

CHAPTER 18

JURY QUESTIONS & DELIBERATIONS

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CHAPTER 18

JURY QUESTIONS & DELIBERATIONS

This chapter was prepared utilizing practice pointers from “After Jury Instructions . . . Before the Verdict” by Marvin E. Schechter, 475 Park Avenue South, New York, NY 10016. Telephone (212) 683-8000.

I. JURY QUESTIONS

Juror may ask a witness a question in writing if the trial court rules that it is appropriate and rules upon any objections by parties. Ind. Evid. R. 614(d).

Trotter v. State, 733 N.E.2d 527, 530-33 (Ind. Ct. App. 2000) (jurors may ask any questions that lead to the discovery of truth or aid in understanding the evidence).

Amos v. State, 896 N.E.2d 1163 (Ind. Ct. App. 2008) (trial court properly allowed jury to ask questions beyond the scope of defendant’s cross; jurors can ask questions to clarify issues).

A. COURT MUST ENSURE JURORS KNOW WHEN THEY CAN ASK QUESTIONS

Court must instruct jury before opening statements that they may seek to ask questions of witnesses by submission of questions in writing. Jury Rule 20(a)(7).

Court should explain to jurors what questioning procedure will entail, to ensure that jurors know when they will be given an opportunity to ask questions. Trial court may use a variety of methods to obtain jury questions, including:

- (1) inform jury that it will be glancing at jury to see if questions exist after a witness’s testimony;
- (2) instruct jurors to verbally or physically indicate if they have any questions; or
- (3) tell jurors that it will specifically ask for questions after each witness.

See Ashba v. State, 816 N.E.2d 862 (Ind. Ct. App. 2004).

Howard v. State, 818 N.E.2d 469 (Ind. Ct. App. 2004) (neither Jury Rule 20(a)(7) nor Evid. Rule 614(d) require trial court to ask jury if it has questions after excusing each witness but merely requires trial court to give a preliminary instruction that does not leave jurors in doubt as to how they may ask questions).

Lemond v. State, 878 N.E.2d 384 (Ind. Ct. App. 2007) (trial court did not abuse its discretion by disallowing questions submitted by jury after close of evidence, where jurors were instructed to submit questions before each witness left the stand).

Holden v. State, 916 N.E.2d 223 (Ind. Ct. App. 2009) (harmless error, even though during a recess juror questioned a state’s witness about his testimony and, when trial reconvened, trial court asked the witness the same question).

Pierson v. State, 73 N.E.3d 737 (Ind. Ct. App. 2017) (Jury Rule 20 not violated when trial court allowed expert’s video deposition to be played at trial, even though jury could not ask expert questions, when parties agreed to use of video deposition in lieu of live testimony).

B. QUESTIONING PROCEDURE

- (1) Juror submits question in writing to trial court;
- (2) Trial court has hearing on “appropriateness” of questions outside presence of jury;
- (3) Trial court considers objections from parties; then

- (4) Court submits questions to witness or witnesses [or explains to jury that question is overruled].

Ind. Evid. R. 614(d); Trotter v. State, 733 N.E.2d 527, 530-33 (Ind. Ct. App. 2000).

C. APPROPRIATENESS OF QUESTION

Not all juror questions are proper, and the trial court must determine whether the question is appropriate after hearing objections from the parties. Trotter v. State, 733 N.E.2d 527, 531 (Ind. Ct. App. 2000). Proper questions are those which allow the jury to understand the facts and discover the truth. Id.

Matheis v. Farm Feed Const. Co., 553 N.E.2d 1241, 1242-43 (Ind. Ct. App. 1990) ("The point of permitting the jurors to resolve their questions was to aid them in their understanding of the facts and search for the truth.").

Carter v. State, 234 N.E.2d 650, 651-52 (Ind. 1968) (noting that jurors, by asking questions, obtain an understanding of the issues and evidence, learn the facts and discover the truth).

Dowdy v. State, 672 N.E.2d 948, 953 (Ind. Ct. App. 1996) (trial court's discretion of whether a juror question is for the purpose of discovering the truth is afforded broad discretion).

A trial judge may ask foundational questions of the witness to ensure that the witness has sufficient knowledge to answer the question. Trotter v. State, 733 N.E.2d 527, 532 (Ind. Ct. App. 2000). The question is proper as long as it has the same meaning as the juror's question and judge remains impartial.

Benson v. State, 762 N.E.2d 748, 755, n.3 (Ind. 2002) (judge inadvertently saying "the defendant" instead of "shooter" in reading of question to jury not fundamental error, and defendant made no objection).

1. Jurors might consult as a group and then submit questions

Jury Rule 20 permits jurors to discuss evidence during recesses prior to the close of the trial. Therefore, depending on when recesses are taken, jurors are permitted to discuss testimony/evidence and submit questions based on those discussions.

2. Questions subject to the rules of evidence

Questions submitted by jurors are subject to the rules of evidence the same as questions propounded by the parties. Burks v. State, 838 N.E.2d 510, 516-20 (Ind. Ct. App. 2005).

3. Alternate jurors

Jury Rule 20 requires trial courts to instruct that alternate jurors, in addition to the regular jurors, may ask questions of witnesses and participate in discussing the evidence in the jury room when all are present.

II. RETIRING TO DELIBERATE

A. PROCEDURE

1. After hearing court's charge

After hearing charge, jury shall retire to jury room for deliberation. They shall retire under charge of an officer sworn by court. Ind. Code § 35-37-2-6(a).

(a) Private place for deliberation

Requirement that jury deliberations be conducted in private place should be scrupulously observed. Richey v. State, 426 N.E.2d 389 (Ind. 1981).

2. Alternate juror may be sent to jury room

Alternate jurors permitted to retire to jury room during deliberations. Reichard v. State, 510 N.E.2d 163 (Ind. 1987).

(a) Alternate cannot participate

Alternate jurors not to participate in deliberations unless it becomes necessary for him to replace one of original jurors.

Lawson v. State, 664 N.E.2d 773 (Ind. Ct. App. 1996) (alternate did not impermissibly participate in deliberations by writing and signing note requesting television set to replay videotape; verdict form signed by jury foreperson affirmed alternate did not participate).

Griffin v. State, 754 N.E.2d 899 (Ind. 2001) (alternate did not add any fresh perspective to deliberations, and her only influence was adding one more "me, too" to the collective voice of jury majority; defendant failed to show either gross misconduct or probable harm).

Rice v. State, 916 N.E.2d 962 (Ind. Ct. App. 2009) (permitting alternates to participate in discussions is not contrary to Ind. Code § 35-37-1-1(b)(1) and is in accord with Jury Rule 20(a)(8) (2008)).

Weatherspoon v. State, 912 N.E.2d 437 (Ind. Ct. App. 2009) (court rejected constitutional challenge to 2008 amendment to Rule 20(a)(8), which permits alternate juror's participation in juror discussions before deliberations).

Stokes v State, 908 N.E.2d 295 (Ind. Ct. App. 2009) (although trial court did not inquire as to what alternate juror said, its inquiry whether jurors were influenced by the alternate amounts to adequate "consideration of the alternate's conduct in the overall trial context" to satisfy the Griffin standard).

Sanchez v. State, 794 N.E.2d 488 (Ind. Ct. App. 2003) (situation was actually less egregious than that found harmless in Griffin (above), in that alternate merely confirmed a fact several other jurors had written down, rather than expressing an opinion on the defendant's guilt).

Majors v. State, 773 N.E.2d 231 (Ind. 2002) (same concerns apply to post-verdict juror depositions).

(b) Defendant's consent not necessary

Alternate jurors could retire to jury room without defendant's consent. Wilcoxon v. State, 619 N.E.2d 574 (Ind. 1993).

(1) Defendant's right to have case decided by jury of 12

U.S. Constitution and Indiana Constitution recognize right to trial by jury. Lawson v. State, 664 N.E.2d 773, 776 (Ind. Ct. App. 1996).

Ind. Code § 35-37-1-1(b)(1) provides a statutory right to jury of 12 in murder and Level 1-5 felony cases. See also Jury Rule 16(a).

(2) Defendant's right to 6-person jury

Ind. Code § 35-37-1-1 provides for jury of six in Level 6 felonies, misdemeanors, infractions or ordinance violations. Dyer v. State, 460 N.E.2d 511, 513 (Ind. 1984). See also Jury Rule 16(a).

(c) Court must instruct on limited role

Instructions must be given that alternate jurors not participate in deliberations unless it becomes necessary to replace one of original jurors. Wilcoxon v. State, 619 N.E.2d 574 (Ind. 1993).

Tyra v. State, 574 N.E.2d 918 (Ind. Ct. App. 1991) (error not to properly instruct alternate not to participate; error harmless, no prejudice shown, no evidence presented at post-conviction hearing to show alternate more than observer during deliberations). See also Taylor v. State, 687 N.E.2d 606 (Ind. Ct. App. 1997).

Lyons v. State, 993 N.E.2d 1192 (Ind. Ct. App. 2013) (trial court's failure to instruct two alternate jurors not to participate in deliberations was not fundamental error).

3. Duties of sworn bailiff

Ind. Code § 35-37-2-6(a) provides that officer shall be sworn by court to:

- (1) keep the jury together in the jury room or other place ordered by the court;
- (2) furnish them food as directed by the court; and
- (3) not permit any person to speak or communicate with them.

Feliciano v. State, 467 N.E.2d 748 (Ind. 1984) (where bailiff sworn prior to deliberations on murder charge, court not required to re-swear bailiff, prior to jury deliberations on habitual offender charge).

For discussion of improper communications between bailiff and jurors, see IPDC Trial Manual, Chapter 18 § IV.C., *below*.

B. ITEMS PERMITTED IN JURY ROOM DURING DELIBERATION

Practice Pointers: Recommended means of providing materials to jury is use of juror trial books, which may be issued at discretion of court. Juror trial books may contain: (a) all given instructions; (b) information regarding the anticipated trial schedule; (c) witness lists; and (d) copies of exhibits admitted for trial. Jury Rule 23.

1. Factors court considers

Considerations appropriate for exercise of discretion:

- (1) whether material will aid jury in proper consideration of case;
- (2) whether any party will be unduly prejudiced by submission of material; and
- (3) whether material may be subjected to improper use by jury.

Thacker v. State, 709 N.E.2d 3, 7 (Ind. 1999) (citing Thomas v. State, 259 Ind. 537, 540, 289 N.E.2d 508, 509 (1972)).

(a) Same factors used to determine abuse of discretion

Evaluation of discretionary factors appropriate to determine if abuse of discretion occurred. Ascherman v. State, 580 N.E.2d 294 (Ind. Ct. App. 1991).

2. Lawyer's responsibilities before materials go to jury

- (1) Review material, if necessary, to remove any prejudicial matters that are otherwise inadmissible. **Note:** Jurors cannot view exhibits not in evidence. People v. Bouton, 50 N.Y.2d 130, 136-138 (1980) (reversible error).

- (2) Object to any portion of exhibit before it's marked.
- (3) Make sure only exhibits that have been marked actually go to jury.
- (4) Make sure all exhibits that were marked to go, actually do go to jury.

3. Examples of materials allowed

(a) Jury notes

Trial court is required to instruct jurors that they may take notes. Jury Rule 20(a)(4).

Presumably, notes taken pursuant to this rule may also be taken into the deliberations.

Stephenson v. State, 742 N.E.2d 463, 476-77 (Ind. 2001) (jury must be instructed that note taking cannot distract juror from paying attention to evidence presented).

Stephenson v. State, 742 N.E.2d 463, 478-79 (Ind. 2001) (no error for juror who compiled notes into 430-page typed notebook to take notebook into jury room; notes were just reflection of mental processes and personal observations, not evidence that functioned as an exhibit, and notebook was referred to only by that juror).

Stephenson v. State, 742 N.E.2d 463, 476-78 (Ind. 2001) (juror may also make notes at home during trial breaks as long as there is no communication to or from another person).

Hailey v. State, 521 N.E.2d 1318, 1321 (Ind. 1988) (trial court did not abuse discretion in refusing to grant new trial where juror reviewed notes during deliberation and discussed them with other jurors).

The trial court must preliminarily instruct jurors that though they can take notes, they cannot use laptop computers during testimony or deliberations; prohibition also includes cell phones or other electronic communication devices. Jury Rule 20(b).

Practice Pointers: The Stephenson opinion also noted that defendant did not seek instruction prohibiting jurors from sharing or reviewing each other's notes. Stephenson v. State, 742 N.E.2d 463, 479 (Ind. 2001). By inference, such an instruction may be sought and should be given if requested. Such an instruction may be useful if you notice jurors taking copious notes; notes may mistakenly be treated as transcript of testimony and bias their deliberations.

(b) Final instructions

(1) Must be retained during deliberations

Jurors shall retain written final instructions during deliberations. Jury Rule 26. See also Ind. Code § 35-37-2-2(5).

Ind. Code § 35-37-2-2(6) provides in part: If final instructions are submitted to the jury in written form after having been read by the court, no indication of the party or parties tendering any of the instructions may appear on any instruction.

(2) Must be read in open court

Court must first read instructions in open court before sending instructions into jury room. Rozika v. State, 520 N.E.2d 1267 (Ind. 1988). See also Jury Rule 26.

See Criminal Rule 8(G) providing: The court may of its own motion and shall, if requested by either party, reread to the jury the [preliminary] instructions along with the other instructions given to the jury at the close of the case.

(3) Must send entire instructions cleansed of extraneous markings

Court has discretion to send entire body of written instructions to jury cleansed of extraneous information.

Jewell v. State, 624 N.E.2d 38 (Ind. Ct. App. 1993) (violation of Ind. Code § 35-37-2-2(6) where 5 instructions identified State as proponent, and 2 other instructions cited to case law).

(4) No indications of party who tendered instruction

Criminal Rule 8(D) provides in part: Where final instructions are submitted to the jury in written form after having been read by the court, no indication of the party or parties by whom instructions were tendered should appear on any instruction.

(c) Weapons and bullets used in crime

Marsh v. State, 271 Ind. 454, 393 N.E.2d 757 (1979) (overruled on other grounds by Beattie v. State, 924 N.E.2d 643, 649 (Ind. 2010)) (no abuse of discretion in sending into jury room exhibits consisting of shotgun, ten photographs, and two sketches).

Jackson v. State, 274 Ind. 297, 303, 411 N.E.2d 609 (1980) (no error sending into jury room bullets removed from victim's body).

Henning v. State, 477 N.E.2d 547 (Ind. 1985) (in robbery case, no error in allowing jury to take brick purportedly used to render cab driver unconscious; brick relevant in demonstrating force of attack upon victim and defendant, and defendant did not demonstrate prejudice by brick's having been allowed into jury room).

(d) Confession, Miranda waivers, written reports where part of the evidence

Jackson v. State, 274 Ind. 297, 411 N.E.2d 609 (1980) (no abuse of discretion in permitting jury to take with them transcribed confession and copy of signed Miranda waivers; reexamination of confession could assist jury in determining if it was rationally and voluntarily made). See also Glasscock v. State, 576 N.E.2d 600, 603 (Ind. Ct. App. 1991).

Smith v. State, 437 N.E.2d 975, 976-77 (Ind. 1982) (court did not abuse discretion in permitting jury to examine defendant's statement, even though only one containing inculpatory information and inconsistent with two other statements, as it was only statement offered into evidence).

(1) Review of alleged error

When reviewing alleged error in submission of confessions or written reports to jury during deliberations, the appellate court evaluates circumstances surrounding submission and potential for prejudice. Ascherman v. State, 580 N.E.2d 294 (Ind. Ct. App. 1991).

(e) Photographs of victim

Roland v. State, 501 N.E.2d 1034 (Ind. 1986) (no abuse of discretion in allowing jury to take photographs of rape victim in hospital into jury room during deliberations to aid jury in determining issue of force versus consent).

Pettiford v. State, 619 N.E.2d 925 (Ind. 1993) (twelve photographs of murder victims and of crime scene properly permitted in jury room; each picture of victims taken from different angle and showed various wounds and would aid jury in understanding testimony of doctor, and photographs were not gruesome to point of being prejudicial).

(f) Charging information

Huffman v. State, 543 N.E.2d 360 (Ind. 1989), *overruled on other grounds* 567 N.E.2d 102, 105, HN 32 (not reversible error to permit jury to take Information into jury room while deliberating where jury had been fully apprised of charges against defendant, Information had been read to them twice, and jury had been instructed Information was merely formal, written charge and not evidence of guilt).

Practice Pointers: Insist on instruction that document only accusatory, not evidence. For dismissed counts or counts pertaining to severed defendants, insist on redaction. Try masking and Xeroxing, preferably get permission to scan redacted document and re-word process it.

(g) Audiotape/videotape

If audio or videotape is provided to jury following onset of deliberation, court must monitor use of videotape by playing it for jury in open court. Stokes v. State, 801 N.E.2d 1263 (Ind. Ct. App. 2004).

Stokes v. State, 801 N.E.2d 1263 (Ind. Ct. App. 2004) (abuse of discretion for trial court to give videotape to jury with equipment and instruction to view videotape on its own without monitoring its use; however, error was harmless as no prejudice shown).

Harris v. State, 659 N.E.2d 522 (Ind. 1995) (no error in sending audiotapes and tape player to jury room when jury began deliberations where defendant made no objection when State's exhibits were admitted into evidence or when State requested that audio-taped confession be played for jury in open court; defendant failed to show how or why exhibits unduly prejudiced his case or subject to improper use by jury).

Hall v. State, 897 N.E.2d 979 (Ind. Ct. App. 2008) (even assuming jury listened to sound recording repeatedly in an unsupervised setting, defendant did not identify what prejudice to his substantial rights might have ensued).

Mays v. State, 907 N.E.2d 128 (Ind. Ct. App. 2009) (although trial court abused its discretion in sending a video to the jury room for the jury to view unmonitored from the prosecution's lap top, the error was harmless).

Robinson v. State, 699 N.E.2d 1146 (Ind. 1998) (same considerations set forth in Thomas v. State, 289 N.E.2d 508 (Ind. 1972) apply to requests made after deliberations have begun, unless Ind. Code § 34-36-1-6 is implicated).

Sturma v. State, 683 N.E.2d 606 (Ind. Ct. App. 1997) (where additional material is provided to jury following onset of deliberation, Ind. Code § 34-1-21-6 and Indiana precedent suggests providing information in open court).

Lawson v. State, 664 N.E.2d 773, 777 (Ind. Ct. App. 1996) (videotape, along with other exhibits, sent to jury room).

4. Inadmissible materials inadvertently taken inside jury room

Franklin v. State, 533 N.E.2d 1195, 1196 (Ind. 1989) (reversible error where jury found defendant's fingerprint record - revealing prior conviction - inside of evidence bag supposed to only contain firearm transaction record; court had granted motion in limine prohibiting any reference to criminal history, and affidavit from juror indicated criminal record discussed during deliberations; jury influenced by fingerprint record as only evidence against defendant was from fellow prisoner's conviction).

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

Hape v. State, 903 N.E.2d 977 (2009) (text messages on cell phone admitted into evidence are intrinsic to cell phone; thus, the jury reading text messages was not reversible error, even though defense counsel and prosecutor were unaware of their existence).

Shipley v. State, 620 N.E.2d 710, 714 (Ind. Ct. App. 1993) (defendant not prejudiced and not placed in grave peril when jurors inadvertently took partially un-redacted portion of co-defendant's inadmissible statement into jury room; exhibit made no reference to defendant, and evidence was exculpatory).

Note: For alleged error in submission of confessions or written reports to jury, the appellate court evaluates circumstances surrounding submission and potential for prejudice.

Ascherman v. State, 580 N.E.2d 294 (Ind. Ct. App. 1991).

5. Materials that jurors cannot take into jury room

(a) Mug shots

Limited utility to be derived by jury in viewing mug shots. Highly prejudicial nature of mug shots compounded when permitted in jury room for jurors' close scrutiny.

Anderson v. State, 360 N.E.2d 1266, 1267 (Ind. Ct. App. 1977) (reversible error in permitting defendant's mug shots to be taken into jury room; possibility mug shots could have been subjected to improper use by jury, and prejudice of mug shots indicating possible prior criminal record greater than limited aid of photographs to jury).

(b) Prior statements of witness

Per se abuse of discretion to allow prior witness statements to go to jury room. Thomas v. State, 259 Ind. 537, 289 N.E.2d 508 (1972); Ascherman v. State, 580 N.E.2d 294 (Ind. Ct. App. 1991).

(1) Substantive and impeachment evidence

Court's rationale in Thomas v. State, 259 Ind. 537, 289 N.E.2d 508, 509 (1972), did not limit its application to impeachment as opposed to substantive evidence. Ingram v. State, 547 N.E.2d 823, 828 (Ind. 1989).

State v. Harden, 496 N.E.2d 35 (Ind. 1986) (defendant prejudiced because jury took transcripts of prior inconsistent statements used to impeach State's witnesses into deliberations; considering evidence at trial was conflicting, and jury might have considered impeaching statements as substantive evidence).

III. REQUEST FOR INFORMATION DURING DELIBERATIONS

A. WHEN JURY INDICATES THAT IT HAS REACHED AN IMPASSE/IS IN DISAGREEMENT

1. Jury Rule 28 – jury advises it is at an impasse

Indiana Jury Rule 28 urges that trial judges facilitate and assist jurors in deliberative process when they express that they have reached an impasse in its deliberations. Jury Rule 28; Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002).

(a) Options for trial court to respond to request

Under appropriate circumstances, trial court may:

- (1) directly seek further information from jury;
- (2) directly answer jury's question;
- (3) allow counsel to briefly address jury's question in short supplemental arguments;
or
- (4) employ other approaches or combination thereof.

Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002).

Other approaches include replaying a witness's testimony. Parks v. State, 921 N.E.2d 826 (Ind. Ct. App. 2010).

(b) Old case law does not apply; look to other jurisdictions

As Jury Rule 28 is a new procedure in Indiana, courts may turn to other jurisdictions for guidance rather than to old case law. Litherland v. McDonnell, 796 N.E.2d 1237 (Ind. Ct. App. 2003).

2. Ind. Code § 34-36-1-6 – jury expressly in disagreement

Jury requests for information during deliberations, if arising as a result of an expressed disagreement among the jurors, is addressed by Ind. Code § 34-36-1-6.

The statute provides that the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys if, after the jury retires for deliberation: (1) there is a disagreement among the jurors as to any part of the testimony; or (2) the jury desires to be informed as to any point of law arising in the case. Ind. Code § 34-36-1-6. See also Jury Rule 28.

(a) When is statutory procedure triggered?

Statute's protections are only triggered upon an express showing of disagreement among jurors. Bouye v. State, 699 N.E.2d 620 (Ind. 1998); Robinson v. State, 699 N.E.2d 1146 (Ind. 1998).

A question or mere request to review evidence does not implicitly show disagreement. Id.

Gibson v. State, 702 N.E.2d 707, 709 (Ind. 1998) (no error for court to send jury all exhibits without consulting with counsel after request to see various State's exhibits, as request did not express a disagreement between the members of the jury).

Perry v. State, 867 N.E.2d 638 (Ind. Ct. App. 2007) (trial court improperly determined that jury had reached an impasse, which has been defined as "a position from which there is no escape, a deadlock").

Practice Pointers: When jury explicitly indicates disagreement, information must be given in the presence of the parties or counsel under Ind. Code § 34-36-1-6. However, the common law protections described below apply to any jury request; so defense counsel should argue both statutory and common law protections if both apply. Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998). Also consider broad discretion given by Jury Rule 28 when the jury expresses that an impasse has been reached.

B. COMMON LAW RULES IF JURY JUST REQUESTS EVIDENCE

If jury merely requests to review exhibits, Ind. Code § 34-36-1-6 does not apply. Bouye v. State, 699 N.E.2d 620 (Ind. 1998). Indiana Jury Rules afford greater flexibility in responding to jury questions. Powell v. State, 769 N.E.2d 1128 (Ind. 2002).

1. No *ex parte* communication permitted

Judge must notify parties so that they may be present in court and informed of court's proposed response to jury before judge ever communicates with jury. Failure to do so is an *ex parte* communication, which is completely forbidden and creates a presumption of error. Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998); Grey v. State, 553 N.E.2d 1196 (Ind. 1990). See also Jury Rule 28.

2. Factors to consider in granting request

Trial court should consider three factors in deciding whether to permit the jury to view the exhibits: (1) whether the material will aid the jury in a proper consideration of the case; (2) whether any party will be unduly prejudiced by submission of the material; and (3) whether the material may be subjected to improper use by the jury. Thacker v. State, 709 N.E.2d 3, 6, (Ind. 1999).

3. Trial judge must ensure jury makes best effort to reach truth, with restraint

"The trial judge must conduct the proceedings in a manner that facilitates ascertainment of the truth, insures fairness, and obtains economy of time and effort commensurate with the rights of both society and the criminal defendant . . . Although this Court has been liberal in allowing the jury to rehear portions of the evidence, there are limitations on the trial court's discretion. For example, trial courts may not allow the jury to review the testimony of an entire trial." James v. State, 613 N.E.2d 15, 23-24 (Ind. 1993).

4. Less discretion after jury has begun deliberation

Discretion is somewhat more limited in the situation where the jury interrupts its deliberations to request material to review. Stokes v. State, 801 N.E.2d 1263 (Ind. Ct. App. 2004); Harris v. State, 659 N.E.2d 522, 526 (Ind. 1995).

C. PREFERRED PROCEDURE FOR ANY JURY REQUEST

- (1) Jury makes request in writing.
- (2) Notify defense and prosecution.
- (3) Mark note as court exhibit.
- (4) Read note into record before jury returns. **Caveat:** There should be no "We'll put this on the record later."
 - (a) all counsel and defendant present during reading.
- (5) Counsel have full opportunity to suggest responses on the record. **Caveat:** No informal, off-the-record discussion of jury note, no matter how well the judge, prosecutor and defense lawyer know each other.
 - (a) all argument regarding note should refer to exhibit number.
- (6) Court apprises counsel of intended response.
- (7) Counsel get further opportunity to modify response.
- (8) Jury returned to courtroom.

- (9) Defendant must be present.
- (10) Note read into record again.
- (11) Answer the note.

1. Court refuses to answer question

(a) Court not required to notify parties if it decides not to respond to jury request for information

Right to be notified triggered when court communicates response to jury question, not when jury raises the question. Wray v. State, 720 N.E.2d 1185, 1189-90 (Ind. Ct. App. 1999).

Wray v. State, *supra* (if trial court decides not to respond to jury request for information, judge is not required to notify parties and bring them into court).

Hillenburg v. State, 777 N.E.2d 99, 107-08 (Ind. Ct. App. 2002) (when trial court responds to jury request for information by responding through bailiff that information cannot be provided, no prejudice to defendant in not being informed of the jury request). See also Godby v. State, 736 N.E.2d 252, 257-58 (Ind. 2000) and Dickenson v. State, 835 N.E.2d 542 (Ind. Ct. App. 2005).

Williams v. State, 830 N.E.2d 107 (Ind. Ct. App. 2005) (trial court's response that the "instructions and verdict forms are your best guidance" was essentially a denial of the jury request; Ind. Code § 34-36-1-6 requires notice or presence only when "information" is given and jury here received no information).

(b) Failure to answer question not error per se

Failure to answer question not error per se. Court must exercise discretion in determining whether certain questions should be answered. Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc., 437 N.E.2d 1360, 1364 (Ind. Ct. App. 1982).

Note: If jury indicates it is at an impasse, emphasize to court that Jury Rule 28 encourages court to respond to jury so as to facilitate deliberations.

2. If jury's question ambiguous

(a) As to facts

Insist upon clarification before agreeing to further argument or an intended response.

(b) As to crimes charged or elements

Clarification may be necessary as to whether jurors inquiring about differences between elements of crimes AND/OR inquiring about particular crime or element.

3. When challenging exhibits ask for mistrial

(a) Because making record constitutes waiver

Request affirmative relief of mistrial. Electing only to make record for appeal waives challenge for exhibits being sent to jury during deliberations.

Ascherman v. State, 580 N.E.2d 294, 296 (Ind. Ct. App. 1991) (defendant merely requested to "make some record" but did not request affirmative relief from court upon learning exhibits had been sent to jury during deliberations; defendant could have afforded trial court opportunity to rectify perceived harm, but elected to make record for appellate purposes).

D. SPECIFIC JURY REQUESTS

1. Clarification of point of law

If, after retiring for deliberation, the jury desires to be informed as to any point of law arising in the case, Ind. Code § 34-36-1-6 applies.

Jury Rule 28 urges trial courts to facilitate the deliberative process, and combines with Ind. Code § 34-36-1-6 to encourage flexible response to jury requests. Court may apply reasonable procedure to jury request, even if question is merely one as to a point of law. Hobson v. State, 795 N.E.2d 1118, 1125-26 (Ind. Ct. App. 2003).

Hobson v. State, *supra* (proper for trial court to permit counsel to present one minute each of supplemental argument on question about self-defense law).

See also IPDC Trial Manual, Chapter 18 § III.D.2., *below*, permitting additional instructions to be given.

2. Court may give additional instructions

Jury Rule 28 permits reading of additional instructions after deliberations commence. Thomas v. State, 774 N.E.2d 33, 36 (Ind. 2002).

Massey v. State, 803 N.E.2d 1133, 1137 (Ind. Ct. App. 2004) (in response to jury confusion about lesser-included offenses, proper for trial court - after consulting with counsel in presence of defendant - to re-read instructions in entirety and add new instruction on how to apply verdict forms for the lesser-included offenses).

Gantt v. State, 825 N.E.2d 874 (Ind. Ct. App. 2005) (trial court acted appropriately under Jury Rule 28 in providing an additional jury instruction to address a disagreement among jury members; however, instruction given was an erroneous statement of law and invaded province of jury to determine credibility and accept or reject evidence as it sees fit).

Jervis v. State, 916 N.E.2d 969 (Ind. Ct. App. 2009) (trial counsel not ineffective for failing to request instruction on a lesser included offense after the jury claimed during deliberations that it bothered some of them that they did not have the option of reckless homicide; such request could not legally have been granted).

Ramirez v. State, 174 N.E.3d 181 (Ind. 2021) (holding trial courts are no longer required to find an error or “legal lacuna” to give supplemental jury instruction in response to juror question that seeks clarification on a point of law and upholding decision to give supplemental instruction clarifying mens rea for murder in LWOP case).

(a) Oral and written instructions required

Court must give each juror written instructions, read appropriate final instructions, and instruct jurors to retain written instructions during deliberations. Jury Rule 26.

(b) Written instructions

(1) Must be retained during deliberations

Jurors shall retain written final instructions during deliberations. Jury Rule 26. See also Ind. Code § 35-37-2-2(5).

(2) Instructions must be cleansed

Ind. Code § 35-37-2-2(6) provides in part: If final instructions are submitted to the jury in written form after having been read by the court, no indication of the party or parties tendering any of the instructions may appear on any instruction.

(c) Jury confused by initial charge

If jury indicates confusion over initial jury charge:

- (1) court should do more this time than it did during initial charge;
- (2) counsel should request in writing that something more be done than what jury is requesting;
- (3) make your request in writing, and ask court to make it an exhibit;
- (4) obtain ruling; or
- (5) if your request denied, and after court gives supplemental charge, object again.

3. Court may not read from party's closing argument

Court responding to jury request by reading from one of parties' arguments is error. Thomas v. State, 774 N.E.2d 33, 36 (Ind. 2002).

Thomas v. State, *supra* (reading of legal opinion that State used in closing argument was error - even though just legal opinion was read, it also was part and parcel of State's argument; however, error was harmless).

4. Replaying testimony or rereading documentary evidence

Judge required, upon request of jury, to read any properly admitted testimony or documentary evidence. Douglas v. State, 441 N.E.2d 957, 962 (Ind. 1982).

Court's authority to replay parts of trial testimony after jurors have commenced deliberations not unlimited. Smith v. State, 549 N.E.2d 1101, 1106 (Ind. Ct. App. 1990); Shaffer v. State, 449 N.E.2d 1074 (Ind. 1983).

In order for court to have duty to furnish jury with additional information, Ind. Code § 34-36-1-6 requires jury either: (1) manifest disagreement over testimony; or (2) desires to be informed as to any point of law.

See also Jury Rule 28, permitting court to assist jury is it notifies court that it "has reached an impasse in its deliberations."

Morrison v. State, 609 N.E.2d 1155 (Ind. Ct. App. 1993) (jury's note asking court to make factual determination did not invoke requirements of statute governing requests by deliberating jury for information, which requires either disagreement as to part of testimony, or desire for information as to point of law in case).

Brownlee v. State, 555 N.E.2d 505, 508 (Ind. Ct. App. 1990) (statute seems to require that the juror disagree about the testimony, rather than merely being unable to hear testimony).

(a) Viewing of admitted depositions is permitted

Deposition transcripts that have been admitted into evidence may be allowed into jury room if jurors have indicated that they are at an impasse and, after consulting with counsel, trial court finds that neither party will be unduly prejudiced. Litherland v. McDonnell, 796 N.E.2d 1237 (Ind. Ct. App. 2003).

(b) Procedure

Ind. Code § 34-36-1-1 through 9 mandates judge read [or after Litherland, alternatively submit to jury] properly admitted testimony or documentary evidence if:

- (1) jurors have retired for deliberation; and

- (2) disagree as to any part of testimony or desire to be informed as to a point of law in the case.

Court will then call jury back into court, and information requested shall be given (a) in presence of, or (b) after notice to parties or their attorneys.

See also Jury Rule 28.

(1) Judge decides whether disagreement exists

Miller v. State, 716 N.E.2d 367, 370-71 (Ind. 1999) (trial court did not commit fundamental error by preparing note with assistance of parties telling jury that testimony they wanted to rehear could not be reviewed unless there was some disagreement among jurors concerning testimony).

Smiley v. State, 579 N.E.2d 136 (Ind. Ct. App. 1991) (although defendant waived error by failing to object at trial, judge did not have to ascertain whether there was any disagreement among jurors as to witnesses' testimony, prior to directing court reporter to read portion of testimony to jurors in response to jury's request to review evidence after deliberations had commenced).

(a) But party who wants testimony replayed must take steps

Party who wants testimony replayed must take steps to determine whether disagreement exists when jury requests. If party does not do so, judge not required to do so. Hogan v. State, 616 N.E.2d 393, 398 (Ind. Ct. App. 1993).

Cade v. State, 590 N.E.2d 624, 627 (Ind. Ct. App. 1992) (no basis for belief there was disagreement where note from jury asked to listen to testimony for further review and consideration, and defendant asserted that "there exists a strong possibility that they disagreed as to portions of the testimony"; defendant did not take any steps to determine whether any disagreement existed).

Note: In a concurring opinion Chief Judge Ratliff limited his concurrence: defendant invited error by agreeing with trial judge not to replay testimony. Judge Ratliff expressed no opinion as to who is responsible for determining whether disagreement exists.

(2) Jurors may take notes

Jury Rule 20 permits notes to be taken at any time during trial, as long as note taking does not interfere with attention to testimony.

(c) Strategic considerations

- (1) go on record when responding to court regarding testimonial read backs. Failure to do so may result in any court error not being preserved for review.
- (2) object prior to read back, where court allows read back beyond scope of jury request. See People v. Merrill, 169 A.D. 2d 997 (N.Y. App. 1991) (reversible error may occur where providing more information results in undue emphasis on unrequested portion, creates other prejudice or does not meaningfully respond to jury inquiry).
- (3) think about ramifications of testimonial read back in context of theory of case, prior notes, counsel's assessment of chances of acquittal, conviction or hung jury.

- (a) if jury requests specific witnesses read back on specific subject, can you request another witness' testimony on that subject be read if it's favorable to defense case?
- (4) consent to read back by giving transcript not advantageous, in most instances, where records contain objections which were sustained.
- (5) read back of good defense summation advantageous, particularly if prosecutor's summation was disorganized.

(d) Court may deny request if it amounts to retrial of case

Court has discretion to deny request if jury wants testimony of numerous witnesses reread amounting to effective retrial of case.

Shaffer v. State, 449 N.E.2d 1074 (Ind. 1983) (abuse of discretion in granting jury request to listen to tapes which contained three and one-half hours of testimony of witnesses, particularly since evidence conflicted).

Note: Generous discretion given to court by Jury Rule 28 may permit the type of behavior disapproved of by Shaffer; general movement is towards allowing any non-prejudicial means of assisting jury.

(e) Waiver

Lee v. State, 569 N.E.2d 717 (Ind. Ct. App. 1991) (defendants waived error, court sent exhibits to jury during deliberations without first notifying counsel, no objection was made when trial court informed defense counsel that it would send exhibits to jury if requested or when, before announcement of verdict, trial court advised counsel that it had granted requests).

5. Providing additional materials

It is error to provide jury with items after deliberations have begun without monitoring use of items.

Powell v. State, 644 N.E.2d 855 (Ind. 1994) (reversible error to provide tape recorder and three audiotapes of alleged drug transaction after onset of deliberation without monitoring use of items).

Hall v. State, 897 N.E.2d 979 (Ind. Ct. App. 2008) (trial court's decision to provide sound recording and equipment to jurors during deliberations, albeit technically erroneous, did not prejudice defendant's substantial rights).

Perry v. State, 867 N.E.2d 638 (Ind. Ct. App. 2008) (in its typed response to jury's questions, trial court erroneously inserted defendant's first name instead of State's witness, which conveyed to jury that defendant admitted that he fired shots; neither party nor trial court recognized the error and jury was never informed of mistake, which resulted in "incalculable prejudice" and fundamental error).

(a) Means to view exhibit

Court may provide means to view exhibit after deliberations commenced, if exhibit was given to jury before it began deliberations.

Pattison v. State, 958 N.E.2d 11 (Ind. Ct. App. 2011) (trial court did not err in allowing jurors to examine and experiment with weightlifting machine during deliberations).

Lawson v. State, 664 N.E.2d 773, 777 (Ind. Ct. App. 1996) (no error in the trial court's merely providing the means to view an exhibit after deliberations have commenced).

Harris v. State, 659 N.E.2d 522 (Ind. 1995) (Supreme Court did not specifically address whether it's proper to send tape player to jury after deliberations had commenced).

Stokes v. State, 801 N.E.2d 1263 (Ind. Ct. App. 2004) (harmless error in allowing videotape exhibit to go back to jury after deliberations began without monitoring its use).

(b) Unrequested exhibits

Van Sant v. State, 523 N.E.2d 229 (Ind. Ct. App. 1988) (no error in denying defendant's request exhibits be sent to jury room where jury reviewed exhibits and heard evidence on public opinion poll in open court; jury never requested to see exhibits during deliberations and record failed to indicate how viewing exhibits would have aided jury).

6. Examination/Experimentation

(1) Will it aid your theory of case?

(2) Courtroom v. jury room?

Patterson v. State, 742 N.E.2d 4, 15 (Ind. Ct. App. 2000) (jurors did not conduct improper experiment by measuring and comparing shoes with shoeprint that was admitted in evidence).

7. Viewing single piece of evidence

Improper to allow jury to view single piece of evidence. Places undue emphasis on such evidence.

Shaffer v. State, 449 N.E.2d 1074 (Ind. 1983) (abuse of discretion by sending tapes of defense witnesses' testimony which was contested by State).

Underwood v. State, 535 N.E.2d 118 (Ind. 1989) (not reversible error in refusing to allow viewing of videotape or to supply transcript).

8. Transcript of witness' testimony

Parks v. State, 921 N.E.2d 826, 829-32 (Ind. Ct. App. 2010) (trial court properly responded to jury request for transcript of a witness' testimony after jury had reached an impasse; jury returned to court after two hours of deliberations, said they were not close to reaching a verdict, submitted two questions to the court which it declined to answer, asked for a transcript of the witness' testimony which the court declined to provide, and then deliberated for two more hours before again requesting the testimony).

IV. IMPROPERLY COMMUNICATING WITH JURY (JUDGE AND BAILIFF)

A. PROCEDURES TO CHALLENGE

1. Communications must be in open court

All communications by court with jury after submission of cause to must be in open court. Hall v. State, 8 Ind. 439 (1856) and Averhart v. State, 470 N.E.2d 666, 690 (Ind. 1984).

(a) Procedure

Upon request by jury when there is disagreement between them as to part of testimony, judge may, in open court, and in presence of defendant and his attorney, allow jurors to rehear testimony. Ind. Code § 34-36-1-1 through 9.

Hogan v. State, 274 Ind. 119, 409 N.E.2d 588 (1980) (statute requiring court to conduct all conversations with jury in open court and in presence of or after notice to parties or their attorneys applied to criminal prosecutions).

(1) Notification

Notification of parties is required to ensure their presence in court before communication with jury is accomplished. Grey v. State, 553 N.E.2d 1196, 1198 (Ind. 1990); Faceson v. State, 642 N.E.2d 985 (Ind. Ct. App. 1994).

(2) Defendant's right to be present when jury present

Ex parte communications with jury without notice and presence of defendant violates Sixth Amendment via Due Process Clause. Marsillett v. State, 495 N.E.2d 699, 709 (Ind. 1986); Harrison v. State, 575 N.E.2d 642 (Ind. Ct. App. 1991). See also Ind. Const. Art. 1 §13.

Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998) (failure to notify parties so they may be present is forbidden *ex parte* communication and creates presumption of error).

Childers v. State, 408 N.E.2d 1284 (Ind. Ct. App. 1980) (reversible error to communicate with jury in defendant's absence, although defense counsel present, and communication involved explanation of elements of offense charged; further comment on instructions given, in response to question from jury after they had deliberated for seven hours, and jury returned guilty verdict an hour later).

(a) Must expressly waive Sixth Amendment right

Right to be present at every critical stage of proceedings requiring presence of jury may be relinquished only by defendant's express personal waiver. Robinson v. State, 699 N.E.2d 1146, 1151 (Ind. 1998); State v. Harden, 496 N.E.2d 35 (Ind. 1986).

If this right can be waived at all, such waiver should be expressly given by accused. Cape v. State, 400 N.E.2d 161, 163 (Ind. 1980)

(3) Provide parties with proposed response

Judge should provide parties with his proposed response to jury's request for information. Marsillett v. State, 495 N.E.2d 699 (Ind. 1986); Faceson v. State, 642 N.E.2d 985, 987 (Ind. Ct. App. 1994).

2. Improper communications**(a) Discovered during deliberations**

Make record about everything you know

- (1) ask court to conduct hearing inquiring about communication;
- (2) ask court to rule whether its supervisory power has been violated; and
- (3) ask court to rule on violation of defendant's right to be present at all critical stages.

If court finds improper communication:

- (1) move for mistrial; and
- (2) do not consent to curative instruction, as this could be a waiver.

(b) Discovered after verdict

File written motion to set aside verdict, including sworn factual allegations.

B. JUDGE

1. May give additional instructions

Jury Rule 28 permits reading of additional instructions after deliberations commence. Thomas v. State, 774 N.E.2d 33, 36 (Ind. 2002). Normal protections of notice to and consultation of parties apply. Trial courts have flexibility to help jurors deliberate in order to avoid mistrials.

Campbell v. State, 19 N.E.3d 271 (Ind. 2014) (trial counsel was not ineffective for failing to object to supplemental instruction read to jurors after they requested a definition of intent).

Massey v. State, 803 N.E.2d 1133, 1137 (Ind. Ct. App. 2004) (in response to jury confusion about lesser-included offenses, proper for trial court - after consulting with counsel in presence of defendant - to re-read instructions in entirety and add new instruction on how to apply verdict forms for the lesser-included offenses).

Ronco v. State, 862 N.E.2d 257 (Ind. 2007) (it was proper for trial court to re-read only relevant instructions and explain the instructions in response to jury's questions about the law).

2. Forbidden ex parte communications

Communications between judge and jury in defendant's absence forbidden, but not per se grounds for reversal. Thompson v. State, 555 N.E.2d 1301 (Ind. Ct. App. 1990).

Rebuttable presumption of prejudice to defendant, when communications with jury occurs outside defendant's presence. Brewer v. State, 605 N.E.2d 181 (Ind. 1993).

(a) Reversible error

(1) Accumulated communications

Improper *ex parte* communications which may not be individually sufficient to establish reversible error may result in reversible error when accumulated.

Jewell v. State, 624 N.E.2d 38 (Ind. Ct. App. 1993) (reversible error where defendant established violation of right to be present at all stages of prosecution; error accumulated from five *ex parte* contacts between judge and jury, and also from providing jury with certain written instructions during deliberations).

(2) Instructions

Communication between judge and jury regarding instructions that take place without notice to defendant violates defendant's constitutional rights.

Harrison v. State, 575 N.E.2d 642 (Ind. Ct. App. 1991) (rereading one or more instructions in isolation from body of final instructions constitutes reversible error).

Dowell v. State, 973 N.E.2d 58 (Ind. Ct. App. 2012) (after deliberations began, jury erroneously given accomplice liability instruction and court did not reread the entire set of final instructions; issue was wrongly emphasized, requiring reversal).

(3) Testimony

Cape v. State, 400 N.E.2d 161 (Ind. 1980) (violation of Sixth Amendment for court to allow jury to hear replay of portions of testimony without presence of accused and his counsel).

State v. Harden, 496 N.E.2d 35 (Ind. 1986) (error occurred during deliberations when court played a tape exhibit for jury in defendant's absence).

(4) Responding in writing

Jackson v. State, 175 Ind. App. 584, 372 N.E.2d 1242 (1978) (prejudice presumed and new trial granted where jury twice sent written notes to court requesting information or instruction and on each occasion court responded by written communication not in open court and not with accused present; nothing before court of appeals disclosing contents of these communications).

(b) Avoiding reversal

State may avoid reversal if it shows no harm or prejudice resulted from communication. Brewer v. State, 605 N.E.2d 181 (Ind. 1993).

Appellate court reviews: (1) nature of communication to jury; and (2) effect it might have had upon fair determination. Marsillett v. State, 495 N.E.2d 699, 709 (Ind. 1986).

(c) Harmless error

No prejudice shown if communications between judge and jury in absence of counsel: (1) did not involve material issues; or (2) did not play role in a decision on merits of verdict. City of Indianapolis v. Ervin, 405 N.E.2d 55 (Ind. Ct. App. 1980).

(1) Court denies jury's request

Inference of prejudice rebutted and deemed harmless by showing trial court merely responded to jury by denying its request. Brewer v. State, 605 N.E.2d 181 (Ind. 1993); Grey v. State, 553 N.E.2d 1196 (Ind. 1990).

(2) Rereading jury instructions in entirety

Presumption rebutted by showing trial court merely reread jury instructions in their entirety. Mullins v. State, 523 N.E.2d 419, 423 (Ind. 1988).

(3) Sentencing recommendation/verdict

Harmless error where trial court merely responded to jury by stating jury could make sentencing recommendation and jury could write own verdict based on instructions where statements did not go to merits of case or manner in which merits are determined.

(4) Commenting on inappropriate behavior

Majors v. State, 773 N.E.2d 231, 234 (Ind. 2002) (when trial court observed juror making inappropriate facial expressions during trial, having bailiff caution juror privately about conduct was not prejudicial ex parte communication and defendant

had no right to be present during communication because it did not relate to substantive right of defendant).

(5) Supplying dictionary

Shultz v. State, 417 N.E.2d 1127 (Ind. Ct. App. 1981) (not reversible error when dictionary sent to jury during deliberations at jury's request although neither counsel present; in light of innocuousness of everyday definitions of common language found in dictionary, coupled with overwhelming evidence of defendant's guilt).

(6) Telling jury to continue deliberating

Nichols v. State, 591 N.E.2d 134 (Ind. 1992) (harmless error where judge responded to jury's note without first notifying parties, or where jury informed court of inability to reach verdict on one count, judge told jury to continue deliberating and their meal was on the way).

(7) Telling jurors to "read instructions"

Hogan v. State, 274 Ind. 119, 409 N.E.2d 588 (1980) (harmless error where, after receiving note from jury concerning their verdict, judge accompanied by bailiff went to jury room and told jurors to "read the instructions.").

Morgan v. State, 544 N.E.2d 143 (Ind. Ct. App. 1989) (no prejudice when trial court responded to jury's question, without notifying defense counsel, and indicated jury could not find defendant guilty of anything less than attempted murder; jury not instructed on any lesser included offense of attempted murder).

3. Must make objection

Mere fact error complained of relates to constitutional right does not render it 'fundamental error' appealable without requirement of timely in-trial objection. Allen v. State, 686 N.E.2d 760, 776 (Ind. 1997).

Reynolds v. State, 460 N.E.2d 506 (Ind. 1984) (error not preserved for appeal where defendant failed to object to judge's action, judge communicated by phone with juror during deliberations, without calling jury into open court and without informing defendant or counsel; highly improper, but did not rise to level of "fundamental error.").

Butler v. State, 622 N.E.2d 1035 (Ind. Ct. App. 1993) (failure to preserve court's alleged error in responding to jury questions during deliberations, counsel failed to adequately object at time that answer sent back to jury).

Durden v. State, 99 N.E.3d 645 (Ind. 2018) (defendant invited trial court's structural error in its removal of juror during deliberations and therefore error was unavailable for appellate review).

Batchelor v. State, 119 N.E.3d 550 (Ind. 2019) (defendant's failure to object at trial to jury instruction was not result of "invited error," and thus claim that instruction impermissibly lowered State's burden of proof was not entirely foreclosed from appellate review, but was reviewable for fundamental error).

Ramirez v. State, 174 N.E.3d 181 (Ind. 2021) (defendant waived challenge to procedure by which supplemental instruction was given to jury by not objecting when court failed to reread entire set of instructions or assign it logical position amongst other instructions).

Note: Failure to object does not constitute waiver when party has no opportunity to object. See Trial Rule 46 and Criminal Rule 8(B).

Long v. State, 448 N.E.2d 1103 (Ind. Ct. App. 1983) (defendant did not waive error by failing to object to judge's *sua sponte* instruction, defendant understandably reluctant to object to judge's instruction with jury present).

C. BAILIFF

1. Speak only to ask if verdict reached, or if court orders

Ind. Code § 35-37-2-6 prohibits any communication with deliberating jury, even by a sworn officer in charge, except to remind them of their duty to not converse among themselves or permit other to converse with them when separated, to ask if they have reached a verdict, or upon order of the court.

Farris v. State, 732 N.E.2d 230, 234-35 (Ind. Ct. App. 2000) (integrity and appearance of partiality in judicial system is crucial, and communications between bailiffs and juries will be closely examined).

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

(a) Presumption of harm where ex parte communication

Presumption of harm to defendant when communication between bailiff and jury occurs outside defendant's presence. Wilson v. State, 511 N.E.2d 1014, 1018 (Ind. 1987) and Azania v. State, 730 N.E.2d 646 (Ind. 2000).

(b) Error only if communication prior to verdict

Azania v. State, 730 N.E.2d 646, 654 (Ind. 2000) (no error where bailiff, after learning jury had reached verdict, was instructed by judge to determine whether verdict was unanimous and informed jurors they might be individually polled; because communication occurred after verdict forms were signed, no harm or prejudice occurred).

(c) Reversible error

(1) Giving tape of final instructions

Driver v. State, 594 N.E.2d 488 (Ind. Ct. App. 1992) (bailiff, in response to questions which jury gave to bailiff, gave jury tape of final instructions; trial judge, not bailiff, should have directed response).

(2) Reading or explaining verdict forms

Stauffer v. Lothamer, 419 N.E.2d 203, 217 (Ind. Ct. App. 1981) (bailiff reading or explaining verdict forms to jury in jury room during deliberations).

(3) Sentencing

Turner v. State, 254 Ind. 91, 257 N.E.2d 825 (1970) (bailiff told jury foreman, in answer to inquiries, that on conviction of second-degree murder defendant would be sentenced to life imprisonment and that time he would actually have to serve would depend on his good behavior);

Deming v. State, 235 Ind. 282, 133 N.E.2d 51 (1956) (juror asked bailiff to inquire of judge as to possibility of defendant being paroled if found guilty of second degree murder; after contacting judge, bailiff reported to jurors that it would be entirely up to institution).

(4) Giving copies of specific instructions

Harrison v. State, 575 N.E.2d 642, 649 (Ind. Ct. App. 1991) (State could not rebut presumption of harm by showing bailiff gave jurors copy only of final instructions regarding theft or theft and burglary separate from rest of final instructions).

(5) Providing definitions

Sparks v. State, 154 Ind. App. 691, 290 N.E.2d 793 (1972) (bailiff, at request of juror, advised members of jury as to his definition of “disfranchisement” and matters pertinent thereto after deliberations had begun).

(d) State rebuts presumption

Burden on State to show no harm or prejudice resulted from improper contact. Harrison v. State, 575 N.E.2d 642 (Ind. Ct. App. 1991).

(1) Giving entire body of final instructions

State may rebut presumption of harm by showing bailiff responded to alleged request by giving jurors written copy of entire body of final instructions that trial court had read to jury. Denton v. State, 455 N.E.2d 905, 906 (Ind. 1983).

(2) Court corrects error

Defendant cannot obtain reversal by showing bailiff communicated with jury, if also shown defendant not prejudiced in any way by bailiff’s communication.

Sylvester v. State, 549 N.E.2d 37 (Ind. 1990) (bailiff conversed with juror regarding selection of foreman; juror excused and replaced with alternate, and jury instructed they should not be prejudiced for or against State or defendant as result of replacing juror).

Randall v. State, 474 N.E.2d 76 (Ind. 1985) (court remedied any impropriety arising from bailiff’s communication regarding remaining counts after jury had reached guilty verdict on murder charge by vacating judgment on all counts other than murder).

(3) Answering jury question without prejudicing defendant

Farris v. State, 732 N.E.2d 230, 234-35 (Ind. Ct. App. 2000) (improper but harmless error for bailiff to answer juror’s question about asking questions by explaining that it was rarely done because testimony will come out later, and that they should wait until they hear evidence before deliberating; comments did not talk about facts of case, further instruct jury, or discuss substantive legal matters).

McClendon v. State, 910 N.E.2d 826, 834-35 (Ind. Ct. App. 2009) (even though bailiff should not have told prosecutor that jury had an evidentiary question, there was no prejudice because the prosecutor had already planned to call ballistics expert to testify on that issue).

(4) Referring to instructions

Wilson v. State, 511 N.E.2d 1014 (Ind. 1987) (bailiff’s out-of-court statement, “go ahead,” indicating to jury that they should refer to their instructions was not prejudicial to defendant).

(5) Continue deliberating

Gann v. State, 263 Ind. 297, 330 N.E.2d 88 (1975) (bailiff's communication shown to be harmless beyond reasonable doubt where bailiff, at the court's direction, merely told jury to continue deliberating).

(6) Sentencing

Frasier v. State, 262 Ind. 59, 312 N.E.2d 77 (1974) (bailiff was instructed to tell jurors that judge could not answer questions regarding concurrent sentencing, but instead told them sentencing was up to judge, the jury was not influenced to vote for guilt because of the mistaken belief thereby imparted that the harshness of concurrent sentences could be mitigated by judge).

(7) Making coffee in jury room

Bruce v. State, 268 Ind. 180, 375 N.E.2d 1042 (1978) (no presumption of prejudice where bailiff went into jury room and made coffee for jurors; no conversation between jury and bailiff shown, nor was it shown jurors were actually deliberating at time).

V. SEPARATION OF JURORS**A. NOT REQUIRED PRIOR TO TRIAL**

Talley v. State, 736 N.E.2d 766, 767-68 (Ind. Ct. App. 2000) (judge is not required to sequester jurors during voir dire process as each juror is selected; although best practice is to keep jurors together as they are selected, defendant has no right to have jurors kept together).

Fuller v. State, 851 N.E.2d 22 (Ind. Ct. App. 2006) (requirement for sequestration is invoked when jury is charged).

B. NO RIGHT TO SEQUESTER THROUGHOUT TRIAL UNLESS CAPITAL CASE

Holmes v. State, 671 N.E.2d 841, 854 (Ind. 1996) (where State is seeking death penalty, trial court must sequester jury if defendant requests it).

Johnson v. State, 749 N.E.2d 1103, 1107 (Ind. 2001) (defendant does not have right to sequester jury throughout trial in case involving possible penalty of life without parole; decision of whether to sequester is at discretion of trial court).

C. MUST REMAIN TOGETHER UNTIL VERDICT RETURNED UNLESS PARTIES CONSENT

In criminal cases, jury must remain together from time deliberations begin until verdict returned, unless all parties consent to the separation and proper instructions are given. Jury Rule 29(b). See also Follrad v. State, 428 N.E.2d 1201, 1202 (Ind. 1981) and Ind. Code § 35-37-2-6.

1. Instructions if parties consent to separation

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

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

Jury Rule 29.

D. SEPARATION MAY BE HARMLESS – WALKER RULE

Separation of jurors could be found harmless on appeal, if State: (1) proves beyond reasonable doubt deliberations not affected by separation; and (2) verdict “clearly appears to be right upon the evidence.” Walker v. State, 410 N.E.2d 1190, 1193 (Ind. 1980).

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

Drake v. State, 467 N.E.2d 686 (Ind. 1984) (after deliberations had begun, jurors being allowed to travel from courthouse to motel in own private cars did not warrant reversal of conviction, in absence of any evidence that any juror was in fact exposed to prejudicial influence).

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

Treadway v. State, 924 N.E.2d 621 (Ind. 2010) (defendant showed no prejudice from 20-minute separation of jury to allow a juror to go to adjacent room to express milk from her breasts for her child).

Stewart v. State, 531 N.E.2d 1146 (Ind. 1988) (defendant failed to show juror who left room for five minutes after deliberations began was exposed to prejudicial influence).

Bryant v. State, 202 N.E.2d 161 (Ind. 1964) (no reversible error where trial judge allowed juror to separate from jury to call a relative who was caring for his livestock, even though trial court gave permission outside presence of defendant and his counsel).

Practice Pointer: Though finding no prejudice, Pagan supported the defendant's concern about cell phone use during jury deliberations. Pagan v. State, 809 N.E.2d 915, 921-22 (Ind. Ct. App. 2004). Court noted that cell phone usage should not be allowed during deliberations, as improper outside influence is too easily obtained and facilitates “mischievous purposes” such as seeking extraneous information via the internet. Id. The bailiff should be used for phone calls. Id. at 922. If some prejudice can be shown, this type of behavior would be grounds for reversal.

1. Not harmless error when

Harmless error rationale not applicable to: (1) significant and (2) exigentless separations of jurors. Follrad v. State, 428 N.E.2d 1201, 1203 (Ind. 1981).

Follrad v. State, 428 N.E.2d 1201 (Ind. 1981) (error in allowing jury to return to their homes at 1:30 a.m. after deliberating for seven hours and to return to court at 9:00 a.m. even though they were admonished not to talk with anyone, to stop nowhere, nor allow anyone to so address them).

Bales v. State, 418 N.E.2d 215 (Ind. 1981) (error in allowing interruption of jury deliberation for 10 1/2 hours in absence of State's proof beyond reasonable doubt that separation did not influence jury adversely).

Walker v. State, 274 Ind. 224, 410 N.E.2d 1190 (1980) (reversible error to separate jurors for four-day recess where, after deliberating eight hours, court instructed jury to adjourn on evening of June 30 and to reconvene on morning of July 5 to continue deliberations).

White v. State, 643 N.E.2d 414 (Ind. Ct. App. 1994) (error in allowing jury to separate overnight during deliberation where there were no exigent circumstances justifying jury separation).

E. EXCEPTION – EXIGENT CIRCUMSTANCES

Only compelling “exigent circumstances” warrant violation of no separation of jurors rule.

Farrell v. State, 622 N.E.2d 488, 493, n.3. (Ind. 1993).

1. State must prove exigent circumstance

Burden upon State to establish separation of jury due to exigent circumstances. Walker v. State, 410 N.E.2d 1190 (Ind. 1980).

F. WAIVER – ACCEPTING COURT’S ADMONISHMENT OF JURY

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

VI. DEADLOCK / DISCHARGE – D.9.E.6

A. DEADLOCK

1. When is jury deadlocked?

Jury is deadlocked when it appears that there is “no probability of the members agreeing upon a verdict.” Hernandez v. State, 761 N.E.2d 845, 852 (Ind. 2002) (*quoting* Ind. Code § 34-36-1-7).

Hernandez v. State, 761 N.E.2d 845, 852 (Ind. 2002) (when jury, after deliberating for only four and a half hours, sent a note asking, “What if we are a hung jury? What will happen to Mr. Hernandez? Will he go free or have another trial?”, this is not indication that there was no probability of the members agreeing upon a verdict).

Mitchell v. State, 535 N.E.2d 498 (Ind. 1989) (even when jury sent notes to judge stating, “Our deliberations have come to a standstill. We are at the point of deadlock,” and “We cannot come to a unanimous decision, we are deadlocked,” judge exercised proper discretion in refusing to release jury and subsequent guilty verdict was upheld).

2. Procedure

Court calls jury back into open court: (1) in presence of all parties and their counsel; and (2) rereads all instructions given to them prior to deliberations without emphasis on any of them and without further comment. Bailey v. State, 669 N.E.2d 972 (Ind. 1996); Lewis v. State, 424 N.E.2d 107 (Ind. 1981).

See also *Criminal Rule 8(G)* providing: “The court may of its own motion and shall, if requested by either party, reread to the jury the instructions given pursuant to subdivision (F) of this rule along with the other instructions given to the jury at the close of the case.”

Practice Pointer: Though stressing any particular instruction or evidence would still obviously be improper, note that Jury Rule 28 encourages the trial court to assist jurors at an impasse. Various options to assist a deadlocked jury should be considered, such as those discussed in Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002). See *Options for trial court to respond to request*, IPDC Trial Manual Chapter 18 § III.A.1.(a).

3. Strategy considerations

- (1) deadlock comes about by jury sending note, court raising issue, or some combination of both.
- (2) ask court to inquire into about genuineness of deadlock.
 - (a) whether break needed, more time, coming back another day, etc.
 - (b) individually poll jury regarding deadlock.
- (3) make sure all loose ends covered before mistrial. Request court comply with any outstanding requests not answered (notes, read backs).
- (4) better to object to mistrial.

4. Improper responses

(a) Telling jury defendant moved for mistrial

Proctor v. State, 584 N.E.2d 1089 (Ind. 1992) (new trial required where judge informed jury defendant had moved for mistrial after jury appeared to be deadlocked; judge's action tainted regularity of proceedings and had prejudicial effect, jury had continuously indicated it was deadlocked by 10-2 margin and yet rendered unanimous verdict within 40 minutes of being told of request for mistrial; jury could have easily could have interpreted request for mistrial as either an indication of guilt or mistrust of jury's abilities, jury not advised that grant of mistrial would result in retrial as opposed to acquittal).

(b) Allen charge

Allen charge is supplemental instruction by judge to apparently deadlocked jury which unduly intimidates or coerces them. Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896); Broadus v. State, 487 N.E.2d 1298 (Ind. 1986).

Indiana Supreme Court prohibits use of Allen charges to break jury deadlocks. If one instruction is to be re-read they should all be read. Bailey v. State, 669 N.E.2d 972 (Ind. 1996); Lewis v. State, 424 N.E.2d 107 (Ind. 1981).

Burnett v. State, 426 N.E.2d 1314, 1315-16 (Ind. 1981) (Allen- type instruction apt to seriously impinge upon fact-finding process by improperly influencing ultimate vote of one or more of jurors).

(1) Must show jury deadlocked

No Allen violation in absence of some evidence suggesting jury deadlocked when an alleged Allen charge was read. Clark v. State, 597 N.E.2d 4 (Ind. Ct. App. 1992). Deadlock is defined as "a condition in which no progress or activity is possible; a complete standstill; a lack of progress due to irreconcilable disagreement or equal opposing forces." Litherland v. McDonnell, 796 N.E.2d 1237 (Ind. Ct. App. 2003).

(2) Reversible error

Crowdus v. State, 431 N.E.2d 796 (Ind. 1982) (error for judge to give lengthy Allen charge over objection after jurors had deliberated for nearly two hours and requested judge inform them of what would happen if they failed to reach unanimous decision).

Mosley v. State, 660 N.E.2d 589 (Ind. Ct. App. 1996) (reversible error when court read supplemental instruction, although language of instruction not as strong as true Allen charge, intent was to procure verdict from otherwise deadlocked jury).

Long v. State, 448 N.E.2d 1103 (Ind. Ct. App. 1983) (judge *sua sponte* gave Allen charge, after two hours of deliberation. He stated “[t]he issues are not very complicated” and that he “would like” them to “reach a verdict.”).

(3) Modified Allen charge –harmless error

Lewis v. State, 424 N.E.2d 107 (Ind. 1981) (modified Allen charge harmless error, after jury indicated difficulty reaching verdict, court disapproved of Allen charge and any parallel language).

Fox v. State, 457 N.E.2d 1088 (Ind. 1984) (no abuse of discretion where judge gave Lewis instruction with express consent of both parties after jury reported they were deadlocked, advised jury on second occasion when jury said it was not able to agree that court could give them no further instructions on law to assist them and requesting them to continue their deliberations did not constitute impermissible single instruction, nor was that communication so likely to coerce verdict that denial of mistrial was necessary).

Broadus v. State, 487 N.E.2d 1298 (Ind. 1986) (modified Allen charge given with initial instructions is harmless error).

(c) Removal of juror

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

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

Durden v. State, 99 N.E.3d 645 (Ind. 2018) (structural error occurred when trial court removed juror during deliberations without interviewing juror to determine grounds for removal, arbitrarily designated an alternate to replace juror, and failed to admonish remaining jurors regarding reasons for removal).

Wright v. State, 12 N.E.3d 314 (Ind. Ct. App. 2014) (removal of juror voting to acquit required more than a refusal to deliberate and such a situation required an instruction that removal was not due to juror’s view of the case).

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

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

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

5. Acceptable responses

(a) Providing exhibits to assist in deliberations

Mitchell v. State, 535 N.E.2d 498 (Ind. 1989) (not an “Allen charge” where in response to jury’s notes that they were deadlocked, court sent exhibits to jury; court supplied all appropriate exhibits, reducing chances for undue emphasis on certain ones, and informed jury exhibits were being provided simply to assist in deliberations).

(b) Rereading original instructions

Third reading of original instructions at jury’s request does not change them into de facto Allen charge. Fultz v. State, 473 N.E.2d 624 (Ind. Ct. App. 1985).

See Criminal Rule 8(G) for rereading jury instructions.

(c) Directing jury to deliberate further

Length of time jury permitted to deliberate largely within sound discretion of trial judge. King v. State, 531 N.E.2d 1154, 1161 (Ind. 1988).

Cole v. State, 790 N.E.2d 1049 (Ind. Ct. App. 2003) (trial court acted properly in allowing jury to deliberate for twelve hours).

(1) Test for reversal

Conviction not reversed when jury reports inability to reach verdict, and is directed to deliberate further, then later returns verdict, unless: (1) court has abused its discretion; or (2) record indicates verdict may have been coerced. Decker v. State, 179 Ind. App. 472, 386 N.E.2d 192 (1979).

Farrell v. State, 622 N.E.2d 488, 493 (Ind. 1993) (abuse of discretion in not calling recess and sequestering jury where verdict reached after approximately 30 hours of deliberation without sleep; after various questions from jury, concerns expressed about their fatigue, and eventual request for their sequestration, judge suggested if agreement wasn’t reached in next few hours, jury could be sequestered. Two to three hours later, jury returned with verdict of guilty on all counts).

(2) No abuse of discretion

Morris v. State, 266 Ind. 473, 364 N.E.2d 132 (1979) (jury request for sleep or coffee at 3:30 a.m. denied).

Ayad v. State, 254 Ind. 430, 261 N.E.2d 68 (1970) (no abuse of discretion by refusing to discharge jury which received sodomy case for deliberation at 2:00 p.m., returned for first time at 8:50 p.m. and reported inability to reach verdict, returned for second time at 11:10 p.m. and stated inability to agree on verdict but returned verdict of guilty at 11:55 p.m.).

Dukes v. State, 501 N.E.2d 420 (Ind. 1986) (no abuse of discretion in ordering jury to continue deliberating, when jury informed court that it was “hung up” after five and one-half hours of deliberation; trial had been lengthy, and large amount of evidence had been presented);

Decker v. State, 179 Ind. App. 472, 386 N.E.2d 192 (1979) (defendant had not met burden of producing a record which supported allegation that trial court abused its discretion by not declaring a mistrial when jury indicated it had reached an impasse, where although jury foreman’s note, which stated that it was jurors’ consensus that they had reached an impasse, appeared in record and there was an order book entry showing it was “filed” on day cause was submitted to jury and verdict returned, there was nothing in record to indicate at what time it was received, if in fact it was actually seen by judge, whether hearing was held thereon, or what action, if any, was taken by judge).

Fuentes v. State, 10 N.E.3d 68 (Ind. Ct. App. 2014) (after jury asked judge how to proceed given split, judge instructed to continue to deliberate if possible; no error as instructions as whole stressed need for individual honest judgment).

(3) Must object or issue waived

Any alleged error based upon length of deliberations waived where defendant did not object when court proposed to question jurors or when jurors were requested to continue their deliberations. Eiland v. State, 433 N.E.2d 400 (Ind. Ct. App. 1982).

(d) Individual polling of jurors

Treadway v. State, 924 N.E.2d 621, 630-32 (Ind. 2010) (when jury sent a note to the judge after six hours of deliberation and reported that they had not reached a consensus and asked what they should do, trial court properly polled the jurors individually on whether they thought the jury could reach a verdict with further deliberations; although only one juror indicated a belief that a verdict could be reached, trial court had the discretion to send the jury back to the jury room for further deliberations).

B. DISCHARGE

1. Judge’s discretion

Court’s discretion to determine whether discharge of jury and declaring mistrial appropriate under circumstances of case. Young v. State, 482 N.E.2d 246 (Ind. 1985).

Lowry v. State, 440 N.E.2d 1123 (Ind. 1982) (judge’s alleged statement that jury was to remain and continue to deliberate as judge would not call hung jury distinguishable from Allen instruction, where it did no more than direct jury to jury room to continue deliberations).

(a) Hung jury

Jury may be discharged after they have been kept together until it satisfactorily appears there is no probability of their agreeing. Ind. Code § 34-36-1-1 through 9.

State ex rel. Courtney v. Superior Court of Marion, 528 N.E.2d 64 (Ind. 1988) (one circumstance justifying judge in determining necessity for discharging jury is hung jury).

Menifee v. State, 512 N.E.2d 142, 143 (Ind. 1987) (court has discretion to determine appropriateness of mistrial due to hung jury).

(1) Unable to reach unanimous verdict after ample time

When it's apparent to court that jury cannot agree upon verdict after ample time spent in consultation, there exists good cause for jury's discharge.

Meniffee v. State, 512 N.E.2d 142 (Ind. 1987) (declaration of mistrial due to hung jury in robbery prosecution was not abuse of discretion where jury deliberated for approximately seven hours and signified that they did not believe unanimous opinion could be reached even if they were given more time).

Hinton v. State, 397 N.E.2d 282 (Ind. 1979) (no abuse of discretion in discharging jury after approximately 12 hours of deliberation, since jury foreman indicated that there was "no way" that one juror would change her mind and that the jury was unable to reach a verdict).

Wera v. State, 601 N.E.2d 377 (Ind. Ct. App. 1992) (no error in declaring mistrial as to Count I, child molesting, rather than entering judgment on evidence in favor of defendant where jurors were unable to reach unanimous verdict as to Count I after deliberating for fourteen hours, requesting further instructions and reaching verdicts as to remaining counts).

2. No longer jurors after verdict returned and accepted by judge

Members of jury cease to act as jurors: (1) after jury returns verdict in open court; (2) verdict accepted by judge; and (3) jury officially discharged. West v. State, 228 Ind. 431, 437-38, 92 N.E.2d 852, 855 (1950).