CHAPTER 16

JUDGMENT ON EVIDENCE / INVOLUNTARY DISMISSAL

Table of Contents

CHAPTER 16
JUDGMENT ON EVIDENCE / INVOLUNTARY DISMISSAL

I. OVERVIEW

A. FOR JURY TRIALS – T.R. 50

1. Always make T.R. 50 motion at conclusion of State's case

Always make motion for judgment on the evidence at conclusion of State's case.

State your grounds with specificity.

It is proper to make motion any time, even for the first time on appeal.

See II.B, below.

2. Court should grant if lack of evidence on any element

The court should grant the motion if there is a lack of evidence on any element of the offense.

Court must look at the evidence in the light most favorable to the State and cannot weigh the evidence or judge the credibility of the witnesses.

See II.D, below.

3. Presenting evidence following denial of motion waives error

Presentment of any evidence following denial of the motion will waive error for appellate review.

See II.C., below.

4. Do not permit court to reserve ruling on the motion

See II.A.5., below.

B. BENCH TRIAL – T.R. 41 (B)

Consider making the motion to see if the judge may reveal, in comments, what the court considers critical points or issues.

See III. below.

II. JURY TRIALS – T.R. 50 MOTION FOR JUDGMENT ON EVIDENCE

Motion for judgment on evidence relates exclusively to jury trials and addresses whether there is sufficient evidence to justify submitting case to jury. See T.R. 50(A).

Note: Motion for judgment on the evidence is essentially the same as a motion for a directed verdict or a motion for a judgment of acquittal. See Espinoza v. State, 859 N.E.2d 375, 385 (Ind. Ct. App. 2006).

Kuchel v. State, 570 N.E.2d 910, 914-15 (Ind. 1991) (defendant's motion for a "directed verdict of acquittal" treated as motion for judgment on the evidence).

A. WHERE MOTION APPROPRIATE

1. To test sufficiency

T.R. 50 entitles defendant to make motion for judgment on evidence where all or some of issues not supported by sufficient evidence.

Indiana Rules of Criminal Procedure, Rule 21 makes civil trial rules applicable in criminal cases so far as they are not in conflict with criminal rules. See also Pinkston v. State, 163 Ind. App. 633, 325 N.E.2d 497 (1975).

2. State grounds when making motion

Motion or request for judgment on evidence shall state reasons for motion but does not need to be accompanied by peremptory instruction or prayer for particular relief. T.R. 50(D).

3. Make and record motion at sidebar

May be some adverse effect of jury hearing judge deny your contention that prosecution's case insufficient.

> United States v. DiHarce-Estrada, 526 F.2d 637 (5th Cir. 1976) (judge's refusal to excuse jury or hear motion at sidebar, over defendant's objection, might give rise to reversible error in light of attendant prejudice to defendant).

4. Request ruling outside jury's presence

Ruling on motion for directed verdict and whether charge sufficient to go to jury does not disclose judge's opinion as to guilt. However, ruling in presence of jury may be prejudicial or improper influence. Appellate court assesses judge's alleged prejudicial conduct to discern whether conduct was improperly impressed upon jury to taint their decision.

> Gordon v. State, 645 N.E.2d 25, 27-28 (Ind. Ct. App. 1995) (defendant alleged judge improperly created impression defendant guilty of lesser included offense by granting directed verdict for robbery as Class A felony but permitting robbery charge to remain as Class C felony; allegation was unsupported).

5. Insist that judge rule promptly

Politely, but firmly, insist on ruling on motion at time motion made. Some judges, particularly in bench trials, attempt to reserve ruling until close of evidence. Occasionally, prosecutors ask court to "hold open" State's case-in-chief because of problems with an exhibit or because some witness on formal point has been delayed.

Delay in ruling is error because it denies defendant right to have judicial determination of legal sufficiency of State's case before defendant obliged to put on defense. Jackson v. United States, 250 F.2d 897 (5th Cir. 1958); Cooper v. United States, 321 F.2d 274 (5th Cir. 1963).

(a) Evidence offered by defendant may be used against her

Any evidence defendant presents may be used against her, if it fills gaps in or corroborates State's case. Error of judge in denying motion for directed verdict deemed corrected by evidence thereafter offered or admitted. T.R. 50(A)(6).

(b) Violation of presumption of innocence

Effect of reserving ruling can be devastating in close case and reserving ruling should be resisted on ground presumption of innocence comports "the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced

evidence and effected persuasion.'" Taylor v. Kentucky, 436 U.S. 478, 483 n.12, (1978).

6. Court's action shall be shown by order book entry

The court's action in directing or refusing to direct a verdict shall be shown by order book entry; error may be predicated upon such ruling or upon the giving or refusing to give a written instruction directing the verdict. Ind. Crim. Rule 8€.

The manner of objecting to such instructions, of saving questions thereon, and making the same a part of the record shall be the same as in Rule 51(C) of the Rules of Trial Procedure. Ind. Crim. Rule 8(H).

B. TIMELINESS OF MOTION (OPPORTUNITIES TO MAKE MOTION)

1. When defendant is entitled to move

Defendant entitled to move for judgment on evidence: (1) after prosecution has completed its evidence; (2) after close of all of evidence upon any one or more issues; (3) after all of evidence in case has been presented and before judgment; (4) in motion to correct errors; or (5) upon appeal for the first time. Trial Rule 50(A).

2. When court may enter judgment on evidence

The court may enter judgment on evidence: (1) on its own motion at any time prior to final judgment; (2) before filing of notice of appeal; or (3) if motion to correct error made, at any time before entering its order or ruling. Trial Rule 50(A)(6).

3. After State's opening statement, State has opportunity to correct defect

If in opening statement the State omits an essential element of the case, defendant's motion for directed verdict will not be granted without giving State an opportunity to correct the defect by adding any omissions. Chatman v. State, 164 Ind. App. 97, 326 N.E.2d 839 (1975); Jackson v. United States, 515 A.2d 1133, 1135 (D.C. 1986).

U.S. v. Graham, 146 F.3d 6 (1st Cir. 1998) (decision to grant a motion for acquittal after a prosecutor's opening statement is discretionary and should be made only where the statement contains a clearly admitted fact that must defeat its case).

4. Close of State's case is best time to move for directed verdict

Generally recommended to move for directed verdict after prosecution has presented case-in-chief. Samaniego v. State, 553 N.E.2d 120 (Ind. 1990).

Practice Pointer: Counsel should never neglect to make a motion at the close of State's case-in-chief.

5. At close of all evidence, make renewed motion

Renewed motion for directed verdict routinely made at close of all evidence.

6. After mistrial or discharge of jury

Court may enter directed verdict of acquittal under T.R. 50 where: (1) no verdict returned; and (2) after declaration of mistrial and discharge of jury. State v. Lewis, 429 N.E.2d 1110 (Ind. 1981).

7. Before final judgment or before ruling on Motion to Correct Error

T.R. 50(A)(6) provides: "the trial court upon its own motion may enter such a judgment on the evidence at any time before final judgment, . . . or, if a Motion to Correct Error is made, at any time before entering its order or ruling thereon."

8. First time on appeal

T.R. 50(A)(5) provides in part that party "may raise the issue upon appeal for the first time in criminal appeals but not in civil cases. . . ." See also McGowan v. State, 267 Ind. 16, 366 N.E.2d 1164 (1977), *overruled in part on other grounds*, 853 N.E.2d 470 (Ind. 2008) See also Harrison v. State, 469 N.E.2d 22, 24 (Ind. Ct. App. 1984).

C. WAIVER OF APPEAL OF DECISION NOT TO GRANT J.O.E. – G.5.C

Waiver may occur by: (1) introducing evidence after motion is denied; (2) failing to make a record of the motion; and (3) failing to state the grounds for the motion.

1. Introducing evidence after motion denied

Defendant waived alleged erroneous refusal to grant his motion at close of State's case-in-chief by presenting evidence on his own behalf. Snyder v. State, 655 N.E.2d 1238, 1239, n.2 (Ind. Ct. App. 1995); Bush v. State, 176 Ind. App. 164, 374 N.E.2d 564 (1978).

DeWhitt v. State, 829 N.E.2d 1055, 1063-64 (Ind. Ct. App. 2005) (questioning the rationality of the rule that requires a defendant to choose between standing on a motion for judgment on the evidence or waiving the motion by presenting a defense).

(a) Exception – co-defendant who puts on evidence cannot waive right of other defendant

Co-defendant who presents evidence in his own defense cannot waive right of other defendant; if the other defendant rests without presenting evidence on his own behalf, the defendant may appeal denial of directed verdict. United States v. Lopez, 576 F.2d 840, 843 (10th Cir. 1978); United States v. Arias-Diaz, 497 F.2d 165 (5th Cir. 1974).

(b) Court reserves ruling on motion

When trial court considers the defendant's motion for judgment on the evidence and reserves decision on the motion until after the defendant's evidence is presented, this "does not thereby shift the burden of proof to the defendant." Trimble v. State, 842 N.E.2d 798 (Ind. 2006).

2. Failing to make record of motion

Waiver can occur where there is no record of the tendered motion to the trial court following the presentation of evidence. Widner v. State, 391 N.E.2d 1199 (Ind. Ct. App. 1979).

3. Failing to state grounds for motion

Must state grounds for motion specifically at time motion made. T.R. 50(D).

D. COURT'S DECISION TO GRANT OR DENY

1. Sufficiency standard

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. Ind. Trial Rule 50(A).

State v. Goodrich, 504 N.E.2d 1023, 1024 (Ind. 1987) (standard applies to criminal case).

(a) Test for granting motion

Motion may be granted only if: (1) total absence of evidence on an element of the offense; or (2) evidence presented is without conflict and susceptible of only one inference which is in favor of the accused. Scott v. State, 632 N.E.2d 761 (Ind. Ct. App. 1994); Pavlovich v. State, 6 N.E.3d 678 (Ind. Ct. App. 2014).

State v. Vorm, 570 N.E.2d 109 (Ind. Ct. App. 1991) (directed verdict proper where evidence insufficient to establish prima facie case for submission to jury).

(b) State's showing to avoid motion

State need only present a prima facie case to avoid motion for judgment on evidence. Hopper v. State, 539 N.E.2d 944, 946 (Ind. 1989); Carter v. State, 471 N.E.2d 1111 (Ind. 1984).

In regard to T.R. 50, "prima facie case" refers to determination that State has offered evidence on each element of offense charged. Kimbrough v. State, 622 N.E.2d 230, 232 (Ind. Ct. App. 1993). "Prima facie" means such evidence as is sufficient to establish a given fact and which will remain sufficient if uncontradicted. Hollowell v. State, 707 N.E.2d 1014, 1019 (Ind. Ct. App. 1999).

Motion for a directed verdict should be denied if evidence of each element or inconsistent possible inferences has been presented. State v. McKissack, 625 N.E.2d 1246, 1248 (Ind. Ct. App. 1993).

State v. Hill, 688 N.E.2d 1280, 1284 (Ind. Ct. App. 1997) (trial court erred in granting judgment on the evidence for charge of carrying handgun without a license, as State presented evidence that supported inference that defendants actually possessed handgun, even though court thought evidence could only establish constructive possession).

2. Consider evidence introduced prior to motion

Court must consider only evidence introduced at time motion made. Consequently, if motion made subsequent to submission of all evidence, then trial court must consider *all* of evidence in favor of State. Haines v. State, 545 N.E.2d 834 (Ind. Ct. App. 1989).

3. Determining whether State failed to establish essential element of crime

Court considers only evidence favorable to the State and all reasonable inferences therefrom. Bryant v. State, 498 N.E.2d 397 (Ind. 1986). See also Herron v. State, 61N.E.3d 1246 (Ind. Ct. App. 2016).

State v. Boadi, 905 N.E.2d 1069 (Ind. Ct. App. 2009) (motion for directed verdict must be granted when there is a total absence of evidence upon some essential issue or there is no conflict in the evidence, and it is susceptible of but one inference which is in favor of the accused).

4. Cannot weigh evidence

Invades province of jury for judge to direct verdict where determination of issue involves weighing evidence or credibility of witnesses. State v. Goodrich, 504 N.E.2d 1023, 1024 (Ind. 1987).

State v. McKissack, 625 N.E.2d 1246, 1248 (Ind. Ct. App. 1993) (judge improperly weighed evidence when, explaining decision to grant motion, he pointed to

inconsistencies among witness statements and "lack of credible evidence to convict the defendant of this offense.").

(a) Cannot apply "Thirteenth juror standard"

'Thirteenth juror standard,' which allows judges to weigh credibility and weigh evidence, cannot be applied in granting T.R. 50 motion for judgment on evidence. Lewis v. State, 429 N.E.2d 1110, 1114 (Ind. 1981); Taylor v. State, 863 N.E.2d 917 (Ind. Ct. App. 2007); and State v. Hollars, 887 N.E.2d 197 (Ind. Ct. App. 2008).

Note: Thirteenth juror concept found in T.R. 59(J)(7) and refers to judge making finding that verdict against weight, as opposed to sufficiency, of evidence. Wilson v. State, 521 N.E.2d 363, 366 (Ind. Ct. App. 1988).

Tancil v. State, 956 N.E.2d 1204 (Ind. Ct. App. 2011) (trial court did not abuse its discretion in denying defendant's T.R. 59(J)(7) motion for a new trial on attempted murder count, as evidence, if believed, was more than sufficient to support jury's verdict).

(b) Exception – Incredible dubiosity rule

Rare exception to rule against re-weighing evidence and credibility of witnesses on sufficiency challenge. The rule has been applied to appellate review, and it is undecided whether trial courts have discretion to use. (See *Exception – incredible dubiosity rule,* section G.2. below).

5. Examples of insufficiency

(a) Identification

Dunn v. State, 260 Ind. 142, 147, 293 N.E.2d 32, 35 (1973) (reversible error in denying directed verdict where no direct evidence to link accused to murder, defendant identified by victim of assault and robbery in same location where decedent took walk from which he did not return but defendant not shown to have been in area on day decedent did not return; State's evidence did nothing more than tend to establish mere suspicion of guilt);

Caudle v. State, 404 N.E.2d 57 (Ind. Ct. App. 1980) (error in failing to grant directed verdict where State failed to produce any evidence identifying defendant as person who committed check deception; exhibit was check marked insufficient funds with defendant's name, residence and social security number printed on it).

(b) Converting plasma into blood alcohol level

Melton v. State, 597 N.E.2d 359 (Ind. Ct. App. 1992) (error in not granting directed verdict where State failed to prove weight of alcohol in accused's blood; medical technologist testified plasma sample contained 0.167 milligrams of alcohol per deciliter and State failed to produce any evidence to convert result of plasma test into amount of alcohol by weight in whole blood).

(c) Evidence of flight insufficient for theft

Martin v. State, 157 Ind. App. 380, 381, 300 N.E.2d 128 (1973) (error in not granting directed verdict where State failed to introduce evidence of each and every element of theft; State merely showed evidence of flight which failed to establish defendant obtained or exerted unauthorized control over money changer).

(d) Presence of metabolites not prima facie evidence of possession

State v. Vorm, 570 N.E.2d 109 (Ind. Ct. App. 1991) (presence of metabolites in urine, alone, does not constitute prima facie evidence of knowing and voluntary possession of cocaine, and therefore it was proper for trial court to grant directed verdict).

(e) Crime occurred in different county

Crowder v. State, 398 N.E.2d 1352, 1356 (Ind. Ct. App. 1980) (error in failing to sustain motion for acquittal at close of State's case where no evidence defendant in possession of marijuana in prosecution for possession in Posey County; only possible possession of marijuana established by evidence was defendant smoked "joint" in Vanderburgh County).

(f) Insufficient evidence in gun prosecutions

Miller v. State, 616 N.E.2d 750 (Ind. Ct. App. 1993) (error to deny directed verdict at close of State's case where defendant charged with confinement "while armed with a deadly weapon, namely, a handgun" but record indicated pellet gun used to commit crime and statute defines handgun as firearm; conviction vacated and remanded with instructions to sentence defendant for lesser included offense of confinement);

State v. Cox, 256 Ind. App. 548, 297 N.E.2d 920 (1973) (proper to direct verdict against State where defendant charged with carrying pistol without license in motor vehicle; total lack of evidence on issue of whether defendant "carried" pistol in vehicle, as officer merely testified pistol found in tackle box in trunk of defendant's car when car was parked next to residence, and there was no evidence to show car had been driven or moved while pistol was in it).

(g) Accomplice liability for murder

Kelly v. State, 719 N.E.2d 391 (Ind. 1999) (judgment on evidence proper as to murder conviction of third victim, where defendant had left scene prior to shooting and there was complete lack of evidence that confrontations and murders were anything other than spontaneous and spur of moment).

(h) Intent for voluntary manslaughter

State v. Sullivan, 240 Ind. 274, 276, 163 N.E.2d 745 (Ind. 1960) (directed verdict of acquittal proper where State did not show manslaughter was committed or show sufficient criminal intent of defendant; evidence showed that during argument between defendant and husband, husband went into kitchen, brought back knife, and in skirmishing for knife, both husband and defendant had their hands on knife; defendant had knife in her hands as husband fell, and as result of fall husband died).

(i) Uncorroborated testimony of single witness

Leyva v. State, 971 N.E.2d 699 (Ind. Ct. App. 2012) (Baker, J., dissenting from opinion affirming child molesting conviction on basis that child's testimony at trial runs counter to human experience, was uncorroborated and showed a motive to lie; noting that "we should be vigilant when a conviction is obtained on the basis of one eyewitness, so that we do not execute an injustice" and "it is time to consider whether the court should require corroborating evidence when these types of offenses are supported only by the testimony of a single witness").

(j) Apartment stairway not public place

State v. Culp, 433 N.E.2d 823 (Ind. Ct. App. 1982) (proper to grant directed verdict in motion to correct errors in trial for public intoxication; State failed to show defendant in "public place or place of public resort" where defendant appeared intoxicated seated near top of stairway leading to second floor of apartment building).

(k) Possession/constructive possession

Edwards v. State, 385 N.E.2d 496 (Ind. Ct. App. 1979) (insufficient evidence to establish actual or constructive possession of drugs discovered by police in butter compartment of refrigerator in defendant's apartment in which he lived with two others, where many visitors had access to fridge at party two days before discovery of drugs and evidence was presented that defendant was only a margarine user).

But see Goffinet v. State, 775 N.E.2d 1227, 1231-32 (Ind. Ct. App. 2002) (sufficient evidence of constructive possession of drugs found in freezer where defendant presented no evidence that anyone but defendant and his roommate had access to freezer or that defendant never used freezer; constructive possession by multiple residents can be inferred by control over and use of place where drugs were found).

(l) Possession of paraphernalia

Helms v. State, 926 N.E.2d 511, 514-15 (Ind. Ct. App. 2010) (trial court should have granted defendant's motion to dismiss at end of State's case-in-chief in his trial for reckless possession of paraphernalia, a glass pipe used to smoke cocaine, because State failed to offer evidence of possible harm from the possession which is essential in order to prove recklessness).

(m) Recklessness

State v. Boadi, 905 N.E.2d 1069 (Ind. Ct. App. 2009) (failure to stop at a red light at an intersection due to inadvertence or an error in judgment cannot, without more, constitute criminally reckless conduct).

Helms v. State, 926 N.E.2d 511 (Ind. Ct. App. 2010) (State failed to offer evidence of possible harm from possession of glass pipe used to smoke cocaine, which is essential in order to prove element of recklessness).

(n) Polygraph results alone

A.H. v. State, 941 N.E.2d 559 (Ind. Ct. App. 2011) (normal practice of using polygraphs only with other probative evidence reflects a general rule that an incriminating polygraph alone will be insufficient to sustain a conviction; here, State presented insufficient evidence to support incest conviction because the only evidence that defendant engaged in deviate sexual conduct with his granddaughter, as opposed to fondling or touching, was the results of a polygraph test; the polygraph result was not supplemented by other probative evidence).

E. TYPES OF RELIEF

1. Grant some, but not all, of party's judgment on evidence

In appropriate cases the court, in whole or in part, may grant to some or all of the parties a judgment on the evidence or new trial in lieu thereof. T.R. 50(D).

State v. Clark, 175 Ind. App. 358, 371 N.E.2d 1323 (1978) (no prejudice to defendant where judge simultaneously denied defendant's motion for directed verdict and granted motions of his codefendants).

2. Grant of new trial in lieu of judgment on evidence

Court may grant new trial in lieu of judgment on evidence. When a judgment on the evidence is sought before or after the jury is discharged, the court may grant a new trial as to part or all of the issues in lieu of a judgment on the evidence when entry of a judgment is impracticable or unfair to any of the parties or otherwise is improper, whether requested or not. T.R. 50(C).

Grant of new trial under T.R. 50(C) does not require special findings and conclusions. Keith v. Mandus, 661 N.E.2d 26, 31 (Ind. Ct. App. 1996).

3. Judgment on evidence as to some counts or offenses

Judge may grant motion on some counts of multi-count indictment or information and deny it on others. Motion for directed verdict will not ordinarily result in release of defendant but may result in trial going forward on lesser included offenses. State v. Kleman, 503 N.E.2d 895, 896 (Ind. 1987). In-trial reduction of charges may in some instances lead to favorable plea bargain.

Practice Pointer: If motion is granted in part, frequently advantageous to request judge so inform jury before defense presents any evidence: (1) avoids adverse psychological mindset jurors may develop if they perceive defense's case not addressing itself to some particular prosecutorial argument or claim – a psychological block which may persist even when jury learns, at close of whole case, that contention will not be submitted to jury; and (2) avoids possibility that pro-defendant juror will compromise when there is nothing to compromise about. See Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases*, Volume 3, § 387, p. 157 (1989).

4. Reopen of State's case if evidence easily obtainable

Judge has considerable discretion to allow State to reopen case after defendant moves for directed verdict of acquittal when missing proof is easily obtainable. Judge may refuse to reopen case after T.R. 50 motion if it would unfairly prejudice other party, it would implicate double jeopardy, or evidence was affirmatively or dishonestly withheld during case-in-chief. Quigg Trucking v. Nagy, 770 N.E.2d 408 (Ind. Ct. App. 2002).

Saunders v. State, 807 N.E.2d 122, 126 (Ind. Ct. App. 2004) (trial court properly allowed State to reopen case so witness could identify defendant; party is generally afforded opportunity to reopen case to presented unintentionally omitted evidence, where no prejudice to opposing party and no undue emphasis on witness by returning her to stand). See also Lewis v. State, 406 N.E.2d 1226 (Ind. Ct. App. 1980).

Quigg Trucking v. Nagy, 770 N.E.2d 408 (Ind. Ct. App. 2002) (purpose of T.R. 50(D) is to assure full presentation of evidence, not to penalize trial counsel or party when important piece of evidence has been overlooked; where party had marked interrogatory answers as exhibits but inadvertently failed to present them as evidence, and answers were from defendant and therefore did not cause unfair surprise or prejudice, trial court did not abuse its discretion in reopening case).

Maxey v. State, 244 N.E.2d 650 (Ind. 1969) (no abuse of discretion where defendant failed to show how he was unfairly prejudiced by court admitting additional evidence to prove venue after State had rested its case).

Jones v. State, 269 Ind. 543, 381 N.E.2d 1064, 1067 (1978) (no abuse of discretion when State was allowed to reopen its case to present evidence of defendant's age, where State both rested and moved out of presence of jury to reopen case, as there was no real confusion or inconvenience).

5. Set aside verdict

Trial court has authority to set aside jury verdict and enter judgment of acquittal if it finds verdict not supported by sufficient evidence. T.R. 50(A).

State v. Culp, 433 N.E.2d 823 (Ind. Ct. App. 1982) (in trial for public intoxication, proper to grant directed verdict in motion to correct errors where defendant appeared intoxicated inside apartment house seated near top of stairway leading to second floor of building; State failed to show defendant in "public place or place of public resort.")

6. Grant new trial

T.R. 50(C) allows court to grant new trial in lieu of judgment on the evidence and not required to enter special findings and conclusions.

F. DOUBLE JEOPARDY CONCERNS

Judgment pursuant to T.R. 50 intended to terminate pending proceeding following completed presentation of evidence by State. Williams v. State, 634 N.E.2d 849 (Ind. Ct. App. 1994).

When the defendant is acquitted, Double Jeopardy Clause precludes retrial. Fong Foo v. United States, 369 U.S. 141, 143 (1962); State v. Lewis, 543 N.E.2d 1116 (Ind. 1989); see also Wadle v. State, 151 N.E.3d 227, 245 (Ind. 2020).

1. Judgment for defendant acts as acquittal

When judge grants judgment to defendant that judgment acts as acquittal and bars retrial. Smalis v. Pennsylvania, 476 U.S. 140 (1986).

Smith v. Massachusetts, 543 U.S. 462 (2005) (Fifth Amendment double jeopardy clause prohibits a trial judge, who has dismissed a count against defendant on grounds of evidentiary insufficiency, from later changing her ruling and allowing the charge to go to the jury).

State v. McKissack, 625 N.E.2d 1246, 1248 (Ind. Ct. App. 1993) (judgment acts as acquittal and bars second trial where judge erred in applying law in grant of motion for judgment on evidence).

Baca v. State, 122 N.E.3d 1019 (Ind. Ct. App. 2019) (trial court allowing State to amend child molest count after granting defendant's motion for directed verdict on that count violated constitutional prohibition against double jeopardy).

2. Even if court erroneously grants judgment for defendant, double jeopardy bars retrial

An erroneous judgment that the evidence is legally insufficient to support a guilty verdict acts as an acquittal for double jeopardy purposes. State v. Gradison, 758 N.E.2d 1008, 1014 (Ind. Ct. App. 2001).

State v. Gradison, *supra* (trial court should grant motion for judgment on evidence in jury trial only when total absence of evidence on essential issue or evidence is without conflict and susceptible to only one inference which is favorable to defendant; however, when trial court grants judgment on evidence using erroneous standard, judgment operates as acquittal and bars retrial because of double jeopardy); see also Taylor v. State, 863 N.E.2d 917 (Ind. Ct. App. 2007); State v. McKissack, 625 N.E.2d 1246, 1248 (Ind. Ct. App. 1993).

State v. Casada, 825 N.E.2d 936 (Ind. Ct. App. 2005) (court rejected State's contention that double jeopardy only extends to acquittals based on insufficient evidence, and also

rejected State's reliance on *dictum* of Arizona v. Rumsey, 467 U.S. 203 (1984), that a jury's guilty verdict can be reinstated when no new fact-finding is necessary).

3. Verdict set aside, no double jeopardy

If jury verdict of guilty is later set aside by trial court, defendant is not subjected to double jeopardy since criminal proceedings have not yet run their full course. State v. Haines, 545 N.E.2d 834, 835 n.4 (Ind. Ct. App. 1989).

G. STANDARD OF APPELLATE REVIEW

1. Neither reweigh evidence nor judge credibility

Standard of review of denial of motion for judgment on the evidence and of challenge of insufficiency of evidence is the same and reviewing court does not weigh evidence nor credibility. Jones v. State, 472 N.E.2d 1255 (Ind. 1985).

(a) Only evidence most favorable to verdict considered

Only circumstantial and direct evidence most favorable to judgment together with all reasonable inferences therefrom is considered. Letica v. State, 569 N.E.2d 952 (Ind. 1991).

(b) Test

If there is substantial evidence of probative value to support conclusion that defendant is guilty beyond a reasonable doubt, conviction must be affirmed. Baran v. State, 639 N.E.2d 642, 646 (Ind. 1994).

Indiana has specifically rejected "rational trier of fact" sufficiency standard. Washington v. State, 570 N.E.2d 21, 23 (Ind. 1991).

Bethel v. State, 730 N.E.2d 1242, 1243 (Ind. 2000) (applying Jackson standard and describing it as "equivalent to the one we routinely employ in reviewing evidentiary sufficiency).

Letica v. State, 569 N.E.2d 952, 955 (Ind. 1991) (quoting Jackson standard and stating: "We apply the same standard of review on questions of insufficiency of the evidence on direct appeal).

Canaan v. Davis, 2003 U.S. Dist. LEXIS 479 (S.D. Ind. 2003), *reversed in part on other grounds*, 395 F.3d 376 (7th Cir. 2005) (expressing skepticism as to Washington's rejection of Jackson standard).

Jackson v. Virginia, 443 U.S. 307 (1979) (constitutionally required standard for assessing sufficiency of prosecution's evidence to jury is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

2. Exception – "incredible dubiosity" rule

In rare cases, appellate tribunal may impinge upon jury's responsibility to judge credibility of witnesses. When faced with an issue of inherently improbable or incredibly dubious testimony, the appellate courts will reverse only when no reasonable person could believe it. Davis v. State, 658 N.E.2d 896, 897 (Ind. 1995). The rule of incredible dubiosity is not necessarily rendered inapplicable merely because more than one witness testifies for the State; however, the witness's testimony must be inherently contradictory within itself and not contradictory to another witness's testimony. West v. State, 907 N.E.2d 176 (Ind. Ct. App. 2009).

Moore v. State, 27 N.E.3d 749 (Ind. 2015) (incredible dubiosity rule not applicable where there were multiple witnesses, any inconsistencies were put before the jury, and there was circumstantial evidence of guilt).

C.S. v. State, 71 N.E.3d 848 (Ind. Ct. App. 2017) (evidence supporting juvenile finding of child molesting was not incredibly dubious even though four-year old victim's testimony at admissibility hearing was at times vague and inconsistent because in her prior statements to the Children Advocacy Center, she never wavered in her allegations).

III. BENCH TRIALS – T.R. 41(B) MOTION FOR INVOLUNTARY DISMISSAL

Motion for involuntary dismissal (T.R. 41(B)) based on failure of proof tests sufficiency of evidence should be made in bench trials, as T.R. 50 judgment on the evidence does not apply to a bench trial. Workman v. State, 716 N.E.2d 445, 448 (Ind. 1999); State v. Vowels, 535 N.E.2d 146 (Ind. Ct. App. 1989). Motion should be granted if State fails to prove essential elements of offense beyond a reasonable doubt. Id.

A. STRATEGY IN MAKING MOTION

In bench trial, may be beneficial to attempt to engage judge in dialogue rather than to indulge in formal persuasion. Though judge may deny motion, she might give indication of how she views State's case and reveal points to which defense testimony can most profitably be directed. See Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases, Vol. 3: Trial and Post trial Proceedings*, The American Law Institute (1989).

B. TIMELINESS OF MOTION

Must be made following State's case-in-chief. T.R. 41(B). After the plaintiff or party with the burden of proof upon an issue has completed the presentation of his evidence thereon, the opposing party may move for a dismissal. Id.

C. DETERMINATION OF MOTION

1. Court weighs all evidence and credibility

Court has duty to weigh evidence. State v. Mayfield, 536 N.E.2d 294 (Ind. Ct. App. 1989).

Court permitted to weigh evidence, believe or disbelieve testimony or other evidence, and find against State, even if there is no evidence to the contrary. Ferdinand Furniture Co., v. Anderson, 399 N.E.2d 799 (Ind. Ct. App. 1980). See also *Trial Rule 41. Dismissal of Actions*, 3 Ind. Prac., Rules Of Procedure Annotated R 41 (3d ed.).

State v. Vowels, 535 N.E.2d 146 (Ind. Ct. App. 1989) (motion measures quantity of evidence and measures quality as well).

2. Standard

Establishment of prima facie case does not require court to find in favor of party with burden of proof; the court is permitted to make ultimate conclusion in case based solely on evidence presented by State. State v. Vowels, 535 N.E.2d 146 (Ind. Ct. App. 1989).

Defendant's motion should be granted if court concludes, after State's case-in-chief, State has failed to prove essential elements of offense beyond a reasonable doubt. Workman v. State, 716 N.E.2d 445, 448 (Ind. 1999); State v. Vowels, 535 N.E.2d 146 (Ind. Ct. App. 1989).

D. WAIVER BY INTRODUCING EVIDENCE

Introduction of evidence on behalf of defendant following overruling of motion constitutes waiver of any error in overruling of motion at close of State's case. Harwei, Inc. v. State, 459 N.E.2d 52 (Ind. Ct. App. 1984).

E. DOUBLE JEOPARDY

Granting motion for involuntary dismissal constitutes an adjudication on merits and precludes retrial. T.R. 41 (B); State v. Lloyd, 800 N.E.2d 196, 198-200 (Ind. Ct. App. 2003).

See also *Double Jeopardy Concerns*, section II.F, above.

F. STANDARD OF REVIEW

Standard of review in appeals from involuntary dismissal: (1) may not reweigh evidence or judge credibility of witness; and (2) reversal only where evidence without conflict and leads to single conclusion different from that reached by trial court. State ex rel. Medical Licensing Bd. v. Stetina, 477 N.E.2d 322 (Ind. Ct. App. 1985).

Crum v. Avco Financial Services, Inc., 552 N.E.2d 823 (Ind. Ct. App. 1990) (on review, appellate court may reverse negative judgment only where evidence without conflict and points unerringly to conclusion different from that reached by trial court).