[Cite as *State v. Gunnell*, 2010-Ohio-4415.]

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	:	(Criminal Appeal from Common Pleas Court)

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O P I N I O N

Rendered on the 17th day of September, 2010.

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Stephen Schumacher, Pros. Attorney, Atty. Reg. No. 0014643; Amy M. Smith, Asst. Pros. Attorney, Atty. Reg. No. 0081712, 50 E. Columbia Street, 4th Floor, P.O. Box 1608, Springfield, OH 45501
Attorneys for Plaintiff-Appellee State of Ohio

James N. Griffin, Atty. Reg. No. 0015917, 4 West Main Street, Suite 526, Springfield, OH 45502
Attorney for Defendant-Appellant Toneisha Gunnell

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GRADY, J.:

{¶ 1} 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 us to also order Gunnell's discharge.

{¶ 2} We set forth the history of the case in *State v. Patterson*, Clark App. No. 05CA0128, 2007-Ohio-29, at ¶2-4, and repeat it herein in part:

{¶ 3} "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.

{¶ 4} "As the four women sped away in their vehicle, a pedestrian, 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.

{¶ 5} "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

{¶ 6} 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 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.

{¶ 7} 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; *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

{¶ 8} 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 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.

{¶ 9} 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:

{¶ 10} "Perverse: contrary to the manner or direction of the judge on a point of law <perverse verdict>". (Exhibit 2 to Dkt. #62A.)

{¶ 11} The second piece of paper contained typewritten material that stated:

{¶ 12} "Manslaughter: Involuntary

{¶ 13} "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.

{¶ 14} "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.)

{¶ 15} 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.

{¶ 16} 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 on double jeopardy grounds. (Dkt. #65.) The trial court denied this motion on November 26, 2007. (Dkt.

#68.)

{¶ 17} 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. 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.

Third Jury Trial

{¶ 18} 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 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.

{¶ 19} 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 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.

{¶ 20} 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.

{¶ 21} 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 consecutively for an aggregate sentence of eighteen years to life in prison. Gunnell filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 22} "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."

{¶ 23} 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:

{¶ 24} "[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."

{¶ 25} 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.

{¶ 26} 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 to the State.

{¶ 27} 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, 2010-Ohio-2012. We explained why the trial court abused its discretion in denying defense counsels' motion for a mistrial:

{¶ 28} "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, 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 when it overruled Patterson's motion for a mistrial." Id. at ¶81. (Emphasis supplied).

{¶ 29} 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.

{¶ 30} 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:

{¶ 31} "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 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.)

{¶ 32} The State continued this theme throughout its closing:

{¶ 33} "They want you to ignore the law of complicity. We are going to talk about complicity here in a little bit.

{¶ 34} "* * *

{¶ 35} "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.

{¶ 36} "* * *

{¶ 37} "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.

{¶ 38} "* * *

{¶ 39} "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 that led to John Deselem's death.

{¶ 40} "* * *

{¶ 41} "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.

{¶ 42} "And that law of complicity that we talked about all four girls, they are all in this together. * * *

{¶ 43} "* * *

{¶ 44} "That's all that's required. They were acting as a team throughout this. All of this theft was a team effort. * * *

{¶ 45} "* * *

{¶ 46} "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.)

{¶ 47} Moreover, the jury instructions contained portions that

emphasized the existence of a common purpose:

{¶ 48} "Evidence has been presented 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.

{¶ 49} "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.)

{¶ 50} 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.

{¶ 51} 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*, 2010-Ohio-2012.

SECOND ASSIGNMENT OF ERROR

{¶ 52} "THE TRIAL COURT ERRED WHEN IT 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."

{¶ 53} 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.

{¶ 54} 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 ¶20, 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. Trees*****, 90 Ohio St.3d 460, 480, 2001-Ohio-4, citing Crim.R. 33 and** ***State v. Sage*** **(1987), 31 Ohio St.3d 173.**

{¶ 55} "'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. 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.**

{¶ 56} "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." *AAAA Enterprises, Inc v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

Double Jeopardy

{¶ 57} 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.

{¶ 58} 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, 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.

{¶ 59} 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.

{¶ 60} R.C. 2945.36 provides that:

{¶ 61} "The trial court may discharge a jury without prejudice to the prosecution:

{¶ 62} "(A) For the sickness or corruption of a juror or other accident or calamity;

{¶ 63} "(B) Because there is no probability of such jurors agreeing;

{¶ 64} "(C) If it appears after the jury has been sworn that one of the jurors is a witness in the case;

{¶ 65} "(D) By the consent of the prosecuting attorney and the defendant.

{¶ 66} "The reason for such discharge shall be entered on the journal."

{¶ 67} 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

{¶ 68} 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 331, 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.2d 974.

{¶ 69} The Supreme Court has explained that "there are 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

{¶ 70} "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. 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.

{¶ 71} "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.

{¶ 72} 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.

{¶ 73} 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.

{¶ 74} "Sound 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. 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 1336, 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.

{¶ 75} 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 *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, 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

{¶ 76} 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, and such activity is juror misconduct. *State v. King* (1983), 10 Ohio App.3d 161, 165; *State v. Spencer* (1997), 118 Ohio App.3d 871, 873-74. 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 ¶14, citation omitted.

{¶ 77} "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 ¶23, quoting *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶42. 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]

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[1] Accord: *State v. Hopfer* (1996), 112 Ohio App.3d 521, 543 ("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,

{¶ 78} "[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]

{¶ 79} In *Remmer v. United States* (1954), 347 U.S. 227, 74 S. Ct. 450, 98 L.Ed.2d 654, a person told a juror during the trial that a favorable outcome for

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determine whether it materially affected the defendant's substantial rights."), citing *State v. Taylor* (1991), 73 Ohio App.3d 827, 833.

[2] Accord: *Hopfer*, 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 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.").

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:

{¶ 80} "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.

{¶ 81} "***

{¶ 82} "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 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.

{¶ 83} 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, 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. 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 ¶54, quoting *State v. Gray* (July 27, 2000), Cuyahoga App. No. 76170.

{¶ 84} 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 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.

{¶ 85} The United States Court of Appeals for the First District

summarized the trial court's duties:

{¶ 86} "'[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 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.

{¶ 87} 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:

{¶ 88} "Respondent correctly notes that determinations made in *Remmer*-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*, 12 How. 361, 366, 13 L.Ed. 1023 (1852)." *Smith v. Phillips*, 455 U.S. at 217 n.7.

Juror #6's Misconduct

{¶ 89} 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 of perverse and sent the jury home for the night.

{¶ 90} 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

{¶ 91} The entirety of the trial court's short inquiry of Juror

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[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*, ___ Ohio St. 3d ___, Slip Op. No. 2010-Ohio-3830.

#6 was as follows:

{¶ 92} "JUROR NO. 6: Good morning.

{¶ 93} "THE COURT: You can have a seat there.

{¶ 94} "JUROR NO. 6: Okay.

{¶ 95} "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 - -

{¶ 96} "JUROR NO. 6: Yes, I did.

{¶ 97} "THE COURT: A definition or instruction on 'involuntary manslaughter.'

{¶ 98} "JUROR NO. 6: That nobody saw them.

{¶ 99} "THE COURT: You're the only one that saw them?

{¶ 100} "JUROR NO. 6: I told her (the bailiff) that I didn't know we weren't allowed. I'm sorry.

{¶ 101} "THE COURT: Okay. Did you - -

{¶ 102} "JUROR NO. 6: And I didn't talk about it.

{¶ 103} "THE COURT: All right. Apparently you were doing some research last night or this morning on the internet or - -

{¶ 104} "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.

{¶ 105} "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?

{¶ 106} "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 definition. That was all that I was going to share.

{¶ 107} "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?

{¶ 108} "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.

{¶ 109} "THE COURT: Okay. Okay. Counsel have any questions for this particular juror?

{¶ 110} "MR. SHUMAKER: None from the State, Your Honor.

{¶ 111} "MR. REED: No, Your Honor. Thank you.

{¶ 112} "MR. KAVANAGH: No, Your Honor.

{¶ 113} "MS. CUSHMAN: No.

{¶ 114} "MR. GRIFFIN: No, Your Honor." (October 2, 2007 Tr. 9-12.)

The Trial Court Declares a Mistrial

{¶ 115} 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:

{¶ 116} "MR. SHUMAKER: I guess, Your Honor, the State's position is we'd leave it to the Court's discretion as to whether or not this is fatal.

{¶ 117} "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.)

{¶ 118} 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:

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

{¶ 120} "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.)

{¶ 121} The trial court then made it patently clear to the prosecutors that it believed the State was severely prejudiced by Juror #6's actions:

{¶ 122} "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.

{¶ 123} "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 law that would appear to be reckless behavior.

{¶ 124} "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.

{¶ 125} "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.)

{¶ 126} 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:

{¶ 127} "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.

{¶ 128} "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. That - - that's irrelevant why she's done it.

{¶ 129} "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.

{¶ 130} "THE COURT: Well - -

{¶ 131} "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.

{¶ 132} "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.)

{¶ 133} The trial court again reiterated how prejudicial to the State it believed the hypothetical was:

{¶ 134} "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 to be a very nice lady.

{¶ 135} "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.

{¶ 136} "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.

{¶ 137} "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.

{¶ 138} "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.

{¶ 139} "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.)

{¶ 140} The prosecutor then requested a five-minute break to discuss the matter. (Id. at 19.) After the break, the State moved for a mistrial:

{¶ 141} "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.

{¶ 142} "And, unfortunately, we'll be asking for a mistrial at this time." (Id. at 20.)

{¶ 143} 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:

{¶ 144} "THE COURT: The Court was very specific in its

instructions when it informed 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.

{¶ 145} "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.

{¶ 146} "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.

{¶ 147} "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.

{¶ 148} "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, 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.

{¶ 149} "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.

{¶ 150} "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.

{¶ 151} "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.

{¶ 152} "But 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

{¶ 153} 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:

{¶ 154} "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.

{¶ 155} "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.

{¶ 156} "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

{¶ 157} In its entry denying Defendants' joint motion for dismissal of the indictment on double jeopardy grounds, the trial court identified the issue as follows:

{¶ 158} **"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.)**

{¶ 159} **After stating the issue, the trial court stated that it was reviewing its own, previous 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.)**

{¶ 160} **The trial court identified seven "facts" that it relied**

on in making its determination to declare a mistrial:

{¶ 161} "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.'

{¶ 162} "Second, Juror #6 disregarded the Court's repeated admonitions and instructions and engaged in juror misconduct. * * *

{¶ 163} "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.

{¶ 164} "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. * * *

{¶ 165} "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.'

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

{¶ 167} "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.'" (Dkt. #68, p. 6-7.)

The Trial Court Did Not Exercise Sound Discretion

{¶ 168} 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.

{¶ 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.

{¶ 170} 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.

{¶ 171} ***The State, Not Defendants, Must Show Prejudice***

{¶ 172} 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 in consideration of information obtained outside the courtroom. The court abandoned that duty when it instead offered the juror to the parties for questioning.

{¶ 173} 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

{¶ 174} 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 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.

{¶ 175} **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.**

{¶ 176} **Juror #6, along with 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.

{¶ 177} 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 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

{¶ 178} 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 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:

{¶ 179} "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.)

{¶ 180} The printed material that Juror #6 obtained reads as follows:

{¶ 181} "Manslaughter: Involuntary

{¶ 182} "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.

{¶ 183} "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.)

{¶ 184} 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.

{¶ 185} In order to prove that Defendants were guilty of involuntary manslaughter, the State had to show that Defendants caused 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 ¶67, 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.

{¶ 186} 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).

{¶ 187} 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 #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.

{¶ 188} 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 highlight a burden that the State created for itself when it authored the indictment.

{¶ 189} 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 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.

{¶ 190} **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 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.

{¶ 191} 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:

{¶ 192} "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He 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.

{¶ 193} 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*.

{¶ 194} 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 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.**

{¶ 195} 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 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.

{¶ 196} 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.

{¶ 197} The District Court and Sixth Circuit Court of Appeals found reasonable the trial court's 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.

{¶ 198} 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

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[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."

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.

{¶ 199} 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.

{¶ 200} Finally, 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. 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

{¶ 201} 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 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.

{¶ 202} 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.

BROGAN, J., concurring:

{¶ 203} 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 Ohio Supreme Court to revisit its opinion in *State v. Crago* (1990), 53 Ohio St.3d 243, 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, which was overruled in *Crago*; also see the United States Supreme Court decision in *Abney v. United States* (1977), 431 U.S. 651, 661.

Copies mailed to:

Stephen Schumacher, Esq.
Amy M. Smith, Esq.
James N. Griffin, Esq.
Hon. Douglas M. Rastatter