




FILED IN THE DISTRICT COURT
ROGERS COUNTY OKLAHOMA

MAR 17 2023

CATHI EDWARDS, COURT CLERK

DEPUTY

IN THE DISTRICT COURT OF ROGERS COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
Plaintiff,)
)
vs.)
)
ROBERT KENT KRAFT,)
Defendant.)

Case No. CF-2018-0465

**STATE'S RESPONSE TO DEFENDANT'S MOTION FOR MISTRIAL
ON BEHALF OF THE DEFENDANT**

COMES NOW the State of Oklahoma ("State"), by and through Matthew J. Ballard, the duly elected and qualified District Attorney for Rogers County, State of Oklahoma, by and through First Assistant District Attorney Joy Thorp, and respectfully requests the Court deny Defendant's *Motion for Mistrial on Behalf of the Defendant* and further requests this honorable Court set the case for sentencing. In support, the State would show the Court as follows:

Procedural History

The State provides the following procedural history to provide transparency and candor to this tribunal and to the citizens of Rogers County and Oklahoma. While the State has attempted to provide as much detail as possible, the State's information is limited to those facts uncovered in its internal investigation into former District 12 Assistant District Attorneys Isaac Shields and George Gibbs, Jr., as well as any information provided by the Oklahoma State Bureau of Investigation.

Beginning June 27, 2022, District 12 Assistant District Attorneys ("ADA") Isaac Shields and George Gibbs, Jr. prosecuted the instant case, *State v. Kraft*. On the afternoon of July 1, 2022, Mr. Shields and Mr. Gibb's presented closing arguments. The jury deliberated from approximately 3:14 p.m. until 8:05 p.m.

Due to concerns from COVID-19, District Judge Stephen Pazzo placed the jury in an empty courtroom for deliberations in order for the jury to feel comfortable maintaining a safe distance.¹ The deliberation courtroom was secured by locking the outer doors and District Judge Pazzo's Bailiff was stationed outside the door to ensure juror privacy. Courthouse security cameras, located inside the courtroom, remained on, however.²

The security cameras are a closed circuit system displayed and monitored through the Courthouse security office, located on the first floor of the Rogers County Courthouse. The security office is a secured room only accessible by authorized employees of the Rogers County Sheriff's Office.

Courthouse security video shows that at approximately 5:13 p.m., ADA Shields spoke with a Rogers County Sheriff's Office Courthouse Security deputy in the elevator landing and main hallway of the first floor of the Rogers County courthouse. During this conversation, Mr. Shields asked the deputy if he could watch the jury from the courthouse security room, making a statement to the effect of, "let's go see" or "let's look at it," referring to the jury. Due to ADA Shield's position as the chief criminal prosecutor, the deputy allowed Mr. Shields entry to the courthouse security room. All cameras from the jury deliberation room were visible, however, no audio was available.³

From the video collected of the courthouse security room, Mr. Shields is seen sitting in the chair directly in front of a computer screen showing jury deliberations. He remained in the

¹ Deliberating in the courtroom has been a procedure observed by many Rogers County judges since 2020. Prior to 2020, juries deliberated in a standard jury deliberation room.

² Judge Pazzo was not aware that the security cameras in the courtroom were on or were being monitored during deliberations.

³ Camera audio is turned off by default and only the Undersheriff has password authorization to enable audio on courthouse security cameras.

courthouse security room actively watching the jury deliberate, from 5:14 p.m. until the jury reached a verdict, at approximately 8:03 p.m. In total, Mr. Shields was in the courthouse security room for approximately one-hundred and thirty-two (132) minutes. Throughout this time, Mr. Shields is seen manipulating the angle and zoom of the cameras, pointing at the monitor, clapping his hands, and fist punching in excitement.

Sometime around 6:03 p.m., a courthouse security deputy received notice from the court that a member(s) of the defendant's family was running outside the courtroom and disrupting the deliberation process. Mr. Shields was in the courthouse security room when this information was relayed, and he did not appear to advise the courthouse security officers of how to handle the issue. In fact, per the video, Mr. Shields appeared to maintain his gaze on monitor displaying the jury deliberating when the issue arose.

Mr. Gibbs, Jr. was contacted by Mr. Shields to come to the courthouse security room. Mr. Gibbs, Jr. entered the courthouse security room at approximately 7:15 p.m. He watched the jury deliberate for a total of twenty-seven (27) minutes.

During deliberations, the jury sent two (2) notes/questions. The first note/question requested transcripts from specific witnesses. This note was issued between 4:45 p.m. and 5:00 p.m. The court sent the standard response advising the jury that they would not receive the transcript(s) and that the jury maintained all the evidence and law they needed.

The second note was received from the jury at approximately 5:40 p.m. to 6:00 p.m. This note asked if the jury is a "hung jury," can the State of Oklahoma re-try the case. The court responded with the same standard language previously issued. It appears Mr. Shields may have been in the security room at the time of the second note. Mr. Gibbs was not present.

Around 8:03 p.m., the foreman of the jury was observed signing the verdict form from the courthouse security room monitors. A Rogers County Sheriff's courthouse deputy asked Mr. Shields and Mr. Gibbs, Jr. if he should retrieve Mr. Kraft from the jail for the reading of the verdict. Mr. Gibbs, Jr. directed the deputy to wait to retrieve the defendant until the verdict was received by the court. This was so they would not get in trouble.

At approximately 8:35 p.m., the jury found the above defendant guilty of Murder in the First Degree, OKLA. STAT. tit. 21, § 701.7. The jury recommended a sentence of life in prison with the possibility of parole. The matter was scheduled for sentencing August 18, 2022.

On July 7, 2022, a Rogers County courthouse sheriff deputy came forward and advised Special District Judge Lara Russell ADA Shields and ADA Gibbs, Jr. watched the jury deliberate on July 1, 2022, via the courthouse security room. Judge Russell contacted Judge Pazzo, who relayed the information to the District Attorney's Office, specifically to District Attorney Matthew J. Ballard and First Assistant District Attorney Joy Thorp.

The District Attorney's Office opened an immediate internal investigation that included a request for the OSBI to investigate the allegation of watching a jury deliberate in violation of OKLA. STAT. tit. 21, § 588. *See* Affidavit of Wayne Stinnett, attached as Exhibit 1. Mr. Stinnett's affidavit is incorporated as if set forth fully herein. District Attorney Matthew J. Ballard also sent a letter to the Oklahoma Attorney General's Office requesting that his office be recused from any decision as to the potential prosecution of the two (2) former assistant district attorneys. The Oklahoma Attorney General assigned the review and determination of prosecution to District Attorney Brian Hermanson.

Several days after the allegations of the potential criminal conduct, and without any contact from the District Attorney's office, the Jury Foreman came to the Rogers County District

Attorney's Office. Chief Investigator Wayne Stinnett, District Attorney Matthew J. Ballard, and First Assistant District Attorney Joy Thorp met with the Foreman. The foreman was asked whether Mr. Shields or Mr. Gibbs ever contacted this juror or any other juror during the pendency of trial. The foreman stated that she did not have any contact with either prosecutor outside of the courtroom and she was not aware of any unauthorized contact with any of the other jurors. She was not aware that Mr. Shields or Mr. Gibbs, Jr. watched the jury deliberate. Further, the jury never discussed (or was aware) either prosecutor observing the jury deliberations.

Throughout the investigation, there has been no evidence presented that either Mr. Shields or Mr. Gibbs, Jr. made unauthorized contact with any of the jurors. There is no evidence that any Prosecutorial District 12 prosecutors, including the two (2) former prosecutors involved with this case, have ever observed a jury deliberate during any other jury trial in Rogers County since deliberations have been held in a courtroom. Finally, there has been no evidence that either former prosecutor were in the courthouse security room during any other portions of this trial, including any privileged conversations defendant and his attorney may have had during the pendency of this trial.

On March 3, 2023, Defendant filed his *Motion for a Mistrial on Behalf of the Defendant*. While the State does not in any way deny that the actions of the two (2) former assistant district attorneys were potentially criminal and highly unethical, the state respectfully requests that this honorable court deny said motion for mistrial and set the case for sentencing based on the argument and authorities detailed below.

Argument and Authorities

The Sixth Amendment guarantees a criminal defendant the right to be tried before an impartial jury. OKLA. STAT. tit. 22, § 857 was enacted to safeguard this right:

After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

While plentiful authority exists regarding unauthorized communications with a juror(s), no Oklahoma court has addressed the issue of a prosecutor “observing” or “watching” a jury deliberate or the consequences thereof regarding a Sixth Amendment violation. As a result, the state looked outside of this jurisdiction for guidance. *United States v. Small*, 944 F.3d 490, involved an issue in which two (2) jurors raised concerns that individuals outside the jury room had been “watching” them when they left the courthouse. As a result of the juror concerns, the two (2) jurors were excused, and the District Court took reasonable steps in response to the juror concerns by placing additional security around the jurors. The court held:

“Under the Sixth Amendment, in order to trigger a presumption of prejudice arising in a criminal case based on any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury, as would entitle the defendant to an evidentiary hearing in which government bears burden of showing that such contact was harmless to the defendant, the defendant must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict. U.S. Const. Amend. 6.”

The court in *United States v. Small*, 944 F.3d 490, further held:

“Because it is difficult to fully shield juries from the outside world, the appellate court tolerates certain instances of extrajudicial contact that amount to nothing more than innocuous interventions that simply could not justify a presumption of prejudicial effect. Thus, in order to trigger Remmer's presumption of prejudice, the defendant must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict. To determine whether a contact was innocuous, the court turn to the five factors the Supreme Court deemed important in Remmer: (1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before the jury.”

The court continued by stating:

“The appellate court is unaware of any case where a defendant attempted to invoke the Remmer presumption based on watching alone. "Watching" can hardly be described as communication or contact, both of which imply an active exchange of information of some sort. Unsurprisingly, most precedent discussing extrajudicial contact involves spoken words. Watching may be done passively and, unless context indicates otherwise, conveys little information.”

This court further stated that “watching” may take on a more sinister character but in this case, there was no evidence that the “watching “was anything more than an innocuous intervention.

In applying the principle from *United States v. Small* to the facts of this case, it is uncontroverted that Mr. Shields and Mr. Gibbs, Jr. did in fact “view” or “watch” the jury deliberate, in potential violation of an Oklahoma criminal statute as well as ethical obligations to the Oklahoma Bar Association. For the defendant to trigger the presumption of prejudice, however, the defendant must first establish that unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict. *Hiler v. State*, 1990 OK CR 54, held that “some threshold showing that an unauthorized communication occurred must be established before the State’s burden of proof arises.” *Lowery v. State*, 87 OK CR 313, held that “only such communications as are established as prejudicial to the defendant are grounds for reversal.” Furthermore, *Graves v. Territory*, 1907 OK CR 20 held:

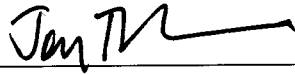
“Upon this state of facts, did the court below err in refusing a new trial upon the ground of misconduct of the jury? We think this question must be answered in the negative. We are aware that this question has been many times before the courts, and extreme views have been presented upon both sides of the question, and it is extremely difficult to extract any general rule therefrom, further than that while the presence of the officer in charge of a jury is generally, and, it might be said, universally, held to be misconduct and therefore disapproved, yet the general and later trend of authority is to the effect that such presence, ipso facto, is not ground for a new trial, unless it appears that the officer participated in the proceedings of the jury, or in some manner and to some extent influenced the minds of the jury either as to the guilt or innocence of the defendant, or as to the form of the verdict they should return.”

The *Graves* court opined that while the actions of an officer of the court in many cases may have affected the verdict of the jury, in this case the rights of the defendant were not prejudiced even with the alleged contact with the officer because the verdict was not affected. Furthermore, the court held “we are not to be understood, however, as holding a new trial should have been granted in this case, had it been made to appear that the prejudice did not result from the misconduct in question; technical errors or defects which do not affect the substantial rights of the parties are to be disregarded.”

In the case at hand, there has been no allegation of actual contact or communication made by either Mr. Shields or Mr. Gibbs with any of the jurors. Furthermore, as there has been no actual communication thus there is no established prejudice to the defendant.

Therefore, the State of Oklahoma respectfully requests that this honorable court deny the *Defendant’s Motion for Mistrial on Behalf of the Defendant* and schedule the case for sentencing.

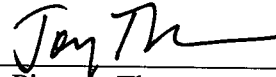
Respectfully submitted,
MATTHEW J. BALLARD
District Attorney

By: 
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CERTIFICATE OF DELIVERY/MAILING

On this March 17, 2023 a copy of the above and foregoing response was delivered to the Defendant's Attorney of Record.

MJ Denman
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Tulsa, OK 74



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