018 IL App (1st) 160813-U

No. 1-16-0813

Order filed December 31, 2018

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 10167
	)	
JOHNIE DAILY,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justice Griffin concurred in the judgment.
Justice Walker dissented.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated unlawful use of a weapon affirmed over his contention that juror misconduct deprived him of a fair trial. We also modify his fines, fees, and costs order.

¶ 2 Following a jury trial, defendant Johnie Daily was convicted of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (3)(A-5) (West 2014)), and sentenced to two years' probation. On appeal, defendant contends that his conviction should be reversed because juror misconduct deprived him of a fair trial by an impartial jury. He also challenges various fines imposed by the trial court. For the following reasons, we affirm and modify his fines, fees, and costs order.

¶ 3 Because defendant does not contest the sufficiency of the evidence, we recite only those facts necessary to our disposition. Defendant was charged with four counts of AUUW for (1) possessing an uncased, loaded weapon on his person without a concealed carry license, (2) possessing an uncased, loaded weapon in his vehicle without a concealed carry license, (3) possessing an uncased, loaded weapon on his person while in possession of cannabis, and (4) possessing an uncased, loaded weapon in his vehicle while in possession of cannabis.

¶ 4 Prior to trial, the court admonished the jury not to consider any information they "may have seen or heard outside the courtroom." The court additionally admonished the jury not to "communicate with, provide information personally, in writing, or electronically to anyone about this case not even your own families or friends *** and also not even among yourselves until instructed otherwise." The court instructed the jury not to reach any opinions or conclusions until they heard "everything there is to hear" about the case and started deliberations. The court gave the same admonishments several times to the jury prior to recesses throughout the trial.

¶ 5 The evidence at trial established that, on May 16, 2014, near the 100 block of South Pulaski Road, Chicago police officers Strazzante and Vivanco approached defendant, who was sitting in the driver's seat of a vehicle parked in a bus stop tow zone. The officers smelled burnt

cannabis and eventually removed defendant from the vehicle. As defendant exited the vehicle, Sergeant G.T. Murphy, who was on the scene for backup, observed a gun near the driver's seat. The officers recovered a Newport cigarette box containing four small Ziploc bags of suspected cannabis on defendant's person. Following a search of defendant's car, Strazzante recovered from between the driver's seat and door, an uncased Glock "2240" caliber semi-automatic handgun containing 13 live rounds in the magazine. He inventoried the weapon and suspected narcotics. Defendant did not have a driver's license, firearm owner's identification (FOID) card, or concealed carry license on his person. Strazzante learned later that defendant had a valid driver's license. Forensic testimony established that 2.7 grams of cannabis was recovered from defendant's person.

¶ 6 The State introduced and published to the jury a certified business record from the Illinois Secretary of State's office showing defendant owned the vehicle. The State also introduced a copy of a document from the Illinois State Police, which showed that defendant had a valid FOID card at the time of the incident, but had not applied for a concealed carry license.

¶ 7 Defendant acknowledged that he was parked at a bus stop on the day of the incident and did not have his driver's license or FOID card with him. He denied being in possession of marijuana that day and having smoked marijuana that day. Further, defendant testified that he was in possession of a gun that day, but that it was in a case under the driver's seat.

¶ 8 During deliberations, the jury sent the court a note, which read, "What do we do if we're not unanimous on a decision of guilty or not guilty on two counts?" After consulting with the parties, the court instructed the jury to "please continue your deliberations." The jury found defendant guilty of all four counts of AUUW.

¶ 9 Defendant subsequently filed a posttrial motion alleging, *inter alia*, that juror misconduct discovered after trial denied defendant his right to a fair trial by an impartial jury. In the motion, defendant argued "actual evidence of juror misconduct was discovered on December 8, 2015." The misconduct was evidenced by several Facebook posts by impaneled juror J. Swint. Defendant alleged Swint posted publicly on Facebook about defendant's case during the pendency of the trial, which revealed she (1) disregarded the trial court's orders not to converse with anyone else on the subject of the trial or listen to outside comments about the case, (2) discussed the case with third parties, and (3) improperly formed an opinion prior to the conclusion of the evidence.

¶ 10 Defendant described the posts in his motion, and apparently attached printed copies of the posts as exhibits. However, copies of the posts are not included in the record on appeal. According to defendant's motion, the day after Swint was sworn in as a juror and instructed by the trial court, she posted the following on Facebook on December 3, 2015:

> "As if one day of jury duty wasn't enough smh day 2 I'm soooo over it already!!!!
>
> * * *
>
> Lolol oh by the way this is goin n the fact that I gotta keep showin up theren missin wrk…just cuz Ima vote guilty lol. #impetty #PettyLinda."

¶ 11 Defendant's motion also described Swint's interaction with a third party, who responded to her Facebook posts:

> "[THIRD PARTY]: It's your civic duty! Lol.
>
> [SWINT]: Well, I'm over this duty lol."

¶ 12 At the initial hearing on defendant's posttrial motion, defense counsel informed the court that defendant brought Swint's Facebook posts to counsel's attention, which the court took to mean that defendant looked up the jurors' Facebook pages. Although not mentioned in the motion, counsel further informed the court that the attached copies of the posts showed that another third party responded to Swint's post, saying "vote guilty." After reading the posts, the court issued a summons to Swint in order to investigate the matter.

¶ 13 At the hearing on the juror misconduct issue, Swint acknowledged the Facebook posts were her own. The court inquired of Swint:

> "[THE COURT]: There is a post there from somebody who says vote guilty.
>
> [SWINT]: Okay.
>
> [THE COURT]: Okay. Did that have any effect on your deliberations as a juror?
>
> [SWINT]: No, not at all.
>
> [THE COURT]: Did you bring that to the attention of the other jurors?
>
> [SWINT]: What, my Facebook?
>
> [THE COURT]: Yes.
>
> [SWINT]: No. Why?
>
> [THE COURT]: Did you tell anybody that other people had told you to vote guilty?
>
> [SWINT]: No.
>
> [THE COURT]: There is another post there, and you were expressing -- I would say exacerbation [*sic*] with having been chosen and having to serve another day and you were going to vote guilty just because you had to be here.
>
> [SWINT]: What, I was going to vote guilty just because I had to be here?
>
> [THE COURT]: Right. Do you see that post?
>
> (Witness peruses document.)

[THE COURT]: What does it say?

[SWINT]: When she said vote guilty, I said LOL. LOL. Oh, by the way --

[THE COURT]: Speak up so the court reporter can hear you.

[SWINT]: She said vote guilty. I said LOL. LOL. I said, oh, by the way, this is going in -- what -- oh, by the way, this is going and the fact that I have to keep showing up and missing work -- just because of [inaudible] I'm going to vote guilty. LOL. Oh, yeah, I said that, but that didn't have nothing to do with anything. I just said it.

[THE COURT]: Okay. Did you mean it?

[SWINT]: That I was going to vote him guilty because of that?

[THE COURT]: Yes.

[SWINT]: No."

¶ 14 On examination by defense counsel, Swint acknowledged that she was annoyed at having to serve jury duty and was annoyed on the date of the hearing. Swint also acknowledged posting on her Facebook the night before the hearing:

[DEFENSE COUNSEL]: And you said you didn't care what happened to the people because you didn't want to do jury duty, right?

[SWINT]: I do not."

Swint testified that the person who told her to vote guilty was her friend, and acknowledged that she values the friend's opinion "depending on what the situation is." Swint wrote "LOL" after another person wrote that jury duty was her civic duty. She "guess[ed]" she knew that jury duty was her civic duty, and clarified, "I mean, I know now that I am doing this. But before this, no, I didn't no [*sic*] nothing about this. I didn't even know I had to do anything like this."

¶ 15 Swint remembered being instructed by the trial court, and denied discussing the case with anyone. She did not believe that posting she was going to vote guilty constituted discussing the case with anyone. She did not specifically remember the court's instruction telling the jurors to not knowingly read or listen to outside comments or news accounts until after being discharged, including anything on the internet. However, Swint recalled receiving the following instruction: "You are not to discuss amongst yourselves any subject connected with the trial or form or express any opinion of the case until it is submitted to you for deliberation." When defense counsel reminded her that the judge instructed her not to discuss the case, she replied "I didn't discuss the case" and "I did hear that, but I never discussed the case."

¶ 16 Following arguments, the court denied defendant's motion for a new trial. The court stated,

> "The Court did have the opportunity to view the juror today in regards to her credibility. She emphatically denied that those Facebook pages or posts had any influence on her verdict. She denied that they were even discussed within the jury room or brought to the attention of the other jurors. And [the court] found her credible. And the Court feels if there was any error, it was harmless error. It did not effect [*sic*] the jury's verdict."

¶ 17 The court thereafter merged the four counts of AUUW and sentenced defendant to 24 months' probation.

¶ 18 On appeal, defendant first contends that he was denied his right to a fair trial before an impartial jury where Swint posted on Facebook during trial that she intended to convict defendant because she was annoyed at having to serve as a juror.

¶ 19 Trial before a biased tribunal deprives a defendant of a substantial right and constitutes structural error requiring reversal. *People v. Runge*, 234 Ill. 2d 68, 102 (2009). When considering juror impartiality, the relevant inquiry is "whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant." *Id.* at 103; *Patton v. Yount*, 467 U.S. 1025, 1035 (1984). Due process requires " 'a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.' " . *Runge*, 234 Ill. 2d at 103 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

¶ 20 The trial judge, if he or she becomes aware of a potential bias, must "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." *Remner v. United States*, 347 U.S. 227, 230 (1954). After a trial judge has made an appropriate inquiry, we review the court's determination for an abuse of discretion. *Runge*, 234 Ill. 2d at 105. This standard "recognizes that the trial court has wide discretion in deciding how to handle and respond to allegations of juror bias and misconduct that arise during a trial." *Id.* Accordingly, following an inquiry, we accord significant deference to the court's judgment on the question of bias because the court was able to appraise the jurors face to face, something a court of review obviously cannot do. *Id.* "That determination requires 'an inference, from the facts and circumstances, that a fair trial had or had not been interfered with.' " *Id.* (quoting *People v. Whitehead*, 169 Ill. 2d 355, 402 (1996)). "The most controlling facts or circumstances involve the character and nature of the allegedly prejudicial information or acts." *Id.* at 105-06. We determine each case according to its own facts and circumstances. *Id.* at 106.

¶ 21 Here, juror Swint's social media posts were not uncovered until after the jury had rendered its verdict. The posts indicated that she did not want to serve as a juror, that prior to the close of the evidence she posted "oh, by the way, this is going and the fact that I have to keep showing up here and missing work—just because of [inaudible] I'm going to vote guilty. LOL" and responded to a third party telling her to "vote guilty." At the hearing regarding her public posting, the juror acknowledged the posts were from her Facebook page, but denied informing the other jurors about the posts and denied that her posting affected her deliberations and denied that she discussed anything about the case with anyone. The trial court subsequently found Swint credible and that "if" there was any error, that it was harmless and did not affect the jury's verdict.

¶ 22 We first point out that the posts in question were not included in the record on appeal. See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 45 ("It is generally the appellant's burden to properly complete the record on appeal. Any doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court." (Internal citations omitted)). Nevertheless, because the trial court conducted a hearing on this issue, the record contains the content of the posts in question sufficient for our review of this issue.

¶ 23 After a careful review of the record, and based on the facts and circumstances of this case, we do not find the trial court abused its discretion. The Supreme Court has acknowledged that trials exist in the real world, and therefore, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

Although we recognize Swint's postings were wrong, we do not find that a new trial is warranted. As previously discussed, the trial court correctly conducted a hearing on this issue and questioned the juror about her posts and whether this showed any bias or prejudice toward defendant. The trial court was in the best position to view the jury throughout the trial, and specifically Swint at the posttrial hearing, and found her credible and that, if any error resulted from her posts, it was harmless. We find nothing in the record to undermine the trial court's determination. We note that no details about the trial were discussed in Swint's postings, and she denied that the postings by her or third parties influenced her verdict. Although defendant argues that Swint's denial that she reached a guilty verdict before all of the evidence was presented was made to avoid incurring the judge's wrath, this is pure speculation and the circuit court was in the best position to accept or reject her statement and assess her credibility in making it. Thus, we do not find that Swint's conduct deprived defendant of a fair trial by an impartial jury and the circuit court did not abuse its discretion in denying defendant's motion for a new trial.

¶ 24 Defendant's remaining contentions request offset of various monetary charges assessed against him by his presentence incarceration credit. Defendant acknowledges that he failed to preserve these issues below. The State agrees that the fines, fees, and costs order should be corrected. Accordingly, the State has forfeited any argument regarding defendant's forfeiture, and we will consider defendant's claims. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (the rules of waiver and forfeiture apply to the State). We review *de novo* the propriety of court-ordered fines and fees. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 25 The trial court assessed $709 in fines, fees, and costs against defendant. Section 110-14 of the Code of Criminal Procedure of 1963 (the Code) provides that a defendant is entitled to a

credit of $5 toward his fines for each day he was incarcerated prior to sentencing. 725 ILCS 5/110-14(a) (West 2016). The Code specifies, however, that "the credit applies only to 'fines' that are imposed pursuant to a conviction, not to any other court costs or fees." *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). Whether an assessment is a fine or a fee depends on its purpose. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Fees reimburse the State "for a cost incurred in the defendant's prosecution." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63 (citing *People v. Jones*, 223 Ill. 2d 569, 582 (2006)). Fines, by contrast, are punitive in nature and "part of the punishment for a conviction." *Id.* The record shows that defendant was entitled to credit for 82 days. He therefore has up to $410 in credit available toward his fines.

¶ 26 The parties agree that the $15 State Police operations fee (705 ILCS 105/27.3a(1.5) (West 2016)) and the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2016)) are fines, rather than fees, that should be offset by defendant's presentence incarceration credit. We agree that these assessments are fines because they do not reimburse the State for expenses incurred in defendant's prosecution. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 ("the State Police Operations Assistance fee does not reimburse the State for costs incurred in defendant's prosecution"); *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21 (determining the defendant was entitled to credit for the court system assessment imposed under section 5-1101(c) of Counties Code because it is not intended to compensate the State for the cost of prosecuting a defendant). Thus, these two charges should be offset by defendant's presentence incarceration credit.

¶ 27 The parties disagree, however, regarding whether the $10 probation and court services operations charge (705 ILCS 105/27.3a(1.1) (West 2016)) is a fine subject to offset. Defendant acknowledges that there has been a split in authority regarding whether this assessment is a fine

or a fee. Compare *People v. Carter*, 2016 IL App (3d) 140196, ¶¶ 56-57 (finding the probation and court services operations charge is a fine), with *People v. Staake*, 2016 IL App (4th) 140638, ¶ 106 (finding the probation and court services operations charge is a fee). Defendant argues this charge is a fine because it is an assessment collected from every defendant who has been found guilty, regardless of whether probation services were rendered. Thus, according to defendant, this assessment constitutes a penalty, rather than a fee.

¶ 28 Most recently, in *People v. Mullen*, 2018 IL App (1st) 152306, ¶¶ 54-56, we determined that this assessment is a fee. In *Mullen*, we explained that the statute's plain language suggested that the charge was a fee because it authorized the clerk of the circuit court to impose the assessment, and the clerk is not authorized to impose fines. *Id.* at ¶ 55. Further, we found the Fourth District's analysis of the issue in *People v. Rogers*, 2014 IL App (4th) 121088, was "a rational interpretation of the legislative intent that this is a fee." *Id.* at ¶ 56.

¶ 29 In *Rogers*, the Fourth District held that the $10 probation and court services operations charge is a fee where the probation office was involved in preparing a presentence investigation report (PSI) for the defendant, which demonstrated that the assessment was intended to recover a cost actually incurred in the defendant's prosecution. *Rogers*, 2014 IL App (4th) 121088, ¶ 27. The probation department prepared a PSI for defendant in the instant case, and therefore, the charge was a fee intended to recover a cost in prosecuting defendant.

¶ 30 We acknowledge the Third District's contrary holding in *People v. Carter*, 2016 IL App (3d) 140196, ¶¶ 56-57 (determining that the probation and court services assessment is a fine because the assessment is imposed regardless of whether the defendant used probation office services), but decline to depart from our holding in *Mullen*, and conclude the $10 probation and

court services operations charge is a fee. Accordingly, defendant may not use his presentence incarceration credit to offset this charge.

¶ 31 For the following reasons, we affirm the judgment of the circuit court of Cook County. Defendant is entitled to use his $410 presentence incarceration credit to offset the $15 State Police operations and $50 court systems fines. We order the clerk of the circuit court to modify the fines, fees and costs order accordingly.

¶ 32 Affirmed; fines, fees and costs order modified.

¶ 33 JUSTICE WALKER, dissenting.

¶ 34 Allowing this jury verdict to stand knowing a juror's Facebook friend told her to "vote guilty" encourages the distrust and skepticism that plagues our judicial system. If the citizens of our state are to maintain confidence in our justice system, this jury verdict which was reached with a manifestly partial juror and her Facebook friends must be reversed. Therefore, I respectfully dissent.

¶ 35 The Illinois Supreme Court has observed that premature jury deliberation is improper, but may not be grounds for reversal. However, when there are external influences on a jury, there is reason to doubt the verdict. *People v. Runge*, 234 Ill. 2d 68, 88 (2009). "A defendant is entitled to be tried by 12 impartial and unprejudiced jurors. Thus, if even a single juror's impartiality is overcome by an improper extraneous influence, the accused has been deprived of the right to an impartial jury." *State v. Abdi*, 2012 Vt. Lexis 5, 45 A.3d 29. Trial before a biased jury is structural error. People v. Glasper, 234 Ill.2d 173, 201.

¶ 36 I would find that the prosecution did not overcome the presumption of prejudice from the juror's communication with persons not on the jury. I also urge our supreme court to adopt new

standards and procedures to better address the problem of juror misconduct involving the internet and social media. I would reverse the conviction because the juror's comments on Facebook created the appearance of impropriety.

¶ 37 On December 2, 2015, the trial court instructed the venire:

> "Do not discuss this case with anyone, not your own friends, not your family, nor among yourselves, and do not let anyone, including your fellow jurors, discuss it with you, not until you retire to the jury room to deliberate.
>
> You may consider this an order of the court, and any attempt to violate it should be reported to me at once.
>
> The proper and fair thing to do is to wait until you've heard everything there is before you, there is to hear, before you begin discussing this case among yourselves, and that will be done only in the jury room when you begin your deliberations."

¶ 38 The following morning, after the parties selected her to serve as a juror, Swint posted on Facebook, "As if one day of jury duty wasn't enough smh day 2 I'm soooo over it already!!!!!"

¶ 39 Later that day, the trial court instructed the jury:

> "During the course of trial do not communicate with, provide information personally, in writing, or electronically to anyone about this case[,] not even your own families or friends, courtroom personnel, and also not even among yourselves until instructed otherwise."

¶ 40 At 5:36 p.m. on December 3, 2015, Swint posted to her Facebook page "Lolol oh by the way this is goin n the fact that I gotta keep showin up theren missin wrk…just cuz Ima vote guilty lol." One of her friends responded on Facebook, "vote guilty."

¶ 41 At the hearing on the motion for a new trial, Swint said that she wrote "Ima vote guilty," "but that didn't have nothing to do with anything. I just said it."

¶ 42 "The right to a jury trial guarantees to a criminal defendant a fair trial by a panel of impartial jurors. *** A person is not competent to sit as a juror if that person's state of mind or mental attitude is such that, with him or her as a member of the jury, the defendant will not receive a fair and impartial trial." *People v. Smith*, 341 Ill. App. 3d 729 (2003). "[S]ocial networking by jurors during trial (whether at the courthouse or at home) carries with it a dangerous potential to undermine the fundamental fairness of trial proceedings." Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, Duke L. & Tech. Rev 1, 9 (2012). "[T]he widespread use of social networking sites, such as Twitter and Facebook, [has] exponentially increased the risk of prejudicial communication amongst jurors and opportunity to exercise persuasion and influence upon jurors." *United States v. Juror No. One*, No. 10-703, 2011 WL 6412039, at *6 (E.D. Pa. Dec. 21, 2011).

¶ 43 Jurors sometimes discuss their cases with outsiders, and courts have developed standards for addressing the problem. See *State v. Smith*, 418 S.W.3d 38, 47–48 (Tenn. 2013). However, with social media now available, jurors share their comments publicly with an entire social network – and the comments, once made, become a permanent written record of the juror's musings, with a much broader reach than the comments of jurors before the internet. See David P. Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 Geo. J. Legal Ethics 589 (2011). While the

public nature of juror comments on social media calls for new standards and approaches to juror misconduct, courts thus far have continued to apply standards developed for much less public forms of misconduct. *Smith*, 418 S.W.3d at 47–48.

¶ 44 Under Illinois law, "any communication with a juror during trial about a matter pending before the jury is deemed presumptively prejudicial to a defendant's right to a fair trial. Although this presumption of prejudice is not conclusive, the burden rests upon the State to establish that such contact with the jurors was harmless to the defendant." *People v. Harris*, 123 Ill. 2d 113, 132 (1988). Swint communicated with her Facebook friends about the trial during the trial. Daily has made a sufficient showing to raise the presumption of prejudice. In ruling that the prosecution overcame the presumption of prejudice, the trial court relied on Swint's testimony that her comment "didn't have nothing to do with anything." The trial court found that Swint did not mean what she said, and her participation in deliberations had no prejudicial effect. I disagree.

¶ 45 This case involves circumstance that rise to the requisite level of prejudice such that due process, fairness, integrity, and honor in the operation of our justice system are inherently lacking. Swint publicly violated a direct instruction from the court not to "communicate with *** anyone about this case." I would find, as in *Dimas-Martinez v. State*, 385 S.W.3d 238, 247–49 (Ark. 2011) "the circuit court's failure to acknowledge this juror's inability to follow the court's directions was an abuse of discretion." Moreover, Swint did not merely post a comment on the case, her comment indicated that before hearing any evidence she had decided to vote guilty. "[A] statement of bias is misconduct because bias is misconduct." *Grobeson v. City of Los Angeles*, 190 Cal. App. 4th 778, 788 (2010). In *Andrews v. County of Orange*, 130 Cal. App. 3d 944 (1982), during the trial, a juror said, "This whole thing is a big farce." The appellate court

found the comment warranted a new trial. The court said, "the cost of a new trial is a small price to pay for the vindication of the constitutional right to a trial by a fair and impartial jury." *Andrews*, 130 Cal. App. 3d at 960.

¶ 46 The actual effect of Swint's Facebook friend telling her to "vote guilty" cannot be proved. Therefore, the standard must be whether obtaining advice from her Facebook friends creates prejudice that is inherently lacking in due process, fairness, integrity and honor in the operation of our system of justice. I would find that under traditional standards, the prosecution did not overcome the presumption of prejudice and unfairness in having a juror inclined to vote guilty before she heard any evidence.

¶ 47 I would also find that the public nature of social media, including Facebook, calls for new standards and procedures to address juror misconduct. "Our system of justice 'depends upon public confidence in the jury's verdict,' and the unseemliness of jurors using facebook or Twitter to discuss their jury service may spawn public doubt about the capacity of the modern jury system to achieve justice." St. Eve & Zuckerman, *supra* at 12, *quoting United States v. Siegelman*, 640 F.3d 1159, 1186 (11th Cir. 2011).

¶ 48 The United States Judicial Conference Committee on Court Administration and Case Management recommended that courts should instruct jurors as follows:

> "I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You

> may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions." Judicial Conference Comm. on Ct. Admin. & Case Mgmt., U.S. Cts., *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case* (2012), quoted in *State v. Webster*, 865 N.W.2d 223, 241 (Iowa 2015).

¶ 49 Our supreme court should adopt the instruction, which might have sufficed to warn Swint off her Facebook use.

¶ 50 A commentator has persuasively argued for a change in the standards applicable to review of cases involving a juror's public misconduct. He argues:

> "In order to protect public confidence in the judicial system, instances of juror misconduct via social networking sites and the use of sanctions to address such behavior must be evaluated under the appearance of impropriety standard. Currently, juror misconduct is viewed through the lens of prejudice. *** [T]he prejudice standard does not account for potential damage to the judicial system's public image ***. News stories involving jurors Tweeting about evidence or posting Facebook messages describing deliberations reflect negatively on the judiciary as a whole, regardless of the prejudicial effect of that behavior." Goldstein, *supra* at 603-04; see also *State v. Webster*, 865 N.W.2d 223, 246 (Iowa 2015) (Hecht, J. concurring in part and dissenting in part). "Like judges, jurors must be—and must be perceived to be—disinterested and impartial." *Smith*, 418 S.W.3d at 45. I would find that the courts should order a new trial whenever a juror's conduct creates the appearance of impropriety.

¶ 51 Swint's public comments show a disregard for the court's instructions and make light of the imprecation to listen to the evidence impartially. When courts trivialize acts in derogation of court instructions, the public believes that no consequences will follow from further disregard of court instructions. The majority's disposition may encourage others to disregard court instructions and treat judicial processes as a joke. In this case, the juror's Facebook post declaring she will find the defendant guilty after her Facebook friend tells her to do "vote guilty," is no laughing matter. It violates the bedrock component of our justice system which requires criminal defendants receive a fair trial before an unbiased decision-maker. The only way to rectify this situation is a new trial.