IN THE

Supreme Court of the United States

RICHARD L. STARGHILL, II,

Petitioner,

V.

UNITED STATES OF AMERICA.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Sixth Circuit

APPENDIX

1. **District Court Opinion**

2. **Sixth Circuit Opinion**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **RICHARD L. STARGHILL, II,** **aka Richard Starghill** **Defendant.**	**CRIMINAL NO. 7:19-CR-05-KKC** **OPINION AND ORDER**

*** *** ***

This matter is before the Court on Defendant Starghill's motion to dismiss. (DE 91.) Defendant asks the Court to dismiss the second superseding indictment with prejudice. For the reasons stated below, Defendants motion (DE 91) is **DENIED**.

I. BACKGROUND

Defendant is charged with possession of an unregistered firearm and possession of a firearm by a convicted felon. On November 4, 2019, the case proceeded to trial in Pikeville, Kentucky. The United States and the Defendant presented witnesses, gave closing arguments, and the matter was submitted to the jury. Soon thereafter, the jury began sending notes to the undersigned regarding their deliberations. In direct contravention of the jury instructions given, the jurors disclosed where they stood on votes for conviction and acquittal. The Court placed the jurors' note under seal and did not disclose the information to the parties. Following, the jury indicated to the Court that it was deadlocked. The Court issued an *Allen* charge and instructed the jury to continue their deliberations. Defense

counsel then moved for a mistrial, which was denied without prejudice by the Court. At the jury's request, they were released to return the following morning.

On November 5, 2019, the jury reassembled and continued their deliberations. Immediately thereafter, the Court received further notes regarding witness testimony. The Court then received a note from a juror stating that he or she had contacted an outside party regarding the case—also in direct contravention of the jury instructions given. The Court disclosed the note to the parties, and the Defendant renewed his motion for mistrial based on the outside information being discussed in jury deliberations. Based on the totality of the circumstances, the Court found the jury was deadlocked and granted the renewed motion for mistrial. (*See* DE 66.)

The Court scheduled a new trial for December 17, 2019. During voir dire, it was brought to the attention of the presiding judge, the Honorable Amul R. Thapar, that a juror was openly making inappropriate comments in the jury room. Some jurors were questioned regarding the comments, and it soon became clear that a juror had looked up extraneous information on the case, including information regarding the specifics of the Defendant's criminal history. Due to the prejudicial nature of the misconduct overheard by several members of the jury pool, the Defendant moved for a mistrial, which was granted by the Court.

The Court scheduled a new trial for February 13, 2020, and the Defendant filed the present motion to dismiss. Defendant asserts that the case should be dismissed because the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution should present a bar to retrial in instances of repeated juror misconduct. (DE 91 at 6.)

The Court finds that the Double Jeopardy Clause of the Fifth Amendment does not present a bar to retrial in instances of repeated jury misconduct. Accordingly, the Defendant's motion is denied.

II. ANALYSIS

The law simply does not support the relief sought by the Defendant. The Double Jeopardy Clause of the Fifth Amendment serves to protect a criminal defendant from repeated prosecutions for the same offense. *United States v. Dinitz*, 424 U.S. 600, 606 (1976).[1] "As part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a 'valued right to have his trial completed by a particular tribunal.'" *Oregon v. Kennedy*, 456 U.S. 667, 671–72 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). "The Double Jeopardy Clause, however, does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Id*. at 672. Jeopardy attaches when the original jury panel is seated and sworn. *Watkins v. Kassulke*, 90 F.3d 138, 141 (6th Cir. 1996) (citing *Crist v. Bretz*, 437 U.S. 28, 38 (1978)). "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury . . . is barred unless (1) there is a 'manifest necessity' for a mistrial or (2) the defendant either requests or consents to a mistrial." *Id.* (citing *Dinitz*, 424 U.S. at 606-07). However, even where the defendant requests or consents to a mistrial, "he may invoke the bar of double jeopardy in a second effort to try him *only if* the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct *intended* to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 667 (emphasis added). The existence of intent is determined based on consideration of "objective facts and circumstances." *United States v. Colvin*, 138 Fed. Appx. 816, 820 (6th Cir. 2005) (citing *id*. at 675). It is not necessary that the misconduct have the specific purpose of provoking the defendant's request for a mistrial, but it must be misconduct intended to undermine the integrity of the proceedings, thereby prejudicing the defendant. *See United States v. Enoch*,

[1] The Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 (1969).

650 F.2d 115, 117 (6th Cir. 1981). "Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion).

In the present case, there were two mistrials declared by the Court. In the first mistrial, there was both a clear manifest necessity for the mistrial and a request for the mistrial by the Defendant. The second mistrial was also requested by the Defendant.[2] Additionally, both the first and second mistrials did not involve prosecutorial or judicial misconduct, and they were not the result of conduct intended to provoke the defendant into moving for a mistrial.

"A deadlocked jury 'has long been considered the classic basis establishing manifest necessity' justifying a mistrial." *United States v. Capozzi*, 723 F.3d 720, 727 (6th Cir. 2013) (quoting *Blueford v. Arkansas*, 566 U.S. 599, 609 (2012)); *see also Kennedy*, 456 U.S. at 672 ("[T]he hung jury remains the prototypical example" of manifest necessity.). Here, the Court granted the Defendant's motion for mistrial based on its finding that the jury was deadlocked. (*See* DE 66.) The jurors in the first trial had sent back multiple juror notes indicating where they stood on votes for acquittal and conviction. Additionally, the jurors stated in open Court that they were deadlocked. At that time, the Court issued an *Allen* charge and instructed the jury to continue their deliberations. Defense counsel then moved for a mistrial, which was denied without prejudice by the Court. The following day, the Court received more notes from the jurors regarding their deliberations. One of those notes stated that a juror had

[2] It is not entirely clear whether jeopardy attached in the second trial because jury selection was not complete at the time the mistrial was declared. *See Crist*, 437 U.S. at 38 (stating that jeopardy attaches when the original jury panel is seated and sworn). *But see Watkins*, 90 F.3d 138, 141 (6th Cir. 1996) (characterizing an incomplete trial "as a mistrial for purposes of analyzing the double jeopardy question"). The Court, however, performs the analysis regarding whether reprosecution is barred as if jeopardy had attached in the second trial.

contacted an outside party regarding the case. After disclosing the note to the parties, the Defendant renewed his motion for mistrial based on the outside information being discussed in jury deliberations. Based on the totality of the circumstances, the Court found the jury was deadlocked and granted the renewed motion for mistrial. Because the Court found that the jury was deadlocked in granting the renewed motion for mistrial, the Court finds that there was a manifest necessity justifying the first mistrial. Accordingly, the Double Jeopardy Clause does not bar reprosecution.

Even if there was not a manifest necessity justifying the first mistrial, the Double Jeopardy Clause does not bar reprosecution because the Defendant moved for the mistrial and there was no prosecutorial or judicial misconduct intended to provoke the Defendant into moving for a mistrial. The same is true for the second mistrial. Although the Defendant concedes that there was no prosecutorial or judicial misconduct prompting either mistrial, he argues that the Double Jeopardy Clause should also bar reprosecution where there are multiple instances of juror misconduct. (DE 91 at 6.) He argues that the concerns articulated in *Green v. United States*, 355 U.S. 184 (1957) are fully implicated where a defendant is required to move for a mistrial based on conduct of parties other than the Defendant. (DE 91 at 5.)

Green, in discussing the purposes of the Double Jeopardy Clause, states that "[t]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 188. While the Court recognizes the inherent strains of multiple trials, the Defendant has not cited any authority supporting the relief he seeks. Instead, the relevant case law tends to support that the Double Jeopardy Clause does not bar reprosecution here.

The Supreme Court has held that where a defendant requests or consents to a mistrial, "he may invoke the bar of double jeopardy in a second effort to try him *only if* the conduct giving rise to the successful motion for a mistrial was prosecutorial or judicial conduct *intended* to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 667 (emphasis added). Here, the Defendant moved for both mistrials, and he concedes that there was no prosecutorial or judicial misconduct prompting either mistrial. Moreover, there are simply no facts or circumstances—and Defendant cites to no facts or circumstances—indicating that the jurors' actions were intended to provoke the Defendant into moving for either mistrial. *See id.* at 675 (The existence of intent is determined based on consideration of "objective facts and circumstances.") In both instances of juror misconduct, the jurors obtained outside information regarding the case. While such action is clearly in contravention of the rules, there is no evidence to suggest the jurors purposefully intended to undermine the integrity of the proceeding. *See Enoch*, 650 F.2d at 117 (The prosecutorial and judicial misconduct referred to in *Dinitz* and *Jorn* is "misconduct intended to 'undermine the integrity of the … proceeding,' thereby prejudicing the defendant.")

While the Court is sympathetic to Defendant's plight, the relevant law does not support his argument. There was a manifest necessity to declare the first mistrial. Additionally, both mistrials were requested by the Defendant and did not involve prosecutorial or judicial misconduct. Although both mistrials involved misconduct by members of the jury, there is no law to support that juror misconduct presents a bar to retrial under the Double Jeopardy Clause. Additionally, the relevant case law stating that a defendant who moves for a mistrial may invoke Double Jeopardy where that mistrial was prompted by prosecutorial and judicial misconduct requires an intention to provoke the defendant into moving for the mistrial. Here, there are no facts or circumstances supporting that the jurors' actions were intended to provoke the Defendant into moving for either mistrial. Accordingly, the Court finds that

the Double Jeopardy Clause of the Fifth Amendment does not bar retrial of the Defendant. As such, his motion to dismiss the second superseding indictment is denied.

III. CONCLUSION

Based on the foregoing, the Court **HEREBY ORDERS** that the Defendant's motion to dismiss (DE 91) is **DENIED**.

Dated February 6, 2020.

KAREN K. CALDWELL
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF KENTUCKY

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File Name: 21a0367n.06

Case No. 20-5706

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD L. STARGHILL, II,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION

BEFORE: GILMAN, McKEAGUE, and BUSH, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. Richard L. Starghill, II, appeals his convictions for possessing firearms as a convicted felon and for possessing a sawed-off shotgun not registered to him in the National Firearms Registration and Transfer Record. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

The events in question took place in Pike County, Kentucky in February 2019. Ronnie Joe Mullins, a friend of Starghill, had invited Starghill to Mullins's residence. The following day, other individuals in the residence began arguing and damaging the property, causing Mullins to call the police. When the police arrived, Kentucky State Trooper Steven Hamilton found Starghill in a bedroom with a handgun "cradled in the bend of his arm." Trooper Hamilton also observed a sawed-off shotgun "laying underneath [Starghill's] left shoulder."

A federal grand jury indicted Starghill on one count of possessing two firearms as a convicted felon, in violation of 18 U.S.C. § 922(g), and on one count of possessing a sawed-off shotgun (one of the two firearms) that was not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. § 5861(d). Starghill's jury trial began in November 2019, but ended in a mistrial, on Starghill's motion, after the jury deadlocked and a juror was found to have contacted an outside party regarding the case. A second trial also ended in a mistrial, again on Starghill's motion, after a venireman searched the internet for Starghill and publicized the results to other jurors.

In February 2020, Starghill was brought before the court for a third trial. After three hours of deliberations, the jury returned a verdict of guilty on both counts. The district court subsequently sentenced Starghill to a total of 240 months of imprisonment, which was 22 months below the advisory Guidelines range. Starghill timely appealed.

II. ANALYSIS

Starghill raises four issues on appeal. First, he contends that the Double Jeopardy Clause barred retrial following the two mistrials. He next claims that the evidence was insufficient to support the convictions. Third, Starghill alleges that the prosecution made improper remarks at closing argument. Finally, he contends that the district court rendered a substantively unreasonable sentence.

A. Double jeopardy

The U.S. Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "The Double Jeopardy Clause, however, does not act as an absolute bar to reprosecution in every case." *United States v. Gantley*, 172 F.3d 422, 427 (6th Cir. 1999). "When a mistrial has been declared, reprosecution is generally

permissible if the declaration came at the request or with the acquiescence of the defendant." *United States v. Cameron*, 953 F.2d 240, 243 (6th Cir. 1992) (citing *United States v. Dinitz*, 424 U.S. 600, 607 (1976)). But the Supreme Court has promulgated an exception to this rule "where the prosecutor's actions giving rise to the motion for mistrial were done in order to goad the [defendant] into requesting a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) (alteration in original) (citation and internal quotation marks omitted). We conclude that the Double Jeopardy Clause did not bar Starghill's third trial because (1) he requested the two mistrials, *see Gantley*, 172 F.3d at 427, and (2) neither mistrial involved judicial or prosecutorial impropriety, so the narrow exception set forth in *Kennedy* does not apply.

B. Sufficiency of the evidence

Starghill's second challenge relates to the sufficiency of the evidence that supported his convictions. He filed a motion for a judgment of acquittal in the district court, which the court denied. A defendant challenging the sufficiency of the evidence "must surmount a demanding legal standard." *United States v. Potter*, 927 F.3d 446, 453 (6th Cir. 2019). We look to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). "In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009).

Starghill contends that there is insufficient evidence to support the possession element of either of the offenses because "the firearms [were] merely . . . located in the same room as [him]." But Trooper Hamilton testified that he found Starghill in Mullins's residence with a handgun cradled in his arm and a sawed-off shotgun laying underneath Starghill's left shoulder. Based on

this evidence, the jury could easily have concluded that Starghill possessed the firearms as alleged. His sufficiency-of-the-evidence argument therefore fails.

C. Prosecutorial misconduct

Starghill's third contention is that the government made improper statements during closing argument. Because no objection was raised at trial, we review Starghill's argument under the plain-error standard. *See United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001).

Starghill focuses on the following remarks made by the prosecutor during the rebuttal portion of closing argument:

> Now I want to talk to you about what a reasonable doubt is. Reasonable doubt is a doubt that is reasonable. It's based on facts. It's based on reason. It's based on, as the defense said, common sense.
>
> I'm going to tell you what it's not based on is speculation. Reasonable doubt is not speculation.
>
> I don't know what happened on the 23rd, 24th, 25th, and it doesn't matter. The only thing that matters is what happened in that residence on February 26th, when Trooper Hamilton walked into that bedroom and saw Mr. Starghill with the guns.
>
> It doesn't matter who owned the guns. It doesn't matter who brought the guns into the residence. What matters is who had direct, physical control over the guns, and that person was Mr. Starghill.

Starghill contends that this portion of the closing argument—specifically the portion in which the prosecutor told the jury that it "doesn't matter" what previously happened in the residence—was improper because it misstated the law and advised the jury to ignore evidence in the record.

This court has applied "a two-step analysis to determine if alleged prosecutorial misconduct requires reversal." *United States v. Eaton*, 784 F.3d 298, 309 (6th Cir. 2015). First, we determine whether the prosecutorial statements were improper. *Id.* If so, then we determine "whether the improprieties were flagrant such that a reversal is warranted." *Id.* (internal quotation marks and citation omitted).

The prosecutor's statements were not improper. During closing argument, defense counsel highlighted to the jury that witnesses had seen firearms in Mullins's residence at other times. In rebuttal, the prosecutor appropriately argued that regardless of who might have owned the firearms or who had previously brought them into the residence, that did not change the fact that Starghill possessed the firearms at the time of his arrest. The prosecutor did not argue that the jury was prohibited from considering the surrounding circumstances. Instead, he rebutted defense counsel's position by arguing that those circumstances did not matter under the government's theory of the case—a theory that focused on Starghill's unlawful possession of the firearms on February 26, 2019. And even assuming *arguendo* that these statements were improper, they were not so flagrant as to require reversal under plain-error review.

D. Reasonableness of the sentence

Finally, Starghill contends that the district court imposed a substantively unreasonable sentence. We review challenges to the reasonableness of a sentence under the abuse-of-discretion standard. *United States v. Kamper*, 748 F.3d 728, 739 (6th Cir. 2014).

"A reviewing court will find that a sentence is substantively *unreasonable* where the district court select[s] the sentence arbitrarily, bas[es] the sentence on impermissible factors, fail[s] to consider pertinent § 3553(a) factors, or giv[es] an unreasonable amount of weight to any pertinent factor." *United States v. Pirosko*, 787 F.3d 358, 372 (6th Cir. 2015) (internal quotation marks and citation omitted) (emphasis and alterations in original). Sentences below the defendant's Guidelines range are presumed to be substantively reasonable. *Id.* at 374.

Here, Starghill's Guidelines range was 262–327 months of imprisonment. The district court varied downward and imposed a 240-month sentence. In reaching this below-Guidelines sentence, the court recognized the seriousness of the crime, Starghill's extensive criminal history,

and Starghill's struggles with addiction. The court also stated that the sentence would "provide [Starghill] with the needed opportunity for correction and some treatment." Starghill has failed to meet his "heavy burden" of showing that the sentence was substantively unreasonable. *See United States v. Greco*, 734 F.3d 441, 450 (6th Cir. 2013).

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.