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COMMENTS

THE JUROR WHO KNOWS TOO MUCH: DEALING WITH EXPERT JURORS AFTER *LEDBETTER V. HOWARD*

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I. INTRODUCTION

Juries are one of the most distinct and important aspects of the American justice system. They "act as the conscience of the community and provide a bulwark against governmental oppression."[1] Yet the jury system is not without flaws. Juror misconduct is one negative side effect, and it poses an alarming threat to our justice system. During any given jury trial, there is always the possibility that one or more jurors could behave improperly, and misconduct could arise in several forms.[2] For example, misconduct could occur if a juror has professional knowledge or expertise on the trial subject and substitutes that knowledge or

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1. Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 322 (2005) (citations omitted).

2. *See id.* at 324 (listing different ways juror misconduct can arise).

expertise for evidence presented at trial.[3] In *Ledbetter v. Howard*, for example, a juror-misconduct issue arose in a medical malpractice case when a licensed practical nurse took over the jury deliberations and interposed her personal experiences over the evidence that had been presented at trial.[4] The Oklahoma Supreme Court granted the Ledbetters a new trial based on the nurse's misconduct,[5] but the majority failed to deliver any broader pronouncements about how to deal with a situation when a juror's knowledge or expertise covers a specific trial issue.[6] Unfortunately, there is no easy solution for dealing with such a circumstance. Should courts allow jurors to testify about another juror's possible misconduct? Or will juror testimony open the door too widely to fraud and corruption?[7] Is there a way to lower the risk of juror misconduct without compromising our justice system's fundamental goals? This Comment will address each of these questions and attempt to find a practical solution for Oklahoma courts to deal with juror misconduct in the wake of *Ledbetter v. Howard*.

II. HISTORY AND BACKGROUND

A. Oklahoma Common Law: The Anti-Impeachment Rule

Before the Oklahoma Evidence Code was enacted in 1978, Oklahoma courts had consistently followed a categorical anti-impeachment rule "prohibiting juror testimony for the purpose of [impeaching] . . . a jury verdict."[8] In *Colcord v. Conger*, the Supreme Court of the Territory of Oklahoma set forth one of the earliest versions of this rigid anti-impeachment rule:

> Upon grounds of public policy, . . . no . . . sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in

3. *See, e.g.*, Ledbetter v. Howard, 2012 OK 39, ¶¶ 14–15, 276 P.3d 1031, 1036.
4. *Id.*
5. *Id.* ¶ 2, 276 P.3d at 1033.
6. *Id.* ¶ 18, 276 P.3d at 1037 ("This is not a case in which we need make any sweeping statement as to when or how a professional may utilize individual training or expertise in the deliberative process or even may be allowed to communicate the same to fellow fact finders." (citations omitted)).
7. *See* Keith v. State, 1912 OK CR 144, 123 P. 172, 174.
8. Willoughby v. City of Okla. City, 1985 OK 64, ¶ 9, 706 P.2d 883, 886 (citations omitted).

> it, or that they misunderstood the charge of the court, or that they otherwise mistook the law or the result of their finding, or that they agreed on their verdict by average or lot.[9]

Despite Oklahoma's consistent adherence to the anti-impeachment rule, there were a few early cases that broke the mold and briefly allowed juror affidavits to impeach verdicts.[10] In *Carter State Bank v. Ross*, the Court acknowledged the general anti-impeachment rule,[11] but clarified it by holding that a juror affidavit could be used "to prove something that does not inhere in the verdict, an overt act, open to the knowledge of all the jury and not alone with the personal consciousness of one."[12] In another case that questioned the anti-impeachment rule, *Harrod v. Sanders*, the Court qualified the general anti-impeachment rule with an exception that allowed juror affidavits to impeach a verdict if the affidavits revealed "any matter . . . which does not essentially inhere in the verdict itself."[13]

Although these cases had appeared to carve out a permanent exception to the anti-impeachment rule, the exception was overruled by subsequent cases. In *Egan v. First National Bank of Tulsa*, just two years after *Carter State Bank* had been decided, the Oklahoma Supreme Court eliminated the anti-impeachment rule exception and overruled *Carter State Bank* in part.[14] The Court reasoned that a categorical anti-impeachment rule "furnishes a surer foundation for justice . . . than is found in those cases which attempt to . . . furnish qualified conditions

9. Colcord v. Conger, 1900 OK 96, ¶ 6, 62 P. 276, 276–77 (citations omitted) (internal quotation marks omitted).

10. *See, e.g.*, Carter State Bank v. Ross, 1915 OK 878, ¶ 2, 152 P. 1113, 1113–14, *overruled in part by* Egan v. First Nat'l Bank of Tulsa, 1917 OK 541, 169 P. 621; Harrod v. Sanders, 1929 OK 228, ¶¶ 25–26, 278 P. 1102, 1104–05, *overruled in part*, Wolff v. Okla. Ry. Co., 1939 OK 113, 87 P.2d 671; Mo. O.&G. Ry. Co. v. Smith, 1916 OK 91, ¶ 8, 155 P. 233, 236. While *Smith* has not been overruled, it has been "discredited by later authorities." 2 LEO H. WHINERY & ALFRED P. MURRAH, OKLAHOMA EVIDENCE: COMMENTARY ON THE LAW OF EVIDENCE, § 24.06 n.5 (2d ed. 2000).

11. *Carter State Bank*, 1915 OK 878, ¶ 2, 152 P. at 1113.

12. *Id.* ¶ 2, 152 P. at 1113–14.

13. *Harrod*, 1929 OK 228, ¶ 25, 278 P. at 1104 (quoting *Smith*, 1916 OK 91, ¶ 8, 155 P. at 236) (internal quotation marks omitted).

14. *Egan*, 1917 OK 541, ¶¶ 9–12, 169 P. at 623 ("[The anti-impeachment] doctrine has uniformly been adhered to by this court, except in [*Carter State Bank*], not yet officially reported, and, in so far as the holding in that case is in conflict with the views herein expressed, the same is overruled.").

under which a juror may impeach the verdict."[15] Similarly, in *Wolff v. Oklahoma Railway Co.*, the Court overruled *Harrod* "insofar as it conflict[ed] with [*Wolff*]" and steadfastly held that there was no reason to change the rule prohibiting the testimony or affidavit of a juror to impeach the verdict.[16]

B. Effect of § 2606(B) of the Oklahoma Evidence Code

After a lengthy and almost consistent adherence to the categorical anti-impeachment rule,[17] the Oklahoma Legislature altered this trend in 1978 with the enactment of § 2606(B) of the Oklahoma Evidence Code.[18] Section 2606(B) begins by stating the general anti-impeachment rule:

> [A] juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations.[19]

But the statute also provides an exception that allows jurors to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[20]

In *Willoughby v. City of Oklahoma City*, the Oklahoma Supreme Court had its first chance to interpret the Oklahoma Evidence Code as it applied to whether a juror could testify about extraneous prejudicial information to impeach the verdict.[21] In that case, a juror conducted an

15. *Id.* ¶ 5, 169 P. at 622.
16. Wolff v. Okla. Ry. Co., 1939 OK 113, ¶ 8, 87 P.2d 671, 673.
17. *See* WHINERY & MURRAH, *supra* note 10, § 24.06 n.5 (summarizing pre-code Oklahoma caselaw that followed the categorical anti-impeachment rule).
18. *See* Willoughby v. City of Okla. City, 1985 OK 64, ¶ 19, 706 P.2d 883, 887–89 (applying the exception to the categorical anti-impeachment rule under § 2606(B) and recognizing that the holding "liberaliz[es] the use of juror testimony to impeach verdicts in qualified situations under section 2606(B)"); *see also* OKLA. STAT. tit. 12, § 2606(B) (OSCN through 2013 Leg. Sess.).
19. OKLA. STAT. tit. 12, § 2606(B).
20. *Id.*
21. *Willoughby*, 1985 OK 64, ¶ 8, 706 P.2d at 886.

independent investigation on a material issue in a wrongful-death case and then shared the results of that investigation with the rest of the jury, even though this information had not been presented at trial.[22] The Oklahoma Supreme Court concluded that "[a] juror is competent to testify concerning prejudicial extraneous information or influences injected into . . . jury deliberations."[23] The Court placed an emphasis on the fact that both parties had been denied the chance to challenge the evidence from the juror's independent investigation, and ultimately ruled that the juror's investigation had introduced extraneous prejudicial information.[24] Thus, jury testimony about the matter was permissible under § 2606(B)'s exception.[25]

After *Willoughby*, the Oklahoma cases that have allowed a juror's testimony to impeach a verdict generally involved situations where "jurors brought into the jury's deliberations information obtained . . . outside the regular evidentiary process."[26] For instance, in *Thompson v. Krantz*, the Oklahoma Court of Civil Appeals ruled that a juror had injected extraneous prejudicial information into deliberations when she conducted internet research to help her understand what expert witnesses had said in a medical negligence case and then relayed that information to the rest of the jury.[27] On the other hand, in *Oxley v. City of Tulsa*, the Court held that there was insufficient proof to allege extraneous prejudicial information when a juror claimed that another juror strong-armed the verdict but only offered description of the deliberation as proof.[28] Thus, even though Oklahoma's anti-impeachment rule has an exception, courts are still mindful of the dangers caused by verdict impeachment. As such, juror testimony must clearly show extraneous prejudicial information before a court will allow it,[29] and if such testimony is questionable, courts will likely continue to prohibit it.[30]

22. *Id.* ¶ 4, 706 P.2d at 885.
23. *Id.* ¶ 14, 706 P.2d at 887.
24. *Id.*
25. *Id.*
26. Walker v. Ison Transp. Servs., Inc., 2007 OK CIV APP 14, ¶ 11, 152 P.3d 894, 896.
27. Thompson v. Krantz, 2006 OK CIV APP 60, ¶¶ 17–20, 137 P.3d 693, 697–98.
28. *See, e.g.*, Oxley v. City of Tulsa, 1989 OK 166, 794 P.2d 742, 747 (holding that a juror's affidavit was inadmissible when the juror "describe[d] at length the deliberation process" and gave "his perception that [the jury foreman] coerced the jury into its verdict").
29. OKLA. STAT. tit. 12, § 2606(B) (OSCN through 2013 Leg. Sess.).
30. *See* Weatherly v. State, 1987 OK CR 28, ¶ 13, 733 P.2d 1331, 1335 (arguing that

C. Underlying Policy Considerations

The rationale behind Oklahoma's anti-impeachment rule has undergone a slight shift following the enactment of the Oklahoma Evidence Code.[31] Before the Evidence Code, Oklahoma courts were primarily concerned with preserving jury autonomy in reaching a verdict and less concerned with ensuring impartial juries.[32] Originally, the rule was intended to "lend[] finality to judgments, rather than leaving finality to a change of mind or second thoughts by a juror."[33] Likewise, in *Keith v. State*, the Oklahoma Court of Criminal Appeals acknowledged that the anti-impeachment rule could lead to unfair outcomes by excluding evidence that may indicate juror misconduct, but the court concluded that "to receive such evidence opens wide the door to corrupt practices."[34] The court decided that the best approach was to prohibit juror affidavits from impeaching verdicts because the finality of jury verdicts outweighed the need to examine juror misconduct.[35]

In contrast, the cases decided after the enactment of the Oklahoma Evidence Code took a more balanced approach in light of the underlying policy considerations of the anti-impeachment rule.[36] While these cases acknowledged the traditional policy considerations behind the anti-impeachment rule, they ultimately concluded that "the assurance of a fair trial and the preservation of judicial integrity outweighed such considerations."[37] Verdict finality and fraud prevention are still important goals to Oklahoma courts, so juror affidavits are only allowed if they

in situations where it is difficult to determine if juror testimony constitutes extraneous prejudicial information, courts should rule in favor of protecting the finality of the jury verdict and not allow the testimony).

31. *See* WHINERY & MURRAH, *supra* note 10, § 24.06 (observing that § 2606(B) recognized Oklahoma's traditional goal of ensuring verdict finality, but also gave courts the ability to address juror misconduct through the use of juror testimony).

32. *See* Egan v. First Nat'l Bank of Tulsa, 1917 OK 541, ¶ 8, 169 P. 621, 623 (noting a prohibition against jurors from testifying about misconduct might occasionally allow juror misconduct to go unpunished, but arguing that the consequences of allowing jurors to testify to impeach verdicts would be worse because it "would open the door to the most pernicious arts and tampering with jurors" (quoting McDonald v. Pless, 238 U.S. 264, 268 (1915)) (internal quotation marks omitted)).

33. *Weatherly*, 1987 OK CR 28, ¶ 11, 733 P.2d at 1335.

34. Keith v. State, 1912 OK CR 144, 123 P. 172, 174.

35. *Id.*

36. *See infra* Part IV.A.

37. Willoughby v. City of Okla. City, 1985 OK 64, ¶ 13, 706 P.2d 883, 887 (discussing Kiser v. Bryant Elec. (*In re* Beverly Hills Fire Litig.), 695 F.2d 207, 213 (6th Cir. 1982), and its acknowledgment of the necessity in a fair trial).

involve extraneous prejudicial information or outside influence.[38] Thus, the new approach attempts to strike a balance by allowing jurors to testify about misconduct on a limited basis.[39]

III. LEDBETTER V. HOWARD

A. Facts

Guy Ledbetter, a diabetic, was subject to increased medical attention to address his worsening diabetic condition.[40] Around 1997, he started to show signs of "peripheral neuropathy, . . . a diabetic complication [that] affect[s] the nerves and which can lead to serious leg and foot complications."[41] In 2005, Ledbetter's left foot and leg swelled up, turned red, and began hurting.[42] Soon after, he went to see his physician, Dr. Reed, who diagnosed Ledbetter with an infection called cellulitis.[43] Ledbetter had a follow-up appointment on June 7, and since Dr. Reed noted no improvement, he admitted Ledbetter to the hospital to administer intravenous antibiotics.[44] Dr. Reed also ordered x-rays because he was worried about a possible bone infection,[45] but Dr. Howard, the defendant, read the x-rays and concluded that Ledbetter's foot was "radiographically normal."[46] Ledbetter was released from the hospital on June 11.[47]

Ledbetter's condition did not improve, however, so he received a second x-ray on July 5 that revealed that his condition had drastically declined.[48] Eventually, Ledbetter went to see Dr. Lund, a podiatrist, who discovered that Ledbetter had Charcot Foot,[49] a nerve disease related to diabetes that causes the bony structure of the foot to deteriorate.[50] Ledbetter underwent surgery to attach an external fixator to his foot.[51]

38. *See* OKLA. STAT. tit. 12, § 2606(B) (OSCN through 2013 Leg. Sess.).
39. *See* WHINERY & MURRAH, *supra* note 10, § 24.06; *see also infra* Part IV.
40. Ledbetter v. Howard, 2012 OK 39, ¶ 3, 276 P.3d 1031, 1033.
41. *Id.*
42. *Id.* ¶ 4, 276 P.3d at 1033.
43. *Id.*
44. *Id.* ¶ 5, 276 P.3d at 1033.
45. *Id.*
46. *Id.* ¶ 5, 276 P.3d at 1034.
47. *Id.* ¶ 6, 276 P.3d at 1034.
48. *Id.*
49. *Id.* ¶¶ 6–7, 276 P.3d at 1034.
50. *Id.* ¶ 6 n.3, 276 P.3d at 1034 n.3 (citations omitted).
51. *Id.* ¶ 7, 276 P.3d at 1034.

After the external fixator had been removed, he was supposed to permanently wear a fitted brace, but he stopped wearing it because it was uncomfortable.[52]

B. Procedural History

Ledbetter and his wife sued Dr. Howard for medical negligence.[53] The Ledbetters alleged that Dr. Howard negligently misread the first x-rays, which delayed the treatment of Ledbetter's foot and caused the injury.[54] The jury returned a verdict in favor of Dr. Howard, and the Ledbetters filed a motion for judgment notwithstanding the verdict, which the trial court denied.[55] The Ledbetters also filed a motion for new trial in which they alleged juror misconduct during deliberations.[56] To support this motion, they presented a sworn affidavit from Dayle Baker, a juror who alleged misconduct on the part of the jury foreperson,[57] a licensed practical nurse with experience in dealing with diabetic patients who experience complications;[58] the foreperson did not, however, have experience with patients who suffer from Charcot Foot.[59] During voir dire, the foreperson promised that "nothing about her experiences would cause her to be biased and that she would not substitute her experience for the testimony of the witnesses at trial."[60]

Baker alleged that the foreperson had extensively relied on her professional experience during deliberations and shared her experiences with the other jurors.[61] Specifically, Baker claimed that the foreperson did the following during deliberations: she claimed she "had been in [a] similar situation[] as Dr. Howard and that it was commonplace to note a patient's condition as being normal when it was not"; she stated that "all diabetics have podiatrists [and] questioned why Ledbetter did not have [one]"; she opined that "Ledbetter had prior foot problems and [had] not follow[ed] his doctor's instructions because, in her experience, most diabetics [did] not follow [their doctors'] instructions"; she also believed

52. *Id.*
53. *Id.* ¶ 8, 276 P.3d at 1034.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* ¶ 15 & n.22, 276 P.3d at 1036 & n.22.
58. *Id.* ¶ 14, 276 P.3d at 1036.
59. *Id.*
60. *Id.*
61. *Id.* ¶ 15, 276 P.3d at 1036.

Ledbetter was taking more insulin than what a doctor would have prescribed; and she claimed that the Ledbetters would "likely have had the same problems and result regardless of any delay in treatment" since he had Charcot Foot.[62]

After examining the evidence, the trial court found that juror misconduct had prejudiced Ledbetter and it sustained the Ledbetters' motion for a new trial.[63] However, the Court of Civil Appeals reversed and remanded the trial court's decision and ordered judgment in favor of Dr. Howard.[64] Subsequently, the Ledbetters appealed to the Oklahoma Supreme Court.[65]

C. Opinion

Justice Watt wrote for the Oklahoma Supreme Court, which determined that the foreperson's statements had been improper because "[t]hey were: made as statements of fact by the foreperson; involved purportedly extraneous information arising solely from the foreperson's professional experience; and were intended to sway the jury toward a defendant's verdict."[66] As a result, the Court affirmed the trial court's decision to grant the Ledbetters a new trial.[67]

While examining the evidence, the Court first decided that "[t]he juror's affidavit regarding [the foreperson's] statements was admissible under" § 2606(B) of the Oklahoma Evidence Code because the statements included extraneous prejudicial information.[68] The Court emphasized the fact that the foreperson had done precisely what she had promised she would not do: she substituted her own experiences during deliberations in place of what had been presented at trial.[69] The majority reasoned that since the foreperson had given an untruthful answer during voir dire, it was unnecessary to decide whether the statements she had made during deliberation were biased against the Ledbetters or had

62. *Id.* (quoting Aff. of Dayle Baker, Pl.'s Ex. D to Mot. for JNOV, Ledbetter v. Howard, 2012 OK 39, 276 P.3d 1031 (Mar. 24, 2008) (internal quotation marks omitted)).

63. *Id.* ¶ 8, 276 P.3d at 1034.

64. *Id.*

65. *See id.* ¶ 1, 276 P.3d at 1033.

66. *Id.* ¶ 16, 276 P.3d at 1036.

67. *See id.* ¶ 22, 276 P.3d at 1038.

68. *Id.* ¶ 16, 276 P.3d at 1036 (citing OKLA. STAT. tit. 12, § 2606(B) (OSCN through 2013 Leg. Sess.)).

69. *Id.* ¶ 18, 276 P.3d at 1037.

influenced any of the other jurors; it was enough that the Ledbetters had been deprived of the chance to further inquire into the foreperson's professional experience and whether that experience would cause her to be biased.[70] Specifically, the Court focused on the foreperson's statement that Ledbetter would have probably had the same problems regardless of the delay in treatment since he had Charcot Foot—a statement "based solely on her experience and training in treating diabetics, **not** on the basis of the evidence presented."[71] While the Court affirmed the trial court's decision that the foreperson's statements constituted extraneous prejudicial information,[72] it unfortunately chose not to address the broader issue of how to deal with jurors who have specific knowledge on a subject of trial.[73]

Justice Gurich wrote a special concurrence in which she agreed that "the Defendants did not overcome the heavy burden of proving that the trial judge [had] abused his discretion in granting a new trial."[74] However, she concurred because the majority had failed to "address whether and to what extent jurors may rely upon professional or occupational expertise during deliberations and whether a juror's statements, based on such expertise, constitute extraneous prejudicial information."[75] Justice Gurich believed the majority should have created an instruction to inform jurors what they may consider or share if they possess "professional or occupational expertise in an area" related to the subject of trial.[76] Specifically, Justice Gurich would have had the trial court give a jury instruction explaining that jurors may use their "expertise and experience" to inform their own deliberation as well as to share such "expertise and experience with other members of the jury" if the information applies to evidence already introduced at trial.[77] Jurors may not, however, "consider extra facts or law, not introduced at trial, that are specific to parties or an issue in the case."[78] Justice Gurich also suggested that courts should only set aside jury verdicts "when it is clear a juror [with professional or occupational expertise] has introduced

70. *Id.* ¶ 19, 276 P.3d at 1037 (quoting Dominion Bank of Middle Tenn. v. Masterson, 1996 OK 99, ¶ 7, 928 P.2d 291, 293) (internal quotation marks omitted).
71. *Id.*
72. *See id.* ¶ 22, 276 P.3d at 1038.
73. *Id.* ¶ 18, 276 P.3d at 1037.
74. *Id.* ¶ 1, 276 P.3d at 1038 (Gurich, J., concurring).
75. *Id.*
76. *Id.* ¶ 3, 276 P.3d at 1039.
77. *Id.* (citing Kendrick v. Pippin, 252 P.3d 1052, 1063 (Colo. 2011)).
78. *Id.*

specific facts or legal content relevant to the case from outside the record."[79]

In dissent, Justice Winchester and Justice Edmondson expressed disagreement with the majority opinion because they did not think "a juror's personal experiences constitute[d] an external influence under the meaning of Section 2606(B)."[80] Justice Winchester, who wrote for the dissent, did not think the foreperson's statements were extraneous since they had been based on the foreperson's own personal experience in dealing with diabetic patients.[81] He concluded that "[a] juror's personal experience, be it professional or otherwise, so long as not directly related to the facts and parties in the underlying litigation, does not constitute a prejudicial, external influence necessitating a new trial."[82] Justice Winchester did not specify what it would take for a juror's personal experience to directly relate to the facts and parties of the case; he only stated his belief that the foreperson's statements in *Ledbetter* had not directly related to the facts and parties of that case.[83] Accordingly, the dissent would have found the juror affidavit inadmissible and sustained the jury verdict in favor of the defendant.[84]

IV. ANALYSIS

A dilemma occurs when two fundamental goals of our justice system are pitted against one another, and cases with potential juror misconduct present such an example. On one hand, jury autonomy is a bedrock principle of the American justice system worthy of enhanced protection.[85] On the other hand, ensuring impartial juries and preventing

79. *Id.* ¶ 4, 276 P.3d at 1039.
80. *Id.* ¶ 1, 276 P.3d at 1040 (Winchester, J., dissenting).
81. *Id.* ¶ 6, 276 P.3d at 1042.
82. *Id.* ¶ 7, 276 P.3d at 1042.
83. *See id.*
84. *Id.* ¶ 1, 276 P.3d at 1041.
85. *See, e.g.*, Weatherly v. State, 1987 OK CR 28, ¶¶ 11–14, 733 P.2d 1331, 1335 (discussing ways to protect jury deliberations because inquiry into those decisions could "destroy the very purpose of trial by jury" (quoting Wheeler v. State, 1939 OK CR 38, 90 P.2d 49, 53) (internal quotation marks omitted)); Keith v. State, 1912 OK CR 144, 123 P. 172, 174 (describing how juror verdicts could steal the court's right to grant a new trial, a situation which would be "[m]anifestly . . . inconsistent with the theory of our judicial system, revolutionary in character, and contrary to public policy"); Egan v. First Nat'l Bank of Tulsa, 1917 OK 541, ¶ 12, 169 P. 621, 623 (noting that the anti-impeachment rule is to "prevent overzealous litigants and a curious public from prying into deliberations which are intended to be, and should be, private, frank, and free discussions

jury tampering are goals necessary to ensure a fundamental right that is enshrined in the Sixth Amendment of the Constitution.[86] While the goals on both sides of this conflict are worthy of protection, choosing one side necessarily undermines the other to some extent. Prohibiting juror testimony to impeach a verdict means courts will refuse to admit what might be the only available evidence of juror misconduct—affidavits from other jurors.[87] By allowing juror affidavits to impeach verdicts, however, courts could potentially open the door to endless attacks on jury verdicts thereby threatening jury autonomy.[88] Although there is no easy solution to this conflict, courts can strike a satisfactory balance between these competing goals if they allow juror affidavits to impeach verdicts *only* when they reveal extraneous information.[89] In other words, limited inquiry into the fairness of a jury verdict can both ensure verdict finality and protect jury impartiality.

A. Striking the Balance Between Verdict Finality and Jury Impartiality

In recent years, Oklahoma courts have focused on ensuring jury impartiality by allowing jurors to testify about extraneous prejudicial information,[90] and this shift created a narrow exception to address allegations of biased jurors.[91] While detractors might protest that juror testimony opens the door to jury fraud and leaves no verdict safe from

of the questions under consideration").

86. *See* U.S. CONST. amend. VI.

87. McDonald v. Pless, 238 U.S. 264, 268 (1915) (noting that an anti-impeachment rule "may often exclude the only possible evidence of [juror] misconduct").

88. *See id.* (arguing that allowing juror testimony to impeach verdicts would put every jury verdict in danger of being overturned).

89. *See, e.g.*, Willoughby v. City of Okla. City, 1985 OK 64, ¶ 14, 706 P.2d 883, 887 (allowing jurors to testify regarding only extraneous prejudicial information whereas previous cases under the anti-impeachment rule would have prohibited jurors to testify about extraneous prejudicial information, even at the cost of potentially upholding an improperly influenced verdict); *see also Weatherly*, 1987 OK CR 28, ¶ 13, 733 P.2d at 1335 (noting that in situations where it is difficult to draw the line as to whether something constitutes extraneous prejudicial information, "the line should be drawn in favor of juror privacy" and juror testimony should be prohibited).

90. *See, e.g.*, Thompson v. Krantz, 2006 OK CIV APP 60, ¶ 14, 137 P.3d 693, 697.

91. *Compare* Keith v. State, 1912 OK CR 144, 123 P. 172, 172. ("It has been repeatedly decided by the unanimous opinions of this court that the affidavits of jurors cannot be received for the purpose of impeaching their verdict."), *with Willoughby*, 1985 OK 64, ¶ 14, 706 P.2d at 887 ("A juror is competent to testify concerning prejudicial extraneous information or influences injected into . . . jury deliberations . . . .").

inquiry,[92] these fears are unwarranted. Jury testimony about extraneous prejudicial information will not undermine the traditional goal of ensuring verdict finality because this narrow exception will not affect the bulk of jury verdicts. After all, Oklahoma's general rule is clear: jurors are not allowed to testify about "any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind . . . during deliberations."[93] Instead, courts will only allow juror testimony when jurors bring in information that was not presented at trial, and judges will only consider the testimony for the limited purpose of impeaching a verdict.

The caselaw that emerged after Oklahoma had adopted the Evidence Code illustrates the limits of this exception. In *Walker v. Ison Transportation Services, Inc.*, jurors testified about how other jurors had speculated that the defendant lacked liability insurance and could not pay for a large verdict, even though this information had not been presented at trial.[94] The Oklahoma Court of Civil Appeals prohibited the testimonies from being used as evidence because it concluded that the information did not constitute extraneous information.[95] The court reiterated that jurors are allowed to draw inferences from trial, and some speculation is inevitable, but the court distinguished the type of speculation that occurred in *Walker* from "those instances where jurors independently and improperly introduce into deliberations matters purporting to possess evidentiary probity and weight."[96] Further, in *Weatherly v. State*, the Oklahoma Court of Criminal Appeals explained that "the line should be drawn in favor of juror privacy, and the testimony should be disallowed" anytime it is difficult to decide whether something constitutes extraneous prejudicial information.[97] In other words, juror testimony is not only limited in purpose, but it must also unequivocally show extraneous prejudicial information before a court will admit it as evidence to impeach a verdict.[98]

92. *See* Egan v. First Nat'l Bank of Tulsa, 1917 OK 541, ¶ 8, 169 P. 621, 623 (citations omitted).

93. OKLA. STAT. tit. 12, § 2606(B) (OSCN through 2013 Leg. Sess.).

94. Walker v. Ison Transp. Servs., Inc., 2007 OK CIV APP 14, ¶ 4, 152 P.3d 894, 895.

95. *Id.* ¶¶ 11–12, 152 P.3d at 896.

96. *Id.* ¶ 11, 152 P.3d at 896.

97. Weatherly v. State, 1987 OK CR 28, ¶ 13, 733 P.2d 1331, 1335.

98. *See id.*

In the end, this approach is much more balanced than the categorical anti-impeachment rule in execution because the categorical rule does not fully prevent jurors from using their experiences or expertise to improperly sway verdicts. For example, in *Ledbetter*, the foreperson was presumably the most knowledgeable juror about diabetic complications since she was a licensed practical nurse with experience in dealing with diabetic patients.[99] Moreover, it is conceivable that the foreperson would use her professional experiences to take over the deliberations and that other jurors would defer to her since she knew the most about the subject. This situation should have raised a grave concern about juror bias, yet the *Ledbetter* Court would not have been able to investigate any potential misconduct under the categorical anti-impeachment rule because it would have been prohibited from hearing testimony about what the foreperson had told the other jurors.[100] Instead, under the balanced approach, the *Ledbetter* Court was able to discover juror misconduct and prevent an unfair jury verdict.[101]

To be fair, this balanced approach is not without its flaws. Unfortunately, there is always the possibility that a juror could impeach a verdict by fabricating extraneous prejudicial information. Although this risk is possible, it should not warrant the complete prohibition of juror testimony because courts already do not allow juror testimony in cases where it is difficult to draw the line as to whether something is extraneously prejudicial.[102] Furthermore, the judge will always hear the testimony before deciding whether to use it as evidence to impeach a verdict.[103] The Sixth Amendment guarantees "the right to . . . an impartial jury,"[104] and since juror misconduct could lead to a violation of

99. Ledbetter v. Howard, 2012 OK 39, ¶¶ 14–15, 276 P.3d 1031, 1036.

100. *See, e.g.*, Keith v. State, 1912 OK CR 144, 123 P. 172, 172 (applying the pre-Code anti-impeachment rule and recognizing that "[i]t has been repeatedly decided by the unanimous opinions of this court that the affidavits of jurors cannot be received for the purpose of impeaching their verdict").

101. *See Ledbetter*, 2012 OK 39, ¶ 2, 276 P.3d at 1033 (determining that the jury foreperson's statements constituted extraneous prejudicial information and sustaining the trial court's grant of a new trial); *see also supra* Part III.C.

102. *See Weatherly*, 1987 OK CR 28, ¶ 13, 733 P.2d at 1335.

103. *See, e.g.*, Walker v. Ison Transp. Servs., Inc., 2007 OK CIV APP 14, ¶ 4, 152 P.3d 894, 895 (showing that the plaintiffs attached a juror's affidavit of alleged juror misconduct in support of their motion for a new trial based on juror misconduct, but the judge ruled that the information alleged in the affidavit did not amount to extraneous prejudicial information, so the judge prohibited the juror's affidavit from impeaching the verdict).

104. U.S. CONST. amend. VI.

a person's constitutional right to an impartial jury, it is imperative that courts investigate allegations of misconduct by any means available. Just as *juries* are given the discretion to determine the credibility of a *party's* testimony in a trial,[105] *judges* should be given the discretion to determine the factual credibility of a *juror's* testimony. By doing so, Oklahoma would continue to safeguard jury verdicts, and the need to protect jury impartiality would outweigh the potential for fraud because only the most credible claims of juror misconduct would be considered by judges for admission into evidence.

B. Potential Alternatives to Prevent Juror Misconduct

While allowing jurors to testify about extraneous prejudicial information is the best overall approach to deal with juror misconduct, it is not the only measure courts can take to ensure jury impartiality. One possible option would be to exclude people from serving on juries when they have particularized knowledge relevant to a case.[106] This could be achieved during voir dire by allowing attorneys to challenge jurors for cause when jurors have particular knowledge on the subject of the trial.[107] At present, however, courts "have refused to find that expertise alone is sufficient grounds for striking a professional juror for cause."[108] In fact, Oklahoma has recently taken measures to encourage professionals to serve on juries,[109] and "judges generally defer to the

105. *See* VERNON'S OKLA. FORMS 2D, *Civil*, *in* OKLAHOMA UNIFORM JURY INSTRUCTIONS 1.4 (2012) (instructing jurors that they can draw reasonable inferences from testimony and evidence to decide a case).

106. *See* Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493, 527 (2002) ("[B]ecause juror expertise cannot properly be screened through the *Daubert* process, the only way to guard against spurious juror expertise is to ensure that jurors *do not have* expertise and so cannot misuse it in the jury room. The only way the judge can perform the requisite gatekeeper role is to strike the expert juror from the panel at the outset.").

107. *See* Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL'Y REV. 239, 253 (2007) ("Attorneys seeking to eliminate professionals from jury panels have only two tools at their disposal: the peremptory challenge and the challenge for cause. . . . [T]he challenge for cause is limited substantively.").

108. *Id.* at 256.

109. Ledbetter v. Howard, 2012 OK 39, ¶ 2 n.2, 276 P.3d 1031, 1038 n.2 (Gurich, J., concurring) (explaining that Oklahoma amended OKLA. STAT. tit. 38, § 28 in 2004 "to encourage jury service by business and other professionals by reducing the time commitment and allowing professionals flexibility in rescheduling to meet the needs of their offices").

good will of the juror" if a juror says, during voir dire, that he or she will be unbiased.[110] Given these trends, it is unlikely that Oklahoma courts would consider allowing attorneys to strike jurors for cause when jurors have particularized knowledge of a trial's key facts.

Moreover, it may be difficult to draw the line as to what actually constitutes particularized knowledge.[111] Does particularized knowledge only include professional or occupational knowledge, or is it more inclusive? For example, a person married to a diabetic likely would have considerable knowledge of diabetes, but does that person have enough expertise on the subject to justify exclusion? If such a situation constituted particularized knowledge, it could be quite arduous for courts to find 12 people without particularized knowledge for any given case. Jurors would have to be almost entirely unfamiliar with the subject of the trial to qualify for the jury, and such an approach is simply too impractical.[112]

On the other hand, if particularized knowledge were defined more narrowly and only included professional experience, exclusion would arbitrarily fail to apply to individuals with substantial knowledge obtained without professional training. Jurors who lack professional training but have above-average knowledge on a subject can raise the same concerns as professional jurors. Furthermore, excluding only professionals from jury service would make juries less representative of the public by eliminating a professional's perspective. Thus, it is unrealistic to attempt to construct a system that fully eliminates the possibility of a knowledgeable juror swaying the verdict because there is no way to strike all jurors with particularized knowledge. While attorneys can always strike knowledgeable jurors with peremptory challenges during voir dire,[113] these challenges are limited in number.[114]

110. Denise M. O'Malley, *Impeaching a Jury Verdict, Juror Misconduct, and Related Issues: A View from the Bench*, 33 J. MARSHALL L. REV. 145, 182 (1999).

111. *See* Kirgis, *supra* note 106, at 504 ("The first and most difficult step in addressing the problem of juror expertise is to define the point at which the knowledge a juror brings to the case so far exceeds common experience as to call for filtering through the evidentiary process.").

112. *See* John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 395 (1985) ("To require jurors to be completely ignorant of the world and its ways except so far as they are instructed by evidence formally introduced would place an intolerable burden on the adjudicatory process.").

113. OKLA. STAT. tit. 12, § 573 (OSCN through 2013 Leg. Sess.); *see also* Mushlin, *supra* note 107, at 253.

114. OKLA. STAT. tit. 12, § 573 (limiting each party to three peremptory challenges in

While peremptory challenges usually do not require justification,[115] attorneys may be unwilling to use them on knowledgeable jurors since there is usually no way of knowing the extent of the juror's knowledge and whether it will lead to bias against either party.[116] In sum, excluding people with particularized knowledge from serving as jurors—irrespective of how particularized knowledge is defined—is an untenable option.

A more sensible option would be to instruct juries on how much they are allowed to rely on personal or professional experience during deliberations.[117] Justice Gurich made a similar suggestion in her *Ledbetter* concurrence, but she limited her instruction to those jurors with "professional or occupational expertise."[118] However, there are various approaches that can limit the use of particularized knowledge by all jurors. One approach would be to restrict jurors from sharing their professional or particularized knowledge with the rest of the jury during deliberations.[119] Texas followed a similar approach up until the mid-1980s,[120] but such an approach is misguided because a jury should be comprised of diverse backgrounds and unique personal experiences to best interpret the evidence presented. While an auto mechanic and an accountant have different perspectives on many matters, both are valuable to the composition and operation of a jury. Juries should be able to consider a wide range of perspectives before reaching a conclusion, and it would be detrimental to the overall process to force jurors to check their perspectives at the door just because they may have particularized knowledge on a relevant subject.[121]

civil litigation); *see also* OKLA. STAT. tit. 22, § 655 (limiting peremptory challenges in criminal trials to nine each in first degree murder trials, five each in other felonies, and three each in non-felony prosecutions).

115. OKLA. STAT. tit. 12, § 573; *see also* Mushlin, *supra* note 107, at 253.

116. *See* Mushlin, *supra* note 107, at 254.

117. *See* Ledbetter v. Howard, 2012 OK 39, ¶ 3, 276 P.3d 1031, 1039 (Gurich, J., concurring).

118. *Id.*

119. *See* Kirgis, *supra* note 106, at 515 ("The approach adopted by the older Texas cases is by far the most restrictive. Those cases effectively barred a juror from offering any background knowledge except that which is share by virtually everyone.").

120. *See id.* at 505 n.69 (providing examples of the historical development of the rule on the impeachment of jury verdicts in Texas). In fact, Texas followed an approach that essentially limited juror "background knowledge except that which is shared by virtually everyone." *Id.* at 515.

121. *See id.* at 521 ("The problem with [only allowing a narrow range of juror background knowledge] is that it is so restrictive it compels overbearing intrusion into the

The most practical approach would be for Oklahoma courts to give all juries an instruction informing them of the permissible ways to use their personal or professional experience during deliberations.[122] In *Ledbetter*, Justice Gurich proposed the following jury instruction:

> Should you have professional or occupational expertise in an area that is relevant to this litigation, you may rely on that expertise and experience in informing your deliberations. You may share that expertise and experience with other members of the jury as it applies to the specific evidence introduced in this case. However, you may not consider extra facts or law, not introduced at trial, that are specific to parties or an issue in this case that may be based on your professional or occupational expertise.[123]

But this instruction does not directly address the juror who has only *personal* expertise on the subject of the trial rather than professional or occupational expertise. Two alterations to Justice Gurich's jury instruction would address this deficiency. To start, the instruction's limited application to professional and occupational expertise should be removed, and the first sentence should simply read: *Should you have expertise in an area that is relevant to this litigation, you may rely on that expertise and experience in informing your deliberations*. Thus, the instruction would broadly apply to any juror who has personal, professional, or occupational expertise in an area relevant to trial.

Second, rather than editing the last sentence of the instruction in a similar fashion, it should be wholly replaced to ensure that jurors fully understand the crux of the instruction. The replacement should read: *You may not, however, use your expertise to make inferences about matters not presented into evidence at trial.* This alteration would serve the same purpose as Justice Gurich's instruction, but it would simplify the statement and put more emphasis on how jurors are not allowed to use their personal or professional experience. Consider the jury instruction as amended:

> Should you have *expertise* in an area that is relevant to this

jury process.").

122. *See Ledbetter*, 2012 OK 39, ¶ 3, 276 P.3d at 1039 (Gurich, J., concurring).

123. *Id.*

> litigation, you may rely on that expertise and experience in informing your deliberations. You may share that expertise and experience with other members of the jury as it applies to the specific evidence introduced in this case. *You may not, however, use your expertise to make inferences about matters not presented into evidence at trial*.

Thus, while Oklahoma courts are already equipped to retroactively address juror misconduct through juror affidavits,[124] the inclusion of this jury instruction would provide a proactive solution to deal with juror misconduct before it occurs.

V. CONCLUSION

Juror misconduct will always be an inherent risk in our justice system. There are measures available to adequately deal with it if it arises, but Oklahoma should consider measures to lower the likelihood of it occurring in the first place. After all, jurors with particularized knowledge warrant special attention in Oklahoma since Oklahoma courts have yet to prescribe a system for proactively addressing potential problems. While merely excluding jurors with particularized knowledge seems to be a simple solution that appears worthwhile at first glance, it has its own flaws. First, it would be difficult to narrow down what constitutes particularized knowledge. As a result, courts would likely find it difficult to find 12 jurors without particularized knowledge on any given case. Second, juries would be less representative of the public if a professional's perspective were to be eliminated. The more practical approach would be to instruct jurors prior to deliberations that they are allowed to use their personal, occupational, or professional experience to interpret the evidence presented at trial, but they are not allowed to bring in matters that were not presented at trial. While this instruction will not completely eradicate all juror misconduct, Oklahoma can continue to rely on juror affidavits to ferret out extraneous prejudicial information. This two-step solution not only ensures jury impartiality, but it also protects verdict finality since juror testimony could only be used as evidence on a narrow basis. Thus, a proactive jury instruction coupled with juror affidavits about extraneous prejudicial information would be the most comprehensive approach for dealing with juror misconduct.

124. OKLA. STAT. tit. 12, § 2606(B) (OSCN through 2013 Leg. Sess.).