[Cite as *State v. Glenn*, 2011-Ohio-829.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090205 TRIAL NO. B-0804934-D
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
ANTWAN GLENN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed from is: Affirmed

Date of Judgment Entry on Appeal: February 25, 2011

Joseph T. Deters, Hamilton County Prosecutor, and *James Michael Keeling*, Assistant Prosecutor, for Plaintiff-Appellee,

Roger W. Kirk, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Antwan Glenn appeals from the judgment of the Hamilton County Court of Common Pleas convicting him of murder and aggravated robbery. For the reasons that follow, we affirm.

{¶2} Glenn's convictions arose out of the robbery and death of Reginald Rolland in the early morning hours of June 18, 2008. Glenn had been indicted for aggravated murder, murder, and aggravated robbery, with accompanying gun specifications. The state proceeded against him as a principal or complicitor. Jovon Davis, Nikkia Sullivan, and James Johnson were also charged with the same crimes. Sullivan and Johnson agreed to testify truthfully for the state in exchange for a plea bargain that provided incarceration for ten to 15 years.

{¶3} At trial, the state presented evidence that on the night of June 17, 2008, Glenn had developed a plan with Sullivan and Davis to rob people in the Avondale neighborhood of Cincinnati. The plan involved Sullivan using her cellular phone to call or send a text message to men whom she knew and enticing them to meet her with the promise of sex. When the men arrived to meet her, Glenn and Davis would rob them at gunpoint.

{¶4} Sullivan testified that a man named Chris became the group's first victim. Sullivan called Chris and lured him to the Commodore Apartments on Reading Road, and in response to Davis's text messages, she led him up a dark stairwell where Glenn and Davis were waiting. Glenn and Davis robbed Chris at gun-point.

{¶5} Next, Sullivan testified, the group attempted to rob a man who met her near Lexington Park. When the man refused to walk to the park with her,

Sullivan texted Davis, who was waiting nearby in a car with Glenn, for advice. Davis directed her to abort the plan and to let the potential victim go.

{¶6} But the group reunited, and after scanning through Sullivan's cellular phone directory, they chose Reginald Rolland as their next victim. Either Glenn or Davis chose a house at 878 Hutchins Street as the location for the robbery. Sullivan recalled that she had accompanied Glenn and Davis there in the past when they had sold drugs to the occupants. Sullivan contacted Rolland, and he agreed to meet her at the Hutchins Street address.

{¶7} Before going to Hutchins Street, Glenn, Davis, and Sullivan met with Johnson, whom Davis had called and asked if he wanted to "hit a lick." Johnson agreed to participate, and the four drove to Hutchins Street in the car that Johnson had been driving, an "[un]noticeable" Ford Contour that belonged to Jasmain Grier, the girlfriend of one of Johnson's friends. Davis drove the Contour, Glenn sat in the front passenger seat, and Sullivan and Johnson sat in the back of the car. On the way to Hutchins Street, Glenn removed and smoked a cigarette from a pack of Newport cigarettes that Sullivan had brought into the Contour.

{¶8} Davis first parked the car in front of the house chosen for the robbery but later moved it down the street. Sullivan received a call on her cellular phone from Rolland and confirmed that he was on his way to meet her. Then all three men exited from the car armed with guns that Davis had distributed and hid, waiting for Rolland's arrival. Sullivan stood in front of the house to greet Rolland.

{¶9} When Rolland arrived, Sullivan led him to the back porch. As planned, Johnson first approached Rolland, pointed his gun at him, and told him to "lay it down." But Rolland pulled a 9-mm handgun out of his waistband and shot at Johnson. Johnson fired back with a .40-caliber Smith & Wesson handgun and then

ran. As he fled from the scene with a bullet wound in his leg, Glenn and Davis fired four or five shots at Rolland.

{¶10} Rolland was shot twice and left dying from these wounds on top of Sullivan on the porch. Sullivan, who had also been shot, grabbed Rolland's gun, moved out from underneath him, and left the porch. She then realized that Glenn, Davis, and Johnson had fled. She testified that at 3:15 a.m., she texted Davis, "Im hit," and then "Come and get me." After receiving no response, she attempted to walk away from the house, collapsed from her gunshot injuries, and called 911. She threw Rolland's gun in an attempt to "ditch it" before the police arrived.

{¶11} Responding officers, including one who had actually heard six or seven gunshots, found Rolland's gun in the neighboring yard. They also discovered Rolland, who soon died, and Sullivan, whom they transported to the hospital.

{¶12} Johnson's aunt and cousin drove him to the hospital. On the way there, he gave to his cousin the .40-caliber Smith & Wesson that he had used to shoot at Rolland. The police recovered the gun from Johnson's cousin when she was detained at the hospital as part of a protocol for those who transported gunshot victims.

{¶13} The police searched the Ford Contour that had been left at the scene unlocked and with the keys in the ignition. They found a pack of Newport cigarettes containing Glenn's fingerprint, Sullivan's purse, Johnson's red cellular phone, and two other cellular phones located in the console between the driver's seat and the passenger's seat. One of the phones had a photograph of Davis and Sullivan as the screen saver, and the other phone's screen saver had written on it Davis's nickname. Those two phones had been subscribed to by the mother of Jovon Davis, and someone named "Jovan" [sic] had called the cellular service provider, Verizon, hours

after Rolland had been shot, reporting the phones as lost and directing the transfer of the phone numbers to new phones. Davis was in possession of a phone with one of these numbers when he was arrested.

{¶14} Cellular phone records were located for a subscriber named "Antwoan Glenn." These records showed the signal from that phone pinging off cell towers near Hutchins Road around 3:00 a.m., and that the phone had later been used to call Sullivan's cellular phone at 3:50 a.m. and Johnson's cellular phone at 4:10 a.m. Further, the records showed communication between that phone and Davis's phone at 6:00 a.m.

{¶15} Importantly, at trial, the state presented evidence of the call and text history of the cellular phones, which demonstrated Sullivan's communication with Chris and Rolland and the communication between Davis, Sullivan, Glenn, and Johnson in the early morning hours of June 18, 2008.

{¶16} Ballistic evidence demonstrated that the two bullets found in Rolland's body were from a .40-caliber Smith & Wesson handgun. But the bullets could not be tied specifically to Johnson's handgun, and Glenn's and Davis's guns were never located. An expert was able to determine, however, that Rolland had shot Johnson and that Johnson had shot Sullivan.

{¶17} Although Sullivan and Johnson first lied about their parts in the robbery and murder of Rolland, they eventually confessed. Their prior statements were admitted into evidence for the jury's consideration, and they testified fully about the details of the plea agreements that they had entered into.

{¶18} The jury found Glenn and Davis guilty of murder and aggravated robbery, but acquitted both of them of aggravated murder and Glenn of all firearm specifications. Glenn filed post-verdict motions for an acquittal, a new trial, and a

"mistrial." The trial court overruled the motions and sentenced Glenn to consecutive terms of fifteen years' to life imprisonment for the murder and to ten years for the aggravated robbery. This appeal followed.

Batson Challenge

{¶19} In his first assignment of error, Glenn argues that the state peremptorily challenged an African-American prospective juror because of his race, in violation of his equal-protection rights under *Batson v. Kentucky*.[1] A *Batson* claim is adjudicated in three steps. If the opponent of the peremptory challenge makes a prima facie case of racial discrimination, then the proponent of the challenge must provide a racially neutral explanation for the challenge.[2] Finally, the trial court must determine based on all the circumstances if the opponent has proved purposeful discrimination.[3] A trial court's conclusion that the proponent did not possess a discriminatory intent will not be reversed on appeal unless it is clearly erroneous.[4]

{¶20} During voir dire, prospective juror Randolph Bennett, an African-American, was asked a series of questions about his background and his ability to be a juror. Bennett repeatedly had difficulty hearing and at one point asked the prospective juror next to him what the court was asking. Bennett also repeatedly qualified his answers with "hopefully" and gave confusing answers, as demonstrated by excerpts from the voir dire colloquy:

{¶21} "Prosecutor: * * * I talked yesterday to [a] lot of jurors about case consideration, using co-defendants to testify about what they had done and what

[1] (1986), 476 U.S. 79, 106 S.Ct. 1712.
[2] Id. at 96-98.
[3] Id. at 98.
[4] *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310, following *Hernandez v. New York* (1991), 500 U.S. 352, 111 S.Ct. 1859.

these two individuals had done, and how you would treat that. Did you follow what I was talking about?

{¶22} "Bennett: Yeah. You said some people bargain.

{¶23} "Prosecutor: And I guess my question is: Do you feel that you would be, like, competent or able to really give the case, like, everything that you should, and make a fair decision, be able to process all the information that's coming in, that you would have to like listen to and figure it out where it all fits?

{¶24} "Bennett: Hopefully I won't have a problem.

{¶25} "Prosecutor: And, again, there's only one person that can answer that, which would be you. Could there be a problem that—again, not a problem, but just a concern that you might have that you might miss something or not understand it the way that it really deserves to be understood?

{¶26} "Bennett: It's hard to say because I don't know the other side.

{¶27} "* * *

{¶28} "The Court: All right. Mr. Bennett, can you sit and listen to the case and evaluate the evidence and make a decision on the case whether the State's proven their case beyond a reasonable doubt or not?

{¶29} "Bennett: I feel I could.

{¶30} "The Court: You think you can?

{¶31} "Bennett: Hopefully.

{¶32} "* * *

{¶33} "Attorney [for Davis]: Are you comfortable with that instruction, that the testimony of an accomplice should be viewed with grave suspicion and weighed with great caution?

{¶34} "Bennett: Please repeat that.

{¶35} "Attorney [for Davis]: Are you comfortable with the rule: the testimony of a person who you find to be an accomplice—there will be people who are accomplices, people who said, I was involved in the robbery and killing of Reginald Rolland. And they are going to point a finger at my client, okay? That is an accomplice testifying. Are you going to weigh his or her testimony with grave suspicion and with great caution?

{¶36} "Bennett: No, I wouldn't."

{¶37} The state used a peremptory challenge to excuse Bennett. Davis's counsel objected to the state's peremptory challenge as a *Batson* violation. In explaining its use of a peremptory challenge to dismiss Bennett, the state said that "[i]t's obvious he has no clue as to what's going on. He * * * cannot hear. He said hopefully a number of times." The court determined that the state had asserted several nonrace-related reasons for the exercise of the peremptory challenge, and that those reasons were supported by the record, and it rejected the *Batson* challenge.

{¶38} We agree with the trial court that a juror's inability to understand and inability to hear the trial proceedings are race-neutral reasons for exercising a peremptory challenge against him. The trial court, which was able to observe Bennett's reaction to the questioning in addition to listening to Bennett's answers, found the state's reasons supported by the record. On this record, we cannot say that the trial court's finding of no discriminatory intent was clearly erroneous. Accordingly, we overrule the first assignment of error.

Other Bad Acts Evidence

{¶39} In his third assignment of error, which we next address, Glenn contends that the trial court erred by admitting evidence of his other bad acts and his prior incarceration, in violation of Evid.R. 404(B) and R.C. 2945.59.

{¶40} Other-acts evidence is generally inadmissible against a defendant in recognition of the substantial danger that a jury will find the defendant guilty because he has committed the other acts.[5] Evid.R. 404(B) and its statutory counterpart, R.C. 2945.59, provide exceptions to the common-law rule with respect to evidence of other acts of wrongdoing. Evidence of other acts is admissible if there is substantial proof that the defendant committed those acts, and if the evidence tends to prove an issue in the case such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[6]

{¶41} Evid.R. 404(B) and R.C. 2945.59 codify an exception to the common-law rule with respect to evidence of other acts of wrongdoing and are construed against admissibility.[7] In other words, "the standard for admissibility of other-acts evidence is strict."[8] But evidentiary rulings generally lie within the broad discretion of the trial court and will form the basis for reversal on appeal only upon an abuse of that discretion amounting to prejudicial error.[9]

{¶42} First Glenn challenges the trial court's admission, over his objection, of the testimony concerning the prior alleged aggravated robbery and attempted aggravated robbery that had occurred just hours before Rolland was robbed and murdered. Sullivan testified that she, Glenn, and Davis had lured a man named Chris to an apartment to rob him at gunpoint, and Sullivan also testified about an

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[5] See *State v. Knight* (1998), 131 Ohio App.3d 349, 352, 722 N.E.2d 568.
[6] *State v. Lowe*, 69 Ohio St.3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616, citing *State v. Broom* (1988), 40 Ohio St.3d 277, 282-283, 533 N.E.2d 682; Evid.R. 404(B); R.C. 2945.59.
[7] Id.
[8] Id. at 533.
[9] Evid.R. 103(A); *Lowe*, 69 Ohio St.3d at 532.

attempted aggravated robbery of another man who had met Sullivan near a park, but refused to get out of his car and accompany her to the park where Glenn and Davis had been planning to rob him.

{¶43} This court addressed and rejected a similar argument raised by Davis in his appeal.[10] We held that Sullivan's testimony on the other planned armed robberies that had occurred just hours before Rolland's armed robbery and murder was probative of Davis's preparation and planning involved in the charged offenses and tended to show that all the robberies were part of a common scheme or plan among the defendants. Sullivan's cellular phone records corroborated her testimony. We conclude that this same testimony was also probative of Glenn's preparation and planning for the charged offenses and Glenn's role in the common scheme. Therefore, we hold that the trial court did not abuse its discretion in admitting this testimony for those proper purposes.

{¶44} Glenn contends also that Sullivan was permitted to testify that he had been involved in drug dealing. The record confirms that Sullivan did testify that Glenn had previously sold drugs to the residents of the house where she had lured Rolland. But Glenn did not object to this testimony, and any error in its admission does not rise to the level of plain error in light of the other evidence of guilt in the case.

{¶45} Finally, Glenn argues that the trial court erred by allowing into evidence testimony indicating that he had been previously incarcerated in the Hamilton County Justice Center. Glenn claims that this testimony was provided by both Sullivan and William Hillard, a senior criminalist for the Cincinnati Police Department who performed the fingerprint analysis in the case.

[10] *State v. Davis*, 1st Dist. No. C-090220, 2010-Ohio-5125.

{¶46} The record does not demonstrate that Sullivan made any reference to or implication about a prior incarceration, outside of her unobjected-to comments about Glenn's drug dealing, which we have already determined to be insufficient to support a reversal.

{¶47} Hillard's reference to or implication concerning a prior incarceration is more problematic. At trial, Glenn stipulated that his fingerprints were on the fingerprint card that Hillard had used to compare the latent print from the cigarette pack. Despite this stipulation, Hillard testified that, to make his comparison, he had obtained Glenn's fingerprint card that was "on file at the justice center." He also explained that when he had entered the latent print from the cigarette pack into the Automatic Fingerprint Investigative System ("AFIS"), the system provided him with a list of candidates identified by a "jacket number," and that a jacket number was assigned to a particular name and was given to "[a]nybody [who] c[ame] in the justice center."

{¶48} Glenn objected on the grounds not only that Hillard was exposing the jury to his criminal history, but also that he lacked any reason to do so in light of the stipulation. The trial court overruled the objection, noting that the state had not asked how Glenn had come to be at the justice center, and that while Glenn had stipulated that his fingerprint was on the fingerprint card, he had refused to stipulate that his fingerprint was on the cigarette pack.

{¶49} As we have noted, the state generally may not introduce evidence that tends to show that a defendant committed another crime wholly independent of the offense for which he is on trial. Glenn had stipulated that his fingerprint was on the fingerprint card, rendering Hillard's testimony outside the exceptions set forth in Evid.R. 404(B) and R.C. 2945.59. And Hillard's challenged testimony, considered in

context, was such that it could have provided a basis for a reasonable inference that Glenn had prior involvement in other crimes. But the ambiguity in the testimony, coupled with the fleeting nature of it, rendered any error in the admission of the statement harmless beyond a reasonable doubt: the reference was vague, the fingerprint card that was admitted did not refer to any criminal activity, and therefore, in light of the other evidence in the case, there is no reasonable possibility that this testimony contributed to Glenn's conviction.[11]

{¶50} Accordingly, we overrule the third assignment of error.

Prosecutorial Misconduct

{¶51} In his second and fourth assignments of error, Glenn makes several allegations of prosecutorial misconduct that, he argues, deprived him of a fair trial. In sum, he argues that the state committed prosecutorial misconduct by asking leading questions on direct examination, by eliciting testimony implying that Glenn had a prior criminal record and had committed prior bad acts, and by making improper comments during opening statement and closing argument.

{¶52} The test for prosecutorial misconduct is whether the prosecutor's questions or remarks were improper and, if so, whether they prejudicially affected the defendant's substantial rights.[12]

{¶53} Glenn contends that the state asked leading questions during direct examination of Sullivan and Detective Eric Karaguleff. In a leading question, the examiner suggests to the witness the answer desired.[13] Evid.R. 611(C) provides that "[l]eading questions should not be used on the direct examination of a witness except

[11] See Crim.R. 52(A).
[12] *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15, 470 N.E.2d 883; *State v. Canyon*, 1st Dist. Nos. C-070729, C-070730, and C-070731, 2009-Ohio-1263, ¶17.
[13] *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶138, citing 1 McCormick, Evidence (5 Ed.1999) 19, Section 6.

as may be necessary to develop his testimony." As indicated by the rule, the parties can use leading questions when necessary to develop a witness's testimony, and the trial court has discretion to allow such questioning.[14] Where leading questions are designed to move the testimony along without delay and "merely direct the witness' attention to the topic of inquiry,"[15] or facilitate testimony in light of the witness's age,[16] nervousness,[17] or established difficulty in remembering information,[18] they are not improper. But a prosecutor's persistent pursuit of an improper line of questioning after an objection has been sustained can be misconduct.[19]

{¶54} To obtain a reversal on the basis of improper leading questions by the state, the defendant must demonstrate not only that the questioning was improper, but that it affected the outcome of the trial.[20] Where no objection is made at trial, the misconduct must rise to the level of plain error.[21] Plain error exists only where it is clear that, but for the error, the outcome of the trial clearly would have been otherwise.[22]

{¶55} Glenn has not specifically identified the questions that he considers to be outside what is permitted under Evid.R. 611(C) and how these questions prejudiced him. Further, he does not argue, and the record does not reflect, that the prosecutor persistently pursued an improper line of questioning. Moreover, Glenn concedes that he must meet the plain-error standard.

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[14] Id.
[15] *State v. Brown* (1996), 112 Ohio App.3d 583, 599, 679 N.E.2d 361.
[16] Id. at 599-600.
[17] *State v. Smith* (1997), 80 Ohio St.3d 89, 110-111, 1997-Ohio-355, 684 N.E.2d 668.
[18] *Drummond* at ¶152.
[19] See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶205.
[20] Id.
[21] *State v. Childs* (1968), 14 Ohio St.2d 56, 236 N.E.2d 545, paragraph three of the syllabus.
[22] See Crim.R. 52(B); *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶56} We conclude that Glenn has failed to demonstrate that the prosecutor's line of questioning was misconduct that rose to the level of error, much less plain error.

{¶57} Glenn contends also that prosecutorial misconduct occurred when the prosecutor asked Detective Karaguleff, on redirect, "Would it be fair to say defense attorneys can also request and be granted by the Court any expert they want to test anything they want?" According to Glenn, the question was designed to improperly shift the burden of proof to Glenn, and the conduct was prejudicial even though the court sustained defense counsel's objection to the question, because the jury heard "the response." While we agree that the prosecutor's question was improper, Glenn has failed to demonstrate prejudice, as the trial court sustained defense counsel's objection before any response was given.

{¶58} Glenn argues further that prosecutorial misconduct occurred (1) during opening statement, when the prosecutor referred to Glenn's alleged participation with Davis and Sullivan in two planned aggravated robberies shortly before committing the offenses against Rolland, and (2) during closing argument, when the prosecutor again referred to Glenn's participation in the planned robberies, as well as denigrating defense counsel and making inflammatory comments.

{¶59} We have already held that Sullivan's testimony about Glenn's alleged participation in two planned armed robberies within hours of Rolland's attempted robbery and shooting death was admissible. In opening statement and closing argument, the prosecutor referred to this admissible testimony, as corroborated by the cellular-phone records, in the context of demonstrating the planning and preparation for Rolland's ambush. Under these circumstances, we find no misconduct by the prosecutor.

{¶60} Glenn identifies as improper four other remarks of the prosecutor in closing argument, none of which he objected to at trial. We reviewed these four remarks in Davis's appeal before holding that Davis had failed to demonstrate a claim for prosecutorial misconduct.[23] We hold that Glenn, too, has failed to demonstrate a claim for prosecutorial misconduct based on these remarks.

{¶61} Finally, Glenn claims that the prosecutor improperly vouched for his witnesses during the rebuttal portion of closing argument when he stated that "[t]hey [referring to Sullivan and Johnson] are telling the truth about that." While the comment appears to be improper vouching by the prosecutor, when it is considered in its context, it is clear that the prosecutor was attempting to summarize the defense's argument to the jurors that they should believe only part of Sullivan's and Johnson's testimony.

{¶62} The full comment stated the following: "The argument is believe mostly everything they say, in fact almost everything they say, Ms. Sullivan and Mr. Johnson, except believe the plan, believe they were bait, believe James Johnson is the shooter, believe they were at the scene, believe that it was a planned robbery, believe all that. *They are telling the truth about that.* What don't they want you to believe? What is the only thing? That these two were involved also. That's the only thing. The only thing that is damaging to them is the thing they don't what you to believe about what they said." When the comment is viewed in its appropriate context, we conclude that it was clearly not improper.

{¶63} In sum, we conclude that most of Glenn's claims of prosecutorial misconduct do not involve an error. Where an error occurred, and was objected to, nothing in the record suggests that the error affected Glenn's substantial rights.

[23] *Davis*, 2010-Ohio-5125, at ¶30-34.

Further, where an error was not objected to, nothing in the record demonstrates that, but for the error, the jury's verdict in this case would have been different. Accordingly, we overrule the second and fourth assignments of error.

Sufficiency and Weight of the Evidence

{¶64} In his fifth assignment of error, Glenn contends that his convictions for murder and aggravated robbery were not supported by sufficient evidence and were against the manifest weight of the evidence. In addition, he contends that the trial court erred by overruling his Crim.R. 29(C) motion for an acquittal.[24]

{¶65} The crux of Glenn's argument is that the state failed to present sufficient evidence linking him to the robbery and death of Rolland, and that the jury was left to rely on the testimony of Sullivan and Johnson, which he describes as incredible. We find Glenn's argument meritless.

{¶66} First, in the review of a sufficiency-of-the-evidence claim, this court views the evidence in the light most favorable to the state to determine whether any rational trier of fact could have found all the essential elements of the charged offenses beyond a reasonable doubt.[25] In this case, Sullivan's and Johnson's testimony, as corroborated by the other evidence, including the cellular-phone records of all the defendants and the location of Glenn's fingerprint on the cigarette pack found in the vehicle used by Rolland's assailants, amounted to more than sufficient evidence to support Glenn's convictions as either a principal or a complicitor in the offenses.

[24] Glenn actually challenges the trial court's denial of his Crim.R. 29 motion for an acquittal in his sixth assignment of error, but he addresses the merits of his claim in his discussion under his fifth assignment of error.

[25] *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

{¶67} Second, in reviewing a weight-of-the-evidence claim, this court is unable to view the demeanor of the witnesses as they actually testify at trial. Therefore, we give great deference to the jurors' credibility determinations. In this case, the jury believed Sullivan and Johnson despite the knowledge that Sullivan and Johnson had entered into plea bargains and that they had first lied to the police. The jury was also properly instructed to view their testimony with suspicion. After reviewing the entire record, we are unable to say that the jury lost its way and created a manifest miscarriage of justice in finding Glenn guilty of murder and aggravated robbery.[26]

{¶68} Further, in his Crim.R. 29(C) motion, with respect to the aggravated-robbery conviction, Glenn argued that the jury's verdicts on the principal charge and the firearm specifications were inconsistent, which required the court to set aside that conviction.

{¶69} This court reviewed the law on inconsistent verdicts in *State v. Hampton*.[27] First, we noted that " 'the several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count.' "[28] Then we noted, with respect to inconsistent responses within the same count such as a conviction on a principal charge and a concurrent acquittal on a specification for identical behavior, that the Ohio Supreme Court had held that the general verdict is not inconsistent where a conviction on the principal charge is not dependent on a finding of the

[26] *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.
[27] 1st Dist. No. C-010159, 2002-Ohio-1907.
[28] Id., citing *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 683 N.E.2d 1112, paragraph one of the syllabus.

specification.[29] Applying this law, we concluded that an acquittal on a one-year firearm specification and a finding of guilt on a three-year firearm specification did not result in an inconsistent verdict requiring the vacation of the three-year specification.[30]

{¶70} More recently, this court specifically held in *State v. Allen*[31] that a jury's general finding of guilty is not invalid where, as in this case, there is a conviction on the principal charge (aggravated burglary) and an acquittal on the accompanying firearm specifications.[32]

{¶71} We hold in this case that the trial court committed no error in allowing the allegedly inconsistent verdict to stand. The evidence supported the aggravated-robbery conviction, the court instructed on the specifications independently and separately, and the aggravated-robbery conviction was not dependent upon a finding on the specifications. The United States Supreme Court stated in a similar context that " '[t]he most that can be said in such a case is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.' "[33]

{¶72} Accordingly, we overrule the fifth assignment of error.

New-Trial Motions

{¶73} In his final assignment of error, Glenn contends that the trial court erred by overruling his motion for a new trial and his motion for a mistrial. Both

[29] Id., citing *State v. Perryman* (1976), 49 Ohio St.2d 14, 358 N.E.2d 1040, paragraph three of the syllabus, vacated on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3136.
[30] Id.
[31] 1st Dist. No. C-060239, 2006-Ohio-6822.
[32] Id. at ¶31-32.
[33] *Dunn v. United States* (1932), 284 U.S. 390, 393, 52 S.Ct. 189, quoting *Steckler v. United States* (C.A.2, 1925), 7 F.2d 59, 60.

motions were filed after the jury had rendered its verdicts, and, thus, we treat both as Crim.R. 33 "new trial" motions.[34] Generally, the decision to grant or deny a new trial pursuant to Crim.R. 33 is within the trial court's sound discretion, and we will not disturb its decision absent an abuse of discretion.[35]

{¶74} The disposition of this assignment of error depends upon the following facts. At the conclusion of the first day of jury deliberations, the jurors asked the bailiff if they could take home the jury instructions to review. The bailiff informed the trial court of the request, and the court, without consulting either the prosecutor or defense counsel, and outside the presence of the accused, approved the jurors' request.

{¶75} The trial court informed defense counsel of its action by telephone after the jurors had been discharged for the day. Glenn objected in court the following day. The court, in the presence of counsel, questioned the jurors and determined that no one had discussed the jury instructions or permitted anyone to discuss the case in their presence. Glenn did not ask to question the jurors about any outside influence or move for a mistrial at that time.

{¶76} The jury then rendered its verdict finding Glenn guilty of murder and aggravated robbery. Glenn moved for a new trial, jointly with Davis, on the ground that the court had addressed the jury outside of his presence and had permitted the jury to take home the jury instructions, prompting juror misconduct.

{¶77} Later, the court allowed its bailiff to proffer for the record a statement indicating that after conveying to the jury, at the court's direction, the court's decision to allow the jurors to take home a copy of the jury instructions, she had

[34] See Crim.R. 33.
[35] See, generally, *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54.

admonished them by warning them not to engage in any independent research or to allow anyone who might question them to see them with the jury instructions. Glenn then moved for a "mistrial" on the ground that the bailiff's communication with the jury during its deliberations violated R.C. 2945.33 and was presumptively prejudicial.

{¶78} On appeal, Glenn maintains that a new trial was warranted because of irregularities in the proceedings stemming from the court's decision to address the jury without him or his counsel present, the court's grant of the jury's request to take home the instructions, and the bailiff's "admonition" to the jury, and because these irregularities in the proceedings prompted juror misconduct.

{¶79} We addressed similar issues in Davis's appeal. Although we found error stemming from the communication with the jury outside Davis's presence, we determined that the error was harmless because the communication was not of a "substantive nature."[36] We also held that the court's decision to allow the jury to take home copies of the jury instructions that had previously been approved by both the state and defense counsel had not prompted any juror misconduct, and, therefore, that it was not prejudicial.[37]

{¶80} The same analysis applies to Glenn's claims. We conclude that the trial court's communication with the jury outside the presence of Glenn was an error but that it was harmless error because the communication was not of a substantive nature. The jury instructions were complete copies of the jury instructions that had

[36] *Davis*, 2010-Ohio-5125, at ¶43-44, citing *State v. Abrams* (1974), 39 Ohio St.2d 53, 313 N.E.2d 823, *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881, and *Schiebel*, supra. Compare *State v. Hardy*, 8th Dist. No. 82620, 2004-Ohio-56 (new trial warranted based on the trial court's response to jury questions outside the presence of defendant and without his approval, where the communication was repetitive, involved matters not addressed in the court's original jury instructions, and involved substantive issues relating to the jury's deliberations).
[37] See id. at ¶44.

already been approved by both the state and defense counsel and given to the jury. Even the court's implication that the jury could study the instructions at home was not a new instruction—the court had informed the jurors before they had first retired to the jury room that **"[a]fter you leave today, until you come back tomorrow, you can certainly think about the case. I hope that you would.** But you still can't discuss the case amongst anybody, yourself or with anyone else, or [allow] anyone to discuss it in your presence. And you still cannot do anything independently to prove or disprove any facts that you have heard." (Emphasis added.) The court gave this instruction in the presence of Glenn, and he did not object to it.

{¶81} We also conclude that the court's communication did not prompt "juror misconduct." Glenn's claim is that a juror's independent consideration of the case outside the jury room when aided by the jury instructions is misconduct. But Glenn has not cited any law to support this argument, which defies common sense.

{¶82} "Juror misconduct" is generally defined as "[a] juror's violation of the court's charge or the law, committed either during trial or in deliberations after trial, such as (1) communicating about the case with outsiders, witnesses, attorneys, bailiffs, or judges, (2) bringing into the jury room information relating to the case but not in evidence, and (3) conducting experiments regarding theories of the case outside the court's presence."[38]

{¶83} Although we do not condone the trial court's action because of the potential for misconduct, we hold that a juror's independent consideration of the case outside the jury room, **especially when aided by jury instructions**, does not, without more, amount to misconduct. Further, any misconduct that could have

[38] Black's Law Dictionary (8 Ed.Rev.2004) 1019.

arisen from a juror's consideration of the case outside the courtroom was dispelled when the court questioned the jury the following day and determined that no one had discussed the case with anyone, had permitted anyone to discuss the case in a juror's presence, or had done any independent investigation. Therefore, Glenn failed to demonstrate that any misconduct had taken place.[39]

{¶84} Finally, we address Glenn's argument that the bailiff's admonition to the jury during its deliberations was in violation of R.C. 2945.33, presumptively prejudicial, and grounds for a new trial.

{¶85} Communication between a bailiff and jurors in a criminal trial in violation of R.C. 2945.33 may be grounds for a new trial.[40] R.C. 2945.33 reads in relevant part as follows: "[w]hen a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court * * * may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. **Such officer shall not permit a communication to be made to them, nor to make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court.** Such officer shall not communicate to any person, before the verdict is delivered, any matter in relation to their deliberation * * *." (Emphasis added.)

{¶86} But a communication outside the bounds of R.C. 2945.33 will not be presumed prejudicial unless it rises to the level of misconduct.[41] For example, in

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[39] See *State v. Murphy* (1992), 65 Ohio St.3d 554, 575, 605 N.E.2d 884.
[40] *State v. Lane* (1988), 48 Ohio App.3d 172, 549 N.E.2d 193, overruled in part on other grounds in *State v. Wetherall*, 1st Dist. No. C-000113, 2002-Ohio-1613.
[41] See *State v. Sheppard* (1956), 165 Ohio St. 293, 298, 135 N.E.2d 340; *State v. Robinson*, 12th Dist. No. CA2005-11-029, 2007-Ohio-354, at ¶40-43; *State v. Redding* (Mar. 5, 1992), 8th Dist. No. 59972. But, see, *State v. Czajka* (1995), 101 Ohio App.3d 564, 578-579, 656 N.E.2d 9.

State v. Adams,[42] an Ohio Supreme Court case involving a bailiff's violation of G.C. 13448-1, the predecessor of R.C. 2944.33, the court presumed prejudice and ordered a new trial where a bailiff, standing in the doorway of the jury room, told deliberating jurors that " 'you must reach a decision if you have to stay here for three months.' "[43] The court stated that "[t]he gross misconduct of the bailiff as an officer of the court was clearly shown in this case by undisputed evidence, and, under the circumstances, must be presumed to have been prejudicial to the defendant."[44]

{¶87} In *State v. Lane*,[45] this court found misconduct by the bailiff that gave rise to a presumption of prejudice. In *Lane*, the jury had been deliberating for several hours, had voted twice, and was divided, when a juror asked the bailiff, " 'What would happen in the event of a hung jury?' "[46] The bailiff improperly replied that she should " ' just deliberate the evidence,' " and not consider that possibility, and, when asked a second time, informed the juror that "she should not consider a hung jury."[47] When the juror asked the bailiff about the possibility of lesser-included offenses, the bailiff " 'answered with gestures.' "[48] The juror felt coerced to come to a verdict and testified accordingly at a hearing on a motion for a new trial.[49]

{¶88} This case is easily distinguished from *Adams* and *Lane*.[50] First, there was no dispute that the admonishment would have been proper if it had been given by the court and was essentially a restatement of prior admonishments that the jury

[42] (1943), 141 Ohio St. 423, 48 N.E.2d 861.
[43] Id. at 424.
[44] Id. at 431.
[45] *Lane*, supra, at 175.
[46] Id.
[47] Id.
[48] Id.
[49] Id.
[50] See *Sheppard*, supra, at 297-299 (presumption of prejudice did not apply where bailiff, without authorization from the court, allowed sequestered jurors to make telephone calls to family members); *Robinson*, supra, at ¶40-41 (presumption of prejudice did not apply to bailiff's communication outside the "bounds" of R.C. 2945.33 where communication was not "impermissible" or "substantive").

had actually received from the court. Further, based on the trial court's voir dire of the jury, the record supports a finding that the jury had followed the admonition of the bailiff and had not engaged in misconduct. Although the bailiff should not have relayed to the jury any information beyond what the trial court had asked her to convey, the record does not demonstrate any prejudice that denied Glenn a fair trial. A new trial cannot be granted on irregularities that do not materially affect the substantial rights of the accused.[51]

{¶89} Accordingly, we hold that the trial court did not err by denying the motions for a new trial, and we overrule this assignment of error.

{¶90} The judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., HILDEBRANDT, and **DINKELACKER, JJ**.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

[51] See Crim.R. 33(E)(5); Crim.R. 52(A).