

In the
Indiana Supreme Court

Roberto Cruz Rivera,
Appellant(s),

v.

State Of Indiana,
Appellee(s).

Court of Appeals Case No.
18A-CR-02862

Trial Court Case No.
49G15-1708-F6-30973



Published 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 11/21/2019.

FOR THE COURT

A handwritten signature in black ink that reads "Loretta H. Rush".

Loretta H. Rush

Chief Justice of Indiana

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

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

David, Justice, dissenting.

I write separately today not because the defendant is necessarily entitled to relief under the facts and circumstances of this case, but because I believe our Court should provide guidance to the bench and bar on two issues raised in the courts below. Therefore, I respectfully dissent from the denial of transfer in this case.

First, the record indicates that the jury was sworn at 12:09 p.m. and admonished in Preliminary Instruction 1 not to talk or communicate about the case with anyone else. Fifteen additional preliminary instructions were read before the jury was dismissed for lunch at 12:23 p.m. No admonishment not to converse about the case was given before lunch. In a published decision, the Court of Appeals found “there was no need” to give the jury an admonishment before lunch because “there [were] no intervening proceedings between the reading of the preliminary instructions and the jury being excused for lunch....” *Rivera v. State*, 127 N.E.3d 1256, 1259 (Ind. Ct. App. 2019). This strikes me as a misstatement of the law.

Indiana Code section 35-37-2-4(a) contains the following mandate:

The court **shall admonish** the jurors in the preliminary instruction, before separating for meals, and at the end of the day, that it is their duty not to converse among themselves or permit others to converse with them on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them.

(Emphasis added). Thus, if we give this statute its “plain and ordinary meaning,” *Cooper Indus. v. City of South Bend*, 899 N.E.2d 1274, 1283 (Ind. 2009), courts are under an affirmative duty to admonish jurors at three points: (1) in the preliminary instruction, (2) before separating for meals, and (3) at the end of the day. *Lake v. State*, 565 N.E.2d 332, 334 (Ind. 1991). Our Court has previously emphasized this point, finding that “[t]he

reading of the admonishment to the jurors at the prescribed times is mandatory.” *Id.*

Here, I believe the trial court erred by failing to admonish the jurors before they were dismissed for lunch. While an additional admonishment may have been repetitive given only fourteen minutes had passed between the first preliminary instruction and the lunch break, I do not think this additional admonishment would unduly burden the trial court or the jury. My concern, however, is not wholly rooted in a rigid interpretation of the statute. I also write today with an eye toward future application of the “close enough” interpretation sanctioned by the Court of Appeals below. In my view, the decision by the Court of Appeals impermissibly engrafts language into this statute to allow for an exception—the “no intervening circumstances” exception—that is simply not present in Indiana Code section 35-37-2-4(a).

While there were no identifiable intervening circumstances that would have caused the jury to forget the admonishment that was given during the preliminary instructions, the natural question now becomes one of time: Fourteen minutes was acceptable in this case, but how long is too long so as to constitute “intervening circumstances” that would lead to reversal? Thirty minutes? An hour? To avoid confusion and misapplication of this precedent, I would draw a bright line rule that tracks the language of Indiana Code section 35-37-2-4(a) and **requires** that courts give the mandated admonishments at the stated times. Under this reading, a court either violates the rule or it doesn’t, and here, the trial court failed to comply with the express language of the statute.

That being said, our Court has reiterated on several occasions that “[f]ailure to provide this admonishment ... doesn’t lead to automatic reversal. Instead, a defendant must show he was ‘harmed by [the] failure of the court to instruct or admonish the jury as to conduct during recess.’” *Cardosi v. State*, 128 N.E.3d 1277, 1284-85 (Ind. 2019) (quoting *Brown v. State*, 245 Ind. 604, 608, 201 N.E.2d 281, 283 (1964)). The defendant in this case failed to object to the lack of a pre-meal instruction and must therefore convince our Court that the failure to read the additional admonishment resulted in fundamental error. *See Cardosi*, 128 N.E.3d at

1285. I do not think the defendant has shown either harm or fundamental error. Nevertheless, it bears repeating that courts are required by statute to give jury admonishments at specific points in time.

Second, and perhaps more importantly, I believe this Court should provide guidance on the conflict between Jury Rule 20(a)(8) and Indiana Code section 35-37-2-4(a). As the Court of Appeals aptly noted:

The admonishment envisioned by Section 35-37-2-4(a) was not technically “covered” by Preliminary Instruction 1. [] Preliminary Instruction 1 was based on Indiana Criminal Pattern Jury Instruction 1.0100, which in turn is largely based on Indiana Jury Rule 20(a)(8). Jury Rule 20(a)(8) requires judges to give jurors a preliminary instruction that they are “**permitted to discuss** the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.” (Emphasis added). Section 35-37-2-4(a), on the other hand, requires judges to admonish jurors “**not to converse** among themselves . . . on any subject connected with the trial . . . until the cause is finally submitted to them.” (Emphasis added). As such, it would have been impossible for the judge to give an admonishment that completely satisfied **both** Jury Rule 20(a)(8) and Section 35-37-2-4(a).

Rivera, 127 N.E.3d at 1258 n. 1 (emphasis in original).

Although neither party has specifically raised this issue for our review, I would observe that our jury rules should govern in place of the statute in this particular situation. *See, e.g., Garner v. Kempf*, 93 N.E.3d 1091, 1099 (Ind. 2018) (citation omitted) (finding “[o]n matters of procedure, to the extent a statute is at odds with our rule the rule governs”). Applying that observation to the present case, I would find that, while Indiana Code section 35-37-2-4(a) still requires jury admonishment at three separate times, Jury Rule 20(a)(8) overrides the remaining portion of the statute to provide “that jurors, including alternates, are permitted to discuss the

evidence among themselves in the jury room during recesses from trial when all are present” and that “[t]he court shall admonish the jurors not to discuss the case with anyone other than fellow jurors during trial.”

For these reasons, I respectfully dissent from the denial of transfer.

Rush, C.J., joins.