

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO :  
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 Plaintiff-Appellee : C.A. CASE NO. 2008 CA  
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 v. : T.C. NO. 08 CR 282  
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 GARY STAMBAUGH : (Criminal appeal from  
 : Common Pleas Court)  
 Defendant-Appellant :  
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**OPINION**

Rendered on the 30<sup>th</sup> day of December, 2009.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Gary S. Stambaugh appeals his conviction and sentence  
for one count of theft, in violation of R.C. § 2913.02(A)(1), a felony of the fifth degree.  
Stambaugh filed a timely notice of appeal with this Court on December 29, 2008.

## I

{¶ 2} On July 30, 2008, Stambaugh was charged by indictment with one count of theft. Stambaugh was arraigned on August 4, 2008, and he entered a plea of not guilty.

{¶ 3} The case was set for trial on November 5, 2008. During voir dire, counsel for the State inquired whether anyone in the prospective jury panel believed that they could not be fair regarding the offense allegedly committed by Stambaugh. One of the prospective jurors responded that she did not think she could be fair since she had heard from a friend that Stambaugh was involved in an another unrelated theft of someone's tools.

Defense counsel objected to the juror's statement and requested a mistrial during a sidebar conference. The trial court overruled the request for mistrial, excused the juror who made the statement, and gave a limiting instruction to the remaining members of the prospective jury.

{¶ 4} At the end of voir dire, defense counsel informed the trial court of Stambaugh's intention to change his plea from not guilty to no contest. Shortly thereafter, the trial court held a hearing in which Stambaugh was allowed to change his plea to no contest. The trial court accepted Stambaugh's plea, and subsequently found him guilty of the charged offense of theft. On December 15, 2008, the trial court sentenced Stambaugh to six months in prison, but stayed the sentence pending the outcome of the instant appeal.

{¶ 5} It is from this judgment that Stambaugh now appeals.

## II

{¶ 6} Stambaugh's sole assignment of error is as follows:

{¶ 7} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING

APPELLANT’S REQUEST FOR A MISTRIAL AFTER A PROSPECTIVE JUROR  
MADE DAMAGING ALLEGATIONS DURING VOIR DIRE.”

{¶ 8} In his sole assignment, Stambaugh contends that the trial court abused its discretion when it overruled his motion for a mistrial after a prospective juror made inappropriate hearsay comments during voir dire. Specifically, Stambaugh argues that the entire jury panel was tainted when the prospective juror stated that she could not be fair and impartial because she had heard from an unidentified third party that Stambaugh had committed a separate theft in an unrelated case.

{¶ 9} The incident of alleged juror misconduct occurred during the following exchange:

{¶ 10} “The State: \*\*\* This is a theft case. Nothing particularly unusual or high drama about this kind of case. In this case it was some tools [that were stolen].

{¶ 11} “Defense Counsel: Your Honor, I’d object to the characterization. I think it’s an alleged theft. I’d prefer that it be characterized that way.

{¶ 12} “The Court: Well, I explained to the jurors the indictment is simply an allegation. Go ahead, Mr. Bennett.

{¶ 13} “Prospective Juror Seat No. 3: Okay. *This is gonna be – I know somebody that alleges that he stole some tools from them too so I don’t think I could be fair on this.*

{¶ 14} “Defense Counsel: Can we have a sidebar on this?

{¶ 15} “\*\*\*

{¶ 16} “The Court: Yes. Hold on a second. Just a second. Thank you for telling me that but yes. Mr. Bennett he requested a –

{¶ 17} “The State: I’m sorry.

{¶ 18} “The Court: – sidebar.

{¶ 19} (Bench Conference)

{¶ 20} “Defense Counsel: That’s about as damaging of pollution of a jury as you can get so –

{¶ 21} “The Court: What did she say?

{¶ 22} “Defense Counsel: She said that my client stole some tools from someone else that she –

{¶ 23} “The Court: Oh, I didn’t hear her say that your client did.

{¶ 24} “Defense Counsel: Yeah, I think so.

{¶ 25} “The State: She said, he was accused of stealing some –

{¶ 26} “Defense Counsel: Okay, I didn’t –

{¶ 27} “The State: She did say that.

{¶ 28} “Defense Counsel: I hate to do it but I move for mistrial.

{¶ 29} “The Court: Okay. Noted. And I’ll tell the jurors to disregard that and excuse her.

{¶ 30} “Defense Counsel: I don’t think its correctable on the record as such.

{¶ 31} “The Court: She didn’t really mention Mr. Stambaugh. She just used the word ‘he.’ Just plural could be, could be Mr. Bennett.

{¶ 32} “Defense Counsel: Well, I don’t think so, but I, I don’t think any limiting instruction will correct that mistake.

{¶ 33} “The Court: I understand. You’ve made a record.

{¶ 34} “Defense Counsel: Thank you very much.

{¶ 35} (End Bench Conference)

{¶ 36} “\*\*\*

{¶ 37} “The Court: \*\*\* Based upon the indication to me that you could not be fair and impartial in the case I’ll go ahead and excuse you at this time. So thank you very much for appearing here today. Thank you very much.

{¶ 38} “\*\*\*

{¶ 39} “And ladies and gentlemen of the jury as I indicated the, this part of the trial process is not evidence. Anything that’s said by jurors or the attorneys is not evidence. The only evidence in this case comes from the witness stand and any exhibits that are admitted. Anything else that you hear is simply designed to try to make sure that some people don’t come into the courtroom with their own impressions or opinions which have no bearing on the case and may be completely erroneous so with that in mind, Mr. Bennett, you can continue.”

{¶ 40} Mistrials need be declared only when the ends of justice so require, and a fair trial is no longer possible. *State v. Garner* (1995), 74 Ohio St.3d 49, 59. The decision whether to grant a mistrial lies within the trial court's sound discretion. *Id.* In order to demonstrate that a trial court has abused its discretion in denying a motion for a mistrial, a criminal appellant must show that the trial court's decision was arbitrary, unreasonable, or unconscionable. *State v. Nichols* (1993), 85 Ohio App.3d 65, 69.

{¶ 41} A new trial may be granted for the misconduct of the jury when the

substantial rights of the defendant have been materially affected. *State v. Lewis* (1993), 67 Ohio St.3d 200, 207; see also, Crim. R. 33; R.C. § 2945.79. Jury misconduct will not warrant a new trial in the absence of prejudice to the defendant. *State v. Jaryga*, Lake County App. No. 2003-L-023, 2005-Ohio-352. “It is a long-standing rule of this court that we will not reverse a judgment because of the misconduct of a juror unless prejudice to the complaining party is shown. *Armleder v. Lieberman* (1877), 33 Ohio St. 77.” *State v. Kehn* (1977), 50 Ohio St.2d 11, 19.

{¶ 42} In reviewing circumstances suggesting juror misconduct, we must employ a two-tier analysis: 1) determine whether there was juror misconduct, and 2) if juror misconduct is found, determine whether it materially affected the defendant’s substantial rights. *State v. Hopfer* (1996), 112 Ohio App.3d 521; see also, *State v. Taylor* (1991), 73 Ohio App.3d 827, 833.

{¶ 43} In the instant case, we agree with the trial court that the prospective juror’s statement regarding Stambaugh’s alleged involvement in a separate theft was clearly improper. The prospective juror’s statement also established that she was unable to be fair and impartial in regards to Stambaugh’s alleged involvement in the underlying offense. Thus, the trial court acted properly when it excused the prospective juror in light of her apparent bias against Stambaugh.

{¶ 44} The trial court found that the remainder of the venire was not tainted by the juror’s statement and refused to grant defense counsel’s motion for mistrial. After excusing the prospective juror, the court, instead, chose to provide the remaining members of the jury pool with a limiting instruction in which it stated that the opinions expressed by other jurors or the attorneys were not evidence. The

court stated that the opinions being expressed by the other jurors were only being used to discover who could fairly judge Stambaugh's case. At the close of voir dire, defense counsel expressed his client's decision to change his plea from not guilty to no contest since he felt that he would not be able to receive a fair trial in light of the prospective juror's statement. The trial court allowed Stambaugh to plead no contest to the theft charge, and subsequently found him guilty without a trial being held.

{¶ 45} While we find that the prospective juror's statement was prejudicial on its face, we are unable to conclude on this particular record whether the statement materially affected Stambaugh's substantial rights because a trial was not held with the jury pool that was allegedly tainted by the improper statement. Since a trial was not held, it would amount to pure speculation on our part if we were to find that the juror's statement somehow contaminated the jury pool. Had Stambaugh decided to move forward with the trial rather than change his plea to no contest, a trial record would exist whereby we could properly determine whether Stambaugh's substantial rights were materially affected by the juror's statement. Thus, we cannot find on the record before us that the trial court abused its discretion when it overruled Stambaugh's motion for mistrial.

{¶ 46} Stambaugh's sole assignment of error is overruled.

### III

{¶ 47} Stambaugh's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

Copies mailed to:

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