. Ct. App. 2000) (trial court not required to discharge juror when it was disclosed that juror had lunch during the trial with presiding judge of a different court).

Dixon v. State, 769 N.E.2d 685 (Ind. Ct. App. 2002) (defendant was not deprived of fair trial because of *ex parte* communications between jury foreman and bailiff; brief interaction did not involve facts of case or any legal discussion but was rather procedural in nature as to where verdict form should be placed).

Pribie v. State, 46 N.E.3d 1241 (Ind. Ct. App. 2015) (*ex parte* conversation between juror and bailiff during break in trial was harmless error because trial court would have asked substantially the same questions bailiff did and would have kept the juror).

9. Making phone calls during jury separation

“In this day and age, thanks to cell phones, most people now take it for granted that they can call or be called by anyone, anywhere, at any time. This expectation should not be carried into the jury room once deliberations have commenced, in accordance with the long-standing principle in Indiana of disfavoring the separation of jurors or having outside communications during deliberation.” Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004), *disapproved of on other grounds*.

See also *Use of cell phones during deliberations*, section II.I., below.

(a) Phone usage requires Jury Rule 29 be followed

If jurors wish to separate for purpose of making calls, Indiana Jury Rule 29 should be followed, which requires consent of parties in criminal cases and admonition to jurors in all cases. Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004), *disapproved of on other grounds*.

(b) Exposure to pressure to reach verdict may be prejudicial

There is the potential for improper outside influence of a juror if that juror telephones a family member or business associate and informs them that the jury is still deliberating, and the family member or business associate then places implied or express pressure on

the juror to hastily reach a verdict and return home or to work. Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004), *disapproved on other grounds*.

(c) Preliminary and Final Instructions re: electronic communication devices

Indiana Jury Rule 20(b) provides:

The court shall instruct the jurors before opening statements that until their jury service is complete, they shall not use computers, laptops, cellular telephones, or other electronic communication devices while in attendance at trial, during discussions, or during deliberations, unless specifically authorized by the court. In addition, jurors shall be instructed that when they are not in court they shall not use computers, laptops, cellular telephones, other electronic communication devices, or any other method to:

- (1) conduct research on their own or as a group regarding the case;
- (2) gather information about the issues in the case;
- (3) investigate the case, conduct experiments, or attempt to gain any specialized knowledge about the case;
- (4) receive assistance in deciding the case from any outside source;
- (5) read, watch, or listen to anything about the case from any source;
- (6) listen to discussions among, or received information from, other people about the case; or
- (7) talk to any of the parties, their lawyers, any of the witnesses, or members of the media, or anyone else about the case, including posting information, text messaging, email, Internet chat rooms, blogs, or social websites.

C. CONSUMPTION OF ALCOHOLIC BEVERAGES

1. After deliberations have begun

“While allowing jurors to consume alcohol during deliberations would certainly be ill-advised, the question is not whether alcohol touched any juror’s lips during the entire time between the judge’s charge to the jury and the jury’s rendering of verdicts. Rather, the focus is whether the jury was free from the influence during actual deliberations.” Majors v. State, 773 N.E.2d 231, 235 (Ind. 2002).

Majors v. State, 773 N.E.2d 231, 235 (Ind. 2002) (court rejected claim of jury mismanagement and misconduct based on jurors’ alcohol consumption on evening after third day of deliberations where juror drank two beers and full night passed between drinking and resumption of deliberations).

Schultz v. Valle, 464 N.E.2d 354, 355 (Ind. Ct. App. 1984) (verdict per se invalid where trial court had policy of permitting consumption of alcoholic beverages by jurors during evening meal after deliberations had begun and some jurors consumed as many as three beers during an hour-and-a-half dinner break, then resumed deliberations).

Davis v. State, 35 Ind. 496 (1871) (verdict set aside where bailiff permitted drinking after deliberations had begun).

2. Prior to deliberations

Drinking intoxicating liquor during recess of court alone is insufficient to warrant grant of a new trial, unless juror becomes intoxicated. Carter v. Ford Plate Glass Co., 85 Ind. 180 (1882); Pratt v. State, 56 Ind. 179 (1877).

Brown v. State, 137 Ind. 240, 36 N.E. 1108, 1109 (1894) (though juror did not appear intoxicated when court resumed, court reasoned defendant entitled to have juror consider and pass upon his case with faculties unimpaired by drunkenness during progress of trial).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (trial court learned that several jurors had been drinking alcohol at various times but made a finding that there was no prejudice to defendant because jurors did not drink any alcohol during trial proceedings or deliberations).

See also *Use of Intoxicating Liquor by Jurors: Criminal Cases*, 7 A.L.R.3d 1040, §3 (1996).

D. INATTENTIVENESS OR SLEEPING

In determining whether prejudice resulted from juror's inattention, it must be shown: (1) juror was actually inattentive; and (2) juror's action actually resulted in prejudice to defendant. Warren v. State, 757 N.E.2d 995, 1001 (Ind. 2001) and Chubb v. State, 640 N.E.2d 44 (Ind. 1994).

The length of time a juror was asleep, and importance of the evidence may be taken into account when considering prejudice to the defendant. Lenover v. State, 550 N.E.2d 1328, 1332 (Ind. Ct. App. 1990). Further, a defendant must allege actual prejudice by the allegedly inattentive juror.

Merry v. State, 166 Ind. App. 199, 335 N.E.2d 249, 267, 268 (1975) (defendant did not show prejudice by merely saying conduct of juror "probably prejudiced the right of the defendant to a fair trial").

Smith v. State, 432 N.E.2d 1363, 1368 (Ind. 1982) (defendant did not meet burden of showing prejudice where juror fell asleep and missed part of court-appointed psychiatrist's testimony that defendant was not insane; court took action to ensure juror stayed awake during rest of day's proceeding).

Fleener v. Orkin Exterminating Co., 560 N.E.2d 1257 (Ind. Ct. App. 1990) (sleeping or inattentiveness does not automatically result in prejudice; where information in cross-examination that juror allegedly missed while dozing was discussed again after a court recess, no prejudice shown).

1. Waiver

Both prosecutor and defense attorney have a duty to notify trial court when they suspect juror inattentiveness and to request corrective action that involves a factual determination on the record concerning the behavior, *i.e.*, removal and replacement of the juror or a voir dire of that juror to factually determine the actuality and extent of the problem. Hardin v. State, 956 N.E.2d 160 (Ind. Ct. App. 2011).

Waiver of error by failure to call to court's attention at a time when corrective measures could have been taken. Hopkins v. State, 579 N.E.2d 1297, 1305 (Ind. 1991); Whiting v. Duckworth, 904 F.2d 3 (7th Cir. 1990).

United States v. Krohn, 560 F.2d 293, 297 (7th Cir. 1977), *cert. den'd* (where defense counsel did not request action on sleeping juror, issue was waived; court disapproved of "gamesmanship" of waiting to hear verdict before raising issue).

2. Replacing a sleeping juror is discretionary

Whether a court should dismiss a sleeping juror is discretionary, and not disturbed unless bias or prejudice is shown. United States v. Smith, 550 F.2d 277 (5th Cir. 1977), *cert. den'd*; United States v. Cameron, 464 F.2d 333 (3d Cir. 1972).

E. USE OF PRESCRIBED TRANQUILIZERS

For example, see Hatfield v. State, 243 Ind. 279, 183 N.E.2d 198 (1962) (juror's use of prescribed tranquilizers during course of trial did not warrant new trial; court considered un-contradicted medical testimony that tranquilizer didn't impair juror's mental faculties).

F. TESTIFY AS WITNESS IN CASE

Indiana Evidence Rule 606(a) provides: "[a] juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence."

G. FOREMAN PREVENTS FREE AND OPEN DISCUSSION AMONG JURORS

"A jury, and each member thereof, should be absolutely free to express their opinions of the case." Hutchins v. State, 140 Ind. 78, 39 N.E. 243 (1894).

Hutchins v. State, *supra* (misconduct for foreman to refuse to allow any juror to express opinion or say anything of law or evidence unless juror first stands and addresses foreman as chairman and is recognized by chairman; procedure prevented free and open discussion of merits of case).

H. JUROR DIVULGES EXTRANEOUS EVIDENCE

1. Before reaching verdict

Jury prejudiced when juror interjected extraneous evidence into deliberations prior to time entire jury reached verdict. Krivanek v. State, 252 Ind. 277, 247 N.E.2d 505, 513 (1969). There is a rebuttable presumption of prejudice from communication from one juror to other jurors if the extra-judicial contact or communication pertain to a matter before the jury. Ramirez v. State, 7 N.E.3d 933 (Ind. 2014).

No prejudice can be demonstrated if extraneous materials: (1) do not involve material issues of case, or (2) play a role in decision on merits of verdict. City of Indianapolis v. Erwin, 405 N.E.2d 55, 65 (Ind. Ct. App. 1980).

Isaacs v. State, 673 N.E.2d 757, 761 (Ind. 1996) (where use of knife in rape was in question, juror related to other jurors during deliberations that she had been raped and a knife held to her neck did not leave any visible marks; parties take jurors as they find them, and because juror did not interject information specific to facts of case, and juror's knowledge did not approach degree of specialization necessary to be improper testimony, no jury impropriety found).

Hall v. State, 796 N.E.2d 388 (Ind. Ct. App. 2003) (a juror heard from his stepson who was an inmate with defendant that the stepson and other inmates believed the defendant was guilty; the juror improperly gave this information to the other jurors during deliberations; held, defendant failed to meet his burden of proving that the extraneous information affected the jury's verdict).

Bisard v. State, 26 N.E.3d 1060 (Ind. Ct. App. 2016) (defendant moved for a mistrial upon learning that a juror had performed an internet search on reliability of blood tests; trial court's remedy of replacing juror with an alternate as opposed to mistrial affirmed).

Hambel v. State, 119 N.E.3d 1142 (Ind. Ct. App. 2019) (no evidence defendant harmed by juror's remarks to other jurors about his wife's knowledge of defendant from when they were in high school because it was undisputed that juror communicated only information favorable to defendant).

Note: The standard applied by the Court of Appeals in Hall required defendant to prove that he was probably harmed by the extraneous communication with the juror, which left no room

for the potential for a presumption, in contravention of case law. See Hall v. Zenk, 692 F.3d 793, 803-05 (7th Cir. 2012) (*citing Ramirez v. State*, 7 N.E.3d 933 (Ind. 2014)).

2. After reaching verdict

Information divulged after jury reached verdict does not affect verdict.

Krivanek v. State, 252 Ind. 277, 247 N.E.2d 505, 513 (1969) (no prejudice where jury foreman's extraneous evidence, that defendant's sister involved in gang shooting 20 years ago, not divulged until after hold out juror arrived at her verdict).

I. UNAUTHORIZED VIEWING OF SCENE

Misconduct for juror to go to crime scene and relate information about site to jurors during deliberations. Saperito v. State, 490 N.E.2d 274 (Ind. 1986).

Saperito v. State, *supra* (no prejudice shown where entire jury polled and each member stated information did not affect his verdict in any way, and information did not go to material element of crime or of defense);

Dyer v. State, 168 Ind. App. 278, 342 N.E.2d 671, 674 (1976) (violation of defendant's right to confront and cross-examine witnesses where juror went to scene material to defendant's alibi to determine whether testimony was true, and then mentioned trip to jurors during deliberations; harmless error because jury would have found defendant guilty beyond reasonable doubt based on all evidence other than juror's statements);

Waye v. State, 255 Ind. 136, 139-41, 263 N.E.2d 165, 167-68 (1970) (where jurors passed within sight of scene of crime on direct route from courthouse to nearby restaurant when taken for lunch, no harm to defendant where no third person communicated with them and they did not conduct experiments, even though deliberations after lunch may have included discussion of what was seen during lunch).

Williams v. State, 757 N.E.2d 1048 (Ind. Ct. App. 2001) (during trial, one juror allegedly drove over certain routes between defendant's home and victim's home and reported that defendant could have committed offense; defendant did not convincingly show that juror was guilty of alleged misconduct, and it was not prejudicial in any event because there was independent evidence to the same information already in evidence in the case).

J. JURY EXPERIMENT/RESEARCH

Experiment improper where it amounts to additional evidence supplementary to that introduced during trial. Bradford v. State, 675 N.E.2d 296, 304 (Ind. 1996).

In re Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982) (mistrial proper where during trial, one of jurors performed experiment on home wiring and reported findings to other jurors).

Bisard v. State, 26 N.E.3d 1060 (Ind. Ct. App. 2015) (no abuse of discretion in denying motion for mistrial after juror researched reliability of blood-alcohol testing on Internet and shared research with some other jurors; offending juror was removed, and trial court ensured that remaining jurors decided case solely on evidence presented by the parties).

Mitchell v. State, 726 N.E.2d 1228, 1238 (Ind. 2000) (foreman using wooden rod - used to beat child in murder case - to hit chair 50 times, number of times child was allegedly hit, was not an extra-judicial experiment, and defendant's right to be present during all critical stages of trial was not violated).

Bradford v. State, 675 N.E.2d 296, 304 (Ind. 1996) (jury conducting own experiments at crime scene of walking through motions of pouring gasoline and timing how long it took -

where detective had given testimony concerning how long it took to walk to various spots and pour gasoline inside house - was merely considering evidence admitted at trial, not improper jury experiment).

Brown v. State, 160 N.E.3d 205 (Ind. Ct. App. 2020) (allowing jurors to pull trigger of gun that killed victim during deliberations would not have been experiment that introduced supplemental evidence; although there was no evidence that jurors actually pulled trigger, it would have been in keeping with evidence presented by expert who testified about amount of pressure required to pull trigger on gun).

Patterson v. State, 742 N.E.2d 4, 15 (Ind. Ct. App. 2000) (measuring and comparing shoes and shoeprint in evidence was merely examination of admitted evidence, not an improper jury experiment).

Kennedy v. State, 578 N.E.2d 633, 641 (Ind. 1991) (not extra-judicial experiment requiring reversal where during deliberations two jurors claiming to be similar height and build to defendant tried on shirts and reported to other jurors that shirts fit; jurors were merely examining evidence).

K. BRINGING BOOKS INTO JURY ROOM

A court may provide the jury with a dictionary upon request, absent a showing of prejudice. Shultz v. State, 417 N.E.2d 1127 (Ind. Ct. App. 1981).

Dawson v. State, 649 N.E.2d 653, 664 (Ind. Ct. App. 1995) (defendant did not demonstrate prejudice where jury obtained legal dictionary from bailiff during deliberations; court unable to determine if definitions conflicted with trial court's instructions and no evidence jury actually utilized information in its deliberations).

Other books may be prejudicial.

Bockting v. State, 591 N.E.2d 576, 579 (Ind. Ct. App. 1992) (defendant did not show substantial possibility verdict prejudiced by juror bringing medical book and dictionary into jury room; jurors who looked at books testified their decision not influenced by either book).

Stephenson v. State, 864 N.E.2d 1022, 1025 (Ind. 2007) (fact that a juror read murder mysteries in the jury room during breaks in defendant's eight-month trial for murder was not juror misconduct and did not reflect on juror's impartiality).

Using outside references during break in deliberations is subject to the same analysis.

S. Bend Clinic, Inc. v. Kistner, 769 N.E.2d 591 (Ind. Ct. App. 2002) (after judge refused to let jury have dictionary, one or more jurors consulted dictionary at home between first and second day of deliberations to get definition of "preponderance," but record did not show that any prejudice resulted and jurors acknowledged that definition was not discussed during deliberations; court also rejected defendant's argument for a presumption of prejudice).

L. FAILURE TO DISCLOSE PERSONAL KNOWLEDGE OF MATERIAL FACT

Ind. Code § 35-37-2-3 provides:

- (a) As a part of the preliminary instructions, the court shall instruct the jurors that if a juror realizes, during the course of the trial, that he has personal knowledge of any fact material to the cause, he shall inform the bailiff that he believes he has this knowledge at the next recess or upon adjournment, whichever is sooner. The bailiff shall inform the court of the juror's belief, and the court shall examine the juror under oath in the presence of the parties and outside the presence of the other jurors concerning his personal knowledge of any material fact.

- (b) If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused, and the court shall replace that juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors.

See also Indiana Jury Rule 24, laying down same requirements for the trial court.

Ind. Code § 35-37-2-3 does not require the judge to discharge the jury if the juror professes personal knowledge of evidence material to cause. Ferguson v. State, 273 Ind. 369, 403 N.E.2d 1373 (1980).

Ballin v. State, 610 N.E.2d 846, 850-51 (Ind. Ct. App. 1993) (“fact material to cause” relates to facts about particular parties and incidents of case, not general knowledge that juror brings with him; juror question of expert witness about medical condition of necrosis on tissue surrounding burn marks found on victim does not indicate knowledge of “fact material to the cause” as intended by Ind. Code § 35-37-2-3).

M. MAKING DECISIONS AS JURY PRIOR TO CLOSE OF CASE

1. Jurors may discuss evidence during recesses among themselves, but may not make decision until deliberations commence

Pursuant to Jury Rule 20(a)(8), the trial court is to instruct the jurors that they:

“...are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial.”

This partially *overrules* Ind. Code § 35-37-2-4(a), which provides:

“The court shall admonish the jurors in the preliminary instruction, before separating for meals, and at the end of the day, that it is their duty not to converse among themselves or permit others to converse with them on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them.”

Procedural rules promulgated by the Supreme Court render conflicting statutes a nullity on that point. McEwen v. State, 695 N.E.2d 79 (Ind. 1998). Thus, jurors may now freely discuss evidence, as long as no decisions are made until the conclusion of the trial. Buckner v. State, 857 N.E.2d 1011 (Ind. Ct. App. 2006). See also Fuller v. State, 851 N.E.2d 22 (Ind. Ct. App. 2006) and Weatherspoon v. State, 912 N.E.2d 437 (Ind. Ct. App. 2009).

Gregory v. State, 540 N.E.2d 585, 590 (Ind. 1989) (no prejudice shown where one juror told another that she could not look at defendant because she might faint and cause a mistrial, and she had to keep reminding herself he was 19 and not 16 years old; juror’s remarks went only to defendant’s appearance and not appraisal on evidence or indication of conclusions as to his guilt or innocence). **Note:** Jury Rule 20(a)(8) negates issue of whether juror’s appraisal of evidence was improper in Gregory, although drawing of conclusions based on defendant’s appearance or prior to close of case would still be improper.

2. If court fails to admonish, must show prejudice

Defendant must show prejudice from failure to admonish. Record must disclose no admonishment. Even if the record is silent, there is a presumption the trial court followed the statute and gave an admonition. Baker v. State, 260 Ind. 618, 298 N.E.2d 445 (1973); Merry v. State, 166 Ind. App. 199, 335 N.E.2d 249, 259 (1975).

N. INTIMIDATING OTHER JURORS

A failure to agree, however unreasonable, is a ground for mistrial, not removal of the obstacle to unanimity. Riggs v. State, 809 N.E.2d 322 (Ind. 2004) and Scott v. State, 829 N.E.2d 161 (Ind. Ct. App. 2005).

Mickens v. State, 742 N.E.2d 927, 929-930 (Ind. 2001) (juror # 12 reported another juror was threatening her and calling her names. Court conducted inquiry of juror # 12 and instructed the jury to maintain civility. Another juror sent a note regarding juror # 12 and the judge conducted a second inquiry of juror # 12, who stated that she wished to continue. Jury returned guilty verdict and judge polled jurors individually. Trial judge was satisfied the verdict represented impartial and separate judgment of all jurors, and defendant's motion for mistrial was justifiably denied).

II. POSSIBLE PREJUDICIAL INFLUENCES ON JURY

A. JUROR'S STATEMENT INFECTS VENIRE

Venire infected where remarks relate substantive facts or evidentiary matters that would necessarily prejudice other jurors. Stroud v. State, 450 N.E.2d 992, 995 (Ind. 1983).

Griffin v. State, 754 N.E.2d 899 (Ind. 2001) (alternate answered that she thought defendant was guilty, and one juror stated in affidavit that alternate's input affected her vote. Fact that one juror says alternate's input affected her decision is not part of analysis governing request for new trial. Rather, trial court must consider alternate's conduct in overall trial context. Here, alternate did not add any fresh perspective to deliberations, and her only influence was adding one more "me, too" to the collective voice of jury majority. Defendant failed to show either gross misconduct or probable harm).

Sanchez v. State, 794 N.E.2d 488 (Ind. Ct. App. 2003) (no error in refusing to grant mistrial when alternate juror corroborated fact that three active jurors had already written down; situation was actually less egregious than that found harmless in Griffin, in that alternate did not express opinion on defendant's guilt).

B. EXTRA-JUDICIAL COMMENTS

Upon suggestion of extrajudicial comments made to juror, trial court should assess likelihood of prejudice. If it finds the risk of prejudice is substantial, it should interrogate jury collectively to determine if anyone was exposed to extrajudicial comments, and individually interrogate such jurors away from other jurors. Caruthers v. State, 926 N.E.2d 1016 (Ind. 2010).

Peters v. State, 542 N.E.2d 1340, 1344 (Ind. 1989) (no error meriting reversal in denial of mistrial where after testifying alibi witness came into restroom and sang, "What some people won't do for money." Juror who overheard alibi witness began to cry in presence of other jurors. Several jurors said incident had frightened them, but they could set aside apprehension and would not affect on their decision. Court gave lengthy admonishment).

C. FOREMAN TELLS JURORS HE KNOWS DEFENDANT'S WIFE

For example, see Threats v. State, 582 N.E.2d 396 (Ind. Ct. App. 1991) (court should have questioned jury as to possible prejudice and admonished them, where during deliberations, foreman said that he knew defendant's wife and jurors reported foreman's interest in case to bailiff. Foreman released and replaced by alternate; at minimum, court should have firmly instructed entire jury to disregard removal of foreman and reach verdict based strictly on evidence).

D. ANONYMOUS/INTIMIDATING PHONE CALL

For example, see

Rodriguez v. State, 270 Ind. 613, 388 N.E.2d 493 (1979) (no abuse of discretion to deny mistrial where two jurors received possibly threatening phone calls during course of trial; calls were brief, ambiguous and of uncertain origin, jurors said they were not influenced by calls, judge informed entire jury and told them not to let prank calls enter into their consideration).

See generally, “Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror,” 3 A.L.R.5th 963, §§ 6 and 11.

E. BOMB THREAT/SECURITY CONCERNS

Potential prejudice caused by bomb threat or safety concerns dispelled by court’s admonishment. Smith v. State, 270 Ind. 1, 382 N.E.2d 937, 938-39 (1978).

Caruthers v. State, 926 N.E.2d 1016 (Ind. 2010) (trial court’s failure to *sua sponte* interrogate jury about whether tightening security during trial made some jurors biased against defendant did not constitute fundamental error).

Beasley v. State, 30 N.E.3d 56 (Ind. Ct. App. 2015) (no error in denying defendant’s motion for mistrial after juror told other jurors she recognized someone in the gallery and was concerned for her safety; nothing about the juror’s conduct fundamentally compromised the appearance of neutrality).

Woods v. State, 98 N.E.3d 656 (Ind. Ct. App. 2015) (defendant not entitled to mistrial despite juror’s statement to other jurors that he was afraid of defendant’s family, who lived in his neighborhood, and despite juror’s ultimate removal, because defendant failed to show prejudice and trial court instructed remaining jurors to disregard juror’s removal).

F. INFORMED ABOUT DEFENDANT’S PRIOR CONVICTION

For example, see:

Timm v. State, 644 N.E.2d 1235 (Ind. 1994) (judge took necessary steps to assure juror could render impartial verdict where juror’s mother told her of defendant’s prior conviction for murder, both judge and counsel questioned juror, judge repeatedly admonished her to rely solely on evidence at trial, juror affirmed she could discharge duty, and no suggestion she shared information with others).

Schlabach v. State, 842 N.E.2d 411 (Ind. Ct. App. 2006) (court remanded for new trial where after jury verdict, defendant learned that a juror had found inside a notebook entered into evidence a folded-up summons alleging that defendant violated probation on a prior conviction for possession of marijuana). See also Franklin v. State, 533 N.E.2d 1195 (Ind. 1989).

Stokes v. State, 919 N.E.2d 1240 (Ind. Ct. App. 2010) (trial court reasonably concluded from its voir dire of jurors that knowledge obtained from documents showing defendant’s incarceration pending trial would not impair jurors’ ability to be fair and impartial).

Hampton v. State, 873 N.E.2d 1074 (Ind. Ct. App. 2007) (trial court did not abuse its discretion in denying defendant’s motion for mistrial, where jurors heard alternate juror state that defendant might be a suspect in other murders; trial court immediately removed alternate juror, questioned each remaining juror and evaluated his or her response to alternate’s comments).

G. JURORS OVERHEAR MEMBERS OF AUDIENCE DISCUSS CASE

In exercising discretion in determining necessity of further inquiry, court may consider danger of: (1) aggravating prejudice by emphasis, and (2) hindering jury's assimilation of evidence by frequent interruption.

Bruce v. State, 268 Ind. 180, 375 N.E.2d 1042, 1067 (1978) (reasonable basis exists to support trial court's refusal to examine jurors after juror requested court to caution audience not to discuss case; court admonished members of audience not to discuss anything in the future, also, appellate court did not have content of discussions referred to by juror).

H. EXPOSURE RESULTING BY SEPARATING JURORS

1. Absent consent of parties, jury must remain together once deliberations begin

In criminal cases, the jury must remain together from the time deliberations begin until a verdict is returned, unless all parties consent to the separation and proper instructions are given. Jury Rule 29(b); Farrell v. State, 622 N.E.2d 488, 493, n.3 (Ind. 1993); Ind. Code § 35-37-2-6.

(a) Purpose of non-separation rule

The purpose of the non-separation rule is to ensure each juror's individual assessment and verdict not influenced by matters extraneous to information presented at trial. Follrad v. State, 428 N.E.2d 1201, 1202 (Ind. 1981); White v. State, 643 N.E.2d 414, 415 (Ind. Ct. App. 1994).

(b) Instructions if parties consent to separation

Before jurors are permitted to separate, court shall instruct them that while separated, they shall:

- (1) not discuss the case among themselves or with anyone else;
- (2) not talk to the attorneys, parties, or witnesses;
- (3) not express any opinion about the case; and
- (4) not listen to or read any outside or media accounts of the trial.

(c) Cannot separate foreman from other jurors

For example, see Walker v. State, 274 Ind. 224, 410 N.E.2d 1190, 1193 (1980) (reversible error for court to separate jury foreman from other jurors and talk to him in chambers, in absence of defendants, even though attorneys were present, and purpose was to determine course of action to take with reference to further deliberations).

2. Test for harmless error

Separation of jurors in the absence of parties' consent could be harmless if: (1) State satisfied its burden to prove beyond reasonable doubt deliberations not affected by separation, and (2) verdict "clearly appears to be right upon the evidence." Follrad v. State, 428 N.E.2d 1201, 1202 (Ind. 1981) (citing Walker v. State, 274 Ind. 224, 410 N.E.2d 1190, 1193 (1980)).

Particular circumstances of separation may warrant application of Walker harmless error analysis.

Treadway v. State, 924 N.E.2d 621, 629-30 (Ind. 2010) (during jury deliberations, a juror who was breast-feeding her child was allowed to leave the jury room and go to an adjacent room for twenty minutes to express breast milk in private; although jury continued to deliberate in her absence, the separation was brief and there was no showing that any juror was exposed to any prejudicial influence).

Pruitt v. State, 622 N.E.2d 469 (Ind. 1993) (State met its burden where at post-trial hearing, each juror testified that deliberations were not affected by judge permitting jurors to separate at approximately 5:00 p.m. to their individual homes and return the next morning to continue deliberation, they had no communication with anyone about case, they were in no way influenced adversely to defendant as a result of recess, and they were in no way rendered less capable of discharging their duties because of separation).

Pagan v. State, 809 N.E.2d 915, 921-22 (Ind. Ct. App. 2004) (brief separation of jurors during deliberations, caused by at least two jurors making cell phone calls to their homes, did not require reversal; calls did not pertain to any matter being considered by jury and separation did not cause defendant actual prejudice).

Gibson v. State, 271 N.E.2d 706, 709 (Ind. 1971) (not reversible error where juror separated herself briefly because of illness and record disclosed harm could not have resulted).

Bryant v. State, 246 Ind. 17, 202 N.E.2d 161 (1964) (new trial not warranted where court permitted juror to telephone home to give instructions concerning feeding of his live stock).

(a) No harmless error for significant separations without consent of parties or exigency

Indiana Supreme Court refuses to invoke harmless error rationale when circumstances make it doubtful that impartiality of jury's verdict could ever be assured. Follrad v. State, 428 N.E.2d 1201, 1202 (Ind. 1981).

Walker v. State, 410 N.E.2d 1190, 1193 (Ind. 1980) (conviction reversed where five-day separation of jurors was had in the midst of deliberations).

This rule applies even if verdict form signed prior to separation. White v. State, 643 N.E.2d 414, 416 (Ind. Ct. App. 1994).

Only compelling "exigent circumstances" warrant violation of no separation of jurors rule. Farrell v. State, 622 N.E.2d 488, 493, n.3. (Ind. 1993). The burden is upon the State to establish separation of jury due to exigent circumstances. Walker v. State, 410 N.E.2d 1190 (Ind. 1980).

(b) Waiver – accepting court's admonishment of jury

For example, see Hall v. State, 634 N.E.2d 837 (Ind. Ct. App. 1994) (waiver where court permitted jury to separate for 15 hours after deliberations had begun so that jurors could go home for evening; defendant failed to object when court announced its intention, but approved or acquiesced in separation by assuring court he was satisfied with court's admonishment).

I. USE OF CELL PHONES DURING DELIBERATIONS

"In this day and age, thanks to cell phones, most people now take it for granted that they can call or be called by anyone, anywhere, at any time. This expectation should not be carried into the jury room once deliberations have commenced, in accordance with the long-standing principle in Indiana of disfavoring the separation of jurors or having outside communications during deliberation." Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004), *disapproved of on other grounds*.

If jurors wish to separate for purpose of making calls, Indiana Jury Rule 29 should be followed, which requires consent of parties in criminal cases and admonition to jurors in all cases. Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004). There is the potential for improper outside influence of a juror if that juror telephones a family member or business associate and informs

them that the jury is still deliberating, and the family member or business associate then places implied or express pressure on the juror to hastily reach a verdict and return home or to work. Id.

1. Use of cell phone is jury separation

Cell phone use during deliberations is a jury separation and undergoes same analysis as physical separation. Pagan v. State, 809 N.E.2d 915, 920 (Ind. Ct. App. 2004), *citing* Bryant v. State, 202 N.E.2d 161 (Ind. 1964).

Ind. Code § 35-37-2-6(a)(3) requires that the bailiff in charge of jury must “not permit any person to speak or communicate with them” once deliberations have begun, and cell phone communications violates this statute. Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004).

2. Short usage – defendant must show prejudice

Where only a brief separation, defendant must demonstrate that juror or jurors were exposed to prejudicial influence or other irregular occurrence. Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004), *citing* Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988) (addressing separation of five minutes).

Pagan v. State, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004) (although improper for two jurors to make phone calls, defendant did not show that communications pertained to matter before jury or that any prejudice resulted; jurors merely attended to personal matters and behavior was not gross misconduct).

3. Jury Rule 26 – instructions re: electronic communication devices

Indiana Jury Rule 26(b) provides:

The court shall instruct the bailiff to collect and store all computers, cell phones or other electronic communication devices from jurors upon commencing deliberations. The court may authorize appropriate communications (i.e. arranging for transportation, childcare, etc.) that are not related to the case and may require such communications to be monitored by the bailiff. Such devices shall be returned upon completion of deliberations or when the court permits separation during deliberations. Courts that prohibit such devices in the courthouse are not required to provide this instruction. All courts shall still admonish jurors regarding the limitations associated with the use of such devices if jurors are permitted to separate during deliberations.

Lyons v. State, 993 N.E.2d 1192 (Ind. Ct. App. 2013) (no fundamental error from failing to order bailiff to take electronic devices from jurors, where trial court had previously instructed jurors not to use such devices; court presumes jurors follow instructions unless there is evidence to contrary).

J. THREATENING COMMENTS TO JUROR’S WIFE

For example, see Daniels v. State, 264 Ind. 490, 346 N.E.2d 566, 569 (1976) (no abuse of discretion in interrogating jurors as to whether they had heard anything concerning trial or had discussed trial with anyone, even though one male juror had knowledge that his wife had been threatened, and court did not admonish juror not to discuss matter with other jurors).

K. ALTERNATE JUROR’S PARTICIPATION IN DELIBERATIONS

While Indiana Rule of Evidence 606(b) does not allow a juror to testify about any statement made or incident that occurred during the jury’s deliberations, one of the exceptions allows a juror to testify about whether an outside influence was improperly brought to bear on any juror; under this exception, an alternate is an outside influence for purposes of the rule.

Wahl v. State, 51 N.E.3d 113 (Ind. 2016) (erroneous denial of motion for mistrial based on alternate juror's misconduct, based on fact he immediately involved himself in the jury deliberations and manipulated physical evidence and a DVD).

L. LINDSEY TEST –DETERMINING POTENTIAL EXPOSURE DURING TRIAL

Guidelines for dealing with areas of possible prejudicial influence on jurors: (1) juror to be individually interrogated by court, outside presence of other jurors; (2) to determine degree of exposure and likely effect; (3) after interrogation, court individually admonishes juror; and (4) assembles jury and collectively admonish. Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819 (1973); Shipley v. State, 620 N.E.2d 710, 713 (Ind. Ct. App. 1993); and Jury Rule 24.

Initially, the Lindsey procedure applied to prejudicial publicity. Now it is applied to other areas of possible prejudicial influence on jurors. Gee v. State, 271 Ind. 28, 389 N.E.2d 303, 313 (1979); Flowers v. State, 738 N.E.2d 1051, 1057-58 (Ind. 2000).

Indiana Jury Rule 24 requires trial court to question a juror after receiving information that the juror may have “personal knowledge about the case.” If the court finds that the juror “has personal knowledge of a material fact,” the court apparently has no discretion to give a curative instruction but must discharge the juror.

1. Bring to attention of court

Bring jurors' exposure to improper and prejudicial influence to attention of trial judge.

2. Court determines likelihood of resulting prejudice

Court determines risk of prejudice based upon: (1) content of the publication; and (2) likelihood it came to attention of any juror. Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819, 824 (1973).

If either factor is absent or only minimally present, then no substantial likelihood of prejudice exists, and trial court need not further inquire. Bruce v. State, 268 Ind. 180, 375 N.E.2d 1042, 1063 (1978).

Jarvis v. State, 441 N.E.2d 1, 7 (Ind. 1982) HN 2 (court required to act only if there has been presented some basis for reasonable belief that one or more of jurors has been exposed to potentially harmful publicity);

Ridenour v. State, 639 N.E.2d 288, 292 (Ind. Ct. App. 1994) (court not required to employ Lindsey procedure if no basis for believing jury may have been subjected to improper stimuli; no evidence juror discussed her problem with other jurors, she testified she was unable to discuss it with anyone, no evidence she came into contact with other jurors on the morning she determined she was incapable of remaining impartial).

(a) Poll jury where risk of prejudice appears substantial

If risk of prejudice appears substantial, court should interrogate jury collectively to determine if anyone has been exposed: (1) if any juror exposed, court must individually interrogate juror outside presence of other jurors, to determine degree of exposure and likely effect; (2) after interrogation, each exposed juror should be individually admonished; (3) jury should be assembled and collectively instructed upon hazards of exposure and necessity for avoiding exposure to out-of-court comment concerning the case; and (4) imperiled party should move for mistrial, if he deems such action insufficient to remove the peril. Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819, 824 (1973).

Tatusko v. State, 990 N.E.2d 986 (Ind. Ct. App. 2013) (failure to ask trial court to interrogate prospective jurors about potentially prejudicial statements by one prospective juror during voir dire was reasonable strategic decision).

(b) Instruct jury where no exposure found

If court determines no exposure, it should instruct upon hazards of exposure and necessity for avoiding exposure to out-of-court comment concerning the case. Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819 (1973).

(c) Court must individually question tainted jurors

Court must individually question jurors exposed to prejudicial information or risk contaminating the entire jury, including those who may have not been exposed to the information. Stroud v. State, 787 N.E.2d 430 (Ind. Ct. App. 2003).

Holden v. State, 916 N.E.2d 223 (Ind. Ct. App. 2009) (although trial court spoke with witness regarding his communication with juror outside presence of jury, it committed harmless error in failing to speak with juror outside presence of other jurors pursuant to Jury Rule 24).

3. Reversible error where denial of motion to interrogate

Reversible error only if appellate court can say there has been substantial peril. Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819, 824 (1973).

4. Reversible error where failure to poll at proper time

For example, see Lindsey v. State, *supra* (judge's failure to have jury polled at proper time violated defendant's right to fair trial, where judge continued trial and relied upon post-verdict voir dire of jury to determine which jurors had been exposed to highly prejudicial newspaper article).

5. Review of denial of mistrial

If jury has been interrogated and admonished, court may deny mistrial unless "it can be said, after giving the decision of the trial judge the benefit of all reasonable doubt that the peril was such as to be incurable by instruction." Seeley v. State, 547 N.E.2d 1089 (Ind. 1989).

III. PROCEDURES TO RAISE ISSUE OF JUROR MISCONDUCT OR REMOVE JUROR

A. PROCEDURE FOR RAISING JUROR MISCONDUCT DURING TRIAL

1. Object before return of verdict

If defendant has knowledge of misconduct before return of verdict, must object at first opportunity - without showing of sufficient excuse for failure to object, presumption is that defendant acquiesced - cannot wait until jury returns unfavorable verdict. Messenger v. State, 52 N.E. 147 (Ind. 1899).

United States v. Krohn, 560 F.2d 293, 297 (7th Cir. 1977), *cert. den'd* (where defense counsel did not request action on sleeping juror, issue was waived; court disapproved of "gamesmanship" of waiting to hear verdict before raising issue).

Bowman v. State, 207 Ind. 358, 369, 192 N.E. 755 (1934) (error waived where defense counsels' affidavits showed they knew before return of verdict that bailiff had gone back and forth in jury room to carry information).

Norton v. State, 137 N.E.3d 974 (Ind. Ct. App. 2019) (error in failing to remove juror who was closely related to multiple people involved in trial waived where defense counsel did not move to strike juror after juror informed court of familial relationship).

2. Present specific evidence showing possibility of bias

Defendant seeking hearing on misconduct must raise question of possible misconduct by presenting some specific, substantial evidence showing juror was possibly biased. Fuquay v. State, 583 N.E.2d 154, 157 (Ind. Ct. App. 1991).

Smith v. State, 486 N.E.2d 465, 469 (Ind. 1985) (defendant did not adequately raise bias and prejudice of juror by motion to correct errors that did not disclose source of information nor identify content of remark).

3. Hearing to determine bias or prejudice

If defendant successfully raises question of possible bias or misconduct, where discovery of possible prejudice made after voir dire but prior to rendering decision, judge must hold hearing out of presence of remainder of jury to determine, among other things, whether juror's inaccurate response indicated bias or lack of disinterest. Stevens v. State, 265 Ind. 396, 354 N.E.2d 727 (1976).

Phillips v. State, 22 N.E.3d 749 (Ind. Ct. App. 2014) (instead of revealing identity of and permitting counsel to question juror who asked question that defendant argued indicated bias against him, trial court did not abuse discretion in giving curative instruction informing jury not to reach a conclusion on guilt or innocence until all evidence was presented and deliberations began).

(a) Defendant must make prima facie showing

Defendant has burden of proof to present specific, substantial evidence of bias or prejudice. Martin v. State, 535 N.E.2d 493 (Ind. 1989).

Lopez v. State, 527 N.E.2d 1119 (Ind. 1988) (defendant did not present prima facie case of misconduct, even though step-daughter of juror testified that juror knew defendant prior to trial, juror discussed case with other jurors prior to deliberation, juror read newspaper articles about case during trial, and juror's husband told her that defendant was guilty - no showing of impact on verdict because shortly before deliberations began juror said she did not know how she was going to vote).

Fuquay v. State, 583 N.E.2d 154, 157 (Ind. Ct. App. 1991) (in drug offense case, no evidence to support claim of misconduct where defendant presented affidavit that juror's daughter had been convicted of drug offense and offered record of a woman's drug conviction - documents did not establish that the woman named was juror's daughter).

Barnett v. State, 916 N.E.2d 280 (Ind. Ct. App. 2009) (denial of mistrial affirmed where juror rolled her eyes and prematurely formed opinion prior to close of evidence but did not share it with other jurors).

(b) State must refute defendant's evidence

Once defendant makes prima facie case, the State has the burden of going forward to refute defendant's evidence. Atkinson v. State, 411 N.E.2d 651 (Ind. Ct. App. 1980).

(c) Exception – ex parte communications

It is well established that if a juror is involved in out-of-court communications, it creates a rebuttable presumption of prejudice. Such misconduct must be based upon proof, by

preponderance of evidence, that extra-judicial contact or communication occurred relating to matter pending before jury. Spears v. State, 811 N.E.2d 485 (Ind. Ct. App. 2004); see also Griffin v. State, 754 N.E.2d 899, 901 (Ind. 2001).

For details on ex parte communications, see *Out-of-court communications or contact*, section I.B., above.

4. Decision within court's discretion

Issue of juror misconduct within trial court's discretion. Reviewed only to determine abuse. Lopez v. State, 527 N.E.2d 1119, 1130 (Ind. 1988).

Defendant is entitled to a new trial upon proof: (1) juror was biased against defendant; or (2) lied on voir dire. There must be a showing that misconduct was gross and probably harmed defendant. Lopez v. State, 527 N.E.2d 1119, 1130 (Ind. 1988) and Dickenson v. State, 732 N.E.2d 238, 241 (Ind. Ct. App. 2000).

Johnson v. State, 518 N.E.2d 1073, 1079 (Ind. 1988) (evidence presented did not reveal irregularity meriting new trial where defendant's fiancée heard one juror say to another during trial "he was guilty." Fiancée never informed anyone of incident prior to conclusion of trial, did not know who jurors were, and did not know to whom statement referred).

B. PROCEDURE FOR RAISING JUROR MISCONDUCT AFTER TRIAL

If defendant was unaware of misconduct and made no objection, to preserve juror misconduct for appeal:

- (1) Mandatory filing of Motion to Correct Error alleging juror misconduct, supported by affidavit. See *Indiana Rules of Criminal Procedure, Rules 16 & 17*.
- (2) Use affidavit to show how defendant prejudiced by juror misconduct. Merry v. State, 335 N.E.2d 249, 268 (Ind. Ct. App. 1975).
- (3) Affidavit based upon personal knowledge of affiant. See *Indiana Rules of Civil Procedure, Rule 11(C)*.

1. May not impeach verdict

Testimony and affidavits by jurors will not be received to impeach their verdict. Stinson v. State, 262 Ind. 189, 313 N.E.2d 699 (1974) and Bockting v. State, 591 N.E.2d 576, 579 (Ind. Ct. App. 1992).

Pursuant to Indiana Rule of Evidence 606(b), "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters."

Hall v. State, 760 N.E.2d 688 (Ind. Ct. App. 2002) (defendants are not guaranteed right to depose jurors in matters of juror misconduct; rather, this discovery method should be used only in most appropriate situations; more common method of dealing with juror misconduct is for trial court to conduct in camera interviews, although decision is best left to trial court's discretion).

Williams v. State, 757 N.E.2d 1048, 1059-61 (Ind. Ct. App. 2001) (juror's affidavit may not be used to challenge verdict by showing intra-jury influences such as fact that jurors discussed case among themselves before deliberations, showed notepads to one another, or considered fact that defendant did not testify).

Juror may give testimony as to what transpired during trial, including deliberations. Fox v. State, 457 N.E.2d 1088, 1093 (Ind. 1984), *citing* Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Practice pointer: Other jurisdictions will allow affidavits concerning whether the jury misrepresented whether they could follow the instructions. *See* Ida v. U.S., 191 F.Supp. 2d 426 (S.D.N.Y. 2002); State v. Furutani, 873 P.2d 51 (Haw. 1994).

2. Exceptions for intoxication, outside information, and outside influence

Indiana Rules of Evidence 606(b) provides in part: “[a] juror may testify about whether: (A) any juror’s drug or alcohol use; (B) extraneous prejudicial information was improperly brought to the jury’s attention; (C) an outside influence was improperly brought to bear on any juror; or (D) a mistake was made in entering the verdict on the verdict form.”

(a) Drug or alcohol use by juror

See Consumption of alcoholic beverages, section I.C.

(b) Exposure to improper, prejudicial material

Juror may impeach own verdict when: (1) evidence shows jury exposed to improper, extrinsic material during deliberations; and (2) substantial possibility exists verdict prejudiced by improper material. Fox v. State, 457 N.E.2d 1088, 1093 (Ind. 1984) and Lindsey v. State, 295 N.E.2d 819 (Ind. 1973).

Bockting v. State, 591 N.E.2d 576, 579 (Ind. Ct. App. 1992) (defendant did not show substantial possibility verdict prejudiced by juror bringing medical book and dictionary into jury room; jurors who looked at books testified decision was not influenced by either book).

See generally Possible prejudicial influences on jury, section III., above and relevant sections in part I, *supra*.

(c) Exposure to improper outside influence

See Out-of-court communication or contact, section I.B., above.

C. REMOVAL OF JUROR

1. Trial court must justify removal on record

Unjustified removal of a juror is a structural error, just as much as denial of the right to an impartial jury. To establish that right is not infringed, trial court must establish a carefully developed record to support removal of the deliberating juror. Riggs v. State, 809 N.E.2d 322 (Ind. 2004); Scott v. State, 829 N.E.2d 161 (Ind. Ct. App. 2005).

Durden v. State, 99 N.E.3d 645 (Ind. 2018) (structural error occurred in removing juror during deliberations because trial court made no record to justify removal and took no precautionary steps).

2. Court must avoid affecting juror’s judgment during questioning

Inquiry into need to remove juror must avoid affecting juror’s judgment, as juror may continue to serve on panel. Riggs v. State, 809 N.E.2d 322, 329 (Ind. 2004).

3. Instruction should be given

Removal of a juror should be accompanied by an instruction that removal in no way reflects approval or disapproval of the views expressed by the dismissed juror. Riggs v. State, 809

N.E.2d 322, 329 (Ind. 2004). Riggs does not mandate an instruction in all cases. Rector v. State, 826 N.E.2d 12 (Ind. Ct. App. 2005).

Walker v. State, 988 N.E.2d 341 (Ind. Ct. App. 2013) (trial court erred in failing to instruct jury that removing a juror did not reflect its opinion on the merits of the juror's vote to acquit).

4. Court cannot remove impartial juror

Removing an impartial juror who has voted to acquit based upon the evidence presented at trial and on the juror's life experiences gravely imperils a defendant. Gavin v. State, 671 N.E.2d 440, 447 (Ind. Ct. App. 1996).

Gavin v. State, *supra* (reviewing lengthy portions of record, appellate court determined that although isolated portions of record could be read as supporting juror bias, record as a whole supports conclusion that juror was not unduly influenced by life experiences, including knowledge of prior case where innocent person was wrongly convicted of crime; because juror was able to make impartial decision about defendant's guilt, trial court erred in dismissing juror).

5. Timing of removal of juror

(a) Significant leeway to remove juror before or during trial

Trial court has significant leeway in determining whether to remove a juror prior to end of trial. Riggs v. State, 809 N.E.2d 322 (Ind. 2004); Jervis v. State, 679 N.E.2d 875, 881 (Ind. 1997); Harris v. State, 659 N.E.2d 522, 525 (Ind. 1995).

Phillips v. State, 22 N.E.3d 749 (Ind. Ct. App. 2014) (no basis to remove juror, where, after complaining witness in child molesting prosecution testified, the juror sent a question to trial court expressing concern for C.W. "implicating someone he has been so close to" and "telling the truth has hurt someone who has been like a grandfather to him." Juror asked whether courts ever order counseling for children in these situations; held, juror's question did not indicate bias in favor of or against a particular verdict, thus removal was not necessary for integrity of process);

Walker v. State, 988 N.E.2d 341 (Ind. Ct. App. 2013) (no abuse of discretion in replacing juror 271, the only African American juror, where he was late, could not be reached and arrived during closing argument after a lengthy bus delay).

Gridley v. State, 121 N.E.3d 1071 (Ind. Ct. App. 2019) (removal of juror for sleeping during trial was not abuse of discretion where trial court questioned juror, confirmed juror had been sleeping, explained reason for juror's dismissal to other jurors, and alternate juror was present and, presumably, awake and deliberations had not begun).

(b) Removal during deliberations warranted only in extreme situations

Removal of a seated juror after deliberations have begun, based on conduct in jury room, implicates defendant's right to a unanimous verdict and right to a jury trial. Once deliberations begin, discharge is warranted only in most extreme situations where it can be shown that removal of juror is necessary for the integrity of the process, does not prejudice deliberations of the rest of the panel, and does not impair the parties' right to a trial by jury. Riggs v. State, 809 N.E.2d 322, 327 (Ind. 2004).

Durden v. State, 99 N.E.3d 645 (Ind. 2018) (trial court committed structural error in removing juror during deliberations, on grounds she was "subverting the integrity of the process," because court did not interview juror and record on appeal provided no basis to determine whether removal was justified).

Scott v. State, 829 N.E.2d 161 (Ind. Ct. App. 2005) (trial court abused its discretion in dismissing juror who equivocated and referred often to his own life experiences during deliberations; failure to agree, however unreasonable, is a ground for mistrial and not removal).

Wright v. State, 12 N.E.3d 314 (Ind. Ct. App. 2014) (trial court erred in replacing a juror based on the conclusion that he "refused to deliberate" simply because he would not change his vote to acquit, based on his determination the victim was not credible).

Leslie v. State, 978 N.E.2d 486 (Ind. Ct. App. 2012) (trial court did not abuse its discretion in removing juror after deliberations began where juror said she could not overcome her discomfort with deciding whether defendant was innocent or guilty, making her unable to make a decision).

Rector v. State, 826 N.E.2d 12 (Ind. Ct. App. 2005) (no error in dismissing juror after deliberations had begun, where juror brought a booklet into jury room entitled "Citizens Rule Book," which could be mildly described as libertarian in tone, with anti-communist, religious references).

LeFlore v. State, 823 N.E.2d 1205 (Ind. Ct. App. 2005) (juror properly removed during deliberations after communicating to trial court that she could not continue because she could not "determine somebody's fate" and was unable to vote her conscience).

6. Varying appellate standard of review

Standard of review of the removal of a juror and replacement with an alternate depends on the timing of the removal. Riggs v. State, 809 N.E.2d 322 (Ind. 2004).

(a) More deference if removed from panel or during trial

Reversal of removal of juror before or during trial is granted only for an abuse of discretion. Riggs v. State, 809 N.E.2d 322 (Ind. 2004); Jervis v. State, 679 N.E.2d 875, 881 (Ind. 1997); Harris v. State, 659 N.E.2d 522, 525 (Ind. 1995).

Spears v. State, 811 N.E.2d 485, 488 (Ind. Ct. App. 2004) (incident leading to possible dismissal of juror occurred during recess in trial, prior to deliberations, so trial court's decision reviewed only for abuse of discretion).

Gridley v. State, 121 N.E.3d 1071, 1075 n.9 (Ind. Ct. App. 2019) (declining to apply less deferential standard of review simply because removal occurred "late in the presentation of evidence" because it was nevertheless before deliberations).

(b) Less deference if removed during deliberations

Closer review of decision to remove dissenting juror during deliberations. Although appellate court should still have deference to trial court's judgment, such a removal requires a carefully developed record as to grounds for removal and precautions to avoid inappropriate consequences from the removal. Riggs v. State, 809 N.E.2d 322, 327 (Ind. 2004). See also State v. Adams, 727 A.2d 468 (N.J. Super. Ct. App. Div. 1999) (mistrial is required if discharge occurs after deliberations begin); Durden v. State, 99 N.E.3d 645 (Ind. 2018) (trial court committed structural error by not following Riggs).