

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 2010-1636
Plaintiff-Appellant : On Appeal from the
Clark County Court
-vs- : of Appeals, Second
Appellate District
TONEISHA GUNNELL :
Defendant-Appellant : Court of Appeals
Case No. 09-CA-0013

MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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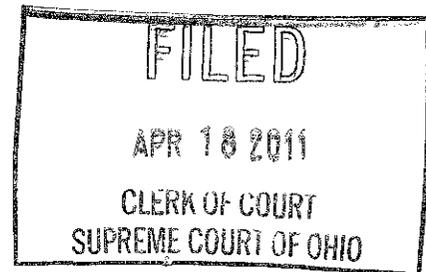


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES CITED.....	iii
INTRODUCTION.....	1
STATEMENT OF FACTS.....	3
ARGUMENT.....	7
Proposition of Law One:	
<u>When addressing a motion for mistrial based on juror misconduct, a trial court has broad discretion and flexibility as to the manner and length of inquiry that must be conducted with any juror as to the misconduct, and a reviewing court may not impinge upon that discretion with a standard script.....</u>	
	7
Proposition of Law Two:	
<u>When extrajudicial material contrary to the State’s case is obtained through juror misconduct, the situation is presumptively prejudicial and the burden shifts to the defendant to establish that the juror was not prejudiced by her research.....</u>	
	16
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21
APPENDIX.....	A
Notice of Appeal (filed September 17, 2010).....	A-1
Second District Judgment (filed September 17, 2010).....	A-3
Second District Decision (filed September 17, 2010).....	A-5
Common Pleas Entry Granting Mistrial (filed October 10, 2007).....	A-24
Common Pleas Entry Denying Motion to Dismiss (filed November 25, 2007).....	A-30
<u>Gunnell v. Rastatter</u> (September 17, 2008), Southern District of Ohio Case No. 3:08-cv-064, 2008 U.S. Dist. LEXIS 118428.....	A-39

Gunnell v. Rastatter (January 26, 2010), 6th Cir. No. 08-4505,
2010 U.S. App. LEXIS 19819.....A-46

R.C. 2903.02.....A-48

R.C. 2903.04.....A-49

R.C. 2911.01.....A-51

R.C. 2913.02.....A-53

R.C. 2945.36.....A-56

TABLE OF AUTHORITIES

CASES:

<u>AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., City of Columbus</u> (1990), 50 Ohio St.3d 157.....	9
<u>Arizona v. Washington</u> (1978), 434 U.S. 497, 98 S. Ct. 824.....	7
<u>Blakemore v. Blakemore</u> (1983), 5 Ohio St.3d 217.....	8
<u>Gunnell v. Rastatter</u> (Sept. 17, 2008), Southern District of Ohio Case No. 3:08-cv-064, 2008 U.S. Dist. LEXIS 118428.....	6,13,19
<u>Gunnell v. Rastatter</u> (Jan. 26, 2010), 6th Cir. No. 08-4505, 2010 U.S. App. LEXIS 19819.....	7
<u>Pons v. Ohio State Medical Board</u> (1993), 66 Ohio St. 3d 619, 621.....	9
<u>Ross v. Petro</u> (C.A.6 2008), 515 F.3d 653.....	9,12
<u>State v. Glover</u> (1988), 35 Ohio St.3d 18, 19.....	8,15
<u>State v. Gross</u> , 97 Ohio St. 3d 121, 2002-Ohio-5524, 776 N.E.2d 1061.....	17
<u>State v. Gunnell</u> , 2nd Dist. No. 2005 CA 119, 2007-Ohio-2353.....	3
<u>State v. Gunnell</u> , 2nd Dist. No. 09-CA-0013, 2010-Ohio-4415.....	4,19
<u>State v. Hall</u> , Sixth Dist. No. S-08-018, 2009-Ohio-5728.....	17
<u>State v. Henness</u> (1997), 79 Ohio St. 3d 53, 679 N.E.2d 686.....	11,13
<u>State v. Hood</u> (1999) 132 Ohio App.3d 334, 724 N.E.2d 1238.....	17
<u>State v. Keith</u> , 79 Ohio St. 3d 514.....	18
<u>State v. King</u> (1983), First Dist. No. C-820648, 10 Ohio App. 3d 161.....	2,16,17
<u>State v. Manns</u> , 2nd Dist. No. 2005 CA 131, 2006-Ohio-5802.....	4
<u>State v. McAlmont</u> , 2nd Dist. No. 2005 CA 130, 2006-Ohio-6838.....	4
<u>State v. Patterson</u> , 2nd Dist. No. 05CA0128, 2007-Ohio-29.....	4

<u>Smith v. Phillips</u> (1982), 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78.....	16
<u>State v. Phillips</u> (1995), 74 Ohio St.3d 72.....	16
<u>State v. Sanders</u> , 92 Ohio St. 3d 245, 2001-Ohio-189, 750 N.E.2d 90.....	11,13
<u>State v. Spencer</u> (1997), 118 Ohio App.3d 871, 694 N.E.2d 161.....	17
<u>State v. Treesh</u> (1990), 90 Ohio St. 3d 460.....	8
<u>State v. Widner</u> (1981), 68 Ohio St.2d 188.....	7,8
<u>United States v. Davis</u> (C.A.6, 1999), 177 F.3d 552.....	11

STATUTES:

R.C. 2903.02.....	3
R.C. 2903.04.....	4
R.C. 2911.01.....	3
R.C. 2913.02.....	4
R.C. 2945.36.....	7

OTHER AUTHORITIES

LaFace, Israel, King & Kerr, Criminal Procedure 3rd, §24.9(f).....	13
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INTRODUCTION

This case presents the issue of exactly what steps a trial court must take prior to declaring a mistrial on the State's motion in order for there not to be a bar to retrial. After a juror committed misconduct at trial, the court conducted an inquiry of her, gave all parties an opportunity to question her, and explored alternative solutions. Upon finding the juror not to be credible and that she was "irreparably tainted" as a result of her misconduct, the court granted the State's motion for a mistrial. (R. 316).

The Second District Court of Appeals was not satisfied with the extent of the trial court's inquiry of the juror's misconduct, and instead insisted that the trial court perform several additional steps in investigating the misconduct before declaring a mistrial. State v. Gunnell, 2nd Dist. No. 09-CA-0013, 2010-Ohio-4415, at ¶¶168-170, 191-195. The Second District found the trial court abused its discretion because it "did not conduct any inquiry into what effect, if any, the definition of involuntary manslaughter Juror #6 found had on her impartiality. The trial court did not even inquire whether Juror #6 recalled any of the information contained in her research, or what her understanding of it was." Id. at ¶169.

The trial court was in the best position to observe the juror, not just during the inquiry into her conduct, but also throughout the entire course of the trial. Also, the Second District's insistence on further inquiry ignores the circumstances of the misconduct itself, which the trial court used in finding the juror to be irreparably tainted and not credible.

The Second District has created an inflexible standard whereby trial courts must conduct a veritable inquisition into juror misconduct before declaring a mistrial. Not only is such a standard unworkable in trial courts, it flies in the face of longstanding law that defers to the trial

court's discretion and knowledge of the situation before it in determining the necessity for a mistrial.

The Second District seemed concerned that “the trial court was wholly and exclusively concerned with the prejudicial effect on the State’s case . . . rather than the egregiousness of Juror #6’s actual misconduct” *Id.* at ¶174. However, when the goal is a fair trial, the prejudicial effect of jury misconduct should be the primary focus of a trial court’s inquiry. It is irrelevant how innocuous conduct may seem if it affects the fairness of the trial, then it has created a manifest necessity for a mistrial.

Trial courts need to have the flexibility to handle the myriad situations that can arise during the course of a trial in the manner they find to be most appropriate given the circumstances. Trial courts also need to be able to actually exercise their discretion, and not fear that if a superior court would reach a different conclusion, their discretionary decision will be reversed. A decision is not truly discretionary if the trial court must follow a set procedure or standardized practice in every scenario.

The Second District also held that the material obtained by the juror was not inherently prejudicial, and therefore by itself did not create a manifest necessity for a mistrial. However, this is contrary to the First Appellate District’s decision in *State v. King* (1983), 10 Ohio App. 3d 161, 165, where it was held that all juror misconduct is presumptively prejudicial. This does not mean that all juror misconduct will warrant a mistrial or reversal on appeal; however, it does put the burden on the party opposing the mistrial to demonstrate the misconduct was not prejudicial under the particular circumstances of the case.

For these reasons, and those set forth below, the State respectfully asks this Court to reverse the Second District’s decision and hold that the trial court did not abuse its discretion in

declaring a mistrial, and further hold that juror misconduct of obtaining extrajudicial information is presumptively prejudicial, and shifts the burden to prove there is not prejudice to the party opposing the motion for a mistrial.

STATEMENT OF FACTS

The facts that gave rise to the charges in this case were summarized by the Second District Court of Appeals in a previous decision in this matter as follows:

[O]n June 7, 2005, Alicia McAlmont took her sister's rented Ford Taurus and drove with three companions – Toneisha Gunnell, Mahogany Patterson, and Renada Manns – to the Upper Valley Mall in Springfield, Ohio. The women went to several stores, including Old Navy, and they took several items without paying for them. The women apparently placed the items from Old Navy in the trunk of their car. Gunnell, Patterson, and McAlmont returned to the mall to continue shoplifting at Macy's while Manns waited outside in the car. While Manns's companions were in Macy's, the vehicle was parked at the northern set of doors along the curb and facing southward toward on-coming traffic.

At approximately 3:30 p.m., the three women ran out of Macy's with several items of clothing on hangers and entered the vehicle. Chris Clarkson, a Macy's loss prevention officer, emerged from the doors near the security office and attempted to apprehend them. At that time, John Deselem was returning to Macy's after retrieving his girlfriend's purse from their car, which was parked in a handicap space across from the southern set of doors into the store. As the women sped off in their vehicle, Deselem waved his arms at them in an effort to stop them. Manns hit Deselem with the car, resulting in fatal injuries. Manns drove out of the mall parking lot without stopping or slowing down.

Shortly afterward, the Taurus was located in the ditch along Cardinal Drive with numerous articles of clothing in the backseat and in the trunk. Manns's, McAlmont's, and Gunnell's palm and fingerprints were located in several places on the vehicle and on other items left in the car. The following day, the four women each surrendered to the police department in Columbus, Ohio. State v. Gunnell, 2nd Dist. No. 2005 CA 119, 2007-Ohio-2353, at ¶¶2-4.

On June 20, 2005, Mahogany Patterson, Toneisha Gunnell, Renada Manns, and Alicia McAlmont were all indicted for one count of felony murder, in violation of R.C. 2903.02(B); one count of aggravated robbery, in violation of R.C. 2911.01(A)(3); one count of involuntary

manslaughter, in violation of R.C. 2903.04(A); and one count of theft in violation of R.C. 2913.02(A)(1). (R. 1). After trial, all four defendants were found guilty of all charges by a jury on November 7, 2005. (R. 86, 87, 88, 93). On appeal, those convictions were reversed due to a Batson violation. State v. Gunnell, 2nd Dist. No. 09-CA-0013, 2010-Ohio-4415; State v. Manns, 2nd Dist. No. 2005 CA 131, 2006-Ohio-5802; State v. Patterson, 2nd Dist. No. 05CA0128, 2007-Ohio-29; State v. McAlmont, 2nd Dist. No. 2005 CA 130, 2006-Ohio-6838.

A second joint trial occurred in September 2007 but ended in a mistrial.¹ That mistrial is the focus of this appeal and both of the State's Propositions of Law in this case. After the jury retired from deliberations for the evening and was sent home, Juror #6 conduct independent research regarding the instructions of law on the Internet. (Excerpt of Jury Trial 10/02/07 at 2-3²; R. 316). The juror then brought with her into the jury room the following morning a handwritten definition of the word "perverse," and a printout of information regarding involuntary manslaughter she had found on the Internet. (Id. at 2-7).

Previously, the jury had sent a question to the court asking for a definition of the word "perverse," since it was used in the jury instructions in the definition of "recklessness," as it pertains to involuntary manslaughter. (Id. at 5-6). The trial court declined to provide the jury with a definition. (Id.). The handwritten definition stated, "Perverse is contrary to the evidence or direction of the judge on a point of law <perverse verdict>". (R. 312, Ex. 1).

¹ A complete transcript of the second trial in September 2007 is not available and was never prepared for the record, because no appeal was taken to the Court of Appeals in the case. The only transcript prepared was filed in the record on November 5, 2007, and is an excerpt of what occurred on the record that day regarding Juror #6's misconduct and the trial court's ruling on the motion for a mistrial. (Excerpt of Jury Trial 10/02/07; R. 316).

² The front of the transcript indicates it is from October 2, 2007. (Excerpt of Jury Trial 10/02/07 at 1; R. 316). The next page states at the top "Tuesday Morning Session November 5, 2007 10:41 a.m." (Excerpt of Jury Trial 10/02/07 at 2; R. 316). From the docket, as well as the trial court's entry on October 10, 2007, it is clear the November 5, 2007 is a clerical error, and the events depicted by the transcript occurred on October 2, 2007. (R. 312).

The printout the juror brought into the jury room regarding involuntary manslaughter read as follows:

Manslaughter: Involuntary

Involuntary manslaughter usually refers to an unintentional killing that results from recklessness or criminal negligence, or from an unlawful act that is a misdemeanor or low-level felony (such as DUI). The usual distinction from voluntary manslaughter is that involuntary manslaughter (sometimes called “criminal negligent homicide”) is a crime in which the victim’s death is unintended.

For example, Dan comes home to find his wife in bed with Victor. Distraught, Dan heads to a local bar to drown his sorrows. After having five drinks, Dan jumps into his car and drives down the street at twice the posted speed limit, accidentally hitting and killing a pedestrian. (R. 312, Ex. 2). (Emphasis sic).

The court’s bailiff, Ms. Gibson, noticed the juror had these items with her in the jury room, and immediately notified the judge. (Excerpt of Jury Trial 10/02/07 at 2-4; R. 316). At that point, the judge conferred with counsel about possible solutions to the problem, and conducted an inquiry of the juror. (Id. at 4-11; R. 316). All parties were given the opportunity to further question the juror, but none did so. (Id. at 11-12; R. 316).

The trial court declared a mistrial on the State’s motion. (Id. at 24-27; R. 316). The trial court issued a written decision October 10, 2007, finding there was a manifest necessity for a mistrial, and that “without a mistrial, public justice would have been diminished.” (R. 316 at 3). In that decision, the court summarized the events that occurred leading up to the mistrial and reviewed the applicable law. (Id. at 1-3). The trial court further stated that:

[D]eclaring a mistrial was a manifest necessity because Juror #6 had been irreparably tainted by the information she had acquired. The involuntary manslaughter hypothetical was somewhat analogous to the case herein since it involved the defendant causing the death of a pedestrian with his vehicle. The hypothetical, however, including other aggravating factors such as “five drinks” and “twice the posted speed limit,” neither of which is a prerequisite for a felony murder or involuntary manslaughter conviction under Ohio law. Juror #6 likely would have used this hypothetical as a gauge in evaluating the case against the

four defendants herein. With this hypothetical as a gauge, it is likely that Juror #6 would have disregarded felony murder as a possible verdict. It is even possible that she would have reasoned that the four defendants herein are not even guilty of involuntary manslaughter because they did not consume “five drinks” and there was no proof beyond a reasonable doubt that they were going “twice the posted speed limit.” A juror using this hypothetical as a gauge or reference, whether consciously or subconsciously, is extremely unfair and prejudicial to the State of Ohio, especially since the State could not address it in its closing arguments.

Second, declaring a mistrial was a manifest necessity because, despite her statements to the contrary, it appears she would have tainted the other jurors with the outside information she had acquired. The Court’s concern is corroborated by the fact that she actually brought the documents to the jury room. Juror #6 had already disregarded the Court’s repeated instructions, and there was no way the Court could have been assured that she would follow subsequent instructions to not disclose the outside acquired material to other jurors. Accordingly, it is somewhat likely that all of the jurors would have eventually been tainted by the outside information.

Third, declaring a mistrial was a manifest necessity because an admonition could not have cured the problem herein. Juror #6 had already disregarded the Court’s repeated instructions and admonitions. There was no way the Court could have been assured that she would follow subsequent instructions to disregard the outside acquired material. (Id. at 3).

The handwritten note and Internet printout the juror brought with her were attached to the entry as Exhibits 1 and 2. (Id. Ex. 1; Ex. 2).

On November 25, 2007, the trial court issued another entry, further expanding upon its reasoning and conclusions in response to a motion by the defendants to dismiss the case and bar a retrial. (R. 317; R. 348). The trial court overruled the defendants’ motion. (R. 348).

All four defendants joined in filing a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. Gunnell v. Rastatter (Sept. 17, 2008), Southern District of Ohio Case No. 3:08-cv-064, 2008 U.S. Dist. LEXIS 118428. That petition was denied by Chief United States Magistrate Judge Michael R. Merz. (Id.). Magistrate Judge Merz concluded “that Judge Rastatter’s declaration of a mistrial was not an unreasonable application of clearly established law as declared by the United States Supreme Court.” Id. at

*20. Only Renada Manns appealed to the Sixth Circuit Court of Appeals. Gunnell v. Rastatter (Jan. 26, 2010), 6th Cir. No. 08-4505, 2010 U.S. App. LEXIS 19819. That appeal was denied on January 26, 2010. Id.

Gunnell's third trial, which Gunnell argues was in violation of the Double Jeopardy provision of the United States Constitution, was conducted January 20, 2009 to January 30, 2009. At the conclusion of the trial, the jury found Gunnell guilty on all counts. (1/30/09 Tran. at 1871-1875). Gunnell was sentenced to fifteen years to life for felony murder and three years for aggravated robbery. (2/3/09 Tran. at 11). The sentences were ordered to run consecutively for a total of eighteen years to life. (Id.). As noted above, this trial was a retrial of three of the four original defendants.

ARGUMENT

Proposition of Law No. 1:

When addressing a motion for mistrial based on juror misconduct, a trial court has broad discretion and flexibility as to the manner and length of inquiry that must be conducted with any juror as to the misconduct, and a reviewing court may not impinge upon that discretion with a standard script.

Ohio Revised Code Section 2945.36 states in part that, "The trial court may discharge a jury without prejudice to the prosecution (A) For the sickness or corruption of a juror or other accident or calamity;" "[U]nder controlling precedent of the United States Supreme Court, the question of whether, under the double jeopardy clause, there can be a second trial, after a mistrial has been declared . . . depends on whether (1) there is a 'manifest necessity' or a 'high degree' of necessity for ordering a mistrial, or (2) 'the ends of public justice would otherwise be defeated.'" State v. Widner (1981), 68 Ohio St.2d 188, 189, citing Arizona v. Washington (1978), 434 U.S. 497.

Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

Washington, supra, at 505.

This Court has stated, “As to the necessity for a mistrial, we note that strict necessity is not required.” State v. Glover (1988), 35 Ohio St.3d 18, 19, citing Washington, supra, at 511. It is not dispositive that other judges may have resorted to alternate means of dealing with a situation. Id. at 20. “In evaluating whether the declaration of a mistrial was proper in a particular case, this court has declined to apply inflexible standards, due to the infinite variety of circumstances in which a mistrial may arise.” Id. at 19, citing Widner. “[The Ohio Supreme Court] has instead adopted an approach which grants great deference to the trial court’s discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial.” Id., citing Widner. The Supreme Court “has deferred to the trial court’s exercise of discretion in light of all the surrounding circumstances.” Widner at 190.

An appellate court should not disturb a trial court’s decision granting or denying a mistrial unless it constitutes an abuse of discretion. State v. Treesh (1990), 90 Ohio St. 3d 460, 480. An abuse of discretion is “more than an error of law or judgment; it implies that the court’s attitude was unreasonable, arbitrary or unconscionable.” Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. “It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or

arbitrary.” AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., City of Columbus (1990), 50 Ohio St.3d 157, 161. “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” Id. “The appellate court is to determine only if the trial court has abused its discretion, *i.e.*, being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.” Pons v. Ohio State Medical Board (1993), 66 Ohio St. 3d 619, 621.

“Hallmarks of the exercise of ‘sound discretion’ include a trial court allowing the parties to state their positions, seriously considering their competing interests, and making a thorough inquiry into reasonable alternatives to a mistrial.” State v. Gunnell, *supra*, at ¶74 citing Ross v. Petro (C.A.6 2008), 515 F.3d 653. “[A] reviewing court is obliged to satisfy itself, with great deference to the trial judge’s assessment of possible juror bias, that the trial judge exercised ‘sound discretion.’” Ross at 663.

Shortly after discovering the issue of misconduct in this manner, the trial court disclosed to all attorneys that a juror had brought “a printout of a definition of ‘involuntary manslaughter’ that the juror said she retrieved off of the internet.” (Excerpt of Jury Trial 10/02/2007 at 2; R. 316). The court further advised the parties that she also brought in a handwritten definition of “perverse” on a small piece of paper. (Id.). The trial court opened the discussion by asking the attorneys for their suggestions. (Id. at 3). All attorneys were allowed the opportunity to review the materials and state their concerns and thoughts for the court’s consideration. (Id. at 3-9). Juror #6 was brought before the court and questioned as to the reasons behind her behavior. (Id. at 9-11). The court then gave all parties an opportunity to question the juror; none of the

attorneys took advantage of that opportunity. (Id. at 11-12). The parties again discussed their positions on a possible curative instruction and whether a curative instruction would be sufficient on record. (Id. at 12-19). The trial court noted,

We can bring her in, and we can all ask her and try to rehabilitate her; and I'm sure she's going to say all the right things because, again, I think she's a nice person. And she's going to want to try to be accommodating and pleasing, and I know or I'm certain she doesn't want to be responsible for a mistrial. So she's going to try to appease us and say what she needs to say; but, you know, I just – I feel like that may be an exercise of futility. I don't know that I can be convinced that she's going to be able to put this out of her mind. (Id. at 19).

A brief recess was taken at the request of the State, and then the State moved for a mistrial. (Id. at 19-20). The trial court allowed each of the defense attorneys to argue against the mistrial. (Id. at 20-24). The trial court then granted the State's motion, stating that it found the information prejudicial to the State and beneficial to the defendants. (Id. at 25). The trial court concluded that Juror #6 was "irreparably tainted" as a result of her misconduct and that there was "substantial prejudice" to the State. (Id. at 26; R. 316; 348).

The Second District Court of Appeals concluded, however, that this trial court failed to exercise sound discretion. This conclusion was based on the appellate court's finding that the trial court failed to conduct any inquiry on Juror #6's impartiality. Gunnell, supra, at ¶169.

The trial court did not conduct any inquiry into what effect, if any, the definition of involuntary manslaughter Juror #6 found had on her impartiality. The trial court did not even inquire whether Juror #6 recalled any of the information contained in her research, or what her understanding of it was. Without such an inquiry, the trial court lacked sufficient information to exercise sound discretion in ruling upon the State's motion for a mistrial.

Id.

The appellate court instructed that the trial court must conduct an inquiry into the impartiality of the juror even if the defendant does not so request. Id. at ¶172. The Second District stated, "[T]he fact that such an inquiry may be time consuming and painstaking does not

mean that the inquiry may be abandoned in favor of unsupported assumptions by the court that it could not ‘be convinced’ the juror could be fair.” Id. at ¶173. This mandatory inquiry and manner of inquiry creates the inflexibility that is contrary to this Court’s longstanding ruling on the deference to trial court’s handling of matters involving juror misconduct and mistrials.

“The scope of voir dire is generally within the trial court’s discretion, including voir dire conducted during trial to investigate jurors’ reaction to outside influences.” State v. Sanders, 92 Ohio St. 3d 245, 252, 2001-Ohio-189 (citing State v. Henness (1997), 79 Ohio St. 3d 53, 65). In Sanders, the defendant had argued that the trial court “had a duty to conduct a deeper, more individualized inquiry.” Id. In reviewing the inquiry conducted by the trial court in that case, this Court concluded that the trial court did not abuse its discretion in conducting the inquiry it did. Id.

This Court also distinguished Sanders from United States v. Davis (C.A.6, 1999), 177 F.3d 552, 557. In Davis, a juror was dismissed after informing the court he felt intimidated by his employees discussing his jury service with him. Id. at 556. The juror also admitted discussing this fear with other jurors. Id. The trial court did not make any attempt to determine what effect the extraneous contact had upon the other jurors. Id.

In Henness, 79 Ohio St. 3d at 64, the defendant also argued that the trial court “inadequately investigated the allegation that a friend of the victim’s [sic] communicated with jurors.” Defense counsel informed the court that heard from a friend of the defendant that a friend of the victim had spoken to jurors during a recess and praised the victim’s character. Id. Defense counsel also had personally observed someone talking to a juror, but did not know who it was. Id. Defendant moved for a mistrial and asked the court to make a general inquiry of jurors about the matter. Id.

The trial court then addressed the jury as a whole and asked if anyone tried to engage them in conversation. Id. One juror responded, and the court individually questioned her about the matter. The juror explained someone had inquired about the nature of the case, and she told them she was not at liberty to discuss the case with them. Id. The juror told the court she could still be fair. Id. Defense counsel later presented two witnesses. Id. One testified that the victim's friend had approached her and asked her if she was a juror or knew any jurors, and then told her that the victim "was like a father to him." Id. The other testified that she saw the victim's friend in the cafeteria, and that it appeared he was talking to some people wearing juror badges, but did not hear what he said. Id. The victim's friend also testified, and was brought into the courtroom for the jury to see. Id. at 66. None of the jurors responded when asked whether he approached them or tried to discuss the matter with them. Id.

This Court found no abuse of discretion on the part of the trial court as to the scope of the voir dire conducted. Id. Defendant also argued that the trial court abused its discretion by not questioning each juror individually, even though he did not ask the trial court to do so. Id. Again, deferring to the trial court's discretion as to the scope of voir dire, this Court affirmed the trial court's decision and overruled the defendant's proposition of law. Id.

In assessing the "hallmarks of sound discretion" which have been the standard of review, the trial court in this case did exercise its sound discretion in reaching its decision to grant the State's request for a mistrial. The record as reproduced in the decision and as cited above supports a finding that the trial court allowed the parties to state their positions, took into consideration the competing interests, and inquired as to all suggested alternatives to a mistrial. *See, Ross v. Petro, supra.* The trial court did consider and discuss the possibility of a curative instruction but concluded, after questioning the juror, that the court could not be convinced that

she could be cured of the taint. The court even allowed the parties to make suggestions for further inquiry with this juror and gave the attorneys the opportunity to question her. Defense counsel did not take the opportunity to further question the juror, and did not suggest to the court any further inquiry to undertake. Rather than acknowledge the steps that the trial court did utilize to determine if there was a basis for the decision, the Second District focused on steps that it believed should have been taken, infringing upon the trial court's discretion as to the scope of voir dire to be conducted in such situations. Heness and Sanders, supra.

The Second District's statement that "the trial court lacked sufficient information to exercise sound discretion in ruling upon the State's motion for a mistrial," is wrong. Gunnell, supra, at ¶169. The trial court had the opportunity to observe the juror throughout the entire trial process and discussed the items she brought with her on the record. The trial court also had the fact that the juror ignored its multiple admonishments and conducted independent research at home about the law. The trial court also reasonably concluded that despite the juror's statements to the contrary, she likely would have shared the information with the other jurors—why else bring the items to court?—and would have continued to disobey or ignore the court's instructions. "Even when a juror's own statements may be considered, as would be true if misconduct is investigated before a verdict is returned, a juror may intentionally or unintentionally fail to recognize the prejudicial impact of an event and profess that she was not affected. Thus in many instances, the critical question may be whether, under the particular circumstances, a reasonable person would have been influenced." Gunnell v. Rastatter (Sept. 17, 2008), Southern District of Ohio Case No. 3:08-cv-064, 2008 U.S. Dist. LEXIS 118428 at *19-20, citing LaFace, Israel, King & Kerr, Criminal Procedure 3rd, §24.9(f).

An assessment by a trial judge on a matter of misconduct does necessarily require some uncertainties. The trial judge must make the assessment of the juror's credibility as she testifies given the totality of the circumstances. Given the fact that this juror did her own research into the law, printed the instruction out, and brought that printed piece of paper with her to the jury room contradicts her testimony that the instruction was only for her own information and use. This is not speculation but rather an assessment supported by the attendant circumstances. As her testimony was contrary to her actions, the trial court had just cause to question her credibility. More importantly, Juror #6's behavior of violating the judge's instructions and admonitions was a sufficient basis for the trial court to doubt her ability to follow any curative instruction.

There was competent and credible evidence in the record to support the trial court's finding that the juror was not capable of being rehabilitated because she could not be trusted to follow a curative instruction. This conclusion was based on the totality of the circumstances as well as the testimony from the juror herself. However, the Second District Court of Appeals questioned the trial court's assessment by concluding that the trial court assumed the juror's testimony was inherently suspect. Ignoring the fact that this trial court observed these jurors through an individual voir dire, a general voir dire, a week of trial, and had spent in total over six days with this particular jury before conducting a separate voir dire on Juror #6's misconduct, the Second District concluded that the trial court "never took the time to actually make such an inquiry of Juror #6 and observe her demeanor, gestures, and voice inflections in order to determine her credibility." Gunnell at ¶200.

When the record contains competent and credible evidence which supports the trial court's assessment of a juror's credibility, it is improper for the appellate court to substitute its

own assessment in reversing the trial court's findings. An appellate court will never have an equal or better grasp on a witness's or juror's credibility because an appellate court reviews only the cold, printed text. It is that limited review of the matter which is the basis for this Court's requiring a reviewing court to accord "great deference" to the trial court. "The trial judge was in the courtroom, observing counsel, the witnesses, and the reactions of the jurors. A written transcript of the proceedings cannot reflect these critical factors." Glover, supra, at 19.

Rather than accord the trial court "great deference" in its assessment of the prejudicial effect of the material and credibility of the witness and rather than respect the trial court's basis of knowledge from throughout the trial, the Second District Court of Appeals applied an inflexible standard of review requiring the trial court to engage in a mandatory and lengthy inquiry after misconduct occurs before crediting the court with a sufficient basis of knowledge on which to rule. The mandatory inquiry of a juror who engaged in misconduct as to her belief whether she is prejudiced surely would have been a useless exercise in the present matter. Further questioning of Juror #6 would likely have resulted in a situation akin to where the trial court found itself when it ruled, i.e., Juror #6 would have provided all the right answers but the trial court could not trust her to follow the curative instruction or be relieved of the taint caused by her misconduct. This useless exercise may have created a larger record for review but had no material effect on the outcome.

The exacting review by the Second District in this matter devalues the trial court's unique awareness of the situation in its courtroom. The Second District's inflexible standard, which requires the trial court to engage in fruitless exercises before crediting the trial court with sufficient knowledge on which to rule, flows against the longstanding precedent by this Court.

For these reasons, this Court should reverse the Second District Court of Appeals, and find that the trial court did not abuse its discretion in finding a manifest necessity for a mistrial.

Appellant's Proposition of Law No. 2:

When extrajudicial material contrary to the State's case is obtained through juror misconduct, the situation is presumptively prejudicial and the burden shifts to the defendant to establish that the juror was not prejudiced by her research.

“When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror.” State v. Phillips (1995), 74 Ohio St.3d 72, 88, citing Smith v. Phillips (1982), 455 U.S. 209, 215-216. However, “In a criminal case, any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial” Id. “[A]ll juror misconduct is presumed to be prejudicial.” State v. King, 10 Ohio App.3d 161. Although the Second District did not acknowledge the existence of presumptive prejudice, Smith v. Phillips did not foreclose the trial court's use of implied bias in appropriate circumstances. See Smith v. Phillips, 455 U.S. at 223. (O'Connor, J. concurring).

The First Appellate District stated:

Not every instance of juror misconduct requires reversal. The misconduct must be prejudicial. While Ohio has not spoken directly to the question of the burden of proof to demonstrate prejudice once the existence of juror misconduct has been established, we believe the better rule is that all juror misconduct is presumed to be prejudicial, and the prevailing party (the state, in our case) has the burden to demonstrate that the misconduct was not prejudicial under the circumstances.

King, 10 Ohio App.3d at 165 (emphasis added).

In King, the trial continued to a verdict and the defendant was convicted. The King court held that the State on appeal, as the prevailing party in the case, had the burden “to demonstrate that the misconduct was not prejudicial under the circumstances.” Id. The King court further

stated, “The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.” Id. at 165-166. “[J]uror misconduct raises a presumption of prejudice, but the presumption may be rebutted.” Id. at 166. See State v. Hall, 6th Dist. No. S-08-018, 2009-Ohio-5728 at ¶58. (“Prejudice is presumed when a criminal defendant has proven juror misconduct.” (citing State v. Hood (1999) 132 Ohio App.3d 334, 338; State v. Spencer (1997), 118 Ohio App.3d 871, 873; State v. King (1983), 10 Ohio App.3d 161, 165)); See also State v. Gross, 97 Ohio St. 3d 121, 2002-Ohio-5524 at ¶¶122-139 (finding that participation by alternative jurors in deliberations during the penalty phase in a capital case created a presumption of prejudice).

Based on the logic of the King court, when misconduct arises that introduces extraneous information that is prejudicial to a particular party, prejudice should be presumed to exist against that party. Then, at a hearing, the non-prejudiced party would need to make the necessary inquiry to rebut the presumption and ascertain whether any true bias or prejudice remains. Based on the reasoning of the court in King, all juror misconduct is presumed to be prejudicial. In this matter, the trial court believed that the definition and example of involuntary manslaughter prejudiced the State’s case. It is the State’s position that the State is entitled to the presumption of prejudice as well when the misconduct results in material contrary to the State’s case.

The Second District, relying on King, held that there must be a showing that the juror misconduct resulted in prejudice. Gunnell at ¶177. That does not mean that prejudice cannot be presumed. Rather than acknowledge the presumption of prejudice in a situation of juror misconduct, the Second District put the burden on the State to prove actual prejudice in this matter through inquiry of the juror. The appellate court analyzed the definition and example of

involuntary manslaughter at length and concluded that the trial court “piled possibility on top of likelihood to find the prejudice a mistrial requires.” *Id.* at ¶191. However, because the definition and example were contrary to law and had the possibility of impeding the State’s ability to receive a just and fair verdict on the highest charge of felony murder, the trial court had sufficient grounds to conclude that the State would be prejudiced by Juror No. 6’s misconduct. “[T]he public’s interest in fair trials designed to end in just judgments must prevail over the defendant’s valued right” to a particular jury. Washington, 434 U.S. at 516 (internal quotation marks omitted).

This Court in State v. Keith (1983), 79 Ohio St. 3d 514, 526-527, stated, “On numerous occasions, however, we have reaffirmed a long-standing rule that a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown.” The juror misconduct in Keith consisted of a juror allegedly discussing the case with co-workers, although the juror denied doing so. *Id.* at 527. The trial court reasoned there was no prejudice, because nothing factual was discussed, and no information was revealed that wasn’t already publicly known. *Id.* The other two instances of juror misconduct in the case involved a juror that a deputy sheriff gave a ride to the bank to make a house payment before the bank closed during penalty deliberations and some phone calls and voice mail messages received by the jurors that the jurors assumed were prank calls. *Id.* at 527-528.

The situation in this particular case differs greatly from that in Keith. Here, a juror disobeyed the trial court’s admonitions and instructions and actively sought outside information regarding the law. The juror obtained information contrary to the law of the State of Ohio and brought it into the jury with her to share with her fellow jurors during deliberations. When a juror actively commits misconduct, ignores trial court instructions, and intentionally exposes

herself to outside information regarding the facts and/or law of the case, prejudice should be presumed.

Magistrate Judge Merz writing for the District Court for the Southern District of Ohio noted, “It is possible that Juror [No. 6] would have obeyed a curative instruction . . . , but no defense attorney attempted to rehabilitate her when given the opportunity to question her outside the presence of the other jurors, nor did any defense attorney request an opportunity to reopen the questioning after she had once been excused.” Gunnell v. Rastatter (Sept. 17, 2008), Southern District of Ohio Case No. 3:08-cv-064, 2008 U.S. Dist. LEXIS 118428 at *18. Magistrate Judge Merz, in essence, acknowledged that the defense has a burden to take advantage of the opportunity to rebut any presumption of prejudice. The Second District, nevertheless, noted that it is not defense’s burden to rehabilitate the juror but only to object to the State’s request for mistrial. Gunnell, 2010-Ohio-4415 at ¶173.

While prejudice is presumed when a juror is introduced to extraneous information relevant to the trial, this presumption is even stronger when the extraneous information is obtained by the juror who conducted independent research into the law during the deliberation stage of trial. By virtue of the fact that the law researched by the juror is contrary to the law in Ohio and reduces the likelihood of a conviction on the highest charges, the Second District should have presumed the State to be prejudiced by the extraneous information. That presumptive prejudice should be sufficient to meet the State’s burden of manifest necessity. The Second District believed that “[t]o find that this level of misconduct automatically creates a manifest necessity for a mistrial would establish a rule that any juror misconduct, no matter how mild, mandates a mistrial.” Id. at ¶177. However, that fear of mandatory mistrials fails to

account for the opportunity available to defense counsel to rebut the presumption of prejudice at the hearing, i.e., to rebut the need for a mistrial.

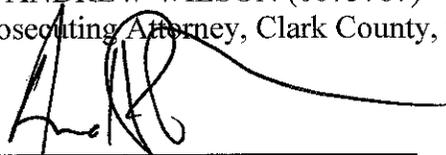
Because the misconduct in this matter resulted in extrajudicial material which undermined the public's interest in a just and fair trial, the Second District Court of Appeals should have acknowledged that the misconduct was presumptively prejudicial against the State's case. Rather than releasing the defendant of any burden, the Second District should have held the defendant to take an active role in rebutting that presumption by making her own inquiry of the juror as to actual prejudice. For these reasons, this Court should reverse the Second District Court of Appeals.

CONCLUSION

The Second District Court of Appeals has created an inflexible standard of review which impedes a trial court's ability to address the unique situations that are presented in its courtroom. This inflexible standard fails to account for the trial court's unique situational awareness and requires the trial court to expend useless time and energy in conducting inquiries that would have no effect on the outcome. Furthermore, given the inherent prejudice which arises from extrajudicial material obtained through juror misconduct, the non-prejudiced party must take an active role in the hearing following discovery of misconduct. A burden of rebutting the presumption of prejudice allows all parties a just and fair trial. For all these reasons the State respectfully asks this Court to reverse the Second District Court of Appeals' decision in this matter.

Respectfully submitted,

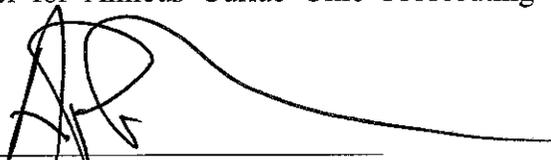
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Plaintiff-Appellant State of Ohio was served by regular mail upon James N. Griffin, 8 North Limestone Street, Suite D, Springfield, Ohio 45502, Counsel for Appellee; Charles Blue, Esq., 401 E. Stroop Road, Kettering, Ohio 45429, Counsel for Amicus Curiae Alicia McAlmong; and Billie Jo Belcher, 225 Court Street, 3rd Floor, Elyria, Ohio 44035, Counsel for Amicus Curiae Ohio Prosecuting Attorneys Association on the 18th day of April, 2011.



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Asst. Clark County Prosecutor
Attorney for Plaintiff-Appellant

ORIGINAL

**IN THE
SUPREME COURT OF OHIO**

10-1636

STATE OF OHIO :
 :
 Plaintiff-Appellant, :
 :
 -vs- :
 :
 TONEISHA GUNNELL :
 :
 Defendant-Appellee :

S.C. Case No. _____

On Appeal from the Clark County
Court of Appeals,
Second Appellate District

Court of Appeals
Case No. 09-CA-0013

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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FILED

SEP 17 2010

CLERK OF COURT
SUPREME COURT OF OHIO

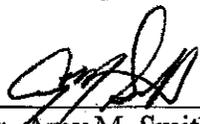
Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clark County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 09-CA-0013 on the 17th of September, 2010.

This case is one of public or great general interest.

Respectfully,

Stephen A. Schumaker
Prosecuting Attorney, Clark County Ohio



By: Amy M. Smith (0081712)
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CERTIFICATE OF SERVICE

This is to certify that a copy of this Memorandum was mailed by regular U.S. mail to counsel of record for defendant-appellee, James N. Griffin, at 4 West Main Street, Suite 526, Springfield, OH 45502 and upon the Office of the Ohio Public Defender at 250 East Broad Street, Suite 1400, Columbus, OH 43215 on this 17th day of September, 2010.



Amy M. Smith (0081712)
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO
Plaintiff-Appellee

: C.A. CASE NO. 09-CA-0013

vs.

: T.C. CASE NO. 05-CR-502

TONEISHA GUNNELL
Defendant-Appellant

:
:
:

FINAL ENTRY
CLARK COUNTY
COURT OF APPEALS

SEP 17 2010

FILED
RONALD E. VINCENT, CLERK

Pursuant to the opinion of ~~this court~~ rendered on the 17TH day of SEPTEMBER, 2010, the judgment of the trial court is reversed and Defendant-Appellant Gunnell's sentence and convictions vacated. Defendant-Appellant Gunnell is Ordered discharged as to the offenses for which she was convicted. Costs are to be paid as provided in App.R. 24.

James A Brogan

JAMES A. BROGAN, PRESIDING JUDGE

Thomas J. Grady

THOMAS J. GRADY, JUDGE

Jeffrey E. Froelich

JEFFREY E. FROELICH, JUDGE

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12 of 15 DOCUMENTS

**STATE OF OHIO, Plaintiff-Appellee vs. TONEISHA GUNNELL,
Defendant-Appellant**

C.A. CASE NO. 09-CA-0013

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, CLARK
COUNTY**

2010 Ohio 4415; 2010 Ohio App. LEXIS 3720

September 17, 2010, Rendered

SUBSEQUENT HISTORY: Motion denied by *State v. Gunnell*, 126 Ohio St. 3d 1615, 2010 Ohio 5101, 935 N.E.2d 853, 2010 Ohio LEXIS 2703 (2010)

Companion case at *State v. McAlmont*, 2010 Ohio 5879, 2010 Ohio App. LEXIS 4958 (Ohio Ct. App., Clark County, Nov. 30, 2010)

Discretionary appeal allowed by *State v. Gunnell*, 2011 Ohio 376, 940 N.E.2d 985, 2011 Ohio LEXIS 177 (Ohio, Feb. 2, 2011)

PRIOR HISTORY: [**1]

(Criminal Appeal from Common Pleas Court), T.C. CASE NO. 05-CR-502.

State v. Gunnell, 2007 Ohio 2353, 2007 Ohio App. LEXIS 2190 (Ohio Ct. App., Clark County, May 11, 2007)

COUNSEL: Stephen Schumacher, Pros. Attorney, Amy M. Smith, Asst. Pros. Attorney, Springfield, OH, Attorneys for Plaintiff-Appellee State of Ohio.

James N. Griffin, Springfield, OH, Attorney for Defendant-Appellant Toneisha Gunnell.

JUDGES: GRADY, J. FROELICH, J., concurs. BROGAN, J., concurring.

OPINION BY: GRADY

OPINION

GRADY, J.:

[*P1] Defendant, Toneisha Gunnell, appeals from her convictions for felony murder, R.C. 2903.02(B), involuntary manslaughter, R.C. 2903.04(A), aggravated robbery, R.C. 2911.01(A)(3), and theft, R.C. 2913.02(A)(1), and the sentences imposed on those convictions pursuant to law. We reverse and vacate those convictions and sentences on two findings. First, the trial court abused its discretion when it denied Gunnell's motion for a mistrial because the jury was exposed to evidentiary material that had not been admitted into evidence and was highly prejudicial to Gunnell and her co-defendants. Second, the trial court erred when it denied Gunnell's motion to dismiss her indictment on a claim of double jeopardy, because the trial court abused its discretion when it ordered a mistrial that terminated a prior trial. The latter finding requires [**2] us to also order Gunnell's discharge.

[*P2] We set forth the history of the case in *State v. Patterson*, Clark App. No. 05CA0128, 2007 Ohio 29, at P2-4, and repeat it herein in part:

[*P3] "On the afternoon of June 7, 2005, Defendant Patterson and three other young women, Toneisha Gunnell, Alicia McAlmont and Renada Manns, traveled from Columbus to the Upper Valley Mall in Springfield. McAlmont drove the women to Springfield in her sister's rental car. The four women shared a common criminal

purpose, plan or scheme: to steal clothing from stores in the mall, and they all participated in that criminal enterprise. After stealing clothing from the Macy's store, Patterson, Gunnell and McAlmont ran outside to their waiting getaway vehicle that was parked along the curb in front of the northern set of doors of the Macy's store, leading to the parking lot. The vehicle was parked facing south, facing oncoming traffic as it sat at the curb. Renada Manns was driving the vehicle. When the three women, who by now were being pursued by a Macy's security guard, got inside the vehicle, Manns accelerated rapidly and sped off in order to avoid apprehension.

[*P4] "As the four women sped away in their vehicle, a pedestrian, [*3] John Deselem, was walking back into the mall from the parking lot, moving toward the southern set of doors into Macy's after retrieving his girlfriend's purse from their car. Deselem apparently saw the security guard running after the fleeing vehicle, and so Deselem stopped, turned and faced the oncoming vehicle and waived his arms in an effort to stop the vehicle. The vehicle did not stop, however, and it struck Deselem, resulting in fatal injuries. Manns drove off out of the mall parking lot without slowing down or stopping. The vehicle was discovered by police a short time later, not far from the mall, with much of the stolen merchandise yet inside. The next day all four defendants turned themselves in to Columbus police.

[*P5] "Defendant Patterson and her three co-defendants were each charged by indictment with one count of felony murder, *R.C. 2903.02(B)*, one count of aggravated robbery, *R.C. 2911.01(A)(3)*, one count of involuntary manslaughter, *R.C. 2903.04(A)*, and one count of theft, *R.C. 2913.02(A)(1)*. * * *

First Jury Trial

[*P6] Defendants Gunnell, Manns, McAlmont, and Patterson were tried together to a jury in November of 2005, and were each found guilty as charged on all four counts [*4] of the indictment. Defendants filed motions for a new trial and for a directed verdict of acquittal. The trial court overruled these motions. On November 17, 2005, the trial court merged Defendants' convictions for sentencing purposes and sentenced Defendants accordingly for murder and aggravated robbery.

[*P7] Defendants appealed from their convictions and sentences. We reversed Defendant's convictions and sentences on a finding that the trial court erred when it

denied her *Batson* challenge, *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, to the State's use of a peremptory challenge to exclude an African-American juror seated on the prospective panel. *State v. Gunnell*, *Clark App. No. 2005-CA-119*, 2007 Ohio 2353; see also *State v. Manns*, 169 Ohio App.3d 687, 2006 Ohio 5802, 864 N.E.2d 657; *State v. McAlmont*, *Clark App. No. 2005-CA-130*, 2006 Ohio 6838; *State v. Patterson*, *Clark App. No. 05CA0128*, 2007 Ohio 29.

Second Jury Trial

[*P8] Defendants Gunnell, Manns, McAlmont, and Patterson were tried together to a jury for a second time beginning on September 24, 2007. Closing arguments concluded on October 1, 2007, and the case was presented to the jury for deliberations. While the jury was deliberating [*5] that evening, the jury requested a definition of "perverse" from the trial court. The trial court declined to provide a definition of perverse. The jury continued to deliberate until after midnight but was unable to reach a verdict. The jury was not sequestered and was sent home at 12:22 A.M. The jury was instructed to return at 10:00 A.M. to continue deliberations.

[*P9] On the morning of October 2, 2007, Juror # 6 was the second juror to arrive. She had two pieces of paper in her hand. The trial court's bailiff obtained these two pieces of paper from Juror # 6 and showed them to the trial court. Juror # 6 had not shared them with any of the other jurors. One of the two pieces of paper had Juror # 6's handwriting on it, which read as follows:

[*P10] "Perverse: contrary to the manner or direction of the judge on a point of law <<perverse verdict>". (Exhibit 2 to Dkt. # 62A.)

[*P11] The second piece of paper contained typewritten material that stated:

[*P12] "Manslaughter: Involuntary

[*P13] "Involuntary manslaughter usually refers to an unintentional killing that results from recklessness or criminal negligence, or from an unlawful act that is a misdemeanor or low-level felony (such as DUI). The usual distinction from [*6] voluntary manslaughter is that involuntary manslaughter (sometimes called 'criminally negligent homicide') is a crime in which the victim's death is unintended.

[*P14] "For example, Dan comes home to find his wife in bed with Victor. Distraught, Dan heads to a local bar to drown his sorrows. After having five drinks, Dan jumps into his car and drives down the street at twice the posted speed limit, accidentally hitting and killing a pedestrian." (Emphasis in original). (Exhibit 1 to Dkt. # 62A.)

[*P15] After speaking with counsel for the State and counsel for Defendants, the trial court conducted a very short inquiry of Juror # 6 regarding how she obtained the information on the two pieces of paper. After the inquiry, the trial court repeatedly emphasized that it believed that the juror's involuntary manslaughter research was very prejudicial to the State's case. Following that, counsel for the State moved for a mistrial and the trial court granted the motion over the objections of Defendants.

[*P16] The trial court subsequently issued an October 10, 2007 entry journalizing the mistrial and scheduling a new trial. (Dkt. # 62A.) On November 6, 2007, Defendants filed a joint motion to dismiss the indictment [**7] on double jeopardy grounds. (Dkt. # 65.) The trial court denied this motion on November 26, 2007. (Dkt. # 68.)

[*P17] Defendants filed petitions for a writ of habeas corpus in the United States District Court for the Southern District of Ohio pursuant to 28 U.S.C. § 2254. The District Court denied Defendants' petitions because Defendants failed to show that the trial court's decision in the state proceedings "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Gunnell v. The Honorable Douglas Rastatter* (S.D. Ohio Sept. 17, 2008), Case No. 3:08-CV-064, 2008 U.S. Dist. LEXIS 118428. Manns appealed from the District Court's judgment to the United States Court of Appeals for the Sixth Circuit. Gunnell, Patterson, and McAlmont did not appeal the District Court's judgment. On January 26, 2010, the Court of Appeals for the Sixth Circuit affirmed the District Court's judgment. *Gunnell v. Douglas Rastatter* (6th Cir. Jan. 26, 2010), Case No. 08-4505, 2010 U.S. App. LEXIS 19819.

Third Jury Trial

[*P18] While Manns' appeal was pending before the Court of Appeals for the Sixth Circuit, Gunnell, Patterson, and McAlmont were tried together to a jury for

a third time from [**8] January 20 to January 30, 2009. After the jury began its deliberations in this third trial, the jury informed the trial court that it had received and collectively examined an exhibit that had not been discussed or admitted in evidence. Upon investigation, it was determined that State's Exhibit 227B, which had been marked and identified in Gunnell's second trial, was inadvertently included in a stack of the State's exhibits that were admitted into evidence as a group prior to the beginning of jury deliberations in the third trial.

[*P19] Counsel for Gunnell, McAlmont, and Patterson moved for a mistrial. The trial court stated that it would hold the motion for mistrial in abeyance until it had a chance to individually speak with each juror regarding State's Exhibit 227B. The trial court questioned each juror regarding whether they had read and examined State's Exhibit 227B. Each juror indicated that he or she had, in fact, seen and discussed the document with the other jurors. The trial court cautioned each juror that during trial no testimony was offered regarding the exhibit, and that the contents of the statement were unreliable. The trial court instructed each juror to disregard State's [**9] Exhibit 227B. For their part, the jurors, in response to questioning from the trial court, stated that they would be able to disregard the statement and not consider it during their remaining deliberations.

[*P20] The trial court stated that it believed the jury could disregard the impact of the document and allowed them to continue deliberations. Further, after the jury finished deliberating, but before the verdict was announced, the trial court interviewed each juror again regarding State's Exhibit 227B to determine whether each juror had disregarded the exhibit. After questioning each juror a second time, the trial court overruled defense counsels' motions for mistrial and allowed the jury's verdict to be announced in open court.

[*P21] Gunnell, Patterson, and McAlmont were each found guilty on all four of the counts contained in the indictment. For sentencing purposes, the trial court merged the felony murder and involuntary manslaughter counts, as well as the counts for aggravated robbery and theft. The trial court sentenced Gunnell to fifteen years to life in prison for the felony murder and three years for the aggravated robbery. The trial court ordered that Gunnell's sentences be served [**10] consecutively for an aggregate sentence of eighteen years to life in prison. Gunnell filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

[*P22] "THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE DEFENDANT TO DECLARE A MISTRIAL WHEN THERE WAS OBVIOUS DENIAL OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO FAIR AND IMPARTIAL JURY DELIBERATIONS."

[*P23] Gunnell argues that the trial court abused its discretion in denying Gunnell's motion for a mistrial in the third trial because the jury collectively examined State's Exhibit 227B, which had not been admitted into evidence. State's Exhibit 227B is a Clark County Sheriff's Office form entitled "Official Statement," and consists of a written statement made by a State's witness at the second trial, Jennifer Rockwell. The statement reads as follows:

[*P24] "[Renada Manns] and [Mahogany Patterson] where [sic] up in pod 3 east laughing about hitting and killing that guy at the mall[.] [T]hey said that fat mother-fucker hit the windshield and rolled off the car[.] [T]hey also stated that [Renada's] sister[']s boyfriend is the one that picked them up when they abanded [sic] their car. [Renada] stated that she was the one driving the car when Mr. Deselem was hit."

[*P25] [**11] Jennifer Rockwell did not testify at the third trial, and her written statement that had been marked as State's Exhibit 227B and admitted into evidence in the second trial was neither discussed nor admitted into evidence in the third trial. Nevertheless, the statement was among the exhibits that were admitted into evidence by the court and provided to the jury for its deliberations in the third trial. The jury, after reviewing the written statement and realizing that a serious error had been committed, brought the matter to the trial court's attention.

[*P26] It appears from the record that the error occurred when, at the conclusion of the State's case, the trial court, impatient with reviewing the State's exhibits for admission into evidence one-by-one, ordered that all remaining exhibits in the State's stack of marked materials would be admitted, absent an objection by the Defendants. One of the Defendants objected to that procedure, but the court overruled the objection. (Tr. 1412-18.) How the written statement marked as State's Exhibit 227B found its way into the stack of materials the State offered is unexplained. Nevertheless, the

consequence of any prejudice that resulted is chargeable [**12] to the State.

[*P27] We sustained an identical assignment of error raised by Mahogany Patterson, one of Gunnell's co-defendants. *State v. Patterson, Clark App. No. 2009-CA-16, 188 Ohio App. 3d 292, 2010 Ohio 2012, 935 N.E.2d 439*. We explained why the trial court abused its discretion in denying defense counsels' motion for a mistrial:

[*P28] "Simply put, Rockwell's statement vilified Patterson and was devastating to her defense to aggravated robbery and murder, both of which require proof of recklessness beyond a reasonable doubt. We find that the trial court's instructions to the jurors were insufficient as a matter of law to cure the prejudicial effect of State's Exhibit 227B. We noted earlier that the repeated references to State's Exhibit 227B, an incendiary statement, may have served to only highlight it further. 'We will not blindly assume that a jury is able to follow a *** court's instruction to ignore the elephant in the deliberation room.' *U.S. v. Morena (C.A.3, 2008), 547 F.3d 191, 197*. The fact that jurors believed that they could disregard State's Exhibit 227B does not convince us that they did so, given its inherent prejudice. When given the opportunity to impeach their own verdict before its announcement in open court, [**13] it is no surprise that not a single juror did so. The decision on the motion for mistrial should have been made on a wholly objective basis and not on the questioning of individual jurors regarding their deliberative process. We are not willing to conclude that State's Exhibit 227B is something that can simply be erased from a juror's mind. The jurors' good faith in deliberations cannot counter the effect of such an injurious and false hearsay statement. Its inclusion amongst the exhibits was especially egregious given its known falsity. It violated Patterson's rights under the *Sixth Amendment Confrontation Clause*. Despite the jurors' efforts to decide this case solely on the facts and the law, State's Exhibit 227B readily arouses passion against Patterson and her accomplices. We are not unmindful of the impact of the decision that we render today. However, the right to a trial by an impartial jury is at the very heart of due process. *Irvin v. Dowd (1961), 366 U.S. 717, 721-722, 81 S.Ct. 1639, 6 L.Ed.2d 751*. This is true, irrespective of the gravity of the crimes charged. The ends of justice and due process require a mistrial. Thus, we hold that the trial court abused its discretion [**14] when it overruled Patterson's motion

for a mistrial." *Id. at P81. (Emphasis supplied).*

[*P29] We will sustain Gunnell's first assignment of error on the same basis on which we sustained Patterson's assignment of error. The State argues that Gunnell's assignment of error should be overruled because the document referred only to Renada Manns and Mahogany Patterson, and therefore the written statement of Jennifer Rockwell had limited or no prejudicial effect on Gunnell's case. (State's Brief, p. 9.) That contention is completely undermined by the State's theory of collective criminality and the arguments it made to the jury.

[*P30] During the State's closing arguments, counsel for the State stressed over and over again that all of the Defendants were responsible for the actions of each other. For example, the prosecutor explained complicity, stating:

[*P31] "The defendants' actions were one cause. They are responsible. The Court is going to instruct you on complicity. Mr. Collins went over that in his opening. If somebody in the jury rooms says, 'But they weren't driving,' say, 'Wait a minute. Let's look at these instructions. The law says if two of [sic] more people are working together for the common purpose [**15] and one person does one part, another person does another part, they are all equally responsible. Let's look at the law.'" (Tr. 1601-02.)

[*P32] The State continued this theme throughout its closing:

[*P33] "They want you to ignore the law of complicity. We are going to talk about complicity here in a little bit.

[*P34] " * * *

[*P35] "Is Renada Mann's going to leave without them? No. She is waiting on them. And it's no coincidence that she hits that accelerator clear to the floor as soon as they get in that car. We talk about the law. The law is important. They want you to ignore the law. You promised that you won't. You promised that you would follow the law.

[*P36] " * * *

[*P37] "It caused his death. The question becomes to you as to whether or not it was recklessly inflicted. Their actions before, during and after this event showed

that it was reckless. Everything they did that day was reckless. And as a result of that, they're guilty of aggravated robbery. And then if you cause somebody's death as a proximate result of committing that aggravated robbery, that is murder.

[*P38] " * * *

[*P39] "The common purpose here is the theft, and then the question becomes for you is whether there was a common recklessness as a result of that theft [**16] that led to John Deselem's death.

[*P40] " * * *

[*P41] "The common purpose here was to steal and they all conceded to that, and in doing that and in the manner that they did it and the manner that they fled from doing it, they had a common recklessness where somebody was likely to get hurt. 'My client couldn't stop the car. My client couldn't steer the car. My client didn't have any control over that accelerator.' It has a certain amount of appeal to it until you follow the law and until you delve into what's really going on here.

[*P42] "And that law of complicity that we talked about all four girls, they are all in this together. * * *

[*P43] " * * *

[*P44] "That's all that's required. They were acting as a team throughout this. All of this theft was a team effort. * * *

[*P45] " * * *

[*P46] "We do not have to show a common purpose to commit a robbery. It's a misstatement of the law. They shared that common purpose to commit the theft. All of these girls shared a common recklessness that led to the serious -- the infliction of serious physical harm and ultimately the death of John Deselem." (Tr. 1713-18.)

[*P47] Moreover, the jury instructions contained portions that emphasized the existence of a common purpose:

[*P48] "Evidence has been presented [**17] that the defendants may have acted in concert with one another in committing the offenses in the indictment. When two or more persons have a common purpose to

commit a crime and one does one part and another performs the other part, both are equally guilty of the offense.

[*P49] "One who purposefully aids, abets, helps, or assists another to commit a crime is regarded by law as an accomplice to that offense and is treated as if she were the principal offender." (Tr. 1748-49.)

[*P50] It is disingenuous for the State, having so ardently argued to the jury that the conduct of one defendant is attributable to all, to now argue that the prejudice resulting from the improper admission of Jennifer Rockwell's statement did not extend to Defendant Gunnell. It did, the trial court's instructions and meticulous efforts to obtain denials of that prospect from the jurors notwithstanding.

[*P51] Given the theory of common and collective guilt on which the State's case was predicated, the inherently prejudicial content of State's Exhibit 227B requires us to sustain Gunnell's first assignment of error, based on our opinion in *State v. Patterson*, 188 Ohio App. 3d 292, 2010 Ohio 2012, 935 N.E.2d 439.

SECOND ASSIGNMENT OF ERROR

[*P52] "THE TRIAL COURT ERRED WHEN IT [**18] DECLARED A MISTRIAL AT THE END OF THE SECOND TRIAL WHEN A CURATIVE INSTRUCTION WOULD HAVE BEEN SUFFICIENT TO ALLOW THE JURY TO CONTINUE TO DELIBERATE."

[*P53] This assignment of error concerns the trial court's denial of Defendant's motion to dismiss the indictment prior to the third trial on her claim of double jeopardy.

[*P54] We conduct a de novo review of a denial of a motion to dismiss an indictment on the grounds of double jeopardy. *State v. Betts*, Cuyahoga App. No. 88607, 2007 Ohio 5533, at P20, citing *In re Ford* (6th Cir. 1992), 987 F.2d 334, 339. The granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Treesh*, 90 Ohio St. 3d 460, 480, 2001 Ohio 4, 739 N.E.2d 749, citing *Crim.R. 33* and *State v. Sage* (1987), 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343.

[*P55] "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 Ohio B. 123, 482 N.E.2d 1248. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

[*P56] "A decision is unreasonable [**19] if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

Double Jeopardy

[*P57] The *Double Jeopardy Clause of the Fifth Amendment to the United States Constitution*, made applicable to the states through the *Fourteenth Amendment*, states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb," and thus protects a criminal defendant from multiple prosecutions for the same offense. *Oregon v. Kennedy* (1982), 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416. Jeopardy attaches when the jury is empaneled and sworn. *Crist v. Bretz* (1978), 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24.

[*P58] The purpose behind the prohibition against double jeopardy is that "the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, [**20] expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty." *Green v. United States* (1957), 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199, 77 Ohio Law Abs. 202.

[*P59] The protections afforded by the *Double Jeopardy Clause* confer upon a criminal defendant the right to have his trial completed by a particular tribunal. *Oregon v. Kennedy*, 456 U.S. at 671-72; *Arizona v. Washington* (1978), 434 U.S. 497, 503-04, 98 S.Ct. 824, 54 L.Ed.2d 717. This right, nonetheless, is not absolute. "Because of the variety of circumstances that may make

it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington*, 434 U.S. at 505.

[*P60] R.C. 2945.36 provides that:

[*P61] "The trial court may discharge a jury without prejudice to the prosecution:

[*P62] "(A) For the sickness or corruption of a juror or other [**21] accident or calamity;

[*P63] "(B) Because there is no probability of such jurors agreeing;

[*P64] "(C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;

[*P65] "(D) By the consent of the prosecuting attorney and the defendant.

[*P66] "The reason for such discharge shall be entered on the journal."

[*P67] The trial court did not reference R.C. 2945.36 in its entry declaring a mistrial or in its entry overruling Defendants' joint motion to dismiss the indictment. Based on our review of the record, "corruption of a juror" is the only situation identified in R.C. 2945.36 that may be applicable to the present case.

Mistrials Based on Manifest Necessity

[*P68] In cases where a mistrial has been declared without the defendant's request or consent, the defendant "may not be retried unless there was a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice." *Gilliam v. Foster* (4th Cir. 1996), 75 F.3d 881, 893, citing *United States v. Dinitz* (1976), 424 U.S. 600, 606-07, 96 S.Ct. 1075, 47 L.Ed.2d 267, and *Wade v. Hunter* (1949), 336 U.S. 684, 690, 69 S. Ct. 834, 93 L. Ed. 974.

[*P69] The Supreme Court has explained that "there are [**22] degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Arizona v. Washington*, 434 U.S. at 506.

"[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one." *Id.* at 505.

The Trial Court Must Exercise Sound Discretion

[*P70] "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490. The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1.

[*P71] "The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances[.]'" *Downum v. United States* (1963), 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100. Trial courts "are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *United States v. Perez* (1824), 22 U.S. 579, 580, 9 Wheat. 579, 6 L.Ed. 165.

[*P72] [**23] The fact that a trial court's decision to declare a mistrial is entitled to great deference "does not, of course, end the inquiry." *Arizona v. Washington*, 434 U.S. at 514. "[D]iscretion does not equal license; the Fifth Amendment's guarantees against double jeopardy would be a sham if trial courts' declarations of 'necessary' mistrials were in fact to go unreviewed." *United States v. Sisk* (6th Cir. 1980), 629 F.2d 1174, 1178.

[*P73] The trial court "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn* (1971), 400 U.S. 470, 486, 91 S.Ct. 547, 27 L.Ed.2d 543. "In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial court exercised 'sound discretion' in declaring a mistrial. Thus, if a trial court acts irrationally or irresponsibly, * * * his action cannot be condoned." *Arizona v. Washington*, 434 U.S. at 514, citations omitted.

[*P74] "Sound [**24] discretion" is "the essential

element of the 'manifest necessity' standard: it is not merely whether or not a high degree of necessity exists, but the manner in which the inquiry is conducted by the trial court." *Slagle v. Court of Common Pleas of Montgomery County, Ohio* (S.D. Ohio Aug. 3, 2009), Case No. 3:08-cv-146, 2009 U.S. Dist. LEXIS 84012. The trial court's "exercise of discretion stands on much firmer ground * * * when it is apparent on the face of the record the reasons for a particular decision, and the analytic process leading to that conclusion." *Glover v. McMackin* (6th Cir. 1991), 950 F.2d 1236, 1241. Hallmarks of the exercise of "sound discretion" include a trial court allowing the parties to state their positions, seriously considering their competing interests, and making a thorough inquiry into reasonable alternatives to a mistrial. *Ross v. Petro* (6th Cir. 2008), 515 F.3d 653.

[*P75] The "doctrine of manifest necessity stands as a command to trial courts not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn*, 400 U.S. at 485, citing [*25] *United States v. Perez*. As such, "[a]n order of the trial court declaring a mistrial during the course of a criminal trial, on motion of the state, is error and contrary to law, constituting a failure to exercise sound discretion, where, taking all the circumstances under consideration, there is no manifest necessity for the mistrial, no extraordinary and striking circumstances and no end of public justice served by a mistrial, and where the judge has not made a scrupulous search for alternatives to deal with the problem." *State v. Schmidt* (1979), 65 Ohio App.2d 239, 244-45, 417 N.E.2d 1264, citing *United States v. Jorn* and *Downum v. United States* and *United States v. Perez*. "[A] precipitate decision, reflected by a rapid sequence of events culminating in a declaration of mistrial" is not a "scrupulous exercise of sound discretion" and "tend[s] to indicate insufficient concern for the defendant's constitutional protection." *Brady v. Samaha* (1st Cir. 1981), 667 F.2d 224, 229, citations omitted.

Juror Misconduct and Prejudice

[*P76] Any independent inquiry by a juror about the evidence or the law violates the juror's duty to limit his considerations to the evidence, arguments, and law presented in open court, [*26] and such activity is juror misconduct. *State v. King* (1983), 10 Ohio App.3d 161,

165, 10 Ohio B. 214, 460 N.E.2d 1383; *State v. Spencer* (1997), 118 Ohio App.3d 871, 873-74, 694 N.E.2d 161. But not every instance of juror misconduct requires a mistrial; the misconduct must be prejudicial. *King*, 10 Ohio App.3d at 165; *State v. Hubbard*, Cuyahoga App. No. 92033, 2009 Ohio 5817, at P14, citation omitted.

[*P77] "It is well-established that 'the party complaining about juror misconduct must establish prejudice.'" *State v. King*, Lucas App. No. L-08-1126, 2010 Ohio 290, at P23, quoting *State v. Adams*, 103 Ohio St.3d 508, 2004 Ohio 5845, P42, 817 N.E.2d 29. This requirement of prejudice is reflected in *Crim.R. 33(A)(2)*, which provides: "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: (2) Misconduct of the jury, prosecuting attorney, or the witnesses of the state[.]"

1

1 Accord: *State v. Hopper* (1996), 112 Ohio App.3d 521, 543, 679 N.E.2d 321 ("In reviewing circumstances suggesting juror misconduct, we must employ a two-tier analysis: (1) determine whether there was juror misconduct and (2) if juror misconduct is found, determine whether it materially affected the defendant's substantial rights."), [*27] citing *State v. Taylor* (1991), 73 Ohio App.3d 827, 833, 598 N.E.2d 818.

[*P78] "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial court, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial court ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer*[".]" *Smith v. Phillips* (1982), 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78.

2

2 Accord: *Hopper*, 112 Ohio App.3d at 543 ("The test for a prospective juror is not whether he has escaped normal influences or has no views on a universal question; the test is whether his views will impair his judgment to the extent that

he would not be able to faithfully and impartially determine the facts and apply [**28] the law according to the instructions of the court.' *Dayton v. Gigandet* (1992), 83 Ohio App.3d 886, 891-92, 615 N.E.2d 1131, 1134.").

[*P79] In *Remmer v. United States* (1954), 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146, a person told a juror during the trial that a favorable outcome for the defendant could be potentially lucrative. The juror immediately informed the trial court of this communication. The judge, prosecutor, and FBI investigated the matter and determined that the comment was said in jest and no further action was taken. The defendant was never informed of the contact with the juror until after he was convicted. On appeal, the United States Supreme Court vacated the conviction and explained the importance of a hearing to determine whether the juror was impacted by the outside communication:

[*P80] "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.

[*P81] ****

[*P82] "The trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact [**29] thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229-30.

[*P83] The Ohio Supreme Court has relied on *Remmer* to require the trial court to hold a hearing in cases involving outside communications with jurors: "When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror." *State v. Phillips*, 74 Ohio St.3d 72, 88, 1995 Ohio 171, 656 N.E.2d 643, citing *Smith v. Phillips* (1982), 455 U.S. at 215-16, and *Remmer*. See also *State v. Stallings*, 89 Ohio St.3d 280, 296, 2000 Ohio 164, 731 N.E.2d 159. Similarly, if juror misconduct in the form of an independent investigation is discovered, the trial court is "required to inquire of that particular juror to determine whether he or she remained impartial after the independent investigation." *Spencer*, 118 Ohio App.3d at

874. See also *State v. Gordon*, Stark App. No. 2005CA00031, 2005 Ohio 3638, at P54, quoting *State v. Gray* (July 27, 2000), Cuyahoga App. No. 76170, 2000 Ohio App. LEXIS 3371.

[*P84] The inquiry of whether the juror has been biased by the outside information should not be left to counsel for the parties. Rather, the trial court has the duty [**30] to protect the rights of the State and the defendant to a fair and impartial jury. This duty is reflected in *R.C. 2945.03*, which provides that: "The judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue." Therefore, if an allegation arises of outside influence on the jury, the trial court must lead the inquiry to determine whether prejudice has resulted from the juror misconduct.

[*P85] The United States Court of Appeals for the First District summarized the trial court's duties:

[*P86] "[When] a colorable claim of jury taint surfaces during jury deliberations, the trial court has a duty to investigate the allegation promptly.' *Bradshaw*, 281 F.3d at 289 (footnote omitted); see also *United States v. Corbin*, 590 F.2d 398, 400 (1st Cir. 1979). The investigation must 'ascertain whether some taint-producing event actually occurred,' and then 'assess the magnitude of the event and the extent of any resultant prejudice.' *Bradshaw*, 281 F.3d at 289. Even if both a taint-producing [**31] event and a significant potential for prejudice are found through the investigation, a mistrial is still a remedy of last resort. See *id.* The court must first consider 'the extent to which prophylactic measures (such as the discharge of particular jurors or the pronouncement of curative instructions) will suffice to alleviate prejudice.' *Id.* This painstaking investigatory process protects the defendant's constitutional right to an unbiased jury, *id.* at 289-90, as well as his "'valued right to have his trial completed by a particular tribunal,'" *Jorn*, 400 U.S. at 484, 91 S.Ct. 547 (plurality opinion) (quoting *Wade*, 336 U.S. at 689, 69 S.Ct. 834). The investigation is also critical in creating a sufficient record to permit meaningful appellate review of the [trial] court's manifest necessity determination." *United States v. Lara-Ramirez*, (1st Cir. 2008), 519 F.3d 76, 86.

[*P87] When conducting the inquiry into juror misconduct and any resulting bias or prejudice, a trial

court normally will need to question the juror. The United States Supreme Court has cautioned trial courts against automatically dismissing the juror's credibility:

[*P88] "Respondent correctly notes that determinations made in *Remmer*- [**32] type hearings will frequently turn upon testimony of the juror in question, but errs in contending that such evidence is inherently suspect. As we said in *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), '[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.' *Id.*, at 171, 70 S.Ct., at 523. See also *United States v. Reid*, 53 U.S. 361, 12 How. 361, 366, 13 L.Ed. 1023 (1852)." *Smith v. Phillips*, 455 U.S. at 217 n.7.

Juror # 6's Misconduct

[*P89] The jurors in the second trial interrupted their deliberations to ask the court for a definition of the word "perverse." That matter suggests that the court had instructed the jury on the statutory definition of "reckless" conduct in *R.C. 2901.22(C)* ("perversely disregards a known risk"), as the culpable mental state applicable to the charges of felony murder, *R.C. 2903.02(B)*, and aggravated robbery, *R.C. 2911.01(A)(3)*, 3 as the court did in the third trial. (Tr. 1745-1751). In any event, the court declined to provide the jury a definition [**33] of perverse and sent the jury home for the night.

3 The Supreme Court more recently held that *R.C. 2911.01(A)(3)* is a strict liability offense, and does not require proof of a culpable mental state. *State v. Horner*, 126 Ohio St. 3d 466, Slip Op. No. 2010 Ohio 3830, 935 N.E.2d 26.

[*P90] At some point between being sent home at 12:22 A.M. and arriving back at the courthouse by 10:00 A.M., Juror # 6 looked up the definition of the word "perverse" and wrote the definition on a piece of paper. Also, Juror # 6 apparently conducted a search on the internet for information relating to the term "involuntary manslaughter" and printed what she found onto a single sheet of paper. She then brought these two pieces of paper with her to the jury room, intending to share only the handwritten definition of perverse with the other jurors. The trial court's bailiff obtained the two pieces of

paper from Juror # 6 before she shared any of the information with any of the other jurors. The court informed counsel of the matter, and then questioned the juror, with counsel present.

The Trial Court's Inquiry of Juror # 6

[*P91] The entirety of the trial court's short inquiry of Juror # 6 was as follows:

[*P92] "JUROR NO. 6: Good morning.

[*P93] "THE COURT: [**34] You can have a seat there.

[*P94] "JUROR NO. 6: Okay.

[*P95] "THE COURT: It's come to our attention that you brought some items in with you this morning. One appears to be a handwritten definition of the term 'perverse,' and another one appears to be something that maybe you printed off of the internet that --

[*P96] "JUROR NO. 6: Yes, I did.

[*P97] "THE COURT: A definition or instruction on 'involuntary manslaughter.'

[*P98] "JUROR NO. 6: That nobody saw them.

[*P99] "THE COURT: You're the only one that saw them?

[*P100] "JUROR NO. 6: I told her (the bailiff) that I didn't know we weren't allowed. I'm sorry.

[*P101] "THE COURT: Okay. Did you --

[*P102] "JUROR NO. 6: And I didn't talk about it.

[*P103] "THE COURT: All right. Apparently you were doing some research last night or this morning on the internet or --

[*P104] "JUROR NO. 6: I just wanted to see -- everybody kept asking what the word 'perverse' was, and I just wanted to look it up for myself to see exactly what it meant.

[*P105] "THE COURT: Sure. Okay. What about the -- what about the manslaughter issue? Was there something you were doing on the computer with respect to that?

[*P106] "JUROR NO. 6: No. It was just something I wanted - - that was for me. I wasn't going to show them that. I had the other - - I had the [**35] definition. That was all that I was going to share.

[*P107] "THE COURT: Was there - - was there something inadequate or something wrong with the Court's instruction for 'involuntary manslaughter' that you felt like you needed to supplement the instruction or what - - was there something that wasn't clear about the Court's instruction on that?

[*P108] "JUROR NO. 6: No. I was - - I was at home. I was on the computer, and I just - - I did not get much sleep last night, and I just - - that was mainly for myself. I just wanted to have it clear in my own head.

[*P109] "THE COURT: Okay. Okay. Counsel have any questions for this particular juror?

[*P110] "MR. SHUMAKER: None from the State, Your Honor.

[*P111] "MR. REED: No, Your Honor. Thank you.

[*P112] "MR. KAVANAGH: No, Your Honor.

[*P113] "MS. CUSHMAN: No.

[*P114] "MR. GRIFFIN: No, Your Honor." (October 2, 2007 Tr. 9-12.)

The Trial Court Declares a Mistrial

[*P115] After the court's questioning of Juror # 6 about how she obtained the two pages of information that she brought to the jury room, counsel for the parties and the trial court discussed their positions with respect to what should be done in response to Juror # 6's actions. The prosecutor stated:

[*P116] "MR. SHUMAKER: I guess, Your Honor, the State's position [**36] is we'd leave it to the Court's discretion as to whether or not this is fatal.

[*P117] "It's clear, although unintentional, that it's clear juror misconduct. If - - if the Court did decide that this is not automatically a mistrial, at the very least, I think this juror needs to be strongly, strongly instructed that the definitions that she has - - that she has retrieved here have no application to this case whatsoever and - - and, in fact, they're not Ohio law; and they need to be

completely disregarded and not communicated in any way, shape, or form to any other juror. And we need her assurance that in no way she would consider such things." (October 2, 2007 Tr. 12-13.)

[*P118] Defense counsel stated that a curative instruction would be sufficient to assuage any concerns they had about the conduct of Juror # 6. The only questions that appeared to remain between counsel for the State and counsel for Defendants appeared to be the language of the curative instruction and whether it should be given solely to Juror # 6 or to all of the twelve jurors. Counsel for the State stated:

[*P119] "MR. SCHUMAKER: State's position, Your Honor, would be that the general instruction is not sufficient, that we're dealing with [**37] specific documents here with a specific juror; and she needs to be instructed specifically as to those documents that were produced.

[*P120] "And that - - and to specifically be instructed that she is not to consider those in any way and that they are not the law of the State of Ohio, and she would have to be able to give us her assurance that she could do so." (Id. at 14-15.)

[*P121] The trial court then made it patently clear to the prosecutors that it believed the State was severely prejudiced by Juror # 6's actions:

[*P122] "THE COURT: I guess I don't know what, you know I have a clear indication from the defense as to what they want. I don't have a recommendation from the State. Initially you indicated that it was juror misconduct in your belief but that you wanted to leave matters to the discretion of the Court.

[*P123] "I mean, are you - - and let me preface this by saying I think this definition or hypothetical of manslaughter is prejudicial to the State because it talks about a scenario where an individual has five drinks, is arguably under the influence of alcohol, gets in a car and drives twice the posted speed limit, and accidentally hits and kills a pedestrian. I think - - I would think that under Ohio [**38] law that would appear to be reckless behavior.

[*P124] "Of course, that would be for a jury to determine; but I would think that gets us pretty close to recklessness. And yet it comes under the heading of

'involuntary manslaughter'; whereas in our case, the instructions are that if there's recklessness, then that translates into aggravated robbery and felony murder and/or reckless homicide as opposed to involuntary manslaughter so I believe this is prejudicial to the State.

[*P125] "The State's position, I guess, is that this can be cured with an instruction to the juror as opposed to a mistrial?" (Id. at 16-17.) (Emphasis supplied.)

[*P126] Having been prompted twice by the trial court that the involuntary manslaughter hypothetical was prejudicial to the State, the prosecutors raised the possibility of a mistrial:

[*P127] "MR. COLLINS: I'm not sure that that was our recommendation to you, Your Honor. For - - for one thing - - and when we characterize this as juror misconduct, you can have juror misconduct without malicious purpose.

[*P128] "And I don't think anybody here believes that what [Juror # 6] did, she did with some kind of malicious purpose, with some specific intention of causing a problem in this particular case. [**39] That - - that's irrelevant why she's done it.

[*P129] "The fact that she did it is what the problem is; and I believe the Court is correct as it stands right now, [Juror # 6] herself is contaminated. And the - - unless we could be assured that in no way would this contamination affect her decision in this particular case, we have a mistrial; and I don't know if we can or not.

[*P130] "THE COURT: Well - -

[*P131] "MR. COLLINS: I think that was what our position was is that she would have to be strongly instructed and be able to assure us that she would not use that and particularly that example. I'm not sure how we get to that point.

[*P132] "MR. SHUMAKER: That example is so bad it equates reckless conduct with involuntary manslaughter, which is not the law of the State of Ohio. It ignores the fact that another predicate crime has been committed. So the - - task of ensuring that she is not prejudiced by this is very daunting." (Id. at 17-18.)

[*P133] The trial court again reiterated how prejudicial to the State it believed the hypothetical was:

[*P134] "THE COURT: Well, I have no doubt in my mind that if we bring her back in here and ask her, can she put this out of her mind and not consider it, she'll say yes because she appears [**40] to be a very nice lady.

[*P135] "And I agree. I don't think there's any allegation here that she purposely did anything wrong or was trying to sabotage the case; or I think she was, just as she indicated, she was up all night. And this is weighing heavily on her mind, and she's grasping for any information or any assistance she can get to help her to make what she believes to be a fair and just verdict.

[*P136] "So I don't fault her for - - for anything she's done, but the point is that she's done something now; and she's been exposed to something that I think is very prejudicial. It flies in the face of the Court's instructions on the two most critical charges in the indictment.

[*P137] "So I guess my point is: We can bring her in, and we can all ask her and try to rehabilitate her; and I'm sure she's going to say all the right things because, again, I think she's a nice person. And she's going to want to try to be accommodating and pleasing, and I know or I'm certain she doesn't want to be responsible for a mistrial.

[*P138] "So she's going to try to appease us and say what she needs to say; but, you know, I just - - I feel like that may be an exercise of futility. I don't know that I can be convinced that she's [**41] going to be able to put this out of her mind.

[*P139] "I mean, she's been given a hypothetical here that's very prejudicial, extremely inconsistent with the law and State of Ohio as I instructed." (Id. at 18-19.) (Emphasis supplied.)

[*P140] The prosecutor then requested a five-minute break to discuss the matter. (Id. at 19.) After the break, the State moved for a mistrial:

[*P141] "MR. COLLINS: Yes, Your Honor. I thank you for the opportunity. We've had an opportunity to review this matter, and we're thoroughly looking at the law and examining this situation. At this time it is our conclusion that the situation that we have here with this particular juror is a fatal situation that, unfortunately, cannot be cured.

[*P142] "And, unfortunately, we'll be asking for a mistrial at this time." (Id. at 20.)

[*P143] Defense counsel disagreed with the State and objected to the motion for mistrial. Defense counsel suggested that a curative instruction and assurances from Juror # 6 that she could put the hypothetical out of her mind would be sufficient to ensure a fair trial. The trial court sided with the State and declared a mistrial. The trial court explained:

[*P144] "THE COURT: The Court was very specific in its instructions when it informed [**42] the jury yesterday that the Court and the jury have separate functions. You decide the disputed facts, and the Court gives the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You may neither change the law nor apply your own idea of what you think the law should be.

[*P145] "Further in the instructions, the Court informed the jurors that it is your duty to weigh the evidence, decide the disputed questions of fact, and apply the instructions of law to your findings, and render your verdict accordingly.

[*P146] "I don't know how much more clear I could make it to them that the Court is the authority on the law and that it was their sworn duty to accept those instructions and to apply the law as the Court gave it to them.

[*P147] "It doesn't surprise me that the position on this issue of a mistrial, that the parties are lining up as they are because the information that this juror was exposed to is very prejudicial to the State of Ohio and is very beneficial to the defendants.

[*P148] "The hypothetical in this instruction on 'involuntary manslaughter' contains facts that, in the Court's opinion, rise to the level of recklessness. And yet in this definition, [**43] wherever the juror got it, it indicates that that conduct translates to involuntary manslaughter; whereas under Ohio law, that conduct would translate into aggravated robbery and felony murder.

[*P149] "I don't believe the juror was acting in bad faith. I don't think she did anything intentionally wrong. She appears to be a very nice person who was simply trying to gather as much information as she possibly

could in an effort to make the right decision, a decision that she could live with and a decision that she believed would be just and fair.

[*P150] "So the issue isn't whether or not she intended to sabotage the case, but the point is is that she's now been exposed to a definition and a hypothetical of involuntary manslaughter that's contrary to the laws of the State of Ohio; and I believe that she's been irreparably tainted as a result of that. I think there's substantial prejudice to the State of Ohio.

[*P151] "I don't think there's anybody that wants to get this case resolved more than the Court. I know the parties want to get it resolved. I think that's - - there's evidence of that fact, due to the fact that the parties and the Court have been working very hard for last seven days on this case.

[*P152] "But [**44] given the situation, the Court believes that it has no other option than to sustain the State's motion, and I'll do that at this time. The Court is declaring a mistrial * * *." (Id. at 24-27.)

The Trial Court's Entry Journalizing The Mistrial

[*P153] The trial court journalized its reasons for granting the State's motion for a mistrial in an October 10, 2007 Entry. (Dkt. # 62A.) The trial court identified the following three reasons why it believed there was manifest necessity for a mistrial:

[*P154] "First, declaring a mistrial was a manifest necessity because Juror # 6 had been irreparably tainted by the information she had acquired. The involuntary manslaughter hypothetical was somewhat analogous to the case herein since it involved the defendant causing the death of a pedestrian with his vehicle. The hypothetical, however, included other aggravating factors such as 'five drinks' and 'twice the posted speed limit,' neither of which is a prerequisite for a felony murder or involuntary manslaughter conviction under Ohio law. Juror # 6 likely would have used this hypothetical as a gauge in evaluating the case against the four defendants herein. With this hypothetical as a gauge, it is likely that Juror [**45] # 6 would have disregarded felony murder as a possible verdict. It is even possible that she would have reasoned that the four defendants herein are not even guilty of involuntary manslaughter because they did not consume 'five drinks' and there was no proof beyond a reasonable doubt that they were going 'twice the posted

speed limit.' A juror using this hypothetical as a gauge or reference, whether consciously or subconsciously, is extremely unfair and prejudicial to the State of Ohio, especially since the State could not address it in its closing arguments.

[*P155] "Second, declaring a mistrial was a manifest necessity because, despite her statements to the contrary, it appears she would have tainted the other jurors with the outside information she had acquired. The Court's concern is corroborated by the fact that she actually brought the documents to the jury room. Juror # 6 had already disregarded the Court's repeated instructions, and there was no way the Court could have been assured that she would follow subsequent instructions to not disclose the outside acquired material to other jurors. Accordingly, it was somewhat likely that all of the jurors would have eventually been tainted [**46] by the outside information.

[*P156] "Third, declaring a mistrial was a manifest necessity because an admonition could not have cured the problem herein. Juror # 6 had already disregarded the Court's repeated instructions and admonitions. There was no way the Court could have been assured that she would follow subsequent instructions to disregard the outside acquired material." (Dkt. # 62A, p. 3.)

The Denial of Defendants' Joint Motion to Dismiss

[*P157] In its entry denying Defendants' joint motion for dismissal of the indictment on double jeopardy grounds, the trial court identified the issue as follows:

[*P158] "Whether the *double jeopardy clause of the Fifth Amendment to the United States Constitution* bars the retrial of four criminal co-defendants where the Court declared a mistrial due to a juror (1) disregarding the Court's repeated admonitions, (2) referring to outside sources for guidance during deliberations, and (3) conveying extraneous material into the jury room at a critical point in the deliberation process with the specific intent of sharing some portion thereof with the other jurors." (Dkt. # 68, p. 2.)

[*P159] After stating the issue, the trial court stated that it was reviewing its own, previous [**47] decision in which it declared a mistrial for an abuse of discretion. In ruling on Defendants' motion to dismiss, it was not the role of the trial court to review its own prior decision for

an abuse of discretion. In such matters, the judge should refer the issue presented to a different judge to decide. Not surprisingly, the trial court concluded that it had not abused its discretion in declaring a mistrial. The trial court concluded: "The most compelling evidence that the Court's decision was not arbitrary, unreasonable, or unconscionable, is that, prior to declaring a mistrial, the Court conducted a hearing on the record and scrupulously searched for an alternative solution." (Dkt. # 68, p. 4.)

[*P160] The trial court identified seven "facts" that it relied on in making its determination to declare a mistrial:

[*P161] "First, the Court repeatedly instructed the jurors that '* * * it is critical that you, from this point on, limit the information that you take in with respect to this case to that which is presented to you in the courtroom.'

[*P162] "Second, Juror # 6 disregarded the Court's repeated admonitions and instructions and engaged in juror misconduct. * * *

[*P163] "Third, a further admonition could not [**48] have cured the problem. Juror # 6 had already disregarded the Court's repeated instructions and admonitions. There was no way the Court could have been assured that she would follow subsequent admonitions and instructions to disregard the extraneous material which had contaminated her.

[*P164] "Fourth, a juror using the involuntary manslaughter hypothetical as a gauge or reference, whether consciously or subconsciously, would be extremely unfair and prejudicial to the State of Ohio. * * *

[*P165] "Fifth, Juror # 6 planned to use the involuntary manslaughter hypothetical as a supplement to the Court's instruction as she informed the Court upon inquiry, '. . . [the internet version of involuntary manslaughter] was mainly for myself. I just wanted to have [the Court's instruction on involuntary manslaughter] clear in my own head.'

[*P166] "Sixth, Juror # 6 conveyed extraneous material into the jury room at a critical point in the deliberation process.

[*P167] "Seventh, Juror # 6 conveyed the extraneous material into the jury room at a critical point

in the deliberation process with the specific intent of sharing some of it with the other eleven jurors as she informed the Court upon inquiry, 'I had the definition. That [**49] was all that I was going to share.'" (Dkt. # 68, p. 6-7.)

The Trial Court Did Not Exercise Sound Discretion

[*P168] When the jury requested a definition from the court of the word "perverse," the court could reasonably have given a dictionary definition. The trial court did not do that. The trial court was not responsible for Juror # 6's misconduct when she independently conducted research in the early morning of October 2, 2007. But, once the trial court was informed of that misconduct, it had a duty to conduct an inquiry of Juror # 6 to determine the extent of the misconduct and what effect, if any, the misconduct had on Juror # 6's impartiality. *Smith v. Phillips*, 455 U.S. at 217; *State v. Phillips*, 74 Ohio St.3d at 88. This inquiry serves two vital purposes. It ensures that the trial court is fully informed of all of the facts when the court considers both of the parties' interests and what reasonable alternatives to a mistrial are available. It also develops a record necessary for an appellate court to determine whether the trial court exercised sound discretion when ruling on the motion for a mistrial.

[*P169] The trial court did not conduct any inquiry into what effect, if any, the definition [**50] of involuntary manslaughter Juror # 6 found had on her impartiality. The trial court did not even inquire whether Juror # 6 recalled any of the information contained in her research, or what her understanding of it was. Without such an inquiry, the trial court lacked sufficient information to exercise sound discretion in ruling upon the State's motion for a mistrial.

[*P170] In its written entries journalizing the mistrial and denying Defendants' joint motion to dismiss the indictment, the trial court defended its failure to conduct a further inquiry of Juror # 6 on two bases. First, that Defense counsel had failed to request a further inquiry of Juror # 6. Second, that such an inquiry would have been futile because Juror # 6 could no longer be trusted to be impartial. We do not agree.

[*P171] *The State, Not Defendants, Must Show Prejudice*

[*P172] The fact that Defense counsel did not push

more aggressively for further questioning of Juror # 6 is not a valid reason for a trial court to ignore its duty to perform such a further inquiry. As we discussed above, it is the duty of the trial court to lead the necessary inquiry to determine whether a fair trial is still possible despite the juror's misconduct and [**51] in consideration of information obtained outside the courtroom. The court abandoned that duty when it instead offered the juror to the parties for questioning.

[*P173] Moreover, it was the State's burden to show prejudice resulting from Juror # 6's misconduct in order to justify a mistrial the State requested. It was not Defense counsel's burden to somehow "rehabilitate" Juror # 6. Defendant's only burden was to object to the State's request, which she did. We acknowledge that any inquiry of a juror after deliberations have begun cannot be taken lightly and must only be undertaken after careful deliberation by the trial court and counsel. But the fact that such an inquiry may be time consuming and painstaking does not mean that the inquiry may be abandoned in favor of unsupported assumptions by the court that it could not "be convinced" the juror could be fair.

Juror # 6's Misconduct Was Innocuous

[*P174] When a mistrial was ordered, the trial court was wholly and exclusively concerned with the prejudicial effect on the State's case of the information obtained by Juror # 6 relating to involuntary manslaughter, rather than the egregiousness of Juror # 6's actual misconduct in looking up the information [**52] on the internet. While all juror misconduct must be taken seriously, we agree with the trial court's first instinct that Juror # 6's misconduct was mild. Indeed, counsel for the State, counsel for Defendants, and the trial court all agreed at the time the misconduct was discovered that Juror # 6 did not have any ill intentions when she conducted her independent research.

[*P175] The description by the trial court of a juror who essentially was a victim of her own desire to do a good job and reach a fair verdict is in stark contrast to the description the trial court gave in the entry journalizing the mistrial and in the entry overruling Defendants' joint motion to dismiss the indictment. In those two entries, the trial court described the juror as someone who could not be trusted because she intentionally ignored repeated instructions by the trial court throughout the trial to not consider anything other than the evidence and law

presented in the courtroom. The shift in the trial court's views of Juror # 6 lacks foundation, absent a simple, further inquiry that would have allowed the court to determine whether Juror # 6 had in fact been prejudiced or was not trustworthy.

[*P176] Juror # 6, along with [**53] the rest of the jury, deliberated into the early morning of October 2, 2007. Prior to being sent home for the evening, the jury had requested the definition of "perverse" from the trial court. The jury's request was denied. Juror # 6 did not go home and ask her family or friends what "perverse" meant. She did not call an attorney in the morning to get the definition of perverse. Rather, it appears that she looked up the word in a dictionary, which is only natural when one does not know the meaning of a word. She explained upon inquiry by the trial court that "everybody kept asking what the word 'perverse' was, and I just wanted to look it up for myself to see exactly what it meant." At oral argument, counsel for the State conceded that the handwritten definition of "perverse" brought into the jury room by Juror # 6 did not create a manifest necessity for a mistrial. We agree.

[*P177] Regarding the involuntary manslaughter information she printed from the internet, Juror # 6 stated that she was unable to sleep and wanted to have the idea of involuntary manslaughter "clear in her head" when she returned for deliberations at 10:00 A.M. The trial court did not inquire what she meant by that. The [**54] juror did not say that she would be guided by the definition she obtained instead of by the court's instruction. She explained to the trial court that she did not intend to share the information with the remainder of the jury. The trial court ignored this testimony and speculated that she likely would have shared this information with the rest of the jury. The trial court stated no reason for disbelieving Juror # 6 except that she had committed misconduct. A juror is not automatically discredited by her misconduct. *Smith v. Phillips*. To find that this level of misconduct automatically creates a manifest necessity for a mistrial would establish a rule that any juror misconduct, no matter how mild, mandates a mistrial. This is not the law in Ohio. Rather, juror misconduct must result in prejudice in order to necessitate a mistrial or new trial. *King*, 10 Ohio App.3d at 165; *Crim.R. 33(A)*.

Juror # 6's Research Was Not Extremely and Inherently Prejudicial

[*P178] There was no manifest necessity for a

mistrial unless Juror # 6 was biased or prejudiced by the information she obtained through her misconduct such that she could not remain impartial. To make that determination, the court must hold a [**55] hearing to determine whether the outside "communication" biased the juror. *State v. Phillips*. But the trial court avoided such an inquiry. Instead, the trial court reviewed the two pages of information brought in by Juror # 6 and determined, without a hearing or any inquiry, the effect the court subjectively believed the information would have on Juror # 6's impartiality. When the court journalized its order declaring a mistrial on October 10, 2007, the court stated:

[*P179] "Juror # 6 likely would have used this hypothetical as a gauge in evaluating the case against the four defendants herein. With this hypothetical as a gauge, it is likely that Juror # 6 would have disregarded felony murder as a possible verdict. It is even possible that she would have reasoned that the four defendants herein are not even guilty of involuntary manslaughter because they did not consume 'five drinks' and there was no proof beyond a reasonable doubt that they were going 'twice the posted speed limit.'" (Dkt. # 62A, p. 3.)

[*P180] The printed material that Juror # 6 obtained reads as follows:

[*P181] "Manslaughter: Involuntary

[*P182] "Involuntary manslaughter usually refers to an unintentional killing that results from recklessness [**56] or criminal negligence, or from an unlawful act that is a misdemeanor or low-level felony (such as DUI). The usual distinction from voluntary manslaughter is that involuntary manslaughter (sometimes called 'criminally negligent homicide') is a crime in which the victim's death is unintended.

[*P183] "For example, Dan comes home to find his wife in bed with Victor. Distraught, Dan heads to a local bar to drown his sorrows. After having five drinks, Dan jumps into his car and drives down the street at twice the posted speed limit, accidentally hitting and killing a pedestrian." (Emphasis in original). (Exhibit 1 to Dkt. # 62A.)

[*P184] Count I of the indictment charged the offense of felony murder, *R.C. 2903.02(B)*, with aggravated robbery, *R.C. 2911.02(A)(3)*, being the necessary predicate offense. The definition Juror # 6

obtained does not reference aggravated robbery or felony murder. Therefore, we do not agree with the trial court's concern that Juror # 6's research contained such inherently prejudicial information that the State would not be able to obtain a felony murder conviction.

[*P185] In order to prove that Defendants were guilty of involuntary manslaughter, the State had to show that Defendants caused [**57] the death of John Deselem as a proximate result of committing or attempting to commit a felony. *R.C. 2903.04(A)*. "The culpable mental state for Involuntary Manslaughter is that of the underlying offense." *State v. Hancher, Montgomery App. No. 23515, 2010 Ohio 2507, at P67*, citation omitted. The underlying offense must be one "which, while taken without an intention to kill, was performed in circumstances in which a reasonable person would foresee that it would cause the death of the victim." *State v. Ziko (1991), 71 Ohio App.3d 832, 837, 595 N.E.2d 1019*.

[*P186] Count III of the indictment identified theft, rather than aggravated robbery, as the underlying offense. In order to prove theft, the State merely had to prove that Deselem's death was a proximate result of Defendants "knowingly obtain[ing] or exert[ing] control over" the property of another without the consent of the owner of the property. *R.C. 2913.02(A)*.

[*P187] The reference to "(such as DUI)" and the example given on the page that Juror # 6 brought into the jury room presents no essential element of involuntary manslaughter. The present case involves no facts of that kind. It was pure speculation on the part of the trial court to conclude that Juror # [**58] 6 would require such proof in order to convict, especially when she was never asked what effect, if any, the research had on her. What the example given in the definition that Juror # 6 had does highlight, though, is the difficulty the State created for itself when it identified theft as the underlying offense for the involuntary manslaughter Count.

[*P188] It would be difficult for the State to show that Deselem's death was a proximate result of Defendants' theft, as compared with showing that Deselem's death was a proximate result of serious physical harm Defendants inflicted when they fled after committing the theft. At most, the mentioning of "DUI" in the research obtained by Juror # 6 highlights the fact that the shoplifting theft offenses are not circumstances which a reasonable person would foresee would cause the

death of the victim in this case. *State v. Ziko*. Driving while intoxicated or driving while fleeing after committing theft are more likely to result in a reasonable person foreseeing that the action will result in the death of an individual than is the simple, isolated act of committing theft. Consequently, the reference to "DUI" in Juror # 6's research did nothing more than [**59] highlight a burden that the State created for itself when it authored the indictment.

[*P189] Moreover, it is important to note that the hypothetical contained in Juror # 6's research begins with the words, "For example." By its very nature, the phrase "For example" implies that what follows is but one example, but not the only example, of the general information preceding the hypothetical. The paragraph that preceded the hypothetical presented a general summary of what the term involuntary manslaughter "usually refers to." While the general summary is in no way a perfect depiction of Ohio law, it is consistent with Ohio law in that involuntary manslaughter is an unintentional killing that results from an unlawful act that is a misdemeanor or low-level felony. *R.C. 2903.04(A), (B)*. It veers from Ohio law in this particular case when it mentions "recklessness", which is not required to prove an involuntary manslaughter based on theft, with which Defendants were charged in this case. But the general summary states that an unintentional killing resulting from "recklessness" or "criminal negligence" or "a misdemeanor or low-level felony" may constitute involuntary manslaughter. Therefore, the [**60] information preceding the hypothetical made it clear that involuntary manslaughter could be proven if a "low-level felony" was shown. In this case, the indictment identified theft, which is a low-level felony. Therefore, it is unreasonable to assume, without further inquiry, that Juror # 6 would have "likely" used the hypothetical to add a "reckless" requirement into the involuntary manslaughter Count of the indictment and ultimately reject a guilty verdict.

[*P190] Indeed, a review of the two paragraphs relating to involuntary manslaughter reveals that the information contained therein is nowhere near as inherently prejudicial as the statement contained in State's Exhibit 227B, to which the entire jury was improperly exposed in the third trial. Unlike State's Exhibit 227B, the product of the independent research by Juror # 6 did not refer to any of the parties, did not contain any incendiary statements, and would not readily arouse passion against

any of the parties. Despite this indisputable fact, the trial court acted in a remarkably different way when confronted with the potential jury taint in the second and third trials. The court extensively and meticulously questioned all the jurors [**61] in the third trial concerning possible prejudice. In the second trial, the court rejected out of hand the prospect of even questioning the single juror regarding possible prejudice. The difference in the two instances calls into question whether in the second trial the court approached the issue of a mistrial in an impartial manner, and instead "indicate[s] insufficient concern for the defendant's constitutional protection." *Brady v. Samaha*, 667 F.2d at 229.

[*P191] The "findings" the trial court made and on which it ordered a mistrial are not the product of the exercise of "sound discretion" the court is charged to exercise in determining whether a manifest necessity for a mistrial exists. *United States v. Jorn*. The court instead piled possibility on top of likelihood to find the prejudice a mistrial requires, having both failed to make an inquiry necessary for that finding or a scrupulous search for alternatives to a mistrial. *Arizona v. Washington*. Justice Benjamin N. Cardozo warned trial courts that exercising discretion does not leave room for such unsupported assumptions and speculation:

[*P192] "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He [**62] is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." Selected Writings of Benjamin Nathan Cardozo (Margaret E. Hall 1947), *The Nature of the Judicial Process*, p. 164-65.

[*P193] The cardinal rule governing declaration of a mistrial is that before doing so the court must engage in a scrupulous search for alternatives to deal with the problem concerned, *United States v. Jorn*, and that the search must reveal a manifest necessity for a mistrial and/or that failure to order a mistrial would defeat the ends of justice. *United States v. Dinitz*. In other words, a mistrial should only be ordered as a last resort. *United*

States v. Lara-Ramirez.

[*P194] The trial court did not view a mistrial as a last resort, but instead as the first and only resort, ignoring the State's initial request [**63] for an inquiry and instruction and insisting, repeatedly, that the juror's misconduct was prejudicial to the State. The leap to that conclusion that the court announced neither demonstrates nor creates a manifest necessity. Disturbingly, the court abandoned its role as a neutral adjudicator and became an advocate for the State's cause, seizing on the juror's misconduct, without any inquiry into the prejudice that might result, to order a mistrial. The Double Jeopardy Clause functions to guard against efforts by prosecutors or judges to see or declare a mistrial in order to obtain a more favorable jury. *Arizona v. Washington*, 434 U.S. at 508, quoting *U.S. v. Dinitz*, 424 U.S. at 611.

[*P195] The trial court drove the process toward a mistrial the State had not requested, and then requested only after the prosecutors saw which way the wind was blowing. Indeed, the prosecutor, when a mistrial was finally requested, saw no need to even offer any grounds, confident that the State could rely on the court's pronouncement that it could not "be convinced" otherwise. The court's subsequent efforts to justify its actions find scant, if any, support in the record. Instead, the record amply demonstrates [**64] that the court abused its discretion when it ordered a mistrial, and that the court erred when it denied Defendant's motion to dismiss the indictment on her claim of double jeopardy. Therefore, the second assignment of error will be sustained.

[*P196] The State argues that we should overrule Gunnell's second assignment of error based on the reasoning of the United States District Court for the Southern District of Ohio and The United States Court of Appeals for the Sixth Circuit in their denials of Defendants' petitions for habeas corpus relief.⁴ We are not bound by those holdings. Neither do we agree with them.

⁴ 28 U.S.C. § 2254(d) provides, in pertinent part:

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

[*P197] The District Court and Sixth Circuit Court of Appeals found reasonable the trial court's [**65] determination that the hypothetical example in the internet definition of involuntary manslaughter brought in by Juror # 6 "was potentially quite damaging" to the State's case. As we explained above, the hypothetical was not the type of inherently prejudicial material that would, by itself, create a manifest necessity for a mistrial without conducting further inquiry of the juror who reviewed it.

[*P198] The District Court, along with the trial court, emphasized defense counsels' failure to rehabilitate Juror # 6. But this ignores the fact that it was the State's burden to show that Juror # 6's misconduct prejudiced the State's case, and it was the trial court's duty to make a sufficient inquiry of Juror # 6 to ensure that it exercised "sound" discretion in ruling on the State's motion for a mistrial. Defendant Gunnell met her burden by objecting and requesting that the juror be instructed to ignore the information she obtained.

[*P199] The Sixth Circuit Court of Appeals also stated that the trial court considered many alternatives to declaring a mistrial. As we explained above, however, the record belies any suggestion that the trial court seriously considered any alternatives to a mistrial.

[*P200] Finally, [**66] the District Court and Sixth Circuit Court of Appeals deferred to the trial court's decision to find that Juror # 6 would not be credible were she asked whether she could remain impartial despite her independent research. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial court is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273. But, in the present case, the trial court never took the time to actually make such an inquiry of Juror # 6 and observe her demeanor, gestures, and voice inflections in order to determine her credibility. Instead, it did precisely what the United States Supreme Court has cautioned trial courts not to do: assume that jurors' testimony is inherently suspect. *Smith v. Phillips*, 455 U.S. at 217 n.7.

Conclusion

[*P201] The trial court failed to act rationally, responsibly, or deliberately when confronted with Juror # 6's misconduct in Gunnell's second trial. Thus, we conclude that the trial court did not [**67] exercise sound discretion in declaring a mistrial, and therefore also erred in denying Gunnell's motion to dismiss the indictment on her claim of double jeopardy. We fully appreciate the significance of our decision. Our conclusion that Gunnell's double jeopardy rights were violated by the trial court's improper declaration of a mistrial means that Gunnell, who is presently incarcerated, and has been for more than five years, cannot be retried on these charges. Such consequences emphasize the need for careful consideration of alternatives to a mistrial by the trial court in the first instance and the need to conduct an adequate investigation when confronted with juror misconduct.

[*P202] The judgment of the trial court will be reversed and Gunnell's sentence and convictions vacated. Gunnell will be ordered discharged from custody.

FROELICH, J., concurs.

CONCUR BY: BROGAN

CONCUR

BROGAN, J., concurring:

[*P203] I concur in the well reasoned opinion of Judge Grady that the trial court erred in granting a mistrial absent a manifest necessity for doing so. It is unfortunate that the appellant had to endure a third trial before she could appeal the denial of her motion to dismiss on double jeopardy grounds. It is time for the [**68] Ohio Supreme Court to revisit its opinion in *State v. Crago* (1990), 53 Ohio St.3d 243, 559 N.E.2d 1353, wherein the court held that the overruling of a motion to dismiss on double jeopardy grounds is not a final appealable order. It is clear that the *Double Jeopardy Clause* is a guarantee against being twice put to trial for the same offense. See the unanimous opinion of the Ohio Supreme Court in *State v. Thomas* (1980), 61 Ohio St.2d 254, 400 N.E.2d 897, which was overruled in *Crago*; also see the United States Supreme Court decision in *Abney v. United States* (1977), 431 U.S. 651, 661, 97 S. Ct. 2034, 52 L. Ed. 2d 651.

this case. The Court and the jury have separate functions. You decide the disputed facts and the Court gives the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You may neither change the law nor apply your own idea of what you think the law should be.

The Court further charged the jury as follows:

It is your duty to weigh the evidence, decide the disputed questions of fact, apply the instructions of law to your findings, and render your verdict accordingly.

The jury was released at 12:22 A.M. on October 2, 2007 and Ordered to return at 10:00 A.M. on October 2, 2007.

Juror #6 returned to the jury room to resume deliberations at approximately 10:00 A.M. on October 2, 2007. She was bearing two pieces of paper, copies of which are attached hereto as Court Exhibit #'s 1 and 2. Exhibit #1 is a handwritten definition of the word "perverse." Exhibit #2 is a definition and hypothetical of involuntary manslaughter that the juror admitted printing off the internet and bringing to Court.

The Court found Exhibit #2, especially the hypothetical contained therein, to be prejudicial to the State. The State moved for a mistrial. The defense objected and recommended that the Court cure the problem by admonishing Juror #6 to disregard the information she had acquired.

It is within a trial judge's sound discretion to grant a mistrial. State v. Sage, 31 Ohio St. 3d 173 (1987). In State v. Glover, 35 Ohio St. 3d 18 (1988), the court held "that where the trial judge sua sponte declares a mistrial, double jeopardy does not bar retrial unless the judge's action was instigated by prosecutorial misconduct designed to provoke a mistrial, or the declaration of a mistrial constituted an abuse of discretion." An abuse of discretion exists when the trial court's decision is arbitrary, unreasonable, or unconscionable. See State v. Xie, 62 Ohio St. 3d 521 (1992); State v. Moreland, 50 Ohio St. 3d 58 (1990); State v. Adams, 62 Ohio St. 2d 151 (1980).

The trial judge's decision to grant a mistrial and retry appellant is reasonable and does not violate the constitutional prohibition against double jeopardy if: (1) there was a manifest or high degree of necessity for declaring a mistrial, or (2) without a mistrial, public justice would have been diminished. Arizona v. Washington, 434 U.S. 497 (1978); State v. Widner, 68 Ohio St. 2d 188 (1981). The trial judge occupies the best position to determine whether a mistrial is warranted. Widener, supra.

Moreover, trial courts have broad discretion in dealing with improper outside juror communication. State v. Phillips, 74 Ohio St. 3d 72 (1995). Juror misconduct creates a presumption of prejudice. Id. As State v. Spencer, 118 Ohio App. 3d 871 (1997) opined, "the act of the juror in contacting outside sources for information was

clearly inappropriate juror misconduct."

In State v. Hood, 132 Ohio App.3d 334 (1999), a juror performed an inappropriate act and disclosed to the other jurors what he believed he gleaned from Black's Law Dictionary. The trial judge found that the definition of aider and abettor in Black's was not Ohio law and that the "extraordinary investigation" by the juror prejudiced the case. The trial judge declared a mistrial and the appellate court found that his decision to do so was not unreasonable.

In the case sub judice, the Court sustained the State's motion for a mistrial out of manifest necessity and because, without a mistrial, public justice would have been diminished.

First, declaring a mistrial was a manifest necessity because Juror #6 had been irreparably tainted by the information she had acquired. The involuntary manslaughter hypothetical was somewhat analogous to the case herein since it involved the defendant causing the death of a pedestrian with his vehicle. The hypothetical, however, included other aggravating factors such as "five drinks" and "twice the posted speed limit," neither of which is a prerequisite for a felony murder or involuntary manslaughter conviction under Ohio law. Juror #6 likely would have used this hypothetical as a gauge in evaluating the case against the four defendants herein. With this hypothetical as a gauge, it is likely that Juror #6 would have disregarded felony murder as a possible verdict. It is even possible that she would have reasoned that the four defendants herein are not even guilty of involuntary manslaughter because they did not consume "five drinks" and there was no proof beyond a reasonable doubt that they were going "twice the posted speed limit." A juror using this hypothetical as a gauge or reference, whether consciously or subconsciously, is extremely unfair and prejudicial to the State of Ohio, especially since the State could not address it in its closing arguments.

Second, declaring a mistrial was a manifest necessity because, despite her statements to the contrary, it appears she would have tainted the other jurors with the outside information she had acquired. The Court's concern is corroborated by the fact that she actually brought the documents to the jury room. Juror #6 had already disregarded the Court's repeated instructions, and there was no way the Court could have been assured that she would follow subsequent instructions to not disclose the outside acquired material to other jurors. Accordingly, it was somewhat likely that all of the jurors would have eventually been tainted by the outside information.

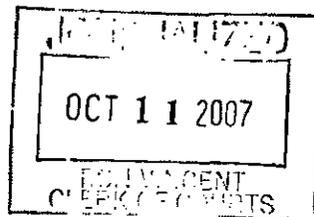
Third, declaring a mistrial was a manifest necessity because an admonition could not have cured the problem herein. Juror #6 had already disregarded the Court's repeated instructions and admonitions. There was no way the Court could have been assured that she would follow subsequent instructions to disregard the outside acquired material.

Accordingly, the Court declared a mistrial out of manifest necessity and because, without a mistrial, public justice would have been diminished.

This matter is hereby re-assigned for trial on December 3, 2007 at 9:00 A.M.

IT IS SO ORDERED.


DOUGLAS M. RASTATTER, JUDGE



cc: Steve Schumaker and Steve Collins
Jim Griffin
Joseph Reed
Linda Cushman
Paul Kavanagh

perverse: contrary to the sources
or direction of the judge on a
point of law & perverse verdict

Manslaughter: Involuntary

Involuntary manslaughter usually refers to an unintentional killing that results from recklessness or criminal negligence, or from an unlawful act that is a misdemeanor or low-level felony (such as DUI). The usual distinction from voluntary manslaughter is that involuntary manslaughter (sometimes called "criminally negligent homicide") is a crime in which the victim's death is unintended.

For example, Dan comes home to find his wife in bed with Victor. Distraught, Dan heads to a local bar to drown his sorrows. After having five drinks, Dan jumps into his car and drives down the street at twice the posted speed limit, accidentally hitting and killing a pedestrian.

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 05-CR-502
Plaintiff,	:	
vs.	:	ENTRY
MAHOGANY PATTERSON	:	
TONEISHA GUNNELL	:	
RENADA MANN	:	
ALICIA McALMONT	:	
Defendants.	:	

2007 NOV 25 AM 1:53
 COURT REPORTER
 111

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I. Introduction

This matter was before the Court on the defendants' November 6, 2007 joint motion for dismissal. The Court has reviewed and deliberated upon that motion, the State's November 15, 2007 response, the trial transcript, and the case-law.

II. Juror Misconduct

It is beyond dispute that Juror #6 engaged in misconduct, not simply by disregarding the Court's repeated admonitions and referring to outside sources for guidance during deliberations and therefore contaminating herself, but also by conveying that extraneous material into the jury room at a critical point in the deliberation process with the specific intent of sharing some portion thereof with the other jurors.

On the morning of September 25, 2007, prior to general voir dire, the Court admonished the prospective jurors as follows:

It's also critical that if you are selected as a juror in this case and you get to the point where you're deliberating, that during your deliberations . . . you only consider the evidence that's presented to you in the courtroom during the course of this trial. And that's absolutely critical in order for there to be a fair trial to both sides. It wouldn't be fair to either side if jurors were in the jury room deliberating and talking about issues or facts that were not addressed during the course of the trial. For one, they may not be factual. They may not be facts. And two, the attorneys may or may not be aware of those things and, therefore, wouldn't be able to incorporate those things into their arguments. **So it is critical that you, from this point on, limit the information that you take in with respect to this case to that which is presented to you in the courtroom.** And I think that you all have

a pretty good understanding and idea of the importance of – of that concept.

By the end of that day, a jury of twelve and two alternates had been seated. Furthermore, the State and all four defense attorneys delivered their opening statements. Prior to releasing the jurors that evening, the Court admonished the jurors in pertinent part:

It's absolutely critical that from this point on, the only exposure you have to this case is from what transpires here in the courtroom.

On October 1, 2007 at approximately 9:45 P.M., the Court charged the jury. Included in that charge was the following:

It is now the duty of the Court to instruct you on the law which applies to this case. The Court and the jury have separate functions. You decide the disputed facts and the Court gives the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You may neither change the law nor apply your own idea of what you think the law should be.

The Court further charged the jury as follows:

It is your duty to weigh the evidence, decide the disputed questions of fact, apply the instructions of law to your findings, and render your verdict accordingly.

In direct violation of this Court's admonitions and instructions, Juror #6 conducted an internet search on involuntary manslaughter, printed her findings, looked up the definition of the word "perverse" in a dictionary, wrote out her findings, and conveyed that extraneous material into the jury room at a critical point in the deliberation process with the specific intent of sharing some portion of it with the other eleven jurors.

III. Issue

Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution bars the retrial of four criminal co-defendants where the Court declared a mistrial due to a juror (1) disregarding the Court's repeated admonitions, (2) referring to outside sources for guidance during deliberations, and (3) conveying extraneous material into the jury room at a critical point in the deliberation process with the specific intent of sharing some portion thereof with the other jurors.

IV. Law

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

"[W]here the trial judge sua sponte declares a mistrial, double jeopardy does not bar retrial unless the judge's action was instigated by prosecutorial misconduct designed to provoke a mistrial, or the declaration of a mistrial constituted an abuse of discretion." State v. Glover, 35 Ohio St. 3d 18 (1988).

In other words, it is within a trial judge's sound discretion to grant a mistrial. State v. Sage, 31 Ohio St. 3d 173 (1987). An abuse of discretion exists, not when there is an error in judgment, but when the trial court's decision is arbitrary, unreasonable, or unconscionable. See State v. Xie, 62 Ohio St. 3d 521 (1992); State v. Moreland, 50 Ohio St. 3d 58 (1990); State v. Adams, 62 Ohio St. 2d 151 (1980).

The trial judge's decision to grant a mistrial and retry appellant is reasonable and does not violate the constitutional prohibition against double jeopardy if: (1) there was a manifest or high degree of necessity for declaring a mistrial, or (2) without a mistrial, public justice would have been diminished. Arizona v. Washington, 434 U.S. 497 (1978); State v. Widner, 68 Ohio St. 2d 188 (1981).

Moreover, trial courts have broad discretion in dealing with improper outside juror communication. State v. Phillips, 74 Ohio St. 3d 72 (1995). Juror misconduct creates a presumption of prejudice. Id. As State v. Spencer, 118 Ohio App. 3d 871 (1997) opined, "the act of the juror in contacting outside sources for information was clearly inappropriate juror misconduct."

The trial judge occupies the best position to determine whether a mistrial is warranted. Widener, supra. The Supreme Court of the United States, in Arizona v. Washington, supra, stated in pertinent part:

There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more 'conversant with the factors relevant to the determination' than any reviewing court can possibly be.

In State v. Hood, 132 Ohio App.3d 334 (1999), a juror performed an inappropriate act and disclosed to the other jurors what he believed he gleaned from Black's Law Dictionary. The trial judge found that the definition of aider and abettor in Black's was not Ohio law and that the "extraordinary investigation" by the juror

prejudiced the case. The trial judge declared a mistrial and the appellate court found that his decision to do so was not unreasonable.

V. Analysis

There is no evidence before the Court of any prosecutorial misconduct designed to provoke a mistrial. Accordingly, the narrow factual issue for review is whether the Court abused its discretion in declaring a mistrial.

It is critical to note at the outset that the Court's decision to declare a mistrial must be affirmed so long as it was not arbitrary, unreasonable, or unconscionable. See Glover, Sage, Xie, Moreland, and Adams. This statement of the law is true and enforceable irrespective of whether the defendants can establish an error in the Court's judgment. See Xie and Adams.

It is also critical to note that a presumption of prejudice arose at the moment the misconduct of Juror #6 was discovered, see Phillips, supra, that, for reasons the Court will discuss more fully below, the prejudice was against the State of Ohio, and that the presumption was never rebutted by the defense. The Court provided each attorney with the opportunity to examine Juror #6 on the record after her misconduct had been confirmed, but defense counsel simply declined to avail themselves of that opportunity. Accordingly, the presumption of prejudice existed at the time the Court rendered its decision to declare a mistrial.

The most compelling evidence that the Court's decision was not arbitrary, unreasonable, or unconscionable, is that, prior to declaring a mistrial, the Court conducted a hearing on the record and scrupulously searched for an alternative solution.

A. Hearing

Defense counsel's argument that the Court failed to conduct a hearing is without merit. Counsel's argument suggests that the Court simply declared a mistrial immediately upon learning that Juror #6 conveyed extraneous material into the jury room during deliberations. On the contrary, the Court conducted a hearing on the record with all parties being present.

As the State indicated in its response, Black's Law Dictionary defines a hearing as "[a] judicial session, usually open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying."

The Court discussed the situation with all of the attorneys on the record as is evidenced by defense counsel's concession at the top of page 5 of their motion. Juror #6 was brought into the courtroom at the Court's suggestion to question her about her alleged extraneous investigation. The Court did in fact question Juror #6 and confirmed that she engaged in juror misconduct by performing an extraneous investigation and by conveying the materials at issue into the jury room. The Court then afforded each attorney the

opportunity to examine Juror #6 on the record after her misconduct had been confirmed, but counsel declined. The Court then afforded all of the attorneys with the opportunity to offer their recommendations for a solution as is evidenced by defense counsel's concession at the bottom of page 6 of their motion.

At the conclusion of the hearing, the Court considered all of the facts and arguments of counsel and declared a mistrial.

B. Scrupulous Search for an Alternative Solution

1. Tasks Executed by the Court

Contrary to counsel's argument, the Court, upon learning of the juror misconduct, scrupulously searched for an alternative to declaring a mistrial. In its search, the Court executed numerous tasks, all of which are enumerated below.

First, while waiting for counsel to arrive, the Court carefully and methodically read and reviewed the written materials that had been confiscated from Juror #6. This seemingly innocuous task should not be overlooked. Juror #6 engaged in misconduct simply by conveying unauthorized, extraneous material into the jury room at a critical point in the deliberation process. The Court did not automatically declare a mistrial due to that juror misconduct. Rather, the Court deliberated upon the nature of the materials and the effect they might have on a juror exposed to them.

Second, while waiting for counsel to arrive, the Court deliberated upon several options for curing the problem in a fair and just manner including, but not necessarily limited to, declaring a mistrial, admonishing Juror #6, admonishing the entire panel, and re-instructing the entire panel on involuntary manslaughter and felony murder.

Third, the Court discussed the situation with all of the attorneys as is evidenced by defense counsel's concession at the top of page 5 of their motion. This discussion with counsel, which transpired on the record, is evidence of the Court's intent and effort to include all of the attorneys in the process of formulating a course of action to hopefully cure the problem.

Fourth, Juror #6 was brought into the courtroom at the Court's suggestion to question her about her alleged extraneous investigation. The Court did not simply rely on the word of its Bailiff. While the Court trusts its Bailiff and has no reason to question her veracity, the Court wanted to confirm some matters on the record directly with Juror #6. The Court did in fact question Juror #6 and confirmed that she engaged in juror misconduct by performing an extraneous investigation and by conveying the materials at issue into the jury room with the specific intent of sharing a portion thereof with other jurors.

Fifth, the Court gave each attorney the opportunity to question Juror #6 on the record after her misconduct had been confirmed. All six attorneys- four for the defense and the two prosecutors- declined to avail themselves of the opportunity provided them by the

Court. This fact is significant in that, again, it demonstrates the Court's intent and effort to include all of the attorneys in the process of formulating a course of action to hopefully cure the problem. This fact is also significant in that it is evidence of defense counsel's failure to rebut the presumption of prejudice against the State, and it serves to estopp them from making a good-faith argument today that certain questions should have been posed to Juror #6.

Sixth, the Court provided all of the attorneys with the opportunity to offer their recommendations for a solution to the Court as is evidenced by defense counsel's concession at the bottom of page 6 of their motion. This fact is further evidence of the Court's intent and effort to include all of the attorneys in the process of formulating a course of action to solve the problem.

Seventh, the Court considered whether it would be permissible to recall one of the alternate jurors to replace Juror #6 and to Order the jury to begin deliberations all over again. The State cited Criminal Rule 24 in asserting that alternates may be used only prior to the commencement of deliberations.

Eighth, the Court considered and deliberated upon the recommendations made to the Court and even provided, at the State's request, a recess for the attorneys to solidify their positions.

Finally, upon the State's motion for a mistrial and after deliberating upon the totality of the circumstances, the Court carefully and conscientiously rendered what it believed, and still believes, to be a just and fair decision.

Whether the Court ultimately decided to accept defense counsel's recommendation is irrelevant. What is relevant is the Court's intent and effort to scrupulously search for alternatives to a mistrial.

2. Facts Considered by the Court

Contrary to defense counsel's argument that "speculation was the only factor used in this Court's determination" to declare a mistrial, the Court relied heavily on facts when making its determination. The Court will now take the liberty of enumerating the facts it considered in making its determination.

First, the Court repeatedly instructed the jurors that **“. . . it is critical that you, from this point on, limit the information that you take in with respect to this case to that which is presented to you in the courtroom.”**

Second, Juror #6 disregarded the Court's repeated admonitions and instructions and engaged in juror misconduct. In violation of this Court's instructions, she conducted an internet search on involuntary manslaughter, printed her findings, looked up the definition of the word perverse in a dictionary, wrote out her findings, and conveyed the material into the jury room at a critical point in the deliberation process with the specific intent of

sharing a portion of it with the other jurors.

Third, a further admonition could not have cured the problem. Juror #6 had already disregarded the Court's repeated instructions and admonitions. There was no way the Court could have been assured that she would follow subsequent admonitions and instructions to disregard the extraneous material which had contaminated her.

Fourth, a juror using the involuntary manslaughter hypothetical as a gauge or reference, whether consciously or subconsciously, would be extremely unfair and prejudicial to the State of Ohio. The hypothetical was somewhat analogous to the case herein since it involved the defendant causing the death of a pedestrian with his vehicle. The hypothetical, however, included other aggravating factors such as "five drinks" and "twice the posted speed limit," neither of which is a prerequisite for a felony murder or involuntary manslaughter conviction under Ohio law.

Fifth, Juror #6 planned to use the involuntary manslaughter hypothetical as a supplement to the Court's instruction as she informed the Court upon inquiry, "... [the internet version of involuntary manslaughter] was mainly for myself. I just wanted to have [the Court's instruction on involuntary manslaughter] clear in my own head."

Sixth, Juror #6 conveyed extraneous material into the jury room at a critical point in the deliberation process.

Seventh, Juror #6 conveyed the extraneous material into the jury room at a critical point in the deliberation process with the specific intent of sharing some of it with the other eleven jurors as she informed the Court upon inquiry, "I had the definition. That was all that I was going to share."

3. Inferences Drawn by the Court

Contrary to defense counsel's argument that the Court used speculation in making its determination to declare a mistrial, the Court drew lawful inferences from established facts in making its determination.

"To infer, or to make an inference, is to reach a reasonable conclusion of fact which you may, but are not required to, make from other facts which you find have been established by direct evidence. Whether an inference is made rests entirely with you."

This instruction on inferences comes directly from Ohio Jury Instructions. It is a standard instruction delivered to jurors in criminal cases who are about to embark upon the task of determining whether the State of Ohio has proven a defendant's guilt beyond a reasonable doubt.

Since jurors are authorized by law to make inferences when determining whether a defendant is guilty of a crime, certainly this Court is authorized by law to make inferences when determining whether the misconduct of Juror #6 would render her irreparably tainted

and biased thus necessitating a mistrial.

From the facts set forth above, inferences were drawn by this Court which, by law, occupies the best position to determine whether a mistrial is warranted. See Arizona v. Washington and Widener, supra.

First, Juror #6 would have used the involuntary manslaughter hypothetical as a gauge in evaluating the case against the four defendants herein. She admitted to the Court that she searched this term on the internet so that the Court's instruction would be clear in her own head. Her statement is therefore an admission that she needed the internet information as a supplement to the Court's instructions. With this hypothetical as a gauge, Juror #6 could have disregarded felony murder as a possible verdict. It is even possible that she could have reasoned that the four defendants herein are not even guilty of involuntary manslaughter because they did not consume "five drinks" and there was no proof beyond a reasonable doubt that they were going "twice the posted speed limit." The fact that Juror #6 does not remember the hypothetical on October 19, 2007- seventeen (17) days after the fact- as stated in her affidavit is irrelevant.

Second, Juror #6 would not follow subsequent admonitions and instructions because she already violated previous admonitions and instructions. This inference was drawn immediately by the Court. It is because of this inference that the Court did not ask Juror #6 any follow-up questions. Her credibility as a juror had been severely and irreparably damaged. It no longer mattered to the Court what she would say or not say concerning her willingness or ability to follow subsequent admonitions and instructions. It is also because of this inference that the Court rejected defense counsel's recommendation to simply admonish Juror #6 and continue forward with deliberations.

Incidentally, defense counsel quotes State v. Phillips, supra, that "a juror's belief in his or her own impartiality is not inherently suspect and may be relied upon by the trial court." That may be true in cases like Phillips where there is no juror misconduct. In Phillips, several unsuspecting jurors simply heard an unknown person make unsolicited comments about the case outside of the courthouse during a recess. They immediately returned and reported the comments to the bailiff and assured the Court they could disregard the comments. The situation herein is completely different and much more egregious. Juror #6 engaged in misconduct, and therefore the Court did not have the luxury of relying on her word.

Third, Juror #6 would have shared the involuntary manslaughter information with the other eleven jurors. This inference is drawn from several specific facts. She stated she was not going to share that material with the other jurors but she no longer had any credibility with the Court. She admitted she was going to share the other material with her fellow jurors so it is reasonable to believe she would have shared all of it. And finally, she conveyed the involuntary manslaughter material into the jury room and there would have been no reason to do that unless she intended to share it. Even if she did not intend to share it, it is reasonable to believe that her fellow jurors would have discovered it during deliberations.

Far from speculation, these are reasonable inferences drawn from facts established by direct evidence.

VI. Conclusion

Whether a mistrial is declared is within the sound discretion of the Court, which means that the Court's decision must be affirmed so long as it was not arbitrary, unreasonable, or unconscionable. The Court occupies the best position to determine whether a mistrial is warranted.

Prior to its determination, the Court conducted a hearing and scrupulously searched for an alternative to granting a mistrial. Juror misconduct was confirmed and a presumption of prejudice against the State was established. That presumption was not rebutted by defense counsel. The Court concluded, upon taking into account the totality of the circumstances, that there was a manifest or high degree of necessity for declaring a mistrial, and that, without a mistrial, public justice would have been diminished. Accordingly, the Court declared a mistrial.

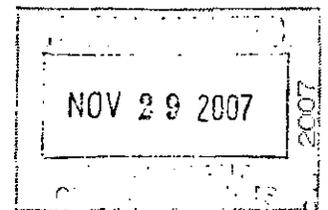
The status of deliberations at the time the Court declared a mistrial is irrelevant. Defense counsel says it best in their motion, "No one can predict what the conclusion of the jurors' deliberations would have been"

The double jeopardy clause of the Fifth Amendment to the United States Constitution does not bar the retrial of four criminal co-defendants where the Court declared a mistrial due to a juror (1) disregarding the Court's repeated admonitions, (2) referring to outside sources for guidance during deliberations, and (3) conveying extraneous material into the jury room at a critical point in the deliberation process with the specific intent of sharing some portion thereof with the other jurors.

Accordingly, defense counsel's motion to dismiss is hereby **OVERRULED**.


DOUGLAS M. RASTATTER, JUDGE

cc: Steve Schumaker and Steve Collins
Jim Griffin
Joseph Reed
Linda Cushman
Paul Kavanagh





2 of 2 DOCUMENTS

TONEISHA GUNNELL, Petitioner, -vs- THE HONORABLE DOUGLAS RASTATTER, et al., Respondents.

Case No. 3:08-cv-064 Consolidated with Case Nos. 3:08-cv-065, 3:08-cv-116, 3:08-cv-183

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

2008 U.S. Dist. LEXIS 118428

**September 17, 2008, Decided
September 17, 2008, Filed**

SUBSEQUENT HISTORY: Affirmed by *Gunnell v. Rastatter*, 2010 U.S. App. LEXIS 19819 (6th Cir. Ohio, Jan. 26, 2010)

PRIOR HISTORY: *State v. Gunnell*, 2007 Ohio 2353, 2007 Ohio App. LEXIS 2190 (Ohio Ct. App., Clark County, May 11, 2007)

COUNSEL: [*1] For Toneisha Gunnell, Petitioner: James Neil Griffin, LEAD ATTORNEY, Springfield, OH.

For Renada Manns, Petitioner: Joseph Dues Reed, LEAD ATTORNEY, Columbus, OH.

For Mahogany Patterson, Petitioner: Paul J Kavanagh, LEAD ATTORNEY, Springfield, OH.

For Alicia McAlmont, Petitioner: David Carr Greer, LEAD ATTORNEY, Bieser, Greer & Landis - 3, Dayton, OH; Linda Joanne Cushman, LEAD ATTORNEY, PRO HAC VICE, Suite 505, Springfield, OH.

For The Honorable Judge Douglas Rastatter, Sheriff Gene A Kelly, Respondents: Diane Duemmel Mallory, LEAD ATTORNEY, Ohio Attorney General - 2, Columbus, OH; Marc E Dann, LEAD ATTORNEY, Cleveland, OH.

JUDGES: Michael R. Merz, Chief United States Magistrate Judge.

OPINION BY: Michael R. Merz

OPINION

DECISION AND ORDER

These four consolidated habeas corpus actions all arise out of charges pending against all four Petitioners in the Clark County Common Pleas Court; Respondents are the assigned trial judge and the Sheriff of Clark County. At the request of the Prosecuting Attorney of Clark County, these cases are being defended by the Ohio Attorney General.

The parties have unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c) and all four cases have been referred [*2] on that basis.

Petitioners Gunnell, Manns, and McAlmont plead one ground for relief as follows:

Ground One: The *Double Jeopardy Clauses* of the United States and *Ohio Constitutions* bar the Petitioner from

retrial because the State of Ohio did not meet its burden to establish the manifest necessity of a mistrial.

(Petition, Case Nos. 3:08-cv-064, 065 & 183, Doc. No. 1, at 4.)

Petitioner Patterson pleads two grounds for relief:

Ground One: The trial court created its own legal standard before declaring a mistrial: "substantial prejudice to the State," thereby failing to apply clearly established federal law of Manifest Necessity.

Supporting Facts: After six (6) days of trial and two (2) hours of deliberation, the Court dismissed the jurors for the evening. A juror returned in the morning with two (2) definitions she looked up. The parties requested she be given a curative instruction, but the Court declared a mistrial over Defendant's objection.

Ground Two: The Trial Court's failure to attempt a curative instruction which was requested by all parties was irrational and irresponsible.

(Petition, Case No. 3:08-cv-116, Doc. No. 1, at 5.)

It is alleged by the State that on June 7, 2005, the Petitioners [*3] drove to the Upper Valley Mall in Springfield, Ohio, "in order to engage in a shoplifting spree. They were observed by a loss prevention officer at Macy's who chased them outside in an effort to apprehend them. In order to escape, the four sped off in their car and, in the process, ran down a man in the parking lot and killed him." (Return of Writ, Doc. No. 8, in Case No. 3:08-cv-064, at 6.) As a result, Petitioners were indicted by the Clark County Grand Jury on charges of murder, aggravated robbery, involuntary manslaughter, and theft. Their convictions at their first trial were reversed for a violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *State v. Manns*, 169 Ohio App. 3d 687, 2006 Ohio 5802, 864 N.E.2d 657 (Ohio App. 2d Dist 2006).

Their second trial commenced September 24, 2007, with the case reaching the jury on October 1, 2007. The

jury deliberated until after midnight. At one point during deliberations, they asked for a definition of "perverse," but the Court, with the agreement of counsel, did not give them one. The jury was not sequestered, but went home for the night.

The next morning the second juror to arrive was Juror No. 6, Cynthia Murphy, who

arrived with a couple of items in her hand. And somehow, [*4] fortunately, Mrs. Gibson [the bailiff] either inquired or was able to see what they were; but one of the items is an -- apparently a printout of a definition of "involuntary manslaughter" that the juror said she retrieved off of the internet. And then another one is a small handwritten piece of paper that has a definition of "perverse" that she apparently looked up in a dictionary or something like that.

(Judge Rastatter at Transcript, p. 3, Exhibit 1 to Return of Writ.)

There was no suggestion that Ms. Murphy had shown the documents to any other juror or shared with any of them the substance of what the documents contained before they were retrieved by the bailiff. All counsel agreed, at least tacitly, that the definitions did not represent the law of Ohio.¹ Counsel also agreed that substituting one of the alternate jurors was not possible but rather prohibited by *Ohio R. Crim. P. 24* once deliberations had begun. *Id.* at 8.

1 That is to say, no Petitioner has suggested that it would have been harmless for Juror Murphy to have conveyed this information to her fellow jurors because it accurately represented Ohio law.

The court inquired of Ms. Murphy and she admitted the extrajudicial research, [*5] but confirmed she had not shared it with any other juror as yet. *Id.* at 10. Although given an opportunity to do so, none of the attorneys asked Ms. Murphy any questions. *Id.* at 11. After first indicating it would leave the matter to the court's discretion, the State moved for a mistrial. *Id.* at 20. Counsel discussed with the court the possibility of a curative instruction either to Ms. Murphy alone or to the entire jury. Judge Rastatter expressed his conclusion that, if a curative instruction were attempted, Ms. Murphy

would say that she could and would put the extrajudicial matter out of her mind because she was generally cooperative, "a very nice lady" and "accommodating and pleasing." *Id.* at 18-19. However, he concluded that the extrajudicial matter, particularly the definition of involuntary manslaughter was "very prejudicial" to the State because it was at odds with the law of Ohio. Because she had done the research herself, he concluded any attempt to get her to put it out of her mind would be "an exercise in futility" and that she was "irreparably tainted." *Id.* at 19, 26.

Judge Rastatter orally declared the mistrial on October 2, 2007. On October 10, 2007, he memorialized that [*6] decision in a written Entry (Exhibit B to Petition). In it, he quotes the language in which, on a number of occasions, he had instructed the jury that they had to decide the case based on what was presented in the courtroom. He characterized Ms. Murphy's conduct in obtaining extrajudicial material and bringing it in written form as juror misconduct and noted that Ohio law gives a trial judge "broad discretion in dealing with improper outside juror communication." *Id.* at 2, citing *State v. Phillips*, 74 Ohio St. 3d 72, 1995 Ohio 171, 656 N.E.2d 643 (1995). He quoted and relied on the federal constitutional standard from *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978):

The trial judge's decision to grant a mistrial and retry appellant is reasonable and does not violate the constitutional prohibition against double jeopardy if: (1) there was a manifest or high degree of necessity for declaring a mistrial, or (2) without a mistrial, public justice would have been diminished.

Id. at 2. He repeated his previous conclusions that Ms. Murphy was irreparably tainted by what she read and that particularly the involuntary manslaughter definition was "extremely unfair and prejudicial to the State of Ohio, especially since the State [*7] could not address it in its closing arguments." *Id.* at 2. He concluded Ms. Murphy would probably have communicated what she learned to the other jurors, in part because she "had already disregarded the Court's instructions and admonitions." *Id.* at 2.

On November 6, 2007, the Petitioners jointly moved to bar retrial on double jeopardy grounds (Joint Motion,

Exhibit 2 to Return of Writ). In support of their argument that Judge Rastatter did not expend enough effort in exploring alternatives to a mistrial, they filed Affidavits from Jurors Murphy, Sturgeon, Grigiss, and Snyder, purporting to show that they would have followed a curative instruction. (Attachments to Joint Motion). The State opposed the Joint Motion and particularly opposed reliance on affidavits created after the jury was discharged and which showed the state of deliberations. (Exhibit 3 to Return of Writ). Judge Rastatter then denied the Joint Motion in an Entry in which he reiterated and somewhat expanded upon the reasoning he had given both orally and in the original Entry declaring a mistrial. (Exhibit 4 to Return of Writ.) As to the post-trial juror affidavits, he concluded

The status of deliberations at the time the [*8] Court declared a mistrial is irrelevant. Defense counsel says it best in their motion, "No one can predict what the conclusion of the jurors' deliberations would have been. . . ."

Id. at 113. Judge Rastatter then set the case for trial, but Petitioners filed these habeas corpus actions and obtained a stay.

Analysis

The *Double Jeopardy Clause of the United States Constitution* affords a defendant three basic protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187(1977), quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The Supreme Court has made it plain that the *Double Jeopardy Clause* protects against a second trial, not just against conviction at a second trial. *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977). For that reason, a double jeopardy claim is cognizable in federal habeas corpus prior to the "second" trial. *Justices of the Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984);

Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 408 (7th Cir. 1985); [*9] *Malinovsky v. Court of Common Pleas of Lorain County*, 7 F.3d 1263 (6th Cir. 1993). To put it another way, a habeas petitioner with a double jeopardy claim is not required to exhaust the remedy of direct appeal before invoking our habeas jurisdiction. The Sixth Circuit reaffirmed these principles and specifically affirmed a district court's granting of a stay of Ohio Common Pleas Court proceedings pending decision on a pre-trial double jeopardy habeas petition in *Harpster v Ohio*, 128 F.3d 322 (6th Cir. 1997). The Ohio courts do not consider a denial of a motion to dismiss on double jeopardy grounds to be a final appealable order. *State v. Crago*, 53 Ohio St. 3d 243, 244, 559 N.E.2d 1353 (1990). Thus Petitioners' claims were exhausted in the Ohio courts even though they did not appeal from Judge Rastatter's denial of their Joint Motion because the Ohio Court of Appeals would have lacked jurisdiction.

Judge Rastatter decided the double jeopardy claim now presented to this Court. The Supreme Court has recently elaborated on the standard of review of state court decisions on claims later raised in federal habeas corpus:

The Antiterrorism and Effective Death Penalty Act of 1996 modified a [*10] federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law. See *Williams v. Taylor*, 529 U.S. 362, 403-404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). To these ends, § 2254(d)(1) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-- "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

As we stated in *Williams*, § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U.S., at 404-405, 120 S.Ct. 1495. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable [*11] facts. *Id.*, at 405-406, 120 S. Ct. 1495. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.*, at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id.*, at 409- 410, 120 S.Ct. 1495. See also *id.*, at 411, 120 S.Ct. 1495 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Bell v. Cone, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

[The] AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application [*12] of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth

in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra, at 405*; *Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam)*. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra, at 405*; *Woodford v. Visciotti, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam)*.

Brown v. Payton, 544 U.S. 133, 134, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005). The question this Court must decide, then, is whether the Judge Rastatter's decision is an unreasonable application of clearly established federal law as enunciated by the United States Supreme Court.

Petitioner Patterson's Claims

Petitioner Patterson's first Ground for Relief might be [*13] read as asserting that Judge Rastatter's decision was contrary to clearly established law, rather than an unreasonable application in that she alleges he adopted a new legal standard -- substantial prejudice to the State -- rather than applying the manifest necessity doctrine which is clearly established federal law. It is true that, during the discussion among counsel and the court after disclosure of Juror Murphy's conduct there was no use of the term "manifest necessity" by either the court or counsel, nor was there any citation to any case law dealing with either declaration of a mistrial or juror misconduct.

However, it is not common for either trial judges or trial lawyers to have names of Supreme Court cases ready to hand, except perhaps cases which are in use every day, such as *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*. The question is not whether Judge Rastatter fully articulated an application of the manifest-necessity doctrine; but whether in fact there was a manifest necessity.

In any event, it is clear from the oral decision to grant a mistrial that Judge Rastatter considered more than whether Juror Murphy's conduct substantially prejudiced the State. He also considered whether [*14] a curative

instruction, either to Ms. Murphy alone or to the entire panel, could cure whatever prejudice there was.

In her second Ground for Relief, Petitioner Patterson asserts that the trial judge's "failure to attempt a curative instruction which was requested by all parties was irrational and irresponsible." This claim assumes a state of facts which is not supported by the record. There was general discussion among the court and counsel about the possibility of a curative instruction and whether it would have to be given to just Juror Murphy or the whole panel. Initially, the prosecutor spoke as if that might be a possibility. However, a brief recess was taken to allow the parties to consider their positions; thereafter the State moved for a mistrial.

In addition, Petitioner Patterson's second Ground for Relief, read literally, does not state a claim upon which habeas corpus relief can be granted. Federal habeas corpus is available only to correct federal constitutional violations. *28 U.S.C. §2254(a)*; *Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990)*; *Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*, *Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)*. There is no right to relief [*15] from a state court judgment on the ground that the state court judge has acted "irrationally" or "irresponsibly." While the requirements to act responsibly and rationally are implicit in many constitutional guarantees, a federal judge cannot grant relief because he or she finds a state judge has acted irrationally. Rather the finding must be in terms of specific constitutional guarantees. If a state judge abuses his or her discretion in a way that denies due process of law, for example, irrationality might lead indirectly to habeas relief.

Because Petitioner Patterson's position in both the state court and this Court is basically consistent with that of her co-defendants, the Court will treat her Petition as raising the same claims as the other Petitioners and will analyze it on that basis, rather than the rejected bases set forth above and rather than requiring her to replead.

Was There A Manifest Necessity for a Mistrial?

There is no doubt that Juror Murphy's behavior constituted juror misconduct. She obtained information on which she intended to rely to decide the case from one or more extrajudicial sources. Moreover, she admitted her intention to share at least part of that information [*16]

with the other jurors. This was not a situation where the obtaining of extrajudicial material was inadvertent -- Ms. Murphy was engaged in research to gain information to help her and the others decide the case. While the trial court and all counsel conceded her behavior was not malicious or intended to provoke a mistrial, malice is not required for a finding of juror misconduct.

Any private communication or contact with the jury is presumed prejudicial. If it is alleged that such contact happened, the court must conduct a hearing to determine whether the contact was harmless. *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954). This is precisely what the trial judge did. He first inquired how far the information had been spread, what the content of the information was, how it potentially related to the issues in trial, and what the Ohio law was on those issues as he had instructed the jury. He determined that the communication was not harmless and no Petitioner contends, so far as the Court understands, that the information was in fact harmless.

Judge Rastatter's determination that the information was prejudicial to the State is also not questioned by Petitioners and this Court finds it to [*17] be reasonable. The hypothetical example in the internet definition of involuntary manslaughter, which involved a conviction for a death which happened after the driver had consumed "five drinks," was potentially quite damaging to the State's case since there was no indication of any drinking by any of the Petitioners prior to the fatal collision. There is likewise no evidence the State somehow manipulated matters to make a mistrial inevitable so that it could benefit from retrial.

The burden of Supreme Court law is that each manifest necessity case must be decided on its own facts.

[E]ach manifest necessity ruling is grounded on its own facts. The manifest necessity standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising in the course of a criminal trial."

LaFave, Israel, King & Kerr, *Criminal Procedure* 3rd, § 25.2(c), quoting *Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973). A key question is what alternatives there are to mistrial and whether the trial

judge considered them. *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1971); *Johnson v. Karnes*, 198 F. 3d 589 (6th Cir. 1999). Here the trial [*18] judge discussed the alternative of replacing Juror Murphy with one of the alternates, but everyone agreed that would not be lawful under *Ohio R. Crim. P. 24*.

The only lawful possible alternative to a mistrial was a curative instruction. Of course, one cannot tell experimentally whether a curative instruction has been successful. Petitioners' post-trial affidavits from Juror Murphy and other jurors arguing that they would have followed a curative instruction are not relevant because they were not available to the trial judge at the time he was deciding the question. It is possible that Juror Murphy would have obeyed a curative instruction as she now says she would have done, but no defense attorney attempted to rehabilitate her when given the opportunity to question her outside the presence of the other jurors, nor did any defense attorney request an opportunity to reopen the questioning after she had once been excused.

Petitioners argue that a good deal of time had been spent on voir dire because of local publicity about the case and that all parties had accepted Juror Murphy's assurances at the outset that she could set aside whatever she had learned from the press. This argument, however, [*19] cuts in favor of Judge Rastatter's conclusion that Juror Murphy's assurances could not be accepted at face value because she had intentionally acquired and brought with her to share with other jurors extraneous material even after she had been carefully examined on ignoring external material and had promised to do so.

Although jurors are presumed to follow instructions, that is not an irrebuttable presumption and here there was evidence the particular juror in question had not followed a repeated explicit instruction. Some weight must also be given to Judge Rastatter's opportunity to assess the likely credibility of Juror Murphy. He had observed her in individual voir dire and through an extended trial and articulated the reasons why he concluded she would likely not follow an instruction to disregard what she had read. The fact that she had not merely heard the extraneous material, but had intentionally researched it in the middle of the night must also be given weight.

Even if Juror Murphy, in an effort to be a conscientious juror, had proclaimed her ability and intent to disregard what she had read, her statements need not have been taken at face value. As LaFave, et al., write:

Even [*20] when a juror's own statements may be considered, as would be true if misconduct is investigated before a verdict is returned, a juror may intentionally or unintentionally fail to recognize the prejudicial impact of an event and profess that she was not affected. Thus in many instances, the critical question may be whether, under the particular circumstances, a reasonable person would have been influenced.

LaFave, et al., *supra*, at § 24.9(f).

In *Arizona v. Washington* itself, the trial judge declared a mistrial after defense counsel in opening statement made a prejudicial reference to a *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215

(1963) violation in a prior trial. The Supreme Court acknowledged that some trial judges might have attempted a cautionary instruction, but concluded that the determination of manifest necessity in this case was within the trial judge's broad discretion.

Conclusion

This Court concludes that Judge Rastatter's declaration of a mistrial was not an unreasonable application of clearly established law as declared by the United States Supreme Court. The Petitions will accordingly be dismissed with prejudice.

September 17, 2008.

/s/ **Michael R. Merz**

Chief United States Magistrate Judge



1 of 2 DOCUMENTS

**TONEISHA GUNNELL, Petitioner, RENADA MANNNS, Petitioner-Appellant, v.
DOUGLAS RASTATTER, Judge, Clark County Court of Common Pleas; GENE A.
KELLY, Respondents-Appellees.**

No. 08-4505

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2010 U.S. App. LEXIS 19819

January 26, 2010, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28(g)* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28(g)* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: [*1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Gunnell v. Rastatter, 2008 U.S. Dist. LEXIS 118428 (S.D. Ohio, Sept. 17, 2008)

COUNSEL: For RENADA MANNNS, Petitioner - Appellant: Joseph Dues Reed, Law Office, Columbus, OH.

For DOUGLAS RASTATTER, Judge, Clark County Court of Common Pleas, GENE A. KELLY, Respondents - Appellees: Diane Mallory, Assistant Attorney General, Office of the Ohio Attorney General, Columbus, OH.

JUDGES: Before: KEITH, DAUGHTREY, and GIBBONS, Circuit Judges.

OPINION

ORDER

Renada Manns, an Ohio prisoner proceeding through counsel, appeals a district court judgment dismissing with prejudice her petition for a writ of habeas corpus filed pursuant to 28 U.S.C § 2254. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *Fed. R. App. P. 34(a)*.

Manns, along with three co-defendants, was convicted in 2005 of murder, aggravated robbery, involuntary manslaughter, and theft, and was sentenced to fifteen years to life on the murder charge and to ten years on the aggravated-robbery charge, to be served consecutively. On appeal, the convictions were reversed and remanded for a second trial. *State v. Manns, 169 Ohio App. 3d 687, 2006 Ohio 5802, 864 N.E.2d 657 (Ohio Ct. App. 2006)*. Manns's co-defendants' convictions separately were reversed. [*2] *See State v. Gunnell, No. 2005 CA 119, 2007 Ohio 2353, 2007 WL 1429683, at *2 (Ohio Ct. App.)*.

The second trial reached the jury, but before it reached a verdict, the trial judge learned that one juror had researched on the internet the definition of "perverse" and of "involuntary manslaughter," and brought her research with her into the jury room. All counsel agreed

that the definitions did not represent Ohio law and that substituting this juror with another was prohibited under *Ohio R. Crim. P. 24*.

The trial judge called the juror for questioning. The juror stated that she had not shared her extrajudicial research with the other jurors. And although counsel were offered the opportunity to question the juror, neither did. The prosecutor then moved for a mistrial; defense counsel inquired about a curative instruction and objected to a mistrial. The trial judge concluded, however, that the extrajudicial matter - particularly the involuntary manslaughter definition and hypothetical example - was very prejudicial to the state because it conflicted with Ohio law. Accordingly, the trial judge declared a mistrial, explaining that the juror was irreparably tainted by what she read, the state would [*3] have been prejudiced, and that the juror would have probably communicated what she learned with the other jurors since she had already disregarded the court's instructions.

Manns and her co-defendants moved to bar a retrial on double jeopardy grounds. The trial judge denied the motion and set the case for trial, but Manns and her co-defendants each filed § 2254 petitions and obtained stays. In Manns's petition, she argued that the *Double Jeopardy Clause* barred a retrial because the state failed to establish a manifest necessity to declare a mistrial. The district court consolidated the habeas petitions and concluded the trial judge's decision to declare a mistrial conformed with 28 U.S.C. § 2254(d)(1). It issued an order and separate judgment dismissing the petitions with prejudice. Of the four petitioners in this case, only Manns appealed. The district court issued a certificate of appealability as to whether there was a manifest necessity for the trial judge to have declared a mistrial. Manns argues on appeal that there was no manifest necessity.

We review the district court's denial of habeas corpus relief de novo. *Herbert v. Billy*, 160 F.3d 1131, 1136 (6th Cir. 1998). A federal habeas [*4] court may not issue a writ unless the state-court adjudication "resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see *Walls v. Konteh*, 490 F.3d 432, 436 (6th Cir. 2007). Here, the district court concluded that the trial judge's declaration of a mistrial because of manifest necessity was not an unreasonable application of clearly established Supreme Court law. We agree.

When a mistrial has been declared in the absence of the defendant's consent, "reprosecution is not barred where a 'manifest necessity' exists to declare a mistrial in the defendant's initial prosecution." *United States v. Gantley*, 172 F.3d 422, 427 (6th Cir. 1999) (quoting *United States v. Cameron*, 953 F.2d 240, 243 (6th Cir. 1992)); see also *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *Ross v. Petro*, 515 F.3d 653, 660 (6th Cir. 2008). "[A] reviewing court is obliged to satisfy itself, with great deference to the trial judge's assessment of possible juror bias, that the trial judge exercised 'sound discretion.'" *Ross*, 515 F.3d at 663.

The record shows that "the trial [*5] judge did not act irrationally or irresponsibly, but exercised 'sound discretion.'" *Id.* at 661. The trial judge considered both parties' suggestions and considered many alternatives, such as admonishing the juror, admonishing the entire jury panel, and reinstructing the entire panel on involuntary manslaughter and felony murder. But the trial judge ultimately concluded that admonishing the juror would not have cured the problem because she had already disregarded the judge's repeated instructions and admonitions. He also felt that the hypothetical example of involuntary manslaughter that the juror found on the internet would have been extremely unfair and prejudicial to the state because it included other aggravating factors that were not prerequisites for a felony murder or involuntary manslaughter conviction under Ohio law.

For the above reasons, we affirm the district court's judgment.

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.02 (2011)

§ 2903.02. Murder

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of *section 2903.03* or *2903.04 of the Revised Code*.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in *section 2929.02 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 146 v S 239 (Eff 9-6-96); 147 v H 5. Eff 6-30-98.

LEXSTAT ORC 2903.04

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.04 (2011)

§ 2903.04. Involuntary manslaughter

(A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.

(B) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree, a regulatory offense, or a minor misdemeanor other than a violation of any section contained in Title XLV of the Revised Code that is a minor misdemeanor and other than a violation of an ordinance of a municipal corporation that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any section contained in Title XLV of the Revised Code that is a minor misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

(D) If an offender is convicted of or pleads guilty to a violation of division (A) or (B) of this section and if the felony, misdemeanor, or regulatory offense that the offender committed or attempted to commit, that proximately resulted in the death of the other person or the unlawful termination of another's pregnancy, and that is the basis of the offender's violation of division (A) or (B) of this section was a violation of division (A) or (B) of *section 4511.19 of the Revised Code* or of a substantially equivalent municipal ordinance or included, as an element of that felony, misdemeanor, or regulatory offense, the offender's operation or participation in the operation of a snowmobile, locomotive, watercraft, or aircraft while the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, both of the following apply:

(1) The court shall impose a class one suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege as specified in division (A)(1) of *section 4510.02 of the Revised Code*.

(2) The court shall impose a mandatory prison term for the violation of division (A) or (B) of this section from the range of prison terms authorized for the level of the offense under *section 2929.14 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 7-1-83); 144 v S 275 (Eff 7-1-93)*; 145 v H 236 (Eff 9-29-94); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 239 (Eff 9-6-96); 148 v S 107, Eff 3-23-2000; 149 v S 123, § 1, eff. 1-1-04.

LEXSTAT ORC 2911.01

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

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ORC Ann. 2911.01 (2011)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in *section 2913.01 of the Revised Code*, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.

(2) "Law enforcement officer" has the same meaning as in *section 2901.01 of the Revised Code* and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and

scope of their duties.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 147 v H 151. Eff 9-16-97.

LEXSTAT ORC ANN. 2913.02

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2913. THEFT AND FRAUD
THEFT

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ORC Ann. 2913.02 (2011)

§ 2913.02. Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

- (1) Without the consent of the owner or person authorized to give consent;
- (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
- (3) By deception;
- (4) By threat;
- (5) By intimidation.

(B) (1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in *section 2913.71 of the Revised Code*, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), or (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult,

and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of *section 4510.02 of the Revised Code*, provided that the suspension shall be for at least six months.

(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by stealing rented property or rental services, the court may order that the offender make restitution pursuant to *section 2929.18 or 2929.28 of the Revised Code*. Restitution may include, but is not limited to, the cost of repairing or replacing the stolen property, or the cost of repairing the stolen property and any loss of revenue resulting from deprivation of the property due to theft of rental services that is less than or equal to the actual value of the property at the time it was rented. Evidence of intent to commit theft of rented property or rental services shall be determined pursuant to the provisions of *section 2913.72 of the Revised Code*.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

HISTORY:

134 v H 511 (Eff 1-1-74); 138 v S 191 (Eff 6-20-80); 139 v S 199 (Eff 1-1-83); 140 v H 632 (Eff 3-28-85); 141 v H 49 (Eff 6-26-86); 143 v H 347 (Eff 7-18-90); 143 v S 258 (Eff 11-20-90); 146 v H 4 (Eff 11-9-95); 146 v S 2 (Eff 7-1-96); 147 v S 66 (Eff 7-22-98); 148 v H 2. Eff 11-10-99; 150 v H 7, § 1, eff. 9-16-03; 150 v H 179, § 1, eff. 3-9-04; 150 v H 12, § 1, eff. 4-8-04; 150 v H 369, § 1, eff. 11-26-04; 150 v H 536, § 1, eff. 4-15-05; 151 v H 530, § 101.01, eff. 6-30-06; 151 v H 347, § 1, eff. 3-14-07; 152 v S 320, § 1, eff. 4-7-09.

LEXSTAT ORC 2945.36

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
JURY TRIAL

Go to the Ohio Code Archive Directory

ORC Ann. 2945.36 (2011)

§ 2945.36. For what cause jury may be discharged

The trial court may discharge a jury without prejudice to the prosecution:

- (A) For the sickness or corruption of a juror or other accident or calamity;
- (B) Because there is no probability of such jurors agreeing;
- (C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;
- (D) By the consent of the prosecuting attorney and the defendant.

The reason for such discharge shall be entered on the journal.

HISTORY:

GC § 13443-18; 113 v 123(185), ch 22, § 18; Bureau of Code Revision. Eff 10-1-53.