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Court of Appeals of Kansas.
STATE of Kansas, Appellee,
v.
Leon MITCHELL, III, Appellant.

No. 101,611.
April 8, 2011.

Background: Defendant was convicted in a jury trial in the Sedgwick District Court, Benjamin L. Burgess, J., of aggravated burglary and attempted aggravated robbery. Defendant appealed.

Holdings: The Court of Appeals, Greene, C.J., held that:
(1) trial court acted within its discretion in denying mistrial on basis of alleged juror misconduct of texting on cellular phone during trial;
(2) State's proffered race-neutral explanation for striking African-American juror was credible;
(3) error in district court's inclusion of outdated Allen-type deadlocked jury instruction, advising jury that another trial would be a burden on both sides, was not clearly erroneous error requiring reversal;
(4) under controlling precedent, a sentence to any term, including an aggravated term, within the range in a Kansas sentencing guidelines presumptive grid box does not violate defendant's Sixth or Fourteenth Amendment rights.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿855(8)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k855 Misconduct of or Affecting Jurors
110k855(8) k. Communication between jurors and third persons. Most Cited Cases

Communication between jurors and third parties is broadly termed juror misconduct.

[2] Criminal Law 110 ⚿855(1)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k855 Misconduct of or Affecting Jurors
110k855(1) k. In general. Most Cited Cases

Juror misconduct will not be a ground for mistrial unless the party claiming error shows that such error substantially prejudiced his or her rights. West's K.S.A. 22–3423(1)(c).

[3] Criminal Law 110 ⚿1141(2)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1141 In General
110k1141(2) k. Burden of showing error. Most Cited Cases

Criminal Law 110 ⚿1155

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1155 k. Issues related to jury trial. Most Cited Cases

A motion for mistrial is reviewed under an abuse of discretion standard, and the party alleging the abuse bears the burden of proving that his or her rights to a fair trial were prejudiced. West's K.S.A. 22–3423(1)(c).

[4] Criminal Law 110 ⚿855(8)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k855 Misconduct of or Affecting Jurors
110k855(8) k. Communication between

jurors and third persons. Most Cited Cases

Trial court acted within its discretion in denying mistrial on basis of alleged juror misconduct of texting on cellular phone during trial, even if best practice is for trial courts to prohibit access to mobile electronic communication devices by jurors; defendant failed to request any such inquiry or to utilize any posttrial procedure to investigate matter. West's K.S.A. 22–3423(1)(c).

[5] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered for striking a juror will be deemed race-neutral.

[6] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

State's proffered race-neutral explanation for striking African-American juror, based on juror's apparent statement that she would hold State to standard higher than that of reasonable doubt, was credible, supporting validity of strike under *Batson*, even though trial court denied State's for cause challenge of juror and there was some rehabilitation of juror on the issue; juror's statement that she would "do a lot more than the average person" in context raised concern about her willingness to accept and follow instructions on burden of proof, and, of the two other African-American potential jurors, one was selected to be on jury and one was excused with concurrence of both parties.

[7] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Tone of voice is a matter which the trial court may take into consideration in determining whether the prosecutor has a valid and race neutral reason for striking the juror.

[8] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

One factor to consider in determining whether the State's peremptory challenges are discriminatory is the presence of other members of the same minority on the jury and the failure of the State to remove such members when given the opportunity.

[9] Criminal Law 110 ⚿865(1.5)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k865 Urging or Coercing Agreement
110k865(1.5) k. "Allen," "dynamite," or "hammer," etc., charge. Most Cited Cases

Criminal Law 110 ⚿1038.1(3.1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(3) Particular Instruc-

tions

110k1038.1(3.1) k. In general. Most Cited Cases

Error in district court's inclusion of outdated Allen-type deadlocked jury instruction, advising jury that another trial would be a burden on both sides, was not clearly erroneous error requiring reversal of conviction for aggravated burglary and attempted aggravated robbery, where instruction was given before jury deliberations began.

[10] Criminal Law 110 1038.1(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(1) k. In general. Most Cited Cases

Criminal Law 110 1038.2

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.2 k. Failure to instruct in general. Most Cited Cases

An appellate court reviewing a district court's giving or failure to give a particular instruction applies a clearly erroneous standard where a party neither suggesting an instruction nor objected to its omission. West's K.S.A. 22–3414(3).

[11] Criminal Law 110 1023(11)

110 Criminal Law
110XXIV Review
110XXIV(C) Decisions Reviewable
110k1021 Decisions Reviewable
110k1023 Appealable Judgments and Orders
110k1023(11) k. Requisites and sufficiency of judgment or sentence. Most Cited Cases

Court of Appeals was precluded by statute from review of defendant's constitutional challenges to his sentence on direct appeal; defendant's sentence fell within sentencing grid box and was a presumptive sentence. West's K.S.A. 21–4704(f), 21–4721(c)(1).

[12] Criminal Law 110 1134.39

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.39 k. Jurisdiction and venue. Most Cited Cases

Whether jurisdiction exists is a question of law over which reviewing court's scope of review is unlimited.

[13] Criminal Law 110 1004

110 Criminal Law
110XXIV Review
110XXIV(A) Nature and Form of Remedy
110k1004 k. Nature and scope of remedy in general. Most Cited Cases

The right to appeal is entirely statutory and is not contained in the federal or state constitutions.

[14] Jury 230 34(6)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(6) k. In general. Most Cited Cases

Under controlling precedent, a sentence to any term, including an aggravated term, within the range in a Kansas sentencing guidelines presumptive grid box does not violate defendant's Sixth or Fourteenth Amendment rights. U.S.C.A. Const.Amends. 6, 14.

[15] Criminal Law 110 ⚿1042.3(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.3 Sentencing and Punishment
110k1042.3(1) k. In general. Most Cited Cases

Appellate court had authority to hear defendant's argument that district court erred by sentencing him to a higher sentence based on his criminal history score, even though defendant failed to object to his criminal history score; appellate court could still review claim that sentencing court erroneously included recognition of a prior conviction.

****588 *592** *Syllabus by the Court*

1. Under K.S.A. 22–3423(1)(c), a district court may order a mistrial at any time if prejudicial conduct, inside or outside the courtroom, makes it impossible to proceed without injustice to either party. Juror misconduct will not be a ground for mistrial, however, unless the party claiming error shows that such error substantially prejudiced his or her rights.

2. With regard to unauthorized juror communication, whether electronic or otherwise, it is the usual practice to question the juror involved in complaints alleging misconduct, but a trial court is within its discretion to deny a mistrial where the complaining party fails to request an interview of the juror or otherwise meet his or her burden of proving juror misconduct.

3. The best practice is for trial courts to prohibit access to mobile electronic communication devices by jurors during jury deliberation.

4. Under the third step in analyzing a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the district judge determines the ultimate question—whether the defendant has carried his or her burden of proving purposeful discrimination. The decision on this step hinges on credibility determinations and is reviewed for abuse of discretion.

5. To be valid under *Batson*, the prosecutor's explanation for a peremptory strike need not rise to the level justifying exercise of a challenge for cause. The purpose of a peremptory challenge is to strike prospective jurors not subject to challenge for cause but who are believed to be inclined against a party's interests.

6. Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.

7. Tone of voice is a matter which the trial court may take into consideration***593** in determining whether the prosecutor has a valid and neutral reason for striking the juror.

8. One factor to consider in determining whether the State's peremptory challenges are discriminatory is the presence of other members of the same minority on the jury and the failure of the State to remove such members when given the opportunity.

9. Instructing the jury that "another trial would be a burden on both sides" as contained in outdated PIK Crim.3d 68.12 (2004 Supp.) is error. Under the clearly erroneous standard of review, however, the error is not reversible when the instruction is given before jury deliberations began.

10. K.S.A. 21–4721(c)(1) precludes our jurisdiction to review a presumptive sentence. Kansas appellate courts have held that most constitutional challenges to a presumptive sentence may not be considered in a direct appeal.

11. An appellate court may review a claim that the sentencing court erroneously included recognition of a prior conviction notwithstanding the defendant's failure to object to his or her criminal history score.

Rachel L. Pickering, of Kansas Appellate Defender Office, for appellant.

Boyd K. Isherwood, assistant district attorney, Nola Tedesco Foulston, district attorney,****589** and Steve Six, attorney general, for appellee.

Before GREENE, C.J., BUSER and ATCHESON, JJ.

GREENE, C.J.

Leon Mitchell, III, appeals his convictions and sentences for aggravated burglary and attempted aggravated robbery, arguing that the district court abused its discretion in denying his motion for mistrial due to juror misconduct, erred in denying his *Batson* challenge, erred in giving the jury an *Allen*-type instruction, and violated his due process rights at sentencing by conducting independent online research. Mitchell also argues cumulative error. Mitchell finally argues that the district court violated his Sixth and Fourteenth Amendment rights by enhancing his sentences***594** without requiring either the aggravating factors or his criminal history score to be proven to a jury beyond a reasonable doubt.

FACTUAL AND PROCEDURAL BACKGROUND

After Mitchell came to Wanda Markham's home looking for her boyfriend, Andre Leon Williams, Mitchell returned the same day while Markham was on the phone with Williams. Markham testified that she heard the screen door open and looked around and saw Mitchell in the house. Markham screamed at Mitchell to get out of her house. Mitchell pulled a gun out of a white Wal–Mart sack, cocked it, and said he was going to "merk" Markham and her daughter, Loni. Loni started crying and screaming and attempted to leave the house through the back door when she saw the gun. Mitchell pointed the gun at Loni and told Markham to tell her daughter to "shut up and get back in here or I'm gonna merk her." Markham told Loni to go into Markham's mother's room, close the door, and lock it.

According to Markham, Mitchell then told her that he was there to get drugs that Williams had stolen from Mitchell's cousin, and he demanded money as well. Mitchell told her that he would kill her if she did not give him the drugs and the money. Mitchell became nervous and left the house after Williams' mother arrived and called 911.

Mitchell was charged with aggravated burglary and attempted aggravated robbery. He was found guilty as charged by a jury and sentenced to 136 months' imprisonment for the aggravated burglary and 34 months for the attempted aggravated robbery, with the sentences to run consecutively.

Mitchell appeals both his convictions and his sentences.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING MITCHELL'S MOTION FOR MISTRIAL DUE TO JUROR MISCONDUCT?

At the start of the second day of trial, outside of the presence of the jury, Mitchell's counsel asked for a mistrial based on juror misconduct because he was "led to ***595** believe" that juror number one was text messaging during the trial. The court noted that "led to believe is something different from any observation of" the juror actually text messaging and asked defense counsel if he had any direct evidence that the juror was texting. Defense counsel stated that he observed the juror slumped down in her seat below the rail in front of the jury box, but that he did not know what she was doing. He said he moved for a mistrial "grudgingly, because [he] favored this jury" and that he was "satisfied with the other jurors," who had "been attentive and participated fully in the case."

The prosecutor stated that she did not notice the juror texting, but that she did not look at the jury during trial. She added, "So I don't know if you want to bring her out here and ask her or what." The judge noted that his bailiff had advised him that juror number one was texting during jury selection, and that he had noticed the juror's hands were below the rail and that her focus was down towards her lap during the first day of the trial, although the judge could not see if the juror was text messaging.

The court denied the motion for mistrial but admonished all the jurors collectively to make sure their cell phones were turned off, not just set to vibrate. On appeal, Mitchell ****590** argues that the district court should have granted his motion for mistrial.

[1][2][3] Applicable standards of review have been stated by our Supreme Court. "Communication between jurors and third parties is broadly termed juror misconduct." *State v. Overton*, 279 Kan. 547, 557, 112 P.3d 244 (2005). Under K.S.A. 22–3423(1)(c), a district court may order a mistrial at any time if prejudicial conduct, inside or outside the courtroom, makes it impossible to proceed without injustice to either party. Juror misconduct will not be a ground for mistrial, however, unless the party claiming error shows that such error substantially prejudiced his or her rights. *State v. Wimbley*, 271 Kan. 843, 852, 26 P.3d 657 (2001). A motion for mistrial is reviewed under an abuse of discretion standard, and the party alleging the abuse bears the burden of

proving that his or her rights to a fair trial were prejudiced. *State v. McReynolds*, 288 Kan. 318, 329, 202 P.3d 658 (2009).

> "A high degree of appellate deference is allowed a trial judge's exercise of discretion in assessing the texture and feel of the trial, the credibility of witnesses, and the perceived impact of an allegedly prejudicial event. In these circumstances, ***596** appellate decisions often recognize a presumption of validity in the exercise of discretion because of the superior vantage point of the trial judge. The judge's decision will be affirmed even though the appellate tribunal might otherwise be inclined to take a precisely opposite view of the matter." *Saucedo v. Winger*, 252 Kan. 718, 731, 850 P.2d 908 (1993).

With regard to unauthorized juror communication, whether electronic or otherwise, our appellate courts have held that "[i]t is the usual practice to question the juror involved in complaints alleging misconduct," but the trial court was within its discretion to deny a mistrial where the complaining party failed to request an interview of the juror or otherwise meet his or her burden of proving juror misconduct. *State v. Macomber*, 244 Kan. 396, 407–08, 769 P.2d 621, *cert. denied* 493 U.S. 842, 110 S.Ct. 130, 107 L.Ed.2d 90 (1989), *overruled on other grounds by State v. Rinck*, 260 Kan. 634, 923 P.2d 67 (1996). Our Supreme Court has also held that even where the trial court denies such a request, prejudice will not be presumed where the complaining party failed to pursue his or her claim by utilizing the posttrial procedure to recall the juror or jurors and question them pursuant to K.S.A. 60–441. *State v. Fulton*, 269 Kan. 835, 844, 9 P.3d 18 (2000).

[4] Here, Mitchell failed to request any inquiry into the alleged misconduct and failed to utilize any posttrial procedure to investigate the matter. Although it may have been the better practice for the trial court to have made the inquiries, we are unable to conclude that no reasonable person would take the view adopted by the district court. See *State v. Moses*, 280 Kan. 939, 945, 127 P.3d 330 (2006). The trial court did not abuse its discretion in denying Mitchell's motion for a mistrial on the basis of juror misconduct.

We agree with the Indiana Supreme Court that the best practice is to prohibit such use of electronic devices by jurors.

> "We additionally observe that permitting jurors, other trial participants, and observers to retain or access mobile telephones or other electronic communication devices, while undoubtedly often helpful and convenient, is fraught with significant potential problems impacting the fair administration of justice. These include the disclosure of confidential proceedings or deliberations; a juror's receiving improper information or otherwise being influenced; and a witness's or juror's distraction or preoccupation with family, employment, school, or business concerns. These and other detrimental factors are magnified due to swift advances in technology***597** that may enable a cell phone user to engage in text messaging, social networking, web access, voice recording, and photo and video camera capabilities, among others. The best practice is for trial courts to discourage, restrict, prohibit, or prevent access to mobile electronic communication devices by all persons except officers of the court during all trial proceedings, *and particularly by jurors during jury deliberation.*" (Emphasis added.) *Henri v. Curto*, 908 N.E.2d 196, 202–03 (Ind.2009).

****591** We encourage our PIK committee to consider a revision to the general instruction on juror communication along the lines of that utilized in New York:

> " 'Jury Admonitions in Preliminary Instructions' to include specific instructions to jurors not to use 'internet maps or Google Earth' as well as not to actually visit any place mentioned during the trial, not to use 'the internet' to do any research about the case, and not to use 'text messages, email, internet chat rooms, blogs or social websites, such as **Facebook**, MySpace, or Twitter' as well as face-to-face conversations to discuss the case." *People v. Jamison*, No. 8042/06, 2009 WL 2568740 (N.Y.Sup.Ct., Misc.3d 2009) (unpublished opinion).

DID THE DISTRICT COURT ERR IN DENYING MITCHELL'S *BATSON* CHALLENGE?

Mitchell argues that the district court erred in denying his challenge to the State's peremptory strike of an African–American juror under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

At Mitchell's trial, three African–Americans were present for jury selection. X.H., an African–American potential juror was excused by agreement because of her age. F.A., an African–American, was selected to be on the jury. During jury selection, the prosecutor, C.J. Rieg, asked if any of the potential jurors knew anyone that was or had been in prison. After the third African–American, R.A., answered that she had a cousin in jail, Rieg asked her if this would affect her ability to be fair and impartial, and R.A. replied, "Not sure." R.A. stated that Mitchell was a black man and that she thinks the system is sometimes unfair. The following exchange then occurred:

"MS. RIEG: Okay. Do you think you can be fair and impartial to the State and to the defendant in this particular case?

***598** "[R.A.]: I think I'm a trustworthy and honest person, so I would have to say yes. I think I may dissect the evidence a lot more than maybe just an average person.

"MS. RIEG: To convince yourself more that of guilt—

"[R.A.]: Guilty or not guilty, correct.

"MS. RIEG: The bottom line is will you hold the State to a higher standard?

"[R.A.]: When you say higher standard, higher than what?

"[R.A.]: [The transcript indicates R.A. was speaking, but it appears that it was the prosecutor]: Beyond a reasonable doubt.

"[R.A.]: Yes.

"MS. RIEG: Thank you for your honesty, I appreciate it."

The State challenged R.A. for cause, stating, "[B]because she will hold me to a higher standard than beyond a reasonable doubt." The State noted that it did not object to R.A.'s statement that she would scrutinize the evidence. The district court gave Mitchell's counsel, Randall Price, the chance to rehabilitate R.A. The following conversation occurred:

"MR. PRICE: ... [R.A.], I'm not clear about your answer. You indicated that, in response to a question from Ms. Rieg, that if you were asked to decide this case and were asked to find that the State was required to prove guilt beyond a reasonable doubt, you would hold the State to a higher standard?

"[R.A.]: I don't think I said that.

"MR. PRICE: Okay, I didn't think you did, either, but I just want to make sure that we were clear about your answer real quickly. Have you formed an opinion about whether or not Mr. Mitchell is guilty or not guilty?

"[R.A.]: No, I have not.

"MR. PRICE: Will you agree that you should follow the judge's instructions as given?

"[R.A.]: Of course.

"MR. PRICE: And do you feel that you can act impartially and without prejudice?

"[R.A.]: Yes."

The district court then had the following conversation with R.A.:

"THE COURT: ... The question, [R.A.] is whether or not you would hold the State to the standard they're required to ****592** prove, that is proof beyond a reasonable doubt and not any higher standard?

"[R.A.]: Correct

"THE COURT: You could do that?

"[R.A.]: Yes.

***599** "THE COURT: Okay, Well I will not honor the for cause challenge on that—on [R.A.]"

Thereafter, the parties exercised their peremptory challenges, and Rieg used a challenge on R.A. Price indicated that he wished to make a *Batson* challenge.

The jury was excused, and the court asked to hear from counsel on the *Batson* issue. The following exchange occurred:

"MS. RIEG: Judge, I requested of Ms. Miles to pull just the questioning by me of [R.A.], because when she was talking to Mr. Price that just was not my recollection of what she said. And this transcript—this is what I recall her saying, that she—I think I may dissect the evidence a lot more than maybe just an average person. And the dissection of evidence doesn't give me concern; however, I'm a little concerned that she thinks she's—I don't know, different than an average person.

"But what really concerns me is that I asked her, the bottom line is will you hold the State to a higher standard. And she responded, when you say higher standard, higher than what? Beyond a reasonable doubt. Yes. Okay. Thank you. So and the way it—with her tone and everything, I took it to be that she would hold me to a higher standard than beyond a reasonable doubt is the way the colloquy, the flow of it went, that—

"THE COURT: Well, this transcript, of course, does speak for itself. Following this exchange with [R.A.] there were some additional questions asked by Mr. Price and by the Court and I don't have the transcript of that, but I do recall that she was asked if she understood what the beyond a reasonable doubt standard was. I told the jury as a whole that there was no legal definition that I could give them. And she did indicate that she would follow the beyond a reasonable doubt standard.

"MS. RIEG: Correct.

"THE COURT: So how do you—what additional argument do you have in conjunction or in relation to the rehabilitation that was done in the manner that I've just described?

"MS. RIEG: Well, she said she could follow the law, but when we were—when we were talking, just this, in conjunction with her saying that she would hold me to the higher standard and she'd do a lot more than the average person, that just gives me concern."

[5] Our Supreme Court recently outlined the three distinct steps of analysis and the standard of review to be applied to each step of a *Batson* challenge:

"In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), the United States Supreme Court held that the Equal Protection Clause of the ***600** Fourteenth Amendment prohibits the use of peremptory challenges to strike potential jurors on the basis of race. Analysis of a *Batson* challenge, such as that pursued by [the defendant] here, involves three distinct steps, with different standards of review applied to each step. See *State v. Angelo*, 287 Kan. 262, 272, 197 P.3d 337 (2008) (discussing *State v. Pham*, 281 Kan. 1227, 1237, 136 P.3d 919 [2006]).

"The first step in the *Batson* analysis requires that a defendant make a prima facie showing that the prosecutor has exercised a peremptory challenge on the basis of race. Appellate review of the district judge's decision on this step is plenary. *Angelo*, 287 Kan. at 271 [197 P.3d 337].

"Second, once a defendant makes a prima facie showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the prospective juror. The prosecutor's burden is one of production, not persuasion. Thus the explanation does not have to be persuasive, or even plausible; it need only be facially valid. Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. *Angelo*, 287 Kan. at 271 [197 P.3d 337]. '[T]he ultimate burden of persuasion rests with, and never shifts from, the opponent****593** of the strike.' *Angelo*, 287 Kan. at 272 [197 P.3d 337].

"Third, the district judge determines the ultimate question—whether the defendant has carried his or her burden of proving purposeful discrimination. 287 Kan. at 272 [197 P.3d 337] (quoting *Pham*, 281 Kan. at 1237 [136 P.3d 919]). The decision on this step hinges on credibility determinations and is reviewed for abuse of discretion. See *Pham*, 281 Kan. at 1237 [136 P.3d 919], (quoting *Hernandez v. New York*, 500 U.S. 352, 364–65, 111 S.Ct. 1859, 114 L.Ed.2d 395 [1991]) (Decisive question in typical peremptory challenge inquiry whether counsel's race-neutral explanation should be believed; seldom much evidence bearing on issue; best evidence often

demeanor of attorney exercising challenge; evaluation of such demeanor 'peculiarly within a trial judge's province'); compare *Thaler v. Haynes*, ___ U.S. ___, 130 S.Ct. 1171, 175 L.Ed.2d 1003 (2010) (when demeanor of venire member placed in issue by *Batson* challenge, ruling judge need not have observed or remember venire member's demeanor)." *State v. Hill*, 290 Kan. 339, 358–59, 228 P.3d 1027 (2010).

[6] Mitchell's challenge on appeal focuses on the third step of the analysis, the credibility of the State's proffered explanation for striking R.A. First, Mitchell argues that the State struck R.A. because of a fear that she would hold the State to a higher standard and this was purposeful discrimination because "defense counsel, with the court's assistance had clearly rehabilitated R.A." We recognize that there was some rehabilitation of R.A. on this issue and that the court ultimately denied a challenge for cause on this issue. Neither this rehabilitation nor the denial of a for cause challenge, however, is definitive on a *Batson* challenge. Our Supreme Court ***601** has been clear in holding that a survival of a challenge for cause does not make the juror immune to peremptory strike:

"It does not follow, however, that [the prospective juror's] survival of a challenge for cause made her immune to peremptory strike. The rejection of the State's challenge for cause does not mean that it could not employ similar reasoning as a basis for a legitimate peremptory challenge. To be valid under *Batson*, the prosecutor's 'explanation need not rise to the level justifying exercise of a challenge for cause.' *Batson*, 476 U.S. at 97 [106 S.Ct. 1712]. Moreover, the purpose of a peremptory challenge is to strike prospective jurors not subject to challenge for cause but who are believed to be 'inclined against' a party's interests. *Morrison v. State*, 818 So.2d 432, 443–44 (Fla.2002) (quoting *Holland v. Illinois*, 493 U.S. 474, 480, 107 L.Ed.2d 905, 110 S.Ct. 803 [1990]) (not improper for State to ' "exercise its peremptory challenges to strike prospective jurors who are opposed to the death penalty, but not subject to challenge for cause" ')." *Hill*, 290 Kan. at 359–60, 228 P.3d 1027.

Second, Mitchell argues that the alternative reason stated as a basis for peremptory strike was that R.A. said "she'd do a lot more than the average person" in reviewing the evidence. Although the prosecutor told the court during voir dire that she "was not objecting to the scrutinizing the evidence," R.A.'s statement was made in the context of her other statement about holding the State to a higher burden, so we understand it as heightening the concern about R.A.'s willingness to accept and follow instructions on burden of proof.

Examining both of the stated reasons for the peremptory challenge, we conclude that there is no discriminatory intent in either of these explanations. Accordingly, we must deem the reasons to be race-neutral. See *Hill*, 290 Kan. at 358, 228 P.3d 1027.

[7] Two additional factors suggest no abuse of discretion. As noted by the State, the prosecution also noted R.A.'s tone. Our Supreme Court has recognized that although the trial court must be cautious in using body language, including tone of voice as the sole reason for striking a juror, tone of voice " 'is a matter which the trial court may take into consideration in determining whether the prosecutor has a valid and neutral reason for striking the juror.' " *Pham*, 281 Kan. at 1238–39, 136 P.3d 919 (quoting *State v. Hood*, 245 Kan. 367, 374, 780 P.2d 160 [1989]).

****594** [8] ***602** Finally, our Supreme Court has noted that "[o]ne factor to consider in determining whether the State's peremptory challenges are discriminatory is the presence of other members of the same minority on the jury and the failure of the State to remove such members when given the opportunity." *State v. Trotter*, 280 Kan. 800, 812, 127 P.3d 972 (2006). Here, three African–Americans were present for jury selection. X.H., a potential African–American juror was excused because of her age. F.A., an African–American, was selected to be on the jury. The district court noted in its decision that its analysis would have been different if the prosecutor had struck both F.A. and R.A. and further noted that X.H. was excused with the concurrence of the parties.

Mitchell fails to show that the district court abused its discretion in determining that the State's strike of R.A. was constitutionally permissible.

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR IN GIVING AN ALLEN INSTRUCTION IN THE GENERAL PREDELIBERATION INSTRUCTIONS?

[9] Mitchell challenges the language found in

Jury Instruction No. 2, an *Allen*-type instruction. See *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). The instruction stated, in pertinent part:

> "Like all cases, this is an important case. If you fail to reach a decision on some or all of the charges, that charge or charges are left undecided for the time being. It is then up to the state to decide whether to resubmit the undecided charge(s) to a different jury at a later time. *Another trial would be a burden on both sides.*" (Emphasis added.)

The challenged language came from the outdated 2004 version of PIK Crim.3d 68.12, commonly known as the "deadlocked jury" instruction. See PIK Crim.3d 68.12 (2009 Supp.) (revised).

[10] Counsel for Mitchell did not object to the issuance of the instruction. "An appellate court reviewing a district court's giving or failure to give a particular instruction applies a clearly erroneous standard where a party neither suggesting an instruction nor objected to its omission." *State v. Martinez*, 288 Kan. 443, 451, 204 P.3d 601 (2009); see K.S.A. 22–3414(3).

***603** In *State v. Salts*, 288 Kan. 263, Syl. ¶ 2, 200 P.3d 464 (2009), our Supreme Court held that "[i]nclusion of the language '[a]nother trial would be a burden on both sides' in PIK Crim.3d 68.12 is error." The court found, however, that under the clearly erroneous standard of review, the error was not reversible. 288 Kan. at 267, 200 P.3d 464. The court also noted, when discussing other portions of PIK Crim.3d 68.12, "our criticisms of other language found in PIK Crim.3d 68.12 have never led to reversal of a conviction when the instruction was given before jury deliberations began." 288 Kan. at 266, 200 P.3d 464. In this case, the instruction was given before jury deliberations began.

Mitchell provides no argument for why his case is distinguishable from the result in *Salts*. Because there was not a real possibility that the jury would have rendered a different verdict had the error not occurred, the district court's inclusion of the *Allen*-type jury instruction in the original instruction set was not clearly erroneous.

DID CUMULATIVE ERROR SUBSTANTIALLY PREJUDICE MITCHELL AND DENY HIM A FAIR TRIAL?

Mitchell argues that even if he has not raised one issue that requires reversal alone, the cumulative effect of the trial court's error requires reversal.

> "Cumulative error, considered collectively, may be so great as to require reversal of a defendant's conviction. The test is whether the totality of the circumstances substantially prejudiced the defendant and denied him or her a fair trial. No prejudicial error may be found under the cumulative error doctrine if the evidence against the defendant is overwhelming. [Citation omitted.]" *State v. Dixon*, 289 Kan. 46, 71, 209 P.3d 675 (2009).

As discussed above, the district court committed a nonreversible error involving inclusion of an outdated *Allen*-type jury instruction,****595** which was not clearly erroneous. Our Supreme Court has noted, however, that "[o]ne error is insufficient to support reversal under the cumulative effect rule. [Citation omitted.]" *State v. Cofield*, 288 Kan. 367, 378, 203 P.3d 1261 (2009); see also *State v. Ellmaker*, 289 Kan. 1132, 1156–57, 221 P.3d 1105 (2009), *cert. denied* — U.S. —, 130 S.Ct. 3410, 177 L.Ed.2d 326 (2010) (refusing to apply cumulative error doctrine when a deadlocked jury instruction was the only trial error).

***604** We have rejected other claims of error, so we must conclude there is no basis to reverse Mitchell's convictions under the cumulative effect rule.

DOES THIS COURT HAVE JURISDICTION TO CONSIDER MITCHELL'S CONSTITUTIONAL CHALLENGES TO HIS SENTENCES?

The district court found Mitchell's criminal history category was A. Mitchell's aggravated burglary was a severity level 5 nondrug person felony, which subjected him to prison with a low sentence of 122 months, a standard sentence of 130 months, or a high sentence of 136 months. The district court imposed the high sentence of 136 months. Mitchell's attempted aggravated robbery was a severity level 5 nondrug person felony, which subjected him to a low sentence of 31 months, a standard sentence of 32 months, or a high sentence of 34 months. The district court imposed the high sentence of 34 months, to run consecutive to his aggravated robbery conviction.

Mitchell raises two constitutional challenges to his presumptive sentence.

A. Due process challenge to the Judge's use of information contained within the Kansas Department of Corrections' website

[11] For the first time on appeal, Mitchell argues that the sentencing court violated his due process rights by basing his sentence, in part, on information contained within the Kansas Department of Corrections' (KDOC) website.

The State argues two grounds on which defendant's constitutional challenge to his sentence is not properly before this court. First, the State argues that the Court of Appeals has stated that constitutional challenges to a presumptive guidelines sentence are not cognizable on direct appeal, citing *State v. Lewis*, 27 Kan.App.2d 134, 140–42, 998 P.2d 1141, *rev. denied* 269 Kan. 938 (2000). Second, constitutional issues raised for the first time on appeal are not properly before the reviewing court, citing *State v. Shears*, 260 Kan. 823, Syl. ¶ 8, 925 P.2d 1136 (1996).

[12][13] Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Ellmaker*, 289 Kan. at 1147, 221 P.3d 1105. ***605** The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. Subject to certain exceptions, Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken in the manner prescribed by statutes. See 289 Kan. at 1148, 221 P.3d 1105. An appellate court has a duty to question jurisdiction on its own initiative. When the record discloses a lack of jurisdiction, it is the duty of the appellate court to dismiss the appeal. *State v. Gill*, 287 Kan. 289, 294, 196 P.3d 369 (2008).

Because Mitchell received a sentence within a grid box, it is a presumptive sentence under K.S.A. 21–4704(f) and K.S.A. 21–4721(c)(1) precludes our jurisdiction to review the presumptive sentence. Although Mitchell argues his sentence violated constitutional due process, Kansas appellate courts have held that most constitutional challenges to a presumptive sentence may not be considered in a direct appeal. *State v. Huerta*, 291 Kan. 831, Syl. ¶ 3, 247 P.3d 1043 (2011) (argument that presumptive sentence has a constitutionally based infirmity not reviewable on direct appeal); *State v. Clemons*, 273 Kan. 328, 343–44, 45 P.3d 384 (2002) (discussing cruel and unusual punishment argument); *State v. Bramlett*, 273 Kan. 67, Syl., 41 P.3d 796 (2002) (imposition of consecutive sentences does not violate *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [2000]; court without jurisdiction to review presumptive sentences); *Lewis*, 27 Kan.App.2d at 140–42, 998 P.2d 1141 (finding that there was no jurisdiction to ****596** review defendant's cruel and unusual punishment argument and framing the question as "whether the court could reach a constitutional challenge to a presumptive sentence"); *State v. Smotherman*, No. 93,685, 2005 WL 3289428, unpublished opinion filed December 2, 2005 (finding that the procedural bar does not recognize an exception when due process rights are violated). The issue Mitchell presents is plainly one beyond this court's jurisdiction on a direct appeal.

B. *Sixth and Fourteenth Amendment challenge to high number in applicable sentencing grid box*

Secondly, Mitchell argues that because the aggravating factors were not charged in the complaint, put before a jury, and proven ***606** beyond a reasonable doubt to a jury, the aggravated sentence imposed by the district court was a violation of his Sixth and Fourteenth Amendment rights, relying on *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).

[14] This issue was directly addressed by our Supreme Court in *Johnson*, 286 Kan. 824, Syl. ¶¶ 5–6, 190 P.3d 207, where the court found that because the Kansas Sentencing Guidelines Act provides the trial court with discretion to impose any sentence within the presumptive range, the prescribed statutory maximum sentence under *Cunningham* is the higher number in the applicable sentencing grid box. Therefore, a sentence to any term, including an aggravated term, within the range in a Kansas sentencing guidelines presumptive grid box does not violate *Cunningham* or *Apprendi*. *Johnson*, 286 Kan. at 851, 190 P.3d 207. Moreover, because a sentence that falls within a grid box is a presumptive sentence, appellate courts lack jurisdiction to consider a challenge to such sentence under K.S.A. 21–4721(c). Appellate courts lack jurisdiction even if the sentence is to the longest terms in the presumptive grid box for a defendant's convictions. 286 Kan. at 851–52, 190 P.3d 207; see *State v. Schad*, 41 Kan.App.2d 805, 831, 206 P.3d 22 (2009).

Mitchell acknowledges that this issue was decided in *Johnson* but includes the issue to exhaust his state court remedies. Because the Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position, *Johnson* controls this issue and we must affirm the district court's decision regarding the aggravated sentence imposition.

DID THE DISTRICT COURT VIOLATE MITCHELL'S CONSTITUTIONAL RIGHTS UNDER *APPRENDI?*

[15] As a preliminary matter, the State argues that this court lacks jurisdiction to review Mitchell's arguments regarding the use of his criminal history score to enhance his sentence. Our Supreme Court, however, has found that even when the defendant did not object to his or her criminal history score in the trial court, " 'an appellate court may review a claim that the sentencing court erroneously included recognition of a prior conviction notwithstanding***607** the defendant's failure to object to his or her criminal history score.' " *State v. Fischer*, 288 Kan. 470, 471, 203 P.3d 1269 (2009) (quoting *State v. Pennington*, 276 Kan. 841, 851, 80 P.3d 44 [2003]). Therefore, this court has authority to hear Mitchell's argument that the district court erred by sentencing him to a higher sentence based on his criminal history score.

Proceeding to the merits, our Supreme Court has rejected Mitchell's argument, finding that " *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does not apply where the sentence imposed was based in part upon a defendant's criminal history score under K.S.A.2001 Supp. 21–4704 of the Kansas Sentencing Guidelines Act." *State v. Ivory*, 273 Kan. 44, Syl. ¶ 1, 41 P.3d 781 (2002). In *Ivory*, the defendant argued "(1) the sentencing court increased his sentence by using prior convictions, (2) the convictions were neither included in his complaint nor presented to a jury and proven beyond a reasonable doubt, and (3) prior criminal history should not be included in calculating his sentence." 273 Kan. at 45, 41 P.3d 781.

Reviewing Mitchell's argument de novo, because the Court of Appeals is duty bound to follow Kansas Supreme Court precedent, ****597** absent some indication the court is departing from its previous position, *Ivory* controls this issue, and we must affirm the district court's decision. The Supreme Court reaffirmed *Ivory* in 2009 and, therefore, this court is duty bound to follow *Ivory*. See *State v. Brinklow*, 288 Kan. 39, 54–55, 200 P.3d 1225 (2009). Mitchell acknowledges that *Ivory* controls but includes the issue to exhaust his state court remedies.

Affirmed.

Kan.App.,2011.
State v. Mitchell
45 Kan.App.2d 592, 252 P.3d 586

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Social Media and Juries: A Bad Mix?

Lawyers.com℠

Social media websites are virtual meeting places where anyone can share information, pictures, and even v about themselves and others. Even if you've never visited one, you've surely heard about some. Twitter and Facebook are two popular ones, but there are others.

They're used by millions of people just about everywhere, from school to work to restaurants. Now they're c into someplace they probably shouldn't be.

In Court?!

Believe it or not, yes, social networking sites are being used by people while they're in court, during criminal -criminal (or "civil") trials. For example, in January 2010, there was a high-profile criminal case in Pennsylva former state representative, Mike Veon, and three of his aides were charged with public corruption.

The judge gave reporters covering the case permission to send out short reports about the case over Twitte they weren't the only ones Tweeting. Stephen Keefer, who headed Veon's information technology departme defendant in the corruption trial, was Tweeting from the courtroom.

What's the Big Deal?

At first blush, there isn't a big deal, really. There's nothing wrong with reporters giving some Tweets on the c about of what they've seen and heard in the courtroom. And so long as it doesn't disrupt the trial, what's wrc a defendant tweeting - even if the rest of his life at stake while he's tweeting.

The real problems crop up when **jurors** use Twitter and other social media sites or web tools during the tria now you're saying, "C'mon, that's not going on." Yes, it is. For instance:

- In Arkansas, a juror was Tweeting during jury deliberations (that's when the jury decides who wins the c was a civil case involving an investment company's mismanagement of investor's funds. The jury award investors $12.6 million. But it may not stand. Defense attorneys filed a motion for a mistrial asking that tl judgment be thrown out because the juror's Tweets showed that he was biased against the company an done outside research over the internet
- In Florida, a mistrial was declared in a criminal case after a defendant was convicted of drug-related crir Several jurors were running Google searches about the defendant, looking up definitions of legal terms, discovered evidence that they weren't supposed to know about (it had been excluded from the trial)
- Again in Pennsylvania, there was a motion for a mistrial in criminal case against Vincent Fumo, a formei senator. He claimed the trial was unfair because a juror was posting updates on the case Twitter and Fa The motion was denied, but he plans an appeal based on the juror's activities

All these cases happened in 2009. Early in 2010, and no doubt because of cases like these, a model jury instruction was drafted for use in federal courts. Essentially it tells jurors they're not allowed to do outside re over the web or communicate through "e-mail, Blackberry, iPhone, text messaging, or on Twitter," among o

Clear Danger

These examples and the jury instruction show the dangers of jurors using Twitter or other web tools. Jurors supposed to consider and weigh **only** the evidence they hear and see in court. Information from the outside make a trial unfair.

There's a good argument that **any** use of the web or electronic devices in court should be barred. For instar happens if a juror reads a reporter's Tweet containing her opinion about the case? What if a defendant's Fa page shows things that aren't favorable to his case?

Judges, as well as attorneys and their clients, should be aware of the dangers. Judges should consider givi instruction about the problem, and attorneys should ask the court to do so before trial. Also, attorneys shoul Keefer's lawyer did: Warn their clients not to Twitter during trial.

The hallmark of the US legal system is fairness. The use of social media and other tools jeopardizes that fa and it shouldn't be allowed or tolerated.

Questions For Your Attorney

- Can a juror get into legal trouble for using Twitter or the web during a trial?
- Does a criminal defendant get set free if there's a mistrial because a juror used social media websites d trial?
- Legally can a judge ban everyone from bringing phones and digital devices into her courtroom during a

Related Resources on Lawyers.com[sm]

- Find a Communications and Media Law Lawyer in your area, and read about Selecting a Lawyer
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- Legal Dictionary
- Visit the Forums for discussions on Cyber Law topics

Accused Filing #084a

IN THE DISTRICT COURT OF BARTON COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 10 CR 231
ADAM LONGORIA, Defendant.	)	

(84a) SUPPLEMENT TO MOTION FOR THE COURT TO ADOPT A POLICY TO DEAL WITH JUROR USAGE OF ELECTRONIC DEVICES

COMES NOW the accused and submits this supplement to his *Motion For the Court to Adopt a Policy to Deal with Juror Usage of Electronic Devices* (Accused Filing #84).

In State v. Mitchell, 45 Kan. App.2d 592, 596-97, 252 P.3d 586, (2011) the Kansas Court of Appeals cited with approval the Supreme Court of Indiana on the issue of electronic communication and jurors.

> We additionally observe that permitting jurors, other trial participants, and observers to retain or access mobile telephones or other electronic communication devices, while undoubtedly often helpful and convenient, is fraught with significant potential problems impacting the fair administration of justice. These include the disclosure of confidential proceedings or deliberations; a juror's receiving improper information or otherwise being influenced and a witnesses's or juror's distraction or preoccupation with family, employment, school, or business concerns. These and other detrimental factors are magnified due to swift advances in technology that may enable cell phone users to engage in text messaging, social networking, web access, voice recording, and photo and video camera capabilities, among others. The best practice is for trial courts to discourage, restrict, prohibit, or prevent access to mobile electronic communication devices by all persons except officers of he court during all trial proceedings, *and particularly by jurors during jury deliberation.* (Emphasis added) Henri v. Curto, 908 N.E.2d 196, 202-03 (Ind. 2009).

The Kansas Court of Appeals went on to encourage the "PIK committee to consider a revision to the general instruction on juror communication along the lines of that utilized in New York:"

> 'Jury Admonitions in Preliminary Instructions' to include specific instructions to jurors not to us "internet maps or Google Earth" as well as to not actually visit any place mentioned during the trial, not to use "the internet" to do any research about the case, and not to use "text messages, email, internet chat rooms, blogs or social websites, such as Facebook, MySpace, or Twitter" as well as face-to-face conversations to discuss the case. People v. Jaminson, No. 8042/06, 2009 WL 2568740 (N.Y. Sup. Ct., Misc.3d 2009) (unpublished opinion).[1]

WHEREFORE, the Defendant moves the motion be granted and for such other and further relief as the Court deems just and equitable.

Respectfully Submitted;

Tim Frieden, #12022
Jeffrey D. Wicks, #17643
Death Penalty Defense Unit
155 N. Market, Suite 820
Wichita, Kansas 67212
316-264-2605

[1]Mitchell, 45 Kan.App.2d at 597.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2011 a true and correct copy of the foregoing pleading was sent via U.S. mail, properly addressed and postage prepaid to:

Andrew Bauch
Office of the Attorney General
Memorial Building
120 S.W. 10th Ave., Room 200
Topeka, Kansas 66612

Douglas A. Matthews
Barton County Attorney
1400 Main, Room 302
Great Bend, Kansas 67530

Judge Hannelore Kitts
Barton County Courthouse
1400 Main St.
Great Bend, Kansas 67530

Jeffrey D. Wicks

Friend or Foe? Social Media, the Jury and You

by
Leslie Ellis, Ph.D. from Trial Graphix
– September 26, 2011 **Posted in:** Internet/Social Media, Jury Experiences, Technology Download this article

Introduction

Jurors' improper use of social media, and the ensuing appeals, mistrials and reprimands, have been covered in dozens of press articles over the last several months. Just in the last year we have seen jurors write online about how they are going to get out of jury duty, their verdict preferences, and – in perhaps the most egregious uses of social media – poll Facebook friends about what the verdict should be, and "friend" a defendant during deliberations. There have also been reports of witnesses, attorneys and judges misusing social media.

It can be difficult and time consuming to keep up with all of the ways in which trial participants can publish or receive information about their jury service. Some have decided not to bother tracking the technological advances,

arguing it is irrelevant or too difficult to keep track. However, information flows both to and from online jurors. If properly used and monitored, social media can be a help and not only a hindrance. This article will discuss how to take advantage of jurors' online footprints, the ways in which social media is disrupting jury decision making and the trial process, and ways to minimize those disruptions.

Making Social Media Your Friend

Most of the publicity about social media and juries has been about jurors' inappropriately disclosing information about their case via various social media sites, such as Facebook or Twitter. However, experienced litigators have been using social media and other online resources to learn more about their jurors for years, and to great advantage.

Some people may remember stories of private investigators going to potential jurors' homes, interviewing their neighbors, and taking photos of yard signs and bumper stickers. Not only have many courts now prohibited parties from doing so, it isn't really necessary. You can see jurors' virtual bumper stickers via blogs, online comments, Facebook profiles and Twitter feeds.

According to the Pew Center's Global Attitudes Project, 46 percent of Americans use social networking websites.[i] Litigants can and should use social media to their advantage prior to and during the voir dire stage. If the parties can get the list of potential jurors prior to jury selection, parties have ample time to research them. If they don't get the list of names until the start of voir dire, searches can be done on the fly using laptops, iPads or smartphones in the courtroom. At its most basic, a Google search of jurors' names can find political donations, publications, organization affiliations, blogs, prior occupations and more. A more exhaustive search of public databases, usually for a fee, can identify litigation histories, liens, mortgages and car registrations. Finally, searches of networking and updating sites such as Facebook, LinkedIn and Twitter can be a source of information about people's opinions and experiences, if their profiles are public.

It is true that there is a technology age gap – younger jurors are likely to be online and using social media sites more often than older jurors. However, the gap is not as large as many people think. The Pew Center study found that roughly three-fourths of people ages 18-29 use social networking sites, compared to 55 percent of people ages 30-49. And in a recent comparison of internet use among generations, the Pew Center found that older generations are making quick strides to tighten the gap.[ii] Within the last two years alone, use of social networking sites has gone from 20 to 50 percent in Young Boomers (45 – 55 years of age) and from 9 to 43 percent in Older Boomers (55 to 64 years of age). The fastest growth in the use of social networking sites has been among those 74 and older, which quadrupled from 4 to 16 percent.

However, the information is only valuable if the parties know how to use it. You must be able to confirm that the people you have found online are the same people in the courtroom (and not just people with similar names) and have a well-planned voir dire strategy in place to be able to make quick use of

whatever information you may find. Otherwise, the jumble of information will be just that – a jumble – which is not helpful in the heightened pressures of trial and speed of voir dire. Decades of research tells us that, in most types of civil litigation, demographics are not predictive of verdict preferences, with the exception of cases in which a particular demographic is the basis of the litigation, such as harassment or discrimination cases. Rather, jurors' case-specific experiences and attitudes are most predictive of verdict preference. Therefore, counsel should determine in advance which experiences and attitudes will work for or against them. Then, when they find that a juror has donated to a certain politician or belongs to a certain special interest organization, they will quickly be able to use the information to their advantage in trial.

In addition to learning about jurors' backgrounds, corporate litigants should also search social media for references to the company. People blog, tweet and post about their experiences with companies, as well as post recommendations for employees and employers. These can be valuable sources of information on popular sentiment about your company. Just as your marketing, public relations or branding teams want to know what the public is saying about your company, you want to know what jury pools are saying about your company. Keep track of what is in the ether about your company and its practices. Then you will know what kinds of attitudes potential jurors may have about your company, and your trial counsel can be prepared to ask about them in voir dire.

Finally, litigants who use social media sites to gather information about jurors should be very careful not to cross ethical boundaries. While most people agree that it is acceptable to view content that the user has designated as public and/or unrestricted (e.g., blogs or unrestricted Facebook pages), the issue gets murkier when users have taken efforts to keep their identity anonymous or their content private. Recent ethics opinions in New York County[iii] and Pennsylvania[iv] state that it would be in violation of their Rules of Professional Conduct to directly, or through a third party, contact a juror (the subject of New York County's opinion) or witness (the subject of Pennsylvania's opinion) through a Facebook "friend" request. Resist the temptation to join restricted chat groups, "friend" people, or otherwise gain access to restricted information in order to find out more about your potential jurors – the risk is not worth the reward.

Inappropriate Disclosures via Social Media

It is a common misconception that only young people use wireless devices to go online or frequent social media and networking sites. As of September 2009 [v], 30 percent of adults aged 30 or over had gone online using a cell phone or other handheld device. By August 2010, the number of adults ages 50 and older who used social networking sites doubled, from 22 percent to 42 percent. [vi] The use of the updating site Twitter among older adults is not as high (6 percent of all internet users ages 50-64), but is still higher than many would expect.

The popularization of such sites, as well as the frequency with which many people access them in a day, have led to dozens of problems when jurors and

other litigation participants took to the "airwaves" to discuss their experiences. The two major concerns are when jurors go online either to disclose information about the trial or to search for information and introduce it into their deliberations.[vii]

A recent study by Reuters Legal found that Internet-related juror misconduct has led to 21 overturned verdicts or new trials since January 2009. [viii] However, judges found instances of misconduct in three-fourths of cases in which the verdicts were challenged but not declared mistrials. This is indicative of what you find when you look closely at what jurors are writing online about their jury experiences – a vast majority have nothing to do with their job as a fact-finder.

Jurors are given very specific instructions that they are not to talk about the case prior to their deliberations (with the exception of civil trial jurors in Arizona, Colorado and Indiana) and they are not to disclose anything about their deliberations until they are complete. However, they do not receive that instruction until they are sworn in, so potential jurors feel (and are) free to comment online about how much they are dreading jury duty, what they are doing in the jury room, etc. Even after being sworn in, most posts are fairly innocuous – jurors may say they are serving on a murder case or mention how bored they are during the long breaks, or even "friend" each other during the trial. These posts do not refer to the evidence or parties, and are usually determined to be harmless.

More troubling, some jurors take the instructions very literally – they do not equate updating their Facebook page or tweeting about the case with "discussing" the case. They are careful not to talk about the case at home with their families, but they do not think that posting about an attorney's ugly tie or how bored they were during a witness' testimony is prohibited. This is more likely to cause problems, because jurors may divulge evidence or their opinions without realizing it is prohibited. Moreover, even though the jurors' disclosures may be permissible, they are not the only cause for concern. Comments on their posts can influence what they are thinking. The information jurors are considering is no longer subject to the regular rules of evidence, which is a key issue for judges when they are deciding whether a jurors' disclosure is problematic.

Most problematic is when jurors understand the intent of the judge's instruction and simply ignore it. Publicized examples of this scenario include a juror who tweeted about giving away millions of dollars of someone else's money or how "fun" it would be to tell a defendant he is guilty before the jury reported their verdict to the Court. In a worst case example, a juror in a Queens County, NY rape trial emailed his friends, one of whom was a prosecutor, about his jury's deliberations. We cannot know why these jurors decided to defy the instructions so directly – it may be that they did not take their jobs seriously, could not resist the urge (one blogger reported getting out of jury duty because said there was no way she would be able to stop herself from blogging about the case during the trial), or did not understand the consequences of their actions.

And not all violations have been from jurors. A witness was caught sending text messages to counsel from the witness stand during a break, and a judge in North Carolina was reprimanded for "friending" an attorney who was trying a case before him and commenting to each other about the case. It appears that all types of trial participants have trouble understanding how the old rules apply to new types of communication.

As much as instances like these seem to be more and more common, we must ask ourselves, is this really a new phenomenon, or are we just able to catch them now? A study in 1986 found that 10 percent of former jurors admitted discussing the case before their deliberations, and that was those who would admit it.[ix] We do not know if these kinds of violations are more common than they used to be, or just more public.

Inappropriate Research via Social Media and Online Sources for Research

We *can* assume that jurors' use of online sources for their own research is more common, simply because the information is more accessible. Another Pew Center study found that 41 percent of Americans surveyed said the internet is their main source of news, which is up from 24 percent in 2007.[x] The Internet passed television as the main source of news for those younger than 30. More than one-third of adult internet uses had consulted Wikipedia, and Wikipedia use far surpasses any other educational and reference online source, including Dictionary.com and Merriam-Webster Online. Until recently, Google was accessed more often per day than any other Web site (Facebook surpassed it for the first time in January 2011). Clearly, the first place many people go for information is the Web. Why should jurors be any different?

Research on jury decision making has proven that the old concept of "Tabula Rasa" – that jurors are empty tablets to be filled with information – is inaccurate. Rather, jurors are very active users of information. They also try very hard to make the right decision, and they struggle when they think they are missing a critical piece of information.

Just as we have heard about dozens of incidents of jurors' disclosing information online, we have also heard about many incidents of jurors' bringing in information they acquired online. And as with the disclosures, we do not know if they are doing it more often than they used to, or we are just hearing about it more often. Jurors may have a more difficult time understanding why they cannot have the information they want in the age of instant access. Verdicts have been overturned when jurors looked up definitions of legal terms, searched defendants' criminal histories and looked up symptoms of "rape trauma syndrome," just to name a few examples.

What Are the Remedies?

It is easy to talk about all of the problems caused by jurors' use of social media and the Internet. But what are the solutions? Unfortunately, there is no silver bullet. Judges will always instruct jurors not to disclose or import information, and some jurors will always ignore them. But there are a few ways to reduce the frequency with which it happens. Judge Dennis M. Sweeney (Ret.) has

recently published a very thorough review of several remedies that judges can undertake (as well as a few that are unlikely to work).[xi] Attorneys can take a proactive approach by suggesting the remedies discussed here, when judges are less attuned to the problems or unsure how to best address them.

One remedy is to be proactive about it in voir dire. Trial counsel should ask potential jurors if they have an online footprint. Do they blog, do they have Facebook or MySpace pages, or do they have Twitter accounts? If so, how often do they post, tweet, update, etc.? This will give counsel an idea of how prevalent an issue it might be. Some medical and research professionals have discussed the existence of "internet addictions" or "online addictions," which can be generally defined as "online-related compulsive behavior which interferes with normal living. The validity of such a disorder is heavily debated, but some people do find it difficult to stay offline. Additionally, those who have become reliant on having constant access to information might also find it difficult to abide by the judge's orders not to do any investigations. Counsel should ask the necessary questions to find out if any potential jurors fall into those categories.

More importantly, counsel and/or the judge should ask jurors if they will be able to refrain from saying anything about the trial (in the broadest sense of the word) online. Make them promise not to do so, out loud. We are less likely to break promises we have made in public and on the record. Some have suggested asking jurors to sign forms promising they won't violate the rules [xiii], and research suggests that having jurors promise to do so at the start of trial (perhaps followed by reminders) will be more of a deterrent than having them say they haven't done so at the end.[xiv] Counsel can ask the judge to have jurors sign such a form. Finally, counsel should follow their sitting jurors (and witnesses, judges and opposing counsel, to be safe) online during and shortly after the trial to make sure they aren't posting anything they should not.

The second remedy is to improve the instructions on "discussing" the case and conducting independent investigations, referring specifically to the use of social media and information sites. Several states[xv], the Federal Judicial Conference[xvi], and the American College of Trial Lawyers[xvii] have drafted instructions on the topic, some of which are better than others. California has made great strides in writing their pattern instructions using common, everyday language so laypeople can more easily understand them, and their preliminary instructions on using technology to research or communicate about a case is no exception. The instruction is very explicit in what jurors are not to do.[xviii] However, they only expand the list of admonitions, without explaining why it is important to follow the rules, and what the consequences might be if they do not.

Many jurors may not understand the consequences of disclosing information or doing their own research. Most instructions simply tell jurors what not to do. But jurors, like small children, ask, "Why?" They want to know why something is or isn't important, or why someone did or didn't do something. And telling them why helps them follow the rules. The instructions proposed by the American College of Trial Lawyers explain why relying on

untested information is problematic (and, interestingly, asks jurors to sign an oath that they will not violate the instructions). Further, participants in a small survey estimated that jurors who were instructed on why they should not disclose or research case information would be less likely to do so than jurors who were not.[xix] Whether informing about the consequences of their actions would help is less clear, but California is considering adding a discussion of consequences to their instructions. A Massachusetts judge recently fined a juror $1200, the court costs to retry a case, after he told the other jurors about the defendant's criminal history, which he found online[xx], and a judge in England recently sentenced a juror to jail for eight months when a juror "friended" and communicated with a defendant via Facebook, during deliberations, leading to a mistrial in a case that has already cost the justice system over £6 million[xxi].

Finally, allowing jurors to ask questions of witnesses could alleviate a lot of problems with jurors' doing their own research about the case. More than 30 states permit jurors to pose questions to witnesses. Only 10 states prohibit the practice[xxii], but it is almost always at the judge's discretion – very few states mandate that jurors be allowed to pose questions[xxiii]. The Seventh Circuit recently conducted a study on the impact of several jury trial innovations, including juror questions.[xxiv] They found that the majority of questions were asked to clarify information, check on a fact or explanation, or get additional information they thought was important. The majority of judges and attorneys reported that jurors asked either the right amount or not enough questions, and that most or all of the questions were relevant.[xxv] Most importantly, a full 86 percent of jurors reported that being able to ask questions increased their understanding of the case. That improvement comes at little cost – two-thirds of attorneys and three-fourths of judges said the process either had no impact or *improved* the efficiency of the trial process.[xxvi] A study conducted in Pima County Superior Court in Arizona found that allowing jurors to ask questions increased the length of the trial by a mere 33 minutes.[xxvii]

Conclusion

Jurors, like the general population, are accessing social media and information on the Internet more and more frequently. We are just now beginning to understand the impact this can have on the trial process and identify ways in which it can be minimized. It is important to note there are literally thousands of trials a year. While instances of juror misconduct and mistrials receive a great deal of press, they are disproportionately reported. We don't hear about the thousands of trials in which nothing went wrong, so we should be careful not to overstate the problem. However, it is a real problem that can have real consequences for litigants. But, being aware, proactive, progressive and vigilant can help turn potential problems into opportunities.

***Leslie Ellis, Ph.D.** is a Senior Jury Consultant with TrialGraphix, and works out of its Washington. D.C. and Atlanta offices. She works primarily on complex civil and white-collar criminal matters, and has worked in venues across the country. She assists clients with mock trials and focus groups, witness preparation, jury selection, venue surveys, theme development,*

opening statements/closing arguments, and general litigation strategy. You can read more about Dr. Ellis at her company's webpage, http://www.trialgraphix.com.

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[i] http://pewglobal.org/2010/12/15/global-publics-embrace-social-networking/

[ii] Pew Internet & American Life Project, "Generations Online in 2010" Report, December 16, 2010

[iii] New York County Lawyers Association Committee on Professional Ethics Formal Opinion No. 743 (Issued on May 18, 2011)

[iv] Philadelphia Bar Association Professional Guidance Committee Opinion 2009-2 (March 2009)

[v] Pew Internet & American Life Project, "Social Media and Young Adults" Report, 2010

[vi] Pew Internet & American Life Project, "Older Adults and Social Media" Report, 2010

[vii] A third concern regarding the use of social media, and one that is growing, is that of trial participants or observers contacting jurors during the trial. Judge James Zagel, who presided over both prosecutions of former Illinois Gov. Rod Blagojevich, kept the jurors' identities in both trials secret until after the trial, arguing in part that it would keep people from trying to contact jurors. This is not an unreasonable fear – the friend of a defendant in Fort Valley, Georgia did try to contact at least one juror through Facebook, and a review of tapes of jailhouse telephone conversations revealed the defendant gave his family members and friends the names of multiple jurors and instructions to contact them during the trial, resulting in a mistrial and an investigation into jury tampering. See http://www.macon.com/2011/06/23/1606284/alleged-jury-tampering-halts-start.html.

[viii] http://www.reuters.com/article/idUSN0816547120101208

[ix] Loftus, Elizabeth F.: "Do Jurors Talk?" (*Trial*, vol. 22, 59-60, 1986)

[x] Pew Center, "Internet Gains on Television as Public's Main News Source." January 4, 2011

[xi] Sweeney, Hon. Dennis M.: Worlds Collide: The Digital Native Enters the Jury Box. (*Reynolds Courts & Media Law Journal*, vol. 1, 121-146, 2011).

[xii] Young, Kimberly S. Internet Addiction: The Emergence of a New Clinical Disorder. (*CyberPsychology and Behavior*, vol. 1, no. 3, 237 – 244).

[xiii] The American College of Trial Lawyers have a recommended form, at page 6 of their Jury Instructions Cautioning Against Use of the Internet and Social Networking, which can be found at

http://www.actl.com/AM/Template.cfm?
Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213

[xiv] Shu, Lisa L., et al. "When to Sign on the Dotted Line? Signing First Makes Ethics Salient and Decreases Dishonest Self-Reports." (*Harvard Business School Working Paper*, vol. 11-117, 2011).

[xv] Examples from Florida, Arizona, New York, and other states have been compiled by the National Center for State Courts and can be found at: http://www.ncsc.org/topics/media-relations/social-media-and-the-courts/state-links.aspx?cat=Jury%20Instructions%20on%20Social%20Media

[xvi] The Federal Judicial Conference's suggestions instruction can be found at: http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf

[xvii] The proposed instructions from the American College of Trial Lawyers can be found at: http://www.actl.com/AM/Template.cfm?
Section=Home&template=/CM/ContentDisplay.cfm&ContentID=5213

[xviii] Judicial Council of California, §100 Preliminary Admonitions. Last revised December 2009.

[xix] Diamond, Shari S. "Jurors and the Electronic World." Paper presented at the National Jury Symposium, October 2010

[xx] Timmins, Annmarie, "Juror Behind Mistrial Pleads, Pays $1,200." Concord Monitor, October 9, 2010

[xxi] http://www.bbc.co.uk/news/uk-13792080

[xxii] When permitted, jurors write down their questions for a certain witness and give them to the judge, who reviews them with counsel for objections. The permitted questions are then posed to the witness by the judge or counsel. The judge may choose to explain why the unasked questions were not permitted.

[xxiii] Mize, Hon. Greg E. (Ret.), et al., The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report. (The National Center for State Courts, April 2007)

[xxiv] Seventh Circuit Bar Association American Jury Project; the report can be found at: http://www.7thcircuitbar.org/associations/1507/files/7th%
20Circuit%20American%20Jury%20Project%20Final%20Report.pdf

[xxv] Ibid, p. 61

[xxvi] Ibid, p. 62

[xxvii] Diamond, Shari S., et al.: "Juror Question During Trial: A Window into Juror Thinking." (*Vanderbilt Law Review*, vol. 59, issue 6, 1927-1972, 2006)

(Image courtesy flickr user Adriano Gasparri)

Judge removes juror after 'guilty' Facebook post

by Chris Matyszczyk August 31, 2010 10:50 AM PDT

Facebook would like us to believe the world will be a better place if we just share a little more of ourselves.

The road to a better world, though, is paved with faux pas.

You see, a woman in suburban Detroit was very excited to share her views about a trial. The defendant, she believed, was guilty of resisting arrest. So she posted her view to her friends and, depending on her privacy settings, quite a few other people too.

The only slight snag with her enthusiasm was that 20-year-old Hadley Jons was actually sitting on the jury.

And, well, according to the Associated Press, the jury hadn't quite decided whether the defendant was guilty or not. This might have been because the prosecution hadn't, in fact, finished presenting its case.

Her Facebook post was slightly troubling in that she reportedly wrote: "Gonna be fun to tell the defendant they're guilty."

Well now, let she who is completely innocent cast the first stone and hope she is more accurate than the San Francisco Giants bullpen. The judge removed her from the jury and now Jons herself might be found guilty of something called contempt of court.

You might be wondering how her post came to the court's attention. No, the judge hadn't friended all of the jurors. Instead, the defense lawyer's son happened upon Jons' post, as he had decided to get to know the jury members a little better.

His mom, defense lawyer Saleema Sheikh, offered the AP these comforting words for Jons: "I would like to see her get some jail time, nothing major, a few hours or overnight."

Jons must now return to court Thursday so that the judge might weigh whether to find her Facebook actions contemptible.

Perhaps Jons will enter an apology (or even a plea) as a status update.

Judge Cracks Down on Google Mistrials

Posted on : 21-09-2011 | By : Julie Gottlieb | In : Buzz, Government

Tags: Colin Moynihan, Google Mistrials, John Scwartz, Shira Scheindlin

"Google Mistrials" refers to cases disrupted by jurors' independent internet investigations. Specifically searches for lawyers, victims, witnesses, defendants, news articles, blogs and evidence that had been specifically excluded by the judge can lead to a "Google Mistrial." While this is not necessarily a new phenomenon, over the past few years the immediacy and accessibility of smart phones has increased such occurrences and wreaked havoc on trials around the country.

Now a Manhattan federal judge, known for her series 2004 of opinions that established e-discovery rules, is doing something about it. According to Colin Moynihan's article, Judge Considers Pledge for Jurors on Internet Use, this month, during a hearing, U.S. District Judge Shira Scheindlin said, "I am keenly aware that there are convictions set aside all over the country when we learn later during deliberations a juror looked up the keyword or the key name." Attempting to avoid this in her court room, Judge Scheindlin plans to write a pledge that jurors might be required to sign. According to Moynihan's article jurors who sign the pledge will be subject to perjury charges if they conduct independent internet investigations during the trial.

Some question why a written pledge would be successful when oral instructions have failed. Instructing jurors not to use any source outside the court room to assist in deciding any question of fact is boilerplate. In his 2009 article, As Jurors Turn to Web, Mistrials Are Popping Up, John Schwartz wrote, "Judges have long amended their habitual warning about seeking outside information during trials to include Internet searches." Still, the number of Google Mistrials continues to grow. Apparently, Judge Scheindlin believes that jurors will be less likely to conduct independent online investigations if they affirmatively agree not to in writing. Time will tell if other judges follow suit.