CHAPTER 11

PROSECUTION MISCONDUCT DURING PRESENTATION OF EVIDENCE

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I. PROSECUTORIAL MISCONDUCT PRACTICE TIPS

A. MUST OBJECT TO PRESERVE ERROR

In order to preserve a prosecutorial misconduct error for appeal, trial counsel should: (1) object at the time of misconduct; (2) move for mistrial; and (3) request a curative instruction.

1. Request for admonishment

When prosecutorial misconduct occurs, request the trial court to admonish the jury. Unless there is fundamental error, a defendant waives appellate review of the issue of prosecutorial misconduct when he fails to immediately object, request an admonishment, and then move for mistrial. Reynolds v. State, 797 N.E.2d 864 (Ind. Ct. App. 2003). Repetitive misconduct may create incurable error, but, generally, only if defense has objected and given the court an opportunity to correct the error and/or admonish prosecutor.

Evans v. State, 497 N.E.2d 919 (Ind. 1986) (reversal may be required by prejudicial effect of isolated improper remark aggravated by repeated instances of misconduct and cumulative impact).

Bonner v. State, 650 N.E.2d 1139 (Ind. 1995) (simple fact that admonition is given does not necessarily mean that particularly prejudicial, erroneously admitted evidence will be erased from minds of reasonable jurors or omitted from their deliberations).

NOTE: Even if an admonishment is accurate, it still may not cure the error. There are various social science studies that seriously question the efficacy of jury admonishments. "These materials are interesting and suggest at a minimum that a court construct and deliver jury admonishments with care and precision." Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000).

Baker v. State, 506 N.E.2d 817 (Ind. 1987) (although admonishment was given to jury, prosecutor's question to police officer whether defendant ever was offered a polygraph required reversal being defendant's credibility was at issue).

Humphrey v. State, 680 N.E.2d 836 (Ind. 1997) (where potentially damaging evidence is properly admitted for one purpose, as here, trial strategy may dictate not requesting an admonition; limiting admonition or instruction may do more harm than good because it could focus jury on undesirable aspect of evidence).

2. Request for mistrial

If the defendant is not satisfied with an admonishment, the correct procedure to avoid waiver is to make a motion for a mistrial. Brewer v. State, 605 N.E.2d 181 (Ind. 1993).

B. TEST FOR REVERSIBLE ERROR

Defendant must show: (1) prosecutor's actions constituted misconduct by reference to norms of professional conduct; and (2) resulting prejudice placed him in position of grave peril to which he should not have been subjected. See, e.g., Maldonado v. State, 265 Ind. 492, 355 N.E.2d 843, 848 (1976) and Clark v. State, 668 N.E.2d 1206 (Ind. 1996).

1. Misconduct need not determine outcome of trial

"Grave peril" standard does not require court to find that misconduct determined outcome of trial. Mistrial should be declared if: (1) prosecutor deliberately violated rights of defendant; (2) reasonable grounds to believe such violation may have prejudiced his cause; and (3) mistrial moved for by injured party. See, e.g., White v. State, 257 Ind. 64, 78, 272 N.E.2d 312, 320 (1971) and Shaffer v. State, 674 N.E.2d 1 (Ind. Ct. App. 1996).

2. Probable persuasive effect of misconduct on jury's decision

Whether the misconduct subjects the defendant to "grave peril" is determined by the probable persuasive effect of misconduct on jury's decision. Swope v. State, 263 Ind. 148, 325 N.E.2d 193 (1975).

Everroad v. State, 571 N.E.2d 1240, 1244 (Ind. 1991) (reversal required where evidence is close and the court fails to alleviate prejudicial effect of misconduct). See also Herrera v. State, 710 N.E.2d 931 (Ind. Ct. App. 1999).

3. Intentional misconduct

Reversal may result if repeated instances evidence deliberate attempt to improperly prejudice defendant. Robinson v. State, 260 Ind. 517, 297 N.E.2d 409 (1973).

Evans v. State, 497 N.E.2d 919 (Ind. 1986) (reversal may be required by prejudicial effect of isolated improper remark aggravated by repeated instances of misconduct and cumulative impact).

C. MISCONDUCT CLAIM MUST BE RAISED IN DIRECT APPEAL; CLAIM IMPROPER FOR POST-CONVICTION REVIEW (PCR)

Prosecutorial misconduct claims improper for post-conviction review and are solely to be remedied within scope of direct appeals. Improper for PCR because it fails to be an issue "not known at the time of the original trial and appeal or for some reason not available to defendant at that time." Keller v. State, 481 N.E.2d 1109 (Ind. Ct. App. 1985).

Object immediately, preserve error at trial, and seek remedy on direct appeal. Bailey v. State, 472 N.E.2d 1260 (Ind. 1985).

However, on post-conviction, defendant may raise the issue of ineffective assistance of counsel based on failure to object to prosecutorial misconduct. See, e.g., J.J. v. State, 858 N.E.2d 244 (Ind. Ct. App. 2006).

D. PROSECUTOR TO ACHIEVE JUST RESULT, NOT TO PROCURE CONVICTION AT ANY COST

Function of prosecution is to ensure that justice prevails, not to procure convictions at any cost. Lewis v. State, 629 N.E.2d 934, 937 (Ind. Ct. App. 1994). See also Indiana Rules of Professional Conduct, Rule 3.8, stating responsibilities of prosecutors.

Shuttleworth v. State, 469 N.E.2d 1210, 1216 (Ind. Ct. App. 1984) (prosecuting attorney must not allow professional judgment to be compromised because his office, as prosecutor in name of public, is not so much to convict as to achieve just result).

II. SPECIFIC TYPES OF MISCONDUCT WITH AUTHORITY

Throughout this section, the following specific types of misconduct are discussed:

A. Curry favor with the jury;
B. Prevent or discourage defense witnesses from testifying;

C. Characterize witnesses as liars
D. Comment on roles of defense and prosecution;
E. Use defendant's post-arrest, post-Miranda silence for impeachment;
F. Refer to defendant's request for counsel;
G. Display or refer to inadmissible evidence;
H. Make impressions unsupported by evidence;
I. Display suppressed articles, compelling defense to object repeatedly;
J. Repetitious improper questioning;
K. Reference to polygraph;
L. Reference to mug shots;
M. Inadmissible prior bad acts;
N. References to religious beliefs or defendant's race;
O. Bring witness before jury in attempt to show refusal to testify;
P. Calling witness in order to impeach and arguing impeachment evidence as substantive;
Q. Improper impeachment;
R. Character assassination;
S. Guilt by association;
T. Telling jurors to put themselves or children in victim's place;
U. Suggesting defendant has burden of proof; or
V. Using false testimony to obtain a conviction.

A. CURRY FAVOR WITH JURY

"All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause." Woods v. State, 233 Ind. 320, 119 N.E.2d 558, 560-61 (1954).

B. PREVENT OR DISCOURAGE DEFENSE WITNESSES FROM TESTIFYING

Prosecutor may not prevent or discourage defense witness from testifying on behalf of defendant. Such acts may be violation of due process rights guaranteed by Fifth and Fourteenth Amendment, as well as defendant's Sixth Amendment right to compel witnesses in his favor. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967); see also Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646 (1988).

Diggs v. State, 531 N.E.2d 461 (Ind. 1988) (misconduct when just prior to presentation of evidence for defense, prosecutor approached defense witness in corridor and informed him that if he testified to "the statements he did in his deposition, he [would] be charged, according to his own testimony." Witness then invoked Fifth Amendment, and trial court refused to admit witness's deposition at trial; harmless error).

Greer v. State, 115 N.E.3d 1287 (Ind. Ct. App. 2018) (prosecutor's warnings of "trouble" during deposition if 13-year-old complaining witness failed to testify truthfully was not improper and did not constitute misconduct).

Lewis v. State, 629 N.E.2d 934 (Ind. Ct. App. 1994) (prosecutor committed misconduct when, during personal interview with prospective defense witness, referred to possible criminal charges against witness; actions denied defendant due process guaranteed by Fifth and Fourteenth Amendments as well as Sixth Amendment right to compel witnesses in his favor).

Collins v. State, 822 N.E.2d 214 (Ind. Ct. App. 2005) (prosecutor's threat to arrest witness on three charges if she testified that guns found in house belonged to her violated Sixth Amendment right to call witnesses).

It is important to make an offer of proof regarding the threat made by the prosecutor and the materially favorable testimony that would have been heard by the jury absent the threat.

Dorelle-Moore v. State, 968 N.E.2d 287 (Ind. Ct. App. 2012) (any error in prosecutor discouraging witness from testifying was harmless where there was no offer of proof showing how testimony would have been materially favorable to the defense).

C. CHARACTERIZE WITNESSES AS LIARS

1. Prosecutor cannot express personal opinion

Improper for prosecutors to make remarks during examination of witnesses which express personal opinion of veracity of witnesses.

Indiana Rules of Professional Conduct, Rule 3.4(e) provides: "A lawyer shall not: in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause*, the credibility of a witness,* the culpability of a civil litigant or the guilt or innocence of an accused" (emphasis added).

Cummings v. State, 384 N.E.2d 605 (Ind. 1979) (improper for prosecutor to state on cross-examination of defense alibi witness "[y]ou can't recall. You were lying then, Harvey Cummings, and you're lying now," - but remarks did not place defendant in grave peril so as to require reversal, as unequivocal identification of defendant by two victims, and other victim was able to positively identify trousers defendant had been wearing because of the unusual color and pattern).

2. Forcing defendant and witnesses to call other liars

Some prosecutors will ask defendant or defense witness, during cross-examination, whether certain prosecution witnesses were "lying." It is improper for attorney to ask for witness's opinion of veracity of another witness. Courts have issued strong admonitions against this practice. United States v. Richter, 826 F.2d 206 (2d Cir. 1987); Freeman v. United States, 495 A.2d 1183 (D.C. App. 1985); and People v. Ochoa, 86 A.D.2d 637, 446 N.Y.S.2d 339 (1982).

Prejudice is heightened when defendant is forced to characterize police officers as liars in order to maintain his or her innocence. State v. Suarez-Bravo, 864 P.2d 426 (Wash. 1994) and People v. Montgomery, 103 A.D.2d 622, 481 N.Y.2d 532 (1984).

D. COMMENT ON ROLES OF DEFENSE AND PROSECUTION

1. Prosecutor as "good guy"

It is an unfair tactic to refer to the prosecutor as a "good guy." It negates defendant's presumption of innocence, and runs afoul of Indiana Rules of Professional Conduct, Rule 3.4(e) (lawyer shall not state personal opinion as to guilt or innocence of accused). Craig v. State, 267 Ind. 359, 370 N.E.2d 880, 884 (1977) (although a correct statement of law, unfair and "highly improper" for prosecutor to state he had duty to all society, including accused).

(a) During closing argument

Sanders v. State, 724 N.E.2d 1127, 1133-34 (Ind. Ct. App. 2000) (though not fundamental error due to overwhelming evidence and fact that jury listened to evidence

without bias, prosecutor's comment during closing arguments that prosecutors' role is "to be ethic ministers of justice" was prosecutorial misconduct because it "conveyed to the jury that seeking justice was her paramount concern, and by negative implication, conveyed the idea that the defense counsel's job was something else altogether," an impermissible bolstering of the State's case). See also Brummett v. State, 10 N.E.3d 78 (Ind. Ct. App. 2013).

But see Hubbard v. State, 262 Ind. 176, 313 N.E.2d 346 (1974) (quoting dissenting opinion in Supreme Court case which compares the roles of the prosecutor and defense attorney during closing arguments not prejudicial because remarks coming at the conclusion of a long trial after jury has heard evidence were of little impact). See also Fox v. State, 520 N.E.2d 429 (Ind.1988).

(b) During voir dire

Bardonner v. State, 587 N.E.2d 1353 (Ind. Ct. App. 1992) (reversible error and prosecutorial misconduct to read excerpts from Justice White's opinion, interspersed with questions and comments to prospective jurors; only purpose for prosecutor's comments to prejudice jurors into viewing prosecutor as a "good guy" and defense counsel as a "bad guy," and because comments occurred during voir dire, jury was tainted from the beginning and their evaluation of every piece of evidence was colored by misconduct).

Richardson v. State, 794 N.E.2d 506 (Ind. Ct. App. 2003) (prosecutor's statement during voir dire that defense attorney's job was "to do whatever it takes to get you to believe he didn't do it" was not prosecutorial misconduct in context of defense counsel's statements to jury about role of defense attorney).

Lainhart v. State, 916 N.E.2d 924 (Ind. Ct. App. 2009) (prosecutor improperly commented on disparate roles of defense counsel and prosecution by stating his job was "to seek the truth" while defense counsel's role was "to defend their client to the best of their ability, whatever that may be").

Coy v. State, 720 N.E.2d 370 (Ind. 1999) (although prosecutor referred to prosecutors as "ministers of justice" as did prosecutor in Bardonner, prosecutor did not degrade role of defense attorney as in Bardonner).

2. Remarks about integrity of defense counsel

Brock v. State, 423 N.E.2d 302 (Ind. 1981) (prosecutorial misconduct where prosecutor said, "[h]e is pulling the most low life tricks in this case." Comment did not place defendant in grave peril so as to warrant new trial).

Paschall v. State, 825 N.E.2d 923 (Ind. Ct. App. 2005) (Court strongly disapproved of prosecutor, in front of jury, telling opposing counsel he is not being truthful and making "smarmy" comments; unprofessional, potentially sanctionable conduct extended length of trial and made trial more difficult for all involved).

Collins v. State, 966 N.E.2d 96 (Ind. Ct. App. 2012) (prosecutor's objection in which he stated that "counsel knows very well that her client was convicted. It was reduced to a misdemeanor" was misconduct as it disparaged defense counsel and mischaracterized the evidence to reflect that defendant had a prior conviction).

Kendrick v. State, 947 N.E.2d 509 (Ind. Ct. App. 2011) (in response to defense's objection, prosecutor's comment "that sounds like slick lawyering to me" was "clearly improper" but did not put defendant in position of grave peril or have probable persuasive effect on jury).

E. USE DEFENDANT'S POST-ARREST, POST-MIRANDA SILENCE FOR IMPEACHMENT

1. Violates due process

It is a violation of due process rights for prosecutor to use defendant's post-arrest silence, after Miranda warning given, to impeach the accused at trial or substantively in the prosecution's case-in-chief. Doyle v. Ohio, 426 U.S. 610, 620, 96 S.Ct. 2240, 2245 (1976). It is also a violation of the Fifth Amendment for the State to use defendant's post-arrest, pre-Miranda silence as substantive evidence in the State's case-in-chief. Peters v. State, 959 N.E.2d 347 (Ind. Ct. App. 2011).

Akard v. State, 924 N.E.2d 202 (Ind. Ct. App. 2010), *aff'd in part and reversed in part on other grounds*, 937 N.E.2d 811 (Ind. 2010) (State improperly asked two police officers if defendant made any statements or asked any questions when he was arrested after the officers entered his apartment but before he was given any Miranda warnings).

Lynch v. State, 632 N.E.2d 341, 342 (Ind. 1994) (citing Wainwright v. Greenfield, 474 U.S. 284, 292, 106 S.Ct. 634, 639 (1986)) (fundamentally unfair to promise arrested person his silence will not be used against him and thereafter breach promise by using silence to impeach his trial testimony).

Caveat: In the absence of Miranda warnings, the State may allow cross-examination on post-arrest silence on the issue of self-defense but is not required to do so. Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 1311 (1982).

Kelly v. State, 122 N.E.3d 803, 806 (Ind. 2019) (*citing* Weir, 455 U.S. at 607) ("With regard to whether defendant's post-arrest, pre- Miranda silence can be used for impeachment purposes, the U.S. Supreme Court has held that it can be used.").

Similarly, the State may be able to comment on defendant's pre-arrest silence. See, e.g., Owens v. State, 937 N.E.2d 880 (Ind. Ct. App. 2010) and Barton v. State, 936 N.E.2d 842 (Ind. Ct. App. 2010).

The Fifth Amendment allows prosecutors to elicit testimony about a person's pre-arrest, pre-Miranda silence unless the person explicitly invokes his right to silence. Salinas v. Texas, 133 S.Ct. 2174 (2013).

Nichols v. State, 55 N.E.3d 854 (Ind. Ct. App. 2015) (trial court did not abuse discretion in admitting evidence that defendant did not attend an interview with a detective or ask about the investigation since defendant did not invoke privilege against self-incrimination; failing to follow up with or contact the detective does not support a finding that the defendant invoked his right to remain silent).

2. Probativeness is irrelevant

The probative value of a post-warning silence is irrelevant; the State may not draw even well-justified inferences from post-warning silence. Wainwright v. Greenfield, 474 U.S. 284 (1986). See also Brecht v. Abrahamson, 944 F.2d 1363, 1369 (7th Cir. 1991).

But see Splunge v. State, 641 N.E.2d 628 (Ind. 1994) (during presentation of State's case, police officer testified that when first advised of Miranda rights, defendant refused to sign waiver and indicated he wished to exercise his Fifth Amendment right to remain silent; court found no harm from reference to defendant's exercise of right to remain silent, because officer was not making reference to impeach defendant as prohibited by Doyle v. Ohio, but was merely reciting chronology of events which led to defendant eventually making his statement to police).

Practice Pointer: Although it is misconduct for a prosecutor to impeach with a defendant's post-Miranda silence, it may be a reasonable defense strategy to use an individual's refusal to testify to bolster the defense theory that such individual was the actual perpetrator. Teague v. State, 891 N.E.2d 1121, n.11 (Ind. Ct. App. 2008). See also Whitt v. State, 649 N.E.2d 258, 269 (W.Va. 2007) ("where a defendant in a criminal case seeks to call a witness to the stand who intends to invoke his or her Fifth Amendment privilege against self-incrimination and the defendant has presented sufficient evidence to demonstrate the possible guilt of the witness for the crime the defendant is charged with committing, the trial court has the discretion to compel such witness to invoke his or her Fifth Amendment privilege in the presence of the jury.").

3. Examples of reversible error

Jones v. State, 265 Ind. 447, 355 N.E.2d 402 (1976) (reversal where defendant was asked 12 times why he had never told police, prosecutor, or press of his innocence; improper commentary on defendant's silence that suggested defendant must prove innocence, admonition not sufficient to remedy harm). See also Nelson v. State, 401 N.E.2d 666 (Ind. 1980).

Teague v. State, 891 N.E.2d 1121 (Ind. Ct. App. 2008) (reversible error where State specifically referred to defendant's entire period of pre-trial, post-Miranda silence by asking him on cross-examination whether he had told his version of events to police anytime since arrest and leading up to trial).

White v. State, 647 N.E.2d 684 (Ind. Ct. App. 1995) (misconduct and reversible error where prosecutor used defendant's post-arrest silence to indicate guilt throughout trial, asked questions about his post-arrest silence, and implications concerning post-arrest silence during closing arguments; testimony conflicting, and judge had no opportunity to warn jury of dangers of this type of testimony).

Nichols v. State, 974 N.E.2d 531 (Ind. Ct. App. 2012) (jury instructions did not mitigate peril or cure the harm that prosecutor created by so obviously suggesting to the jury that defendant did not testify so as not to incriminate himself);

Bevis v. State, 614 N.E.2d 599, 604 (Ind. Ct. App. 1993) (defendant placed in grave peril, violation of her 5th Amendment right against self-incrimination, and prosecutorial misconduct where State sought to impeach defendant's exculpatory testimony by making two direct references to her post arrest silence, even though defendant had been advised when charged that she had a right to remain silent; State's questions impermissible under Doyle v. Ohio). See also Hightower v. State, 735 N.E.2d 1209 (Ind. Ct. App. 2000).

Herron v. State, 801 N.E.2d 761 (Ind. Ct. App. 2004) (in attempted murder trial, prosecutor committed fundamental error when he stated during closing argument, "but as for not presenting the gun to you, that actually fired those bullets, members of the jury, right over there at that table, that's the only one in the courtroom that can certainly tell us where the gun is").

See also Shell v. State, 26 N.E.3d 1 (Ind. 2015) (David, J., dissenting from denial of transfer) (would grant transfer to address cumulative impact of prosecutorial misconduct, including alleged Doyle violation, "to resolve what seems to me to be a disturbing trend").

4. Improper to offer post-arrest silence as evidence of sanity

Raising the insanity defense does not open the door to testimony obtained in violation of the defendant's Miranda rights. A defendant's post-arrest and post-Miranda silence cannot be used as evidence of sanity. Robinette v. State, 741 N.E.2d 1162 (Ind. 2001).

Barcroft v. State, 26 N.E.3d 641 (Ind. Ct. App. 2015) (trial court's reliance on defendant's post-Miranda request for counsel as evidence of her sanity was fundamental error).

Myers v. State, 27 N.E.3d 1069 (Ind. 2015) (where convoluted request for attorney was made to mother before defendant was read his Miranda rights, it was no due process violation to use request as evidence of defendant's sanity).

5. Open the door

Otherwise, inadmissible evidence may become admissible where the defendant opens the door to questioning on that evidence.

Ludack v. State, 967 N.E.2d 41 (Ind. Ct. App. 2012) (detective's comment that defendant neither admitted nor denied allegations of child molesting and "just asked to stop speaking" did not violate Fifth Amendment right against compulsory self-incrimination because it was defense counsel who first questioned detective as to what defendant did not say during the interview; State's evidence was fair response to evidence elicited by defendant). See also Cameron v. State, 22 N.E.3d 588 (Ind. Ct. App. 2014).

6. Object to preserve error

Must object to preserve issue for appeal. Prosecutor's statements not error if acquiesced to. Davidson v. State, 442 N.E.2d 1076 (Ind. 1982).

7. Specific procedure

In order to preserve the error for appeal and remedy the misconduct error, trial counsel must: (1) object to prosecutor's statement, inference, questions, or reference to defendant's silence on State and Federal constitutional grounds; (2) request mistrial; and (3) request admonishment. Rogers v. State, 272 Ind. 65, 396 N.E.2d 348 (1979) (fundamental error for court to fail to admonish jury after objection made and sustained regarding 5th Amendment rights of accused).

8. Standard of review

Courts employ five-factor test: (1) Purpose for which post-arrest silence is utilized; (2) Who elected to pursue line of questioning; (3) Quantum of other evidence supporting guilt; (4) Intensity and frequency of the reference; and (5) Availability to trial judge of an opportunity to grant a motion for mistrial or to give curative instructions. Rowe v. State, 717 N.E.2d 1262 (Ind. Ct. App. 1999) (*citing* Bieghler v. State, 481 N.E.2d 78 (Ind. 1985) *cert. den'd*).

9. Harmless error analysis

Per Doyle v. Ohio, 426 U.S. 610 (1976), error is harmless if: (1) after examining record as a whole; (2) court concludes beyond a reasonable doubt; and (3) error did not affect the jury's verdict. White v. State, 647 N.E.2d 684 (Ind. Ct. App. 1995). See also United States v. Robinson, 485 U.S. 25, 108 S.Ct. 864 (1988) (harmless error analysis applies to prosecutor's references to silence as evidence of guilt).

Teague v. State, 891 N.E.2d 1121 (Ind. Ct. App. 2008) (State wholly failed in its burden of showing that Doyle violation did not influence jury's verdict).

Weedman v. State, 21 N.E.3d 873 (Ind. Ct. App. 2014) (prosecutor's questions and comments concerning defendant's post-arrest and post-Miranda silence did not constitute fundamental error when State presented overwhelming evidence that defendant's self-defense claim failed due to his excessive use of force against victim).

Mauricio v. State, 652 N.E.2d 869, 873 (Ind. Ct. App. 1995) (harmless error in referring to post-arrest silence during cross-examination where prosecutor did not make further use of statements and evidence of guilt overwhelming). See also Sobolewski v. State, 889 N.E.2d 849 (Ind. Ct. App. 2008).

United States v. Shue, 766 F.2d 1122 (7th Cir. 1985) (Doyle violation in prosecutor's argument not harmless beyond reasonable doubt despite another witness identifying defendant as his accomplice).

F. UNDECIDED WHETHER IT IS IMPROPER TO USE POST-ARREST, PRE-MIRANDA SILENCE

It remains an open question whether a defendant's post-arrest, pre-Miranda silence may be used against a defendant; the Supreme Court has not addressed the issue, and federal circuits are split on the question. Kelly v. State, 122 N.E.3d 803, 806 (Ind. 2019).

In Kelly, the Indiana Supreme Court found the defense opened the door to evidence and its use was not fundamental error. There, the defendant charged with dealing drugs argued he was unaware of the drug deal but rather was an unwitting participant, and in response, the State offered testimony and argument that he was aware of the drug deal, both because he did not say anything indicating that he was unaware of why the police were arresting him and because of his demeanor and behavior. Id. at 807.

G. REFER TO DEFENDANT'S REQUEST FOR COUNSEL

1. Improper for prosecutor to reference exercise of right to counsel

It is misconduct to use defendant's invocation of his right to counsel against him. Johnson v. State, 901 N.E.2d 1168 (Ind. Ct. App. 2009); United States v. McDonald, 620 F.2d 559 (5th Cir. 1980); Zemina v. Solem, 573 F.2d 1027 (8th Cir. 1978).

Compare,

United States ex rel Macon v. Yeager, 476 F.2d 613 (3d Cir. 1973) (conviction overturned where prosecutor in closing expressly tied defendant's retention of counsel to other circumstantial evidence of guilt; comments could raise inference in jury that defendant believed self to be guilty);

And,

Marshall v. Hendricks, 307 F.2d 36, 76 (3d Cir. 2002) (comments on defendant retaining counsel in wife's murder was harmless error because prosecutor's attack was indirect (on other witness), was a brief exchange, and was aggressive in a manner that would have been perceived as badgering a minor witness).

Johnson v. State, 901 N.E.2d 1168 (Ind. Ct. App. 2009) (although prosecutor improperly referred to the defendant's invocation of his right to counsel at least six times during her closing, including saying that "you need a lawyer when you know you've done something wrong," the quantum of evidence of guilt was substantial and the trial court's admonishment cured the prejudice).

2. Improper to offer exercise of 6th Amendment as evidence of sanity

Violation of due process to refer to defendant's request for counsel after arrest, to rebut claim of insanity. State must carefully frame questions about defendant's demeanor to introduce evidence of sanity, without referring to exercise of 6th Amendment right. Wainwright v. Greenfield, 474 U.S. 284106 S.Ct. 634 (1986).

Accord Willsey v. State, 698 N.E.2d 784 (Ind. 1998) (citing Lynch v. State, 632 N.E.2d 341, 342 (Ind. 1994)).

Myers v. State, 27 N.E.3d 1069 (Ind. 2015) (where request for attorney was made to mother and before defendant was read his Miranda rights, it was not a due process violation to use the request as evidence of sanity).

H. DISPLAY OR REFER TO INADMISSIBLE EVIDENCE

1. Prohibited unless reasonable basis to believe evidence admissible

Prosecutor may not comment on or allude to inadmissible evidence during trial. Bagnell v. State, 413 N.E.2d 1072, 1076-77 (Ind. Ct. App. 1980).

ABA Standards for Criminal Justice § 3-6.6(d) (4th ed. 2015) (unprofessional conduct for prosecutor to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments).

When overzealous prosecutor injects numerous comments that serve no purpose but to unduly prejudice jury, duty devolves upon judge to vigilantly protect rights of defendant. Rowley v. State, 259 Ind. 205, 285 N.E.2d 646 (1972).

Tucker v. State, 646 N.E.2d 972 (Ind. Ct. App. 1995) (defendant deprived of fair trial by prosecutor's reference to prior conviction and State witness's reference to defendant's "mug shot," even though defense counsel did not make proper objections).

Bean v. State, 15 N.E.3d 12 (Ind. Ct. App. 2014) (by eliciting testimony about defendant's pretrial interview, which was clearly inadmissible, prosecutor did not merely stumble into error; despite being warned, he defied court's instructions).

U.S. v. Abair, 746 F.3d 260 (7th Cir. 2014) (in prosecution for structuring currency transactions, prosecutor lacked good faith basis to cross-examine defendant as to her "lies" in statements on tax and financial aid forms).

Hamilton v. State, 43 N.E.3d 628, *aff'd on reh'g*, 49 N.E.3d 554 (Ind. Ct. App. 2015) (admitting forensic interviewer's testimony that neither complaining witness showed any indicators of being coached was impermissible vouching testimony).

2. Serious conflicts in evidence

Where there are serious conflicts in evidence entitling jury to go either way upon issue of guilt or innocence, especially important they not be subjected to improper influences.

White v. State, 257 Ind. 64, 272 N.E.2d 312 (1971) (reversible error where only evidence offered by police was improper evidence of another robbery charge pending against defendant; officer knew nothing concerning defendant's involvement, if any, with crime for which he was standing trial; sole purpose of calling police officer was to deliberately prejudice jury against defendant and his defense).

3. Exception

Prosecutor reasonably believes evidence will be admissible. Hossman v. State, 473 N.E.2d 1059 (Ind. Ct. App. 1985).

I. MAKE IMPRESSIONS UNSUPPORTED BY EVIDENCE

Courts have condemned prosecutors' attempts to create an impression on jury via innuendos in questions when no supporting evidence. United States v. Elizondo, 920 F.2d 1308, 1313 (7th Cir. 1990). Ind. Professional Conduct Rule 3.4(e) prohibits a lawyer from alluding at trial to any

matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.

Below are some examples where courts found violations of impressions unsupported by evidence:

- Where prosecutor stated in presence of jury that he would like to examine witnesses before anyone had an opportunity to talk with them; no evidence to indicate defendant would attempt to persuade witnesses to testify falsely or had ever done so in the past. Hossman v. State, 473 N.E.2d 1059 (Ind. Ct. App. 1985).
- State confronted its own witness with unsubstantiated suggestion that his reluctance to testify was due to threats received while witness was incarcerated. Benson v. State, 762 N.E.2d 748 (Ind. 2002).
- Prosecutor asked defendant whether he had been convicted of robbery, and prosecutor knew he had not been or could not disprove denial. Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980).
- Prosecutor improperly informed jury that complaining witness was telling the truth and suggested that defendant wanted two-year-old to watch him having sex with complaining witness, harmless error. Birari v. State, 968 N.E.2d 827 (Ind. Ct. App. 2012).
- Prosecutor, in closing, described the defendant as gloating over the victim's dead body where there was no evidence supporting such; improper, but not fundamental error. Neville v. State, 976 N.E.2d 1252 (Ind. Ct. App. 2012).

But see;

Thompkins v. Cohen, 965 F.2d 330 (7th Cir. 1992) (even though prosecutor falsely insinuated defendant had a prior record, habeas corpus relief denied because improper conduct did not work "miscarriage of justice").

"A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking." *ABA Standards for Criminal Justice* § 3-5.7(d) (3d ed. 1993).

J. DISPLAY SUPPRESSED ARTICLES, COMPELLING DEFENSE TO OBJECT REPEATEDLY

Prejudicial error for prosecutor to make repeated efforts to lay inadmissible evidence before jury for purpose of compelling defendant to make repeated objections. See Rohlfing v. State, 230 Ind. 236, 102 N.E.2d 199 (1951) (on nine occasions prosecutor displayed articles previously ordered suppressed which compelled defendant to make repeated objections; State's efforts calculated to impress jury that evidence damaging to defendant).

Practice Pointer: Argue curative instruction insufficient. See Rohlfing v. State, 102 N.E.2d 199 (Ind. 1951) (frequent repetition of admonition may actually tend to attach to such evidence a wholly unwarranted and undeserved significance).

K. REPETITIOUS IMPROPER QUESTIONING

Making repeated attempts to bring before jury that which had already been held to be inadmissible in evidence places defendant in grave peril.

Riley v. State, 489 N.E.2d 58 (Ind. 1986) (mistrial where defendant repeatedly questioned by prosecution regarding alleged prior drug transactions and drug use in violation of motion in limine; violations of order were attempts to besmirch defendant's character and prejudice him).

Dailey v. State, 406 N.E.2d 1172 (Ind. 1980) (defendant placed in grave peril where State attempted 10 times to bring before jury fact that defendant had confessed to police, even though confession was suppressed at pretrial hearing; errors not harmless even in light of overwhelming evidence of guilt).

Bagnell v. State, 413 N.E.2d 1072 (Ind. Ct. App. 1980) (reversible error and prosecutor's actions reprehensible where more than 15 separate instances asked questions portraying defendant as member of "underworld" who had been frequently arrested; grossly unfair and mockery of justice for defendant to defend against offense for which no charge exists—being a member of the criminal element).

L. REFERENCE TO POLYGRAPH

1. Reinforcing credibility of witness

Extremely prejudicial to defendant when State seeks to establish witness has taken polygraph and was therefore testifying truthfully at trial—high probability jury will conclude accused merely seeks to suppress truth. Williams v. State, 268 Ind. 365, 375 N.E.2d 226 (1978) (reversible error where State asked its primary witness linking defendant to the crime if witness had taken polygraph exam prior to making statement to police; purpose in asking question was to reinforce credibility of witness's testimony; once jury realized witness had taken polygraph it was likely to conclude he was telling truth and witness's failure to answer question in either affirmative or negative would not change this result).

Bixler v. State, 537 N.E.2d 21, 24 (Ind. 1989) (reference to polygraph test not grounds for mistrial because polygraph remark was not purposely elicited but rather was mentioned unexpectedly in witness's response, court excused jury and offered defendant either admonishment or no further reference whatever to polygraph test, and witness whose credibility was enhanced did not testify directly to crime defendant was charged with).

Speer v. State, 995 N.E.2d 1 (Ind. Ct. App. 2013) (prosecutor's asking witness if his plea agreement required him to take a polygraph if requested did not place defendant in grave peril where witness testified that he was never asked to take polygraph).

Practice Pointer: The witness who spontaneously mentioned a polygraph test in Bixler to buttress another witness was a detective with a sheriff's department. Id. at 23. When a law enforcement agent makes such an improper comment, defense counsel should argue that the prejudice is aggravated because it came from a source that the jury generally considers to be honest and that law enforcement officers clearly know or should know of the inadmissibility of such testimony.

2. Cannot allude to polygraph of accused

Courts are easy to find fundamental error where officers or prosecution allude to polygraph testing of the accused.

Baker v. State, 506 N.E.2d 817 (Ind. 1987) (credibility of defendant improperly placed in jeopardy in eyes of jury when police officer commented concerning polygraph examination; once information presented to jury it was unclear whether defendant actually took test and failed or whether he refused offer of polygraph test).

Houchen v. State, 632 N.E.2d 791, 793 (Ind. Ct. App. 1994) (fundamental error where experienced police officer twice volunteered that defendant had refused polygraph test; court will not tolerate blatant and deliberate attempt to improperly influence jury).

If the defendant opens the door to the polygraph evidence, then the prosecutor is allowed to ask the defendant whether he took a polygraph test and is allowed to use the previous incorrect answers for impeachment purposes before the jury. Shriner v. State, 829 N.E.2d 612 (Ind. Ct. App. 2006).

Merely mentioning that the terms of a plea agreement includes a required polygraph test, without any implication that the defendant passed a polygraph test, is still improper, but not fundamental error. Lay v. State, 659 N.E.2d 1005, 1013 (Ind. 1995) (witness's testimony was echoed by other witnesses, so mention of polygraph test did not guarantee a conviction).

Practice Pointer: Object at first mention of polygraph to preserve error, then move for mistrial. If denied, see Glenn v. State, 796 N.E.2d 322 (Ind. Ct. App. 2003), for a specific admonishment regarding the unreliability and inadmissibility of polygraph tests.

M. REFERENCE TO MUG SHOTS

1. Not per se inadmissible

Mug shots not *per se* inadmissible and will be allowed if: (1) not unduly prejudicial; (2) have substantial independent probative value; and (3) State makes every effort to disguise by redacting any criminal information and law enforcement insignia. Graves v. State, 496 N.E.2d 383, 385 (Ind. 1986).

Brooks v. State, 560 N.E.2d 49, 58 (Ind. 1990) (prosecutorial misconduct to deliberately refer to mug shots; behavior of prosecutor not to be condoned, even though defendant unable to show he was placed in grave peril by the misconduct).

Practice Pointer: Reference to mug shots is grounds for reversal even if not solicited by State, and therefore not prosecutorial misconduct. In Mack v. State, 736 N.E.2d 801 (Ind. Ct. App. 2000), a detective testified that he identified defendant from "a 12-pack photograph of people known to deal in the area of 24th and Alabama." Id. at 803. The appellate court found that this warranted a mistrial because it tainted the sole evidence against Mack even though the testimony was not intentionally introduced by the State. Id. at 803, n.4.

2. Misconduct must place defendant in grave peril

If misconduct established, must determine whether misconduct under circumstances placed defendant in position of grave peril to which he should have not been subjected.

Fox v. State, 399 N.E.2d 827 (Ind. Ct. App. 1980) (defendant placed in position of grave peril, State's use and reference to police mug file was reckless and inexcusable, highly improper for prosecution to bring entire picture file into court room, place it before witness, and then refer to file as a police "mug file"). See also Brooks v. State, 560 N.E.2d 49 (Ind. 1990).

Tucker v. State, 646 N.E.2d 972 (Ind. Ct. App. 1995) (reference to mug shot and child molesting conviction together prejudiced defendant and deprived him of fair trial).

3. No probative value and irrelevant when witness positively identifies defendant in courtroom

Where witness positively identifies defendant in courtroom, mug shots introduced as evidence going to identification are irrelevant, lack probative value, and an encumbrance on record. Blue v. State, 235 N.E.2d 471, 474 (Ind. 1968) (reversible error to introduce mug shots of defendant, even though taken at time of defendant's arrest on charge being tried; jurors might assume defendant had criminal record).

4. Photograph of person in three classic poses

Where photograph depicts individual in three classic poses: (1) full-length standing view; (2) sitting close-up facial view; and (3) sitting, side-profile view, reasonable to assume jurors would know photos taken incident to arrest or prison term. Photographs highly prejudicial upon sight and may easily create unfavorable automatic reaction in juror's mind without further investigation. Blue v. State, 235 N.E.2d 471, 474 (Ind. 1968).

5. Introduction of mug shots from current arrest not error if probative

Objection to mug shots is that jurors may infer a criminal history from the pictures; therefore, introduction into evidence of photographs taken at time of arrest for current charges, clearly marked with arrest date, is not error when some probative value is shown. Wheeler v. State, 749 N.E.2d 1111, 1114 (Ind. 2001). See also Dunsizer v. State, 523 N.E.2d 409, 411 (Ind. 1988).

Wheeler v. State, *supra* (introduction into evidence of mug shots taken after arrest for charged crime in order to support contention that defendant sustained head injury while killing victim does not raise normal prejudice of introduction of mug shots).

N. INADMISSIBLE PRIOR BAD ACTS

1. Prior crimes

Garcia v. State, 509 N.E.2d 888 (Ind. Ct. App. 1987) (defendant placed in grave peril where prosecution deliberately persisted to introduce prejudicial evidence regarding prior conviction, which had not been shown to be admissible under Ashton v. Anderson [now Ind. Evid. R. 609(a)] and which could not be conclusively shown to involve defendant, despite similarities in names and social security numbers). See also Collins v. State, 966 N.E.2d 96 (Ind. Ct. App. 2012).

Mack v. State, 736 N.E.2d 801 (Ind. Ct. App. 2000) (detective's testimony that he identified defendant from "a 12-pack photograph of people known to deal" in a certain area was prejudicial evidence of alleged prior crimes; where detective's testimony was only evidence against defendant, reversal required).

2. Allegations defendant bribed or threatened State's witness

Reversible error to admit evidence of cover-up without proper foundation: (1) that cover-up done by defendant; or (2) with his knowledge or authorization. Scifres-Martin v. State, 635 N.E.2d 218, 220 (Ind. Ct. App. 1995).

Keyser v. State, 160 Ind.App. 566, 569, 312 N.E.2d 922 (1974) (reversible error not to grant mistrial after State's chief witness testified, he had been offered bribe to change his testimony; where no evidence or testimony presented to connect defendant with alleged bribe).

Cox v. State, 422 N.E.2d 357 (Ind. Ct. App. 1981) (reversible error where State's witness testified his life was threatened if he testified against defendant; no evidence defendant had knowledge of or had authorized threats).

Adams v. State, 890 N.E.2d 770 (Ind. Ct. App. 2008) (distinguishing Keyser and Cox, where prosecutor purposefully elicited the threat testimony, witness here surprisingly volunteered that he would not testify because he feared for his safety and that of his family; there was no evidence suggesting that defendant knew of the alleged threats made to witness or that defendant was in any way connected to them when witness made the statements in open court), *trans. denied*, 901 N.E.2d 1094 (Ind. 2009) (Boehm and Sullivan, JJ., dissenting with opinion explaining why admonishment was insufficient).

Benson v. State, 762 N.E.2d 748 (Ind. 2002) (trial court erred in allowing State to confront its own witness with unsubstantiated suggestion that his reluctance to testify was due to threats received while witness was incarcerated; court questioned State's trial strategy, noting that Ind. Professional Conduct § 3.4(e) prohibits lawyer from alluding at trial to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence).

Hale v. State, 875 N.E.2d 438 (Ind. Ct. App. 2007) (no error in denying defendant's motion for mistrial after prosecutor asked confidential informant whether he had been threatened about his testimony at trial; defense counsel's cross-examination of informant permitted inference that threat to informant was not directly related to defendant and waived issue for review).

O. REFERENCES TO RELIGIOUS BELIEFS OR DEFENDANT'S RACE

1. Any reference to witness's religious beliefs improper

Indiana Rules of Evidence § 610 provides: "Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility."

Sevits v. State, 651 N.E.2d 278, 280, n.5 (Ind. Ct. App. 1995) (advisory notes on Fed. Evid. R. 610 indicate that an inquiry for purpose of showing interest or bias because of religious beliefs or opinions is not within the prohibition).

Pawlik v. Pawlik, 823 N.E.2d 328, 334 (Ind. Ct. App. 2005) (Rule 610 applies to attempts to bolster credibility as well as to impeachment but does not forbid evidence of a witness's religious beliefs when offered for another, relevant purpose).

People v. Wood, 488 N.E.2d 86 (N.Y.S. 1985) (conviction reversed when prosecutor attempted to impeach credibility of defendant's expert witness by emphasizing expert's decision to affirm rather than swear to truth of his testimony).

United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980) (evidence that witness was devoted to Luceme religion and faithfully adhered to that sect's teachings and consulted with spirits of his religion is inadmissible for purpose of showing that credibility is impaired by beliefs).

2. References to defendant's race

Where references to a defendant's race or ethnicity are not relevant to the case and serve only to appeal to the prejudices of the jury, admission of such evidence will amount to plain error and warrant reversal. United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000) and United States v. Vue, 13 F.3d 1206 (8th Cir. 1994). Constitutional principles of equal protection and due process forbid prosecutor from attempting to gain conviction on basis of racial prejudice. McClesky v. Kemp, 107 S.Ct. 1756 (1987) and Smith v. Farley, 59 F.3d 659 (7th Cir. 1995).

Reviewing courts will closely scrutinize allegations concerning wrongful injection of race into criminal proceedings. Tompkins v. State, 669 N.E.2d 394 (Ind. 1996).

United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000) (where defendant was Cuban, government references to drug market falling under control of Cuban dealers, suggestion that Cubans were flight risks, and descriptions of how Cuban package drugs were plain error).

United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) (Jamaican defendant was deprived of fair trial where prosecutor made references to fact that retail drug market in D.C. had been taken over by Jamaicans, implying that it was more likely that defendant was guilty of drug sales; plain error even though defense counsel did not object).

United States v. Hakim, 344 F.3d 324, 333 (3rd Cir. 2003) (no plain error even though government made repeated references to defendant's Islamic belief and passed around passport showing he traveled to Saudi Arabia, as explanation that government was demonstrating that witness respected, and trusted defendant was plausible).

P. BRING WITNESS BEFORE JURY IN ATTEMPT TO SHOW REFUSAL TO TESTIFY

1. Accomplice or co-defendant

Prosecutorial misconduct where State makes conscious and flagrant attempt to build its case out of inferences arising from use of defendant's or accomplice's testimonial privilege in presence of jury. United States v. Maloney, 262 F.2d 535, 537-538 (2nd Cir. 1959).

Inevitable inference raised in jury's mind when alleged accomplice refuses to testify is that withheld testimony would be damaging to witness and defendant. Douglas v. Alabama, 380 U.S. 415, 419, 85 S.Ct. 1074, 1077 (1965) (mere refusal to speak indelibly implants adverse inferences in mind of jurors and reaches them in form not subject to cross-examination)

It is improper to permit accomplice to be called before the jury when all parties know in advance that the accomplice will invoke the Fifth Amendment. See Borders v. State, 688 N.E.2d 874 (Ind. 1997); Steele v. State, 672 N.E.2d 1348 (Ind. 1996); Brown v. State, 671 N.E.2d 401 (Ind. 1996); and Chapman v. State, 556 N.E.2d 927, 927, 929 (Ind. 1990) (prosecutor not permitted to call accomplice who had not yet been brought to trial; would be highly prejudicial to defendant for accomplice to take stand and refuse to testify on grounds it might incriminate him);

Tucker v. State, 534 N.E.2d 1110 (Ind. 1989) (trial court committed reversible error in permitting confederate to be called to testify before jury when all parties knew in advance that he would invoke 5th Amendment; trial court further erred in refusing to admonish jury to disregard situation);

But See Eubanks v. State, 729 N.E.2d 201 (Ind. Ct. App. 2000) (trial counsel was not ineffective for failing to object and ask for admonishment when prosecutor called two accomplices knowing that they would assert 5th Amendment privilege; defendant was not prejudiced due to overwhelming evidence; see Darden, J., dissenting opinion).

2. Witnesses

The prosecution cannot call any witness solely to claim the Fifth Amendment privilege. Brewster v. State, 450 N.E.2d 507, 509 (Ind. 1983) (court should have admonished and instructed jury not to use witness's refusal to testify as evidence against defendant, even though witness was eyewitness and not accomplice or co-defendant).

However, a defendant may, as part of his trial strategy, call such a witness. Teague v. State, 891 N.E.2d 1121, 1130 n. 11 (Ind. Ct. App. 2008) and State v. Whitt, 649 S.E.2d 258 (W.Va. 2007).

Martin v. State, ___N.E.3d___(Ind.Ct.App. 12/30/21) (a witness who is expected to invoke his 5th Amendment privilege is not categorically barred from being called as a witness but there is no right to force a witness to take the stand solely to invoke a 5th Amendment right).

But see *ABA Standards for Criminal Justice*, § 3-5.7(c) (3d ed. 1993) (prohibiting both prosecutor and defense from calling a witness who is asserting the Fifth) and United States v. Crawford, 707 F.2d 447 (10th Cir. 1983). See also 86 A.L.R.2d 1443.

3. Entitled to admonishment and final instruction

If accomplice refuses to testify in presence of jury, defendant entitled to have jury admonished and instructed in final instructions that: (1) they are not to use witness's refusal to testify as evidence against defendant in any manner; nor (2) let it influence their verdict as to guilt or innocence. Brewster v. State, 450 N.E.2d 507, 509 (Ind. 1983). See Also Pitman v. State, 436 N.E.2d 74 (Ind. 1982).

Failure to admonish the jury when requested is reversible error. Aubrey v. State, 261 Ind. 692, 310 N.E.2d 556, 558 (1974) (failure to admonish jury when requested reversible error).

Q. CALLING WITNESS IN ORDER TO IMPEACH & ARGUING IMPEACHMENT EVIDENCE AS SUBSTANTIVE

Prosecutor is prohibited from placing a witness on the stand when the prosecutor's sole purpose in doing so is to present otherwise inadmissible evidence cloaked as impeachment. Impson v. State, 721 N.E.2d 1275 (Ind. Ct. App. 2000).

Appleton v. State, 740 N.E.2d 122 (Ind. 2001) (after State witness testified that defendant had not even been present at scene of crime, trial court erred in permitting prosecution to impeach this witness by reading line-by-line from prior inconsistent pretrial statement in which witness described defendant's participation).

R. IMPROPER IMPEACHMENT

1. Using specific acts to prove bad character

Witness cannot be impeached by specific events of misconduct. Impeachment must be done by proving general reputation for truthfulness. Bell v. State, 820 N.E.2d 1279 (Ind. Ct. App. 2005).

Brooks v. State, 497 N.E.2d 210 (Ind. 1986) (letters written by prosecution witness, to robbery defendant, containing sexual fantasies, were not admissible to impeach witness; witness's bad reputation for chastity could not properly be used to impeach her general character).

Ind. Evidence Rule 404(a) prohibits specific acts, but defendant may offer reputation and opinion evidence of good character to show innocence, and prosecution may rebut the same.

2. Exceptions – evidence rules

(a) Indiana Rule of Evidence 404(b)

Uncharged misconduct admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Ind. Rule of Evidence 404(b).

Not admissible to prove defendant's bad character or propensity to commit charged crime. Carter v. State, 634 N.E.2d 830 (Ind. Ct. App. 1994).

Oldham v. State, 779 N.E.2d 1162 (Ind. Ct. App. 2002) (in murder prosecution, defendant was subjected to fundamental error when State introduced business cards, a novelty photograph, and photographs of two guns found in defendant's garage during search of defendant's home; these items constituted irrelevant, inadmissible character and prior misconduct evidence under Indiana Evidence Rule(s) 404(a) & 404(b)).

Pagan v. State, 809 N.E.2d 915 (Ind. Ct. App. 2004) (State's questions regarding "pimp" tattoo on defendant's hand were improper).

Wilson v. State, 770 N.E.2d 799 (Ind. 2002) (photo of defendant brandishing firearms and flashing what appeared to be gang signs was irrelevant where there was no comparison between shell casings at scene and weapon in photo).

(b) Indiana Rule of Evidence 608(b)

If defendant testifies, prosecutor permitted to cross-examine concerning bad acts or other misconduct not resulting in previous conviction: (1) that are probative of truthfulness; and (2) based on good faith belief prior criminal conduct actually occurred. Ind. Rule of Evidence 608(b).

However, specific acts cannot be proved by extrinsic evidence. Ind. Rule of Evidence 608(b). See also Beatty v. State, 856 N.E.2d 1264 (Ind. Ct. App. 2006) and United States v. Abel, 469 U.S. 45, 55, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984).

PRACTICE POINTER: Ind. Rule of Evidence 608(b), which would otherwise prohibit evidence of specific acts of untruthfulness to impeach witness's credibility, must yield to defendant's Sixth Amendment right of confrontation and right to present full defense. See Walton v. State, 715 N.E.2d 824 (Ind. 1999) and Beaty v. State, 856 N.E.2d 1264 (Ind. Ct. App. 2006) (Baker, J., concurring on basis that there should be another exception to Indiana Rule of Evidence § 608(b)'s limitation on admission of specific acts of misconduct; when the State has offered a deal to a witness that results in avoidance of prosecution, the defendant should be able to explore the prior acts of misconduct in the dismissed charges.).

Moreover, bad acts that are inadmissible under Indiana Rule of Evidence 608(b) may be admissible under Indiana Rule of Evidence § 616 to show bias. Indiana Rule of Evidence § 608(b) does not preclude use of prior acts to show the "bias, rather than merely the character, of the witness being impeached." Miller, 13 Ind. Practice 165, § 608.203. "It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness is a liar." United States v. Abel, 469 U.S. 45, 56, 105 S.Ct. 465, 471, 83 L.Ed.2d 450 (1984).

S. CHARACTER ASSASSINATION

Misconduct when prosecutor attempts to portray defendant as dangerous, sinister, or possessing other undesirable characteristics of one likely to have committed crime charged or some other crime. See Bennett Gershman, *PROSECUTORIAL MISCONDUCT*, §10.2, p. 444 (Thompson Reuters 2015).

Bagnell v. State, 413 N.E.2d 1072 (Ind. Ct. App. 1980) (reversible error - and prosecutor's actions reprehensible - where more than 15 separate instances of questions portraying defendant as member of "underworld" who had been frequently arrested; grossly unfair and mockery of justice for defendant to defend against being a member of the criminal element).

Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (in murder prosecution, trial court committed reversible error by allowing State to present extensive evidence of extramarital sexual activity by defendant; if State's claim of relevance to motive is too strained and remote to be reasonable, then extrinsic act evidence is inadmissible).

T. GUILT BY ASSOCIATION

1. Guilt due to association with unsavory characters

Misconduct when prosecutor attempts to show guilt by showing defendant associates with unsavory individuals. Oldham v. State, 779 N.E.2d 1162 (Ind. Ct. App. 2002); United States v. Singleterry, 646 F.2d 1014, 1018 (5th Cir. 1981); and United States v. Turkette, 515 F.2d 145, 152 (2d. Cir. 1975).

Seide v. State, 784 N.E.2d 974 (Ind. Ct. App. 2003) (prosecutor did not commit misconduct during closing argument by comparing defendant's and victim's character and referring to defendant's character, including, defendant's inability to maintain steady employment; unfaithfulness to live-in girlfriend; parasitical dependence on girlfriend, who worked two jobs to support them both; and friendship with a man convicted of a cocaine offense. Prosecutor merely summarized what defendant's own witnesses said about him during trial).

The mere fact that person married to, associated with, or in company of criminal does not support inference that person is criminal or shares criminal's guilty knowledge. United States v. Forrest, 620 F.2d 446, 451 (5th Cir. 1980).

2. Guilt due to co-defendant's guilt

Conviction or guilt of others charged with same offense is not substantive evidence of defendant's guilt or innocence and cannot be introduced to imply guilt. Borders v. State, 688 N.E.2d 874, 880 (Ind. 1997).

Borders v. State, *supra* (although guilty plea may be admitted for impeachment purposes, use of co-defendant's guilty plea in closing argument - including statement that "if [co-defendant] is guilty of felony murder so is" defendant - was improper attempt to use guilty plea as substantive evidence of defendant's guilt).

U. TELLING JURORS TO PUT THEMSELVES OR CHILDREN IN VICTIM'S PLACE

It is ill-advised and inappropriate for prosecutor to tell jurors to put themselves or their children in the victim's place. McBride v. State, 785 N.E.2d 312 (Ind. Ct. App. 2003) (but not reversible error here due to the weight of the evidence against defendant).

V. SUGGESTING DEFENDANT HAS BURDEN OF PROOF

It is improper for a prosecutor to suggest that a defendant shoulders the burden of proof in a criminal case. However, a prosecutor's improper statements suggesting a defendant's failure to present witnesses may be cured by the trial court advising the jury that the defendant was not required to prove his innocence or to present any evidence. Stephenson v. State, 742 N.E.2d 463, 483 (Ind. 2001).

Bryant v. State, 41 N.E.3d1031 (Ind. Ct. App. 2015) (prosecutor's comments did not constitute attempt to shift burden of producing evidence onto defendant, but rather permissible impeachment of a defense witness, arising from the evidence the defendant introduced).

W. USING FALSE TESTIMONY TO OBTAIN A CONVICTION

See Chapter 12, Perjury.