APPENDIX

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APPENDIX A

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT

COUNTY OF CUYAHOGA

JUN 20 2024

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRITTANT SMITH, ET AL.,

Defendant-Appellants.

Nos. 112882, 112908, and 112910

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: June 20, 2024

Criminal Appeals from the Cuyahoga County Common Pleas Court

Case Nos. CR-22-670878-C, CR-22-670878-D, and CR-22-670878-E

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kevin R. Filiatraut, Assistant Prosecuting Attorney, *for appellee*.

Susan J. Moran, *for appellant* Brittany Smith.

Flowers & Grube and Louis E. Grube, *for appellant* Hakeem-Ali Shomo.

Robert A. Dixon, *for appellant* Anthony Bryant.

Baker & Hostetler, LLP, Terry M. Brennan, and Mary Pat Brogan, *for intervenor-appellee* The Honorable John J. Russo.

Taft, Stettinius & Hollister, LLP, John R. Mitchell, and Mira Aftim, *for intervenor-appellee* Kathleen Dunham.

ANITA LASTER MAYS, J.:

{¶1} In this consolidated appeal, defendants-appellants Brittany Smith ("Smith"), Hakeem-Ali Shomo ("Shomo"), and Anthony Bryant ("Bryant"), collectively referred to the appellants, appeal the trial court's decision denying their motion to dismiss on double jeopardy grounds and granting the plaintiff-appellee's, the State of Ohio ("the State"), motion to quash. We affirm the trial court's decision.

I. Facts and Procedural History

{¶2} On May 2, 2022, the appellants and three other defendants were indicted by the Cuyahoga County Grand Jury on aggravated murder, murder, felonious assault, kidnapping, conspiracy to commit kidnapping, and having weapons while under disability, related to the murder of Alishah Pointer ("Pointer") and the kidnapping of two other women. As part of a plea agreement, the other three defendants pled guilty and agreed to truthfully testify against the appellants.

{¶3} The case was assigned to Judge John J. Russo ("Judge Russo"), and the trial date was set for March 6, 2023. Prior to trial, the appellants' trial counsel raised the issue of the State calling the other three codefendants to testify without having first presented independent proof of the conspiracy and each appellant's involvement

with the crime. In accordance with the trial court's stated procedure, the State made an oral record of an extensive proffer of the evidence it intended to produce at trial that would satisfy the requirement of independent proof of the conspiracy and each appellant's involvement.

{¶4} The State indicated that the crimes were committed against three women, Turquoise Jackson ("Jackson"), Tashara Harris ("Harris"), and Pointer stemming from the unsolved murder of Aminjas Shomo ("Aminjas"). The six defendants decided to conduct their own investigation into Aminjas's murder, and from social media and information obtained from other sources, determined that Collin Funches ("Funches") was involved in Aminjas's murder. The six defendants also identified Pointer as Funches's girlfriend. The defendants decided to look for Funches but were unable to locate him. Then they decided to kidnap Pointer to gain information on Funches's whereabouts.

{¶5} The defendants kidnapped Jackson and Harris at gunpoint, who informed them of Pointer's location. They kidnapped Pointer at gunpoint, took a photo of Pointer with a gun in her mouth, and posted it on Instagram to lure Funches out of hiding. According to the State, these events took place at one of the defendant's homes. While there, Smith used a roll of clear tape to wrap Pointer's face. The piece of tape was recovered from the home with Smith's fingerprint on it. Pointer was transported to another location and shot 16 times with two different guns. Spent casings recovered from the scene of Pointer's murder had Bryant's DNA on them. The

State offered additional evidence to demonstrate that the six defendants conspired together to commit the indicted crimes.

{¶6} After the State's proffer of evidence, trial began as scheduled, jury selection occurred, the jury was sworn, and six witnesses testified. On March 9, 2023, Judge Russo's bailiff privately approached the prosecutor during an afternoon break from trial. The bailiff asked the prosecutor whether the State was planning on calling any witnesses to establish independent proof of the conspiracy prior to the codefendants testifying. The prosecutor stated that he was unsure and then told his supervisor, who became visibly upset and told the prosecutor to ignore the request and that "we don't engage in that bull. . . ." Tr. 34.[1] On March 10, 2023, the next morning before trial, the bailiff approached the prosecutor again at the trial table and asked if there was a follow-up from the communication that happened on the previous day. Tr. 14.[2] The prosecutor did not respond to the bailiff. That same day, after leaving court, the three prosecutors on the case received a text message from Judge Russo's bailiff at 6:10 p.m. The text stated: "Sorry to bother you, but judge wanted me to text you and see if any of the witnesses prior to Williams will tie in Smith to the conspiracy. He wants to make a good record. Thanks."

{¶7} One of the prosecutors responded to the text a minute later, stating: "We can't answer that over text. If he wants anything from us he needs to ask us in court

[1] This case has several transcripts totaling 1,320 pages. These facts are from Volume I with pages 1 through 1,153. Volume II has pages 1 through 167.
[2] These facts are from Volume II.

with the other lawyers there. That's all we can say without them on this text." The bailiff responded, "ok."

{¶8} That same evening the prosecutor sent an email to each trial counsel for the appellants, including a screenshot copy of the text message from the bailiff. The email read as follows:

> RE: Information
>
> I wanted to let you all know that Ben, Sean, and I received a text from Judge Russo's bailiff tonight asking about the case. We were the only four in this text. Because you were not on this, we are sending it to all of you. Additionally, prior to sending this text, the bailiff has asked Sean a couple of times whether there will be more evidence of the conspiracy prior to Portia Williams testifies. Sean never answered those questions and told me about them after they happened. See the attached screenshot for the text and my response to it. The texts prior to that one were all ministerial in nature.

{¶9} On March 13, 2023, the appellants moved for a mistrial based on the ex parte communication. Judge Russo granted a hearing on the motion and stated that the communication sent by his bailiff to the prosecutors was meant to go to all the parties. Judge Russo indicated that he was devastated by the situation and stated that he felt terrible. He granted the request for a mistrial and recused himself from the case.

{¶10} On March 27, 2023, the appellants filed motions to dismiss and moved to subpoena Judge Russo and his bailiff. In their motions, the appellants argued that the trial court engaged in deliberate ex parte communication to ensure that the State would be able to meet the elements of its case. On May 1, 2023, Judge Russo and his

bailiff filed a joint motion to quash the subpoenas, arguing that their appearances at the hearing were unnecessary because the appellants received the relief they sought, the material facts surrounding the text message were not in dispute, the appellants cannot meet the standard to subpoena a sitting judge, the bailiff's testimony is unnecessary, and the testimony sought is forbidden because a court speaks through its journal entries. That same day, another trial court judge held a hearing on the motions to dismiss with prejudice for violation of the Double Jeopardy Clause of the United States Constitution.

{¶11} At the hearing, the prosecutor testified as to both the in-person conversation and the text messages between he and Judge Russo's bailiff. On May 2, 2023, the trial court granted Judge Russo and his bailiff's motion to quash. On May 31, 2023, the trial court denied the appellants' motions to dismiss with prejudice on grounds of double jeopardy. The appellants filed this timely appeal assigning two errors for our review:

1. The trial court erred in denying the appellants' motion to dismiss on double jeopardy grounds; and
2. The lower court erred in granting the motion to quash the subpoenas of Judge Russo and his bailiff.

II. Motion to Dismiss for Violation of Double Jeopardy

A. Standard of Review

{¶12} "The denial of a motion to dismiss on double jeopardy grounds is a final appealable order subject to immediate appellate review." *Cleveland v. Jones*, 2017-Ohio-7320, ¶ 11 (8th Dist.), citing *State v. Anderson*, 2014-Ohio-542, ¶ 26. "Appellate

courts review the denial of a motion to dismiss on the grounds of double jeopardy de novo." *Id.*, citing *State v. Morris*, 2012-Ohio-2407, ¶ 16.

B. Law and Analysis

{¶13} In the appellants' first assignment of error, they argue that the trial court erred in denying their motions to dismiss on double jeopardy grounds. "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, protects a criminal defendant from multiple prosecutions for the same offense." *State v. Truhlar*, 2016-Ohio-5338, ¶ 33 (8th Dist.), citing *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982).

{¶14} However, the Double Jeopardy Clause does not bar a defendant from reprosecution in every case. When a defendant requests a mistrial, double jeopardy does not prohibit a retrial unless the defendant's request was precipitated by prosecutorial misconduct intended to elicit the defendant to seek a mistrial. *Id.* at ¶ 34, citing *N. Olmsted v. Himes*, 2004-Ohio-4241, ¶ 36-37.

{¶15} "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *United States v. Dinitz*, 424 U.S. 600, 611 (1976). "It bars retrials where 'bad-faith conduct by judge or prosecutor,' threatens the '[harassment] of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *Id.*, quoting *Downum v. United States*, 372 U.S. 736 (1963).

{¶16} In the instant case, both the appellants and State agree there was not any prosecutorial misconduct. Instead, the trial court engaged in ex parte conversations with the State, and the State properly reported the communications to the defense. The trial court declared a mistrial, but the appellants have not demonstrated that the judicial misconduct was intended to elicit the defendants to seek a mistrial. In fact, the record supports that the trial court wanted to know if the State was planning on calling any witnesses to establish independent proof of the conspiracy prior to the codefendants testifying. This was demonstrated from both the oral conversation initiated by Judge Russo's bailiff on his behalf and from the text message.

{¶17} Additionally, the appellants have failed to demonstrate that judicial misconduct afforded the prosecution a more favorable opportunity to convict them. The State's proffered testimony concerning the evidence that would satisfy the requirement of independent proof of the conspiracy and each appellant's involvement was not affected. "In other words, only conduct 'intentionally calculated to cause or invite mistrial' will bar retrial." *Himes*, 2004-Ohio-4241, at ¶ 38, citing *United States v. Thomas*, 728 F.2d 313, 318 (6th Cir. 1984).

{¶18} Therefore, the appellants' first assignment of error is overruled.

III. Motion to Quash Subpoenas

A. Standard of Review

{¶19} "We generally review a trial court's ruling on discovery matters, including motions to quash subpoenas, for abuse of discretion." *Gangale v. Coyne*, 2022-Ohio-196, ¶ 24 (8th Dist.). "Abuse of discretion is 'a very high standard.'" *Id.*, citing *Supportive Solutions Training Academy, L.L.C., v. Elec. Classroom of Tomorrow*, 2013-Ohio-3910, ¶ 11 (8th Dist.).

{¶20} A trial court abuses its discretion where its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 481, (1983). An abuse of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 2021-Ohio-3304, ¶ 35.

B. Law and Analysis

{¶21} In the appellants' second assignment of error, they argue that the trial court erred by granting Judge Russo and his bailiff's motion to quash the subpoena. The trial court stated in its journal entry:

> Defendants' joint motion to quash subpoenas is granted. The joint motion of subpoenaed witnesses Russo and [bailiff] to quash the subpoenas against them is hereby granted. From the motion, brief, and hearing of 5/1/23, the court concludes the purpose of the requested testimony is not to obtain unknown and necessary facts pertinent to the motions to dismiss but rather to delve into the purpose and intent of the witnesses in their courtroom conduct. The underlying facts involved in the motions to dismiss are not disputed or unknown; the motivations of the subpoenaed actors are not relevant to the issues raised by the motions.

Journal Entry No. 145735024 (May 2, 2023).

{¶22} The appellants argue that if Judge Russo and his bailiff testified at the hearing, the trial court would have a full record to evaluate whether the motion to dismiss on double jeopardy grounds was rightfully granted or denied. As previously stated in this opinion, the trial court did not err in denying the appellants' motion to dismiss. It was unnecessary to have Judge Russo and his bailiff testify at the hearing because the record is clear as to why Judge Russo improperly communicated with the State.

{¶23} Therefore, the appellants' second assignment of error is overruled.

{¶24} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

s/ Anita Laster Mays

ANITA LASTER MAYS, JUDGE

Filed and Journalized

Per App.R. 22(C)

Jun 20 2024

Cuyahoga County Clerk

of the Court of Appeals

By /s D. Wright Deputy

EILEEN A. GALLAGHER, P.J., CONCURS;

LISA B. FORBES, J., CONCURS (WITH SEPARATE OPINION)

LISA B. FORBES, J., CONCURRING:

{¶25} I agree with the majority that the trial court did not err by denying the motion to quash and motion to dismiss. I write separately to add that in analyzing whether there has been bad-faith conduct by a judge or prosecutor, appellate courts must look to objective evidence in the record. The United States Supreme Court recognized that "[i]nferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982). As noted in the concurring opinion, "[B]ecause 'subjective' intent often may be unknowable, I emphasize that a court — in considering a double jeopardy motion — should rely primarily upon the objective facts and circumstances of the particular case." *Id.* at 679-680 (Powell, J., concurring).

APPENDIX B

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	Case No. CR-22-670878-E
Plaintiff	Judge MICHAEL J. RUSSO
	INDICT: 2903.01 AGGRAVATED MURDER
HAKEEM-ALI SHOMO	/FRM1 /FRM3
Defendant	2903.02 MURDER /FRM1 /FRM3
	2903.11 FELONIOUS ASSAULT /FRM1 /FRM3
	ADDITIONAL COUNTS...

JOURNAL ENTRY

05/31/2023: ORDER AND OPINION ON DEFENDANTS' MOTIONS TO DISMISS. OSJ.

THIS ENTRY TAKEN BY JUDGE JANET R BURNSIDE.

05/31/2023

CPJRB 05/31/2023 16:12:45

/_____

Judge Signature Date

FILED

2023 May 31 P 4:20

Clerk of Courts Cuyahoga County

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	Case No. CR 670878-C
Plaintiff,	670878-D
vs.	670878-E
ANTHONY BRYANT,	Judge Janet R. Burnside (Ret.)
BRITTANY SMITH,	**JUDGMENT ENTRY**
HAKEEM-ALI SHOMO	
Defendants.	

Janet R. Burnside, J:

Counsel for Defendants Smith and Bryant each filed their separate motions to dismiss and Defendant Shomo was permitted to join in their motions. The motions to dismiss on double jeopardy grounds are denied after hearing. The Court finds that Judge John Russo did not provoke a mistrial or intend to cause one and that defendants voluntarily requested mistrial even though Judge Russo willingly recused.

BACKGROUND. Six people were indicted for collective criminal conduct claimed to result in the kidnapping and murder of Alishah Pointer. The allegations of the indictment follow. The defendants came together to locate and kill one Funches. Failing to find him, they sought his girlfriend, Pointer, and intended to force her to reveal his location. She did not cooperate and was kidnapped, tortured, and

ultimately murdered. Defendants' charges include various conspiracy counts for these offenses. Three defendants pleaded guilty and agreed to testify for the State. Trial then proceeded against the above-named three remaining defendants in the courtroom of Judge John J. Russo.

After the second full day of trial testimony before the jury, defense counsel was advised by the prosecutors that Judge Russo's bailiff had three times in the last 24 hours attempted to engage them in ex parte communications on the subject of certain trial evidence. Defense counsel immediately asked for and received a mistrial and the Judge voluntarily recused himself from the case. In their motions to dismiss now before the Court for decision, defendants claim their mistrial occurred under circumstances barring their retrial and therefore the case must be dismissed on double jeopardy grounds.

EX PARTE COMMUNICATIONS. Hearing on defendants' motions to dismiss was held 5/1/23 and 5/2/23. The evidence showed that on 3/9/23 during a Thursday afternoon break in the first full day of trial testimony, Judge Russo's bailiff asked prosecutor Sean Kilbane to step into the hallway to ask him a question. He did so and her question asked—as Kilbane phrased it—whether they were calling any witnesses to establish independent proof of conspiracy prior to any co-conspirator testimony.[1] He replied they didn't know yet. He recalled the bailiff said Judge Russo told her it was "okay" to ask the question. On Friday morning, the bailiff again approached Kilbane at the courtroom trial table during a break and asked if there

[1] As will be seen, the parties regularly refer to Evid. R. 801(D)(2)(e) as restricting introduction of co-conspirator testimony; it only restricts introduction of co-conspirators' out-of-court statements.

was any update on yesterday's question. He did not give a substantive answer. Both conversations were immediately reported to his fellow prosecutors in the case, Kevin Filiatraut and Ben McNair, but not reported to defense counsel at this time. At the end of Friday's trial testimony, the prosecutor outlined for court and counsel the witnesses who would testify on Monday and included codefendant Portria Williams, a co-conspirator.

At 6:10 p.m. Friday, 3/10/23, after trial concluded and everyone left the courthouse, the bailiff texted the three prosecutors,

> "Sorry to bother you, but judge wanted me to text you and see if any of the witnesses prior to Williams will tie in smith to the conspiracy. He wants to make a good record. Thanks".

Mr. Filiatraut responded,

> "We can't answer that over text. If he wants anything from us he needs to ask us in court with the other lawyers there. That's all we can say without them also on this text."

(The Court notes the bailiff did not send her 6:10 p.m. text again with all defense counsel included as recipients as suggested by Filiatraut's response.) At 11:27 p.m. that evening Filiatraut emailed screen shots of the two text messages to all defense counsel and disclosed the fact that the bailiff initiated two earlier communications with Kilbane. There was no prior history of this bailiff texting the attorneys on the case; the bailiff had previously only sent emails to all counsel.

THE MISTRIAL. That Monday morning, 3/13/23, instead of continuing trial, all counsel met in chambers with Judge Russo about the communications and each defense counsel requested a mistrial. The participants then went on the record in the

courtroom with all defendants present and repeated the mistrial requests. Judge Russo admitted he had directed the bailiff to

> "confer with the parties ... I asked her again late Friday, hey, can you confirm again who those witnesses are with respect to the ... conspiracy. So I indicated to her I want to know who they are putting on and does it go to the conspiracy argument. And I think she may even mentioned that the defendant's names in that text ... [S]he didn't hit the button where all of the lawyers were included on it."

The trial judge recused himself and granted a mistrial promptly. His journal entry of the action stated:

> THERE WAS A MOTION FOR MISTRIAL. COURT STAFF HAD SENT A PROCEDURAL COMMUNICATION TO THE PARTIES, WHICH WAS INADVERTENTLY SENT ONLY TO THE PROSECUTORS. BECAUSE THIS COULD BE CONSIDERED EX-PARTE COMMUNICATION, OUT OF AN ABUNDANCE OF CAUTION, THE COURT GRANTED THE MISTRIAL AND THE JUDGE RECUSED HIMSELF FROM THE CASE.

During this hearing no one explored replacing the trial judge under Crim. R. 25 as an alternative to a mistrial. Judge Russo mentioned that possibility on the record but dismissed the idea because he assumed the new judge would necessarily have to rely on him to become acquainted with the case but his involvement familiarizing the new judge would not be proper. (Crim. R. 25 requires the new judge to become familiar with the case in order to resume trial but there is no expectation the exiting judge be involved in that.)

Later that day, Administrative Judge Sheehan randomly assigned the case to Judge Michael Russo's docket which the undersigned is presiding over during his medical leave.

CONCLUSIONS. The Court finds from the evidence, arguments, and filings that the bailiff was directed by Judge Russo to ask these three questions of the prosecutors about their prospective witness testimony; that his questions involved implementation of Evid. R. 801(D)(2)(e), the most hotly-disputed issue in the trial; that the circumstances of the communications show they were intended by Judge Russo and his bailiff for the prosecutors alone, that is, they were ex parte communications from Judge Russo; and that the ex parte communications were substantive, not procedural or ministerial, in nature.

LEGAL BACKGROUND AND LEGAL ANALYSIS. The law holds that generally defendants who seek and obtain mistrials are subject to retrial. However, under a line of federal and state cases, some mistrials do not permit retrial. Defendants claim their mistrial is of this type. This category primarily involves mistrials that are provoked by deliberate action of the prosecutor or trial judge. *State v. Anderson*, 148 Ohio St. 3d 54 (2016); *State v. Glover*, 35 Ohio St. 3d 18 (1988); *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). The defendants here claim Judge Russo acted deliberately to provoke their request for a mistrial and in any event his actions provoked their mistrial request.

Defendants theorize Judge Russo determined he had made a fatal evidentiary ruling under Rule 801 and then to correct his mistake, deliberately engaged in the ex

parte communications knowing they would be disclosed to defense counsel who would promptly request a mistrial. They also theorize the judge's purpose was to instruct or help the prosecution in its evidence presentation. Without any supportive evidence or other indication, one defendant's motion to dismiss theorized Russo's purpose was to avoid presiding over this lengthy trial.

The Court reviewed the full trial transcript including the record built on 3/13/23 when the mistrial was declared. The parties pointed out trial transcript pages of the parties' chief evidentiary discussions about Evid. R. 801 on the record. (See Court exhibits A-D.)

The motions to dismiss require this Court to examine the objective evidence to determine Judge Russo's intent in engaging in the ex parte communications. Did he intend to cause a mistrial? Did his conduct in effect provoke one? The Court rejects each characterization of his intent by the defense described above. In essence, the motions to dismiss ask this Court to find Judge Russo wanted a mistrial so badly he would risk embarrassment, professional criticism, and a disciplinary complaint to obtain one. It is difficult to believe a trial judge would choose blatant, ethical violations to effectuate a mistrial.

The Court does not find Judge Russo was signaling the prosecutors about their evidence or witness order because all indications showed he was struggling to understand the evidentiary requirements, not trying to intervene in the presentation of the state's case. No evidence indicates he thought he had made an irreversible evidentiary ruling. His comments on the record do not show a determined insistence

for a certain implementation of this difficult evidence provision. A review of the trial transcript shows any decision on Rule 801 could have been changed given it was only 2 1/2 days into trial with ten more days of state's witnesses planned. Both sides suggest Judge Russo was at least rethinking his rulings on satisfying Rule 801. The factual support for this is explained in detail below. That would be entirely proper and laudable but would have to be announced to both sides and discussed. The objective evidence does not strongly support any of the defense theories.

The objective evidence convinces the Court that Judge Russo was attempting to obtain relevant information about the order and content of witness testimony but inexplicably doing so by secretly questioning one side of the case through his bailiff. The objective evidence does not convince the Court of any other motive. Whether the trial judge used ex parte communications thinking they were merely procedural or thinking no one would complain does not affect the Court's analysis. Judge Russo's ex parte questions were valid requests for information.[2] That leaves unanswered why he wanted the information or why he used secretive means to obtain it. Since under Evid. R. 801(D)(2)(e) the state's witnesses provide the foundation for introducing co-conspirators' out-of-court statements as substantive, non-hearsay evidence, a court in this situation has to keep track of the evidence of a conspiracy in order to know whether certain co-conspirators' out-of-court statements can be introduced or must be excluded. The subject must be taken up with all counsel outside the jury's hearing since, as noted below, whether the state's evidence amounts to independent proof of

[2] As discussed below, perhaps Judge Russo was misapplying Rule 801 but in the context of his misunderstanding, his was a valid inquiry.

conspiracy is likely to be disputed by the parties and their views must be heard and considered.

After thorough and careful consideration of the evidence, the parties' arguments, written filings, and the relevant case law, the Court concludes Judge Russo did not act with the purpose to cause a mistrial or a request for one. Regardless of intent, his actions did not provoke a mistrial. Judge Russo's ex parte communications dealt with the State's introduction of evidence necessary to permit the introduction of other substantive evidence under Evid. R. 801(D)(2)(e). The transcript of trial shows Judge Russo did not thoroughly understand the implementation of the rule. On the other hand, there is no indication he appreciated his lack of understanding or was particularly concerned or had misgivings about his prior evidence rulings on the subject.

Both sides characterize the trial judge's ex parte questions as indicating he was changing his approach in implementing Rule 801, possibly to one closer to the defense's position. While that is plausibly suggested under the surrounding circumstances, that motive is functionally no different than a motive to obtain relevant and necessary information about the order and content of witness testimony. It does not support an intent to provoke defendants into asking for a mistrial.

The motion to dismiss on double jeopardy grounds is denied as to defendants' argument that Russo intended to produce a mistrial or that his actions in effect provoked defendants to move for one. There is a second reason to deny the motion however.

The Court concludes the defendants were justified and compelled to seek Judge Russo's recusal: he had deliberately attempted private conversation with the prosecutors on the most contentious issue of the trial. Since the jury was not tainted by the judge's conduct, however, no mistrial was necessary or provoked by his misconduct. Once on the record that day, Judge Russo was quick to recuse himself before granting the defense requests for mistrial. Given that, defendants' requests for a mistrial were entirely voluntary. The Court concludes Defendants were acting strategically in moving for mistrial. One defense counsel pointedly mentioned the ex parte communications on the record on 3/13/23:

> "which [impropriety] forces us to inform our clients and forces us to say, you know, this is an opportunity you have to ask for a mistrial."

Judge Russo's ex parte communications provoked defendants to seek his recusal but not a mistrial. This was merely an "opportunity" presented to defendants. Criminal Rule 25 was available to oversee replacing the trial judge and providing time for the new judge to become familiar with the trial in order to resume. Rule 25 has a safety valve: if the new judge finds it impossible to do so, a new trial may be ordered (not a mistrial). Even though Judge Russo readily recused himself, defendants still sought a mistrial, received what they requested, and accordingly are subject to retrial. The motions to dismiss on double jeopardy grounds are denied for this reason as well.

THE PARTIES' EVIDENTIARY DISPUTE AND ITS IMPACT. The three ex parte communications by Judge Russo do not innocently ask who are the state's

next witnesses. They deal with the thorny issue of implementing Evid. R. 801(D)(2)(e) defining a seldom-used category of non-hearsay that operates as an extension of the "admission of a party opponent" category of non-hearsay under Evid. R. 801(D)(2)(a). Under Evid. R. 801(D)(2)(e), out-of-court statements of a co-conspirator are treated as if they were statements by the defendant himself. *State v. Milo*, 60 Ohio App. 3d 19, 22 (10th Dist. 1982) (discussing historical rationale for the rule).

Under the rule, the state can introduce a co-conspirator's out-of-court statements against a defendant if it first establishes independent proof of the existence of their conspiracy. The rule also requires proof that the co-conspirator's statement was made in the course of and in furtherance of the conspiracy. The parties in this case however primarily wrestled with the independent proof of the conspiracy requirement.

Rule 801 requires that independent proof of the conspiracy evidence precede admission of the out-of-court statements, but Ohio case law has relaxed that requirement and permitted admission of the statements to precede proof of conspiracy. See *State v Carter*, 72 Ohio St. 3d 546 (1995); *State v. Jalowiec*, 91 Ohio St. 3d 220 (2001) (both finding harmless error when the co-conspirator's out-of-court statement was admitted prior to evidence proving a conspiracy between the maker of the statement and the defendant). This relaxed approach may work well enough if there is only one defendant and one criminal partner.

Since in this trial there were three defendants being tried together and at least three admitted coconspirators in this case, it might require an Excel spreadsheet to

keep track of whether the evidentiary groundwork for admission of a given co-conspirator's out-of-court statements had been laid as to a specific defendant. There was concern in this trial that an out-of-court statement of defendant X's coconspirator Y could be used as evidence against defendant Z even though Z and Y had not been established to be in a conspiracy with each other. This was of particular concern to defendant Bryant since the evidence showed his participation started later in the sequence of events than that of other defendants. See *State v. Milo* at 23 (discussing the complexity under Rule 801 with multiple coconspirators). As a result, defense counsel at trial continued to object to the decision to try all three defendants together and they continued to object to admitting co-conspirators' statements without regard to whether evidence had proven a conspiracy involving the maker of the statement and each defendant.

The parties also differed on what evidence was admissible to prove a conspiracy. The Ohio Supreme Court in *State v. Carter* held that a co-conspirator's out-of-court statements could not be used to prove the existence of the conspiracy:

> "Inclusion of the phrase 'upon independent proof of the conspiracy' in Evid.R. 801(D)(2)(e) distinguishes Ohio practice from practice under the Federal Rules of Evidence, and precludes a finding that the [co- conspirator's] statement itself may be used to establish the existence of the conspiracy."

72 Ohio St. 3d 546, 550 (citation omitted). This requirement flows from the rule's insistence on independent proof of conspiracy. See also *State v. Jurek*, 52 Ohio App. 3d 30, 35 (8th Dist. 1989); *State v. Milo*, *supra*; *State v. Duerr*, 8 Ohio App. 3d 396, 402

(1st Dist. 1982). The prosecutors appeared to gloss over that requirement in discussions during trial and in the motion hearing.

Adding to the confusion, defense counsel seem to argue that a co-conspirator's in-court testimony is not permitted until independent proof of conspiracy is admitted. (In Judge Russo's text message sent to the prosecutors, his question seemed to share defense counsel's view about such in-court testimony.) This is clearly not required by Rule 801(D)(2)(e) since it defines when hearsay (by definition, out-of-court statements) is deemed "not hearsay." This argument is not entirely misplaced however. To the extent a co-conspirator is called upon to testify to what another non-defendant coconspirator said out-of-court, then Rule 801 would require independent proof of the conspiracy be established prior to that part of the testimony.

In the trial transcript, all counsel and Judge Russo discuss these Rule 801 requirements in poorly-phrased terms and that continued during the hearing of this motion.[3] Due to either poorly worded arguments or poorly understood evidence concepts, the two sides and Judge Russo continued to differ on how and when the independent proof of conspiracy was to be provided even as the trial entered its first days.

On the first full trial day of Wednesday 3/8/23, the prosecutor put on the record a proffer of the detailed facts of the six defendants' conspiracy to commit kidnapping and murder. This was at least intended to help the trial judge follow the factual

[3] The undersigned's own statements on the subject were similarly unhelpful by consistently referring to admission of defendant's statements when the Rule deals with admission of the defendant's co-conspirator's statements.

background to be presented in the testimony. The prosecutor represented the proffer to be what the state intended to prove by way of the defendants' conspiracy. Afterwards Judge Russo indicated the proffer itself would be accepted as independent proof of the conspiracy:

> THE COURT: * * * base[d] on the proffer that's been offered here this morning by the State of Ohio I'm going to find that the state has made a prima facie case today based on what I heard that there is an existence of a conspiracy and that's by independent proof.

Trial transcript, p. 308.

Defense counsel objected to the notion a mere proffer could be accepted as evidence of a conspiracy, arguing that Rule 801 requires evidence of conspiracy not mere representations of counsel and that *State v. Carter* prohibited co-conspirators from providing that proof of the conspiracy. Trial transcript, p. 308-313.

The state at trial and motion hearing said it understood proof was required and they intended to introduce—and were in the process of introducing—evidence of the conspiracy. At trial, however, Prosecutor Filiatraut reinforced Judge Russo's view that the proffer was independent proof of conspiracy after the defense objected to mention of a conspiracy during opening statements:

> MR. FILIATRAUT: Well, it's a [conspiracy] charge -- I mean, I'm going to go over the elements during opening statement and I am going to give a preview of the testimony.
>
> THE COURT: Very good.
>
> MR. FILIATRAUT: I think the court has already made a preliminary finding.

> THE COURT: I did.
>
> MR. FILIATRAUT: Based on the proffers.

Trial transcript, p. 611. Filiatraut repeats this at page 813-17 of the Trial transcript and the issue comes to a head:

> MR. SCHLACHET: * * * There has to be irrespective of the statements, prior to those coming in, independent proof that there is a conspiracy. We objected, your Honor, most respectfully, I know that this court believes that we can have a proffer and then there's a basic modicum of a threshold. We object to that.
>
> THE COURT: We're noting your objection. I'm not letting it go.
>
> MR. SCHLACHET: We do not believe that that is the appropriate or legal method to introduce evidence of a conspiracy. The proffer from counsel does not cut it. It's evidence independent of statements. And if they want to introduce those statements, introduce them against Poke. But you can't introduce them against these sitting defendants, especially Brittany [Smith] who wasn't named as a conspirator in the testimony.
>
> THE COURT: I'll quote from Carter. The early admission of statements that could have been deemed hearsay at the time they're elicited is rendered harmless since independent proof of the conspiracy was admitted into evidence before the case was submitted to the jury. <u>So at the end of the state's case if Rule 29 is such that the state has failed to present independent proof of the conspiracy obviously there is matters before the court to render potential 29 issues.</u>

Trial transcript, p. 815-17 (emphasis supplied).

With this reference, Judge Russo appears to misunderstand the evidentiary structure since independent proof of the conspiracy is not part of the state's prima facie case; it only determines whether certain out-of-court statements can be

admitted as non-hearsay, substantive evidence. Waiting until Rule 29 to sort out admission of such statements would be unworkable. To the defendants, if independent proof of the conspiracy has not been admitted as to a specific defendant by the time of Rule 29, then certain out-of-court statements of co-conspirators would have to be stricken from the evidence as to that defendant and the effect on a prima facie case re-evaluated. In a trial like this with some ten more days of testimony anticipated for the state, it would be exceedingly difficult to figure out which co-conspirators' out-of-court statements had been admitted improperly in evidence and what damage to the prima facie case resulted. And, the defendants would have been deprived of a fair trial if hearsay statements had been admitted and used as the basis for other inferences and conclusions. Striking select statements at the end would be futile because the jury had so long ago heard them. This explains why the defense resisted the joint trial and insisted that proof of conspiracy precede co-conspirators' statements.

What then is the significance of Judge Russo's three questions about what witnesses will next testify and whether they will connect a defendant to the conspiracy? Under Judge Russo's earlier ruling that the proffer satisfied the independent proof requirement, one would not expect him to pose these questions. The fact that he did raise questions caused both sides to wonder if he was changing his mind to require independent evidence to precede the co-conspirators' statements after all. Changing his ruling or not, Judge Russo was entitled to understand what witnesses would follow and the scope of their testimony since no independent

evidence of a conspiracy involving the third defendant, Brittany Smith, had yet been offered. This would be a proper inquiry and the trial judge would need to ask for the two sides' positions as to whether there was proper evidence of the conspiracy.

Judge Russo's text to the prosecutors after Friday's trial day is clearly making this inquiry: "Sorry to bother you, but judge wanted me to text you and see if any of the witnesses prior to Williams will tie in smith to the conspiracy." The "Williams" mentioned is Portria Williams, a testifying co-defendant and coconspirator. Judge Russo's text wants assurance that witnesses before Williams will connect defendant Brittany Smith to the conspiracy. The Judge's inquiry was entirely legitimate since it helped him determine whether predicate evidence was being admitted and certain subsequent statements would be admissible, but both sides must address the court as to whether Rule 801 was satisfied or not. Therefore his ex parte questions were not procedural inquiries, they raised significant substantive issues.

IT IS SO ORDERED

Dated: 5/31/23

s/ Janet R. Burnside

Janet R. Burnside, Judge

APPENDIX C

Supreme Court of Ohio Clerk of Court - Filed October 15, 2024 - Case No. 2024-1118

THE SUPREME COURT OF OHIO

State of Ohio, Case No. 2024-1118

v. ENTRY

Brittany Smith, et al.

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Cuyahoga County Court of Appeals; No. 112910)

s/ Sharon L. Kennedy

Sharon L. Kennedy

Chief Justice

The Official Case Announcement can be found at

http://www.supremecourt.ohio.gov/ROD/docs/