

STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT	VERDICT	CASE NUMBER CR. NO. <u>12-1-1474</u>
STATE OF HAWAII VS. (DEFENDANT) ROYCE C. GOUVEIA		
WE THE JURY in this case find the Defendant, NOT GUILTY.		
DATE <u>04-06-2013</u>	FOREPERSON 	
MANSLAUGHTER		FIRST CIRCUIT STATE OF HAWAII FILED _____, 20_____ _____, o'clock M. Clerk, 4th Division

ORIGINAL

CAI

FIRST CIRCUIT COURT

STATE OF HAWAII

FILED

2:20 o'clock P. M.

SEP - 6 2013 20

Lynn Y. Nozaki
Clerk, 4th Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,) CR. NO. 12-1-1474
)
) vs.)
) CHARGE(S):
 ROYCE C. GOUVEIA,) MANSLAUGHTER
)
) Defendant.)
)
) COMMUNICATION NO. 3 FROM THE
) JURY
)

COMMUNICATION NO. 3 FROM THE JURY

QUESTION: We waited a verdict.



FOREPERSON

DATE: 09-06-2013 TIME: 1420

ORIGINAL

CAI

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2024 o'clock P. M.
SEP - 6, 2013, 20

Lynn Y. Nozaki
Clerk, 4th Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII,) CR. NO. 12-1-1474
vs.)
ROYCE C. GOUVEIA,) CHARGE(S):
Defendant.) MANSLAUGHTER
)
) COMMUNICATION NO. 2 FROM THE
) JURY
)

COMMUNICATION NO. 2 FROM THE JURY

QUESTION: Concern: This morning on prosecutor's side of courtroom
there was a man shouting, glaring and whistling at
defendant. We now concern for our safety as jurors

Allen Bell

FOREPERSON

DATE: 07-06-2013 TIME: 11:04

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1 yourself, or did you?

2 MS. YOO: I didn't see him glaring or
3 whistling, but I do know he was present with the shaved
4 head, so ...

5 THE COURT: Okay. Anything on your end, Mr.
6 Shigetomi?

7 MR. SHIGETOMI: I'm unaware of it, Your
8 Honor.

9 THE COURT: Okay.

10 VOIR DIRE EXAMINATION/JUROR NO. 1

11 BY THE COURT:

12 Q. All right, Mr. Valencia, why don't you take
13 the first seat there in the jury box, just relax.

14 All right. Mr. Valencia, let me read to you,
15 before we start, this communication that I received from
16 you all, from the jury. Your foreperson I guess wrote it
17 down and it reads:

18 "Concern. This morning on prosecutor's side
19 of the courtroom there was a man, shaved head, glaring and
20 whistling at defendant. We are concerned for our safety
21 as jurors."

22 First of all, do you agree with this? Do you
23 subscribe to this?

24 A. I did not witness it. Because we talked
25 about it in there, but I did not witness or notice

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1 anything.

2 Q. So you yourself did not witness this, but it
3 was brought up?

4 A. It was brought up.

5 Q. So I take it it was brought up during your
6 deliberations?

7 A. Yes.

8 Q. Okay. Do you recall how long you all talked
9 about this?

10 A. Probably a few minutes.

11 Q. Do you recall when in your deliberations this
12 came up? Estimates, I just want estimates.

13 A. Probably towards the end part.

14 Q. Toward the end part, but before you reached a
15 verdict?

16 A. Yes.

17 Q. Okay.

18 A. Almost -- well, within two -- almost at the
19 end, then somebody mentioned it.

20 Q. And then you reached a verdict?

21 A. Yeah.

22 Q. And I don't want to know what the verdict is.

23 A. Okay.

24 Q. All right. You personally, what did you
25 think about this discussion and about what one of your

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1 fellow jurors I guess brought up?

2 A. Well, me, no, nothing. Because I didn't
3 witness the whole thing. I didn't know, I wasn't paying
4 attention to that side. I was just paying attention to
5 this side.

6 Q. Are you concerned for your safety?

7 A. No.

8 Q. Did anything having to do with this subject
9 have any bearing on your decision in this case?

10 A. No.

11 THE COURT: All right. Counsel can ask
12 questions if they have any.

13 Ms. Yoo?

14 MS. YOO: No, Your Honor.

15 THE COURT: Mr. Shigetomi?

16 VOIR DIRE EXAMINATION/JUROR NO. 1

17 BY MR. SHIGETOMI:

18 Q. Good afternoon. What do you recall being
19 said about this particular incident or circumstance?

20 A. In here or in the --

21 Q. Inside the deliberation room.

22 A. Somebody just brought it up that they saw or
23 they noted a male, and that's all. And then I told them I
24 didn't even know because I was paying attention to this
25 side, and they talked about it, and I honestly don't know

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1 because I didn't notice it.

2 Q. Okay, I understand you didn't witness it, but
3 what was actually the discussion about?

4 A. That they felt for the safety -- well, they
5 felt threatened.

6 Q. And how many -- well, obviously one person
7 said that they observed something?

8 A. Yes.

9 Q. Did other persons, did more than one person
10 say that they also observed the same thing?

11 A. Yes.

12 Q. Okay. Approximately how many people
13 mentioned that they saw the same thing?

14 A. Maybe three or four.

15 Q. Three or four?

16 A. That's just a guess, because I wasn't paying
17 attention to how many people. I just told them myself, I
18 didn't notice anything. But some said, yes, I noticed.

19 Q. And based on what those persons saw, they
20 expressed some concern for their safety?

21 A. They did phrase it.

22 Q. Did they say anything about -- again, we
23 don't want to know the verdict -- that it had affected
24 their particular decision?

25 A. No.

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1 MR. SHIGETOMI: I have no other questions,
2 Your Honor.

3 THE COURT: okay, thank you, Mr. Valencia.
4 Go back into the deliberation room, but as
5 Kaipo's instructed you all, you should not be talking
6 about this or anything to do with the case at this point.

7 MR. VALENCIA: Yes.

8 THE COURT: okay.

9 (Mr. Valencia was excused.)

10 THE COURT: All right, we're next going to
11 bring in Ms. Wilcox.

12 VOIR DIRE EXAMINATION/JUROR NO. 2

13 BY THE COURT:

14 Q. Ms. Wilcox, just take the first seat here.
15 okay, just relax, Ms. Wilcox. We are
16 speaking to each one of the jurors obviously, and it's
17 because of this communication that your foreperson wrote
18 and that you all sent out to me, and it reads:

19 "Concern. This morning on prosecutor's side
20 of courtroom there was a man, shaved head, glaring and
21 whistling at defendant. We are concerned for our safety
22 as jurors."

23 All right, that's the communication that your
24 foreperson wrote and sent to me. And before I ask you
25 anything else, I'm not going to ask you and I don't want

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1 you to say a thing about the verdict. okay? Because
2 that's not what we're talking about now.

3 First of all, were you aware that the
4 foreperson had written this and sent it to me?

5 A. Yes.

6 Q. Was it with your agreement that the
7 foreperson sent it to me?

8 A. Not entirely.

9 Q. Okay. Why don't you explain that to me.

10 A. I didn't notice, it didn't bother me when I
11 said -- it's not that important for me personally, what
12 they said.

13 Q. Did you notice this at all?

14 A. No, not at all.

15 Q. Okay. So you didn't notice it at all; it was
16 just reported. So I take it one or more of the jurors
17 brought it up?

18 A. Right.

19 Q. And this is while you were deliberating the
20 case?

21 A. It's after, I would say.

22 Q. So are you telling me that you had already
23 reached a verdict, or did this come up -- was it before
24 you reached your verdict?

25 A. I think before we reached.

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1 Q. Before. Did it come up early in deliberation
2 or in the middle -- your best estimation?

3 A. Maybe the beginning, little bit.

4 Q. The beginning, okay. So not too long after
5 you went in and started deliberating the case, somebody
6 mentioned this?

7 A. Yes.

8 Q. You gotta answer out loud.

9 A. Yes, I think so.

10 Q. Was there a discussion among the jurors about
11 this once it was brought up?

12 A. Not really, just some juror mentioned, oh,
13 did you see that -- this guy, something like that.

14 Q. Okay. But was there any -- you know, did
15 anybody react to that and say, oh, yeah, or, I didn't see
16 it?

17 A. Yeah.

18 Q. So there was discussion?

19 A. Right.

20 Q. About how long did the discussion on this
21 subject last?

22 A. I would say probably five minutes.

23 Q. Five minutes. Do you recall anything that
24 was specifically said by any person about this? Did
25 anybody express any feelings, or, you know ...

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1 A. Some. A few jurors said there were a little
2 bit scared.

3 Q. Scared, okay. All right. And you say this
4 is early in the deliberations?

5 A. That's what I recall.

6 Q. That's what you remember, okay. And, again,
7 I don't want to know what the verdict is that you all
8 reached, but my question to you is; did this discussion
9 that we're talking about, the fact that this is brought
10 up, et cetera, you personally and individually, did it
11 have any impact at all on?

12 A. No, no.

13 Q. On your deliberation?

14 A. No.

15 Q. Okay. So it had no impact. But did it have
16 any impact on you that at least some other jurors were
17 concerned and worried about this?

18 A. No.

19 Q. Did it strike you during the deliberation and
20 during you all reaching your verdict that any of the
21 jurors who had expressed this concern, did it seem to you
22 to be maybe affecting their thinking about the case?

23 A. No.

24 Q. All right.

25 THE COURT: Ms. Yoo, anything?

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1 MS. YOO: Just couple questions.

2 VOIR DIRE EXAMINATION/JUROR NO. 2

3 BY MS. YOO:

4 Q. As far as I understand, that there was a
5 discussion in the beginning going on for about five
6 minutes?

7 A. Right.

8 Q. Were there any other discussions throughout
9 the deliberation?

10 A. No.

11 Q. Okay. But as you answered, it was decided
12 that this communication would come out. So in order for
13 this communication to come out, there was another
14 discussion, right? Somebody said, hey, let's tell the
15 judge about this or something?

16 A. Yeah.

17 Q. Okay. So when that whole comment about, hey,
18 let's tell the judge about this, let's write it down, was
19 that before or after the verdict, if you know?

20 A. After.

21 Q. Okay, thank you.

22 THE COURT: Mr. Shigetomi, you got anything?

23 VOIR DIRE EXAMINATION/JUROR NO. 2

24 BY MR. SHIGETOMI:

25 Q. Good afternoon. What do you recall? I know

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1 you said you didn't observe it, I'm just trying to
2 understand what you recall being described to you. Like
3 when people talked about it, how did they describe it?

4 A. Just one lady said, hey, you guys noticed?
5 And half of them say no, and then, yeah, yeah, I noticed,
6 some jurors noticed.

7 Q. What did she say after, if anyone noticed?

8 A. I can tell the story?

9 Q. You can tell us what was said, nothing about
10 the verdict -- not the decision.

11 THE COURT: Nothing about the verdict. But
12 aside from that, yeah.

13 A. Well, she was saying there's a man on that
14 side and intimidating, whistle a little bit. I didn't
15 notice anything.

16 Q. Okay, I understand that. But that juror
17 mentioned that it was on that side and that would be, as
18 you look at the back of the courtroom, the right side?

19 A. I'm not sure.

20 Q. I mean, that's what's being described?

21 A. Yes, sir.

22 Q. And they described it as being on the
23 prosecution's side; was that the description?

24 A. Sort of. I honestly ...

25 Q. You cannot remember?

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1 A. Yeah.

2 Q. Okay.

3 A. It doesn't bother me, so I didn't pay
4 attention.

5 Q. And you said that there were a few; do you
6 remember approximately how many people said that they saw
7 it?

8 A. Maybe two or three.

9 Q. Two or three. Did that -- I know there's a
10 discussion about people asking if they saw it and people
11 either saying yes or no. When that came up, did people
12 mention -- I know they said they were concerned. Did they
13 say anything other than that they were concerned?

14 A. No.

15 Q. And you said that the initial discussion was
16 in the beginning portion for about five minutes?

17 A. Yes.

18 Q. And so at the end, the communication form
19 that we have says that "we have a verdict" and it's signed
20 at I think it's 2:20, and then four minutes later there's
21 another communication form talking about this concern.
22 Who -- I mean obviously it was written by the foreperson.

23 A. Right.

24 Q. Did somebody -- and you don't have to tell us
25 who, but did someone say, hey, we ought to inform the

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1 Court about that, and that's why you put it in the
2 communication?

3 A. Yes.

4 Q. And how did that come about?

5 A. Well, we all agree that's nothing as far as
6 the verdict, but let's write it on the sheet and sort of
7 tell the Judge about this situation. They were a little
8 worried about what they called safety, so...

9 Q. Okay, all right. Thank you.

10 THE COURT: Okay. Thank you, ma'am. Thank
11 you for your patience. As you can see, this is probably
12 going to take a while, but you guys shouldn't talk
13 anything about this or deliberate any further on the case
14 while you're waiting back there, okay? You can talk about
15 other things, all right?

16 MS. WILCOX: All right.

17 (Ms. Wilcox was excused.)

18 VOIR DIRE EXAMINATION/JUROR NO. 3

19 BY THE COURT:

20 Q. All right, Ms. Boehm. Thank you, just relax.

21 All right, Ms. Boehm, I'm going to ask you
22 some questions and the attorneys may have some questions
23 for you about this communication that the jury sent out to
24 me. You're the foreperson, yeah?

25 A. Correct.

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1 Q. All right. So I'm aware you wrote this
2 apparently. It reads: "Concern. This morning on
3 prosecutor's side of courtroom there was a man, shaved
4 head, glaring and whistling at defendant. We have concern
5 for our safety as jurors."

6 Now, first of all, I'm not going to ask you
7 about -- no one's going to ask you about and I don't want
8 to hear anything about the verdict, okay? We're just
9 going to be asking you about this particular
10 communication.

11 First of all, I take it this was a topic of
12 discussion among the jurors during the deliberation?

13 A. It was after the deliberation.

14 Q. So are you telling me that there was
15 absolutely no discussion of this prior to the verdict?

16 A. Not that I remember, no.

17 Q. Not that you remember?

18 A. No, it was after.

19 Q. Okay. So did you see this yourself?

20 A. I heard the whistling this morning; I thought
21 it was someone's cell phone and I glanced up to look. I
22 believe that I saw where it was coming from, but I
23 immediately turned my eyes away, so I can't tell you
24 exactly who was whistling, but it was a whistling sound.

25 Q. Tell me as much as you can, and be as

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1 specific as you can about the discussion among the jurors
2 that led to this communication to me.

3 A. I don't remember how it came up. There was
4 just somebody brought up about the whistling. I had
5 actually forgotten about it and then I did remember that I
6 heard whistling, and then it was asked what other people
7 had heard and seen.

8 Q. And I take it at least some of the jurors
9 expressed concern for their safety?

10 A. Yes.

11 Q. And so how did you come to write this and
12 send it out to me?

13 A. They thought it would be -- that you should
14 know that there were concerns.

15 Q. And do you have any idea, was there any
16 discussion or do you have any inferences or anything about
17 why the jurors thought I should know about this? Did they
18 want me to do something about it, or what was you all's
19 intention, if you can tell me that, of communicating this
20 to me?

21 A. I think that everyone wanted to feel that
22 they could leave safely today when it was over.

23 Q. Yeah, I understand that. But that's kind of
24 what I'm asking you. So did they want me to do something?

25 A. No one ever said for you to do something. It

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1 was just the communication that what was being said or
2 concerns.

3 Q. Well, I guess what I'm asking is; how did the
4 jurors think that just telling me about their concern
5 would ensure their safety?

6 A. I don't know.

7 Q. Okay. Okay, all right. Did this concern
8 raised by other jurors or whatever, in your own personal
9 view, did it have any impact on your own decision in this
10 case?

11 A. None.

12 Q. Okay. Do you have an opinion as to whether
13 there may have been any impact, if any impact at all, on
14 the deliberations and thinking and decision of other
15 jurors in the case, especially the jurors who did express
16 concern for their safety?

17 A. I don't believe so.

18 Q. All right.

19 THE COURT: Ms. Yoo.

20 VOIR DIRE EXAMINATION/JUROR NO. 3

21 BY MS. YOO:

22 Q. So there was no discussion about this in the
23 beginning part of the deliberation?

24 A. No.

25 Q. Okay. So, it only happened after the

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1 verdict?

2 A. Yes.

3 Q. Soon after the verdict?

4 A. No, I think it was way after the verdict. We
5 waited a long time.

6 Q. You waited a long time?

7 A. In the end.

8 Q. Okay. But you sent out the two
9 communications together?

10 A. Yes.

11 Q. Is part of the reason you waited a long time
12 because there was a discussion about it?

13 A. No, no.

14 Q. Okay.

15 A. We were waiting for people to come back from
16 the bathroom.

17 MS. YOO: Okay. Thank you.

18 THE COURT: Go ahead, Mr. Shigetomi.

19 MR. SHIGETOMI: Thank you.

20 VOIR DIRE EXAMINATION/JUROR NO. 3

21 BY MR. SHIGETOMI:

22 Q. Good afternoon. So you actually heard
23 whistling?

24 A. I heard whistling.

25 Q. Okay.

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1 A. I thought it was somebody's cell phone.

2 Q. Okay. And so you heard a sound and you
3 looked -- where was that sound coming from, that it
4 appeared to you, anyway?

5 A. From back there, back where the people are
6 watching the trial.

7 Q. From the gallery?

8 A. The gallery.

9 Q. Okay. And from your position, it would be
10 the right or left side of the gallery?

11 A. The left side. I thought it was coming from
12 there.

13 Q. From my side, or the prosecutor's?

14 A. Your side.

15 Q. Okay. And did the person -- I know you
16 didn't look long at the person, but was the person a male
17 that you saw?

18 A. I believe I thought it was coming from a
19 male.

20 Q. And was it someone with a shaved head --
21 because of the communication, I'm asking?

22 A. Right, I didn't move my eyes up; I just
23 looked in that direction and then turned away.

24 Q. Could you tell if you believed it to be
25 friendly or unfriendly, or you don't know?

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1 A. Well, I think I was surprised that I heard
2 whistling, so I don't think -- at the time I had forgotten
3 about it until somebody had brought it up.

4 Q. Okay. And when people brought it up,
5 obviously they were concerned?

6 A. Yes.

7 Q. And did they describe what they saw or heard?

8 A. I think what I wrote on the communication was
9 that it was a gentleman with shaved head and possibly a
10 white T-shirt, what was expressed.

11 Q. Okay. How about what the person did?

12 A. Whistling.

13 Q. Okay.

14 A. It was brought up that the person was looking
15 at the defendant, glaring.

16 Q. Okay. So the belief was that it was hostile?

17 A. Yes.

18 Q. I mean, that's what was described?

19 A. Yes, yes.

20 Q. And because of the hostility that someone in
21 the gallery was exhibiting, there were -- some jurors were
22 concerned about hostility towards them?

23 A. Correct.

24 Q. When the discussion was had, was the
25 discussion such that a person who was glaring in a hostile

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1 -- assuming it was hostile -- was it someone on the
2 prosecutor's side or -- of course it's not necessarily by
3 someone in the prosecutor's office itself, but associated
4 with that side of the case?

5 A. Oh, I have no idea.

6 Q. You don't know?

7 A. I don't know.

8 Q. Okay. And as best you can, how many people
9 expressed that they saw this happen?

10 A. I don't remember. I mean, in the room, I
11 don't remember how many people.

12 Q. About how many people expressed concern?

13 A. There was a joint consensus that we write the
14 note.

15 Q. Uh-huh.

16 A. So everybody wanted the note to be written,
17 so I don't know many people actually expressed.

18 Q. And as best you can recall, after the
19 verdict, how did it come up, that last subject?

20 A. I don't even remember how it came up.

21 Q. Okay. But the people were concerned enough
22 that they wanted to inform the Court about that?

23 A. Correct.

24 Q. Okay, thank you.

25 THE COURT: So all twelve of you agreed that

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1 you wanted this communication written and sent out to me?

2 A. I believe that I looked up and I said to
3 everybody, is this something that I need to write down and
4 send to the Judge, and I believe the consensus was that
5 everybody said yes, I believe.

6 THE COURT: All right. Thank you, Ms. Boehm,
7 thank you for your patience. Don't talk about this or
8 anything to do with the case. You guys can make small
9 talk in there while you're waiting, but nothing else,
10 okay?

11 (Ms. Boehm was excused.)

12 VOIR DIRE EXAMINATION/JUROR NO. 4

13 BY THE COURT:

14 Q. Ms. Foster, just have a seat in the first
15 seat there. Just relax, Ms. Foster.

16 we're talking to each of the jurors about
17 this communication which was sent out to me. It reads:
18 "Concern. This morning on prosecutor's side of courtroom
19 there was a man, shaved head, glaring and whistling at
20 defendant. We have concern for our safety as jurors."

21 okay, now, I'm not going to ask you and I
22 don't want to know anything about at this point and I
23 don't want to talk about the verdict, okay?

24 A. Okay.

25 Q. I want to talk about this communication.

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1 First of all, I take it this was a discussion among the
2 jurors during the deliberation?

3 A. Yes.

4 Q. Before the verdict?

5 A. (No audible response.)

6 Q. I mean, there might have been continued
7 discussion after the verdict, but was there any discussion
8 also before the verdict?

9 A. I don't think so. I think it was after the
10 verdict.

11 Q. You think it was after the verdict, okay.

12 What about you personally; were you one of the people who
13 observed this and/or was concerned about it?

14 A. Yes.

15 Q. Did you observe it yourself?

16 A. I did.

17 Q. You did, okay. So you were one of the people
18 who actually observed it?

19 A. Right.

20 Q. Were you the first one to bring it up?

21 A. I don't think so.

22 Q. So another juror brought it up first, but you
23 also knew what that juror was talking about?

24 A. Right.

25 Q. All right. Did it play any part in your

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1 deliberation of this case?

2 A. No.

3 Q. Okay. I just want an honest answer, now. No
4 one's in any trouble.

5 A. Right.

6 Q. So you're saying what you noticed before you
7 began to deliberate had no impact on your own
8 deliberations of the case?

9 A. No.

10 Q. Do you recall about how many jurors either
11 saw and/or expressed this concern during this discussion,
12 you and how many others?

13 A. Maybe two or three.

14 Q. Two or three, okay. All right. So I take it
15 you have concern for your safety?

16 A. Yes.

17 Q. As you sit there now?

18 A. Yes.

19 Q. All right.

20 THE COURT: Ms. Yoo?

21 VOIR DIRE EXAMINATION/JUROR NO. 4

22 BY MS. YOO:

23 Q. Hi. So when you observed it yourself, did
24 you associate that person or that behavior with either one
25 side or the other?

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1 A. I did.

2 Q. Okay. And which side did you associate it
3 with?

4 A. The prosecutor.

5 Q. Okay. And when you make that association or
6 when you make that observation, did that affect your -- as
7 you're deliberating the things that you were considering
8 or the things that you took into consideration as you
9 deliberate?

10 A. No.

11 Q. Okay. And it came up right after the
12 verdict?

13 A. I believe so.

14 Q. Okay. It didn't come up in the beginning
15 part, or --

16 A. No.

17 Q. And what happened after the verdict, somebody
18 just said hey?

19 A. I think we were just waiting around for --
20 just waiting around and just started talking. I don't
21 know how it came about.

22 THE COURT: I'm sorry, I can't hear you.

23 A. I don't know how it came about. We were just
24 sitting around, I think we were waiting for something, it
25 was brought up.

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1 Q. And what did you observe; did that have a
2 negative association with the prosecutor's side?

3 A. Not at all.

4 MS. YOO: Okay, thank you.

5 THE COURT: Go ahead, Mr. Shigetomi.

6 MR. SHIGETOMI: Thank you.

7 VOIR DIRE EXAMINATION/JUROR NO. 4

8 BY MR. SHIGETOMI:

9 Q. Good afternoon.

10 A. Good afternoon.

11 Q. So what exactly did you observe?

12 A. I noticed a gentleman standing there glaring
13 this way. Now, I don't know if he was glaring at the
14 defendant or not, but it was definitely in this direction.

15 Q. Okay. Towards this side of the courtroom?

16 A. Right.

17 Q. Okay.

18 A. And he stood there for quite a long time, and
19 that was all, and then just, you know -- I don't know if
20 it was when we came in or when we actually sat down that I
21 observed it.

22 Q. But he was standing and he was glaring in
23 this direction, in the direction of myself, my table?

24 A. Right.

25 Q. And did he appear hostile?

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1 A. I thought so.

2 Q. Was there any reaction to the glaring that
3 you saw?

4 A. No.

5 Q. From anyone?

6 A. No.

7 Q. No. Do you recall what that person did after
8 you saw him glaring; did he remain in the courtroom?

9 A. I believe so, yes.

10 Q. And did you see any other behavior on that
11 person's part that gave you some concern?

12 A. No.

13 Q. So if that's what you observed -- well, first
14 of all, did you observe anything else?

15 A. I did not observe anything else.

16 Q. What did other people describe as what they
17 observed?

18 A. They observed also whistling, but I didn't
19 hear any whistling.

20 Q. Did anybody -- okay, obviously there was a
21 decision to inform the Court and express concern. What
22 kind of concern was expressed?

23 A. I think it was once the verdict was read,
24 that maybe there would be some retaliation against, you
25 know, of us for whatever reason just being a juror.

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1 Q. Okay. More concern about the reaction from a
2 particular person or a particular side?

3 THE COURT: You know, Mr. Shigetomi, I'm
4 afraid that this is getting too close to implications on
5 what the verdict is, so I'm going to ask you to either
6 stop or ask other questions that don't get into this area.

7 Q. (By Mr. Shigetomi:) What were the
8 discussions about -- the concerns, I guess, how's that?

9 A. Just like what I said before that once the
10 verdict was, you know, like I said, was said, we would be
11 in jeopardy or could be in jeopardy.

12 MR. SHIGETOMI: Thank you.

13 THE COURT: Okay.

14 Okay, thank you. Don't talk about this with
15 your fellow jurors.

16 MS. FOSTER: Okay.

17 (Ms. Foster was excused.)

18 MR. SHIGETOMI: Your Honor, I did need to put
19 on the record. I understand the Court's ruling on the
20 previous question. I guess what my concern is, is that
21 I believe there's certain information that I need to know
22 to respond accordingly; in other words, if there's any
23 motion that I'm going to make after we conclude all
24 of this.

25 THE COURT: Well, that's kind of a problem,

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1 though, Mr. Shigetomi. It goes back to what you started
2 out saying about having your cake and eating it, too.

3 MR. SHIGETOMI: I understand that.

4 THE COURT: I mean, you know. To be
5 perfectly frank, we're all adults here, and, I mean, what
6 Ms. Foster already said to me is -- I certainly am reading
7 it a certain way already, and I just don't think it's
8 fair, frankly. I mean, you know, each side should react
9 to this ultimately with motions or otherwise without any
10 -- without knowing what the verdict in fact is.

11 MR. SHIGETOMI: Okay, I understand what
12 you're saying, Judge. What I'm saying, though, is I don't
13 want to be -- if I don't make the motion before the
14 verdict is announced, I don't want there to be any
15 question that I waived it, all right? That's what I'm
16 saying, Your Honor, because then they're going to say, you
17 waited to see the verdict and then you made the motion. I
18 mean, that's my concern at this point based upon
19 particularly the rule, that I don't want to be playing
20 games here.

21 THE COURT: Well, put it this way. If you
22 make the motion following the verdict, and of course that
23 will only be in one particular situation ...

24 MR. SHIGETOMI: Sure.

25 THE COURT: ... I'm likely to set a hearing

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1 and litigate it, you know. But that's all I can say. I
2 mean, I don't know what the positions of the parties are
3 going to be at that point, et cetera. I mean, this is a
4 really novel -- it's pretty interesting except it's ours,
5 so that doesn't make it interesting. Well, my ruling
6 stands.

7 MR. SHIGETOMI: I'm just making my record,
8 Your Honor.

9 THE COURT: Okay, that's fine.
10 Okay, why don't you bring in Ms. Hanashiro.
11 Counsel, I also have a concern, and it may be
12 mundane, but it's still -- we still live in the real
13 world. I don't want to run out of time on this, and I'm
14 not -- you know, I'm not going to keep anybody past 4:30.
15 So with that point, I guess we'll have to bring them back
16 Monday, but I'd really rather not do that if at all
17 possible, so I'm just laying this out there for the two of
18 you. Do what you need to do, but -- okay, bring in Ms.
19 Hanashiro.

20 VOIR DIRE EXAMINATION/JUROR NO. 5

21 BY THE COURT:

22 Q. All right, good afternoon, Ms. Hanashiro.
23 Just relax, nobody's in trouble.

24 All right, Ms. Hanashiro, probably obvious
25 we're talking about this communication that you all sent

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1 out to me. It reads as follows: "Concern. This morning
2 on prosecutor's side of courtroom there was a man, shaved
3 head, glaring and whistling at defendant. We have concern
4 for our safety as jurors."

5 First of all, I'm not going to ask you about
6 and I do not want to talk about or have you talk about the
7 verdict that you all apparently have already reached, all
8 right? And I don't want you to say anything that could
9 even imply what the verdict is. I don't want you to
10 answer in such a way that it would even imply what the
11 verdict is, and if any questions we ask you seem to
12 require that kind of answer, tell me about it before you
13 answer.

14 A. Okay.

15 Q. Tell me, "Judge, I think, you know, I can't
16 this," okay? You understand?

17 A. Yes.

18 Q. All right. Do you recall -- first of all,
19 were you one of the jurors that observed anything like
20 this?

21 A. No.

22 Q. Okay, all right. Tell me how this discussion
23 came up among the jurors. When did it first happen, first
24 of all?

25 A. When we first reconvened, when we first met

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1 in the jury.

2 Q. So, in other words, right as soon as you
3 started deliberating, somebody brought this up?

4 A. Yes.

5 Q. Okay. And do you recall how much discussion
6 there was at that point?

7 A. Quite a few.

8 Q. Okay, I'm going to have to ask you to speak a
9 little louder, Ms. Hanashiro, because we are on the
10 record.

11 A. Oh, oh, okay.

12 Q. So a few, you said?

13 A. Quite a few, uh-huh.

14 Q. How many?

15 A. I would say maybe three or four.

16 Q. Three or four. Not you included, though?

17 A. No.

18 Q. At least you didn't observe this?

19 A. No.

20 Q. Did all twelve of the jurors have something
21 to say about it at that point?

22 A. I would say maybe eight.

23 Q. Eight had something to say?

24 A. Yes.

25 Q. Okay, all right. About how long did this

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1 discussion go on?

2 A. I would say about ten minutes.

3 Q. Ten minutes, all right. So for awhile?

4 A. I guess.

5 Q. Okay, all right. So I don't want to put
6 words in your mouth, but it's sounding to me kind of like,
7 you know, at least some of those jurors were really
8 concerned?

9 A. Yes.

10 Q. All right. And you say that this was brought
11 up right after you started deliberations?

12 A. At the beginning.

13 Q. At the beginning. Okay, all right. You
14 yourself, did this in any way have any impact on your own
15 decision in this case? I just want an honest answer.

16 A. Oh, can I answer that question?

17 Q. Well, don't -- I'm just asking you whether it
18 had any impact on your decision. I don't want to know
19 what the decision is, but you understand what I'm saying?
20 Did it have any bearing on the decision; did it factor
21 into your thinking at all?

22 A. No.

23 Q. No? Okay, all right.

24 What about some of the other jurors? I just
25 want your feeling or impression on this if you have one.

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1 Do you have a feeling or impression especially since it
2 came up so early in the deliberations, that it may have
3 had a bearing or impact upon any of the other jurors
4 thinking about your decision?

5 A. No.

6 Q. All right.

7 THE COURT: Okay, Ms. Yoo?

8 MS. YOO: Thank you, Your Honor.

9 VOIR DIRE EXAMINATION/JUROR NO. 5

10 BY MS. YOO:

11 Q. So that's the first thing you guys discussed
12 when you got into the back?

13 A. Yes.

14 Q. I'm sorry, I cannot hear you. You gotta to
15 answer out loud.

16 A. Yes.

17 Q. Okay. So you guys were discussing the case,
18 and -- or the instructions, but the first thing when you
19 got in the back was, hey, did you guys see the guy in the
20 back?

21 A. Yes, if I recollect, it could be when we
22 started -- yeah, if I remember. I could be wrong, but it
23 started from the beginning.

24 Q. Okay. So whoever brought it up or whoever
25 there was discussions among, you said about three or four

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1 people just saw it and about eight people did not?

2 A. Yes.

3 Q. You said it appeared to you -- and this is
4 just your opinion -- did it seem that the people who
5 brought it up, that they were predisposed or they were
6 sort of set in their minds based on what they saw?

7 A. It sounded like.

8 Q. That whatever they saw -- the discussions,
9 you said it sounded like it affected or they were
10 predisposed to it, because of that, one way or the other,
11 whichever way it is?

12 A. They were concerned.

13 Q. They were concerned. And because of their
14 concern, it appeared that they sort of had their minds
15 made up?

16 A. No.

17 Q. Okay. Did it seem that they were predisposed
18 a certain way?

19 A. Can you define "predisposed"?

20 Q. Okay, I'm sorry -- thank you. That they had
21 a certain way of thinking or they had a certain way of
22 seeing things because of what they observed in the
23 courtroom?

24 A. No.

25 Q. Okay. thank you.

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1 A. You're welcome.

2 THE COURT: Mr. Shigetomi?

3 VOIR DIRE EXAMINATION/JUROR NO. 5

4 BY MR. SHIGETOMI:

5 Q. Good afternoon. What was actually described
6 as being observed?

7 A. What they mentioned was, as we were walking
8 in there was some -- there was this male, shaved head, you
9 know, glaring at the defendant, and also to get his
10 attention, he whistled, and so they were surprised that no
11 one, you know, ever saw that or caught it, so it bothered
12 them. It bothered them, so they felt slightly
13 intimidated.

14 Q. Did they say what bothered them that they
15 were concerned for themselves or concerned about the
16 defendant, or why nobody saw that? I guess I'm trying to
17 find out the concern.

18 A. They were concerned for themselves, you know,
19 to have someone -- the way he glared and he whistled. I
20 think it was more the way he glared and was trying to get
21 the defendant's attention.

22 Q. Okay. And in terms of the discussion, did
23 they associate that person with the prosecutor or who the
24 prosecutor was trying to represent?

25 A. No.

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1 Q. And you said that it didn't have any impact
2 on your decision, the discussion about that?

3 A. Yes, it did not have an impact.

4 Q. I guess, you know, you said at the beginning
5 it's discussed. How's that, is there any resolution to
6 that or was it just discussed and kind of left hanging,
7 or -- I mean, how did you guys get back towards actual
8 deliberation?

9 A. Actually, it just started and it had no
10 impact on the way we deliberated, and then towards the
11 end, then we brought it up.

12 Q. Brought it up again?

13 A. Yeah, brought it up again and wanted to
14 communicate that to the Judge.

15 Q. Okay.

16 A. Just so he knows and he's aware.

17 Q. Was it your impression that people wanted
18 some sort of action on the part of the Judge when they
19 made that communication?

20 A. It didn't appear to me that they wanted, you
21 know, some kind of action, but for him to be aware of it.

22 Q. Thank you.

23 A. You're welcome.

24 THE COURT: Okay, thank you. Thank you for
25 your patience. Don't talk about it at all with your

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1 fellow jurors.

2 MS. HANASHIRO: Yes.

3 (Ms. Hanashiro was excused.)

4 VOIR DIRE EXAMINATION/JUROR NO. 6

5 BY THE COURT:

6 Q. Okay, good afternoon, Ms. Li, just relax.

7 I'm talking to each of you concerning this
8 communication that you all sent out to me, it reads:
9 "Concern, this morning on prosecutor's side of courtroom
10 there was a man, shaved head, glaring and whistling at
11 defendant. We have concern for our safety as jurors."

12 First of all, I'm not going to ask you about,
13 nobody is going to ask you about and I don't want you to
14 say anything about the verdict that you all reached, okay?
15 I'm just -- I just want to talk about this communication.

16 First of all, did you personally observe anything like
17 this, like is talked about in this communication?

18 A. Yes.

19 Q. Okay. What did you see?

20 A. Well, he was sitting on the side and he was
21 just like glaring at the defendant, and I guess he was
22 trying to get his attention by whistling.

23 Q. That's what you thought he was trying to do?

24 A. Yeah, because he was looking right at him

25 Q. Okay. And when was this -- right after you

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1 guys came in?

2 A. Yes. So we came in, sat down and --

3 Q. Did the man remain in the courtroom, if you
4 know?

5 A. I think -- I'm not sure

6 Q. Okay, that's fine. So I take it your --
7 since you observed this personally, you're one of the
8 jurors who brought it up in discussion?

9 A. One of them, yes.

10 Q. Okay. About how many of you were there?

11 A. Probably one more.

12 Q. Okay. And do you recall when in your
13 discussion this first came up?

14 A. In the room?

15 Q. Yeah.

16 A. I don't remember, but.

17 Q. Best, your best estimate. Was it early in
18 the discussion, middle, late?

19 A. Probably in the middle-early.

20 Q. Middle-early. And did it also come up again
21 at the end?

22 A. Yes. When we wanted to let everyone know.

23 Q. Okay, all right. I just want an honest
24 answer; nobody is in any kind of trouble, all right? But
25 I need all of you just to be honest with me. To you

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1 personally, did that episode in your observation and your
2 concern, did it have any impact at all in any way that you
3 can think in your own mind, and you're the only one who
4 can tell me, on your deliberations in this case?

5 A. No, it didn't.

6 Q. Okay. Was it your sense that it might have
7 had such an impact on some of the other jurors?

8 A. No.

9 Q. Okay.

10 THE COURT: All right, Ms. Yoo.

11 MS. YOO: Thank you.

12 VOIR DIRE EXAMINATION/JUROR NO. 6

13 BY MS. YOO:

14 Q. Hi. Did you associate this male either with
15 one side or the other?

16 A. Associate?

17 Q. Yeah, did you think, oh, he's part of the
18 prosecution, or part of the defense, or part of the
19 decedent's family or anything like that?

20 A. I thought he was part of the deceased
21 person's --

22 THE COURT: Little louder, Ms. Li.

23 A. Oh, I thought he was part the prosecutor's
24 side.

25 Q. Okay. And that association or the fact that

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1 he was part of that, did it negatively affect you as to
2 how you viewed the evidence or how you viewed Albert, the
3 discussion or the closing argument that were had?

4 A. Not at all.

5 Q. Okay, thank you.

6 THE COURT: Go ahead Mr. Shigetomi.

7 VOIR DIRE EXAMINATION/JUROR NO. 6

8 BY MR. SHIGETOMI:

9 Q. Good afternoon. What did you think he was
10 trying to do?

11 A. Probably get his attention and make a signal
12 or something, I don't know.

13 Q. Okay. Did it appear that he was hostile?

14 A. Hostile to?

15 Q. I mean, mad or against Royce?

16 A. Yeah, he was mad.

17 Q. Do you remember how it was first discussed,
18 how it came up?

19 A. One other person just mentioned it, and I
20 agreed that I saw it, so ...

21 Q. So someone said, hey, did you guys see that,
22 something like that?

23 A. Yeah.

24 Q. And did the person who brought it up seem
25 concerned?

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1 A. No.

2 Q. Okay. When you saw it, were you concerned?

3 A. I wasn't concerned. I just didn't think
4 anything of it. I thought he was just trying to get his
5 attention.

6 Q. Did you feel that -- at this point, there's
7 some concern, or at least after you reached a verdict and
8 you sent in the communication, there was concern?

9 A. After the verdict, maybe a little.

10 MR. SHIGETOMI: Okay, I have no other
11 questions, Your Honor.

12 THE COURT: Okay, thank you. Thank you for
13 your patience. Don't talk about this with your fellow
14 jurors.

15 (Ms. Li was excused.)

16 VOIR DIRE EXAMINATION/JUROR NO. 7

17 BY THE COURT:

18 Q. Okay, just have a seat, relax. Nobody is in
19 any kind of trouble, nothing like that, but I have to talk
20 to each of you about this communication that was sent out
21 to me, and it reads: "Concern. This morning on
22 prosecutor's side of courtroom there was a man, shaved
23 head, glaring and whistling at defendant. We have concern
24 for our safety as jurors."

25 First of all, no one is going to ask you

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1 about and I don't want to know anything about the verdict
2 that you have reached in this case, all right? That's not
3 what this is about. I just need to speak to all of you
4 individually about this communication, okay?

5 A. Okay.

6 Q. First of all, did you yourself witness this?

7 A. Yes.

8 Q. Describe it to me as specifically as you can.
9 When did it happen; what did you see?

10 A. I was sitting there and I looked over as
11 everyone was sitting down getting situated, and I
12 saw a him in the second row sitting on the edge,
13 larger build, he had white shirt and he was just making
14 these really angry faces, and he wouldn't move from
15 that spot, he wanted to make sure that -- he was
16 trying to get defendant's attention, whistling
17 "whoo-whoo-whoo" demonstrating.

18 Q. And it was directed at defendant?

19 A. Yes, not towards us.

20 Q. Okay. Anything else?

21 A. No.

22 Q. And did this cause you concern?

23 A. I wasn't concerned for me personally, I had
24 no concern.

25 Q. Okay. Now, I understand that this was a

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1 topic of discussion among the jurors during the
2 deliberations, yes?

3 A. Correct.

4 Q. Best estimate. When did it first come
5 up -- early, middle, late in the deliberations?

6 A. Towards the end.

7 Q. Toward the end. Not before?

8 A. No, it wasn't before. It wasn't about the
9 case, so we weren't really focused on it.

10 Q. Okay. Do you recall how many people brought
11 it up?

12 A. No, I think -- we were just, you know,
13 talking about random things we seen, and just like, oh,
14 did you notice that?

15 Q. Was it after you had reached a verdict?

16 A. To be honest, I don't remember.

17 Q. Okay, that's fine. About how long did you
18 all talk about this?

19 A. Not very. Just brought it up for a few
20 minutes, and then one of the ladies said, okay, I wonder
21 if that would be directed at us, you know, after
22 everything's done, and maybe we should just raise it so
23 everybody can be aware that there was someone that seemed
24 threatening to another person.

25 Q. Okay. Did it have any impact on your

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1 deliberation or decision in this case?

2 A. Absolutely not.

3 Q. Did you get any sense that there might have
4 been an impact on one or more of the other jurors?

5 A. Absolutely not.

6 Q. Okay.

7 THE COURT: All right, Ms. Yoo.

8 VOIR DIRE EXAMINATION/JUROR NO. 6

9 BY MS. YOO:

10 Q. Hi.

11 A. Hi.

12 Q. So when you saw this, did you associate this
13 male with one side or the other?

14 A. Not very certain, but seems he was sitting on
15 this side (indicating), so it seemed he was for this side.

16 Q. Okay. So you thought he was, and when you
17 say "this side," you're talking about the right side of
18 the courtroom, right?

19 A. Right.

20 Q. And did that negatively affect or did that
21 affect you in any way while you guys were looking at the
22 evidence as you were deliberating?

23 A. No.

24 Q. How did it come up?

25 A. Like we were just talking about things we had

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1 noticed, like random things, funny comments that we felt
2 anyone had in trial and just little things that really
3 didn't pertain to it. We were just trying to pass some
4 time because we were all getting restless.

5 Q. So this was before or after the verdict was
6 reached?

7 A. I don't remember.

8 THE COURT: I can't hear you.

9 A. Oh, I don't remember. I can't remember. I
10 didn't think it was that big of a deal at the time.

11 Q. Okay. But there was concern enough for there
12 to be a written communication to the Court?

13 A. We just decided that it would be best
14 if there was -- you know, if there was possibly something
15 that -- we were just looking out for the safety of
16 everybody.

17 Q. Okay. So it did come up again after the
18 verdict?

19 A. I guess. I don't remember exactly when the
20 time was. I know we wrote it down afterwards, but.

21 Q. But there was a consensus to send this
22 communication out to the Court?

23 A. Yes.

24 Q. Okay.

25 MS. YOO: No further questions. Thank you.

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1 THE COURT: Mr. Shigetomi?

2 VOIR DIRE EXAMINATION/JUROR NO. 6

3 BY MR. SHIGETOMI:

4 Q. Good afternoon.

5 A. Hello.

6 Q. What did you think was the purpose of the
7 person that you saw; what was he trying to accomplish?

8 A. From her side?

9 Q. Yeah.

10 A. What I saw, I thought he was just trying to
11 instigate something; he just looked really angry to be
12 here. I hadn't seen him before any other days.

13 Q. You had not?

14 A. No.

15 Q. Okay. And, I'm sorry, I couldn't hear what
16 your answer was --

17 A. I'm sorry.

18 Q. -- but the Court asked you something about
19 how did it affect you, and I couldn't tell if you said you
20 didn't feel comfortable.21 A. Personally for me, it wasn't directed at me
22 so I didn't feel fear for my own personal safety. It was
23 later that maybe I was thinking it could be directed
24 towards us later.

25 Q. Okay. So at the time you observed it, it

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1 didn't concern you personally, but later on?

2 A. Correct.

3 Q. Okay.

4 MR. SHIGETOMI: I have no other questions.

5 THE COURT: Okay, ma'am, thank you. Thanks
6 for your patience. Don't talk about this at all with your
7 fellow jurors, thank you.

8 MS. LI: Okay.

9 (Ms. Li was excused.)

10 THE COURT: Okay, Kaipo, hold off a second.

11 Okay, look it, we still have five more people
12 to talk to, and then there may or may not be motions;
13 certainly people are going to have to be thinking about
14 that. Unless you can persuade me otherwise, here's what I
15 intend to do at this point. We're going to recess, we're
16 going to adjourn for the day.

17 I'm going to bring the jury in collectively
18 and address them collectively. I'm going to tell them
19 that they are not discharged, that they are still the jury
20 in this case, that we are not going to take the verdict
21 this afternoon, and that we're going to have further
22 proceedings on Monday morning, and that as I said they are
23 not discharged charged.

24 I'm going to tell them specifically this is
25 just like while the trial itself is going on when we

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1 adjourned for the day and you went home and you came back
2 the next day, and they're going to look at it that way,
3 because that's the way it is. I will specifically
4 instruct them again that they're not to talk about the
5 case, media, all that stuff.

6 And then we're going to reconvene on Monday
7 and continue this, we're going to finish up talking to the
8 final five, and then we'll take it from there, and we may
9 or may not end up receiving the verdict. And, frankly,
10 this would give both of you some time to digest this and
11 think about it, you can talk to your client, Mr.
12 Shigetomi, et cetera, et cetera.

13 But I don't see how we're going to finish it
14 without really rushing through -- well, even rushing
15 through, I don't think we can finish this afternoon,
16 because I really don't want to keep anybody past 4:30 on a
17 Friday afternoon, so that's my intention.

18 Ms. Yoo, what's the State's position?

19 MS. YOO: Your Honor, I'll defer to the
20 Court.

21 THE COURT: Mr. Shigetomi?

22 MR. SHIGETOMI: No objection.

23 THE COURT: Okay, bring them all in.

24 (The Court reconvened with the jury.)

25 THE COURT: Okay, everybody be seated,

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1 please. Let the record reflect the presence of counsel
2 and defendant and the jury now back with us.

3 All right, ladies and gentlemen. The case is
4 not finished, you are still the jury in this case, and
5 we're going to adjourn for the day, and I'm going to order
6 you back Monday morning, all right?

7 And you can think about this, because it is
8 in fact exactly the same as when you went home Tuesday and
9 came back Thursday, and yesterday you went home and you
10 came back today. It's exactly the same; the trial is not
11 over yet, all right?

12 So, obviously, do not talk about this case
13 with anybody, including your fellow jurors; avoid all
14 media; do not try to find out anything on your own about
15 the case. The jurors that we've already talked to
16 individually, just basically put it out of your mind,
17 don't be wondering what it's all about or anything like
18 that, and certainly don't talk to your fellow jurors about
19 that or anything else to do about the case. All right?

20 Again, we will reconvene Monday morning and
21 we will take it from there. I'm quite confident that we
22 won't have to keep you past Monday, but don't even think
23 about that, either. The trial is still proceeding at this
24 point and you are still the trial jurors, as I'm not
25 discharging you yet.

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1 All right. Now, on that, are there any
2 questions?

3 FROM THE JURY: (There was no response.)

4 THE COURT: All right, let the record reflect
5 no response.

6 Okay, counsel approach, please.

7 (At the bench.)

8 THE COURT: Anything else you wanted me to
9 specifically instruct the jurors at this point, Ms. Yoo?

10 MS. YOO: No.

11 MR. SHIGETOMI: No, Your Honor.

12 THE COURT: Mr. Shigetomi?

13 MR. SHIGETOMI: No.

14 THE COURT: Okay, so you're satisfied with
15 what I said. All right, then. Thank you.

16 (Before the jury.)

17 THE COURT: All right, ladies and gentlemen,
18 I'm going to ask you to return at 8:20 on Monday morning,
19 all right? My hope is that we can pick this up at 8:30
20 and then take it from there. All right, so with that,
21 have a good weekend and we'll see you on Monday.

22 (The jury was excused.)

23 THE COURT: Okay, be seated please.

24 Let the record reflect the jury has left the
25 courtroom, leaving counsel and the defendant.

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1 All right. Well, it's not your guys'
2 problem, it's mine, but we got another jury coming in at
3 8:30 Monday, so I guess we're going to have to get in
4 touch with counsel and change that. I'm pretty confident
5 that we should be able to wrap this up in an hour or so on
6 Monday one way or the other.

7 So do counsel have anything for the record at
8 this point before we adjourn until Monday, Ms. Yoo?

9 MS. YOO: No, Your Honor.

10 THE COURT: Mr. Shigetomi?

11 MR. SHIGETOMI: No, Your Honor.

12 THE COURT: All right, see you Monday
13 morning. Thank you.

14 (Proceedings recessed; Court adjourned.)

15 --oo0--

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C E R T I F I C A T E

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6 STATE OF HAWAII)

7 CITY AND COUNTY OF HONOLULU)

8 _____) ss.

9

10

11 I, FLORENCIA L.FINES, an Official
12 Court Reporter for the First Circuit Court, State of
13 Hawaii, do hereby certify that the foregoing pages
14 comprises a full, true and correct transcription of
15 my stenographic notes, to the best of my ability, of
16 The proceedings held in the above-entitled cause.

17 Dated this 23rd day of October, 2013.

18

19

20

21 /S/ Florencia L. Fines

22 FLORENCIA L. FINES, CSR NO. 124

23

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25

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1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

2 STATE OF HAWAII

3 Electronically Filed

4 STATE OF HAWAII _____ Intermediate Court of Appeals

5 CAAP-14-0000358

6 31-JAN-2014

7 11:39 AM

8 vs.) Criminal No.
9) 12-1-1474
10 ROYCE C. GOUVEIA,)
11 Defendant.)
12 JURY TRIAL.
13 Verdict.
14
15 APPEARANCES:
16 KRISTINE YOO, ESQ. For the State of Hawaii
17 ROBERT RAWSON, ESQ.
18 Deputies Prosecuting Attorney
19 KEITH S. SHIGETOMI, ESQ. For the Defendant
20 Court-appointed Attorney
21
22
23 REPORTED BY
24 Sharon Hulihee, RPR, CSR 306
25 Official Court Reporter
State of Hawaii

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2

1 (The following proceedings were held in open
2 court out of the presence of the jury:)

3 THE BAILIFF: Calling criminal calendar for
4 September 9, 2013, calling case number one, Criminal
5 number 1PC12-1-1474 State of Hawaii versus Royce C.
6 Gouveia, for further jury trial. Appearances please.

7 MS. YOO: Good morning, your honor. Deputy
8 Prosecuting Attorney Kristine Yoo for the State.

9 THE COURT: Good morning.

10 MR. RAWSON: Good morning, your honor.

11 Deputy Prosecuting Attorney Robert Rawson for the State.

12 THE COURT: Good morning.

13 MR. SHIGETOMI: Good morning, your honor.
14 Keith Shigetomi and Royce Gouveia.

15 THE COURT: Okay. Good morning. Have a
16 seat, everybody.

17 All right. We're back on record and we're
18 currently individually speaking to each of the jurors in
19 this case and we're going to continue what we started on
20 Friday so unless there's anything for the record before we
21 resume, Ms. Yoo?

22 MS. YOO: No, thank you.

23 THE COURT: Mr. Shigetomi?

24 MR. SHIGETOMI: No, your honor.

25 THE COURT: Very good. Mr. Chandler please.

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3

1 (A pause.)

2

3 EXAMINATION

4 By THE COURT:

5 Q. Good morning, Mr. Chandler. Just take the
6 first seat there. All right, Mr. Chandler. I'm speaking
7 to each of the jurors individually because of this
8 communication that was provided to me by the jury
9 basically at the same time that you told me that you had a
10 verdict, and the communication reads as follows:

11 "Concern: This morning on prosecutor's side
12 of courtroom there was a man, shaved head, glaring and
13 whistling at defendant. We have concern for our safety as
14 jurors."

15 First of all, are you aware that your
16 foreperson went ahead and wrote this communication and
17 sent it out to me?

18 A. Yes.

19 Q. All right. Mr. Chandler, do you recall --
20 well, first of all, did you observe this yourself, this
21 man in the gallery?

22 A. No, I didn't.

23 Q. All right. Was it a topic of discussion
24 among the jurors at any time during the deliberations?

25 A. I would say casually but not anything in

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4

1 depth.

2 Q. All right. It came up though?

3 A. Yes.

4 Q. Do you recall when in the deliberations from
5 the time you first went in there to when you reached a
6 verdict and when in the deliberative process this topic
7 came up, to the best of your recollection?

8 A. It might have been early, just for a minute
9 or so and not until the end.

10 Q. So pretty much not too long after you all
11 went in there and started to deliberate it came up?

12 A. As best I can recall.

13 Q. That's fine, that's fine. Did it resurface
14 again at any time during the deliberations?

15 A. I don't remember.

16 Q. You don't remember. Okay. All right. Did
17 it -- and I just want an honest answer, okay, nobody's in
18 any kind of trouble or anything -- did it impact in any
19 way your deliberations or decision in this case?

20 A. No.

21 THE COURT: Okay. All right. Ms. Yoo, do
22 you have questions? Go ahead.

23

24 EXAMINATION

25 BY MS. YOO:

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5

1 Q. Hi. Good morning. Did it -- how many people
2 were talking about it when it was brought up, do you
3 remember?

4 A. I guess two to four ladies in there.

5 Q. Okay. And did it look like they had made up
6 their mind or it influenced them when they were bringing
7 it up or did they seem scared?

8 A. No.

9 Q. No?

10 A. Not to my knowledge.

11 Q. Okay. And how did it come up at the end of
12 the verdict that you as a group send this communication
13 out to the judge?

14 A. I think somebody mentioned we should write it
15 down, tell the judge.

16 Q. Okay. So somebody mentioned it?

17 A. Yeah.

18 Q. Okay. And there was no objection or nobody
19 said anything?

20 A. Well, I can't say. I really didn't see
21 nothing so I don't know what they was talking about.

22 MS. YOO: Okay, okay. Thank you.

23 THE COURT: Mr. Shigetomi.

24 EXAMINATION

25 BY MR. SHIGETOMI:

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6

1 Q. Thank you. Good morning.

2 A. Good morning.

3 Q. Do you remember what they said they observed?

4 A. Just somebody that -- staring and whistling,
5 trying to get Royce's attention.

6 Q. Okay. Did they say what they thought was
7 trying to happen or anything like that, other than trying
8 to get attention?

9 A. No, I don't have memory. It'd be speculation
10 about anything.

11 Q. And did they express concern about it at that
12 point in time?

13 A. Well, not so much originally but I guess
14 towards the end they did.

15 Q. Okay. All right. Thank you.

16 A. Yes.

17 THE COURT: Okay. Thank you, Mr. Chandler.

18 Don't talk about this in any way with your fellow jurors.

19 Okay?

20 THE JUROR: Right.

21 THE COURT: Thank you.

22 Bring in Mr. Masuno please.

23 (A pause.)

24 EXAMINATION

25 BY THE COURT:

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7

1 Q. Good morning, Mr. Masuno. Just take the
2 first seat there.

3 All right, Mr. Masuno. I'm speaking to each
4 of the jurors individually basically because of this
5 communication that you all provided to me at the same time
6 that you said that you had a verdict. So let me read this
7 communication.

8 "Concern: This morning on prosecutor's side
9 of courtroom there was a man, shaved head, glaring and
10 whistling at defendant. We have concern for our safety as
11 jurors."

12 First of all, did you -- were you aware that
13 your foreperson was writing this down and that the jury
14 sent it out to me?

15 A. Yes, I was.

16 Q. Okay. Do you recall if this concern or this
17 observation -- well, first of all, did you observe what's
18 talked about in the communication?

19 A. Not personally, no.

20 Q. Okay. Did this concern and the observation
21 and anything involved with it, was it a topic of
22 discussion in the jury's deliberations?

23 A. No, it wasn't. It was only after the --

24 Q. No, but what I'm asking --

25 A. I'm sorry.

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8

1 Q. -- Mr. Masuno, is did it come up at all
2 during your discussions about the case?

3 A. No.

4 Q. Not at all?

5 A. Not that I recall, no.

6 Q. Okay. Then how did it come up at all?

7 A. It came up --

8 Q. And I should caution you. Okay. I'm not
9 going to ask you, the attorneys are not going to ask you,
10 and I don't want you to say anything that even implies to
11 me what the verdict is. All right?

12 A. Yes.

13 Q. And if you think a question that I ask or
14 that the counsel ask you --

15 A. Um-hum.

16 Q. -- is going to require in a truthful answer
17 that you get into that at all, even imply what the verdict
18 is --

19 A. Okay.

20 Q. -- then you tell me before you answer the
21 question.

22 A. Okay.

23 Q. All right? Okay. Then how did it come up,
24 if it didn't come up at all during the discussions about
25 the case? It must have come up sometime or this

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9

1 communication wouldn't have been sent out to me, right?

2 A. Yes.

3 Q. So how did that happen?

4 A. To the best of my recollection, like I said,
5 I didn't observe the -- the person that they were
6 referring to. And as I recall it, we took a vote and we
7 got a unanimous decision and then it seems like the
8 tension kind of -- in the deliberation room kind of
9 settled down because we reached a verdict. And so --

10 Q. So there had been tension?

11 A. Definitely, because we -- we were split at a
12 certain point so there was pretty vocal discussions and so
13 --

14 Q. Okay. I don't want to hear any more about
15 that. So there was tension.

16 A. So once the -- once we voted and we got a
17 unanimous verdict, like I said, the tension seemed to have
18 come down and so there was more open --

19 Q. Banter?

20 A. Banter. That's a good term. And -- and then
21 -- so an observation was made by one of the jurors and
22 then it was collaborated by other jurors and it seemed
23 like they had some concern so, you know, it was questioned
24 whether or not this should be addressed to the court. So
25 this was, from my recollection, after we had reached a

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1 unanimous verdict.

2 Q. Did this concern that's expressed in this
3 communication that I read, did it impact your
4 deliberations or decision to a verdict in this case in any
5 way?

6 A. None whatsoever.

7 THE COURT: Okay. Ms. Yoo, do you have any
8 questions?

9

10 EXAMINATION

11 BY MS. YOO:

12 Q. Good morning.

13 A. Good morning.

14 Q. So you never -- you didn't or nobody as soon
15 as you guys went back, nobody said, oh, did you see that
16 guy, or anything like that?

17 A. Yes, that's -- best I can remember. Of
18 course I wasn't, you know, interested in personal
19 observations more than concentrating on the facts of the
20 case so I kind of, like, ignored all the banter and
21 everything until after the verdict was decided upon.

22 Q. Okay.

23 A. And like I said, I didn't even observe the
24 person they were referring to 'cause I pretty much, like,
25 keep my eyes focussed in front of me. I don't wander

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11

1 around too much.

2 MS. YOO: Okay. Thank you, Mr. Masuno.

3 THE COURT: Mr. Shigetomi.

4

5 EXAMINATION

6 BY MR. SHIGETOMI:

7 Q. Good morning.

8 A. Good morning.

9 Q. Do you remember what was actually said as to
10 what was observed?

11 A. Not the exact words. I can kind of
12 paraphrase, some things and -- and it was like, did you see
13 that guy trying to whistle and get the attention of the
14 defendant, and he looked kind of scary -- he had -- he
15 looked kind of scary or something to that effect.

16 Q. Um-hum.

17 A. And then -- then the discussion pursued --

18 Q. That there was -- that there was a --

19 A. Corroboration.

20 Q. -- a need to send that communication?

21 A. Yes, because there seemed to be like more
22 than one person that observed this. And being that the
23 jury consisted of more women than men, I think the concern
24 was kind of more -- that were present than if there were
25 more men than women, but being that they were women, I

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1 thought there was a genuine concern for their safety.

2 MR. SHIGETOMI: Okay. Thank you. No other
3 questions, your honor.

4 THE COURT: Okay. Thank you, Mr. Masuno.

5 Don't discuss this at all with your fellow jurors, all
6 right?

7 THE JUROR: Yes.

8 THE COURT: Bring in Ms. Mau please.

9 (A pause.)

10

11 EXAMINATION

12 BY THE COURT:

13 Q. Good morning, Ms. Mau. Just take the first
14 seat there in the jury box.

15 Okay. Just relax, Ms. Mau. The reason I'm
16 speaking to each of the jurors individually is because of
17 this communication that the jury sent out to me at the
18 same time that the jury sent out to me the fact that you
19 had reached a verdict. So let me read this.

20 "Concern. This morning on prosecutor's side
21 of courtroom there was a man, shaved head, glaring and
22 whistling at defendant. We have concern for our safety as
23 jurors."

24 Do you know what communication I'm talking
25 about?

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13

1 A. Yes.

2 Q. Did you know that your foreperson was writing
3 this down and was sending it out to me?

4 A. Yes.

5 Q. Okay. I have a few questions for you and
6 then the attorneys will have questions for you, Ms. Mau.
7 But before I ask you any questions, I want it very clear
8 that I don't -- I'm not going to ask you about, the
9 attorneys are not going to ask you about, and we don't
10 want to know anything about the verdict, all right? And I
11 don't want you to even imply anything about the verdict in
12 any of your answers to our questions.

13 A. Okay.

14 Q. Okay?

15 A. Yes.

16 Q. And if you think an honest answer to a
17 question put to you will require you to maybe imply
18 something about the verdict, then don't answer the
19 question and just tell me that you think there might be a
20 problem before you answer the question, all right?

21 A. Yes. Okay.

22 Q. Did this concern that's embodied in this
23 communication that you all sent out to me, this topic,
24 this man, this concern, did it come up during the
25 deliberations, the discussion of the jurors at all?

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14

1 A. No.

2 Q. So it never came up during the deliberations
3 to a verdict?

4 A. No.

5 Q. So no one ever mentioned -- even mentioned
6 it?

7 A. No.

8 Q. Not that you recall?

9 A. No.

10 Q. Okay. All right. Did it -- did this concern
11 or this observation impact your decision or deliberation
12 in this case in any way?

13 A. No.

14 Q. If you don't recall it coming up during the
15 deliberations at all, then why did the foreperson write
16 this and send it out to me, if you know?

17 A. I don't know.

18 Q. You don't know? Did you make any observation
19 like this yourself?

20 A. No.

21 Q. Well, do you recall how it came up at all
22 that the -- such that the foreperson wrote this and sent
23 it out to me, if you recall?

24 A. I -- it came up after we decided.

25 Q. Okay. So you reached a verdict?

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15

1 A. Yes.

2 Q. And then you recall that this came up
3 somehow?

4 A. Yes, after.

5 THE COURT: All right. All right. Ms. Yoo?

6

7 EXAMINATION

8 BY MS. YOO:

9 Q. Good morning. So did somebody say, hey, did
10 you see this, or did somebody like -- we're just curious
11 how it came up after the fact. Was there some kind of
12 link to a discussion that you had during the
13 deliberations?

14 A. It just came up like after, someone just said
15 like how you just said, hey, did you see, and then they
16 explained.

17 Q. Okay. But you never saw it?

18 A. I never saw.

19 Q. Okay. So nobody said it in the beginning of
20 the deliberations?

21 A. No.

22 Q. Okay. Do you remember about how many -- like
23 when somebody said, hey, did you see this, do you remember
24 were there other people who saw -- who indicated that they
25 saw what this person was talking about?

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16

1 A. Yes.

2 Q. Okay. Do you remember about how many there
3 were?

4 A. I'd say -- I can't say exact number.

5 MS. YOO: Okay. Okay.

6 THE COURT: How many approximately?

7 THE JUROR: Maybe three, four.

8 BY MS. YOO:

9 Q. Three or four?

10 A. Yeah.

11 MS. YOO: Okay. Thank you.

12 THE COURT: Mr. Shigetomi.

13

14 EXAMINATION

15 BY MR. SHIGETOMI:

16 Q. So it was only after a verdict was reached
17 that there was this expressed concern?

18 A. Yes.

19 Q. And this concern was expressed by about
20 perhaps three to four people?

21 A. Yes.

22 MR. SHIGETOMI: All right. I have no other
23 questions, your honor.

24 THE COURT: Okay, Ms. Mau, don't talk to your
25 fellow jurors about this in any way.

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17

1 THE JUROR: Okay.

2 THE COURT: Bring in Ms. Kama please.

3 (A pause.)

4

5 EXAMINATION

6 BY THE COURT:

7 Q. Have a seat, Ms. Kama. Good morning. Okay.

8 I'm talking to each of the jurors individually because of
9 this communication that your foreperson wrote up and it
10 was sent out to me along with the notification that you
11 had reached a verdict. Okay?

12 A. Yes.

13 Q. So let me read this communication that I'm
14 going to ask you questions about.

15 "Concern: This morning on prosecutor's side
16 of courtroom there was a man, shaved head, glaring and
17 whistling at defendant. We have concern for our safety as
18 jurors."

19 First of all, are you aware that your
20 foreperson wrote this and sent it out to me?

21 A. Yes, I am.

22 Q. Okay. Now, before I start asking you
23 questions and the attorneys start asking you questions,
24 Ms. Kama, it's very important, I am not going to ask you,
25 they are not going to ask you anything about the verdict.

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1 That's not what we're interested in. All right? Gotta
2 answer out loud.

3 A. Yes.

4 Q. And if any of the answers to questions that
5 we put to you in your own mind seem to even imply what the
6 verdict is, then don't answer the question and just tell
7 me that you don't think you can answer the -- that you
8 think it might get into the verdict so do you want me to
9 answer the question; you know what I'm saying?

10 A. Yes.

11 Q. Check with me first, do you understand?

12 A. Yes.

13 Q. Okay. First of all, what, you know, is
14 written in this communication in any way, okay, in any way
15 did it -- was it -- did it come up during the jury's
16 deliberations in the case?

17 A. Yes, it did.

18 Q. Okay. Do you recall when in the
19 deliberations it came up, early, middle, late?

20 A. After.

21 Q. After. So never -- never -- you mean after
22 the verdict, after you reached a verdict?

23 A. Yes.

24 Q. So is it your testimony or your answer to the
25 question that it never came up during the deliberations

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1 before the verdict?

2 A. As far as I remember. I take that back. It
3 came up during the deliberation but the consensus to write
4 this complaint to you was after the deliberation.

5 Q. Okay. All right. That's fine. So my
6 question is did it come up at all during the deliberation.

7 A. Yes, it did.

8 Q. And you say it did.

9 A. It did.

10 Q. And that's what I'm asking you. Did it come
11 up not too long after you guys went in there and started
12 talking about the case?

13 A. No, towards the end.

14 Q. Was it in the middle? Toward the end. So
15 you don't recall it coming up early in the discussions?

16 A. No, it didn't.

17 Q. Okay. All right. But it came up toward the
18 end before the verdict and then the decision to write this
19 up and send it to me was after the verdict?

20 A. After.

21 Q. Okay. All right. Did this concern that is
22 talked about in this -- first of all, did you see this
23 yourself?

24 A. No, I didn't because where I was sitting.

25 Q. Okay. So you didn't yourself make any

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1 observation about this?

2 A. No, I didn't.

3 Q. But you do recall that it did come up during
4 the deliberation?

5 A. Yes.

6 Q. Did this, what is set forth in this
7 communication about concern for safety and this
8 observation of this shaved head man, etcetera, did it
9 impact your deliberations --

10 A. No, it didn't.

11 Q. Well, wait till I finish my question.

12 A. Oh, I'm sorry. I'm sorry.

13 Q. Okay. Did it impact your deliberations or
14 decision in this case in any way?

15 A. No, it didn't.

16 THE COURT: Okay. All right. If you have
17 questions, go ahead, Ms. Yoo.

18

19 EXAMINATION

20 BY MS. YOO:

21 Q. Thank you. So -- good morning.

22 A. Good morning.

23 Q. How did it come up?

24 A. It's like, by the way, did you folks notice,
25 like that.

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1 Q. Okay. So when that conversation came up
2 about by the way, were you guys talking about,
3 deliberating, right, talking about the facts of the case
4 or people were trying to convince the other one way or the
5 other?

6 A. Yes, it did.

7 Q. Is that how it came up?

8 A. Yes.

9 Q. Okay. And at that point did anybody say,
10 hey, we're not supposed to consider things like that?

11 A. No one said anything like that.

12 Q. Okay. And --

13 THE COURT: About how long did you guys talk
14 about it?

15 THE JUROR: You know, I -- I wasn't part of
16 this -- because I didn't take notice of what was going on.

17 THE COURT: About how long -- about how long
18 did other people --

19 THE JUROR: A few minutes, a few minutes, but
20 it caught the attention of the other jurors.

21 THE COURT: So it caught the attention of the
22 other jurors and it was discussed?

23 THE JUROR: Yes.

24 THE COURT: For a few minutes you said?

25 THE JUROR: Yes.

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1 THE COURT: I'm sorry, Ms. Yoo. Go ahead.

2 BY MS. YOO:

3 Q. No, that's okay. Thank you, judge.

4 And do you remember how many people
5 participated in this conversation or who said, oh, hey, I
6 remember seeing that?

7 A. Yeah, about three or four.

8 Q. Three or four?

9 A. Yes.

10 Q. Okay. So nobody talked about this in the
11 beginning part?

12 A. No.

13 Q. Nobody went in and said, hey, do you remember
14 this, anything like that?

15 A. No.

16 Q. It was towards the end?

17 A. Towards the end.

18 Q. Okay. And it was while you guys -- while you
19 were deliberating, while you guys were talking about how
20 to vote or --

21 A. Yes.

22 Q. -- what your opinions were?

23 A. Yes.

24 MS. YOO: Okay. Thank you very much.

25 THE COURT: Mr. Shigetomi.

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23

1 EXAMINATION

2 BY MR. SHIGETOMI:

3 Q. Good morning.

4 A. Good morning.

5 Q. When people were describing what they saw,
6 and I know you didn't see it but when they were saying,
7 hey, by the way, did you see that, did they sound
8 concerned at that point?

9 A. Yes, they were.

10 Q. Okay. Now, I know you said that the
11 conversation did not have an impact on your decision. Did
12 it appear to have an impact on other people's decision?

13 A. It did.

14 THE COURT: So, Ms. Kama, it appeared to you
15 based on what you observed in the deliberation room that
16 this concern for their safety did impact other people's
17 decision?

18 THE JUROR: Yes.

19 THE COURT: Okay. I'm sorry, Mr. Shigetomi.

20 MR. SHIGETOMI: I have no other questions,
21 your honor.

22 THE COURT: Okay. Don't talk to your fellow
23 jurors about this, Ms. Kama. Okay?

24 THE JUROR: Yes.

25 THE COURT: Okay. Go on back in there.

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24

1 Thank you.

2 THE JUROR: Okay.

3 THE COURT: Bring out Ms. Chun please.

4 (A pause.)

5

6 EXAMINATION

7 BY THE COURT:

8 Q. Good morning, Ms. Chun. Just take the first
9 seat there.

10 Okay. Ms. Chun, I'm talking to each of the
11 the jurors individually because of this communication that
12 your foreperson wrote up and that you guys sent out to me
13 at the same time you sent out the communication saying you
14 had reached a verdict. All right? Are you aware of what
15 I'm talking about?

16 A. Yes.

17 Q. Okay. Let me read it.

18 "Concern: This morning on prosecutor's side
19 of courtroom there was a man, shaved head, glaring and
20 whistling at defendant. We have concern for our safety as
21 jurors."

22 Okay. All right. I'm going -- first of all,
23 I'm not going to ask you any questions about, the
24 attorneys are not going to ask you any questions about,
25 and we don't want to know anything about the verdict. All

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1 right? And so I don't want you even to imply anything in
2 an answer that you give what the verdict is. Okay? Gotta
3 answer out loud.

4 A. Yes.

5 Q. Okay. If you think that to answer a question
6 that we put to you truthfully you're going to have to even
7 imply what the verdict is, don't answer the question and
8 tell me, judge, maybe I shouldn't answer that question.

9 Okay?

10 A. Yes.

11 Q. All right. All right. First of all, did you
12 observe this yourself, this man, etcetera?

13 A. No.

14 Q. All right. Did this observation, and
15 apparently the concern may be that some jurors had about
16 it or anything, anything about this, did it -- was it a
17 topic of discussion in your deliberation at any time
18 before you reached a verdict?

19 A. No.

20 Q. You don't recall it coming up at all? I'm
21 asking you did it come up at all?

22 A. When?

23 Q. And if you don't remember, that's fine. But
24 did it come up at all?

25 A. I honestly don't remember.

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1 Q. Okay.

2 A. Yeah.

3 Q. That's fine.

4 A. Yeah.

5 Q. All right. You honestly don't remember?

6 A. No.

7 Q. But it came up at sometime obviously?

8 A. Yes, when it first came up, the topic.

9 Q. Okay. All right. How many people sort of
10 brought it up?

11 A. From what I can remember, maybe about two at
12 the most.

13 Q. Two. Okay. And these people expressed
14 concern for their safety?

15 A. I --

16 Q. Well, see, the thing is, Ms. Chun, it seems
17 to me pretty obvious that at least some people were
18 concerned enough to tell the foreperson write this down
19 and tell the judge.

20 A. I think it was more of a concern.

21 Q. Okay.

22 A. Yeah.

23 Q. But it's a concern, right?

24 A. Yeah.

25 Q. Did this in any way, you personally, did it

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1 impact your decision or your deliberations of this case in
2 any way?

3 A. No.

4 THE COURT: Okay. Go ahead, Ms. Yoo, if you
5 have anything.

6

7 EXAMINATION

8 BY MS. YOO:

9 Q. Thank you. Good morning, Ms. Chun.

10 A. Good morning.

11 Q. So you don't remember if anybody said in the
12 beginning, hey, did you remember seeing that, or did you
13 see this?

14 A. It was brought up, yes, when we went into the
15 room.

16 Q. Okay.

17 THE COURT: So it was brought up then, Ms.
18 Chun?

19 THE JUROR: Yes, well, when we entered the
20 room, yeah.

21 THE COURT: Well, you entered the room and
22 you began your deliberations, right?

23 THE JUROR: Well --

24 THE COURT: What I mean is --

25 THE JUROR: Yeah, when -- when --

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1 THE COURT: As soon as you went into that
2 room, you guys were in deliberations.

3 THE JUROR: Okay, yeah.

4 THE COURT: You understand?

5 THE JUROR: Yes.

6 THE COURT: Given that, you're saying it came
7 up?

10 THE COURT: And it came up shortly after you
11 went into the room?

12 THE JUROR: I'm not sure when. I know we --
13 it was brought up when we were there.

21 THE COURT: That's fine. Go ahead, Ms. Yoo.

22

23 EXAMINATION

24 BY MS. YOO:

25 Q. So when it first came up in the early or the

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1 middle part, how long was that discussed?

2 A. I don't remember it being too long.

3 Q. Okay. But there was definitely some
4 discussions?

5 A. Just from what people -- like what people
6 noticed in the courtroom 'cause I did not notice it, yeah.

7 Q. Okay. So you weren't participating but other
8 people were talking about it?

9 A. Yeah, 'cause they mentioned it, yeah.

10 Q. Right. Did it look like what they observed
11 impacted their verdict or how they thought of the
12 deliberation process?

13 A. No, I don't think it impacted the verdict.

14 Q. Okay. Did it come back up again later on in
15 the discussion during the deliberation?

16 A. Not that I can remember.

17 THE COURT: Little louder, ma'am.

18 THE JUROR: Maybe after when we came up with
19 the verdict, from what I remember.

20 THE COURT: Ma'am, little louder. I can't
21 hear you.

22 THE JUROR: From -- after from when we came
23 up with the verdict.

24 MS. YOO: Thank you.

25 THE COURT: Mr. Shigetomi.

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1 EXAMINATION

2 BY MR. SHIGETOMI:

3 Q. Good morning.

4 A. Good morning.

5 Q. So you made no observations?

6 A. I didn't. I wasn't aware of that person, no.

7 Q. And the communication talks about glaring and
8 whistling. Was there any other discussion about what
9 people observed?

10 A. Only what certain people observed it 'cause I
11 didn't observe it and --

12 MR. SHIGETOMI: Okay. Thank you.

13 THE COURT: Okay. Thank you, Ms. Chun.

14 Don't talk to your fellow jurors about this.

15 THE JUROR: Okay.

16 (A pause.)

17 THE COURT: Okay. We've talked to all 12 of
18 them at this point. Counsel, want us to do anything else
19 at this point as far as this issue goes? Ms. Yoo? I
20 don't mean any motions or anything. I just mean as far
21 as, for lack of a better way of putting it, taking of
22 evidence or, you know, continuing this hearing in any way.
23 Is there anything else that either or both of you want the
24 court to do or think the court should do or think that we
25 should do? Ms. Yoo?

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1 EXAMINATION

2 BY MR. SHIGETOMI:

3 Q. Good morning.

4 A. Good morning.

5 Q. So you made no observations?

6 A. I didn't. I wasn't aware of that person, no.

7 Q. And the communication talks about glaring and
8 whistling. Was there any other discussion about what
9 people observed?

10 A. Only what certain people observed it 'cause I
11 didn't observe it and --

12 MR. SHIGETOMI: Okay. Thank you.

13 THE COURT: Okay. Thank you, Ms. Chun.

14 Don't talk to your fellow jurors about this.

15 THE JUROR: Okay.

16 (A pause.)

17 THE COURT: Okay. We've talked to all 12 of
18 them at this point. Counsel, want us to do anything else
19 at this point as far as this issue goes? Ms. Yoo? I
20 don't mean any motions or anything. I just mean as far
21 as, for lack of a better way of putting it, taking of
22 evidence or, you know, continuing this hearing in any way.
23 Is there anything else that either or both of you want the
24 court to do or think the court should do or think that we
25 should do? Ms. Yoo?

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1 MS. YOO: No.

2 THE COURT: Mr. Shigetomi?

3 MR. SHIGETOMI: No, your honor.

4 THE COURT: Okay. So what, if anything, do
5 either or both of you want to do about this or do you
6 think we even need to do anything about this? We have --
7 they have a verdict. They told me they have a verdict and
8 so it seems to me basically at this point that the basic
9 question is do we take no further action of any kind on
10 this and just take the verdict or do you want us -- do you
11 want me to do something? Do you want any rulings,
12 anything like that? Anybody?

13 MS. YOO: Well, your honor, State would ask
14 that, you know, based on what Ms. Kama --

15 THE COURT: Well, actually, you know, given
16 -- look, we're all adults here, we're all experienced
17 counsel. I think I should ask Mr. Shigetomi whether he
18 wants to do anything first.

19 Mr. Shigetomi, you want the court to do
20 anything about this? And let me -- since you brought it
21 up on Friday, okay, this is your one chance because we
22 don't know what the verdict is, okay? We don't. We
23 literally do not know what the verdict is. I do not know
24 what the verdict is. So what the verdict is, to me, is
25 completely immaterial to the issue before this court now

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1. and that's how I'm looking at it. So it seems to me that
2. you've got a motion for mistrial now or you don't because
3. I'm certainly not going to allow you to throw the dice, we
4. take the verdict, and if it comes up guilty, then you move
5. for mistrial because the arguments you would bring up at
6. that point obviously would have to be the exact same
7. arguments that you should bring up at this point if you
8. have them. So do you have a motion or not?

9. MR. SHIGETOMI: Your honor, I've discussed it
10. with my client and I do not have a motion.

11. THE COURT: Okay. All right. There's no
12. motion for mistrial on the part of defendant. Defendant
13. wants to just take the verdict in this case, correct, Mr.
14. Shigetomi?

15. MR. SHIGETOMI: Yes, your honor, correct.

16. THE COURT: What's the State's position?

17. MS. YOO: Well, your honor, based on the
18. conversations that we've had with all of the jurors, I
19. think that in an abundance of caution we should declare a
20. mistrial.

21. THE COURT: Well, it's not an abundance of
22. caution, Ms. Yoo.

23. MS. YOO: Well, okay.

24. THE COURT: If you're going to move for
25. mistrial, you better ask me to find manifest necessity.

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1 MS. YOO: Well, your honor --

2 THE COURT: 'Cause jeopardy's attached,
3 correct?

4 MS. YOO: Right. But I guess the manifest
5 necessity comes in the discussions we had actually this
6 morning with the jurors that came before the court. And
7 some of --

8 THE COURT: Yeah. So make your case.

9 MS. YOO: And to note that Mr. Masuno had
10 indicated that there were heated discussions right before
11 the verdict, then actually --

12 THE COURT: Well, he said there was tension.

13 MS. YOO: There was tension, and that until
14 that tension or until they voted that the tension was --
15 well, that there was tension. That in association or in
16 -- that also with the fact that what Ms. Kama had
17 indicated, that the discussions came up towards the end
18 and that somebody as part of the deliberation and as part
19 of the discussion had indicated, hey, by the way, did you
20 see this, and at that time nobody stepped up to say we are
21 not supposed to consider things like that. But it was Ms.
22 Kama's observation that it in fact -- what the others had
23 observed had impact on others' decision or deliberation
24 process. Given that, and given also the fact that there
25 were discussions from or there were testimony from other

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1 jurors, that it came up early in the discussion --

2 THE COURT: How many jurors said that, do you
3 recall? How many jurors said it came up basically early
4 on?

5 MS. YOO: Well, I know Ms. Hanashiro had said
6 it. I guess Ms. Chun kind of indicated that it came on
7 early.

10 MS. YOO: Yeah. There were a few and --

11 THE COURT: So Mr. Rawson's been counting.

12 That's good.

13 MR. RAWSON: If I can have a second, I'll
14 tell you.

15 MS. YOO: Given that and given also the fact
16 that, you know, Ms. Hanashiro indicated that the
17 discussions were about 10 minutes in the beginning part
18 and that three to four -- I think the numbers that saw it
19 were three to four people that had seen it and --

20 THE COURT: You mean the actual -- made the
21 actual observations?

22 MS. YOO: Observations. And there were about
23 eight that had something to say about this observation
24 that were made by others, given --

25 THE COURT: So you're saying the jury -- the

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1 verdict, whatever it is, is tainted --

2 MS. YOO: Yes, your honor.

3 THE COURT: -- by extraneous inappropriate
4 circumstances?

5 MS. YOO: Right. And one more --

6 THE COURT: Explain to me why certain of the
7 jurors, at least making this observation, and I never saw
8 it, so it seems to me it happened before I came in but,
9 anyway, they saw it, so explain to me how this observation
10 on the part of at least some of the jurors and the fact
11 that apparently it triggered concern for their personal
12 safety, 'cause that's -- I mean, counsel have any other
13 take on it than that? It seems to me they're concerned
14 for their personal safety.

15 Mr. Shigetomi, you disagree with that? The
16 ones who are concerned, who do have concern.

17 MR. SHIGETOMI: Well, I mean, I hate to
18 speculate. I can just say what -- that's what they say in
19 their communication.

20 THE COURT: Yeah. Okay. All right. So how
21 does that taint the verdict, Ms. Yoo? Spell it out for
22 me. Let's make a complete record.

23 MS. YOO: Well, your honor, in this case it's
24 an issue of self defense and first aggressor and there
25 were testimony that the --

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1 THE COURT: Doesn't matter, I mean, does it
2 even matter what the facts or what's in dispute? Isn't it
3 -- don't you think it's per se an inappropriate extraneous
4 circumstance that if the jurors have concerns for personal
5 safety based on something they observed in the courtroom
6 being done by somebody in the gallery, that if it entered
7 their discussions and had an impact on any of them, that
8 it would taint the verdict?

9 MS. YOO: Yes, your honor. I'm sorry, I
10 thought the court was asking how it would play in with the
11 facts. But, yes, that is correct, your honor.

12 THE COURT: All right. Go on.

13 MS. YOO: What the court had indicated. But
14 -- and on top of that, you know, there's different ways to
15 look at how Ms. Kama had indicated that it had affected
16 the deliberation. One of it is the most -- the biggest
17 part of it is what the court had just indicated on the
18 record.

19 But the other part also is the fact that this
20 did have an issue of first aggressor and, you know, it's
21 unclear whether what they saw in the gallery that they did
22 associate with the prosecution and the decedent side,
23 whether that had any impact on them as to whether they
24 thought maybe it lended more credibility to Mr. Gouveia's
25 testimony as he testified, again, considering things that

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1 are not -- that were not presented as part of the
2 evidence.

3 So based on all of that, your honor, I would
4 ask the court to declare a mistrial. Just for the note
5 also, it appears that --

6 THE COURT: And to find that there's manifest
7 necessity for such?

8 MS. YOO: Yes.

9 THE COURT: All right. Go on.

10 MS. YOO: Sorry, judge. And also it appears
11 that there's -- okay, that it appears that there's seven
12 jurors who had indicated that there was a discussion,
13 somewhere between beginning to the end of the deliberation
14 but --

15 THE COURT: How many said it was in the
16 beginning? You didn't note that. That's fine. If you
17 didn't, you didn't. I recall four or five. I recall four
18 or five. And, I'm sorry, I was remiss, I didn't check it
19 off each time somebody said that. 'Cause the first couple
20 times somebody said that, I didn't check it off plus it
21 was late Friday afternoon, that's my only excuse. But I
22 recall at least four of them saying it came up pretty much
23 not too long after they went into the room and started
24 talking about the case.

25 MS. YOO: Well, your honor --

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1 THE COURT: Do you recall that or not, Ms.

2 Yoo?

3 MS. YOO: Yes, I do recall that. There's --

4 I note about three.

5 THE COURT: Some of them said it came up both
6 at that point and that it also came up later in the
7 deliberations.

8 MS. YOO: Right.

9 THE COURT: I think two or three people said
10 that.

11 MS. YOO: I have three people saying that it
12 came up towards the beginning of the conversation.

13 THE COURT: Okay. You think that's
14 important?

15 MS. YOO: Your honor, I do believe that
16 that's important, especially given what Ms. Hanashiro said
17 was that it was one of immediately -- one of the first
18 things that had come up as soon as they got back there,
19 that it was sort of like, hey --

20 THE COURT: Yeah, I mean, it would seem to
21 imply that it was pretty much -- pretty important to at
22 least some of them, right? I mean, that's what it implies
23 to me, if it's one of the earliest topics of discussion
24 when they get into the room.

25 MS. YOO: And the fact that it again came up

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1 later and the fact that after the verdict that they felt
2 the need or the need to indicate to the court what they
3 had discussed from the beginning part. So based on all of
4 that, your honor, unless the court has any other
5 questions?

6 THE COURT: You have any response, Mr.
7 Shigetomi? I have what I am construing now to be a motion
8 for mistrial by the State based on manifest necessity to
9 declare that mistrial.

10 MR. SHIGETOMI: And we object to it.

11 THE COURT: Yeah. So I'm giving you a chance
12 to make a record if you want to.

13 MR. SHIGETOMI: Well, your honor, the court
14 addresses or instructs the jury that you are to make your
15 decision based solely on the evidence in this case. You
16 listen to the evidence; you follow the court's
17 instructions; you make a decision. Every one of the
18 jurors have said it had -- there was discussion, but it
19 had no impact on my decision, all 12.

20 THE COURT: That's clearly the strongest
21 argument for me to deny the State's motion in my view is
22 that all 12 of them, when I asked them specifically, said
23 it had no impact on their deliberations. Go on.

24 MR. SHIGETOMI: And that's the crux of our
25 argument, that they are presumed to follow instructions.

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1 They all said that they did and therefore the court should
2 take the verdict at this point in time. It's not manifest
3 necessity.

4 THE COURT: Well, if I declare a mistrial
5 based on the reasons that Ms. Yoo has given me, it's a no-
6 brainer it's manifest necessity, right? There's no -- put
7 it this way. There's no other remedy short of a mistrial
8 that's going to cure this or allow us to take the verdict,
9 correct? It's not like we can continue the trial --

10 MR. SHIGETOMI: I understand.

11 THE COURT: -- or I can give them a further
12 instruction.

13 MR. SHIGETOMI: Correct, correct.

14 THE COURT: You know, they reached a verdict
15 already and then they tell me that there was this other
16 thing. So, you know, if I think it rises to the level of
17 a mistrial, I'm pretty much going to find that there's
18 manifest necessity 'cause there's nothing short of a
19 mistrial that I can do. It's a tainted verdict, if that's
20 going to be my ruling. I mean, you agree with that,
21 right?

22 MR. SHIGETOMI: I would agree with that, your
23 honor.

24 THE COURT: Let me ask you this, Mr.
25 Shigetomi, at the risk of seeming to put you on the spot

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1 here. You don't have to answer if you don't want to. But
2 we tell the jurors that they gotta use their reason and
3 common sense obviously. What does your reason and common
4 sense tell you that at least some of them are concerned
5 enough for their personal safety to tell the foreperson to
6 write it in a communication and send it out to the court
7 but, on the other hand, when we bring them in individually
8 and put them on the hot seat so to speak, 'cause again
9 realistically that's what we're doing here, they say when
10 I asked them did it have any impact on your verdict, they
11 say, oh, no, judge, no. I mean, what's your feeling about
12 that? Doesn't it kind of beg to reason or common sense
13 that at least one of them is, I'm not saying lying to me,
14 but telling me maybe what he or she thinks I want to hear
15 at this point, plus they've already reached a verdict and
16 since they did reach a verdict, I'm sure they have an
17 interest now in the court taking that verdict and that's
18 the end of it, you know. Some of them might even be
19 afraid that, oh, my God, if something happens now, we
20 gotta come back or something like that, you know. And --
21 because I'm factoring all that into my thinking here. I
22 gotta make the decision. I'm the finder of fact, meaning
23 I judge their credibility too, right?

24 MR. SHIGETOMI: Yes.

25 THE COURT: So you have a response to that?

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1 MR. SHIGETOMI: Your honor, the communication
2 in which they announced they have a verdict is filed at
3 2:20 in the afternoon. The communication that --
4 expressing their concern is filed at 2:24. The jurors all
5 expressed that the observation or the discussion of the
6 observations had no impact on their decision at all. Most
7 of them -- not most -- many of them said that it was an
8 afterthought just to let the court know about what had
9 happened and to express their concern.

10 THE COURT: About five or six of them said
11 that.

12 MR. SHIGETOMI: Okay.

13 THE COURT: Go on.

14 MR. SHIGETOMI: But I'm just saying --

15 THE COURT: I understand.

16 MR. SHIGETOMI: -- they're saying it was more
17 of an afterthought and there's no evidence at this point
18 to say it had an impact on their verdict.

19 THE COURT: Unless, like I said, I do my own
20 inferring and my own application of my reason and common
21 sense like the finder of fact is allowed to do and, you
22 know, have some suspicions that at least one of them, and
23 maybe more than one of them, is not being completely
24 honest with me on that. Anyway, go on.

25 MR. SHIGETOMI: Well, your honor, I agree

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1 with you. You have that. But I would say that when every
2 one of them have come in and said that it had no impact on
3 them, I would say that such a finding would be clearly
4 erroneous. That would be my response.

5 THE COURT: Yeah. That might become an issue
6 in the fullness of time. This whole thing might become an
7 issue in the fullness of time depending on my ruling but
8 that's always the case. You're right.

9 MR. SHIGETOMI: Sure, I understand.

10 THE COURT: Let me ask you this, both of you.
11 Is there any -- none of you have mentioned any kind of a
12 standard, a standard of proof, for example, or a burden of
13 proof in this sort of a situation. Are you aware of one,
14 Mr. Shigetomi?

15 MR. SHIGETOMI: Obviously they have the
16 burden of proof --

17 THE COURT: No, no, no.

18 MR. SHIGETOMI: I understand. What that
19 actual burden is --

20 THE COURT: No, no, a burden on me. See, I'm
21 talking about in this hearing, you know, and I'm the
22 factfinder.

23 MR. SHIGETOMI: Correct.

24 THE COURT: So is there any kind of a
25 standard for me in a situation like this? Let's say I do

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1 find that, you know, at least one of these jurors was more
2 than likely impacted in his or her deliberations and
3 contribution to the verdict in this case. Is there some
4 sort of standard that should guide my evaluation here? Do
5 you see what I'm saying?

6 MR. SHIGETOMI: I understand that. I don't
7 --

8 THE COURT: Are you aware of one?

9 MR. SHIGETOMI: I don't know, your honor.

10 THE COURT: Ms. Yoo, are you aware of any
11 such standard?

12 MS. YOO: Well, judge, it appears that the
13 standard is the totality of circumstances surrounding
14 their alleged -- well, it says alleged probation of
15 determine --

16 THE COURT: Where are you getting that from?

17 MS. YOO: State versus Bailey.

18 THE COURT: Were the facts in Bailey similar
19 to this one?

20 MS. YOO: Your honor, in this case -- well,
21 no, because these are all guilty verdicts. And they went
22 up so --

23 THE COURT: That's right.

24 MS. YOO: In this case we don't have a
25 verdict one way or the other and --

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1 THE COURT: Well, we do have a verdict.

2 MS. YOO: Well, I'm sorry, we do have a
3 verdict..

4 THE COURT: And the question is whether it's
5 tainted or not, just like in those cases. The unusual
6 twist here is that we don't know what it is.

7 MS. YOO: Right. Well, in that case, I
8 believe they were -- judge, I'm sorry, I read it really
9 briefly this morning but I believe it was about a
10 defendant's prior --

11 THE COURT: Well, anyway, it's totality of
12 circumstances.

13 MS. YOO: Totality of circumstances.

14 THE COURT: What is it, if either counsel is
15 -- can tell me, what is it in the case of juror
16 misconduct? If the allegation is juror misconduct and the
17 court holds an evidentiary, for lack of a better way of
18 putting it, hearing, in other words, voir dire
19 individually the jurors, etcetera, and gathers facts and
20 then the court makes certain fact findings and the fact
21 findings of the court are that in fact, yes, there was
22 juror misconduct in the deliberations of the case, is
23 there a standard that should -- to guide the court's
24 ruling given that finding of fact? What is it in the case
25 of juror misconduct? Are either of you aware of it?

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1 MS. YOO: So --

2 THE COURT: Well, I'll tell you what it is
3 because I got a jury waiting, yeah? What it is, is that
4 if that's where the court has gotten to in the hearing,
5 actually made a finding of juror misconduct, all right,
6 then the standard is that the court has to be able to find
7 that the juror misconduct did not affect the verdict
8 beyond a reasonable doubt. If the court cannot find
9 beyond a reasonable doubt that the misconduct did not
10 affect the verdict, then the verdict is gone. Okay?

11 This is not juror misconduct. I'm not aware
12 of any such standard in a case like this 'cause I'm
13 frankly not aware of a situation like this in the
14 published cases. But what's your thinking now that I've
15 informed you of that, either or both of you? You don't
16 have to have a position but I'm just -- I want to make a
17 full record. You got anything to say to that, Ms. Yoo?

18 MS. YOO: Well, your honor, based on what Ms.
19 Kama had indicated that, I know that all the other jurors
20 came before --

21 THE COURT: No. What I'm asking you is
22 should I use the same standard in this situation? You
23 want to argue to me that I do, don't you, Ms. Yoo?

24 MS. YOO: Right, but harmless beyond a
25 reasonable --

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1 THE COURT: You want a mistrial?

2 MS. YOO: Yes.

3 THE COURT: So you want to import that
4 standard?

5 MS. YOO: Yes.

6 THE COURT: And you want me to be able to
7 find beyond a reasonable doubt that this concern for
8 personal safety had no impact on any of these 12 jurors'
9 decision, and if I can't make that finding, then I should
10 declare the mistrial and find manifest necessity. Isn't
11 that your argument?

12 MS. YOO: Right. Yes.

13 THE COURT: Mr. Shigetomi, you have any
14 response?

15 MR. SHIGETOMI: All 12 said it had no impact.

16 THE COURT: I understand that.

17 MR. SHIGETOMI: I mean, to me that's proof
18 beyond a reasonable doubt.

19 THE COURT: Right. And there's no question
20 if I take that at face value --

21 MR. SHIGETOMI: Yes.

22 THE COURT: -- that I would agree with you.
23 Either of you got anything else to say? Ms. Yoo?

24 MS. YOO: No.

25 THE COURT: Mr. Shigetomi?

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1 MR. SHIGETOMI: Other than they were short
2 discussions and they said it had no effect on them. They
3 went on and they discussed other issues and then only at
4 the end after they had reached a verdict, then they, as my
5 argument, said as an afterthought, hey, we better inform
6 the court.

7 THE COURT: Okay. You can both be seated.

8 Well, it's pretty clear to the court what
9 everybody thinks the verdict is based on your arguments
10 and your motions and lack of such. I don't know what the
11 verdict is. I honestly literally don't know what the
12 verdict is. There's no way I could know. We haven't
13 taken the verdict yet. And, anyway, I think it's
14 immaterial. I think it's literally immaterial to this
15 discussion, this issue in my ruling here. And it's a
16 really, really close ruling as far as I'm concerned. I
17 think that's probably clear from what I've -- you know,
18 this discussion right now. I mean, really, it's
19 difficult, very difficult, but of course nobody forced me.

20 You know, the bottom line to me, and it's my
21 decision, and as I say, Mr. Shigetomi, it could be proved
22 wrong in the fullness of time, but I find it difficult, I
23 really do, I find it difficult to really believe when I,
24 you know, apply my reason and common sense to this that at
25 least some of these jurors have this, what strikes me as a

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1 really serious concern for their personal safety and it
2 came up according to, at least as I count, four or five of
3 them, it came up, was one of the first things, one of the
4 first things, one of the first topics of discussion when
5 they got back in the room and started deliberating the
6 case. Somebody brought it up and they started talking
7 about it. It frankly beggars my reason and common sense
8 that it would have no bearing on the deliberations in this
9 case and therefore the verdict.

10 I'm going to grant the State's motion for
11 mistrial. I'm going to find there's manifest necessity
12 for such based on what I said and all the -- and
13 everything else that's been put on the record, including
14 my questions to counsel.

15 The verdict's going to be sealed for future
16 purposes, if any, but obviously we're not going to take
17 the verdict. I'm declaring a mistrial and I'm finding
18 manifest necessity for that, because I don't think there's
19 anything short of a mistrial that's going -- that can cure
20 it. The verdict's tainted, in my view, based on my
21 findings.

22 And to be explicit about it, as the finder of
23 fact, I don't find it credible that all 12 of these people
24 despite the answer they gave me about no impact on their
25 decision, I think at least one, and probably more than one

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1 of them, probably the three or four women according to Mr.
2 Masuno, and that's neither here nor there except he
3 brought it up, who had these serious concerns about their
4 safety. It really beggars my reason and common sense that
5 it could not have had any impact on their deliberations
6 and decision in this case.

7 Ms. Yoo, you're going to prepare the
8 findings, conclusions and order.

9 MS. YOO: Yes.

10 THE COURT: All right. I'm going to bring
11 the jury in. I'm going to let them -- I'm going to
12 declare a mistrial. I'm going to tell them what happened.

13 Unfortunately I'm not going to be able to
14 talk to them, I really wish I could, especially because
15 they're going to be understandably dissatisfied with this
16 but that's the way it goes. I've got another jury
17 waiting, literally waiting.

18 I'm going to set the retrial in normal course
19 right now subject to further motions. I think Mr.
20 Shigetomi might have some further motions. But for right
21 now because I've declared manifest necessity for the
22 mistrial, at this point implicit in that finding is that
23 the State can retry Mr. Gouveia if they choose to do so.

24 New trial is November 12th, that's a Tuesday.
25 November 10th is a holiday. Pretrial motions deadline

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1 October 14th. Trial call Tuesday, November 5th, 8:30 in
2 the morning. Okay. Bring them in.

3 So the record's clear and Mr. Shigetomi has
4 this appellate issue if it becomes one in the future, I am
5 importing that standard from the juror misconduct cases in
6 my ruling here. Okay. And I'm finding that I cannot find
7 beyond a reasonable doubt that there was no impact on the
8 deliberations or verdict in this case such that the
9 verdict was not tainted.

10 THE BAILIFF: All rise for the jury.

11 (The following proceedings were held in open
12 court in the presence of the jury:)

13 THE CLERK: Recalling case number one.

14 THE COURT: That's okay. Let the record
15 reflect we're back on record in Mr. Gouveia's jury trial.
16 Let the record reflect the presence of all counsel, Mr.
17 Gouveia and the jury.

18 All right. Ladies and gentlemen, the court
19 is declaring a mistrial in this case, so your duties are
20 over. I cannot thank you enough for coming in and doing
21 your duty in this case because, believe me, you did your
22 duty in this case.

23 Now, I'm sure it's just human nature, and
24 you're not lawyers that, number one, you have a lot of
25 questions about what I just did and you may feel like some

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STATE of Hawai'i, Respondent/Plaintiff-Appellee,

v.

Royce C. GOUVEIA,
Petitioner/Defendant-Appellant.

SCWC-14-0000358

Supreme Court of Hawai'i.

OCTOBER 25, 2016

Background: Defendant, who was charged with manslaughter, moved to dismiss declaration of mistrial based on jurors' concerns about their safety. The Circuit Court, First Circuit, Glenn J. Kim, J., denied motion. Defendant appealed. The Intermediate Court of Appeals, 2015 WL 2066780, affirmed. Defendant's application for writ of certiorari was accepted.

Holdings: The Supreme Court, Recktenwald, C.J., held that:

- (1) Circuit Court did not rely on improper juror testimony, concerning the effect that jurors' concerns about their safety due to man in courtroom glaring at defendant had on the verdict, when it concluded that manifest necessity existed for mistrial;
- (2) presumption of prejudice, which arose from jurors' concerns about their safety, was not rebutted beyond reasonable doubt; and
- (3) no reasonable alternative to mistrial would have eliminated potential of prejudice resulting from jurors' concerns for their safety, and thus, manifest necessity existed for mistrial, such that retrial of defendant would not violate double jeopardy.

Affirmed.

Nakayama, J., filed dissenting opinion.

1. Criminal Law \Leftrightarrow 1155

A trial court's declaration of a mistrial is reviewed under the abuse of discretion standard.

2. Criminal Law \Leftrightarrow 867.2

A determination of manifest necessity for a mistrial is left to the sound discretion of the trial court.

3. Criminal Law \Leftrightarrow 1147

An abuse of discretion occurs when the decisionmaker exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.

4. Double Jeopardy \Leftrightarrow 96, 99

A mistrial is properly declared and retrial is not barred by the defendant's right against double jeopardy where the defendant consented to the mistrial or there was manifest necessity for the mistrial. U.S. Const. Amend. 5.

5. Double Jeopardy \Leftrightarrow 2

The issue whether a reprocsecution is barred by double jeopardy is a question of constitutional law. U.S. Const. Amend. 5.

6. Criminal Law \Leftrightarrow 1134.29

The Supreme Court reviews questions of constitutional law by exercising its own independent constitutional judgment based on the facts of the case.

7. Criminal Law \Leftrightarrow 1139

The Supreme Court reviews questions of constitutional law *de novo* under the right/wrong standard.

8. Criminal Law \Leftrightarrow 867.19

Circuit Court did not rely on improper juror testimony, concerning the effect that jurors' concerns about their safety due to man in courtroom glaring at defendant had on the verdict, when it concluded that manifest necessity existed for mistrial in manslaughter prosecution; Circuit Court found that manifest necessity existed for mistrial based on questions to jurors as to what occurred, whether incident was discussed by jurors, when it was discussed, length of discussion, and what jurors said about the incident. Haw. R. Evid. 606(b).

9. Criminal Law \Leftrightarrow 957(1)

Evidence rule, limiting jurors' testimony upon an inquiry into the validity of a verdict,

is inapplicable to statements made prior to jurors reaching a verdict. Haw. R. Evid. 606(b).

10. Criminal Law \Leftrightarrow 957(6)

Once a verdict has been reached, the court cannot consider the jurors' testimony as to the effect of an improper statement upon them; the court can only consider whether such statement was made and whether, given the statement, the court can say that the defendant had a trial before an impartial jury. Haw. R. Evid. 606(b).

11. Criminal Law \Leftrightarrow 633.7

The right to a fair trial is guaranteed to both defendants and to the State.

12. Criminal Law \Leftrightarrow 867.4

Although the defendant has a valued right to have his case concluded by a single tribunal, 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.

13. Double Jeopardy \Leftrightarrow 99

“Manifest necessity,” as would warrant a mistrial and not bar retrial based on defendant’s right against double jeopardy, is defined as circumstances in which it becomes no longer possible to conduct the trial or to reach a fair result based upon the evidence. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

See publication Words and Phrases for other judicial constructions and definitions.

14. Double Jeopardy \Leftrightarrow 99

Manifest necessity, as would warrant a mistrial and not bar retrial based on defendant’s right against double jeopardy, protects the right to a fair trial for both the defendant and the State. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

15. Double Jeopardy \Leftrightarrow 99

When circumstances arise that could influence the impartiality of the jury and thus affect the ability to reach a fair result based on the evidence, a rebuttable presumption of prejudice is raised when determining whether manifest necessity exists for mistrial, such that defendant’s right against double jeopardy would not bar retrial. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

16. Double Jeopardy \Leftrightarrow 99

To overcome a presumption of prejudice resulting from outside influence on the jury, the trial court, after investigating the totality of the circumstances, must find that the outside influence on the jury was harmless beyond a reasonable doubt; if this influence cannot be proven harmless beyond a reasonable doubt, then the court must look at all reasonable alternatives to cure the harm before declaring a mistrial based on manifest necessity, as would allow a retrial without violating defendant’s right against double jeopardy. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

17. Double Jeopardy \Leftrightarrow 99

Presumption of prejudice, which arose from jurors’ concerns about their safety due to man glaring at defendant during manslaughter trial, was not rebutted beyond reasonable doubt, and thus, manifest necessity existed for mistrial, such that retrial of defendant would not violate double jeopardy; jurors expressed actual concern for their safety, and although no juror admitted that the incident affected jurors’ decision-making process, four jurors stated that discussions of incident happened at beginning of deliberations, which indicated that those discussions could have had effect on subsequent jury deliberations. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

18. Double Jeopardy \Leftrightarrow 99

Once there is a showing that an outside incident may have influenced the jury, there is a rebuttable presumption of prejudice that must be overcome beyond a reasonable doubt to preclude mistrial based on manifest necessity, as would bar retrial based on defendant’s double jeopardy rights. U.S. Const.

Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

19. Double Jeopardy ~~99~~99

A *prima facie* showing of improper influence is all that is required to raise the presumption of prejudice; therefore, it is the possibility of improper influence that must be disproved in order to show that a mistrial is not warranted based on manifest necessity, as would bar retrial based on defendant's double jeopardy rights. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

20. Double Jeopardy ~~99~~99

When examining the record for evidence of manifest necessity, as would warrant a mistrial and not bar retrial based on defendant's right against double jeopardy, the Supreme Court must determine whether the trial court sufficiently considered less severe options available and balanced the accused's rights against the public interest. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

21. Double Jeopardy ~~99~~99

No reasonable alternative to mistrial would have eliminated potential of prejudice resulting from jurors' concerns for their safety due to man glaring at defendant during manslaughter trial, and thus, manifest necessity existed for mistrial, such that retrial of defendant would not violate double jeopardy, where jury reached verdict, informed the court that they reached the verdict, and then notified the court that there was concern for their safety. U.S. Const. Amend. 5; Haw. Rev. Stat. § 701-110(4) (b) (iii).

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS (CAAP-14-0000358; CR. NO. 12-1-1474)

Keith S. Shigetomi, Honolulu, for petitioner.

Donn Fudo, Honolulu, for respondent.

RECKTENWALD, C.J., McKENNA, POLLACK, AND WILSON, JJ., WITH NAKAYAMA, J., DISSENTING

1. The Honorable Glenn J. Kim presided.

OPINION OF THE COURT BY RECKTENWALD, C.J.

This case requires us to determine whether the trial court erred in declaring a mistrial based on jurors' concerns about their safety. Defendant Royce Gouveia was charged with manslaughter and tried before the Circuit Court of the First Circuit.¹ After deliberating, the jurors sent several notes to the court. The first note stated: "We reached a verdict." Another note expressed concern for their safety because a man on the prosecutor's side of the courtroom had been "glaring and whistling at [Gouveia]." The circuit court conducted voir dire of the jurors to determine what, if any, effect the incident had on them. The circuit court then declared a mistrial based on manifest necessity. Gouveia subsequently filed a motion to dismiss, asserting that the circuit court's finding of manifest necessity and declaration of a mistrial was erroneous, and that further prosecution was prohibited on double jeopardy grounds. The circuit court denied the motion.

Gouveia appealed the denial of his motion to dismiss to the Intermediate Court of Appeals (ICA). The ICA affirmed the circuit court, *State v. Gouveia*, CAAP-14-358, 2015 WL 2066780 (App. Apr. 30, 2015) (mem.), and Gouveia then petitioned this court to review the ICA's judgment.

We conclude that the circuit court did not abuse its discretion in concluding that there was manifest necessity for a mistrial because the presumption of prejudice was not overcome beyond a reasonable doubt. Accordingly, the ICA's June 4, 2015 judgment on appeal is affirmed.

I. Background

On September 25, 2012, an altercation occurred in which Gouveia struck Albert Meyer, causing Meyer to fall and hit his head on the pavement. Meyer was taken to the hospital by ambulance and pronounced brain dead two days later. Gouveia was arrested and charged with manslaughter for recklessly causing the death of Meyer in violation of

Hawai'i Revised Statutes (HRS) § 707-702(1)(a).

On the afternoon of June 6, 2013, the same day the State and Gouveia made their closing arguments in Gouveia's trial, the jury sent two simultaneous communications to the circuit court. Communication No. 3, signed at 2:20 p.m., stated: "We reached a verdict." Communication No. 2, signed four minutes later, stated: "Concern. This morning on prosecutor's side of courtroom there was a man, shaved head, glaring and whistling at defendant. We have concern for our safety as jurors."

The circuit court told the State and Gouveia, "My intention, unless counsel . . . can persuade me otherwise, is just to take no action on this[.]" However, both counsel agreed that the court should question the jurors "[a]s to its effect, if any, on their deliberations and their verdict[.]" The circuit court then determined that, before opening the verdict, it would allow counsel to voir dire the jurors individually and would also ask questions directly.

Before questioning the jurors, the circuit court asked counsel whether they knew anything about the occurrence to which Communication No. 2 referred. Defense counsel stated that he was not aware of anything that had happened. The Deputy Prosecuting Attorney (DPA) stated that she did not see anything, but was aware that Meyer's brother had been in the courtroom that morning, was "pretty upset," and had a shaved head.

A. Questioning of the Jurors Regarding Communication No. 2

The circuit court questioned all twelve jurors individually. Four jurors stated that they witnessed an individual seated on the prosecutor's side of the courtroom whistling and/or glaring at Gouveia. The incident was brought up in the jury room, where some of the jurors who observed the incident stated that they "were a little bit scared." When Juror No. 4 was asked by the court, "So I take it you have concern for your safety," she replied, "Yes."

Seven jurors indicated that the discussion of the incident occurred before the verdict,

ranging from within ten minutes of commencing deliberation to the end of deliberation. At least four of these jurors indicated that the discussion occurred at the beginning of deliberations and that it was one of the first topics discussed. All twelve jurors stated that neither the incident itself nor the discussions of it affected their own decision, but when Juror No. 11 was asked if the incident "appear[ed] to have an impact on other people's decision[.]" she replied that "[i]t did."

B. The State Moves for a Mistrial

After all of the jurors had been questioned, the circuit court asked both the State and Gouveia if they wanted the court to take any further action. Gouveia said no, but the State moved for a mistrial.

The State argued there was a manifest necessity to declare a mistrial because the topic of the man glaring and whistling at Gouveia had come up during deliberations, no one had remarked that it was an improper topic for the jury to consider, and, based on the statement made by Juror No. 11, the topic had seemed to influence the other jurors. The State noted that approximately five of the jurors had said that the topic of the incident came up during deliberations, i.e., before the jury had reached its verdict. Thus, according to the State, the verdict was "tainted."

The State also argued that it was important that at least three jurors said the topic of the incident came up at the beginning of the deliberations because, along with the fact that the jurors decided to write a communication to the court after reaching a verdict, it implied that it was important to some of the jurors.

Gouveia argued that because the court had instructed the jurors that they had to decide the case based solely on the evidence presented, and each of the jurors said that the discussion did not impact their decision, there was no manifest necessity.

The circuit court determined that it was required to look at the totality of the circumstances and find beyond a reasonable doubt that the jurors' concern for their personal safety had no impact on any of the twelve

jurors' decisions. If it could not find that beyond a reasonable doubt, then there would be manifest necessity requiring a mistrial.

The circuit court then orally granted the State's motion for mistrial:

[W]hen I . . . apply my reason and common sense to this that at least some of these jurors have . . . what strikes me as a really serious concern for their personal safety and it came up according to, at least as I count, four or five of them, it [was] . . . one of the first topics of discussion when they got back in the room and started deliberating the case. Somebody brought it up and they started talking about it. It frankly beggars my reason and common sense that it would have no bearing on the deliberations in this case and therefore the verdict.

I'm going to grant the State's motion for mistrial. I'm going to find there's manifest necessity for such based on what I said . . . and everything else that's been put on the record, including my questions to counsel. The verdict's going to be sealed for future purposes, if any, but obviously we're not going to take the verdict. I'm declaring a mistrial and I'm finding manifest necessity for that, because I don't think there's anything short of a mistrial . . . that can cure it. The verdict's tainted, in my view, based on my findings.

And to be explicit about it, as the finder of fact, I don't find it credible that all 12 of these people despite the answer they gave me about no impact on their decision, I think at least one, and probably more than one of them . . . had these serious concerns about their safety. It really beggars my reason and common sense that it could not have had any impact on their deliberations and decision in this case.

The circuit court later added:

So the record's clear and [Defense Counsel] has this appellate issue if it becomes one in the future, I am importing that standard from the juror misconduct cases in my ruling here. . . . And I'm finding that I cannot find beyond a reasonable doubt that there was no impact on the deliberations or verdict in this case such that the verdict was not tainted.

On October 22, 2013, the circuit court entered its findings of fact (FOFs), conclusions of law (COLs), and order granting the State's motion for mistrial. The circuit court made the following relevant FOFs:

9. Seven of the jurors indicated discussion of the incident occurred before the verdict, ranging from within ten minutes of commencing deliberation to the end of deliberation. At least four of these seven jurors indicated discussion of the incident occurred at the beginning of deliberations, specifically that it was one of the first topics discussed.
10. During the discussion of the incident prior to verdict, the jurors who actually observed the incident communicated to the other jurors fear for their own safety.
11. Some of the juror answers regarding Communication No. 2 and the incident included the following:
 - a. Some jurors were worried about retaliation;
 - b. The unidentified male's look appeared hostile during the incident;
 - c. Some jurors were concerned;
 - d. Some jurors felt intimidated; and
 - e. The incident impacted other jurors' decisions.
12. Although all twelve jurors indicated that neither the incident itself nor the discussion regarding the incident during the deliberations affected their own decision, at least one juror indicated that the incident appeared to have impacted the deliberation process and decision.
13. The incident was not part of the evidence in the case at hand.
14. The verdict was never taken for this case. At no point during the proceedings did the Court take, read or otherwise get any indication of the jury's verdict.
15. The Court finds that the jurors' statements that the incident did not affect their decision-making process and/or deliberations are not credible as evidenced by the plain language of Communication No. 2 and answers of the voir dire of each individual juror.

16. The Court further finds that the concern for personal safety as expressed by the jurors had an impact on the jurors' decisions based on the totality of the circumstances present and thus its effect on the subsequent verdict was not harmless beyond a reasonable doubt.

The court made the following relevant COLs:

5. Communication No. 2 raised the concern of the Court and both counsel that the incident may have substantially prejudiced the right to a fair trial. After further investigating the totality of circumstances surrounding Communication No. 2, the Court concluded at least some of the jurors were not credible, although explicitly indicated they were not lying. The Court's concern is that although all twelve jurors unanimously agreed to release Communication No. 2, no juror admitted that the incident affected their own decision-making process. Furthermore, reason and common sense dictates that the incident did have an effect on the deliberations hence the impartiality of the jurors, which is not harmless beyond a reasonable doubt[.]

....

8. Under the totality of the circumstances in light of the plain language of Communication No. 2 and the voir dire of the individual jurors, the Court finds that the jury was not impartial in their [sic] deliberation and decision-making process. Based on the foregoing, there is no other remedy short of a mistrial to cure the issue at hand as neither a continuance nor a further jury instruction would appropriately address the issue of an impartial jury and its subsequent tainted verdict.

....

10. The incident underlying Communication No. 2 was both beyond the court's control and unforeseeable. Accordingly, based on Communication No. 2, and the totality of the circumstances, there is manifest necessity for a mistrial.

Gouveia filed a motion to dismiss based on double jeopardy, arguing that the circuit

2. Although it is apparent from the record that the parties believed the sealed verdict was "not

court erroneously found manifest necessity and, as such, "the continued prosecution of Defendant violates his federal and state constitutional rights against double jeopardy[.]" The circuit court denied Gouveia's motion.²

C. Appeal to the ICA

Gouveia alleged two points of error to the ICA: 1) the circuit court abused its discretion in declaring a mistrial because manifest necessity was not present; and 2) the circuit court erroneously denied his motion to dismiss for violation of double jeopardy.

In a memorandum opinion, the ICA affirmed the circuit court's order denying Gouveia's motion to dismiss for violation of double jeopardy. First, the ICA noted that Gouveia's primary argument was "his challenge to the Circuit Court's finding that the jurors' statements that the incident did not affect their decision making process and/or their deliberations were not credible." However, the ICA disagreed with Gouveia, and deferred to the circuit court's findings that the jurors were not influenced by the incident or the discussion: "[T]he Circuit Court was in a better position than this court to assess the credibility of the jurors, understand the dynamics of the trial process in this case, and evaluate the effect that the external incident had on the jurors' deliberations." Accordingly, the ICA held that the circuit court did not abuse its "broad discretion" in determining that manifest necessity existed for a mistrial.

The ICA also found that the circuit court had sufficiently considered alternative options to a mistrial when it concluded that "neither a continuance nor a further jury instruction would appropriately address the issue of an impartial jury and its subsequent tainted verdict." The ICA further noted that, in any event, Gouveia had failed to argue on appeal that the circuit court erred in failing to consider options less severe than a mistrial.

The ICA also noted that there was a possible violation of Hawai'i Rules of Evidence (HRE) Rule 606(b), but that even if the

guilty," this was not confirmed until the ICA unsealed the verdict on appeal.

circuit court violated this rule in allowing the jurors to be questioned regarding the effect of the incident and the discussion on their verdict, Gouveia had waived any such argument by failing to object to the questioning in the circuit court, failing to raise it as an issue on appeal, and in relying on the jurors' testimony in his appellate briefs.

The ICA rejected Gouveia's argument that the circuit court erroneously denied his motion to dismiss on double jeopardy grounds because “[w]hen a trial court declares a mistrial that is supported by a proper finding of manifest necessity, ‘retrial is not barred by the defendant’s right against double jeopardy.’”

Chief Judge Nakamura dissented on the ground that “the Circuit Court’s finding of manifest necessity was based on its erroneous view that such finding was *per se* required as a result of the jurors’ expression of concern for their safety.” The dissent agreed with the majority that any claim of error based on HRE Rule 606(b) was waived.

Gouveia sought review in this court, presenting three questions:

1. Did a divided [ICA] erroneously affirm the trial court’s declaration of a mistrial, at the request of [the State], over [Gouveia’s] objection, before receiving a jury’s not guilty verdict, based on “manifest necessity” when each juror indicated that his or her verdict was not influenced by an extra-judicial incident?
2. Did a divided [ICA] erroneously affirm the trial court’s denial of a Motion to Dismiss for Violation of Double Jeopardy based on the trial court’s prior declaration of the mistrial?
3. Did a divided [ICA] erroneously rely on testimony which should not have been permitted pursuant to Rule 606(b) of the [HRE]?

II. Standards of Review

A. Declaration of Mistrial and Finding of Manifest Necessity

[1-3] A trial court’s declaration of a mistrial is reviewed under the abuse of discretion standard. A determination of manifest

necessity is likewise left to the sound discretion of the trial court. An abuse of discretion occurs when the decisionmaker exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.

State v. Wilmer, 97 Hawai‘i 238, 243, 35 P.3d 755, 760 (2001) (citation and quotation marks omitted).

B. Denial of Motion to Dismiss for Violation of Double Jeopardy

[4-7] “A mistrial is properly declared and retrial is not barred by the defendant’s right against double jeopardy where the defendant consented to the mistrial or there was manifest necessity for the mistrial.” *Id.* at 242-43, 35 P.3d at 759-60.

The issue whether a reprocsecution is barred by double jeopardy is a question of constitutional law. We review questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Accordingly, we review questions of constitutional law *de novo* under the right/wrong standard.

State v. Rogan, 91 Hawai‘i 405, 411-12, 984 P.2d 1231, 1237-38 (1999) (citation and internal quotation marks omitted).

III. Discussion

A. The Circuit Court did not Rely on Improper Juror Testimony When it Concluded that Manifest Necessity Existed for a Mistrial

[8] Gouveia argues in his application that pursuant to HRE Rule 606(b), the circuit court should not have permitted the jurors to be questioned about whether the incident or subsequent discussion of the incident affected their decisions and that the ICA’s ruling that he had waived any claim of error based on HRE Rule 606(b) was “unfair.” Gouveia argues that the incompetent evidence violated his right to a fair trial and, without it, there was no basis for the trial court’s or the ICA’s decisions.

HRE Rule 606(b) provides:

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of

a verdict or indictment, a juror may not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may the juror's affidavit or evidence of any statement by the juror indicating an effect of this kind be received.

[9, 10] HRE Rule 606(b) is inapplicable to statements made prior to jurors reaching a verdict. See State v. Bailey, 126 Hawai'i 383, 402 n.23, 271 P.3d 1142, 1161 n.23 (2012). Once a verdict has been reached, however, "the court cannot consider the jurors' testimony as to the effect of the improper statement upon them." State v. Kim, 103 Hawai'i 285, 291, 81 P.3d 1200, 1206 (2003) (citation and quotation marks omitted). The court "can only consider whether such statement was made . . . and whether, given the statement, we can say that [the defendant] had a trial before an impartial jury." Id.

Here, the court's questions to the jurors were appropriate, except for the questions regarding the effect of the incident on the verdict. See id. However, the court specifically found that it did not find the jurors' responses on that point to be credible, and in any event, the record indicates that the bases for the court's decision comported with the limitations imposed by HRE Rule 606(b).

For instance, in the written FOFs, the circuit court found that seven jurors indicated that discussion of the incident occurred before the verdict. At least four of these jurors indicated that the discussion occurred at the beginning of deliberations, and that it was one of the first topics discussed. It also found that the incident caused some jurors to feel concern, intimidation, and fear retaliation. Based on these facts, the court found that "the concern for personal safety as expressed by the jurors had an impact on the jurors' decisions based on the totality of the circumstances present and thus its effect on

3. The ICA concluded that Gouveia waived his HRE Rule 606(b) challenge by failing to object to the court's questioning of the jurors as to the effect of the incident on their decision-making. Because we conclude that the bases for the

the subsequent verdict was not harmless beyond a reasonable doubt."

In short, the court properly asked the jurors what occurred, their reaction to what occurred, whether the incident was discussed by some or all of the jurors, when it was discussed during deliberations, the length of the discussion, and what other jurors said about the incident. Based on these answers, it concluded that there was manifest necessity for a mistrial. Accordingly, we do not agree with Gouveia that the circuit court relied on improper HRE Rule 606(b) testimony.³

B. The Circuit Court did not Abuse its Discretion in Finding that Manifest Necessity Existed for a Mistrial Because the Presumption of a Possibility of Unfairness was not Rebutted Beyond a Reasonable Doubt

Gouveia argues that the circuit court abused its discretion when it found there was manifest necessity for a mistrial. Specifically, Gouveia contends that each juror stated that their verdict was not influenced by the incident or subsequent discussions regarding it, that the jurors' concerns regarding their safety were "peripheral to Gouveia's guilt or innocence[.]" and that there was "no evidence that the incident was used as a circumstance against either party." Lastly, Gouveia adopts the argument in the ICA's dissent that "the circuit court's finding of manifest necessity was based on its erroneous view that such finding was per se required as the result of the jurors' expression of concern for their safety[.]"

We conclude that the circuit court did not abuse its discretion in deciding that manifest necessity existed for a mistrial because the presumption of prejudice could not be overcome beyond a reasonable doubt and no reasonable alternatives to a mistrial were available.

court's decision comported with the limitations imposed by HRE Rule 606(b), we do not reach the waiver issue, or endorse the ICA's discussion of that issue.

1. The circuit court did not abuse its discretion in finding that, under the totality of the circumstances, manifest necessity existed to warrant a mistrial

[11] The right to a fair trial is guaranteed to both defendants and to the State. Although the defendant has a valued right to have his case concluded by a single tribunal,

[12] [b]ecause 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.

State v. Quitog, 85 Hawai'i 128, 142, 938 P.2d 559, 573 (1997) (emphasis added) (quoting Arizona v. Washington, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)).

[13] “A mistrial is properly declared and retrial is not barred by the defendant’s right against double jeopardy where the defendant consented to the mistrial or there was manifest necessity for the mistrial.” Wilmer, 97 Hawai'i at 242–43, 35 P.3d at 759–60. Manifest necessity is defined as “circumstances in which it becomes no longer possible to conduct the trial or to reach a fair result based upon the evidence.” Id. at 244, 35 P.3d at 761 (quoting Quitog, 85 Hawai'i at 143, 938 P.2d at 574). Hawai'i law states that termination of prosecution is not improper, and thus a defendant can be retried, when “[p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State[.]” HRS § 701–110(4) (b) (iii).

[14] Therefore, manifest necessity protects the right to a fair trial for both the defendant and the State. See State v. Deguair, 136 Hawai'i 71, 91, 358 P.3d 43, 63 (2015).

In Wilmer, we noted that “[b]ecause manifest necessity is a high standard not to be declared lightly, a trial judge should record

his or her reasons for declaring a mistrial and include the reasons for finding manifest necessity.” 97 Hawai'i at 245, 35 P.3d at 762. Moreover, we stated that “it is impossible to define all the circumstances that would render it proper to interfere by declaring a mistrial” and that “no standard can be applied mechanically or without attention to the particular problem confronting the trial judge.” Id. at 244–45, 35 P.3d at 761–62 (citations, quotation marks, and brackets omitted). A determination of manifest necessity is left to the sound discretion of the trial court. Id. at 243, 35 P.3d at 760.

[15, 16] When circumstances arise that could influence the impartiality of the jury and thus affect the ability to reach a fair result based on the evidence, a rebuttable presumption of prejudice is raised. See id. at 244, 35 P.3d at 761; see also State v. Napulou, 85 Hawai'i 49, 55–56, 936 P.2d 1297, 1303–04 (1997). To overcome such a presumption, the trial court, after investigating the totality of the circumstances, must find that the outside influence on the jury was harmless beyond a reasonable doubt. Wilmer, 97 Hawai'i at 244, 35 P.3d at 762. If this influence cannot be proven harmless beyond a reasonable doubt, then the court must look at all reasonable alternatives to cure the harm before declaring a mistrial. State v. Minn, 79 Hawai'i 461, 465, 903 P.2d 1282, 1286 (1995).

[17] In the present case, upon receiving Communication No. 2, both counsel recognized that the possibility of an improper influence existed and requested that the court question the jurors. This possibility of an improper influence created a rebuttable presumption of prejudice. Wilmer, 97 Hawai'i at 244, 35 P.3d at 762. The circuit court agreed to the request, conducted voir dire of each juror individually, and allowed both the DPA and defense counsel to question the jurors. Therefore, the issue here is whether the circuit court abused its discretion in finding that the presumption was not proven harmless beyond a reasonable doubt and no reasonable alternative to declaring a mistrial

existed.⁴

After questioning the jurors regarding the incident in the courtroom, the circuit court found that the majority of the jurors indicated that discussion of the incident occurred prior to the verdict and that some jurors communicated fear for their own safety. The circuit court also found that “the concern for personal safety as expressed by the jurors had an impact on the jurors’ decisions based on the totality of the circumstances present and thus its effect on the subsequent verdict was not harmless beyond a reasonable doubt.”

Based on these FOFs, the circuit court concluded that even though no juror admitted that the incident affected their own decision-making process, “reason and common sense dictates that the incident did have an effect on the deliberations hence the impartiality of the jurors, which is not harmless beyond a reasonable doubt[.]” The circuit court concluded that:

[u]nder the totality of the circumstances in light of the plain language of Communication No. 2 and the voir dire of the individual jurors . . . the jury was not impartial in their deliberation and decision-making process, [and] there is no other remedy short of a mistrial to cure the issue at hand as neither a continuance nor a further jury instruction would appropriately address the issue of an impartial jury and its subsequent tainted verdict.

In looking at the totality of the circumstances, including the discussion of the incident in the jury room and the likelihood that it was one of the first things discussed, the circuit court was well within its discretion to conclude that manifest necessity existed for a mistrial because the presumption of prejudice was not overcome beyond a reasonable

4. Gouveia argues that the circuit court found that manifest necessity was “per se” required due to the outside influence of the individual’s behavior. This argument is without merit. The circuit court asked the DPA, “don’t you think its per se an inappropriate extraneous circumstance that if the jurors have concerns for personal safety based on something they observed in the courtroom . . . that if it entered their discussions and had an impact on any of them, that it would taint the verdict?” (emphasis added). It is clear that the court did not view the conduct as neces-

doubt. Cf. *Bailey*, 126 Hawai'i at 402–03, 271 P.3d 1142 (trial court should have granted a new trial based on a juror’s remarks during deliberations, despite other jurors saying the remarks did not affect their verdict).

Gouveia contends the circuit court committed clear error because there was no evidence in the record that the incident affected the jurors’ decision-making process and/or deliberations. He bases this argument primarily on the fact that each of the twelve jurors stated that the incident did not affect his or her verdict, and asserts that without evidence to the contrary, the court must presume the jury follows the court’s instructions in not considering outside evidence or being influenced by emotion.

[18, 19] Gouveia’s argument misconstrues the applicable law. Once there is a showing that an outside incident may have influenced the jury, there is a rebuttable presumption of prejudice that must be overcome beyond a reasonable doubt. *Napulou*, 85 Hawai'i at 55–56, 936 P.2d at 1303–04. A prima facie showing of improper influence is all that is required to raise that presumption. *State v. Chin*, 135 Hawai'i 437, 448, 353 P.3d 979, 990 (2015). Therefore, it is the possibility of improper influence that must be disproved. *Id.* It is Gouveia, then, who must show that the court abused its discretion in concluding that under the totality of the circumstances, the outside influence was not harmless beyond a reasonable doubt.

Gouveia compares the facts of this case to a similar circumstance which occurred in Napulou. In Napulou, the jury sent a communication to the court after some members of the defendant’s family were seen entering the same parking lot as the jurors. The communication, sent immediately after the inci-

sarily requiring a mistrial. In FOF 16, for example, the court found that based on the “totality of the circumstances,” the effect on the verdict “was not harmless beyond a reasonable doubt.” And in COL 10, the court concluded that “based on Communication No. 2, and the totality of the circumstances, there is manifest necessity for a mistrial.” Based on this record, we disagree with Gouveia and the dissent that the circuit court believed that its finding of manifest necessity was per se required as a result of the jurors’ safety concerns.

dent was mentioned in the jury room and prior to a verdict being reached, asked, “[i]f a guilty verdict is given, could there be a danger to some of us or has some arrangement been made for protection?” Napulou, 85 Hawai’i at 51–52, 936 P.2d at 1299–300. The trial court, after conducting voir dire of the jurors, found the jurors could be impartial and denied Napulou’s motion for a mistrial. *Id.* at 54, 936 P.2d at 1302. The ICA affirmed, finding that the trial court was empowered to assess the credibility of the jurors and that the record supported the conclusion that any improper comments were harmless beyond a reasonable doubt. *Id.* at 56, 936 P.2d at 1304.

This case is distinguishable from Napulou. Notably, the communication in Napulou occurred prior to the verdict, and thus the court could rely on the jurors self-assessment as to whether they could remain impartial. See Bailey, 126 Hawai’i at 402 n.23, 271 P.3d at 1161 n.23. The voir dire of the jurors in Napulou revealed that the concerns were “peripheral to the matter of Napulou’s guilt or innocence” and that “the jurors paid little attention to members of Napulou’s family.” Napulou, 85 Hawai’i at 56, 936 P.2d at 1304. Further, the trial court found the jurors’ assertions that “they could continue as impartial jurors, unaffected by the safety concerns that had disturbed them” to be credible. *Id.*

In contrast, the jury communication in the instant case was a statement that the jurors were actually concerned for their safety, not merely inquiring into the possibility of danger. Additionally, at least four jurors stated that the discussions of the incident and potential danger happened at the beginning of deliberations, which indicates those discussions could have had an effect on the subsequent jury deliberations. Under these circumstances, the circuit court was well within its discretion to conclude that under the totality of the circumstances, the outside influence was not harmless beyond a reasonable doubt.

2. No reasonable alternative to a mistrial would have eliminated the potential of prejudice

[20] After determining that there was an outside influence on the jury, the circuit

court was required to consider all reasonable alternatives that would be less severe than a mistrial. “When examining the record for evidence of manifest necessity, we must determine whether the trial court sufficiently considered . . . less severe options available and balance[d] the accused’s rights against the public interest.” Minn, 79 Hawai’i at 465, 903 P.2d at 1286.

In Napulou, the trial judge was able to question the jurors prior to a verdict being delivered. During this process, the court was able to alleviate any lingering concerns the jurors had regarding their safety. Cf. 85 Hawai’i at 56, 936 P.2d at 1297. This, along with the trial court’s finding that the jurors’ statements about being able to proceed without the outside influence affecting their deliberations were credible, allowed the court to proceed without concern for the impartiality of the jury.

In Wilmer, this court found that several instances of prosecutorial misconduct resulted in little actual prejudice to the defendant. 97 Hawai’i at 245, 35 P.3d at 762. The inappropriate conduct arose prior to jury deliberations, and the trial court denied the defendant’s request to proceed with the trial after finding that manifest necessity existed for a mistrial. *Id.* In reversing the trial court, we found “[w]hat little prejudice did result could have been cured through means other than a mistrial” and thus “the trial court abused its discretion in concluding there was manifest necessity for the mistrial because the circumstances creating an apparent need for a mistrial did not make it impossible for the trial to proceed.” *Id.* at 245–46, 35 P.3d at 762–63.

[21] Here, unlike in Napulou and Wilmer, the jury reached a verdict, informed the court that they had reached the verdict, then notified the court that there was a concern for their safety because of the incident. Under these circumstances, the circuit court determined that the verdict was already tainted and that neither a continuance nor additional jury instructions to ignore the outside influence would have been effective. This determination was reasonable.

Based on the facts of this case, the circuit court's determination that nothing short of a mistrial would have cured the potentially impartial jury was not an abuse of discretion.

C. Because There was Manifest Necessity for a Mistrial, Retrial is not Barred by Double Jeopardy

The final issue raised is whether the ICA erroneously affirmed the trial court's denial of Gouveia's motion to dismiss for violation of double jeopardy. "A mistrial is properly declared and retrial is not barred by the defendant's right against double jeopardy where . . . there was manifest necessity for the mistrial." *Wilmer*, 97 Hawai'i at 242-43, 35 P.3d at 759-60. In light of our ruling that the circuit court was within its discretion in concluding that manifest necessity existed, retrial of Gouveia is not barred by double jeopardy.

IV. Conclusion

The circuit court did not abuse its broad discretion in determining that manifest necessity existed for a mistrial. Accordingly, it appropriately denied Gouveia's motion to dismiss on double jeopardy grounds.

Therefore, the ICA's June 4, 2015 judgment on appeal is affirmed, but for the reasons stated herein.

**DISSENTING OPINION BY
NAKAYAMA, J.**

Our review of this case focuses on two notes sent by the jury. The first note announced to the court that the jury had reached a verdict. The second note, signed four minutes after the first, expressed the jurors' concern for their safety based on the behavior of a man seated on the prosecutor's side of the courtroom. After questioning the jurors regarding the notes, the circuit court declared a mistrial based on manifest necessity, concluding that "the jury was not impartial in their deliberation and decision-making process" because of the possibility that they were influenced by the man's behavior.

The Majority concludes that the circuit court did not abuse its discretion in deciding that manifest necessity existed for a mistrial.

However, under the totality of the circumstances, the record evidences that the jurors were impartial despite expressing concern for their safety. Additionally, under Hawai'i law, jurors' safety concerns are not per se grounds for declaring a mistrial. For these reasons, I respectfully dissent from section III.B of the Majority's opinion and conclude that manifest necessity did not exist for a mistrial. As such, I would hold that Gouveia's retrial is now barred by the protection against double jeopardy.

I. BACKGROUND

During an argument on September 25, 2012, Gouveia punched or slapped Albert Meyer, who then fell and struck his head on the road. Days later, Meyer died from brain injuries related to the fall. Gouveia was arrested and charged with manslaughter in violation of Hawai'i Revised Statutes § 707-702(1)(a).

After closing arguments were made and the jury entered deliberations, the jury sent the court two notes. The first note stated: "We reached a verdict." The second, signed four minutes after the first, stated: "Concern. This morning on prosecutor's side of courtroom [sic] there was a man, shaved head, glaring and whistling at defendant. We have concern for our safety as jurors."

The circuit court conferred with counsel for both sides. Defense counsel stated that he knew nothing about the incident described in the second note. The prosecutor stated that, while she did not witness the incident, she did know that the decedent's brother, who had a shaved head, was in the courtroom and that "he was pretty upset."

The circuit court decided to investigate this matter further before opening the verdict by conducting a voir dire of the jurors. The circuit court, along with counsel for both sides, questioned all twelve jurors individually. The voir dire revealed the following: 1) four jurors witnessed a man, seated on the prosecutor's side of the courtroom, whistling and/or glaring at Gouveia, and that this incident was brought to the attention of the other jurors sometime during deliberations; 2) seven jurors testified that discussion of the

incident occurred before the verdict was reached; 3) one juror testified that the incident “appear[ed] to have an impact on other people’s decision[,]” although it did not impact her decision; and 4) all twelve jurors testified that “neither the incident itself nor the discussion regarding the incident during the deliberations affected their own decision[.]”.

At the conclusion of voir dire, defense counsel stated that he wished to take the verdict. The State, in contrast, moved for a mistrial, arguing that there was manifest necessity because the incident was discussed during deliberations and seemed to influence some jurors. When the State began to explain that the incident tainted the verdict because of the facts of the case, the circuit court interrupted and asked the following:

Doesn’t matter, I mean, does it even matter what the facts or what’s in dispute? Isn’t it—don’t you think it’s per se an inappropriate extraneous circumstance that if the jurors have concerns for personal safety based on something they observed in the courtroom being done by somebody in the gallery, that if it entered their discussions and had an impact on any of them, that it would taint the verdict?

The State agreed.

Defense counsel argued that a mistrial based on manifest necessity was not required because “[e]very one of the jurors” testified that the incident had no impact on their decision, and that most of the jurors indicated that the concern was more of an afterthought that had no bearing on the deliberations.

After listening to the arguments, the circuit court orally granted the State’s motion for mistrial:

I find it difficult to really believe when I, you know, apply my reason and common sense to this that at least some of these jurors have this, what strikes me as a really serious concern for their personal safety and it came up according to, at least as I count, four or five of them, it came up, was one of the first things, one of the first

1. Although the verdict was not unsealed at the circuit court level, the record indicates that both

things, one of the first topics of discussion when they got back in the room and started deliberating the case. Somebody brought it up and they started talking about it. It frankly beggars my reason and common sense that it would have no bearing on the deliberations in this case and therefore the verdict.

I’m going to grant the State’s motion for mistrial. I’m going to find there’s manifest necessity for such based on what I said and all the—and everything else that’s been put on the record, including my questions to counsel.

The verdict’s going to be sealed for future purposes, if any, but obviously we’re not going to take the verdict. I’m declaring a mistrial and I’m finding manifest necessity for that, because I don’t think there’s anything short of a mistrial that’s going—that can cure it. The verdict’s tainted, in my view, based on my findings.¹

On October 22, 2013, the circuit court entered its findings of fact, conclusions of law, and order granting the State’s motion for mistrial, holding that there was manifest necessity for a mistrial.

II. DISCUSSION

A. Manifest Necessity Did Not Exist For A Mistrial.

“A mistrial is properly declared and retrial is not barred by the defendant’s right against double jeopardy where the defendant consented to the mistrial or there was manifest necessity for the mistrial.” *State v. Wilmer*, 97 Hawai‘i 238, 242–43, 35 P.3d 755, 759–60 (2001) (citing *State v. Quitor*, 85 Hawai‘i 128, 142, 938 P.2d 559, 573 (1997)). In this case, Gouveia did not consent to the mistrial; thus, our inquiry focuses on whether there was manifest necessity for the mistrial.

“Manifest necessity is defined as . . . circumstances in which it becomes no longer possible to conduct the trial or to reach a fair result based upon the evidence.” *Wilmer*, 97 Hawai‘i at 244, 35 P.3d at 761 (quoting *Quitor*, 85 Hawai‘i at 143, 938 P.2d at 574). When a fair result is potentially compromised be-

the court and the parties believed that the verdict was “not guilty.”

cause of outside influences affecting the jury, the court must act:

the initial step for the trial court to take . . . is to determine whether the nature of the [outside influence] rises to the level of being substantially prejudicial. . . . Where the trial court does determine that such influence is of a nature which could substantially prejudice the defendant's right to a fair trial, a rebuttable presumption of prejudice is raised. The trial judge is then duty bound to further investigate the totality of circumstances surrounding the outside influence to determine its impact on jury impartiality. . . . The standard to be applied in overcoming such a presumption is that the outside influence on the jury must be proven harmless beyond a reasonable doubt.

State v. Williamson, 72 Haw. 97, 102, 807 P.2d 593, 596 (1991) (internal quotation marks and citations omitted; formatting altered); *see also State v. Napulou*, 85 Hawai'i 49, 55–56, 936 P.2d 1297, 1303–04 (App. 1997).

In short, Hawai'i courts utilize a two-step inquiry for determining whether a mistrial based on manifest necessity is warranted when outside influences occur: 1) whether the nature of the outside influence on the jury could be substantially prejudicial to a fair trial, and, if so, 2) whether, under the totality of the circumstances, the outside influence on the jury was harmless beyond a reasonable doubt.

Under the first step, the circuit court correctly recognized that the outside influence raised the possibility of substantial prejudice to a fair trial and properly conducted an investigation to determine the impact of the outside influence on juror impartiality. Under the second step, however, I conclude for two reasons that the circuit court erred when it held that the outside influence was not harmless beyond a reasonable doubt.

1. The totality of the circumstances indicates that the outside influence on the jury was harmless beyond a reasonable doubt.

First, under the totality of the circumstances, the timing and substance of the jury

communications, along with the jurors' testimonies during voir dire, indicate that the verdict was not tainted by the outside influence and was thus harmless beyond a reasonable doubt.

The record evidences that the jury signed the first note, announcing that they had reached a verdict, four minutes before signing the second, which expressed their safety concern. The timing of the notes indicates that the verdict was reached before the jurors decided to express their concern to the court, which implies that the concern stemmed from the verdict. This implication is supported by the voir dire testimony of several jurors:

[THE COURT]: And do you have any idea, was there any discussion or do you have any inferences or anything about why the jurors thought I should know about this? Did they want me to do something about it, or what was you all's intention, if you can tell me that, of communicating this to me?

[JUROR # 3]: I think that everyone wanted to feel that they could leave safely today when it was over.

(Emphasis added).

[DEFENSE COUNSEL]: Did anybody—okay, obviously there was a decision to inform the Court and express concern. What kind of concern was expressed?

[JUROR # 4]: I think it was once the verdict was read, that maybe there would be some retaliation against, you know, of us for whatever reason just being a juror.

...

[DEFENSE COUNSEL]: What were the discussions about—the concerns, I guess, how's that?

[JUROR # 4]: Just like what I said before that once the verdict was, you know, like I said, was said, we would be in jeopardy or could be in jeopardy.

(Emphasis added).

[THE COURT]: Best estimate. When did [discussion of the safety concerns] first come up—early, middle, late in the deliberations?

[JUROR # 7]: Towards the end.

[THE COURT]: Toward the end. Not before?

[JUROR # 7]: No it wasn't before. It wasn't about the case, so we weren't really focused on it.

...

[THE COURT]: Okay, that's fine. About how long did you all talk about this?

[JUROR # 7]: Not very. Just brought it up for a few minutes, and then one of the ladies said, okay, I wonder if that would be directed at us, you know, after everything's done, and maybe we should just raise it so everybody can be aware that there was someone that seemed threatening to another person.

(Emphasis added). These testimonies indicate that the safety concern arose because of the substance of the verdict reached by the jurors, and that the concern did not influence the jurors' deliberation of the verdict. Additionally, all jurors testified during voir dire that the incident did not affect their ability to be impartial jurors.

Finally, even if we were to conclude that the jurors' concern for their safety did influence the verdict, the logical implication of that conclusion is that the jurors would have been influenced to decide against Gouveia for fear of retribution by the man they observed glaring and whistling at Gouveia. However, the above testimonies of jurors three, four, and seven indicate that the jurors were concerned for their safety post-verdict, which suggests that they decided in favor of Gouveia and were fearful of retaliation by the shaved-head man.² As such, the jurors' testimonies lend support to the conclusion that the outside influence did not taint the verdict but simply raised concerns amongst the jurors of possible retaliation after the verdict was read.

Therefore, although this incident raised the possibility of substantial prejudice to a fair trial, the totality of the circumstances reveals that the outside influence did not taint the verdict and was thus harmless beyond a reasonable doubt.

2. In fact, the verdict, unsealed at the ICA level, revealed that the jury did decide in favor of Gouveia. And while this court had the benefit of

2. Jurors' safety concerns are not per se grounds for declaring a mistrial.

Second, safety concerns like those expressed by the jurors in this case are not, on their own, sufficient grounds for declaring a mistrial under Hawai'i law.

For example, in *State v. Napulou*, 85 Hawai'i 49, 936 P.2d 1297 (App. 1997), the ICA considered a similar set of facts and issue. During deliberations in a second degree murder and burglary trial, the empaneled jurors discussed amongst themselves their concerns that members of the defendant's family were following jurors from the courtroom to the parking area. *Id.* at 51, 936 P.2d at 1299.

The jurors eventually sent a communication to the court, which stated: "Some jurors have noticed members of [Napulou's] family following them downstairs and toward the car garage. If a guilty verdict is given[,] could there be a danger to some of us or has some arrangement been made for protection." *Id.* at 51–52, 936 P.2d at 1299–300. The circuit court conducted a voir dire of each juror and each juror testified that he or she could continue to deliberate on the evidence fairly and impartially. *Id.* at 54, 936 P.2d at 1302. After the voir dire, Napulou moved for a mistrial, which was denied by the circuit court. *Id.* Napulou was convicted of attempted murder in the second degree, burglary in the first degree, and assault in the second degree. *Id.* at 51, 936 P.2d at 1299. Napulou appealed, arguing that the circuit court erred when it denied his motion for a mistrial because the evidence indicated that the jury's verdict had been tainted by their concern for their safety. *Id.*

On appeal, the ICA affirmed the decision of the circuit court, concluding that the "statements of the jurors on voir dire, if believed, were sufficient to establish beyond a reasonable doubt that Napulou was not denied an impartial jury." *Id.* at 56, 936 P.2d at 1304. In coming to this conclusion, the ICA considered the following:

In Napulou's case, the trial court implicitly recognized that the jurors' comments re-

seeing the verdict where the circuit court did not, the record suggests that the circuit court also believed the verdict was not guilty.

garding their safety concerns and possible retaliation by Napulou's family possibly affected Napulou's substantial right to receive a fair trial by an impartial jury. The court therefore conducted a voir dire of each juror outside the presence of the other jurors, in accordance with Williamson, to determine if any jurors had actually been tainted by the jury's discussion about Napulou's family.

The trial court questioned each juror individually. The proceedings were unhurried and thorough. Napulou's defense counsel was permitted to question the jurors and did so at some length. The questioning revealed that the jurors paid little attention to members of Napulou's family. Clearly, any concerns of the jurors about Napulou's family were peripheral to the matter of Napulou's guilt or innocence and did not have a direct bearing on the evidence in the case. Neither the court nor counsel elicited any evidence during the voir dire to indicate that the jurors' comments regarding Napulou's family were "used as a circumstance against" Napulou or that jurors considered the comments in question during their deliberations. Furthermore, the three jurors who appeared most concerned for their safety, jurors Nos. 2, 9, and 12, were positive in their assertions that they could continue as impartial jurors, unaffected by the safety concerns that had disturbed them.

Id. Thus, the ICA determined that the jurors' safety concerns were not *per se* grounds for declaring a mistrial.

Similarly, in the current case, the jurors sent a communication to the court expressing concern for their safety. The circuit court recognized that the jurors' concern raised the possibility of substantial prejudice to a fair trial and conducted a voir dire to determine if the verdict had been tainted by the jurors' concern. As in *Napulou*, the circuit court, and counsel for both sides, questioned each juror individually. And, as in *Napulou*, each juror indicated that the safety concern did not affect his or her deliberation of the case. As such, *Napulou* and the current case are factually similar in important ways, namely that: 1) jurors in both cases expressed safety

concerns to the court, and 2) all the jurors, when questioned during voir dire, indicated that these concerns did not affect their ability to be impartial jurors. And yet, these factually similar cases had different outcomes.

In *Napulou*, the ICA upheld the trial court's denial of a motion for mistrial that was based on jurors' safety concerns. In contrast, the record in this case indicates that the circuit court relied heavily, if not solely, on the jurors' safety concern as a basis for declaring a mistrial. For instance, when questioning the prosecutor about her reasoning behind the motion for a mistrial, the circuit court asked:

Isn't it—don't you think it's per se an inappropriate extraneous circumstance that if the jurors have concerns for personal safety based on something they observed in the courtroom being done by somebody in the gallery, that if it entered their discussions and had an impact on any of them, that it would taint the verdict?

(Emphasis added). Thus, it appears that, in reaching its conclusion, the circuit court believed that the jurors' safety concern, on its own, was sufficient grounds for a mistrial. This was error.

Napulou established that jurors' safety concerns are not *per se* grounds for declaring a mistrial. Based on this precedent, and the evidence in this case that the safety concern did not affect the jurors' impartiality, the circuit court should have concluded that any concern that the jurors had for their safety was peripheral to a determination that Gouveia was guilty or not guilty. *See also U.S. v. Maye*, 241 Fed.Appx. 638, 641–42 (11th Cir. 2007) ("We have explained that discussions among the jurors as to their fear of the defendants are not inappropriate, so long as such discussions do not lead them to form an opinion of the defendants' guilt or innocence of the offenses charged.") (formatting altered).

III. CONCLUSION

In sum, the totality of the circumstances evidences that the outside influence did not affect juror impartiality in this case. The

timing and substance of the juror communications, in addition to juror testimony during voir dire, strongly suggest that the jurors' safety concern merely stemmed from the verdict they reached, and did not factor into the verdict deliberations. Additionally, *Napulou* established that jurors' safety concerns, on their own, are not grounds for declaring a mistrial.

For these reasons, I conclude that the outside influence on the jury was harmless beyond a reasonable doubt and that manifest necessity did not exist to declare a mistrial. As such, I would hold that the State is barred under double jeopardy from trying Gouveia again.



139 Hawai'i 86

STATE of Hawai'i, Respondent/Plaintiff-Appellee,

v.

**Siriporn NILSAWIT,
Respondent/Defendant-Appellee,**

and

**HAWAII NEWS NOW,
Petitioner/Applicant-Appellant.**

SCWC-15-0000372

Supreme Court of Hawai'i.

NOVEMBER 10, 2016

Background: News gathering agency submitted renewed application for extended coverage of criminal proceeding. The District Court, First Circuit, Faye M. Koyanagi, J., denied parts of application and later denied agency's motion for leave to appeal. Agency appealed. The Intermediate Court of Appeals, Foley, J., 367 P.3d 708, 137 Hawai'i 214, dismissed. Agency's application for writ of certiorari was accepted.

Holdings: The Supreme Court, Pollack, J., held that:

- (1) news gathering agency was not "party" to criminal proceeding, and thus was not authorized to utilize procedure set forth in rule allowing parties to seek interlocutory appeal of extended coverage orders;
- (2) news gathering agency was member of the "media," and thus was required to utilize procedure set forth in rule allowing media to obtain review of extended coverage orders by filing motion addressed to administrative judge no later than five days after order was filed; and
- (3) even if news gathering agency's request for extended coverage of criminal proceeding was a civil matter, district court's order was not final, appealable judgment under statute governing appeals in civil actions.

Affirmed.

1. Criminal Law ☞633.32

Where a request for extended coverage of a criminal proceeding originates from a member of the media, review of a district court's decision regarding that request is limited to the procedure set forth in rule allowing the media to obtain review of extended coverage decisions by filing a motion with administrative judge no later than five days after the decision was filed. Haw. R. Sup. Ct. 5.1(f)(8).

2. Criminal Law ☞1139

The existence of jurisdiction is a question of law that the Supreme Court reviews de novo under the right/wrong standard.

3. Criminal Law ☞1139

Construction of rules promulgated by the Supreme Court is reviewed de novo.

4. Criminal Law ☞1023.5

News gathering agency, which submitted request for extended coverage of criminal proceeding, was not "party" to criminal proceeding, and thus was not authorized to uti-