CHAPTER 3

BURDEN OF PROOF AND PRESUMPTIONS
Table of Contents

CHAPTER 3

BURDEN OF PROOF AND PRESUMPTIONS

I. PRESUMPTIONS IN CIVIL CASES GENERALLY – RULE 301

A. TEXT OF RULE:

In a civil case, unless a constitution, statute, judicial decision, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally. A presumption has continuing effect even though contrary evidence is received.

B. RULE 301 APPLIES TO CIVIL CASES

A discussion of Indiana Rule 301 is beyond the scope of this volume. See Miller, 12 *Indiana Evidence* 178 § 301.101 (4th ed.) for a discussion of presumptions in civil cases.

II. BURDEN OF PROOF IN CRIMINAL CASES

The term 'burden of proof' is not a precise one, for it combines at least two meanings. It can be used to mean: (1) the burden of persuasion; or (2) the burden of production. Burgin v. State, 431 N.E.2d 864, 866 (Ind. Ct. App. 1982); 2 *McCormick on Evidence* 409 § 336 (5th ed.).

A. THE BURDEN OF PERSUASION

The burden of persuasion is the burden of persuading the trier of fact that the alleged fact is true. Burgin v. State, 431 N.E.2d 864, 866 (Ind. Ct. App. 1982).

If the trier of fact is unpersuaded, the verdict must go against the party with the burden of persuasion. Wigmore described this burden as the "risk of non-persuasion." 9 Wigmore, *Evidence*, Sec. 2485 (Chadbourn rev. 1981).

The burden of persuasion does not shift from party to party during the course of trial because it need not be allocated until it is time for a decision. 2 McCormick *on Evidence* 409 § 336 (5th ed.).

B. THE BURDEN OF PRODUCTION (THE BURDEN OF GOING FORWARD WITH EVIDENCE)

The burden of production is the burden of going forward and producing evidence of a particular fact in issue. Burgin v. State, 431 N.E.2d 864, 866 (Ind. Ct. App. 1982).

The term 'burden of production' means "the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced." 2 *McCormick on Evidence* 409

§ 336 (5th ed.). If the party with the burden of production cannot point to sufficient evidence of probative value, trial judge may rule against the party without submitting the issue to the jury. See 9 Wigmore, *Evidence*, Secs. 248301-98 (Chadbourn rev. 1981).

The burden of production is usually cast first upon the party who has pleaded the existence of the fact, but the burden may shift to the adversary once the pleader has discharged its initial duty. 2 McCormick *on Evidence* 409 § 336 (5th ed.).

PRACTICE POINTER: Note that a party with the burden of production does not necessarily have to put on any evidence of its own to meet the burden. For example, testimony from the State's witnesses may establish an affirmative defense for the defendant on direct or cross-examination. See, e.g., State v. Huffman, 643 N.E.2d 899, 900 (Ind. 1994) ("When a defense of intoxication is offered, there must be evidence in the record supporting an instruction to the jury on this issue. The evidence need not come from the defendant[.]")

C. BURDEN OF PROOF IN PRETRIAL SUPPRESSION

1. Searches

In a challenge to the constitutional validity of a search, defendant has the burden of demonstrating a legitimate expectation of privacy in the premises searched. The State has the burden of showing that an exception to the warrant requirement existed. Brown v. State, 691 N.E.2d 438, 443 (Ind. 1998).

Once the State has obtained a magistrate's determination of probable cause, a presumption of validity obtains. Brock v. State, 540 N.E.2d 1236, 1239 (Ind. 1989); Watt v. State, 412 N.E.2d 90, 95 (Ind. Ct. App. 1980). The burden is upon the defendant to overturn the presumption, and the reviewing court, be it a trial or appellate court, will pay substantial deference to the magistrate's determination of probable cause. Stephenson v. State, 796 N.E.2d 811, 814 (Ind. Ct. App. 2003).

2. Voluntariness of confession

Under the Indiana Constitution, the voluntariness of a confession must be proved beyond a reasonable doubt, and in reviewing voluntariness, the courts look at the totality of circumstances, reviewing all the evidence in the record rather than focusing only on the evidence supporting the finding of voluntariness. Magley v. State, 335 N.E.2d 811, 817 (Ind. 1975), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997) (reasonable doubt standard was approved by majority of Indiana Supreme Court); see also Scalissi v. State, 759 N.E.2d 618, 621 (Ind. 2001); Henry v. State, 738 N.E.2d 663 n.1 (Ind. 2000); and Pruitt v. State, 834 N.E.2d 90, 114-15 (Ind. 2005).

Under the Federal Constitution, the State bears the burden of proving the voluntariness of the confession by a preponderance of the evidence. A defendant's mental state is not enough to render a confession inadmissible in the absence of coercive police activity. Smith v. State, 689 N.E.2d 1238, 1246-47 (Ind. 1997).

D. BURDEN OF PROOF AT TRIAL

1. State's case

a. Presumption of innocence: Burden of persuasion

"The burden of persuasion is *always* on the State." State v. Huffman, 643 N.E.2d 899, 900 (Ind.1994) (emphasis in original). Burden of persuasion never shifts to the defendant as to the elements of the crime. He cannot be required to establish his innocence or a reasonable doubt as to his guilt. Wolfe v. State, 426 N.E.2d 647, 650-53 (Ind. 1981). An instruction creating a mandatory presumption that shifts the burden of proof to the defendant violates due process. Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L.Ed.2d 344 (1985). For more discussion mandatory presumptions, see subsection III of this Chapter, *Presumptions*.

b. Proof beyond a reasonable doubt

(1) Constitutional basis

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979) (beyond a reasonable doubt is a subjective state of near certitude).

Moore v. State, 669 N.E.2d 733, 743 (Ind. 1996) (a reasonable doubt is not a fanciful doubt - it must be more than speculation or whim).

(2) Statutory basis

Ind. Code 35-41-4-1(a) provides: A person may be convicted of an offense only if his guilt is proved beyond a reasonable doubt.

Ind. Code 31-37-14-1 provides: A finding by a juvenile court that a child committed a delinquent act, or that an adult committed a crime, must be based upon proof beyond a reasonable doubt.

(3) Type of evidence necessary to meet State's burden

Substantial evidence of a probative value and reasonable inferences drawn from the evidence may allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Bunch v. State, 697 N.E.2d 1255, 1257 (Ind. 1998).

Brown v. State, 691 N.E.2d 438, 444 (Ind.1998) (a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicated facts, but does not require the jury to draw that conclusion; such an inference does not relieve State of its burden of persuasion because it still requires State to convince jury that the suggested conclusion should be inferred based on the predicate facts proved).

Vest v. State, 621 N.E.2d 1094, 1096 (Ind. 1993) (out-of-court statements admitted into evidence for purposes other than to prove the truth of the matter are not of sufficient probative value to prove the truth of the matter in a sufficiency review).

(4) Nullification: Jury not bound to convict

A jury is not bound to convict even in the face of proof of guilt beyond a reasonable doubt. Ind. Const. Art. 1, Section 19. Thus, an instruction in criminal case which orders the jury to return a guilty verdict upon a finding of certain facts invades the jury's constitutional prerogative. Barker v. State, 440 N.E.2d 664, 670 (Ind. 1982).

A defendant is entitled to an instruction to the jury on its role as finders of law and fact. Warren v. State, 725 N.E.2d 828, 837 (Ind. 2000) (reversible error for trial court to refuse defendant's request for instruction on jury's role as finders of law and fact during habitual offender phase of trial); Bridges v. State, 835 N.E.2d 482, 483 (Ind. 2005) ("no sound basis for distinguishing between the right to seek a Section 19 instruction during a habitual offender phase and the right to seek it during final instructions of a guilt phase").

However, it is improper for a court to instruct a jury that it has a right to disregard the law. Holden v. State, 788 N.E.2d 1253, 1255 (Ind. 2003); Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994).

Tyson v. State, 619 N.E.2d 276, 298-99 (Ind. Ct. App. 1993) (instruction stating: "While the jury is the judge of the facts, I am the judge of the law. You must accept my instructions as to the law that governs this case, and then apply that law to the facts as you find them..." directly conflicted with Ind. Constitution, Art. 19, stating jury has right to determine law and facts, and therefore the trial court did not err in refusing it).

Warren v. State, 725 N.E.2d 828, 836-37 n.3 (Ind. 2000) ("[t]here [is] an argument that the framers of the Indiana Constitution intended that [Article 1 § 19] afford the jury the right to set aside the law if their conscience so dictates.")

c. Venue

The State must prove venue by a preponderance of the evidence, and circumstantial evidence alone may be sufficient to prove venue. Morris v. State, 409 N.E.2d 608, 610 (Ind. 1980); Cutter v. State, 725 N.E.2d 401 (Ind. 2000).

d. Statute of limitations

The State must allege in the information and prove at trial sufficient facts to bring the charge within the statute of limitations period. Ind. Code 35-34-1-2(a)(5); Willner v. State, 602 N.E.2d 507 (Ind.1992) ("[o]ne of the reasons for this requirement is to ensure that only timely-filed charges proceed to trial"); Smith v. State, 678 N.E.2d 1152, 1154 (Ind. Ct. App. 1997).

e. When the State fails to meet its burden of production - Judgment on the evidence

If the State fails to meet its burden of production, move for a directed verdict of acquittal at close of the State's case-in-chief. See generally, *IPDC Criminal Trial Law Manual, 2022 ed., Chapter 16.*

(1) Bench Trials - Involuntary Dismissal

See T.R. 41(B) (motion for involuntary dismissal based upon failure of proof in trial to the court).

(B) Involuntary dismissal: Effect thereof. After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

(2) Jury trials - Judgment on the Evidence (Directed Verdict)

See T.R. 50(A):

Rule 50. Judgment on the Evidence (Directed Verdict)

(A) Judgment on the Evidence - How Raised-Effect. Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence.

(1) after another party carrying the burden of proof or of going forward with the evidence upon any one or more issues has completed presentation of his evidence thereon; or

(2) after all the parties have completed presentation of the evidence upon any one or more issues; or

(3) after all the evidence in the case has been presented and before judgment; or

(4) in a motion to correct errors; or

(5) may raise the issue upon appeal for the first time in criminal appeals but not in civil cases; or

(6) The trial court upon its own motion may enter such a judgment on the evidence at any time before final judgment, or before the filing of a praecipe, or, if a Motion to Correct Error is made, at any time before entering its order or ruling thereon. A party who moves for judgment on the evidence at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a judgment on the evidence which is not granted, or which is granted only as to a part of the issues is not a waiver of trial by jury even though

> all parties to the action have moved for judgment on the evidence. A motion for judgment on the evidence made at one stage of the proceedings is not a waiver of the right of the court or of any party to make such motion on the same or different issues or reasons at a later stage as permitted above, except that error of the court in denying the motion shall be deemed corrected by evidence thereafter offered or admitted.

Note: Indiana Criminal Rule 21 makes civil trial rules applicable in criminal cases so far as they are not in conflict with criminal rules. See generally*, IPDC Criminal Trial Law Manual, 2022 ed., Chapter 16.*

(3) Test

A directed verdict of acquittal is proper where:

(1) there is a total lack of evidence on some essential issue, or
(2) there is no conflict in evidence, and it is susceptible only to an inference in favor of defendant. *T.R. 50*.

See Fultz v. State, 473 N.E.2d 624, 628 (Ind. Ct. App. 1985).

Proof beyond a reasonable doubt is not the standard for granting a directed verdict. Taylor v. State, 863 N.E.2d 917, 920 (Ind. Ct. App. 2007). Moreover, the trial court is not permitted to weigh the evidence and determine the credibility of the witness. The "thirteenth juror" principle grounded in Trial Rule 59(J)(7) is not applicable to a motion for judgment on the evidence. Id.

> Russell v. State, 438 N.E.2d 741, 743 (Ind. 1982) (to avoid an adverse directed verdict, State need only establish *prima facie* case).
>
> Moore v. State, 569 N.E.2d 695, 701 (Ind. Ct. App. 1991) (judgment on the evidence, pursuant to Trial Rule 50, can be granted only if: (1) there is absence of evidence on an essential element of a crime; or (2) the evidence is not in conflict and gives rise to inferences only in favor of the accused). See also State v. Vorm, 570 N.E.2d 109, 110 (Ind. Ct. App. 1991).

A *prima facie* case is defined by Black's Law Dictionary as: "1. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary 1209 (8th ed. 2004).

(4) Defendant's own evidence may be grounds to deny judgment on the evidence

Error in court's overruling of motion for directed verdict of acquittal may be corrected by evidence that the defendant subsequently offers in his defense. See, e.g., Mers v. State, 496 N.E.2d 75, 84 (Ind. 1986).

A defendant may renew his motion for a judgment on the evidence or directed verdict at the conclusion of all evidence. Trial Rule 50(A)(3),(6).

(5) Standard on appeal of denial of directed verdict

Appellate court examines only the evidence most favorable to the trial court's ruling, together with the reasonable inferences which can be drawn therefrom. If there is evidence from which a jury could conclude the defendant committed the elements of the crime charged, the trial court's ruling denying the motion for directed verdict will be affirmed. Moore v. State, 569 N.E.2d 695, 701 (Ind. Ct. App. 1991); Russell v. State, 438 N.E.2d 741, 743 (Ind. 1982).

f. Standard in cases often related to criminal charges

(1) Infractions and ordinance violations

Infractions and ordinance violations must be proven by a preponderance of the evidence. Ind. Code 34-28-5-1(e). See, e.g., Dawley v. State, 580 N.E.2d 366, 367 (Ind. Ct. App. 1991).

(2) Forfeitures

Forfeiture is actually a civil action, and the State need only show that facts supporting forfeiture exist by a preponderance of the evidence. Conviction on underlying criminal activity is not a prerequisite for forfeiture. The forfeiture statute contemplates a connection or nexus between the property seized and the offense upon which the seizure is based. Katner v. State, 655 N.E.2d 345, 348-49 (Ind. 1995).

Lipscomb v. State, 857 N.E.2d 424 (Ind. Ct. App. 2006) (fact that defendant has large amount of money when arrested two weeks after alleged drug deal is not proof by a preponderance of the evidence that the money was connected to drug dealing).

(3) Post-conviction proceedings

In post-conviction relief proceedings, the defendant bears the burden of proving his contentions by a preponderance of the evidence. Wallace v. State, 553 N.E.2d 456, 458 (Ind. 1990).

(4) Probation revocation proceedings

In probation revocation proceedings, the State must prove a violation of conditions of probation by a preponderance of the evidence. Ind. Code 35-38-2-3(f); Richeson v. State, 648 N.E.2d 384, 389 (Ind. Ct. App. 1995).

2. Defendant's case - Burden of proof in affirmative defenses

a. General rule- defendant's burden of proving affirmative defense may not require defendant to negate elements of crime

Defendant raising an affirmative defense does not relieve the State of its ultimate burden of persuasion. However, the State does not bear the burden of negating all affirmative defenses that justify or excuse conduct which would otherwise be criminal. It is only unconstitutional to place the burden of persuasion for an affirmative defense on the

defendant when proving the defense becomes tantamount to requiring the defendant to negate an element of the crime. Geljack v. State, 671 N.E.2d 163, 165 (Ind. Ct. App. 1996).

Hirsch v. State, 697 N.E.2d 37, 43 (Ind. 1998) (although the burden of production as to affirmative defenses may be placed on the accused, the party with the burden of coming forward with evidence -- particularly the accused in a criminal case -- must be given a fair opportunity to do so).

b. Specific defenses: allocation of burden

(1) Self-defense: Ind. Code 35-41-3-2 (Use of force to protect person or property - Qualified immunity from legal jeopardy - Use of force against public servant)

(a) Initial burden of production on defendant

The burden of production for the defense of self-defense is always on the defendant. Hirsch v. State, 697 N.E.2d 37, 43 (Ind. 1998). Defendant claiming the justification of self-defense must show that a reasonable doubt exists before the State is required to negate one of the self-defense elements beyond a reasonable doubt. Ashford v. State, 464 N.E.2d 1298, 1300 (Ind. 1984).

However, fact that defendant has initial burden of production does not prohibit the defendant from asking questions of potential jurors regarding their feelings on self-defense. In fact, to deny the defendant that ability is fundamental error. Black v. State, 829 N.E.2d 607 (Ind. Ct. App. 2005). Moreover, the defendant has a Sixth Amendment right to present evidence of self-defense. Hirsch v. State, 697 N.E.2d 37 (Ind. 1998).

(b) Burden on State after defendant raises defense

The State bears burden of disproving existence of one of three elements of self-defense. Defendant: (1) was in place where she had right to be; (2) acted without fault; or (3) acted in reasonable fear of death or great bodily harm. Holder v. State, 571 N.E.2d 1250, 1253 (Ind. 1991).

When a defendant claims self-defense with respect to personal property, the State must disprove one of the following elements beyond a reasonable doubt: (1) he was in a place he had a right to be; (2) he acted without fault; and (3) he used reasonable force which he reasonably believed was necessary to immediately prevent or terminate the other person's trespass or interference with property lawfully in his possession. Moore v. State, 634 N.E.2d 825, 826 (Ind. Ct. App. 1994). The State must present evidence negating self-defense that is sufficient to convince reasonable juror beyond a reasonable doubt. Pointer v. State, 585 N.E.2d 33, 36 (Ind. Ct. App. 1992); see, e.g., Cobbs v. State, 528 N.E.2d 62 (Ind. 1988) (insufficient rebuttal evidence).

Moore v. State, 634 N.E.2d 825, 826 (Ind. Ct. App. 1994) (State may refute claim of self-defense by direct rebuttal or by relying upon the sufficiency of the evidence in its case-in-chief).

Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995) (it is only necessary for the state to disprove one of the elements of self-defense beyond a reasonable doubt for the defendant's claim to fail).

(2) Intoxication - Ind. Code 35-41-3-5

(a) Involuntary intoxication

Defendant must lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. The defendant bears the burden of proof. Neal v. State, 506 N.E.2d 1116, 1120 (Ind. Ct. App. 1987) (defendant mixed alcohol with a prescription drug; defendant's conviction of burglary was affirmed).

Generally, if the evidence raised voluntariness as an issue, the State must prove the defendant acted voluntarily beyond a reasonable doubt. However, the defendant cannot switch the burden of proof of disproving involuntary intoxication to the State by framing intoxication as evidence of voluntariness. Thus, evidence of intoxication is not evidence questioning voluntariness. Davidson v. State, 849 N.E.2d 591 (Ind. 2006).

(b) Voluntary intoxication is not a defense

Ind. Code 35-41-2-5, prohibiting the use of evidence of voluntary intoxication to negate the mens rea requirement in criminal cases, does not violate Indiana Constitution. Sanchez v. State, 749 N.E.2d 509 (Ind. 2001) (*overruling* Terry v. State, 465 N.E.2d 1085 (Ind. 1984)). The statute redefines the requirement of mens rea to include voluntary intoxication, in addition to traditional mental states. Thus, evidence of voluntary intoxication does not negate mens rea requirement; rather, it satisfies this element of crime. Id. at 520.

Orta v. State, 940 N.E.2d 370 (Ind. Ct. App. 2011) (trial court properly limited scope of defendant's cross examination to prevent questioning doctor about effect of voluntary intoxication on defendant's ability to form requisite mental state for murder).

(3) Insanity

Ind. Code 35-41-3-6 provides: a person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense. As used in this section, "mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

(a) Defendant must prove insanity by preponderance of the evidence

Ind. Code 35-41-4-1(b) provides that "the burden of proof is on the defendant to establish the defense of insanity (Ind. Code 35-41-3-6) by a preponderance of the evidence."

Placing the burden of persuasion of insanity on the defendant by a preponderance of evidence does not violate federal due process. Matheney v. State, 688 N.E.2d 883, 900 (Ind. 1997); Price v. State, 412 N.E.2d 783 (Ind. 1980); Leland v. Oregon, 343 U.S. 790, 72 S. Ct. 1002 (1952).

(b) State is not required to disprove mental illness

State need not disprove mental illness to prove that defendant acted knowingly or intentionally. To hold otherwise would shift the burden of proof for an insanity defense. Cate v. State, 644 N.E.2d 546, 548 (Ind. 1994).

(c) Diminished capacity

Although diminished capacity is not a defense to a crime, evidence of such can be introduced to negate the capacity to form the required intent. Neaveill v. State, 474 N.E.2d 1045, 1048 (Ind. Ct. App. 1985).

> Reed v. State, 693 N.E.2d 988, 992 (Ind. Ct. App. 1998) (evidence that transient ischemic attacks placed the defendant in a state of confusion and disorientation was not evidence of diminished capacity but rather evidence negating intent).

(d) Jury Instruction

The Indiana Supreme Court has approved the following jury instruction on preponderance of the evidence in insanity cases: "Preponderance of the evidence, as it applies to the issue of insanity, means that you must be convinced from a consideration of all the evidence in the case that the defendant was more probably insane than sane. The number of witnesses testifying on that issue for one side or the other is not necessarily of the greater weight. Evidence which convinces you most strongly of its truthfulness is of the greater weight." *Ind. Pattern Jury Instructions - Criminal* 11.0900; Gambill v. State, 675 N.E.2d 668, 676 (Ind. 1996).

See *generally IPDC Jury Instructions Manual, 2017 Edition*.

(4) Entrapment

Ind. Code 35-41-3-9 provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

If a defendant shows police inducement and the State fails to show predisposition on the part of the defendant to commit the charged crime, entrapment is established as a matter of law. Ferge v. State, 764 N.E.2d 268, 271 (Ind. Ct. App. 2002).

(a) Defendant's burden

Entrapment is raised once evidence indicates that police were involved in the criminal activity. Shelton v. State, 679 N.E.2d 499, 501-02 (Ind. Ct. App. 1997); Kats v. State, 559 N.E.2d 348, 352-53 (Ind. Ct. App. 1990). No formal pleading of defense is required. Shelton v. State, 679 N.E.2d 499, 502 (Ind. Ct. App. 1997).

(b) State's burden

Once the defendant has both indicated his intent to rely on the defense of entrapment and has established police inducement, the burden switches to the State. McGowan v. State, 674 N.E.2d 174, 175 (Ind. 1996) (*quoting* Docerky v. State, 644 N.E.2d 573, 577 (Ind. 1994)). The State must prove, beyond a reasonable doubt, either that the defendant's prohibited conduct was not the product of the police's efforts, or that the defendant was predisposed to engage in such conduct. Albaugh v. State, 721 N.E.2d 1233, 1235 (Ind. 1999). See also Jacobson v. U.S., 503 U.S. 540, 112 S. Ct. 1535 (1992) and Ferge v. State, 764 N.E.2d 268 (Ind. Ct. App. 2002), for examples of insufficient rebuttal evidence presented by the State.

PRACTICE POINTER: Be aware of filing a pre-trial notice of intent to pursue an entrapment defense if one is not required by local rules. If such a notice is filed, it may open the door to otherwise inadmissible 404(b) evidence. Allen v. State, 518 N.E.2d 800, 802 (Ind. 1988) (trial court properly admitted otherwise inadmissible 404(b) evidence to rebut defendant's pre-trial notice of intent to raise entrapment defense despite the fact that the defendant did not present any evidence of entrapment).

(5) Traffic offenses - extreme emergency

Under Ind. Code 9-30-10-18, in a criminal action for operating vehicle while his driving privileges are suspended or suspended for life, the defendant bears the burden of proof by preponderance of evidence that operation of a motor vehicle was necessary to save life or limb in extreme emergency. Because this affirmative defense is one mitigating culpability, and not one effectively negating an element of the crime, it is not unconstitutional to place the burden of proof on the defendant. Geljack v. State, 671 N.E.2d 163 (Ind. Ct. App. 1996); see also Moore v. State, 702 N.E.2d 762 (Ind. Ct. App. 1998).

(6) Mistake of fact

Ind. Code 35-41-3-7 provides: It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.

(a) Defendant's burden

The defendant must first establish an evidentiary predicate of mistaken belief of fact that could create a reasonable doubt in the jury's mind that the accused acted with the requisite mental state. The mistake must (1) be honest and reasonable, (2) concern a matter of fact, and (3) negate the required culpability. Wrinkles v.

State, 690 N.E.2d 1156, 1162 (Ind. 1997); see, e.g., T.M. v. State, 804 N.E.2d 773 (Ind. Ct. App. 2004).

(b) State's burden

Once the evidentiary predicate is established, the state bears the burden of disproving the mistake of fact defense beyond a reasonable doubt. Wrinkles v. State, 690 N.E.2d 1156, 1162 (Ind. 1997).

(7) Necessity

Where the defendant raises the defense of necessity, the burden of proof is carried by the State. Patton v. State, 760 N.E.2d 672, 676 (Ind. Ct. App. 2002). The State must disprove one of the elements of necessity beyond a reasonable doubt. Id. at 676 (*quoting* Dozier v. State, 709 N.E.2d 27, 29 (Ind. Ct. App. 1999)). The elements are: "(1) the act charged as criminal must have been done to prevent a significant evil; (2) there must have been no adequate alternative to the commission of the act; (3) the harm caused by the act must not be disproportionate to the harm avoided; (4) the accused must entertain a good-faith belief that his act was necessary to prevent greater harm; (5) such belief must be objectively reasonable under all the circumstances; and (6) the accused must not have substantially contributed to the creation of the emergency." Id. at 675 (*quoting* Toops v. State, 643 N.E.2d 387, 390 (Ind. Ct. App. 1994)).

(8) Duress

Ind. Code 35-41-3-8(a) provides: It is a defense that the person who engaged in the prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another person. With respect to offenses other than felonies, it is a defense that the person who engaged in the prohibited conduct was compelled to do so by force or threat of force. Compulsion under this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

(a) Limitations

The duress defense does not apply when the defendant has recklessly, knowingly, or intentionally placed himself in a situation in which it was foreseeable that he would be subjected to duress, Ind. Code 35-41-3-8(b)(1), nor to offenses against the person, Ind. Code 35-41-3-8(b)(2).

Duress is only allowed where prohibited conduct is compelled by threat of imminent serious bodily injury. McCune v. State, 491 N.E.2d 993, 995 (Ind. 1986).

(b) State's burden

A defendant's duress must negate his ability to form the requisite intent. Early v. State, 482 N.E.2d 256, 258 (Ind. 1985). Thus, it is the State's burden to prove beyond a reasonable doubt that the defendant did not act under duress. Indiana Pattern Instruction 10.1600.

(9) Abandonment

Ind. Code 35-41-3-10 provides: With respect to a charge under Ind. Code 35-41-2-4 [aiding, inducing, or causing an offense], Ind. Code 35-41-5-1 [attempting to commit a crime], or Ind. Code 35-41-5-2 [conspiracy to commit a felony], it is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission.

(a) State's burden

The State has the burden of disproving abandonment beyond a reasonable doubt. Indiana Pattern Jury Instruction 10.1800; Pyle v. State, 476 N.E.2d 124, 126 (Ind. 1985). The defendant must voluntarily renounce criminal plan before the crime becomes inevitable or completed, and after a substantial step has been taken toward the attempted crime. Sheckles v. State, 501 N.E.2d 1053, 1055-56 (Ind. 1986).

(b) Withdrawal from conspiracy

An instruction regarding the withdrawal from a conspiracy defense did not reduce the defendant's burden in establishing an affirmative defense. The defense of withdrawal requires the defendant to affirmatively act to defeat the conspiracy; whereas abandonment requires only that the defendant voluntarily abandon effort to commit the crime. Both withdrawal and abandonment consist of the same concept. Weida v. State, 778 N.E.2d 843, 848 (Ind. Ct. App. 2002).

> Weida v. State, 778 N.E.2d 843 (Ind. Ct. App. 2002) (trial court committed reversible error by failing to give instruction on withdrawal from conspiracy defense).

(10) Alibi

"Alibi" is not an affirmative defense but consists of evidence of a defendant's presence at the crime, an essential element the State has to prove beyond a reasonable doubt. *Comments to Indiana Pattern Jury Instructions - Criminal*, (4th ed. 2015) (explaining why Instruction 10.2000 was withdrawn). The commentary states: "If an instruction on this topic is appropriate, the Committee suggests the following language: You have heard evidence that at the time of the crime charged the Defendant was at a different place so remote or distant [or that circumstances existed] that he could not have committed the crime. The State must prove beyond a reasonable doubt the Defendant's presence at the time and place of the crime."

Although the filing of an alibi defense does make time of alleged offense of the essence, the filing does not impose a greater burden of proof on the State than would otherwise be required nor necessarily make time an essential element of the offense. Sangsland v. State, 715 N.E.2d 875, 879 (Ind. Ct. App. 1999) (*citing* Jennings v. State, 514 N.E.2d 836, 837 (Ind. 1987)).

See Ind. Code 35-36-4-1; IPDC Alibi Defense Guide; IPDC Pretrial Manual Chapter 2-16 (2021 Ed.); Preston v. State, 644 N.E.2d 585, 587 (Ind. Ct. App. 1994).

Palmer v. State, 654 N.E.2d 844, 845 (Ind. Ct. App. 1995) (the defendant has right to testify to alibi under U.S. and Indiana Constitutions, regardless of whether appropriate notice of alibi was filed; failure to file appropriate notice merely prevents defendant from presenting third-party witnesses with respect to alibi). See also Campbell v. State, 622 N.E.2d 495, 499 (Ind. 1993), *abrogated on other grounds by* Richardson v. State, 717 N.E.2d 32 (Ind. 1999) ("the exclusion of a defendant's own testimony of alibi under the alibi statute, I.C. § 35-36-4-1, is an impermissible infringement upon the right of the accused to testify guaranteed by Article I, § 13 of the Indiana Constitution.")

(11) Sudden heat, voluntary manslaughter

Sudden heat is not an element of voluntary manslaughter, but a mitigator that reduces murder to voluntary manslaughter. Spradlin v. State, 764 N.E.2d 705, 713 (Ind. Ct. App. 2002). The defendant bears no burden of proof with respect to sudden heat, but only bears the burden of placing the issue in question where the State's evidence has not done so. Dearman v. State, 743 N.E.2d 757, 761 (Ind. 2001); Jackson v. State, 709 N.E.2d 326, 329 n.4 (Ind. 1999) (overruling prior cases to the contrary).

(a) Defendant - must establish *prima face* case

If a defendant charged with murder produces "any appreciable evidence" that he or she committed the crime under sudden heat, the trial court must give a voluntary manslaughter instruction, and the burden shifts to the prosecution to prove the absence of sudden heat beyond a reasonable doubt. Sanders v. Cotton, 398 F.3d 572, 576 (7th Cir. 2005) (*citing* McBroom v. State, 530 N.E.2d 725, 728 (Ind. 1988); see also Taylor v. State, 681 N.E.2d 1105, 1110 (Ind. 1997) (there must be prima facia evidence of sudden heat). The defendant must point to some evidence supporting sudden heat, whether this evidence be in the State's case or the defendant's own. Bradford v. State, 675 N.E.2d 296, 300 (Ind. 1996).

(b) State's burden - beyond a reasonable doubt

The State has the burden of negating beyond a reasonable doubt "the existence of sudden heat, once it has been injected into [the] case as a mitigating factor potentially reducing murder to manslaughter." Taylor v. State, 681 N.E.2d 1105, 1110 (Ind. 1997); Isom v. State, 651 N.E.2d 1151, 1152 (Ind. 1995).

> Mullaney v. Wilbur, 421 U.S. 684, 704, 95 S. Ct. 1881 (1975) (a rule requiring the defendant charged with murder to prove that he acted "in the heat of passion upon sudden provocation" violated due process since it tended merely to rebut the element of malice in a murder prosecution).

The State may meet its burden of negating presence of sudden heat by rebutting the defendant's evidence or affirmatively showing in its case-in-chief that the defendant was not acting in sudden heat when killing occurred. Gregory v. State, 540 N.E.2d 585, 593 (Ind. 1989). Sudden heat occurs when there is sufficient provocation to engender passion. Sufficient provocation is demonstrated by anger, rage, sudden resentment, or terror that is sufficient to: (1) obscure the reason of an ordinary person; (2) prevent deliberation and premeditation; and (3)

render the defendant incapable of cool reflection. Olive v. State, 696 N.E.2d 381, 382-83 (Ind. 1998).

c. Statutory exceptions to specific criminal offenses

If a statute contains exceptions to its operation, the prosecution is not required to negate the exceptions by stating and proving that the defendant does not come within them. Stanley v. State, 252 Ind. 37, 245 N.E.2d 149, 151 (Ind. 1969). The burden of production is on the defendant to prove that the exception applies. McQueen v. Indianapolis, 412 N.E.2d 138, 140 (Ind. Ct. App. 1980).

Lewis v. State, 484 N.E.2d 77, 80 (Ind. Ct. App. 1985) (requiring the defendant to prove he/she has a license or is exempt from the license requirement is constitutional because such proof is not element of offense).

McKeller v. State, 620 N.E.2d 744, 746 (Ind. Ct. App. 1993) (fact State did not prove gun was not made before January 1, 1899, did not render evidence to support conviction for possession of handgun with obliterated serial number insufficient because date of manufacture is exemption to prohibited conduct, not element of offense).

3. Jury Instructions on burdens

a. Unconstitutional to shift burden of persuasion to the defendant on the element of intent

A jury instruction will be found to violate the Fourteenth Amendment where it is reasonably likely that the jury interpreted the instruction as shifting to the defendant a burden of persuasion on the intent element. Winegeart v. State, 665 N.E.2d 893, 903 (Ind.1996). See discussion of mandatory presumptions, infra.

Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979) (instruction that the law presumes that a person intends the ordinary consequences of his acts violated due process because it relieved the State of the burden of proving intent and placed the burden of rebuttal upon the defendant).

b. Unconstitutional to shift burden to defendant to prove innocence

Although an instruction saying "the lawyers representing each side have presented their evidence and have tried to convince you of their version of what happened" is not the best way to describe a jury's task, which is to decide whether the State has proved its case beyond a reasonable doubt, the instruction cannot be fairly characterized as shifting the burden of proof. Edgecomb v. State, 673 N.E.2d 1185, 1197 (Ind. 1996).

c. Instruction on reasonable doubt is mandatory

An instruction on reasonable doubt is mandatory. C.R. 8(F). One example is *Indiana Pattern Jury Instruction -Criminal* Preliminary Instruction No. 1.1500 (2022). Instructions on reasonable doubt vary widely; the Indiana Supreme Court discussed problems with some commonly used instructions, reviewed the literature, and made recommendations for improvement in Winegeart v. State, 665 N.E.2d 893 (Ind. 1996).

d. Jury instruction may not use the phrase "moral certainty"

Although jury instruction which used "moral certainty" phrase to explain reasonable doubt was "less effective" than the Indiana Supreme Court would prefer, it was not so deficient as to be constitutionally defective. The Court disapproved of the continued use of the instruction in the future. Winegeart v. State, 665 N.E.2d 893 (Ind. 1996); See also Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239 (1994); but see Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990). Satisfaction "to moral certainty" is not required by Indiana's capital sentencing procedure, and this instruction has been disapproved by the courts. Bivins v. State, 642 N.E.2d 928, 951-52 (Ind. 1994).

4. Bifurcated trials and sentencing

For a detailed discussion of the burden in habitual offender phases and sentencing hearings, see Chapter 3, *Sentencing Procedure*, Chapter 4, *Sentencing Decision*, and Chapter 8, *Habitual Offender Enhancements*, of the IPDC's Sentencing Manual (2021).

a. Habitual offender phase

The state must prove the existence of two prior unrelated felony convictions beyond a reasonable doubt. Poore v. State, 685 N.E.2d 36, 39 (Ind. 1997); Ind. Code § 35-50-2-8.

b. Sentencing

Any fact which increases the maximum penalty for an offense, other than the fact of a prior conviction, must be alleged in the charging information and proven to a jury beyond a reasonable doubt, Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). This includes aggravating circumstances in capital cases. Ring v. Arizona, 536 U.S. 584, 153 L.Ed.2d 556, 122 S. Ct. 2428 (2002). Moreover, it includes certain aggravators used to enhance sentences prior to the April 25, 2005, amendment changing Indiana's sentencing scheme from a presumptive scheme to an advisory scheme. Smylie v. State, 823 N.E.2d 679 (Ind. 2005), *superseded by statute as stated in* Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007).

E. AFTER PRESENTATION OF EVIDENCE

1. Judgment on the evidence - T.R. 50(A)

A judgment on the evidence occurs before the jury is given the opportunity to return a verdict. State v. Taylor, 863 N.E.2d 917, 920 (Ind. Ct. App. 2007). The trial court has authority to set aside a jury verdict and enter judgment of acquittal if it finds that the verdict is not supported by sufficient evidence. T.R. 50(A). There must be a total absence of evidence on some essential element, or the evidence must be without conflict and susceptible to only one inference, in favor of the defendant. Conn v. State, 535 N.E.2d 1176, 1179 (Ind.1989). A judgment on the evidence, even if erroneously entered, acts as an acquittal. Taylor, 863 N.E.2d at 921.

State v. Kleman, 503 N.E.2d 895, 896 (Ind.1987) (trial court had authority under *T.R. 50* to reduce murder conviction to manslaughter in response to insufficiency of evidence).

2. Thirteenth juror standard - T.R. 59(J)(7)

In a Motion to Correct Errors after the jury has been given the opportunity to return a verdict, the trial court serves as a "thirteenth juror" and has an affirmative duty to weigh conflicting evidence. State v. Taylor, 863 N.E.2d 917, 920 (Ind. Ct. App. 2007). When a defendant challenges the sufficiency of evidence under T.R. 59(J)(7), the trial court should engage in a full fact-finding review, reweighing evidence and judging the credibility of witnesses, in effect, sitting as a thirteenth juror. If the court finds that the verdict is against the weight of the evidence, it, in effect, creates a hung jury and the appropriate remedy is a new trial. Moore v. State, 403 N.E.2d 335 (Ind. 1980). The "thirteenth juror standard" cannot be applied in granting a T.R. 50 motion for judgment on evidence. State v. Hollars, 887 N.E.2d 197 (Ind. Ct. App. 2008).

> State v. Johnson, 714 N.E.2d 1209 (Ind. Ct. App. 1999) (although trial court stated it was using its power as a thirteenth juror, the record established otherwise. The trial court did not vacate the judgment and order a new trial based upon a finding that the verdict was against the weight of the evidence. Rather, on its own motion it determined that a new trial was warranted to prevent manifest injustice).
>
> Tancil v. State, 956 N.E.2d 1204 (Ind. Ct. App. 2011) (trial court did not abuse its discretion in denying defendant's T.R. 59(J)(7) motion for a new trial on attempted murder count, as evidence, if believed, was more than sufficient to support jury's verdict).

Although the trial court must enter special finding of facts when it grants new trial based on weight of evidence, there is no Indiana authority requiring the trial court to enter special findings when it grants new trial on grounds that do not contemplate weighing and sifting evidence. Indiana courts have inherent authority to grant new trials *sua sponte* and are expressly authorized to do so by Ind. Trial Rule 59(B). State v. Johnson, 714 N.E.2d 1209 (Ind. Ct. App. 1999).

When the reversal of a conviction is based upon the weight rather than the sufficiency of evidence, double jeopardy does not bar retrial. Cuto v. State, 709 N.E.2d 356, 362 (Ind. Ct. App. 1999); Tibbs v. Florida, 457 U.S. 31, 102 S. Ct. 2211 (1982).

> Cuto v. State, 709 N.E.2d 356 (Ind. Ct. App. 1999) (where trial court vacated conviction after finding state's witness unreliable, a new trial was not barred because the State had presented sufficient evidence of guilt).

3. Appellate review of sufficiency of the evidence

When reviewing a sufficiency of the evidence claim, the court will affirm the trial court if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Kutscheid v. State, 592 N.E.2d 1235, 1242 (Ind.1992); Ruetz v. State, 373 N.E.2d 152, 156 (Ind. 1978).

Only that evidence most favorable to the State, and all reasonable inferences to be drawn therefrom, will be considered on appeal [from a conviction in a criminal case]. Shutt v. State, 367 N.E.2d 1376, 1378 (Ind. 1977). However, the Supreme Court has held that "[a]ll of the evidence is to be considered in the light most favorable to the prosecution." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979).

However, when reviewing the denial of a motion to suppress, uncontested evidence favorable to the defense is also considered ("We review the denial of a motion to suppress in a manner similar to other sufficiency matters. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. However, unlike the typical sufficiency of the evidence case where only the evidence favorable to the judgment is considered, we must also consider the uncontested evidence favorable to the defendant). Smith v. State, 780 N.E.2d 1214, 1216 (Ind. Ct. App. 2003).

a. Improbable or incredible testimony

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

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

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

Under the "incredible dubiosity" doctrine, where a conviction is based on inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt, the appellate court may find that no reasonable person could believe the testimony and may reverse. Sisson v. State, 710 N.E.2d 203 (Ind. Ct. App. 1999); Edwards v. State, 753 N.E.2d 618, 622 (Ind. 2001) ("To interfere with the jury's authority to judge witness credibility and evaluate evidence, the court must be presented with testimony which 'runs counter to human experience' and that reasonable persons could not believe.")

See also Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007) "If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it."

b. Circumstantial evidence

Appellate court, in reviewing the sufficiency of the evidence, need not exclude every reasonable hypothesis of innocence where the evidence most favorable to the State is entirely circumstantial. Clay v. State, 440 N.E.2d 466, 469 (Ind. 1982); Biggerstaff v. State, 432 N.E.2d 34 (Ind. 1982) ("If a reasonable inference can be drawn from the circumstantial evidence presented, the verdict is not to be disturbed") (overruling the standard of review set forth in Manlove v. State, 250 Ind. 70, 232 N.E.2d 874, 881 (1968)).

However, Manlove still stands for the proposition that "if mere opportunity or suspicion is sufficient to convict an accused of a felonious homicide . . . then the life and liberty of many innocent people may be summarily sacrificed…We cannot predicate an affirmance of guilt upon mere possibility because of opportunity or suspicion." Id. at 881. (citations omitted).

III. PRESUMPTIONS

A. DEFINITIONS

1. Presumption

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in action. 21 Wright & Graham, *Federal Practice and Procedure: Evidence,* Sec. 5124, at 586-87 (1977). "[P]resumptions are not weighed in the sense evidence is weighed if contrary evidence is produced[.]" Miller, 12 *Indiana Evidence* 229 § 301.101 (4th ed.). A presumption of law is not evidence, but merely serves as a challenge for proof. When an opponent of the presumption has met the burden of production thus imposed, the presumption has no further effect and drops from case. Young v. State, 258 Ind. 246, 280 N.E.2d 595 (1972).

2. Inference

An inference suggests a possible conclusion to be drawn if the state proves predicate facts but does not require that conclusion. Winegeart v. State, 665 N.E.2d 893, 903-04 (Ind.1996); Francis v. Franklin, 471 U.S. 307, 314-15, 105 S. Ct. 1965 (1985). An inference remains in the case despite the presentation of contrary proof and may be weighed with all other evidence. Thompson v. State, 646 N.E.2d 687, 692 (Ind. Ct. App.1995).

An inference may be based on an inference. However, an inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility. Walton v. State, 637 N.E.2d 808, 810 (Ind. 1994).

B. CONSTITUTIONAL LIMITATIONS IN CRIMINAL CASES

1. No mandatory presumptions

A presumption in a criminal case must be both rebuttable and permissive. For practical purposes, a presumption in a criminal case differs very little from an inference. Thompson v. State, 646 N.E.2d 687, 692 (Ind. Ct. App. 1995).

a. Jury Instructions

A mandatory presumption instructs the jury that it must infer the presumed facts if the state proves certain predicate facts. Mandatory presumptions violate the Due Process Clause of the Fourteenth Amendment if they relieve the State of the burden of persuasion on an element of an offense. Winegeart v. State, 665 N.E.2d 893, 903-04 (Ind.1996); Francis v. Franklin, 471 U.S. 307, 314-15, 105 S. Ct. 1965 (1985); Collins v. State, 567 N.E.2d 798, 801 (Ind. 1991); Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979). "A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional." Francis v. Franklin, 471 U.S. 307, 317, 105 S. Ct. 1965, 1972 (1985).

The proper inquiry in determining whether an instruction is a mandatory presumption or shifts the burden of proving an element is whether there is a reasonable likelihood that the jury applied the instruction in an unconstitutional manner. Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (*citing* Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198 (1990)). The inclusion of the word "is" in an instruction does not, alone, create an impermissible mandatory presumption. However, the trial courts are implored to use phrases such as "may," "may infer," "may consider," or "may look to" rather than "is." White v. State, 846 N.E.2d 1026, 1033 (Ind. Ct. App. 2006); Higgins v. State, 783 N.E.2d 1180, 1186 (Ind. Ct. App. 2003).

Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979) (jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the 14th Amendment requirement that the State prove every element of the offense beyond a reasonable doubt). See also Matthews v. State, 718 N.E.2d 807, 809 (Ind. Ct. App. 1999); and Walker v. State, 632 N.E.2d 723 (Ind. 1994) (giving of Sandstrom instruction was fundamental error).

Collins v. State, 567 N.E.2d 798, 801 (Ind. 1991) (fundamental error to instruct jury that evidence of a properly mailed letter was sufficient to establish receipt by the addressee unless contradicted by other evidence; instruction could be reasonably understood to advise that defendant must overcome such proof, thereby creating an improper mandatory rebuttable presumption rather than an inference).

Cruite v. State, 641 N.E.2d 1264, 1265 (Ind. 1994) (in prosecution for driving while suspended, finder of fact *may* infer, from record of notice of mailing in defendant's certified BMV record, that defendant knew that his license was suspended).

State v. Jones, 805 N.E.2d 469, 473 (Ind. Ct. App. 2004) (instruction stating that "opening an unlocked door constitutes breaking" created mandatory presumption, but was harmless error), *summ. aff'd on this issue,* 835 N.E.2d 1002 (Ind. 2005). But see White v. State, 846 N.E.2d 1026, 1033 (Ind. Ct. App. 2006); and Higgins v. State, 783 N.E.2d 1180, 1186 (Ind. Ct. App. 2003).

Lampkins v. State, 749 N.E.2d 83 (Ind. Ct. App. 2001) (instruction which implied irrebuttable presumption that if the defendant fired a gun, the law presumes intent, constituted fundamental error).

Chandler v. State, 581 N.E.2d 1233, 1236 (Ind. 1991) (instruction that "[p]ossession of a large amount of a controlled substance is circumstantial evidence of...intent to

deliver..." is misleading and erroneous because it relieves State of its burden of proving elements of possession and intent to deliver).

Wallen v. State, 28 N.E.3d 328 (Ind. Ct. App. 2015) (trial court erroneously instructed jury in theft trial that concealing and removing property from its point of display "constitutes evidence of intent to deprive the owner of the property of a part of its value and/or that the person exerted unauthorized control over the property." This instruction created a mandatory presumption; it required the jury to find the requisite intent upon the State's proof that defendant concealed and removed Wal-Mart merchandise; this relieved State of its burden to establish defendant's intent).

The United States Supreme Court in Sandstrom, *supra*, did not outlaw "mandatory presumptions," but outlawed mandatory presumptions that advise a jury that the State has met its burden of proof on an element of the charged offense. McCorker v. State, 797 N.E.2d 257, 265 (Ind. 2003).

McCorker v. State, 797 N.E.2d 257, 263-65 (Ind. 2003) (the instruction that "it is fundamental principle of law that…each person is criminally responsible for the actions of each other person which were probable and natural consequence of their common plan even though not intended as part of the original plan" was constitutional, although the Indiana Supreme Court instructed trial courts to no longer use it).

b. Statutory presumptions

The Legislature may enact laws declaring that, on proof of one fact, another fact may be inferred or presumed, provided that no constitutional right is destroyed, the presumption is rebuttable, and there is some rational connection between fact proved and ultimate fact presumed. Chilcutt v. State, 544 N.E.2d 856, 858 (Ind. Ct. App. 1989). Presumptions in criminal statutes are never considered conclusive, although they may impose burden of going forward to rebut presumption. Thus, even if a statutory presumption uses mandatory languages, such as "shall," the instruction based on the presumption must be rebuttable. Hall v. State, 560 N.E.2d 561, 563 (Ind. Ct. App. 1990).

Chilcutt v. State, 544 N.E.2d 856, 857-58 (Ind. Ct. App. 1989) (statute which creates a rebuttable presumption that where BAC within three hours of alleged offense is at least .10%, BAC at time of offense was at least .10%, is constitutional because there is rational connection between BAC within three hours of alleged offense and BAC at time of offense, the presumption is rebuttable, and merely shifts burden of going forward with evidence of post-accident consumption of alcohol which is regarded as affirmative defense).

2. No irrational inferences

"A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts but does not require the jury to draw that conclusion. ... A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason, and common sense justify in light of the proven facts before the jury." Taylor v. State, 681 N.E.2d 1105, 1109 (Ind.1997) (alteration in original) (*citing* Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979)). "[A] criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can be said with

substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. U.S., 395 U.S. 6, 36, 89 S. Ct. 1532, 1548 (1969).

An inference which is logical and based upon the evidence is sufficient proof of an element of the crime if accepted by the jury. Thompson v. State, 646 N.E.2d 687, 692 (Ind. Ct. App. 1995).

PRACTICE POINTER: Even if an instruction setting forth an inference or presumption is constitutional, object to the instruction on the basis that it unnecessarily emphasizes certain evidence and invites the jury to violate its obligation to consider all the evidence is erroneous. Ludy v. State, 784 N.E.2d 459 (Ind. 2001) (trial court erred in instructing jury that "[a] conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt"); Marks v. State, 864 N.E.2d 408 (Ind. Ct. App. 2007) (instruction setting forth seven pieces of evidence from which intoxication could be inferred emphasized certain evidence, was confusing, and was misleading); and Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001) (although flight may be the subject of closing argument, it is not appropriate for a jury instruction). These instructions may also infringe on the presumption of innocence. To instruct a jury that a presumption of guilt may be raised from a single fact (possession of recently stolen property) extracted from the entirety of evidence improperly curtails the jury's responsibility to derive its own presumptions from all of the evidence. Crawford v. State, 550 N.E.2d 759 (Ind. 1991); Rhoton v. State, 483 N.E.2d 51, 55 (Ind. 1985); see also Sims v. State, 482 N.E.2d 1182 (Ind. Ct. App. 1985).

C. SPECIFIC PRESUMPTIONS AND INFERENCES

1. Presumption of innocence

Because of the presumption of innocence and the privilege against self-incrimination, the accused has a constitutional right to sit mute at trial and make the State prove every element of its case beyond a reasonable doubt. Hirsch v. State, 697 N.E.2d 37 (Ind. 1998). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. U. S., 156 U.S. 432, 453, 15 S. Ct. 394, 403, (1895), *overruled as stated in* Underhill v. State, 428 N.E.2d 759, 767 (Ind. 1981).

The presumption of innocence remains with the defendant throughout the trial, and it is the duty of the jury to reconcile all of the evidence with that presumption, if at all possible. Vaughan v. State, 446 N.E.2d 1, 4 (Ind. 1983); Farley v. State, 127 Ind. 419, 26 N.E. 898 (1891).

a. Required instruction

Indiana law requires the trial court to instruct the jury on the presumption of innocence and the right to remain silent, if requested. McCowan v. State, 27 N.E.3d 760 (Ind. 2015) (presumption of innocence); Horan v. State, 642 N.E.2d 1374, 1376 (Ind. 1994) (right to remain silent). However, failure to give a jury instruction on the presumption of innocence does not automatically violate federal due process because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt. Kentucky v. Whorton, 441 U.S. 786, 789, 99 S. Ct. 2088, 2090 (1979). However, instructions misleading the jury regarding the

reasonable doubt standard are not subject to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993).

b. Cannot infer presumption applies only to innocent

Courts may not give an instruction that contains an insidious interference with the right to a fair trial and that causes the jury to infer that the presumption of innocence applies only to innocent defendants, and not to those "actually guilty." Turner v. State, 682 N.E.2d 491, 497 (Ind. 1997).

2. Judicial temperance presumption

Appellate courts generally presume during bench trials, that the trial court will render its decisions solely on the basis of relevant and probative evidence. Although the judicial temperance presumption is broad, it is not without its limits. Konopasek v. State, 946 N.E.2d 23 (Ind. 2011), reaffirming Fletcher v. State, 264 Ind. 132, 340 N.E.2d 771 (1976).

One way a defendant can overcome the presumption is by showing the trial court admitted the evidence over a specific objection. If a defendant does overcome the presumption, the reviewing court then engages in full harmless-error analysis: the error is harmless if the reviewing court is satisfied that the conviction is supported by substantial independent evidence of guilt so that there is no substantial likelihood that the challenged evidence contributed to the conviction. If a defendant cannot overcome the presumption, a reviewing court presumes the trial court disregarded the improper evidence and accordingly finds the error harmless. An analysis of the presumption may either trigger or circumvent full harmless-error analysis. Konopasek v. State, 946 N.E.2d 23, 30 (Ind. 2011).

See also Garrett v. State, 992 N.E.2d 710, n.3 (Ind. 2013) (majority noting idea of judicial temperance has limits - it is reasonably possible that even an experienced trial judge can make a mistake, rejecting the view expressed by Massa, J., in his concurrence, finding such a view would “border[] on judicial infallibility”).

3. Presumption of prejudice regarding extra-judicial contact or communication with jurors.

Defendants are entitled to a rebuttable presumption of prejudice when they can show by a preponderance of the evidence that an unauthorized, extra-judicial contact or communication with jurors occurred and that the contact or communication pertained to the matter before the jury. If the State does not rebut the presumption, the trial court must grant a new trial. Ramirez v. State, 7 N.E.2d 933 (Ind. 2014).

4. State's failure to produce witness

Unexplained failure of a party to produce a witness within its control may give rise to an inference that the witness's testimony would have been unfavorable to that party's cause. Goodloe v. State, 248 Ind. 411, 419, 229 N.E.2d 626, 631 (1967). Generally, an instruction based on this inference, referred to as a “missing witness” instruction, is not favored in Indiana. “A ‘missing witness’ instruction ‘is appropriate only where the witness is available to be produced by one party but not by the other.’” Blair v. State, 877 N.E.2d 1225, 1236 (Ind. Ct. App. 2007) (*quoting* Snow v. State, 560 N.E.2d 69, 72-73 (Ind. Ct. App. 1990)); see also Denney v. State, 524 N.E.2d 1301, 1304 (Ind. Ct. App. 1988); and Angel v. State, 342

N.E.2d 668, 670 (Ind. Ct. App. 1976) (State has no duty to produce all witnesses present at the commission of a crime. Defendant could call witness as his own through compulsory process).

5. State's withheld evidence presumed unfavorable to State

Evidence withheld by the State is presumed to be unfavorable to the prosecution. Young v. State, 161 Ind. App. 532, 538, 316 N.E.2d 435, 439 (1974). "An instruction calling for an adverse inference to be drawn from the failure to produce certain evidence is appropriate only where the evidence withheld is material to the trial issues and not cumulative." Snow v. State, 560 N.E.2d 69, 72-73 (Ind. Ct. App. 1990); Gossmeyer v. State, 482 N.E.2d 239, 243 (Ind. 1985).

6. Presumption that public officers discharge duties with due care

There is a presumption that public officers discharge their duties with due care. Johnson v. State, 693 N.E.2d 941, n. 13 (Ind.1998). The State need not establish a perfect chain of custody, and once the State "strongly suggests" the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility. Moreover, there is a presumption of regularity in the handling of evidence by officers, and there is a presumption that officers exercise due care in handling their duties. Troxell v. State, 778 N.E.2d 811, 814 (Ind. 2002).

7. Defendant presumed to be sane

A defendant in a criminal prosecution is presumed to be sane. Mayes v. State, 440 N.E.2d 678, 680 (Ind.1982). Thus, the defendant has the burden of producing evidence to challenge the presumption of sanity. The burden is met when competent or admissible evidence, direct or circumstantial, has been introduced on the issue of insanity. The test is not whether the evidence is credible. Id. Once the defendant raises issue of insanity, the burden of proving sanity rests upon the State. Fitch v. State, 160 Ind. App. 697, 700, 313 N.E.2d 548, 549 (1974).

> Young v. State, 258 Ind. 246, 250, 280 N.E.2d 595, 598 (1972) (because the defendant met the burden of producing evidence of insanity, the legal presumption of sanity had no further evidentiary value, and the jury should not have been instructed as to its existence).

Note: Defendant prevailing on insanity defense at criminal trial does not lessen State's burden of proof in subsequent civil commitment proceedings; defendant is entitled to same procedural safeguards as a person who has never been charged with a crime. Wilson v. State, 259 Ind. 375, 287 N.E.2d 875, 881 (1972).

8. Gender and age

a. Defendant's gender

Rebuttable presumption of the defendant's gender arises once the judge takes judicial notice of such fact. This presumption is sufficient to constitute a *prima facie* case in favor of the State when the defendant fails to produce any competent evidence to the contrary. Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95, 99 (1974).

Once the defendant challenges the presumption by introducing competent evidence, the presumption passes. The State, by affirmative evidence, must then establish the defendant's gender beyond a reasonable doubt where it is an element of the offense. Id. at 99.

b. Defendant's age

Where age is an element of an offense, the State must prove beyond a reasonable doubt the defendant's age. Staton v. State, 853 N.E.2d 470 (Ind. 2006).

Bowens v. State, 578 N.E.2d 377 (Ind. Ct. App. 1991) (because proof that defendant is eighteen or over is necessary element of contributing to delinquency of minor, circumstantial evidence of defendant's age which amounted to only scintilla of evidence, was insufficient to support conviction).

9. Statutory presumption- Operating a vehicle while intoxicated - presumption that blood alcohol content relates back: Ind. Code 9-30-6-15(b)

a. Ind. Code 9-30-6-15(b)

The trier of fact shall presume that the person charged with the offense had at least eight-hundredths (0.08) gram per one hundred (100) milliliters of the person's blood or in two hundred ten (210) liters of the person's breath at the time the person operated the vehicle if the test that elicited the results was performed within the three-hour limit established by Ind. Code 9-30-6-2(c). The presumption is rebuttable under Ind. Code 9-30-6-15(b). The statutory presumption cannot apply if the State does not have proof of when the driving occurred. See, e.g., Allman v. State, 728 N.E.2d 230 (Ind. Ct. App. 2000).

Mannix v. State, 54 N.E.3d 1002 (Ind. Ct. App. 2016) (fact that a blood draw was administered more than three hours after an accident does not render it inadmissible; rather, it deprives the State of the rebuttable presumption that the driver's BAC at time of the test was the same at the time of the accident).

Jackson v. State, 67 N.E.3d 1166 (Ind. Ct. App. 2017) (even though no direct evidence established when defendant crashed her car while driving drunk, reasonable inferences showed her blood was drawn within three hours of accident, allowing trial court to presume her BAC equivalent at time of accident was the same as when her blood was drawn).

b. Rebuttable

The presumption in Ind. Code 9-30-6-15(b) is rebuttable, and the defendant may produce evidence to overcome the presumption. Thompson v. State, 646 N.E.2d 687, 690-91 (Ind. Ct. App. 1995); Chilcutt v. State, 544 N.E.2d 856, 858 (Ind. Ct. App. 1989). The Legislature's use of the word "shall" does not make presumption mandatory, and the jury is free to accept the presumption or not, just as it is free to do with other evidence. Thompson v. State, 646 N.E.2d 687, 691 (Ind. Ct. App. 1995).

The jury must be instructed that presumption of BAC inferred from test within the three-hour limit is rebuttable. Disbro v. State, 791 N.E.2d 774 (Ind. Ct. App. 2003). The presumption instruction does not improperly shift the State's burden of proof, but merely

negates the need for live testimony explaining retrograde extrapolation as a method to estimate the defendant's BAC at the time of driving. Pattison v. State, 54 N.E.3d 361, 367 (Ind. 2016).

Hall v. State, 560 N.E.2d 561 (Ind. Ct. App. 1990) (instruction which parallels Ind. Code 9-11-4-15(b), that jury "shall presume" that the defendant had .10% BAC at the time of operating the vehicle because he tested at least .10 within three hours after arrest, created a mandatory presumption).

10. Statutory presumption: Mailing notice of license suspension -- Rebuttable presumption, Ind. Code § 9-24-19-8.

a. Ind. Code § 9-24-19-8

Service by the bureau of motor vehicles of a notice of an order or an order suspending or revoking an individual's driving privileges by mailing the notice or order by first class mail to the individual at the last address shown for the individual in the records of the bureau establishes a rebuttable presumption that the individual knows that the individual's driving privileges are suspended or revoked, as applicable.

b. Rebuttable

Trial court properly instructed jury notice of a license suspension mailed by the Indiana Bureau of Motor Vehicles established a rebuttable presumption pursuant to IC 9-24-19-8 that a driver knew driving privileges were suspended, and the record did not need to indicate that the notice was sent by first class mail in a prosecution for driving while suspended under Ind. Code § 9-24-19-2. Spivey v. State, 922 N.E.2d 91 (Ind. Ct. App. 2010).