

Arkansas High Court Considers Impact of Juror's Use of Twitter During Trial

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Arkansas may be the next state (after California) to tighten restrictions on Internet usage by jury members. Earlier this year, California passed [a law governing jurors' use of the Internet](#). On November 17, 2011, the Arkansas Supreme Court considered whether a juror's use of Twitter during a capital murder trial unfairly prejudiced defendant Erickson Dimas-Martinez.

Last year, Dimas-Martinez was sentenced to death for the 2006 murder of 17-year-old Derrick Jefferson. The two met at a party, when Dimas-Martinez and a co-defendant offered to give Jefferson and his two friends a ride. All five partygoers left that evening in the defendant's car. Moments later, Dimas-Martinez robbed Jefferson of \$30 and shot him in the head. Jefferson's friends witnessed the crime from the back seat of the car.

On appeal, defense counsel Janice Vaughn argued that the conviction and death sentence should be overturned due to juror misconduct. Vaughn argued that the trial judge should have dismissed juror Randy Franco because Franco repeatedly tweeted about the case in violation of the court's admonition not to discuss the case with anyone or post trial-related messages on the Internet.

Franco, however, tweeted about the substandard coffee and the monotony of trial ("Court. Day 5. Here we go again"). Franco also posted more thoughtful comments on the gravity of the case ("Choices to be made. Hearts to be broken ... We each define the great line."). Roughly 50 minutes before the jury verdict was announced, Franco tweeted "It's over." Perhaps unwittingly, he alerted the reporters stationed outside who were following his Twitter feed. Between the guilt and sentencing phases, Franco expressed some compassion for the defendant when he tweeted "With all my power I couldn't do anything ... nothing at all."

Vaughn argued that the verdict should be reversed. In her view, Franco's misconduct raises questions as to whether Franco ignored other aspects of the judge's instructions or missed important trial evidence while he was busy posting on Twitter.

Assistant Attorney General Eileen Harrison countered that Franco did not violate the judge's order. According to her, the judge did not absolutely ban use of social media; he gave jurors limited permission to post messages regarding the expected length of trial and other scheduling issues. She added that Franco never commented on trial evidence or the substance of jury deliberations; he

simply communicated his thoughts and feelings about the case. She also noted that the state proffered overwhelming evidence of guilt, including the testimony of two eyewitnesses.

During oral argument, Justice Corbin reminded the parties of the governing legal standard. Under Arkansas law, the moving party bears the burden of proving juror misconduct and a reasonable possibility that unfair prejudice resulted from the misconduct. Arkansas does not recognize a presumption of prejudice based on a finding of misconduct, and the decision whether prejudice occurs is within the sound discretion of the trial court. The defense likely cannot meet this burden.

For one, Vaughn argued misconduct; she did not argue resulting prejudice. This was a sticking point. Justice Jim Gunter immediately asked whether Franco received any trial-related messages, suggesting that Franco's outgoing messages could not prejudice him. Vaughn conceded that the defense did not adduce evidence of Franco's incoming messages. Justice Karen Baker noted that one of Franco's tweets occurred after the guilt phase, suggesting that it could not have resulted in prejudice as to guilt.

Other justices focused on inferences of prejudice that may be drawn from Franco's conduct — that he did not take any of the judge's instructions seriously, did not pay attention during trial, or was not fully engaged in deliberations, for example. But if the fact of a juror's misconduct is sufficient to establish a reasonable possibility of prejudice, the first prong of Arkansas' test (misconduct) will swallow the second prong (unfair prejudice). The Court is not likely to go down that road, especially in this case where the value of reversal would be largely symbolic.

Chief Justice Jim Hannah emphasized the policy reasons for requiring secrecy in jury deliberations. He questioned whether conduct like Franco's undermines the jury system. That it does seems obvious. But that fact does not directly tell the Arkansas courts what to do about this case.

California may be a harbinger of things to come. If the Arkansas Supreme Court affirms Dimas-Martinez' conviction and sentence, legislators may decide it is time to act. Arkansas may be the next to pass a bill making a juror's Internet-related misconduct punishable as criminal contempt. Other states are sure to follow; the problem is not going away any time soon.

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