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A LAW PROFESSOR'S VIEW FROM THE JURY BOX

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Along with the national obsession with the O.J. Simpson trial has come an increased public interest in and awareness of the American criminal justice system, especially the dynamics of a jury trial. Yet the one-in-a-million Simpson trial and other high profile cases covered in the media present a totally unrealistic and distorted view of what goes on in most criminal trials in the American court system. Each year in the United States there are thousands of more typical, more mundane trials that make up the grist for the mill of the American criminal justice system. Many of these cases involve drug offenses, both large and small. And even the smallest, seemingly most mundane of these have much to teach us about the jury trial process.

As a professor of law, I was granted the rare opportunity of participating in and observing the judicial process from the viewpoint of a juror. I recently sat on the jury in a criminal case in Baltimore City Circuit Court in which the defendant was charged with possession of cocaine and assault. The trial held some surprises for me, especially from the standpoint of what went on in the jury room, and I thought I would share my thoughts, for what they are worth.

In one important sense the trial was not entirely typical of most jury trials. The most remarkable aspect of the case was that the defendant, an African American, probably in his early twenties, was not represented by counsel. It was never explained to us why he did not have counsel. He was not the kind of glib, self-assured defendant who one might expect would represent himself. He seemed very shy and nervous, he could barely speak above a whisper, and was not very articulate.

Jury voir dire was quite minimal. Only the judge asked questions, and then only a few: Did any jurors know any of the participants; had any jurors or members of their family been charged with a drug offense or had been victims of violent crime; would any of us either tend to believe or disbelieve a witness merely because he was a police officer; was there any other reason we

could not reach a fair verdict?

I did have to consider my response to this last question. I believe rather strongly that simple possession of narcotics should not be a crime and worried that I might have some difficulty convicting someone of cocaine possession. I did not speak up, however, for several reasons. First, being somewhat of a coward, I did not relish the conversation that I would have to have had with the judge if I answered this last question in the affirmative. Secondly, I decided that I probably could put aside my personal feelings about our drug laws and make the simple factual determination that was asked of me, leaving the wisdom and morality of the law to others. Now, looking back on it with hindsight, I believe the jury as an institution helped me decide to participate. Whereas I don't think I could preside as a judge in such a case and sentence the defendant to prison, the thought that I would be making this decision along with eleven other people, all of whom would have to reach agreement, gave me great comfort in overcoming my ethical qualms.

The prosecution and defense each had four peremptory challenges. We were called up in groups of six, shown to the parties, who then either challenged or accepted, and in less than ten minutes a jury was chosen. I know that in addition to our names and addresses, the parties had our occupations. I do not know, however, whether mine is listed merely as Professor or as Law Professor (I would not have listed my occupation as lawyer or attorney). In any case, as I found out later, the prosecutor was well aware that I was a law professor, since he had graduated from the University of Baltimore School of Law five years earlier and remembered me from law school (although I did not remember him).

The jury was a real cross-section of Baltimore: half white and half black, eight women, four men, all ages, mostly much better dressed than I in my old chinos and work shirt.

The prosecution's opening was a short and sweet description of the case, not very exciting, but a compe-

tent description of the testimony to come. When the defendant stood up to give his opening, we could barely hear him, even though he was standing nervously right in front of us. He managed to choke out that this was not the way things happened and that he would tell us his story on the witness stand.

The prosecution had two witnesses, both police officers, two partners, both young, one white, one black. The white officer testified first. He explained that he had been on the force for a year, that he had received forty hours training in narcotics, that he had made approximately 100 drug arrests, most of them for cocaine. He said that he and his partner had been on foot patrol in a high drug and crime neighborhood in Baltimore. The defendant had been walking down the street toward them; when he saw them he "darted" toward the nearest house and crouched behind some bushes next to the porch. They considered this "suspicious" behavior and decided to make an "investigatory stop." They asked him for identification; he had none. They asked him what he was doing there; he said he was visiting a friend at that house. He appeared very nervous, was shaking and sweating. The other officer went onto the porch to check with the people in the house.

While his partner went to check at the house, the testifying officer asked the defendant if he had any drugs. He said no. The officer asked if he could pat him down; he gave permission. While patting him down, the officer noticed he had something in his mouth and asked him about it. At that point he spit out two very small zip-lock baggies. The officer recognized these as the kind used to hold illegal drugs and bent down to pick them up. At this point the defendant shoved him in the head, picked up one of the baggies and swallowed it. Before he could pick up the other, the officer and his partner, who had come down from the porch upon seeing the scuffle, grabbed him, and with the help of a third officer, who had been driving by and stopped to help out, put him in handcuffs after some amount of struggle. The testifying officer took the defendant to the police station for booking, the other took the baggie which contained a white powder suspected of being cocaine or heroin to the lab for analysis. The officer testified that he warned the defendant that he could die if he had swallowed a baggie of heroin or cocaine and offered to take him to the hospital, but he refused treatment. When asked if he was hurt in the incident, he said not really, but his head

and neck did hurt for a few days.

Defendant asked only one question on cross-examination, to the effect that wasn't it true that you were not on foot patrol, but riding in a car and you called me over to your car? The officer said no, that they had driven to the neighborhood from the police station, but had parked their car four blocks away and were on foot when they encountered the defendant.

The second officer's testimony was basically consistent with the first (he had been sitting in the courtroom during the first officer's testimony; had the defendant had an attorney he probably would have asked for witness sequestration), except that he had not witnessed the spitting out of the baggies, since he was going up to the porch at that time. He did say that he had seen the defendant "punch" the other officer (which he demonstrated as a real punch, not a shove). The only other inconsistency with the first officer's testimony was that he stated that the car of the third, assisting officer had been parked across the street, not driving by when this happened. He indicated that the defendant put up quite a struggle when they tried to cuff him. He testified that he took the baggie to the police lab. He identified the lab report which indicated that the powder in the baggie was cocaine, and the lab report was admitted into evidence and passed around to the jury. On cross examination, the defendant asked only, if he had put up such a struggle, why hadn't they charged him with resisting arrest? The reply was that they decided to give him a break. That was the end of the prosecution's case.

The defendant took the stand and testified, again in a shy, halting, barely audible voice (even with a microphone) and gave his version of the events. He was sitting on the porch of the house of his friend, waiting for him to return with his bicycle, which he had borrowed. The police officers pulled up in a car, and waved for him to come over. They began to question what he was doing and "hassle" him. When they weren't satisfied with his responses, the white officer got out of the car and put him in a hammerlock, while the black officer went up to the house. The officer was hurting his arm, so he pulled it away. At that point both officers jumped on him and pushed his face down in the gutter and handcuffed him. There in the gutter next to him was the baggie, which the officers claimed was his, but which he said was just lying there all the time. He said the only thing he had in his mouth was chewing gum.

On cross examination he was asked the name of his friend. He gave a first name, but said he didn't know his last. When asked if the friend was present to testify he said no.

In closing argument, the prosecution mostly relied on the fact that the officers' stories were consistent, although not so identical that they appeared rehearsed, spontaneous (not read from a report), and believable. They had no motive to lie as did the defendant. The defendant, in closing, merely said that he was telling the truth and asked us to believe him.

The judge instructed us on the elements of possession of a controlled substance and assault, gave us some factors to help determine credibility, and explained to us that we had to find the defendant guilty beyond a reasonable doubt.

All of this, from the beginning of voir dire at 10:30 a.m., had taken less than an hour and a half. It was shortly before noon when we were sent off to deliberate. I remember feeling at this point very sorry for the defendant, who I felt really should have had an attorney to present a better defense. Although I am generally skeptical of police testimony, the officers' stories did seem believable. Although I was quite willing to believe that they might have fudged how the encounter began in order to constitutionally justify the stop and search, that I figured, was a matter for the judge in a suppression motion. I had no doubt that the defendant had been carrying the baggies of cocaine and figured the jury would find him guilty on that count before the lunch break.

As I walked into the jury room I told myself: Hold your tongue, at least at first. Let's see what these other people think. Boy was I surprised! Various members of the jury began immediately to question and poke holes in the officers' story: Why weren't we shown the baggie, why didn't the third officer testify, why were the stories inconsistent as to whether the police car was parked there or pulled up, etc? The attack was led by one very articulate African American woman, but a majority of the jurors, including some of the white jurors, spoke up in this manner. Someone asked, just how much cocaine was in the baggie anyway? I had the report in front of me and read that what had been tested was "a small black plastic bag containing a powder residue." This came as a surprise to all of us, including me. Although none of the witnesses nor the prosecutor had mentioned the amount of the white powder in the

baggie, I think we were all expecting *some* amount; a half a gram, a gram, or whatever. This seemed to seal it for many. We were being asked to convict the defendant of possession of cocaine on the basis of an envelope containing merely cocaine residue. All of a sudden, now that the baggie was empty, the defendant's story that the baggie was lying in the gutter did not seem totally incredible. Although it would seem very unlikely to find a full baggie of cocaine discarded on the ground, several jurors mentioned that it seemed quite plausible that a used empty one would be lying in the gutter, especially in a high crime neighborhood.

It was interesting to me, that much of the jury's sympathy for the defendant was based on misconceptions of how the system worked. One woman said, if the defendant was a drug user, he would probably have been arrested or convicted before. Why didn't the prosecutor put on evidence of this? I explained (without "coming out" as a law professor) that they were probably not allowed to do this. It all seemed so unfair, the defendant should have been offered a lawyer, one man complained. I'm sure he was, I stated, but for some reason he decided not to have one. The judge should have insisted that he have a lawyer even if he didn't want one, replied another woman. It was his constitutional right to represent himself, I replied. Why hadn't they pumped his stomach to get the baggie he swallowed, someone wanted to know. I said I thought that they couldn't legally do that, although they probably could have kept watch on him to wait until it had passed through his digestive system and then have retrieved it.

It was clear to me at this point that not one iota of inclination for conviction had been expressed by any juror who had spoken. And these were not people hiding behind the reasonable doubt standard (the closest that anyone came to that was only one woman who said, well he's probably guilty, but they didn't prove it). It seemed to me that most of these jurors believed the defendant's version rather than the police. They just didn't believe that the defendant would try to hide two used empty cocaine baggies in his mouth and then punch an officer in an effort to retrieve and swallow them.

I was not about to try and convince the other members of the jury to convict the defendant; but just to play devil's advocate, I asked why the police might make up the story of his spitting out the baggies and swallowing one? I'm not sure anyone came up with an

adequate explanation for that. At that point I was waiting to see what the one very well-dressed white man sitting at the end of the table who had not yet spoken would say. Finally he spoke up, remarking that it was almost lunch time, we all seemed to be in agreement, so let's vote. We did, and we found the defendant not guilty on both counts on the first ballot. There was no separate discussion of the assault count.

Although I still believed the police account, I was able to justify my vote with the thought that even if their story were true, the only thing the defendant was guilty of was spitting out a baggie that had once contained cocaine. I, who had been uncomfortable in the first place about the crime of possession, was not about to make a futile effort to convince the rest of the jury to convict the defendant of possession of cocaine in a case in which there had been no cocaine presented.

Race did not overtly seem to play a part in the discussion. It was certainly never mentioned at any time either during the trial or in the jury room. It was the black jurors, however, who were both first and most vocal in their skepticism of the police, but several white jurors actively joined in this attack.

I think this was one of those rare cases where the defendant was actually helped by his lack of representation. He presented such a pathetic, frightened image, that it generated a lot of jury sympathy. One juror did remark that he was either very smart or very dumb; I don't think any of us really thought it was an act, however. He really did seem lost and overwhelmed. The fact that he did not have a lawyer led the jury to make various arguments for him. Had these been made by his attorney, they probably would have been viewed with more skepticism. Also, the prosecutor would have had an opportunity to rebut them.

I found it extremely interesting that the jury was prepared to hold the fact that no prior convictions were introduced and that the defendant was unrepresented against the prosecution. I clearly agree with the rule which greatly restricts the introduction of a defendant's previous convictions. He should not be convicted on the basis of past wrongs. I had never recognized, however, that the jury would actively assume that if no prior convictions are introduced then the defendant does not have a record and use this as a partial basis for acquittal. Obviously, nothing can be done about this false assumption by way of jury instructions. It would totally undermine the general rule against admissions to have

the judge tell the jury that although they heard no evidence of any prior convictions, that they were to assume neither that he had or did not have any.

The second problem of the jury blaming the state for the defendant's lack of representation, it seems to me, could and should be addressed, by the judge explaining to the jury at the beginning of the case that it was the defendant's decision and right to represent himself.

As I was leaving the courtroom, I was approached by the prosecutor, who spoke to me by name (recognizing me as a former professor, I still not recognizing him as a former student), and asked me why I thought the jury had voted to acquit. Since both police officers were listening, I tried, while being truthful, to also be a bit tactful, and said that I thought that it was mostly the lack of the baggie with cocaine being introduced into evidence. The prosecutor said he realized that he had made a mistake; that he should have obtained and introduced the baggie. I said that probably would not have solved the problem, since it was mostly empty; that the jury just didn't believe the defendant would go to so much trouble to carry around and hide empty cocaine baggies. One of the officers explained that users would collect the used baggies, bring them home and scrape them out to get one more line. The other officer indicated that the defendant had four or five priors (he didn't say arrests or convictions); that they knew he was still using, and they would get him next time. Neither the officers nor the prosecutor seemed particularly surprised or upset by the result, yet speaking with them afterward reinforced my original belief that their story had basically been true.

The biggest surprise for me was the great amount of skepticism on the jury's part for the police testimony. And this was not a high profile case where the police would have had a motive to frame the defendant. There was no evidence put on that the police officers were racist, and in fact one was black. It's hard to tell if the result would have been different had the baggie contained some reasonable amount of cocaine. That certainly would have made a difference for me. I was not about to believe the defendant's story that the police just happened to push him down near a discarded but full baggie of cocaine. But I don't know whether that would have made a difference for the other jurors, since their skepticism of the police and prosecutor seemed so great.

So here was a case, where the defendant, at least technically, had been guilty of the offense; the police and prosecutor did a competent job of presenting the case; the defendant was unrepresented and put on hardly any defense; yet was found not guilty. What can I make of that?

I think it shows both the strong and weak points of the jury system. My own opinion is that the jury reached the right decision for the wrong reasons. A lot of the factual and legal assumptions on which the jury members based their verdict were, to me at least, simply wrong. Yet I was in complete agreement with the result, which was to decide not to send a man to jail for spitting out an empty baggie that contained cocaine residue.

In speaking with colleagues and friends I realized that others had had similar experiences. They had served on juries which had acquitted defendants in cases where they had entered the jury room with a pretty firm belief that the defendant had been guilty. How do I make sense of this at a time when I hear and read in the media that the public is crying out for the police to lock up all the criminals and throw away the key?

Perhaps it shows that the system is working. Many of the safeguards of the criminal system, including the reasonable doubt standard and the rule against admitting prior convictions, are based on the underlying assumption that it is better to let one thousand guilty people go free than to convict one innocent person. But I don't think that is necessarily what was going on in this case. The words "reasonable doubt" were never even used during the jury deliberations.

I suppose the results could also be explained on racial grounds, with black jurors being reluctant to help the "white system" convict black defendants. One colleague to whom I spoke opined that had this case been tried before an all or mostly white jury in Baltimore

County, the defendant would have been convicted. There may be some truth to that. While jurors of all races agreed with the verdict, it was a few black jurors who set the tone of skepticism of the police and prosecutor. On the other hand, I have heard that Baltimore City prosecutors like to have African Americans on the jury because they are the ones who are suffering disproportionately from the crime and violence and have a greater incentive to try to help end it. Clearly, the jurors were skeptical of the police and the prosecutor, but whether this was racially motivated or a more general phenomenon among the American public not to trust government representatives is not clear to me.

I think the result may have something to do with the fact that jurors could have unrealistic expectations as to how much proof the prosecution can and should present in a "small case" like this. Yes, the prosecutor could have retrieved the baggie and had it admitted into evidence. Yes, the third police officer could have been pulled off the street for the day to testify. And yes, I even suppose the defendant could have been put in solitary confinement and his excrement examined until he passed the baggie. Maybe after watching months of the O.J. trial, members of the jury were expecting the prosecution to present DNA evidence of the defendant's saliva on the baggie (although in fairness, no one actually mentioned this).

With the courts clogged with thousands of cases, with overworked prosecutors and police struggling under the load, they have to make decisions as to how much time and effort to devote to any one individual case. Clearly, the decision was made not to pull out all the stops on this one. It just wasn't worth it. As the officers said after the trial, they'll just get him next time.

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