BEHAVING BADLY

When is online jury misconduct severe enough for a mistrial?

BY JOHN G. BROWNING

Jurors venturing online to research issues or parties in a case, publicize their experience, or to communicate with third parties have been a problem ever since the spread of the internet and proliferation of social media. They have used online resources to second guess legal definitions, examine court case files, download medical information, view photographs of crime scenes, and even tweet about jury deliberations.[1] Such online juror misconduct has occurred in virtually every federal circuit and in numerous state jurisdictions, resulting in so many mistrials and overturned verdicts that *Reuters* described it as an "epidemic."[2]

In reaction to the rash of cases in which online misconduct toppled or threatened jury verdicts, many states, including Texas, revised their jury instructions to specifically address the need to avoid "Googling a mistrial" or discussing a case on social networking sites like Facebook. Yet Texas' experience with the issue and just what constitutes an "outside influence" stands in stark contrast with other states. Just how bad does online misbehavior have to be to warrant a new trial in Texas? As the caselaw in the state has developed in recent years, it's become apparent that this is a high hurdle to clear, with appellate courts analyzing multiple factors when reaching their decisions.

Since well before the advent of the internet, Texas courts have long held that the granting of a mistrial was appropriate "only in extreme circumstances, where the prejudice is incurable,"[3] viewing it as an "extreme remedy" that should be limited to instances where there is "residual prejudice remaining after objections are made and curative instructions are given."[4] In order for a new trial to be warranted on the basis of juror misconduct, the movant must establish not only that such misconduct occurred, "but also that it was material and probably caused injury."[5] And while Texas Rule of Evidence 606(b) prohibits a juror from testifying about "any matter or statement occurring during the jury's deliberations," one of the two exceptions to this rule allows a juror to testify about "whether any outside influence was improperly brought to bear upon any juror."[6] The Texas Rules of Appellate Procedure also provide guidance pertinent to analyzing whether a new trial is justified on grounds of juror misconduct, stating in Rule 21.3(f) that a new trial should be granted "when after retiring to deliberate, the jury has received other evidence."

So with the ubiquity of the internet and social media sites, it stands to reason that information gleaned from some online source could certainly constitute an "outside influence" or "other evidence" that might necessitate a new trial. After all, the behavior that jurors engage in when they venture online tends to fall into one of four categories: investigating the facts of the case or the parties involved, researching or "double-checking" the law or legal definitions, contacting third parties, or publicizing their experiences. And while any of these forms of online conduct is concerning, the type that gives judges and lawyers the most heartburn is jurors engaging in online "research" or "investigation." With access to a digital treasure trove of information literally at jurors' fingertips thanks to smartphones, the same juror who searched online for directions to the courthouse that morning can also examine court case files, view crime scene photos, download medical descriptions of drugs at issue, and even view the house where a party lives.

How have Texas courts reacted to such online juror misconduct? The first case to look at this issue was *Jackson v. State* in 2001.[7] In it, the defendant who was convicted of injury to a child (he had starved the child) sought a new trial because a juror's internet research on malnutrition constituted evidence improperly received. Although the juror admitted to doing the online research, she testified that she didn't share her findings with any other jurors, and that the information she viewed didn't impact her verdict in the case. The appellate court reasoned that because of this, the research results were not "received" since they were not shared with others and made no difference in the verdict; it affirmed the trial court's ruling of no jury misconduct.

Then in 2006, in *Sharpless v. Sim*, the Court of Appeals in Dallas similarly concluded that while a juror had engaged in online misconduct, it made no difference in the verdict that was rendered.[8] In this double fatality trucking accident case, one juror admitted that she looked up the defendant truck driver's driving record online from a public data website,

but the information she found had no effect on her vote (which was in the minority of the 10-2 plaintiff's verdict), nor was it communicated to the other jurors. Since there was nothing to establish that the verdict would have been any different had the misconduct not occurred, the appellate court held that there was no probable injury.[9]

That same year brought *Mathis v. State*.[10] In *Mathis*, a defendant appealed his conviction for aggravated sexual assault on the grounds that one of the jurors had conducted internet research on several issues in the case, printed off and highlighted the results of that research, and vocally referenced the information during deliberations, although no other jurors ever read the material. The Court of Appeals in Dallas affirmed the trial court's denial of the defendant's new trial request, reasoning that outside influence must come from outside the jury and holding that "[i]nformation gathered by a juror and shared with the other jurors does not constitute outside influence."[11]

But by 2012, the Texas Court of Criminal Appeals would acknowledge that excluding anything communicated to the jury by one of the jurors (regardless of the source of that information) from the definition of "outside influence" could produce "absurd results."[12] In *McQuarrie v. State*, the defendant appealed his sexual assault conviction because one juror had gone online to research the effects of date rape drugs and had shared her findings with other jurors. Despite testimony from at least two jurors (once the misconduct was disclosed) that the online information had changed their minds, both the trial court and the Court of Appeals in Corpus Christi held that there was no evidence of "outside influence" since the information had been gathered by a juror and introduced to other jurors. The Texas Court of Criminal Appeals disagreed with this restrictive definition of "outside influence," and applied a more "plain-meaning interpretation" of "outside influence," explaining that since the forbidden research originated from an internet source, "a source other than the jurors themselves," … "[t]he internet constituted an 'outside influence.'"[13]

Since *McQuarrie*, there have been several Texas cases that examined potential online juror misconduct, but each has concluded that while the internet research in question may have been an outside influence, the evidence of any harm justifying reversal was lacking. In *Benson v. State*, a juror read a short online news article about the defendant's intoxication manslaughter arrest but testified that the synopsis would not impact his deliberations.[14] That assurance, combined with the trial court's admonishments to rely only on the admitted evidence, assuaged the Houston appellate court's concerns. Later that year, the same court tackled a case in which the jury foreman performed online research into a defendant's prior criminal history during the voir dire of an aggravated sexual assault of a child case.[15] The Houston court distinguished this situation from *McQuarrie*, pointing out that the jury foreman had kept the prior rape conviction he discovered online to himself, and that it had not affected the jurors from maintaining an open mind as to guilt or innocence. The court also noted that none of the attorneys had ever asked the venire panel about having prior information or conducting research about the case, a factor the court viewed as a lack of due diligence in making the claim of juror misconduct.[16]

And in 2014, the Court of Appeals in Texarkana rejected a murder defendant's argument that a juror pulling up an article about the case on his smartphone during a break in voir dire constituted juror misconduct.[17] The court observed that the research in question occurred prior to any admonishments by the court not to do so, and further noted the juror's testimony that he had not shared this information with any other jurors and that the brief research would not impact his ability to be fair and impartial.

As the *Brooks* court lamented, lawyers in Texas must contend with "the current technological age, in which a juror, now more than ever, can quickly and efficiently obtain information."[18] Yet unlike many other states, Texas law demands a showing that any online research (while it may clearly be an "outside influence") actually impacted the deliberations in the case and caused harm to the defendant's right to a fair trial. **TBJ**

NOTES

1. *See, e.g., U.S. v. Bristol-Martir*, 570 F.3d 29, 43 (1st Cir. 2009) (finding juror misconduct when a juror researched legal definitions on the internet); *Russo v. Takata Corp.*, 774 N.W.2d 441 (S.D. 2009) (new trial ordered because juror researched product safety information online); *State v. Abdi*, 45 A.3d 29 (Vt. 2012) (sexual assault conviction overturned because juror did internet research into Somali culture); and *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238 (Ark. 2011) (murder conviction set aside due to juror's tweeting from the jury box).
2. Even the U.S. Supreme Court has taken note, observing just a few months ago that "courts should also ask to what extent just-dismissed jurors accessed their smart phones or the internet, which provide other avenues for potential prejudice. It is a now-ingrained instinct to check our phones whenever possible. Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. Prejudice can come through a whisper or a byte." *Dietz v. Bouldin*, 2016 WL 3189528, at *8 (U.S. June 9, 2016).
3. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004).
4. *Bauder v. State*, 921 S.W.2d 696, 698 (Tex. Crim. App. 1996).
5. *Ryser v. State*, 453 S.W.3d 17, 39 (Tex. App.—Houston [1st Dist.] 2014, pet ref'd) (citing *Bogue v. State*, 204 S.W.3d 828, 829 (Tex. App.—Texarkana 2006, pet. ref'd).
6. Tex. R. Evid. 606(b).
7. 2001 WL 59371 (Tex. App.—Houston [1st Dist.] 2001, no writ).
8. *Sharpless v. Sim*, 209 S.W.3d 825 (Tex. App.—Dallas 2006, pet. denied).
9. *Id.*
10. 2006 WL 1479879 (Tex. App.—Dallas 2006, no pet.).
11. *Id.*
12. *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012).
13. 380 S.W.3d at 154.
14. 2013 WL 655205 (Tex. App.—Houston [1st Dist.] 2013) (unpublished opinion).
15. *Tate v. State*, 414 S.W.3d 260 (Tex. App.—Houston [1st Dist.] 2013).
16. *Id.*
17. *Brooks v. State*, 420 S.W.3d 337 (Tex. App.—Texarkana 2014, no writ).
18. *Id.*

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