

In the  
Indiana Supreme Court

Kevin Duane Jones,  
Appellant(s),

v.

State Of Indiana,  
Appellee(s).

Court of Appeals Case No.  
18A-CR-01320

Trial Court Case No.  
49G01-1609-F3-36200



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 10/3/2019.

FOR THE COURT

Loretta H. Rush  
Chief Justice of Indiana

Massa, J., Slaughter, J., and Goff, J., vote to deny transfer.

David, J., dissents from the denial of transfer with separate opinion in which Rush, C.J., joins.

## **David, Justice, dissenting.**

Five years ago, we reaffirmed the principle that “[e]very accused has a constitutionally protected right to an impartial jury.” *Ramirez v. State*, 7 N.E.3d 933, 934 (Ind. 2014). Today, we are confronted with the rare case in which both the State and Defendant agreed the right to an impartial jury was imperiled based on unauthorized contact between a juror and a member of the Defendant’s family. After assessing the situation, the trial court denied a joint request for a mistrial and moved forward with the proceedings. The question pending transfer before our Court is whether the trial court erred when it took this action. Answering that question in the affirmative, I would find that the trial court acted contrary to our Court’s precedent in *Ramirez v. State* when it failed to order a mistrial. Therefore, I respectfully dissent from the denial of transfer in this case.

The record before us indicates a juror (“Juror 11”) was approached by a family member of the Defendant during a break. Juror 11 recounted:

I was coming into the security and a gentleman just said, he said, “Oh, you’re a juror.” I said, “Yeah. Are you?” “No.” He said, “My uncle’s the Defendant,” and then he kind of under his breath just said, “self-defense (inaudible).” Like something to that effect, kind of....

(Tr. Vol. 2 at 25.) When the court asked the juror if he could be “fair and impartial in this case,” he answered, “Yes.” (Id.)

Juror 11 was then asked if he talked to any of the other jurors about this incident. The juror stated:

Yeah, I did tell the other jurors that I might be dispensed because someone came up and spoke to me, and then I said, “It wasn’t anything bad,” and then they’re like, “No, we don’t want to hear it.” I’m like, “No, that’s not what I’m saying.” I just said, “It wasn’t – I don’t want anybody to be scared.”

(Id. at 26.) Based on this information, the State believed a mistrial was warranted because “there[ was] going to be something else in the jury room that’s not evidence.” (Id. at 27.) Defendant joined the State’s concern.

The trial court noted it was “in the rare position” where it didn’t think a mistrial should be ordered. (Id.) Juror 11 was dismissed, and the court offered to question each of the remaining jurors individually to “see where their minds are and the way they feel about it.” (Id. at 28.) Both the State and Defendant expressed varying degrees of concern about questioning each juror: The State believed this method would aggravate the situation while defense counsel believed that questioning jurors about whether they were afraid would unduly bias his client.

The trial court, the State, and the Defendant proceeded to question the remaining jurors. It does not appear from the record, however, that any of the jurors were sworn before being questioned or that the jurors were consistently admonished not to discuss the matter in the jury room.<sup>1</sup> Additionally, the record indicates the Defendant’s family was seated in the gallery while jurors were questioned in the courtroom.<sup>2</sup>

Juror 1 reported that Juror 11 had been spoken to by a family member but did not know which family it was. Juror 1 believed she could still sit on the jury. Juror 2 testified that he knew Juror 11 was dismissed because of communication with “the family of the accused,” and that Juror 11 had told the other jurors this information when everyone was in the jury room. (Id. at 31.) Juror 2 believed he could still be a fair and impartial juror. Juror 3 said she didn’t know why Juror 11 was dismissed, but defense counsel noted that when Juror 3 was asked the question, she looked at counsel

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<sup>1</sup> As Judge Mathias’s dissent in this case correctly observes, Indiana Jury Rule 24 requires that jurors must be examined under oath if the court receives information that a juror has personal knowledge about the case. *Jones v. State*, No. 18A-CR-1320, 2019 WL 1984299 at \*9 (Ind. Ct. App. May 6, 2019) (Mathias, J., dissenting); Slip Op. 23. Regardless of Jury Rule 24, it would be best practice to place jurors under oath in this situation.

<sup>2</sup> Here, I believe it would have been prudent to clear the courtroom, especially because the matter involved communication between a juror and a member of the Defendant’s family.

before answering. Jurors 4, 5, 6,<sup>3</sup> 7, and 12 knew Juror 11 was dismissed because he was approached by one of the Defendant's family members, but all said they would be fair and impartial. Juror 8 only knew someone approached Juror 11 but said the incident would not affect his impartiality. Jurors 9, 10, and Alternate Juror 1 did not know why Juror 11 had been dismissed.

After all jurors were questioned and returned to the jury room, the State again expressed its concern to the trial court:

I think it's somewhat unfair to ask these jurors to sit and listen to evidence for two days knowing that someone was approached. I know that would make me uncomfortable, and I definitely wouldn't probably say that, but I would just have concerns that even if they want to be on this jury and they want to be fair and impartial and they want to say they're fine with it, it's still asking them to kind of take something back to the jury room with them that's not in evidence.

(Id. at 47.) Defendant agreed, adding that it would be human nature for the jurors to consider this incident while hearing evidence in the case. The trial court, however, did not "believe the circumstances under this case ... warrant[ed] a mistrial." (Id. at 48.) The trial court declined a request from the State for an admonishment to the jury and instead gave a general reprimand to the gallery not to interact with jurors. Defendant was ultimately found guilty of aggravated battery, battery, and domestic battery.

When this Court handed down *Ramirez v. State* a short while ago, the opinion clarified years of inconsistent precedent regarding unauthorized contact and communication with jurors in a criminal proceeding. The majority in that case held, "Defendants are entitled to a rebuttable

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<sup>3</sup> Juror 6 was equivocal when asked whether he could be fair and impartial, noting he could imagine "an impassioned plea on the part of a family member." (Tr. Vol. 2 at 38.) Juror 6 ultimately told the trial court he could make a decision based on the facts of the case.

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.” *Ramirez*, 7 N.E.3d at 934. If a defendant successfully makes both of these required showings, then the burden shifts to the State to rebut the presumption. *Id.* at 939. But “[i]f the State does not rebut the presumption, the trial court **must grant a new trial.**” *Id.* (emphasis added).

Here, the Defendant made the requisite showing (1) that a member of the Defendant’s family made unauthorized contact with a juror, and (2) the communication—something about self-defense—pertained to a matter before the jury. Under *Ramirez*, this created a presumption of prejudice. *Id.* At this point, the State bore the burden to rebut this presumption by showing the contact or communication was harmless. *Id.* But that did not happen in this case; in fact, the opposite occurred. The State was the first to notify the court that a mistrial was warranted. The State also protested the manner whereby the court spoke to each juror individually. Even after each juror was interviewed, the State’s position didn’t change: A mistrial was the appropriate curative remedy.

*Ramirez* was clear that a court “must grant a new trial” if the State does not rebut a presumption of prejudice. *Id.* I am sympathetic that trial courts are given discretion to decide whether defendants have met the two-part showing enunciated in *Ramirez* and whether a mistrial is the appropriate course of action. *See id.* at 940. I also believe the trial court acted with the correct instinct to question each juror individually about his or her knowledge of and exposure to the information Juror 11 revealed. *See, e.g., id.* But on this record, I believe the trial court should have granted a mistrial because Defendant properly established the presumption of prejudice and the State did not rebut that presumption.

I respectfully dissent from the denial of transfer in this case and would remand the matter for a new trial.

Rush, C.J., joins.