[Cite as *State v. Clark*, 2021-Ohio-4294.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAMON CLARK,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0133

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2007 CR 635 A

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Michael A. Partlow, 112 South Water Street, Suite C, Kent, Ohio 44240, for Defendant-Appellant.

Dated: November 18, 2021

D'Apolito, J.

{¶1} Appellant, Damon Clark, appeals the judgment entry of the Mahoning County Court of Common Pleas denying his Motion for Leave to File Motion for New Trial. For the following reasons, the judgment entry of the trial court is affirmed.

{¶2} The following facts are taken from Appellant's direct appeal:

> On May 5, 2007, appellant left a party to visit his cousin, Joseph Moreland, at his house on Stewart Street in Youngstown, Ohio. Due to a conflict between appellant and another guest, Joseph Moreland told appellant to leave his home. Joseph pushed appellant causing him to fall and land in a children's power vehicle. Joseph Moreland and appellant then argued.
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> Appellant then left driving a blue Buick that belonged to the mother of his children but that he often drove. Appellant dropped his brother, Kevon Moreland, and his cousin, Lewon Bell, back off at the party they had previously attended. Rather than reentering the party as intended, appellant left with Stoney Williams, who had approached the Buick. (Kevon Moreland and Lewon Bell had both witnessed Stoney Williams carrying a gun at the party earlier.) Appellant then picked up Stoney Williams' friend, Darryl Mason, who thought he was being transported to the party. However, appellant drove toward Stewart Street instead.
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> At the time, Joseph Moreland was standing on his front porch speaking to his cousin, Jean Madison, and his aunt, Angela Moreland, who was holding the hand of her three-year-old niece, Cherish Moreland. They had walked over to his house when they heard him arguing with someone on the telephone. Joseph Moreland was concerned because, from statements appellant made when he left the house and additional statements he made over the telephone, it seemed appellant was threatening to come back shooting.

> Appellant soon drove down Stewart Street. As the car passed the house, Stoney Williams sat on the door frame of the passenger window and fired two shots across the roof of appellant's vehicle towards Joseph Moreland's house. A bullet grazed Angela Moreland and passed through Cherish's head. Notwithstanding the bullet hole through the back of her head, she awoke crying at the scene. Regrettably, Cherish died less than two days later.

State v. Clark, 7th Dist. No. 08 MA 15, 2009-Ohio-3328, ¶ 2-5.

{¶3} On May 17, 2007, Appellant was indicted on four counts: (1) aggravated murder with prior calculation and design in violation of R.C. 2903.01(A); (2) aggravated murder with purpose which caused the death of a child under thirteen in violation of R.C. 2903.01(C); (3) murder by causing a death as a proximate result of committing a first or second degree felony of violence in violation of R.C. 2903.02(B); and (4) knowingly discharging a firearm into or at a habitation in violation of R.C. 2923.161(A)(1). He was also charged with four corresponding firearm specifications pursuant to R.C. 2941.146(A).

{¶4} On January 14, 2008, Appellant was convicted by a jury of complicity to murder by causing a death as a proximate result of committing a violent felony of the first or second degree in violation of R.C. 2903.02(B), knowingly discharging a firearm into or at a habitation in violation of R.C. 2923.161(A)(1), and the accompanying firearm specifications. On January 16, 2008, the trial court sentenced Appellant to an aggregate sentence of twenty-five years to life.

{¶5} Appellant filed the Motion for Leave to File Motion for New Trial at issue in this appeal on October 7, 2020. The motion represents his seventh effort at retrial.[1] The

[1] On September 4, 2009, Appellant, acting pro se, filed his first motion for new trial asserting that he had newly-discovered evidence. Appellant did not identify the evidence and did not attach a supporting affidavit. The trial court did not rule on the pro se motion.

On June 21, 2010, Appellant, again acting pro se, filed his second motion for new trial based on newly-discovered evidence. Attached to the motion was a letter from Gerald Johnson. In the letter, Johnson stated "Stoney," Appellant's co-defendant, told him about the shooting and that "Littles," whom he came to learn was Appellant, was not involved. The trial court overruled the second pro se motion.

On January 26, 2011, Appellant, through counsel, filed a Motion for Leave to File Motion for New Trial based on newly-discovered evidence. An affidavit from Johnson was attached to the motion. In the affidavit,

motion for leave currently before us is predicated upon an alleged communication between a juror, Juror No. 5, and a state's witness, Kendra Austin, prior to Kendra's testimony at the trial. According to the affidavit attached to the motion, the affiant, Calvin Austin, who was a Master's Degree candidate in the Chemistry Department at Youngstown State University ("YSU") at the time of Appellant's trial, accompanied Kendra to the courthouse. Kendra is Calvin's cousin and she was subpoenaed to testify at the trial.

{¶6} Calvin explains in his affidavit that he accompanied Kendra to lend moral support because she felt conflicted about testifying. Members of the Austin family were at odds regarding Appellant's role in the crime. According to Calvin, Kendra feared that her testimony could create tension within the family and she also feared retaliation.

{¶7} The affidavit reads, in pertinent part, "[w]hile [Kendra] and [Calvin] were discussing the situation in the hallway of the courthouse, [Calvin] was approached by [Juror No. 5]." Calvin recognized her as a chemistry student from YSU, and she approached him to inquire about tutoring. When Calvin introduced Kendra to Juror No. 5, Juror No. 5 disclosed that she was a juror assigned to Appellant's case.

{¶8} The interaction between Juror No. 5 and Calvin was the subject of an inquiry by the trial court. Four volumes of trial transcripts and exhibits were filed on July 3, 2008, however, a copy of the trial transcript could not be located by the county clerks' office for

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Johnson stated that he was at the scene and witnessed Joseph Moreland with a mini-assault rifle and heard shots fired. The trial court held a hearing on Appellant's motion then overruled it. Appellant filed an appeal and we affirmed the judgment entry of the trial court. *State v. Clark*, 7th Dist. Mahoning No. 11 MA 38, 2012-Ohio-2434.

On April 24, 2015, Appellant filed his second Motion for Leave to File Motion for New Trial, which the trial court denied on November 4, 2015. Appellant filed an appeal, but the appeal was later dismissed.

On April 30, 2015, Appellant filed an application for delayed reopening of the appeal of his conviction under App.R. 26(B). Appellant attached the affidavit of a Henry Edmonds who stated that he spoke with DeJuan Thomas while in jail and that Thomas told him that he saw Joseph Moreland shooting at a vehicle driven by appellant and that Moreland accidentally shot the little girl. The application for reopening was denied due to the unexplained and inordinate delay in filing the application. *State v. Clark*, 7th Dist. Mahoning No. 08 MA 15, 2015-Ohio-2584.

On July 20, 2016, Appellant, acting pro se, filed his third Motion for Leave to File Motion for New Trial. Appellant stated that a man by the name of Demetrius Williams had prepared an affidavit stating that he was present on Stewart Street with DeJuan Thomas on the night of the shooting Although the motion referenced an affidavit prepared by Williams, Appellant did not attach a copy of the affidavit to his motion. On July 22, 2016, the trial court overruled Appellant's Motion for Leave to File Motion for New Trial.

this appeal. As a consequence, and at our request, Appellant's counsel provided the excerpt of the transcript concerning the hearing on potential juror misconduct, as well as the witness index, and Kendra's testimony.

{¶9} The hearing began immediately after the trial court reconvened following a lunch break, and was conducted outside of the presence of the jury and Appellant. The trial court began the hearing, stating "it's my understanding you had a conversation or knew something about the defendant or school or – did you have a conversation with somebody, one of the witnesses?" (Trial Tr., p. 291.) Juror No. 5 responded, "I – I don't know any witnesses. To my understanding, he's not even from Youngstown. That's who I was talking to." (*Id.*) She identified the man as "Calvin." (*Id*., p. 292.)

{¶10} Defense counsel continued the inquiry, but he was similarly inexact in his description of the events giving rise to the hearing. He prefaced his questions as follows, "[s]o somebody saw you talking to somebody back in the gallery and nobody knows if it's a family member or a relative or something like that, so that's what we need to do is find out what happened."

{¶11} Juror No. 5 explained that she was enrolled in an organic chemistry class at YSU and she recognized Calvin as a teacher's assistant in the Chemistry Department as he walked up the interior steps of the courthouse. She approached him to ask if he was available for tutoring, and he explained that he tutored students enrolled in general chemistry classes, not organic chemistry classes. She reiterated that "[h]e's not even from Youngstown." (*Id.,* p. 293.)

{¶12} Juror No. 5 did not disclose that Calvin introduced her to Kendra. The inquiry by Appellant's trial counsel was limited to Juror No. 5's conversation with Calvin, despite the fact that the cause for concern was Juror No. 5's interaction with Kendra. It can be gleaned that the trial court's reference to "a conversation with somebody, one of the witnesses," referred to Kendra, not Calvin.

{¶13} Satisfied with the foregoing information, defense counsel raised no objection to Juror No. 5's continuing jury service. Significant to the above-captioned appeal, Appellant's counsel also waived Appellant's presence at the conclusion of the hearing. (*Id.,* p. 295-296.) According to Calvin's affidavit, he was unaware that there was any inquiry into the juror/witness exchange until he was contacted by Appellant's current

counsel shortly before his affidavit was sworn on August 16, 2020. (Calvin Austin Aff., ¶ 8.)

{¶14} Kendra, who was Appellant's girlfriend in May of 2007, provided the following testimony at trial. At the time the crimes were committed, Kendra owned a blue 1987 Buick LeSabre. Appellant retrieved her from work on the evening of May 5, 2007 at roughly 10:00 p.m. and brought her home. Appellant frequently drove Kendra's automobile and that evening was no exception. During her direct testimony, Kendra testified that she did not see her automobile after Appellant left her home that evening. However, she clarified that she was likely caring for her children and had no reason to look for her automobile. No cross-examination was undertaken by defense counsel.

{¶15} Despite the fact that Appellant filed only a Motion for Leave to File Motion for New Trial, specifically omitting any merits argument, on October 15, 2020, the state filed a "combined response to Defendant's Motion for Leave to File Motion for New Trial and motion for new trial pursuant to Criminal Rule 33." However, the state limited its arguments in its combined response to the unavoidable delay standard and the Appellant's obligation to file the motion for leave within a reasonable time of discovering the new evidence. The state further argued that the content of Calvin's affidavit was not "new evidence" and proffered nothing "to insinuate that the juror engaged in any illegal or unethical behavior during the trial." (Combined Resp., p. 9.).

{¶16} The trial court overruled the motion for leave without explanation on November 4, 2020. This timely appeal followed.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL WITHOUT A HEARING.

{¶17} An accused is entitled to a trial before an impartial, unprejudiced, and unbiased jury. *State v. Robinson*, 7th Dist. Jefferson No. 05 JE 0008, 2007-Ohio-3501, ¶ 94. This right is guaranteed by both the Ohio and United States Constitutions. *Id.* A jury must decide a case solely on the evidence and argument, not on any outside influence.

Id. In cases involving outside communication with a juror, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or replace an affected juror. *State v. Phillips*, 74 Ohio St.3d 72, 89, 656 N.E.2d 643, 1995–Ohio–171.

{¶18} The Supreme Court of Ohio has held that a new trial may be granted when there is jury misconduct that has materially affected the substantial rights of the accused. *State v. Taylor*, 73 Ohio App.3d 827, 833, 598 N.E.2d 818. Typically, any private communication or contact between a juror and another person, especially a person connected with one of the parties to the litigation, concerning a matter before the jury constitutes juror misconduct and is presumptively prejudicial. *State v. Mack*, 8th Dist. Cuyahoga No. 93091, 2010-Ohio-1420, ¶ 16, citing *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), syllabus.

{¶19} This presumption of prejudice, however, is not conclusive. *Mack* at ¶ 16, citing *Remmer* at 229. The Supreme Court of Ohio in *State v. Keith*, 79 Ohio St.3d 514, 1997-Ohio-367, 684 N.E.2d 47, "reaffirmed [the] long-standing rule that a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown." *Id.* at 526, 684 N.E.2d 47. Therefore, the party alleging misconduct bears the burden of demonstrating that the contact was prejudicial. *Smith v. Phillips*, 455 U.S. 209, 215-217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); see, also, *State v. Sheppard*, 84 Ohio St.3d 230, 233, 1998-Ohio-323, 703 N.E.2d 286; *State v. Phillips*, 74 Ohio St.3d 72, 88, 1995-Ohio-171, 656 N.E.2d 643.

{¶20} Crim.R. 33(A)(2) provides that a new trial may be granted because of misconduct by the jury that materially affects a defendant's substantial rights. In this case, the trial court denied Appellant leave to file a delayed motion for new trial.

{¶21} Crim.R. 33(B) addresses timeliness when the basis of a new trial motion is newly discovered evidence:

> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he

> must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

{¶22} Because Appellant's motion was filed well outside the 120-day period, he was required to obtain leave of court to file his motion for new trial. Leave of court must be granted before the merits of the motion are reached. *State v. Lordi*, 149 Ohio App.3d 627, 2002-Ohio-5517, 778 N.E.2d 605, ¶ 25 (7th Dist.). The moving party must prove unavoidable delay by clear and convincing evidence in order to obtain leave. *Id.* at ¶ 26; Crim.R. 33(B).

{¶23} Unavoidable delay results when the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence. *Id.* citing *State v. Walden*, 19 Ohio App.3d 141, 146, 1483 N.E.2d 859 (10th Dist. 1984). The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Clark*, 7th Dist. Mahoning No. 16 MA 0121, 2017-Ohio-899, ¶ 20, citing *State v. Fortson*, 8th Dist. Cuyahoga No. 82545, 2003-Ohio-5387, ¶ 12.

{¶24} Clear and convincing proof is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt: it " 'produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990), quoting *Cross v. Ledford*, 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, (1954) paragraph three of the syllabus. "Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof." *Id.* Where there is competent and credible evidence supporting the trial court's decision, the appellate court should not substitute its judgment for that of the trial court. *Id.*

{¶25} Appellant contends that he was unaware of the contents of Calvin's affidavit until it was provided to him by his current counsel. While Appellant would have been on notice that Juror No. 5 had engaged in a conversation with a man named "Calvin" when he received a copy of the trial transcript for his direct appeal, the transcript did not include

Calvin's last name or his relationship to Kendra. Further, although it can be gleaned from the record that Juror No. 5's exchange with Calvin was cause for concern due to the fact that Calvin had accompanied Kendra to the trial, Juror No. 5 did not reveal that she was introduced to Kendra. Further, neither the trial court nor the defense counsel identified Kendra as the witness at issue during the hearing.

{¶26} However, even assuming that Appellant was unavoidably prevented from discovering the evidence contained in Calvin's affidavit, we find that the information in the affidavit is not "newly discovered evidence." The Ohio Supreme Court set forth the following requirements regarding motions for a new trial based upon newly discovered evidence:

> To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result of a new trial if granted; (2) has been discovered since the trial; (3) is such as could not in the exercise of due diligence have been discovered before the trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence.

State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶27} Calvin's affidavit establishes generally that he and Kendra were discussing her concern over the family's reaction to her testimony and the possibility of retaliation. He does not aver that Juror No. 5 participated in the conversation, or even that Juror No. 5 actually overheard the conversation.

{¶28} At most, Calvin's affidavit suggests that Juror No. 5 might have heard a discussion about Kendra's concerns regarding her testimony, which is merely cumulative to Juror No. 5's testimony at the hearing. It can be gleaned from Juror No. 5's testimony that she did not actually overhear any of the discussion between Calvin and Kendra, but, instead, that she was preoccupied with finding a tutor for her organic chemistry class. In addition to the fact that Calvin's affidavit merely avers that Juror No. 5 might have

overheard his discussion with Kendra, the affidavit does not specifically describe the contents of the discussion, and, as a consequence, we find that the affidavit fails to establish that Juror No. 5 and Kendra engaged in a communication "concerning a matter before the jury." *Remmer*, syllabus.

{¶29} In summary, we find that the evidence contained in Calvin's affidavit is cumulative, as it does not contradict Juror No. 5's hearing testimony and it does not establish that Juror No. 5 and Kendra engaged in a communication concerning a matter before the jury. Therefore, the affidavit does not constitute newly discovered evidence and the judgment entry of the trial court is affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.