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	**:**	

Judith Brant, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Wendy R. Calaway, attorney for the defendant Shannon Blaine Gatliff, 810 Sycamore Street, Suite 117, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a petition to vacate judgment and sentence filed by the defendant Shannon Gatliff.

The court gave the parties notice of a non-oral hearing on the petition which was held on June 10, 2013. On that date, the issues raised by the petition and the memoranda filed by the parties were taken under advisement.

Upon consideration of the petition, the evidence presented for the court's consideration, the 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 in the present case for one count of felonious assault in violation of R.C. 2903.11(A)(1), stemming from a fight which occurred outside the Backyard Inn in Loveland, Ohio. A jury trial commenced on April 30, 2012, and on May 4th the jury returned a guilty verdict as to the felonious assault charge.

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 thereto that one of the jurors (Melinda Copas) was alleging that another juror may have watched video of the subject fight on YouTube some time during the trial. The defendant ultimately filed a motion for new trial and contemporaneously filed the affidavit of Melinda Copas which stated that prior to deliberations (1) one juror indicated 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. The affidavit also stated 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.[1] In a

[1] Decision/Entry, filed June 15, 2012, at pgs. 2-3, citing Motion for New Trial and Request for Evidentiary Hearing, filed May 23, 2012, Exhibit A at ¶¶ 4-7.

decision filed of record on June 15, 2012, the court denied the defendant's motion for new trial.

The defendant appealed and the court of appeals affirmed his conviction.[2] One of the issues raised on appeal was the denial of the motion for new trial and the alleged juror misconduct. The appellate court discussed the affidavits filed in support of the motion and also noted that " * * * printouts show that on May 1, 2012, the second day of trial, someone 'googled' appellant's name and was directed to the video. On May 1, 2012, the first video was viewed 15 times while the second video was viewed five times."[3] The court noted that, while these printouts did constitute outside evidence, as required by the *aliunde* rule, "* * * the printouts merely show that the two fight scenes were viewed on the second day of trial; the printouts do not contain any information to connect these viewings to any member of the jury. Therefore, these printouts did not constitute sufficient evidence to demonstrate juror misconduct."[4]

The appellate court also discussed the affidavit of Melinda Copas as follows:

> "Lastly, we note that even if the affidavits were admissible, appellant has not demonstrated that he suffered prejudice. The affidavit of Juror No. 9 [Melinda Copas] merely stated that Juror No. 10 was aware that the video was posted on YouTube. Appellant presented no evidence that any juror watched this video. It is a 'long standing' rule that a judgment will not be reversed based upon juror misconduct unless prejudice to the complaining party is shown; prejudice will not be presumed."[5]

The defendant has now filed the present petition to vacate judgment and sentence pursuant to R.C. 2953.21. In the petition, the defendant states as follows:

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[2] *State v. Gatliff* (July 1, 2013), 12th Dist. No. CA2012-06-045, 2013-Ohio-2862, ¶ 1.
[3] Id. at ¶ 73.
[4] Id. at ¶ 74.
[5] Id. at ¶ 76, citing *State v. Doan*, 12th Dist. No. CA2001-09-030, 2002-Ohio-3351, ¶ 45, citing, *State v. Keith*, 79 Ohio St.3d 514, 526 (1997).

> "Records obtained of Google searches demonstrate that the videos were viewed 63 times between April 30, 2012 and May 4, 2012. A majority of the IP addresses of those viewing the videos of the incident on the internet during that time period are from the Greater Cincinnati area and ten are from Loveland, Milford and Batavia. These areas are in Clermont County, the area from which the jurors for Mr. Gatliff's case were drawn.
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> Ms. Copas has also made additional statements * * *. Ms. Copas indicated that the jurors in this case intimidated and pressured her into finding Mr. Gatliff guilty when she was not convinced beyond a reasonable doubt that he was, in fact, guilty. * * * Furthermore, the jurors reached their verdict out of concerns for their schedule * * * ."[6]

The defendant also argues that his trial counsel was ineffective for failing to call Bonnie Love, the defendant's mother, as a witness at trial. In her affidavit, Ms. Love avers that, had she been called as a witness at trial, she would have testified that her son informed her on the evening of the incident that Amanda Dilo and Christina Freeman, the victim in this case, got into a physical fight.[7] Ms. Love would have also testified that she witnessed a conversation between Freeman and the defendant several days prior to the fight in which Freeman was angry with the defendant and said that he would pay for getting her in trouble.[8]

LEGAL ANALYSIS

R.C. 2953.21 provides in pertinent part as follows:

[6] Petition to Vacate Judgment and Sentence at ¶¶ 12 and 15 and Exhibits B, C, and E.
[7] Affidavit of Bonnie Love at ¶ 3.
[8] Id. at ¶ 4.

> "(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * * may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.
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> (2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court.
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> (C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal."

The transcripts were filed in the defendant's appeal on October 15, 2012 and one-hundred and eighty days from that date is April 13, 2013. The present petition to

vacate the judgment and sentence was filed on April 11, 2013 and, as such, the petition was timely filed pursuant to R.C. 2953.21(A)(2).

"A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment."[9] "A petition for post-conviction relief is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction."[10] "A petition for post-conviction relief, thus, does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition."[11] "In determining whether a hearing is required, the Ohio Supreme Court * * * stated the pivotal concern is whether there are substantive grounds for relief which would warrant a hearing based upon the petition, the supporting affidavits, and the files and records of the case."[12] " * * * [A] trial court properly denies a defendant's petition for post conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief."[13]

The defendant's first ground for relief is his claim that he was denied his right to a fair trial and to a fair and impartial jury in violation of the Sixth and Fourteenth Amendments to the Constitution. This claim is based on the testimonial evidence

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[9] *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67, citing *State v. Crowder* (1991), 60 Ohio St.3d 151, 573 N.E.2d 652.
[10] *State v. Perry* (Jan. 24, 2011), 5th Dist. No. 2010-CA-00185, 2011-Ohio-274, ¶ 12, citing *State v. Murphy* (Dec. 26, 2000), 10th Dist. No. 00AP-233, 2000 WL 1877526.
[11] Id., citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819.
[12] Id. at ¶ 13, citing *Jackson*, supra.
[13] Id. at ¶ 14, quoting *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905, 1999-Ohio-102, paragraph two of the syllabus.

offered by Melinda Copas and the evidence regarding the YouTube videos as set forth in the petition and the attached exhibits.[14]

As stated in this court's previous decision and as discussed in the decision of the Twelfth District Court of Appeals, "[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[,]"[15] 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 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."[16]

"The purpose of the *aliunde* rule is to maintain the sanctity of the jury room and the deliberations therein."[17] "The rule is designed to ensure the finality of jury verdicts and to protect jurors from being harassed by defeated parties."[18] The Ohio Supreme Court has consistently held that " '"the information [alleging misconduct] must be from a

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[14] Petition, Exhibits B, C, and E.
[15] *State v. Hessler* (2000), 90 Ohio St.3d 108, 123, 734 N.E.2d 1237.
[16] Evid.R. 606(B).
[17] *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).
[18] Id.

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.' "[19] "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."[20]

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 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."[21]

The testimony of Melinda Copas about feeling intimidated by other jurors in the jury room is clearly in violation of the *aliunde* rule and cannot be considered by this court. The remaining issues raised regarding statements made by jurors have already been addressed by this court in its previous decision, which was affirmed by the Twelfth District Court of Appeals, and those issues will not be revisited.

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[19] Id., citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 75, 564 N.E.2d 54.
[20] *Schiebel* at 75-76.
[21] *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.

As to the issue regarding the YouTube videos, the only new evidence presented by the defendant demonstrates that these videos were viewed 63 times during the trial with ten of those viewings occurring in the Loveland, Milford and Batavia areas. This evidence does not alter the analysis of the Twelfth District Court of Appeals set forth above; namely, that there is no connection between the viewing of the YouTube videos and any juror in this case. The simple fact that these videos were viewed in several cities and villages within Clermont County, where thousands of people reside, does not demonstrate that any juror in this case viewed those videos at any time. This evidence does not set forth operative facts establishing that any juror misconduct occurred in this case, nor does it establish that the defendant was denied his right to a fair trial or a fair and impartial jury.

The defendant's second ground for relief is his claim for ineffective assistance of counsel. "In order for [the defendant] to be entitled to an evidentiary hearing in a postconviction relief proceeding on a claim that [he] was denied effective assistance of counsel, the two-part *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, test is to be applied."[22] "[The defendant] must prove that: (1) counsel's performance fell below an objective standard of reasonable representation; and (2) there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."[23] "Furthermore, before a hearing is granted in proceedings for postconviction relief upon a claim of ineffective assistance of trial counsel, appellant bears the initial burden to submit evidentiary material containing

[22] *State v. Gonzales* (Sept. 30, 2010), 6th Dist. No. WD-09-078, 2010-Ohio-4703, ¶ 39, citing, *Hill v. Lockhart* (1985), 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203; *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373; *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169.
[23] Id.

sufficient operative facts that demonstrate 'a substantial violation of any of defense counsel's essential duties to his client' and prejudice arising from counsel's ineffectiveness."[24]

"Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance."[25] "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel."[26]

"The decision whether to call a witness is generally a matter of trial strategy and, absent a showing of prejudice, does not deprive a defendant of effective assistance of counsel."[27]

The affidavit of Bonnie Love demonstrates that the majority of her testimony would have been cumulative to the testimony of the other defense witnesses in this case.[28] Ms. Love states that she was told by the defendant on the evening in question that Amanda Dilo and Christina Freeman got into a fight and that she observed Dilo's wounds. This was the essence of the defense put on at the trial – the defendant claimed that he did not hit Freeman but instead that her injuries were caused by Amanda Dilo. The jury, by virtue of its verdict, did not find this testimony to be credible

[24] Id. at ¶ 40, citing *Calhoun*, supra, 86 Ohio St.3d at 289.
[25] *State v. Flora* (Nov. 2, 2006), 8th Dist. No. 87544, 2006-Ohio-5732, ¶ 24, citing *Strickland*, supra, 466 U.S. at 689.
[26] Id., citing *Strickland*; and, *State v. Taylor* (May 19, 2006), 2nd Dist. No. 21122, 2006-Ohio-2655, ¶ 23.
[27] *State v. Rutter* (Jan. 27, 2003), 4th Dist. No. 02CA17, 2003-Ohio-373, ¶ 27, citing *State v. Williams*, 74 Ohio App.3d 686, 695, 600 N.E.2d 298 (Ohio App. 8th Dist., 1991). See, also, *State v. Clark* (May 4, 2009), 12th Dist. No. CA2008-09-113, 2009-Ohio-2101, ¶ 18.
[28] See, e.g., *State v. Hicks* (March 21, 2005), 12th Dist. No. CA2004-07-170, 2005-Ohio-1237, ¶ 12 (affidavits submitted were merely cumulative to evidence already in the record).

and the court can see no reason why the jurors would have viewed testimony from the defendant's mother any differently.

Any evidence regarding the alleged arson was excluded by this court and that decision was upheld on appeal. This leaves only Love's statement that Christina Freeman said that the defendant "would pay for getting her in trouble" several days prior to the incident. There was evidence presented at trial that Christina Freeman and the defendant broke up shortly before the incident and that they did not remain on good terms when their relationship ended. There has been no showing by the defendant that there is a reasonable probability that this testimony by Bonnie Love would have led to a different outcome in this trial.

Based on the above analysis, the defendant has failed to set forth operative facts to establish substantive grounds for relief from his conviction.

CONCLUSION

The defendant's petition to vacate judgment and sentence is not-well taken and is hereby dismissed.

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 12th day of July 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride