▶ CRIMINAL LAW

What to Do When the Jury is Out—But the Legal Questions Keep Rolling In

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Introduction

You spent months preparing for trial; you selected a perfect jury; your opening statement went smoothly; the evidence came in just as you had hoped; you made a killer closing argument; and the jury is finally deliberating. What can possibly go wrong now? It's time to put your feet up and just wait for your favorable verdict, right? Wrong!

From the start of deliberations through the moment the jury is discharged, a host of legal questions can arise to stump even the most seasoned trial lawyer or judge—especially given what little collective brain power remains in the courtroom at the end of a difficult trial. But most any deliberations challenge can be met with a small amount of pretrial preparation and a generous amount of late-trial patience. This article will provide a starting point for trial lawyers and judges who wish to brush up on their understanding of certain legal issues that might arise during deliberations in criminal cases.

One deliberations issue this article will *not* address is what constitutes juror misconduct. We've all read the articles: Twenty-first-century jurors are out of control, routinely violating their oaths while feeding their addictions to cellphones, Twitter, and Facebook.[1] And misconduct outside of cyberspace recently reached Grisham-esque proportions when a juror tried to elicit a bribe from a defense lawyer in exchange for a not-guilty verdict.[2]

But the authors of this article chose to trust that the vast majority of jurors do their level best to follow their oaths—the very assumption upon which our jury system is based. This article will thus address a few more routine and predictable deliberations issues: juror dismissals, hung juries, and verdict acceptance.

Juror dismissals upon "reasonable cause"

A trial judge may dismiss an individual juror during deliberations for a number of reasons, including sudden illness, a death in the family, a late-blooming conflict of interest, or misconduct. While no Kansas statute explicitly authorizes such dismissals, the Legislature has assumed their propriety by providing for the empanelment of alternate jurors who may step in "if any regular juror shall be discharged from jury service…prior to the jury reaching its verdict."[3]

The Kansas Supreme Court has held that this language "provides the trial judge with authority to remove a juror. However, to ensure that the judge acted appropriately in removing a juror, our case law requires the judge to have reasonable cause."[4] The "better practice" is for dismissals to be "on the record and in the presence of the defendant."[5] Finally, "[a]fter replacing a juror with an alternate juror during deliberations, the trial court should instruct the jury to begin deliberations anew."[6]

Juror dismissals are not usually controversial so long as there are alternates available to satisfy the defendant's right

to a 12-vote jury verdict in a felony trial.[7] But even with the availability of alternates, a dismissal without reasonable cause is an abuse of discretion, and reversible error.[8]

If there are no alternates available, the defendant may (1) opt for a mistrial or (2) elect to proceed to a verdict with only 11 jurors. Kansas law allows that "[a] jury in a felony case shall consist of twelve members. However the parties may agree in writing, at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than twelve."[9] The waiver will only be valid if the court first informs the defendant of the right to a 12-member jury and the right to opt for a mistrial in the absence of a full jury.[10]

A mistrial or an 11-vote verdict are not the defendant's only options. The defendant may also (3) object that there is no reasonable cause to dismiss the juror in the first place and, consequently, no basis for either a mistrial or an 11-vote verdict. If a judge improvidently dismisses one or more jurors on less-than-reasonable cause, any contested mistrial following that dismissal will be invalid, and any retrial following that mistrial will violate the defendant's rights against double jeopardy.

While it does not appear that the Kansas courts have addressed this issue, other jurisdictions have accepted this proposition. For instance, the Massachusetts Supreme Court has held that when a judge's dismissal of jurors depletes the jury, a mistrial is required absent the defendant's consent to proceed; "[y]et, if it were error for the judge to discharge these jurors in the first place, then the rationale for the mistrial would be invalidated."[11] And a New York appellate court has barred a retrial on double-jeopardy grounds after the trial court prematurely declared a mistrial because of a juror's illness rather than continuing the case over the weekend to see if the juror's health would improve.[12]

The jury that threatens to hang: Will they or won't they?

When a jury reports that it is unable to reach a verdict, the judge is faced with a difficult choice: Conclude that the jury is indeed deadlocked and declare a mistrial or very delicately—i.e., uncoercively—urge the jurors to continue deliberating. Either choice is risky. As with mistrials following improvident juror dismissals, any contested mistrial following an improvident deadlock finding will be invalid, and any retrial following that mistrial will violate the defendant's rights against double jeopardy.

This point was illustrated in the Tenth Circuit case *United States v. Horn*.[13] The *Horn* jury declared itself hung at the end of its first day of deliberations. The judge instructed the jurors to go home and continue deliberating the next day. After an hour passed the next morning, the judge sua sponte—and without inquiry of the jury—declared a mistrial.

The Tenth Circuit held that the judge should have "called the jurors back into court and made an inquiry as to their progress, and…asked whether they were close to a verdict, or, if deadlocked, whether all members of the jury agreed that this was the situation."[14] Only then could the judge have determined that "manifest necessity" justified the declaration of a mistrial.[15] Absent any evidence of the jury's condition at the time the judge declared the mistrial, there was no manifest necessity for the mistrial, and double jeopardy barred a retrial.[16]

Urging the jurors to continue deliberations by lecturing them about the importance of reaching a verdict is equally risky. The Kansas appellate courts have repeatedly discouraged judges from "exert[ing] undue pressure on the jury to reach a verdict" with "dynamite," "shotgun," or "*Allen*-type" instructions.[17] Such instructions violate the defendant's Sixth Amendment and due-process rights to a unanimous jury verdict insofar as they encourage verdicts not based on proof beyond a reasonable doubt, but merely to avoid a mistrial.[18]

The Pattern Instructions for Kansas criminal cases include an *Allen*-type instruction at PIK Crim. 3d 68.12. But, following Kansas caselaw, the PIK Committee recommends that the instruction be given—"if given at all"—with the court's other instructions before deliberations begin.[19] This approach de-emphasizes the instruction and renders it less coercive.[20] Even then, judges cannot be sure of the propriety of the current PIK instruction, as the Kansas Supreme Court's view of its wording is constantly evolving.[21] And even when a judge gives the PIK instruction *before* deliberations, it is not clear whether the judge may refer the jury back to that instruction *during* deliberations without rendering the instruction just as coercive as if it were given during deliberations for the first time.

This raises the question what, exactly, may a judge say to a jury that has declared itself at an impasse? The Tenth Circuit has suggested no more and no less than the following: (1) "that no juror should relinquish his or her conscientiously held convictions simply to secure a verdict"; (2) "that every individual juror should reconsider his or her views, whether in the majority or in the minority"; and (3) "a reminder to the jury of the burden of proof, once again to avoid the possibility of coercion."[22] The bottom line is that "exhorting a deadlocked jury to further deliberation… must be undertaken with great care."[23]

Finally, one measure the judge should not take in hopes of inducing a verdict is reopening the case for mid-deliberations evidence or arguments. No Kansas statute authorizes such a measure. The statute setting forth the "order of trial" in a criminal case includes no provision for admitting evidence or allowing argument after the case has been submitted to the jury.[24] The statute providing for judicial acquittals "at the close of all the evidence" allows the judge to "reserve decision on the motion" and "submit the case to the jury," but includes no provision for admitting evidence or allowing argument after that point.[25]

Finally, the statute controlling jury deliberations allows only that "[a]fter the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in

the case, they may request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them."[26] None of these statutes contemplates the introduction of new evidence or arguments after deliberations have begun.

The mid-deliberations introduction of new evidence is particularly problematic. Interrupting the jury's deliberations to allow the submission of additional evidence inevitably would distort the evidence as a whole and unduly emphasize the late-admitted evidence.[27] It would also create a need for rebuttal evidence and additional arguments to address the new evidence, essentially creating a mid-deliberations mini-trial.

The Kansas Supreme Court has suggested that reopening a case mid-deliberations for more evidence is beyond a Kansas trial judge's discretion, holding that it is "within the discretion of the trial court to reopen the case at any time *before its final submission*."[28] And various panels of the Kansas Court of Appeals have repeatedly warned against reopening a case mid-deliberations for more argument.[29]

Accepting the verdict, but only after "hearkening" and an opportunity for polling

Kansas law obligates trial judges to take certain steps before accepting a verdict and discharging the jury:

> The verdict shall be written, signed by the presiding juror and read by the clerk to the jury, and the inquiry made whether it is the jury's verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If the verdict is defective in form only, it may be corrected by the court, with the assent of the jury, before it is discharged.[30]

This statute includes two provisions for making the verdict a public verdict and ensuring its accuracy, unanimity, and finality: (1) The judge must "inquir[e]…whether it is the jury's verdict"; and (2) the judge must, if "require[d]" by either party, poll the jury.[31] The judge fulfills the first requirement—"hearkening" the jury—by asking the jury collectively: "Is this your verdict?"[32] The judge fulfills the second requirement (if invoked by either party) by asking each juror individually: "Is this your verdict, Juror Smith?"; "Is this your verdict, Juror Jones?"; and so on.[33]

Hearkening is mandatory in every case. In *State v. Johnson*, the Kansas Court of Appeals reversed a conviction simply because a judge overlooked this statutory requirement.[34] The *Johnson* court observed that this requirement codifies "the common-law rule that a verdict is of no force or validity until it is affirmed by the jury in open court"; indeed, "until the inquiry is made and the trial court is satisfied that the verdict is truly unanimous, the verdict is not complete."[35]

While the court reversed Johnson's conviction only after considering the possibility that the verdict was not, in fact, unanimous, such a showing is not likely necessary to justify reversing a conviction upon a verdict that "is not complete."[36] As the Maryland courts have recognized, absent either hearkening or polling, the verdict "has not been properly rendered and recorded, *and is a nullity.*"[37]

In Kansas, polling is only mandatory when requested by a party. But that does not mean that polling is any less important than hearkening. The Kansas Supreme Court has described jury polling as an "absolute right" in both civil and criminal cases.[38] Refusal to poll when requested may be *per se* reversible error.[39] Indeed, even depriving the parties of a reasonable opportunity to *request* a poll may be *per se* reversible error.[40]

Judges should proceed with caution if a juror expresses dissent during hearkening or polling. If a juror makes an equivocal answer, the judge must give the juror an opportunity to clarify whether he or she agrees with the verdict.[41] If a juror unequivocally disagrees with the verdict, the judge must either send the jury out for further deliberations or declare a mistrial.[42] Polling the remaining jurors at that point or asking the dissenter further probing questions may unduly pressure the dissenter to change his or her mind.[43]

Conclusion

Dismissing jurors, handling potentially hung juries, and conducting juror hearkening and polling are all delicate tasks that must be undertaken with care for the defendant's rights to an uncoerced, unanimous, public, and accurate 12-member jury verdict. Litigants and judges who prepare for these events ahead of time will find them much more manageable, and will be rewarded with greater confidence in the outcome of their trials—whether those trials result in verdicts or not. ▲

Endnotes

1 *See, e.g.*, Rebecca Porter, *Texts and 'Tweets' by Jurors, Lawyers Pose Courtroom Conundrums*, 45 Trial 12 (Aug. 2009).

2 Martha Neil, *Federal Juror Charged With Bribery, Allegedly Solicited Defense Lawyer*, ABA Journal (June 19, 2009).

3 K.S.A. 22-3412(c). In contrast, Kansas law explicitly authorizes judges to dismiss an entire jury. *See* K.S.A. 22-3420(4) ("The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity, or other necessity to be found by the court requiring their discharge.").

4 *State v. Fulton*, 269 Kan. 835, 841 (2000).

5 *State v. Calderon*, 270 Kan. 241, 244-45 (2000).

6 *State v. Cheek*, 262 Kan. 91, Syl. ¶ 3 (1997).

7 This section applies equally to the defendant's right to a six-vote jury verdict in a misdemeanor trial. That right is protected by statute, upon a timely request, in any misdemeanor case, and by the state and federal constitutions in misdemeanor cases involving potential penalties of six months or more. K.S.A.

22-3404(1)-(2); *State v. Irving*, 216 Kan. 588 (1975).

8 *Cheek, supra* note 6 at 107-08 (reversing murder conviction where no reasonable cause existed to dismiss juror who merely believed he was at odds with other jurors and would cause a deadlock).

9 K.S.A. 22-3403(2). In contrast, Federal Rule of Criminal Procedure 23(b)(3) allows that "[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, *even without a stipulation by the parties*, if the court finds good cause to excuse a juror" (emphasis added).

10 *State v. Simpson*, 29 Kan. App. 2d 862, Syl. ¶ 1 (2001).

11 *Commonwealth v. Cousin*, 873 N.E.2d 742, 751-52 (Mass. 2007).

12 *People v. Niccolich*, 220 A.D.2d 461 (N.Y. App. 2 Dept. 1995), *app. den.* 664 N.E.2d 1268 (N.Y. 1996), *superseded on other grounds by statute as stated in People v. Capellan*, 844 N.Y.S.2d 578 (N.Y. Sup. 2007).

13 583 F.2d 1124 (10th Cir. 1978).

14 *Id.* at 1129.

15 *Id.*

16 *Id.*

17 *State v. Makthepharak*, 276 Kan. 563, 569 (2003); *see also State v. Overstreet*, 288 Kan. 1, 17-20 (2009) (reversing conviction where court committed "clear error" by giving modified *Allen*-type instruction after jury announced itself split on one charge; citing cases).

18 *See United States v. McElhiney*, 275 F.3d 928, 935-38 (10th Cir. 2001).

19 PIK Crim. 3d 68.12, Notes on Use and Comment.

20 *McElhiney, supra* note 18 at 942.

21 *State v. Salts*, 288 Kan. 263, 266-67 (2009) (noting that "[o]ther language in this instruction has been the source of some earlier controversy," and disapproving language cautioning jury that "[a]nother trial would be a burden on both sides").

22 *McElhiney, supra* note 18 at 949.

23 *Id.*

24 K.S.A. 22-3414.

25 K.S.A. 22-3419(2).

26 K.S.A. 22-3420(3).

27 Even jurisdictions that theoretically would allow new evidence mid-deliberations have reversed convictions on this ground. *See United States v. Crawford*, 533 F.3d 133, 140-41 (2d Cir. 2008) (mid-deliberations introduction of trace report "probably imbued the evidence with distorted importance"); *United States v. Nunez*, 432 F.3d 573, 581 (4th Cir. 2005) ("the district court's decision to reopen and admit the Report *after* the jury had retired for deliberations and in response to the jury's request infused the evidence with distorted importance") (emphasis in original).

28 *State v. Blocker,* 211 Kan. 185, 188 (1973) (emphasis added; citation omitted). *See also State v. Doyle*, No. 93,087, 2005 WL 3030328 (Kan. App. Nov. 10, 2005) (dismissing state's appeal on question whether trial courts have discretion to reopen case for admission of evidence after matter has been submitted to factfinder; noting "lack of authority" to support state's position).

29 *See State v. Maze*, No. 93,173, 2006 WL 538270 (Kan. App. March 3, 2006) ("this is the fourth case brought on appeal wherein this district court judge has, in response to a jury question during deliberations, reopened closing arguments and allowed counsel to argue the law in answering the jury's inquiry"; thus, "our panel's admonition, 'It would have been preferable for the judge simply to have answered the jury's question,' is an understatement that merits attention") (Buser, J., concurring) (unpublished), *rev. den.* (Kan. Sept. 19, 2006); *State v. Sloan*, No. 89,218, 2004 WL 2160671 (Kan. App. Sept. 24, 2005) (allowing mid-deliberations argument "is not sanctioned by the statute [K.S.A. 22-3420(3)], and we caution trial courts not to follow this practice"; "reopening final argument is a practice fraught with danger") (unpublished), *rev. den.* (Kan. Mar. 1, 2005); *State v. Mayden*, No. 89,280, 2004 WL 48170 (Jan. 9, 2004) ("this panel would discourage the practice") (unpublished), *rev. den.* (Kan. March 31, 2004). *But see State v. Overstreet*, No. 95,682, 2008 WL 360642 (Kan. App. Feb. 8, 2008) ("Once the jury makes a request for information, the judge must respond in a meaningful way pursuant to K.S.A. 22-3420. The judge here did just that by permitting the parties to argue the points raised by the jury. Overstreet fails to show he suffered any prejudice from…the trial court's decision to allow the attorneys additional argument time to answer the jury's questions.") (unpublished), *rev'd on other grounds*, 288 Kan. 1, 17 (2009) (declining to address reopening of arguments absent objection below).

30 K.S.A. 22-3421.

31 *Id.*

32 Some jurisdictions still use the quaint hearkening language of old. *See, e.g.,* Mass. Dist. Ct. Crim. Model Jury Instruction 2.500, *Taking the Verdict and Discharging the Jury* (directing clerk to ask jury: "Members of the jury, hearken to your verdict as the court will record it. You, upon your oath, do say that the defendant is (guilty) (not guilty) of [offense] on complaint number ___. So say you, Mr. Foreman (Madam Forelady). So say you all, members of the jury.").

33 *State v. Holt*, 285 Kan. 760, 770-71 (2008) ("While trial courts do not have to be 'letter perfect' in their polling procedures and language, the better practice is to poll the jury in such a way as to ensure that each juror is answering for him or herself, e.g., asking, 'Is this your verdict?'").

34 *State v. Johnson*, 40 Kan. App. 2d 1059, 1075-81 (2008).

35 *Id.* at 1077.

36 *Id.*

37 *Jones v. State*, 920 A.2d 1, 12-17 (Md. App. 2007) (emphasis added) (reversing murder and other convictions where judge failed to either hearken or poll jury: "a court's failure to hearken the jury is grounds for a new trial").

38 *State v. Panker*, 216 Kan. 347, 349 (1975); *see also State v. Holt*, 285 Kan. 760, 767 (2008) ("Jury polling has been a right in Kansas for over 100 years.").

39 *See State v. Pare*, 755 A.2d 180, 638 (Conn. 2000) ("[t]he state offers no persuasive reason for departing from the near uniform practice of requiring automatic reversal whenever a trial

court improperly denies a party's timely polling request"; reversing murder conviction where court refused request for individual polling on grounds that "they all nodded and answered yes" in response to collective hearkening), *and cases cited therein; see also Duffy v. Vogel*, 905 N.E.2d 1175, 1177 (N.Y. 2009) (discussing polling at length and concluding that "[i]nasmuch as, under New York law, the honor of a request for a jury poll is a necessary condition of a 'finished or perfected' verdict, it follows that in this State's courts the failure to poll a jury may never be deemed harmless"; reversing civil judgment where trial court refused losing party's request for jury poll).

40 *See United States v. Randle*, 966 F.2d 1209, 1213-14 (7th Cir. 1992) (reversing convictions for insufficient opportunity to request polling where trial court waited only one-and-one-half seconds after reading verdict before launching into defendant's probation report); *People v. Wheat*, 889 N.E.2d 1195, 1198-1203 (Ill. App. 2008) (reversing conviction for insufficient opportunity to request polling where judge discharged jury only two seconds after reading verdict: "A defendant exercising his right to poll the jury is not a quiz show contestant who must anticipatorily press the buzzer before the host is finished asking the question or risk losing points.").

41 *See People v. Beasley*, 893 N.E.2d 1032, 1040-42 (Ill. App. 4 Dist. 2008) (reversing conviction for judge's failure to give juror opportunity to clarify when juror responded to polling by saying, "'[u]m—I have to say, yes, I guess,' while shaking his head").

42 *See Holt, supra* note 33 at 771 ("If the poll discloses that there is not that level of concurrence required by applicable law, the jury may be directed to retire for further deliberations or may be discharged.") (quoting with approval the ABA Principles for Juries and Jury Trials, American Jury Project, Principle 15(F) (2005)).

43 *See Dorn v. United States*, 797 A.2d 1226, 1227-30 (D.C. 2002) (reversing conviction where post-dissent polling may have coerced juror into relinquishing dissent: "[T]he continued polling revealed juror five to be the lone dissenter and could well have pressured him into changing his vote. What the judge should have done was to stop the jury poll immediately as soon as juror number five said 'No' in response to the clerk's question. The judge should then have sent the jury back to the jury room, with appropriate instructions, to deliberate further."); *State v. Conway*, 740 S.W.2d 320 (Mo. App. E.D. 1987) (reversing conviction where juror unequivocally dissented, but changed her mind after judge polled remaining jurors and then asked dissenting juror to "clarify" her disagreement); *Barnett v. State*, 161 S.W.3d 128 (Tex. App. 2005) (reversing conviction where judge discovered two holdout jurors during polling, told them "we do have a problem with both of you," and asked if upon further deliberations "they would be able to change their votes"), *aff'd*, 189 S.W.3d 272 (Tex. Crim. 2006); *State v. Raye*, 697 N.W.2d 407, 411-17 (Wis. 2005) (reversing conviction where judge asked dissenting juror, among other things, "[i]s there something that the Court can do to assist you?" and juror convicted defendant after further deliberations: "In continuing the questioning and polling after Clark dissented to the verdict, the circuit court unduly tainted the jury's deliberations.").

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