COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff	**:**	**CASE NO. 2012 CR 00020**
vs.	**:**	**Judge McBride**
SHANNON BLAINE GATLIFF	**:**	**DECISION/ENTRY**
Defendant	**:**	

Daniel J. Breyer and Lara A. Molnar, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

Richard A. Hyde, attorney for the defendant Shannon Blaine Gatliff, 311 Key Bank Building, 6 South Second Street, Hamilton, Ohio 45011.

This cause is before the court for consideration of a motion for new trial and request for evidentiary hearing filed by the defendant Shannon Gatliff.

The court scheduled and held a hearing on the motion on May 31, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On January 11, 2012, the defendant Shannon Gatliff was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(1), stemming from an altercation which occurred outside the Backyard Inn in Clermont County. A jury trial commenced on April 30, 2012, and on May 4, 2012, the jury returned a guilty verdict as to the offense of felonious assault.

On May 10, 2012, the court held a conference with counsel on the record during which the court informed counsel that the court's bailiff Deborah Cribbet received information several days prior to the conference pertaining to one of the jurors in the case. The bailiff Cribbet then informed counsel that several days before the conference her daughter relayed to her a conversation she had with one of the jurors (who is Cribbet's granddaughter's soccer coach) who stated that she believed one of the other jurors on the case might have watched video of the altercation on YouTube at some point during the trial. Additionally, the juror told the bailiff's daughter that there may have been discussion of some things during deliberations that the jurors were told by the court not to consider.

The defendant filed his motion for new trial and for evidentiary hearing on May 23, 2012. The defendant offers two affidavits in support of his motion. The first affidavit is that of Melinda Copas, the juror that had the conversation with the bailiff's daughter as set forth above. In her affidavit, Copas states that prior to deliberations: (1) one juror indicated that his daughter told him video of the fight at issue was on YouTube and (2)

another juror stated that defense counsel told Amanda Dilo to dress as she did in court so she would appear to be the type of person to start a bar fight.[1] The affidavit also states that during deliberations: (1) several jurors noted the scars on the defendant's face and said that the defendant must like to engage in bar fighting and (2) one juror stated that Amanda Dilo had been tried and acquitted and could not be re-tried which would explain why she testified that she, and not the defendant (who is also Dilo's brother), caused the injuries to the victim in this case.[2]

The second affidavit is that of Richard Hyde, counsel for the defendant, who sets forth what the bailiff Cribbet told counsel at the meeting on May 10th and notes that a YouTube search reveals that videos one and three of the fight at issue appear on YouTube and that these videos had been viewed.[3]

LEGAL ANALYSIS

"A firmly established common-law rule flatly prohibits the admission of juror testimony to impeach a jury verdict. Reflecting that principle, Evid.R. 606(B), the *aliunde* rule, governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict[,]"[4] and states as follows:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that 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

[1] Motion for New Trial and Request for Evidentiary Hearing, Exhibit A at ¶¶ 4-5.
[2] Id. at ¶¶ 6-7.
[3] Id, Exhibit B at ¶¶ 9-10 and 13-14.
[4] *State v. Hessler* (2000), 90 Ohio St.3d 108, 123, 734 N.E.2d 1237.

> connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes."[5]

"The purpose of the *aliunde* rule is to maintain the sanctity of the jury room and the deliberations therein."[6] "The rule is designed to ensure the finality of jury verdicts and to protect jurors from being harassed by defeated parties."[7] The Ohio Supreme Court has consistently held that " '"the information [alleging misconduct] must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence *aliunde* being introduced first.' "[8] "Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of impeaching the verdict or for laying a foundation of evidence aliunde."[9]

Additionally, "[a]lthough Evid.R. 606(B) protects the deliberations process, the language of the rule does not limit its application to the examination of improper conduct or communications only during deliberations. The rule also prohibits inquiry into 'the effect of anything upon his or any other juror's mind or emotions as influencing him to

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[5] Evid.R. 606(B).
[6] *Hessler*, supra, 90 Ohio St.3d at 123, citing *State v. Rudge*, 89 Ohio App.3d 429, 438-439, 624 N.E.2d 1069 (Ohio App. 11th Dist., 1993).
[7] Id.
[8] Id., citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 75, 564 N.E.2d 54.
[9] *Schiebel* at 75-76.

assent to or dissent from the verdict * * * or concerning his mental processes in connection therewith.' This may involve inquiry into improper conduct that occurred throughout the trial, during the presentation of evidence, or among jurors during the course of the trial that may influence a juror's mind, emotions, or mental processes during deliberations. Events that occur during the trial may also have an effect upon the jurors' deliberations."[10]

The facts of the case at bar with regard to the present motion have much in common with those set forth in *State v. Brakeall* (July 20, 2009), 12th Dist. Nos. CA2008-06-022 and CA2008-06-023, 2009-Ohio-3542. In *Brakeall*, the defendant was convicted of felonious assault and, one month after the verdict was announced, the defendant moved for a new trial on the basis of alleged juror misconduct.[11] The appellate court noted that "[a] new trial may be granted on motion of a criminal defendant due to juror misconduct that materially affects the defendant's substantial rights[,]" but that "[a] motion for new trial based on juror misconduct must be supported by affidavit showing the truth of the allegation."[12]

The defense attorney in the *Brakeall* case submitted his own affidavit in which he averred that the trial court informed him that " 'pursuant to information learned from a deputy, two jurors referred to extrinsic materials and/or evidence while deliberating [Brakeall's] verdict[,]'" and that extrinsic evidence was revealed to be Black's Law Dictionary.[13] The trial court denied the motion for new trial on the basis that "under the

[10] *State v. Reiner* (2000), 89 Ohio St.3d 342, 351, 731 N.E.2d 662, overruled on other grounds, 532 U.S. 17, 121 S.Ct. 1252, 149 L.Ed.2d 158.
[11] *State v. Brakeall* (July 20, 2009), 12th Dist. Nos. CA2008-06-022 and CA2008-06-023, 2009-Ohio-3542, at ¶ 4.
[12] Id. at ¶ 9, citing Crim.R. 33(A)(2) and (C).
[13] Id. at ¶ 10.

'aliunde rule' contained in Evid.R. 606(B), the jury's verdict could not be impeached with the information the court employee had received from a juror."[14]

The appellate court upheld the trial court's decision, noting that the defendant "failed to present evidence aliunde of the alleged juror misconduct and thus failed to lay the requisite foundation for the introduction of any testimony from a member of the jury regarding alleged juror misconduct."[15] Due to the fact that the evidence in defense counsel's affidavit came from a court employee who had received the information from a juror, it did not qualify as evidence aliunde, since it originally came from a juror.[16] The affidavit did not allege that defense counsel possessed firsthand knowledge of the alleged misconduct nor was there any allegation or showing that the court employee had any such firsthand knowledge; instead, all of the information came directly from a member of the jury.[17] As a result, the appellate court found that the court did not abuse its discretion in denying the motion for new trial or for denying the motion without holding an evidentiary hearing.[18]

The Ohio Supreme Court has held that when the affidavits offered in support of a motion for new trial do not offer evidence of any improper extraneous influence (i.e., threats, bribes, or attempted threats or bribes, or improprieties by a court officer), and, therefore, do not meet any of the exceptions to the *aliunde* rule set forth in Evid.R. 606(B), a trial court does not abuse its discretion in overruling the motion for new trial or an evidentiary hearing.[19]

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[14] Id. at ¶ 11.
[15] Id. at ¶ 19.
[16] Id.
[17] Id. at ¶ 20.
[18] Id. at ¶ 21.
[19] *Hessler*, supra, 90 Ohio St.3d at 124.

The defendant directs this court's attention to *Doan v. Brigano*, 237 F.3d 722 (6th Cir., 2001), in support of his argument that use of Evid.R. 606(B) would deny him the opportunity to establish a violation of his Sixth and Fourteenth Amendment rights to an impartial jury. In the *Doan* case, a juror conducted an outside experiment and presented the results of that experiment to the jury during deliberations.[20] The Sixth Circuit Court of Appeals held that discussion of an outside experiment which may have been deeply flawed in its methodology denied the defendant his right to confront the witnesses and evidence against him and, therefore, the trial court's refusal to consider this evidence of jury misconduct on the basis of the *aliunde* rule conflicted with Supreme Court precedent recognizing the fundamental importance of that significant constitutional right.[21]

In the case at bar, there is no such evidence of an outside experiment or any extraneous evidence presented by a juror to the jury. There is no evidence that the juror whose daughter informed him that the video evidence was on YouTube actually viewed that video via YouTube. Furthermore, other than the comment that the video was on YouTube, there is no evidence of any discussion or information coming from this juror that would constitute extraneous evidence. The jurors were provided with the video evidence in the jury room and were permitted to view the video individually if they so wished, upon the agreement of counsel. Therefore, there was likely a great deal of discussion about the video during deliberations. There is nothing in the affidavit of Melinda Copas to suggest that the juror at issue injected additional facts into the discussion based on anything related to the copy of the video posted on YouTube.

[20] *Doan* at 729.
[21] Id. at 732.

The statements made by another juror with regard to Amanda Dilo and any Municipal Court proceedings were speculation derived from a question asked by defense counsel during his examination of Dilo, which the jury was instructed by the court to disregard. This is not evidence of any impartiality or a violation of the defendant's constitutional rights. In addition, the statements made by several jurors regarding the defendant's and Amanda Dilo's appearance do not suggest any impartiality. Instead, jurors are told to evaluate the witnesses and the defendant using the various criteria they use in their everyday lives to evaluate an individual's truthfulness and credibility. Two such criteria can be the person's appearance and demeanor.

Therefore, to whatever extent the *Doan* decision is to be given deference, the court finds that it's holding is not applicable to the case at bar given the facts and circumstances of this case. There is no evidence of an outside experiment or other extraneous evidence being presented to the jury and there is no evidence before the court which would suggest that the jury or any individual juror lacked impartiality.

Based on the above analysis, the court finds that the defendant has failed to present any evidence *aliunde* as he was required to do in order to be entitled to an evidentiary hearing or a new trial. As a result, the defendant's motion for new trial and request for evidentiary hearing is not well-taken and shall be denied.

CONCLUSION

The defendant's motion for new trial and request for evidentiary hearing is not well-taken and is hereby denied.

Counsel shall conference by telephone with the Assignment office no later than Monday, June 18, 2012, and shall obtain a date for the sentencing hearing which shall be scheduled no later than two weeks from the date of this decision.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 15th day of June 2012 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride