Death Penalty Overturned Because of Sleeping, Tweeting Jurors

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Contrary to our prediction, the Arkansas Supreme Court has vacated the conviction and sentencing of capital-murder defendant Erickson Dimas-Martinez and remanded the case for a new trial on grounds of juror misconduct. Although the decision is a definite victory for defendants, it may well invite a flood of appeals based on allegations of misconduct, regardless of whether the defendant can demonstrate a reasonable possibility of prejudice.

In 2010, a jury sentenced Dimas-Martinez to death for the 2006 murder of 17-year old Derrick Jefferson. Dimas-Martinez appealed the conviction and sentence on grounds that he was denied a fair trial. Specifically, he claimed unfair prejudice due to one juror who slept through portions of expert testimony (the sleeping juror) and another juror who posted trial-related messages on Twitter in violation of the court's jury instructions (the tweeting juror).

In December 2011, the Arkansas Supreme Court reversed the conviction and sentence. Speaking for the Court, Associate Justice Donald Corbin explained that, under Arkansas law, the moving party bears the burden of proving both jury misconduct and a reasonable possibility of prejudice resulting from the misconduct. Corbin noted further that the court will not presume prejudice based on misconduct; the moving party must show that the alleged misconduct prejudiced his chances for a fair trial.

Then, the court purportedly applied the test. First, the court found juror misconduct because of the sleeping juror. The court found a reasonable possibility of prejudice because the juror would have no way of knowing what testimony he had missed, how much of it he missed, and whether that evidence would have influenced his view of the case. Accordingly, the court reversed and remanded. Although the Court could have ended its analysis there, it proceeded to a discussion of the tweeting juror instead.

With respect to misconduct, the Court readily concluded that the tweeting juror had knowingly and repeatedly violated the judge's explicit instruction not to tweet about the case. But the Court's discussion of the next prong — reasonable possibility of resulting

prejudice —simply conflated the second prong with the first. And considering the tweets, it is clear why: none of the juror's tweets showed that he was more or less likely to decide the case based on the evidence.

For one, all the tweets referenced in the Court's decision were sent during the sentencing phase. They could not have prejudiced the guilt phase. Additionally, the messages were fairly benign and did not expressly reference the case. For example, when all the evidence was submitted for sentencing, the juror tweeted, "Choices to be made. Hearts to be broken. We each define the great line." During deliberations, he tweeted, "If its [sic] wisdom we seek . . . We should run to the strong tower." After the jury reached its sentencing verdict, he tweeted, "Its [sic] over."

The defense proffered no evidence that the juror received trial-related messages. Thus, the defendant had to argue that these outgoing messages resulted in a reasonable possibility of prejudice. The defense did so by claiming that the juror's inability to follow jury instructions called into question his ability to follow the law. If Corbin's standard of law is correct, though, the failure to follow instructions would not, by itself, raise a presumption of unfair prejudice. Without more, the defendant's argument seemed bound to fail. It didn't.

The Court found that the juror's failure to comply with jury instructions raised a question as to whether he followed the law. This reasoning allowed the Court to sidestep a challenging explanation as to how the tweets may have resulted in unfair prejudice: it was the juror's inability to follow instructions that deprived the defendant of a fair trial, not his tweets.

The distinction is so fine it even tripped up the court. Corbin wrote: "It is in no way appropriate for a juror to state musings, thoughts, or other information about a case in such a public fashion." When jurors do so, "[t]he possibility for prejudice is simply too high." But if the court was concerned with prejudice resulting from the juror's inability to follow instructions, why would any of this matter? Whether a juror tweets messages online or falls asleep during trial, it is the juror's failure to follow jury instructions that shows his inability — whether intentional or inadvertent — to follow the law. Under the court's new test, that alone is grounds for reversal.

We support the court's decision to address the growing problem of Internet-related juror misconduct. Fortunately, the decision will cause trial judges to think long and hard before overlooking such misconduct. That said, we question whether the court's rationale will stand the test of time. By eliding the distinction between juror misconduct and resulting prejudice, the court has drastically lowered the bar for obtaining reversal. It is difficult to conceive of any instance of juror misconduct that could not support reversal based on the rationale enunciated in *Dimas-Martinez v. Arkansas.* In the months ahead, the Arkansas Supreme Court will likely delimit the holding to stem the flood of appeals that will be filed in its wake.

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