

LESSONS LEARNED FROM JURORS' QUESTIONS ABOUT EVIDENCE DURING TRIAL

*by Anthony J. Ferrara**

Although controversial, New York State judges have discretion to allow jurors to submit written questions to witnesses. This article recounts one judge's experiences allowing jurors to submit written questions in New York City criminal court trials over the last two years. Relying on three case examples, summaries of the testimony are presented along with specific questions asked, and content of discussion with counsel about the questions, demonstrating that jurors' questions are relevant, reasonable and help to clarify or avoid confusion.

Introduction

Members of the jury, the court thanks you for your dedicated service as jurors, for the care, concern, attention and concentration that you have given to your deliberations. The court thanks each and every one of you.

Neither this court, nor any other court, could function without a jury such as yours. The jury is the touchstone of "freedom under the law" which all of us hold so dear. Your service as jurors is one of the highest duties any citizen can be called on to perform. In the fulfillment of your service as members of a jury, you have reflected the best traditions of a free society.¹

These words come from the standard jury instructions in the New York City Criminal Court's Procedure Manual for Judges. Shortly after I became a judge, I presided over my first

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1. CHECKLIST, INTRODUCTION, GENERAL INSTRUCTIONS, VOIR DIRE, PRELIMINARY INSTRUCTIONS & FINAL INSTRUCTIONS FOR JURY TRIALS 75 (Hon. Joel L. Blumenfeld & Brian H. Lowy eds., 14th rev. 2008), http://homepage.mac.com/brianlowy/Jury_Charges/FileSharing7.html.

trial and read these words to a jury after they returned a verdict. The case was tried in Manhattan Criminal Court, where the most serious charges are Class A misdemeanors, tried before six member juries with up to two alternates. The trial took about a week. Shortly after the jury started deliberating they sent out a series of questions asking for testimony to be re-read and legal instructions to be repeated. I wondered, were they listening to the proceedings? Why so many questions? Why were they unable to absorb the testimony? The case involved a straightforward claim of a daylight assault ably presented by the prosecution and defense. My final instructions were concise. After several read-backs and further instruction, the jury eventually reached a verdict but it seemed to me that something was missing from the process. About a year later, I received a copy of the report of the Jury Trial Project.² I read it with interest and decided to allow jurors to take notes during the trial and to ask questions, two innovations that were supported by caselaw and within my discretion.³ It seemed to me that we are all taught to write things down, especially if they are important, so we will not forget; and, if we do not understand, to ask a question. These two things were preached to us starting in grade school; so why is it we throw that common sense out of the window in jury trials?

Since that decision, I have conducted a dozen jury trials allowing jurors both to take notes and to submit written questions. I supply each juror with a spiral bound steno pad and a pen; each pad is clearly marked by juror number. The pads are kept at the court overnight. Most of the jurors chose to take notes; several jurors in each trial asked questions. Juror note taking did not extend trials. While allowing juror questions extended each trial a bit, the trials moved more smoothly because the advocates were able to clear up misconceptions as they arose, rather than responding to juror notes during deliberations. In each case there were few or no requests for read-backs

2. FINAL REPORT OF THE COMMITTEES OF THE JURY TRIAL PROJECT, *available at* <http://www.nyjuryinnovations.org>

3. *People v. Hues*, 92 N.Y. 2d 413 (1998) (note-taking); *People v. Holman*, 47 A.D. 3d 518 (N.Y. App. Div. 2008); *People v. Knapper*, 230 A.D. 487 (N.Y. App. Div.1930) (juror questions within discretion of the court); 22 N.Y. COMP. CODES R. & REGS. tit. 22 § 220.10 (2008) (note-taking); (CJI2d[NY]Jury - Note-taking), http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Note-taking.pdf.

of testimony or legal instructions, and in each case the jury reached a verdict. From this I have concluded the time has come to recognize the logic of allowing these practices and to make them the norm, rather than the exception.

When we involve jurors in trials, they provide us with insight into the operation of our system of justice. By their questions, jurors teach us valuable lessons. Here are some recent trials over which I presided where jurors asked questions, and the lessons learned. In each case, prior to jury selection I gave the attorneys a copy of Judge Stanley Sklar's model instruction from the Unified Court System Pamphlet "Jury Trial Innovations in New York State"⁴ and explained the ground rules: questions would be solicited upon completion of each witness' testimony, discussed at side bar and if allowed, each attorney could ask follow-up questions. I believe that allowing jurors to ask questions focused them on the testimony, encouraged them to examine evidence carefully, enhanced their retention of important information and improved the quality of justice dispensed.

Case #1 Sexual Abuse

John Guest was charged with sexual abuse in the third degree, forcible touching and harassment in the second degree.

The story according to the prosecution: Cheryl Tourist, her husband John and their adult children spent their winter holiday in Manhattan, staying at a boutique hotel near Times Square. On the morning they were departing, Mrs. Tourist returned to their room to make sure nothing had been left behind. As she entered the elevator she encountered a nicely dressed middle aged man, wearing a distinctive cap, later identified as the defendant, John Guest. As she entered he said to her: "I don't think you want to be on this elevator with me." The doors closed, and as she reached to press the button for her floor he grabbed her breast through her clothing. She got off the elevator and fled to the lobby. As she was reporting the incident to her husband, the elevator door opened and Mr. Guest stepped out. Mrs. Tourist shrieked: "That's the man." Mr. Tour-

4. See JURY TRIAL INNOVATIONS IN NEW YORK STATE, <http://www.nyjuryinnovations.org/materials/JTI%20booklet05.pdf>. Judge Sklar's recommended instruction is included here as Appendix A.

ist bounded across the lobby, and grabbed the defendant who looked in Mrs. Tourist's direction and stated: "I did not touch that woman." Before the police arrived the defendant pointed to Mrs. Tourist and yelled: "You are a whore. She is trying to extort money." The police arrived, investigated and subsequently arrested the defendant. At the precinct, while processing the defendant and prior to searching him, Officer Fast, the arresting officer, asked the defendant: "Do you have anything sharp in your pockets?" The defendant responded: "Yes, my penis." Later while the defendant was being fingerprinted, the officer testified that he blurted out (not in response to any question): "I am a writer from California, and I am writing a book. All of this will be in my book."

The defense painted a different picture, arguing there was no evidence, such as surveillance videos, to confirm Mrs. Tourist's story. In his opening, the defense attorney sketched his future attack on Mrs. Tourist's identification of the defendant and emphasized reasonable doubt.

The first witness was Sergeant Garcia, the first officer to arrive at the scene. She had testified at the suppression hearing a few months earlier. Sergeant Garcia testified first because Mr. and Mrs. Tourist lived out of state and could not attend court that day. Sergeant Garcia said that when she arrived at the hotel she spoke with Mrs. Tourist. Neither attorney elicited the substance of that conversation.

The sergeant testified on direct that she had recently inspected the elevator and there were no surveillance cameras. On cross examination, the defense impeached Sergeant Garcia with her testimony from the suppression hearing where she stated she did not recall if she ever examined the elevator on the date of the arrest. Defense counsel also elicited from the sergeant the process used to voucher evidence, and the importance of vouchering evidence.

Jurors asked these three questions after Sergeant Garcia's testimony.

Juror Question #1: What was the basis for stating that you examined the elevator when you testified at the prior hearing?

In this trial, the defense attorney was adamantly opposed to juror questions and initially objected to each one. The prosecutor did not object to this question, pointing out that the hearing testimony was that the witness could not recall if she looked at the elevator. I allowed the question. The witness answered that at the hearing she could not recall if she had examined the elevator, so she went back before trial and looked and did not see any. This produced further examination by defense counsel pointing out that she never checked to see if there was video surveillance in the lobby or other public areas.

Lesson: This juror's question made it possible to clear up juror confusion about the timing of the sergeant's examination of the elevator.

Juror Question # 2: I understand the process of saving and preserving evidence. Was anything vouchered of relevance?

Defense counsel agreed the question was relevant "while preserving my general objection to allowing juror questions." When I asked: "Do you want me to ask the question?" He answered: "Yes, you may ask it." The answer, of course, was nothing had been vouchered.

Lesson: Some jurors see the point, even when it is subtly made; others do not. The answer to this juror's question made the point for everyone.

Juror Question #3: Did the sergeant ask the witness to describe what transpired in the elevator and if so what did the lady say?

Both sides objected to this question as it called for hearsay. The prosecutor pointed out he purposely avoided eliciting the content of the conversation because it was hearsay and defense counsel offered that the testimony would improperly bolster the "victim's" anticipated testimony. I sustained the joint objection, read the question and explained to the juror that the question might be answered during Mrs. Tourist's testimony (which occurred when she testified). I reminded the jurors that they had been advised at the outset: "your questions, like those of

the lawyers are governed by the rules of evidence, and I may have to change or even not ask your questions.”⁵

In retrospect, I believe that this question was legally permissible. The pattern jury instruction concerning witness identification highlights the concerns of a false identification in a one witness case such as this and touches on this very issue:

[I]n evaluating the accuracy of identification testimony you should consider such factors as

Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant’s appearance to have been on the day in question?

What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness’s ability to observe and accurately remember the perpetrator?⁶

Furthermore, in *People v. Huertas*,⁷ the Court of Appeals allowed a victim to testify to the description the victim gave to the police (later in the trial Mrs. Tourist would be properly allowed to testify to what she said to Sergeant Garcia). In *People v. Figueroa*, the Appellate Division relied on *Huertas* in allowing limited police testimony as to “the description the victim had provided of his assailant since it was relevant to the victim’s ability to observe and remember the events in question, which was at issue at trial.”⁸ In addition, depending on the amount of time that elapsed between the events in the elevator and the interview, as well as Mrs. Tourist’s emotional state at the time she spoke to the officer, the description might fall under the “excited utterance” exception but such admission would require a proper foundation.⁹

Lesson: From a judge’s point of view, sustaining a joint objection to a question is always the safest course. But, if the juror’s question is proper, as it appears was the case here, should the court still ask the question? Upon reflection, if I had it to do over, I would ask the question.

5. See *infra* app. A.

6. (CJI2d[NY] Identification – One Witness), http://www.nycourts.gov/cji/1-General/CJI2d.Identification-One_Witness.pdf.

7. 75 N.Y.2d 487 (1990)

8. 35 A.D.3d 204 (1st Dept., 2006).

9. RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 8–604 (11th ed. 1995 & Supp. 2008).

Officer Fast testified about the arrest and the defendant's station house statements. After cross-examination a juror asked this question:

Juror Question #4: The plaintiff brought up the defendant's seemingly incriminating comments while being processed by Officer Fast. It is important to know if Mr. Guest's rights were read to him by the arresting officer. Was his rights read to him?¹⁰

The prosecutor objected because the defense motion to suppress the statement was denied. The defense did not object. At sidebar, I ruled that the pre-trial denial of the defense motion to suppress did not relieve the People of their burden of proving that the defendant's statement was spontaneously volunteered.¹¹ I also informed the jury that this evidence was properly testified to by the witness, and that at the end of the case the court would give further legal instructions concerning this issue, and ultimately that it would be for the jury to decide what weight to give this evidence. I then asked the question of the officer. He explained that he had not read *Miranda*¹² warnings to the defendant because he did not intend to question the defendant. He asked whether he had anything sharp in his pocket because the officer was about to reach into the defendant's pockets as part of the routine arrest process. The officer also explained the defendant blurted out his statement about being an author and planning on including everything in his book.

Lesson: Certain terms like "Miranda warnings" and "reading rights" are well known. Their legal definitions are not as widely understood. In this instance, the juror's question allowed for appropriate clarification of the legal rules.

The next day I proposed to the parties that I charge the jury on the voluntariness of defendant's statements.¹³ This became unnecessary because the defendant took the stand and admitted both statements offering his explanation for each.

10. Jurors' questions are transcribed here as submitted, including any grammatical or punctuation errors.

11. *People v. Cefaro*, 23 N.Y.2d 283 (1968).

12. *See Miranda v. Arizona*, 348 U.S. 436 (1966).

13. Custodial but Spontaneous Statements and Miranda Rights (CJ12d[NY Confessions]).

The story according to the defendant: John Guest, a small man in his fifties, took the stand, admitted both statements and offered an explanation. He explained that his response to the question about whether there was anything sharp in his pants was sarcasm. He also explained that never having been arrested before he felt frightened by the arrest and blurted out his intent to put all this “in my book” as a way of assuring he was not manhandled by the police. He said that he had not been in the elevator with the victim. He further explained that as a world traveler, he had heard and read about scams where “prostitutes” falsely accused guests of assaultive behavior and their pimps then extorted large payments as “hush” money. Hence his statement in the lobby that he did not know the woman, that he thought she was a whore and her pimp (actually her husband) was trying to extort money.

The defendant was acquitted on all the charges.

Case #2: Assault

Dan Disco was charged with assault in the third degree and attempted assault.

The story according to the prosecution: Three young women—Julie, Kim and Carmen—went out clubbing to celebrate Kim’s birthday. At a trendy Manhattan club they met Dan and his two friends, Jim and Robert. Carmen “hooked up”¹⁴ with Jim. The three girlfriends used Julie’s digital camera to record the spicier moments taking place on and off the dance floor. At about three in the morning the club started to empty and both groups left.

Julie testified that during the evening she spoke with Dan but thought he was a creep and made excuses to avoid him. Upon leaving the club, she stopped a few feet outside to use her cell phone. While she held the phone to her ear, Dan ran towards her from out of nowhere, head-butted her, and caused her to slam the back of her head against a metal grate. Julie was cut and started to bleed heavily. She recalled Dan smiling at her and then running away. She became hysterical and lunged at him but missed. Dan disappeared from her sight. Julie immediately flagged down a patrol car, and described Dan to a police

14. Although this term was never fully explained by any witness, there was testimony that Carmen and Jim were kissing.

officer showing a photo of Dan taken earlier that evening. Dan was arrested nearby. The police took Julie to the hospital for treatment where she asked them to photograph her injuries; they refused. Upon completion of her examination, a juror submitted the following questions:

Juror Question #1: Is it normal or routine for police to prevent victim from taking pictures which show evidence of injury? When she was at the club and hospital she said she was hysterical. Can you define what "hysterical" meant, i.e. crying, angry?

Both attorneys objected to the first question because the witness was not competent to testify as to police procedures. The prosecutor noted he would have his officers address this issue. I decided, and the parties agreed, that I would instruct the jury that the question would not be asked because the witness was not able to testify as to police procedures. Neither side objected to the second question.

After the parties returned to court I read the first question. Juror #1 spontaneously stated in open court, before I could explain why the question would not be allowed, "I made a mistake. I realize she cannot answer that." In response to the second question, Julie repeated her testimony as to how upset she was by the bleeding wound to her head.

Lesson: Jurors' questions seek clarification of evidence and not advocacy for either side.

Juror Question #2: Who was Julie talking to on the phone at 2:45 AM?

Curiously, neither attorney (each a novice accompanied by a supervisor) had asked this question. Neither objected to this question.

I asked the question. Julie answered that she had called her boyfriend because he was in Manhattan and they thought they might meet up. She did not give her boyfriend's name; he did not testify; and he was not mentioned again.

Lesson: An overlooked opportunity is an opportunity lost. This juror focused on a potential key witness, who may have heard the commotion.

The police officer at the scene testified. He generally corroborated the victim, but did not recall if she asked him to pho-

tograph her injuries. He did recall accompanying her to the hospital. The prosecutor asked the police officer to explain police procedures as to taking photographs of injuries. The officer explained that he believed pictures of injuries were only taken in “assault one or two cases not in assault three cases.” This case involved a misdemeanor assault, assault in the third degree.

Upon completion of his testimony each of the two alternates submitted questions. They did not consult with each other before submitting them.

Juror Question #3: Please clarify the difference between second and third degree assault and why photo would be required in only one case.

Juror Question #4: Can you clarify between 1st degree, 2nd degree, and 3rd degree assault?

The prosecutor had no objection but the defense objected fearing that an answer might lead the jury to trivialize this case.

I instructed the jury that crimes are classified by degrees, that second degree is higher than third degree and first degree is higher than second and then asked the officer why a photo would be required in only one type of case. The police officer testified that at the time he thought photographs were needed only in assault cases where a weapon was involved, and that he now knew this was incorrect.

Lesson: Given the chance, jurors will let advocates know when explanations are necessary.

The story according to the defendant: The defendant explained that he and his friends were out for a night on the town. They drove his car into Manhattan, parked near the club and expected to meet other friends there, but wound up in the wrong club. They were having a good time, so they stayed. He met Julie, they talked, danced for a while and got along well. Later that evening he saw her on the street. He thought that she was looking in his direction, so he approached and leaned in to kiss her on the cheek. She pulled away and bumped her head. He said that he laughed out of nervousness and embarrassment. He explained he would never have laughed had he known she was hurt. He said that he never saw any blood. He also agreed that Julie got angry and rushed towards him. When she did that, his friends told him to go down the street while

Julie's friends tried to calm her. The police came and he was arrested.

At the close of the defendant's testimony, two jurors asked questions.

Juror Question #5: Why did you drive your car if you knew you were going out clubbing and drinking and do you usually do this? 33rd and 10th (where defendant testified he parked the car) is at least 5 blocks away. None of you were sober were you? Who was going to drive the car?

Neither side objected. The defendant answered that he purposely parked in a space where he knew he could leave it for the next day (a Saturday), because he planned to take the subway to his cousin's apartment in Astoria and spend the night there.

Lesson: Jurors are sensitive to all surrounding circumstances that might impact a witness's credibility.

Juror Question #6: Did it ever cross your mind to help/comfort Julie seeing her upset or bloodied state?

Neither side objected. The defendant's state of mind was clearly relevant. The defendant answered that when Julie came at him in anger, he tried to get away from her and he was unaware of the state of her injuries at that time. He added, had he known, of course he would have tried to help her, and that he was now very sorry she was hurt.

Lesson: Jurors want to know what "type of person" each key actor in a case is—especially the defendant.

Emphasizing the absence of independent proof of injury to the forehead or side of Julie's head, defense counsel argued in closing that there was nothing to support her assertion that the defendant forcefully butted her head with his head. The defense also highlighted that photos of the defendant, taken at his arrest by the police, showed no injuries to his head or face.

The jury acquitted after 45 minutes of deliberations.

Case #3: Attempted Assault/Resisting Arrest

Danny Castro, a resident at a men's shelter, was charged with multiple counts of assault, attempted assault and resisting arrest arising out of a dispute with a shelter employee, Mr. Simon.

The story according to the prosecution: Mr. Simon testified that after denying Mr. Castro access to the cafeteria because Mr. Castro had already eaten, Mr. Castro became belligerent. Mr. Fagan, a security guard, escorted Mr. Castro from the area. A few minutes later Mr. Simon, seated at his post outside the cafeteria, reported what had occurred to Mr. Brown, the shelter director. As Mr. Brown and Mr. Simon were speaking, Mr. Castro returned to the cafeteria entrance and again lunged toward Mr. Simon. Mr. Brown intervened to protect his employee, and as he and Mr. Castro struggled, they fell to the floor. Mr. Castro scratched the director and tried to bite him (shouting out that he had AIDS and would infect Mr. Brown). When the shelter police arrived, and tried to arrest Mr. Castro, he resisted. Shelter police are technically “peace officers.”

The prosecution called Mr. Fagan, the security guard, first followed by Mr. Brown, Mr. Simon, and the arresting officers. The jury did not deliberate because upon completion of the prosecution’s direct case, the defendant pleaded guilty to resisting arrest.

One issue in this trial underscored the utility of juror questions. Both Mr. Simon and Mr. Fagan drew separate sketches of the area where the assault took place. Mr. Fagan drew his sketch during cross-examination at the request of defense counsel. When the prosecutor called Mr. Simon to testify, he asked Mr. Simon to draw a sketch. The sketches were simply awful. The witnesses placed objects, doors, stairs, offices and entrances in different locations. After the second handwritten diagram was admitted into evidence and Mr. Simon’s testimony finished, one juror asked the following questions:

Juror Question #1: The map drawn by Mr. Simon is still unclear. Can we take a closer look at it? Is this the map we are now to consider correct? Why does Mr. Simon have a different idea of layout of the area? Is it just the 1st map upside-down?

Neither side objected to these questions, but each agreed they were not really properly asked of the witness. Instead the parties agreed to allow both diagrams to be shown to each juror side by side. I gave an instruction that when they deliberated, it

would be up to them to determine what weight to give to the diagrams.

The prosecutor never offered a scaled diagram, or photographs of the scene. The defendant made no attempts to clarify the discrepancies.

Lesson: Juror questions inform advocates of the jurors' concerns.

Conclusion

The jury is the touchstone of "freedom under the law." Our goals as judges should be engaging the jury's attention, assuring careful attention to the evidence, clearing up confusion as soon as possible, and improving the quality of justice dispensed. I think these brief summaries show that allowing jurors to ask questions contributes to meeting these goals.

Overall, my experience has been:

- Jurors ask focused questions that are relevant and reasonable.
- Jurors do not use the opportunity to ask questions to become advocates.
- It is always better to address confusion when it arises than to wait for notes sent out during jury deliberations (when it is sometimes too late).

In sum, we should pay special attention to what jurors say and respond to their concerns. What better way is there than allowing them to ask questions?

APPENDIX A**Judge Stanley Sklar's Suggested Instruction on Juror Questions¹⁵**

Under our system, it is the lawyers' job to ask questions of a witness. I may at rare times also ask a witness a question.

Your job as jurors is to carefully consider all of the testimony and other evidence and come out with a fair verdict based on the evidence. So jurors usually do not question witnesses. In a rare instance a juror may, however, want to ask a question to clarify something the witness said. I will allow you to ask a clarifying question if you follow these rules.

Any question must be written down on a piece of paper and given to the court officer for my review. Please include your name or juror number. Do not give the court officer your question immediately. Often a question that you would like to ask is promptly asked by one of the lawyers. However, if the lawyer doesn't ask your question right away, you may submit your question. Before submitting a question you must not discuss the proposed question or its wording among yourselves.

You should only ask questions to clarify a witness's testimony. For example, you may hear a term used that you have never heard of and feel the need to know its meaning. Your question should also be relevant to the issues in this trial so that we don't get bogged down. When you ask questions, remember that you are an impartial judge of the facts. This means that you must not in any way express your opinion of the witness or the case. You must not try to be an investigator or a detective, or try to help any party. Like me, you should let the lawyers, who have lived with the case for a long time, try the case as they see it. You should not feel that you have to ask a question.

I will review all questions with the lawyers. Your questions, like those of the lawyers, are governed by the rules of evidence, and I may have to change or even not ask your questions. If so, don't be offended, or hold it against any party, or speculate as to what the answer to your question might have been.

If I allow the question, then I will ask it. The lawyers will be allowed to ask follow-up questions.

15. JURY TRIAL INNOVATIONS IN NEW YORK STATE, *supra* note 3 at 14.

Finally, while you may give the answer to a question such importance as you believe is appropriate, you must not give the answers to any of your questions any greater or lesser importance, just because you asked the questions. Remember that you are NOT [emphasize with voice] one of the lawyers, and you must remain neutral fact-finders throughout the trial. You must consider ALL [emphasize with voice] of the evidence fully and fairly to arrive at a true and just verdict.

