[Cite as *State v. Dute*, 2003-Ohio-2774.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-020709 TRIAL NO. B-0202575(A)
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
JENNIFER DUTE,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: May 30, 2003

Michael K. Allen, Prosecuting Attorney, and *Anita P. Berding*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Sirkin, Pinales, Mezibov & Schwartz, LLP, H. Louis Sirkin, Jennifer M. Kinsey, and *Wendy R. Calaway*, for Defendant-Appellant.

Please Note: We have sua sponte removed this case from the accelerated calendar.

DOAN, Presiding Judge.

{¶1} In response to complaints about defendant-appellant Jennifer Dute's website, police initiated an undercover investigation. On four separate occasions, police officers posing as customers used forms available on Dute's website to order videotapes that featured Dute engaged in various sexual acts with multiple partners. Police mailed the order forms and money orders to "Jennifer" at a post-office box in Amelia, Ohio. The videotapes were delivered through the mail to undercover officers at two "covert" addresses, 11787 Hamilton-Cleves Highway and 7699 Harrison Pike.

{¶2} Dute and her husband were charged with four counts of pandering obscenity in violation of R.C. 2907.32(A)(2), felonies of the fifth degree. Specifically, the indictment charged that the Dutes sold or delivered obscene videotapes entitled "Jennifer #2," "Jennifer #3," "Jennifer #6," and "Jennifer #7," in Hamilton County. Following a jury trial, Dute was convicted as charged. Her husband was acquitted. Dute was sentenced to one year's incarceration on each count, to be served concurrently.

{¶3} Dute's first assignment of error alleges that the trial court erred in denying her motion to introduce comparable materials. Prior to trial, Dute filed a motion to introduce comparable materials consisting of three videotapes found not to be obscene in *State v. Metcalf*, Hamilton C.P. No. B-0009955. The trial court denied Dute's motion and precluded her from introducing the comparable materials at trial. Defense counsel proffered the videotapes, along with the transcript of the *Metcalf* trial for the record on appeal. Dute's stated reason for proffering the *Metcalf* transcript was to show that Metcalf had been acquitted because the jury had found that the videotapes were not obscene, and not for any other reason.

{¶4} The test to determine whether material is obscene was set forth by the United States Supreme Court in *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607: "the basic guidelines for the trier of fact must be: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

{¶5} The defendant in an obscenity case must be allowed to introduce competent, relevant evidence bearing on the issues to be tried. See *Hamling v. United States* (1974), 418 U.S. 87, 94 S.Ct. 2887. It is error for a trial court in an obscenity case to deny or unreasonably curtail a defendant's right to introduce into evidence competent and non-repetitive testimony or exhibits that directly relate to or bear upon the absence of any or all of the elements of the *Miller* obscenity test. See *State ex rel. Leis v. William S. Barton Co., Inc.* (1975), 45 Ohio App.2d 249, 344 N.E.2d 342; *State v. Abrams* (July 8, 1981), 1st Dist. No. C-800410.

{¶6} The *Metcalf* videotapes, having been found by a Hamilton County jury not to be obscene, arguably demonstrated contemporary community standards. A trial court may not unreasonably curtail the right of the defendant in an obscenity case to introduce competent, non-cumulative evidence bearing upon the *Miller* test elements, including evidence of community standards. See *State v. Huss* (Mar. 21, 1979), 1st Dist. No. C-780361.

{¶7} In *State v. Hustler Magazine* (Apr. 4, 1979), 1st Dist. No. C-77101, the trial court excluded from evidence all magazines that the defendant had offered as

"comparable literature" sold in Hamilton County. We held that the "trial court abused its discretion in excluding all evidence which directly related to or had a bearing on community standards."

{¶8} We have examined the proffered materials, and we hold that the videotape entitled "Gangland 17" is sufficiently similar to the "Jennifer" videotapes to be considered a comparable material. We hold that the trial court erred in excluding the "Gangland 17" videotape from evidence because it was comparable to the "Jennifer" videotapes, and because it was relevant to the issue of community standards since it had been found not to be obscene in a prior proceeding by a Hamilton County jury. The trial court's refusal to admit the "Gangland 17" videotape denied Dute the right to introduce relevant evidence that directly related to the community-standards element of the *Miller* test.

{¶9} We hold that the other proffered videotapes are not sufficiently similar to the "Jennifer" videotapes to be considered comparable materials.

{¶10} Dute also alleges that the trial court erred in refusing to admit a May 2001 article from the Cincinnati Enquirer entitled "Home is Where the Porn Is." Dute argues that the newspaper article was relevant because it addressed the acceptability of adult material in Hamilton County, as well as the consumption of sexually explicit videotapes by Hamilton County residents through the mail and over the Internet. Dute proffered the article into the record.

{¶11} We have examined the article, and we hold that the trial court did not abuse its discretion in refusing to admit it into evidence. Dute failed to lay a proper foundation for the admission of the article. The trial court could have found that the article was not relevant because it did not deal with the community acceptance of the

material at issue in Dute's trial, and because there was no way to determine whether the materials to which the article referred were comparable to the "Jennifer" videotapes. Further, the article contained quotes from various individuals, including Dute's counsel, who opined that he did not "think the concept of a local community standard is really valid anymore."

{¶12} The first assignment of error is sustained as to the "Gangland 17" videotape and overruled as to the other proffered videotapes and the newspaper article.

{¶13} Dute's second assignment of error alleges that the trial court erred in denying her motion for a mistrial when the jury was exposed to "prejudicial extrajudicial statements."

{¶14} Dute filed a motion in limine to prevent the prosecution from introducing evidence of a prior pandering-obscenity charge that had been brought against Dute. The record reveals that Dute had been charged with pandering obscenity in 1999. The charges against Dute individually had been dismissed when, pursuant to a plea bargain, a fictitious corporate entity, A&J Specialties, had been permitted to plead guilty. The record reveals that the trial court determined that the 1999 charge was inadmissible, apparently finding that evidence of the prior charge was irrelevant and highly prejudicial.

{¶15} On the second day of trial, various local media reported that Dute and her husband had been charged with and/or convicted of pandering obscenity pursuant to the 1999 charges. The media reports were brought to the trial court's attention. Dute's counsel submitted the articles themselves, as well as affidavits from individuals who had read the newspaper stories and had seen television news accounts.

{¶16} The jurors had previously been instructed that they were not to attempt to obtain any information about the case outside the courtroom, but they had not been

instructed that they were not to view, read or listen to any media reports about the case. The trial court polled the jury to determine whether any of the jurors had seen or heard the news reports. Seven of the twelve jurors indicated that they had seen or heard the media reports. The trial court addressed the jury, "What I'm going to ask all of you that raised your hand at this point, is there anything that you observed from the TV viewing, from listening on the radio, or from watching it or seeing it in the newspaper or wherever you came into contact with it, that would cause you any particular problems with this case with continuing to serve as a juror? * * * Is there anybody that now feels that they have got a particular problem, that they saw anything that caused them a problem, made them make up their mind, change their mind, anything?" (T.p. 240-241.) The court then instructed the jurors that they were not to "read, view, or listen to any report" about the case in the media.

{¶17} At a sidebar conference, Dute's counsel requested that the trial court examine the jurors individually to determine what they had read or heard concerning the case, and whether they could still be fair and impartial. In the alternative, Dute's counsel requested a mistrial. The trial court refused to conduct a voir dire of the jurors and overruled the motion for a mistrial.

{¶18} In *Marshall v. United States* (1959), 360 U.S. 310, 79 S.Ct. 1171, the defendant was charged with unlawfully dispensing a prescription drug resulting in misbranding. The trial court refused to allow the prosecution to introduce evidence that the defendant had previously been convicted of practicing medicine without a license. A "substantial number" of jurors read newspaper articles containing facts about the defendant's prior conviction along with other unfavorable information. The United States Supreme Court held that the defendant's conviction had to be reversed because the

jury was exposed to information that the trial judge had ruled inadmissible because of its prejudicial effect. The Court stated that the prejudicial effect was "almost certain to be as great when that evidence reached the jury through news accounts as when it is a part of the prosecution's case." Id at 312-313, 79 S.Ct. 1171. The *Marshall* court stated that it was granting a new trial "in the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts."

{¶19} In *State v. Doll* (1970), 24 Ohio St.2d 130, 265 N.E.2d 279, the Ohio Supreme Court held that the inflammatory effect of evidence tending to show that the defendant had committed another offense was generally recognized as so prejudicial that a reversal was required.

{¶20} The Ohio Supreme Court, in *State v. Craven* (1973), 35 Ohio St.2d 18, 298 N.E.2d 547, relied on *Marshall* and *Doll* in holding that where a trial court had ruled that the defendant's prior felony conviction was inadmissible and the jury was made aware of the conviction through newspaper reports, the prejudice could not be cured by judicially solicited assurances from the jurors that they were not influenced by the information.

{¶21} Where the jury becomes aware of "highly prejudicial" evidence of the defendant's past criminal behavior through news media coverage, it is per se prejudicial to the defendant. See *State v. Kirkland* (Apr. 9, 1998), 10th Dist. No. 97APA07-873; *Marshall v. United States*, supra; *State v. Doll*, supra; *State v. Craven*, supra.

{¶22} In *Murphy v. Florida* (1975), 421 U.S. 794, 95 S.Ct. 2031, a case involving pretrial publicity and the initial selection of the jury, the United States Supreme Court stated that its *Marshall* decision was expressly based upon its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal

courts. The Court held that, therefore, *Marshall* was not a constitutional ruling applicable to the states through the Fourteenth Amendment. The *Murphy* court held that the constitutional standard of fairness required that the defendant's case be tried before an impartial jury, and that "a juror's assurances that he is equal to [the] task cannot be dispositive" of the rights of the accused. The Court noted that the voir dire of the jurors indicated no prejudice toward the defendant or partiality that could not be put aside. The *Murphy* court held that, under the totality of the circumstances, no prejudice to the defendant was demonstrated.

{¶23} We applied the *Craven* standard in *State v. Bess* (Nov. 12, 1986), 1st Dist No. C-850895. In *Bess*, we stated that the *Craven* court had "observed that the fact that jurors saw newspaper articles, thus becoming aware of other inflammatory evidence improperly, could not be cured by judicially solicited assurances that each was not influenced thereby."

{¶24} In *Bess*, the defendant was convicted of aggravated murder and aggravated robbery. On the second day of trial, an article pertaining to the case appeared in the Cincinnati Enquirer. Two jurors had seen the article. One juror had read the headline, but had not read the article. The other juror had read the article. The trial court conducted a voir dire of the second juror, which revealed that he had not read anything about the defendant's alleged criminal past, that he had not discussed the article with any other juror, and that the article would not affect his ability to be impartial. We held that a mistrial was not required because the first juror had not read the article, and because the second juror's "lack of recall rendered him as if he had not seen the article at all."

{¶25} In the instant case, the trial court had determined that evidence of the prior charges of pandering obscenity was inadmissible at trial. The jurors were not initially

instructed that they were not to view, read or listen to any media reports concerning the Dute case. Seven of the twelve jurors indicated that they had read or heard media stories about the case. The stories erroneously reported that Dute and her husband had previously been charged with and/or convicted of pandering obscenity, the same crime for which they were standing trial. The information was "highly prejudicial." The trial court failed to conduct a meaningful voir dire of the jurors who had indicated that they had seen or read the media reports. We hold that under the *Marshall*, *Doll* and *Craven* per se prejudice test, or under the *Murphy* totality-of-the-circumstances test, the trial court erred in refusing to grant a mistrial. The second assignment of error is sustained.

{¶26} The third assignment of error essentially alleges that the trial court erred in entering a judgment of conviction because the state had failed to prove venue. Dute argues that the evidence was insufficient to prove that 11787 Hamilton-Cleves Highway and 7699 Harrison Pike were located within Hamilton County.

{¶27} Venue must be proved beyond a reasonable doubt in a criminal prosecution. See *State v. Headley* (1983), 6 Ohio St.3d 475, 453 N.E.2d 716. "In the prosecution of a criminal case, it is not essential that the venue of the crime be proved in express terms, provided that it can be established by all the facts and circumstances, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the affidavit." *State v. Gribble* (1970), 24 Ohio St.2d 85, 263 N.E.2d 904, paragraph two of the syllabus.

{¶28} The assistant director of real estate for the Hamilton County Auditor testified that 11787 Hamilton-Cleves Highway was located in Hamilton County. (T.p. 61.) A police officer testified that he was familiar with the 11787 Hamilton-Cleves Highway address and that it was located in Hamilton County. (T.p. 71-73.) The

prosecution presented sufficient evidence in "express terms" that 11787 Hamilton-Cleves Highway was in Hamilton County.

{¶29} In regard to the 7699 Harrison Pike address, the same police officer testified that he was familiar with the property, and that it was located at the intersection of Harrison Avenue and East Miami River Road in Colerain Township, approximately eight or nine miles south of the Butler County line, and approximately five or six miles east of the Indiana state line. (T.p. 76.) These "facts and circumstances" were sufficient to demonstrate that Hamilton County was the proper venue. See *State v. Gribble*, supra; *State v. Neeley* (2001), 143 Ohio App.3d 606, 758 N.E.2d 745. The third assignment of error is overruled.

{¶30} The fourth assignment of error alleges that the trial court erred in instructing the jury.

{¶31} A defendant is entitled to have the trial court completely and accurately instruct the jury on all issues that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder. See *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640; *State v. Williford* (1990), 49 Ohio St.3d 247, 551 N.E.2d 1279. The trial court need not give a proposed instruction in the precise language requested by the defendant; however, if the requested instruction correctly states the law and is appropriate to the proceedings, it must be included, in substance, in the court's jury charge. See *State v. Lessin*, 67 Ohio St.3d 487, 1993-Ohio-52, 620 N.E.2d 72; *State v. Kennedy* (Mar. 16, 2001), 1st Dist. No. C-000255. When a defendant claims that a jury instruction was erroneous, it must be viewed in its entirety in the context of the overall charge. See *State v. Frazier*, 73 Ohio St.3d 323, 1995-Ohio-235, 652 N.E.2d 1000.

{¶32} We hold that the trial court did not err in refusing to give Dute's requested jury instructions. To the extent that the requested instructions correctly stated the law and were appropriate to the facts of the case, they were included in the court's general charge to the jury. The fourth assignment of error is overruled.

{¶33} Dute's fifth assignment of error alleges that her convictions were based upon insufficient evidence. Specifically, Dute argues that the prosecution failed to prove beyond a reasonable doubt that she "sold or delivered" the videotapes, as required by R.C. 2907.32(A)(2).

{¶34} For the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of act could have found the essential elements of the crime beyond a reasonable doubt. See *State v. Fears*, 86 Ohio St.3d 329, 1999-Ohio-111, 715 N.E.2d 136, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

{¶35} The police officers testified that they had sent the order forms and money orders to "Jennifer" at a post-office box. The money orders were endorsed "Jennifer Dute." A search of the Dute home revealed numerous copies of the various "Jennifer" videotapes, as well as the order forms sent by the police. One of the police officers testified that it appeared that Dute was "operating a business" from her home. During the search, Dute's husband stated to police that Jennifer Dute was in charge of processing the order forms for the "Jennifer" videotapes. We hold that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that all the elements of pandering obscenity were proved beyond a reasonable doubt. The fifth assignment of error is overruled.

{¶36} Dute's sixth assignment of error, which alleges that the trial court erred in sentencing her to one year's incarceration on each count, is made moot by our disposition of the first and second assignments of error. We point out, however, that we do not believe that the record supports a finding that Dute was engaged in organized criminal activity.

{¶37} The determination of whether conduct constitutes "organized criminal activity" must be made on a case-by-case basis. See *State v. Shryock* (Aug. 1, 1997), 1st Dist. No. C-961111. Griffin and Katz, Ohio Felony Sentencing Law (1999), 368-369, Section T 4.14.3, defines "organized criminal activity" as "criminal activity which because of the number of participants and planned utilization of those participants poses more of a risk to the public order than an activity carried out by a single individual acting in isolation from other offenders or than multiple individuals acting spontaneously or impulsively." See *State v. Shryock*, supra; *State v. Martinez*, 6th Dist. No. WD-01-027, 2002-Ohio-735.

{¶38} The record does not support a finding that Dute's conduct was part of an organized criminal activity posing a greater risk to the public because of its organized nature. See *State v. Shryock*, supra.

{¶39} The first assignment of error is sustained to the extent that it alleges that the trial court erred in failing to allow Dute to introduce the "Gangland 17" videotape into evidence as a comparable material, and it is overruled in all other respects. The second assignment of error is sustained. The third, fourth and fifth assignments of error are overruled. The sixth assignment of error is moot.

{¶40} The judgment of the trial court is reversed, and the cause is remanded for a new trial and for further proceedings consistent with law and this Opinion.

Judgment reversed and cause remanded.

PAINTER, J., concurs.
WINKLER, J., dissents.

PAINTER, J., concurring.

{¶41} The dissent confuses the type of personalized prejudice that results when jury members for a specific case are exposed to information about that case, *which the trial court had already deemed too prejudicial to be offered as evidence*, with mere general pretrial publicity.

{¶42} In *State v. Davis*[1] and *Mu'Min v. Virginia*,[2] both cases cited by the dissent, a murder defendant argued that members of the jury pool had been exposed to media reports about the murder months before the trial. In both cases, the court conducted a careful and searching voir dire and questioned potential jurors, either individually or in small groups, about the impact of any pretrial publicity. In both cases, the court held that the defendant was not deprived of a fair trial due to the pretrial publicity. To equate those cases with this one, where the publicity was *during* trial, and where no voir dire was done, is to equate zebras with kumquats.

{¶43} Many events that eventually lead to a criminal prosecution are reported in the news, and many potential jurors follow the news. The impact of such pretrial publicity is clearly less prejudicial than the impact of the jury exposure in Dute's trial. In Dute's case, a majority of the jurors heard reports, during the trial, that Dute had been previously charged with and/or convicted of pandering obscenity, the very charge in the current trial. The facts of *Marshall*[3] and *Craven*[4] are more on point than any case cited

[1] See 76 Ohio St.3d 107, 1996-Ohio-414, 666 N.E.2d 1099.
[2] (1991), 500 U.S. 415, 111 S.Ct. 1899.
[3] (1959), 360 U.S. 310, 79 S.Ct. 1171.

by the dissent, and they make it clear that the trial court erred in not granting a mistrial. I concur in Judge Doan's analysis.

WINKLER, J., dissenting.

{¶44} Because I am convinced that the trial court did not abuse its discretion in excluding from evidence the allegedly comparable materials or in refusing to grant a mistrial following juror exposure to media reports, I must respectfully dissent.

{¶45} In her first assignment of error, Dute argues that the trial court erred by denying her motion to introduce comparable materials, which included three videotapes. Dute's argument before the trial court and on appeal that the three proffered videotapes[5] had been "found by a Hamilton County jury not to be obscene" lacks foundation in the record. Dute proffered the three videotapes, as well as a transcript of the trial proceedings in *State of Ohio v. Elyse Metcalf*.[6] Metcalf had been charged with three counts of pandering obscenity in connection with her sale of the three videotapes to undercover officers.[7]

{¶46} As with most criminal trials, those who review the record following an acquittal typically are not able to determine why a jury chose not to find the defendant guilty. Because jury deliberations are secret, even the judge who presided over the trial or the lawyers who tried the case cannot say for certain why the jury acquitted the defendant. "As a general rule, no one -- including the judge presiding at trial -- has a

[4] (1973), 35 Ohio St.2d 18, 298 N.E.2d 597.
[5] The three videotapes were "Jeff Stryker's Underground," "Gangland 17," and "Kitty Foxx's Aged to Perfection."
[6] Hamilton County Common Pleas No. B-0009955.
[7] We note that one of Metcalf's lawyers represented Dute at trial and is her counsel in this appeal. Metcalf's second lawyer represented her husband, Alan, at trial.

'right to know' how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror.'"[8]

{¶47} Having reviewed the transcript of the Metcalf trial, I cannot conclude that it demonstrates that the jury acquitted Metcalf based upon a finding that the videotapes at issue were not obscene. In Metcalf's trial, defense counsel made much of the fact that Metcalf had not actually watched the three videotapes that were the subject of her prosecution, and that Metcalf, who was "not hiding anything," did not intend to violate the law. Counsel argued that Metcalf would have had to know the character of the videotapes -- she would have had to know that the material in the videotapes was obscene.

{¶48} Metcalf's defense counsel also argued that one of the undercover police officers had entered Metcalf's store and, within a few minutes, "seemed to get enough trust out of [Metcalf] to have her help him find the tape that he wanted to give for his father * * *. * * * And then he further lured her into the idea of feeling comfortable with him so that he could ask her, do you have a particular tape? And she said no. Well, can you get it for me? And never meeting him before, in his ability to be able to get her to feel comfortable, she went ahead and paid out of her own money, called the national distributor and asked, do you have a particular tape and got it."

{¶49} One might speculate that the jurors were swayed by counsel's arguments that Metcalf lacked knowledge of the obscene nature of the videotapes, or that the police had "lured" her into making the sales. But that is just as speculative as Dute's argument that the Metcalf jury found the three videotapes not to be obscene. "A distinct possibility

[8] *Koch v. Rist*, 89 Ohio St.3d 250, 252, 2000-Ohio-149, 730 N.E.2d 963, citing *State v. Robb*, 88 Ohio St.3d 59, 81, 2000-Ohio-275, 723 N.E.2d 1019.

exists that the [jury's] verdicts were predicated on findings that the prosecution failed to prove any of the other elements of the offense beyond a reasonable doubt rather than that the materials were not obscene."[9]

{¶50} Following a review of the three videotapes proffered by Dute, a majority of this court has concluded that only one of the three videotapes, "Gangland 17," is sufficiently similar to the Dute videotapes. The majority holds that the trial court erred by excluding the videotape from evidence because it was comparable to the Dute videotapes and "had been found not to be obscene in a prior proceeding by a Hamilton County jury." While I agree that the "Gangland 17" videotape is somewhat similar to the Dute videotapes, I cannot agree that it had been found by a previous jury not to be obscene. Moreover, as the United States Supreme Court has recognized, "A judicial determination that particular matters are not obscene does not necessarily make them relevant to the determination of the obscenity of other materials, much less mandate their admission into evidence."[10]

{¶51} The trial court's decision to exclude evidence concerning the existence of comparable material rests within the sound discretion of the court.[11] Absent a showing of an abuse of discretion, that decision should not be disturbed on appeal. An abuse of discretion "connotes more than error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude * * *." [12]

---

[9] *State v. Keaton* (1996), 113 Ohio App.3d 696, 702, 681 N.E.2d 1375.
[10] *Hamling v. United States* (1974), 418 U.S. 87, 126-127, 94 S.Ct. 2887.
[11] See *State v. Hustler Magazine* (Apr. 4, 1979), 1st Dist. No. C-77101. See, also, *State v. Williams* (1991), 75 Ohio App.3d 102, 115, 598 N.E.2d 1250; *State v. Keaton* (1996), 113 Ohio App.3d 696, 681 N.E.2d 1375.
[12] See *State v. Mauer* (1984), 15 Ohio St.3d 239, 250, 473 N.E.2d 768.

{¶52} In *Hamling v. United States*, the United States Supreme Court noted that the petitioners had offered into evidence at trial allegedly comparable materials, including materials that had been the subject of prior litigation and had been found to be constitutionally protected, as well as materials that were openly available on newsstands. The Supreme Court held that the trial court had not abused its discretion in refusing to admit the allegedly comparable materials into evidence:

{¶53} "The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried. But the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating. As stated by the Court of Appeals, the mere fact that materials similar to the brochure at issue here 'are for sale and purchased at book stores around the country does not make them witnesses of virtue.' [Citations omitted.] Or, as put by the Court of Appeals in *United States v. Manarite* [Citations omitted]: 'Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.'"[13]

{¶54} The availability of similar materials "does not automatically make them admissible as tending to prove the non-obscenity of the materials which the defendant is charged with circulating," and the trial court "retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative, and in requiring that

[13] *Hamling v. United States* (1974), 418 U.S. 87, 125-126, 94 S.Ct. 2887.

which is to be brought to the jury's attention to be done so in a manner least likely to confuse that body."[14]

{¶55} In this case, the trial court did not deprive Dute of her right to introduce evidence regarding the *Miller* obscenity test. Dute presented the testimony of Elyse Metcalf, the proprietor of a store that sold what she described as "adult material, including adult movies and sexual enhancement." Metcalf testified that sexually explicit videotapes were available for sale in Hamilton County through various stores within the county, as well as through the Internet.

{¶56} Because I believe that the trial court did not abuse its discretion in refusing to admit the *Gangland Vol. 17* videotape into evidence, I would overrule Dute's first assignment of error.

{¶57} In her second assignment of error, Dute argues that the trial court erred by denying her motion for a mistrial following the media reports of her prior pandering-obscenity charge. "In the assessment of the denial of a motion for a mistrial, the standard of review for this court is whether the trial court abused its discretion."[15] "An appellate court will not disturb the exercise of that discretion absent a showing of an abuse and that the accused has suffered material prejudice."[16]

{¶58} In 1959, in *Marshall v. United States*,[17] the United States Supreme Court held that jurors who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced. In 1973, the Ohio Supreme Court seized upon this

[14] *State v. Abrams* (July 8, 1981), 1st Dist. No. C-800410, citing *Hamling v. United States* (1974), 418 U.S. 87, 125, 127, 94 S.Ct. 2887.
[15] *State v. McMillian* (May 8, 1996), 1st Dist. No. C-950523, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343; *State v. Smith* (1990), 68 Ohio App.3d 692, 696, 589 N.E.2d 454.
[16] *State v. Smith*, supra, at 696, 589 N.E.2d 454, citing *State v. Long* (1978), 53 Ohio St.2d 91, 98, 372 N.E.2d 804.
[17] (1959), 360 U.S. 310, 79 S.Ct. 1171.

holding despite the fact that *Marshall* was expressly limited to the Supreme Court's exercise of supervisory power to formulate standards for enforcement of the criminal law in federal courts. In *State v. Craven*,[18] the Ohio Supreme Court reversed the defendant's conviction because the defendant had been prejudiced by the prosecutor's attempts to elicit testimony regarding the defendant's prior convictions, and because the prejudice to the defendant that had resulted from the jurors' exposure to a newspaper article could not have been overcome by the jurors' assurances that they had not been influenced by the article.

{¶59} In 1975, in *Murphy v. Florida*,[19] the United States Supreme Court specifically stated that its earlier decision in *Marshall* was not a constitutional ruling and was, therefore, not applicable to the states through the Fourteenth Amendment to the United States Constitution. *Murphy* specifically rejected the "proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."[20] Instead, the Court used a totality-of-the-circumstances test to determine whether the defendant's trial had been fundamentally unfair.[21] *Murphy* held that, under the totality of the circumstances, the defendant had not been denied a fair trial where members of the jury had learned from news accounts about a prior felony conviction or about certain facts about the crime with which he was charged.[22]

[18] (1973), 35 Ohio St.2d 18, 298 N.E.2d 597.
[19] (1975), 421 U.S. 794, 95 S.Ct. 2031.
[20] Id. at 799, 95 S.Ct. 2031.
[21] Id.
[22] Id. at 803, 95 S.Ct. 2031.

{¶60} In *State v. Davis*,[23] the Ohio Supreme Court recognized the United States Supreme Court's repudiation of the per se rule of prejudice. Davis had argued that publication by the media of his criminal record, along with information "highly probative of his guilt," was enough to create a presumption of prejudice. The court rejected Davis's argument, because his "claim ignores the mandate of *Murphy v. Florida*, which held that pretrial publicity about a defendant's criminal record does not create an automatic presumption of prejudice."[24]

{¶61} In this case, the majority concludes that the information contained in the news accounts was "highly prejudicial" to Dute. On appeal, Dute argues that "various local media outlets reported on the second day of trial that Mrs. Dute had a prior obscenity conviction stemming from the 1999 charges. * * * The prejudicial effect of these reports were heightened by their blatantly false suggestion that Mrs. Dute had been previously *convicted* of pandering obscenity. Mrs. Dute had no such conviction; the prior charges against her were dismissed in exchange for a corporate plea by A&J Specialties." Dute's claim that the media had reported that she had been convicted of the prior charge is not supported by the record or by the affidavits submitted by defense counsel.

{¶62} On the third day of trial, Alan Dute's lawyer, now one of Jennifer Dute's lawyers on appeal, filed an affidavit with the court alleging that, since the first day of the trial, she had viewed two television news reports and one newspaper account about the Dute case. The lawyer alleged that she had heard one television story report that "the Dutes had previously been charged with obscenity and had agreed 'never to sell videos in Hamilton County again.'" The lawyer further alleged that a second television story had

[23] 76 Ohio St.3d 107, 1996-Ohio-414, 666 N.E.2d 1099.
[24] Id. at 111-112, 1996-Ohio-414, 666 N.E.2d 1099, citing *Murphy v. Florida*, supra, at 798, 95 S.Ct. 2031.

reported that "Mr. and Mrs. Dute have previously been charged with pandering obscenity but that the charges were dismissed in exchange for an agreement by the Dutes not to sell videos in Hamilton County." Finally, the newspaper account reported that "* * * this isn't the first time [the Dutes] have been charged with pandering obscenity. In a 2000 plea bargain, the Dutes allowed their company --A&J Specialties-- to plead guilty to two counts of pandering obscenity to have the charges against each of them dismissed. They escaped potential prison time when they paid a $2,500 fine and agreed to never again sell their videos to or from Hamilton County." As Alan Dute's lawyer indicated in her affidavit, "[Alan] Dute was never charged with pandering obscenity in the past."

{¶63} A second lawyer from the same law firm filed an affidavit with the court alleging that he had heard a radio news report. According to him, "Although I do not recall the exact wording of the story, I do remember that it contained a reference to a prior obscenity matter involving the Dutes. As I recall, the story suggested that, according to the prosecutor's office, both Jennifer and Allan [sic] Dute should know better than to sell adult videos in Hamilton County because they had entered into an agreement not to sell such videos in the county as part of the resolution of their prior matter."

{¶64} The only evidence before the trial court regarding the media coverage consisted of the affidavits of the lawyers concerning their memories of the news reports and a copy of the newspaper article. Other than the newspaper article, no videotape or audiotape of television or radio reporting was submitted. A reading of the lawyers' affidavits makes clear that none of the news stories reported that the Dutes had been previously convicted of pandering obscenity, but only that they previously had been charged with the offense. According to the memory of the lawyers, at least one of the

television reports indicated that the previous charges had been dismissed. Each report incorrectly indicated that Alan Dute had been charged in the past with pandering obscenity.

{¶65} The majority's conclusion that Jennifer Dute was prejudiced by the media reports is seriously undermined by the fact that Alan Dute was acquitted by the jury despite the media's false report that he previously had been charged with pandering obscenity. Although several jurors had been exposed to misinformation about Alan Dute's past, they were obviously not so inflamed by the news reports that they could not decide the case on the evidence, as they had been instructed by the trial court.

{¶66} The majority further holds that the trial court "failed to conduct a meaningful voir dire of the jurors" upon learning that some had been exposed to the news accounts. The record reveals that the trial court asked the jurors whether the information had caused them to "make up their mind, change their mind, anything?" The court, having already instructed the jurors that they should gain no additional information on the case outside the courtroom, further instructed them to refrain from exposure to news accounts about the case.

{¶67} In *Mu'Min v. Virginia*,[25] the trial judge had denied a defense motion for individual voir dire relating to the content of news items to which potential jurors might have been exposed. Upon learning of a potential juror's exposure to news accounts regarding the case, the judge had simply asked whether the juror had formed an opinion. Although eight of the twelve jurors eventually sworn admitted that they had been exposed to information about the case, none indicated that they would be biased in any

[25] (1991), 500 U.S. 415, 111 S.Ct. 1899.

way. The United States Supreme Court held that "the trial judge's refusal to question prospective jurors about the specific contents of the news reports to which they had been exposed did not violate [the defendant's] Sixth Amendment right to an impartial jury or his right to due process under the Fourteenth Amendment."[26]

{¶68} The Court further noted that its prior cases had "stressed the wide discretion granted to trial courts in conducting voir dire in the area of pretrial publicity and in other areas that might tend to show juror bias."[27]

{¶69} The Ohio Supreme Court also has consistently emphasized that a trial court has discretion in determining a juror's ability to be impartial.[28] In *State v. Phillips*,[29] five jurors had heard out-of-court comments by a grand juror who had said that the case was the worst one that she "was on,"[30] and that she hoped the defendant got what he deserved. The jurors had immediately reported the comments to the trial court. Following the trial court's examination of the jurors, the court stated that it was satisfied that the jurors would put the remarks out of their minds. The Ohio Supreme Court held that the trial court had not abused its discretion by retaining the jurors because they had stated that they would disregard the grand juror's comments.[31] "A juror's belief in his or her own impartiality is not inherently suspect and may be relied upon by the trial court."[32]

---

[26] Id.
[27] Id.
[28] See, e.g., *State v. Sheppard*, 84 Ohio St.3d 230, 235, 1998-Ohio-323, 703 N.E.2d 286; *State v. Williams* (1983), 6 Ohio St.3d 281, 288, 452 N.E.2d 1323. See, also, *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4, 739 N.E.2d 749 (decision on change of venue due to highly publicized nature of case is within sound discretion of trial court); *State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710 (trial court did not abuse its discretion in denying the defendant's motion for change of venue despite jurors' exposure to extensive pretrial media coverage, where no juror indicated it would affect his or her impartiality).
[29] 74 Ohio St.3d 72, 1995-Ohio-171, 656 N.E.2d 643.
[30] The court noted that the woman had not served on the grand jury that had indicted the defendant.
[31] 74 Ohio St.3d 72, 89, 1995-Ohio-171, 656 N.E.2d 643.
[32] Id., citing *Smith v. Phillips* (1982), 455 U.S. 209, 217, 102 S.Ct. 940.

The court also noted that the comments had not been so inflammatory as to prejudice the members of the jury.[33]

{¶70} In *State v. Wilson*,[34] a capital murder case, the defendant claimed that the trial court had denied him due process by not allowing him to conduct a voir dire of prospective jurors individually about specific mitigating factors. The Ohio Supreme Court cited *Mu'Min* for the conclusion that "a trial court has 'great latitude in deciding what questions should be asked on voir dire.' [Citations omitted.] Deciding 'issues raised in voir dire in criminal cases has long been held to be within the discretion of the trial judge.'"[35]

{¶71} In this case, I believe that the trial court's inquiry following the media exposure was sufficient to ascertain whether the jurors had been biased. Following its inquiry, the trial court instructed the jurors to refrain from further media exposure, having already told them that they would have to rely solely on the evidence presented to them in the courtroom to resolve the case. The jury acquitted Alan Dute, despite several of its members having been exposed to media reports that had incorrectly reported that he had previously been charged with pandering obscenity. Accordingly, under the totality of the circumstances, I cannot conclude that Jennifer Dute was prejudiced by the jurors' exposure to the media reports.

{¶72} Therefore, I do not believe that the trial court abused its discretion in refusing to declare a mistrial. I am convinced that no material prejudice to Jennifer Dute

[33] Id.
[34] 74 Ohio St.3d 381, 1996-Ohio-103, 659 N.E.2d 292.
[35] Id. at 386, 1996-Ohio-103, 659 N.E.2d 292.

is demonstrated by the record in light of the trial court's actions and the jury's acquittal of Alan Dute.

{¶73} The state was required to prove that Jennifer Dute, knowing the character of the material or performance involved, sold or delivered obscene material, in violation of R.C. 2907.32(A)(2). The standards that the jury was required to apply were (1) whether the average person, applying contemporary community standards, would have found that the work, taken as a whole, appealed to the prurient interest; (2) whether the work depicted or described, in a patently offensive way, sexual conduct; and (3) whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value.[36]

{¶74} The jury in this case was confronted with a very difficult task. The jury was obliged to watch four of Dute's videotapes in their entirety before concluding that the videotapes were obscene. As part of the appeals panel that reviewed this case, I, too, was obliged to watch each of the Dute videotapes. To quote Justice Potter Stewart of the United States Supreme Court, "I know it when I see it."[37] The Dute videotapes are clearly obscene -- they are garbage. I know it, and the jurors who decided this case knew it.

Please Note:

The court has recorded its own entry on the date of the release of this Opinion.

[36] *Miller v. California* (1973), 413 U.S. 15, 24, 93 S.Ct. 2607.
[37] *Jacobellis v. Ohio* (1964), 378 U.S. 184, 197; 84 S.Ct. 1676 (Stewart, J., concurring).