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**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DERRICO DEVON SEARCY,

Defendant-Appellee.

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UNPUBLISHED

October 22, 2020

No. 351442

Wayne Circuit Court

LC No. 10-001495-01-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARRELL RASHARD EWING,

Defendant-Appellee.

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No. 351446

Wayne Circuit Court

LC No. 10-001495-02-FC

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

This case returns to us following federal habeas proceedings and a trial court hearing ordered by the federal court to determine whether defendants are entitled to a new trial in light of the jury’s exposure to extraneous information. In our prior treatment of this case, we concluded that the jury was exposed to extrinsic information but held that defendants had not demonstrated prejudice as a result. On habeas review, the Sixth Circuit concluded that it was constitutionally improper to make the prejudice determination without an evidentiary hearing. The case returned to the state trial court for the mandated evidentiary hearing. After hearing the evidence, the trial court made credibility and factual findings and based on those findings ordered a new trial, concluding that defendants had been prejudiced by the jury’s exposure to extraneous information. The prosecution appeals and for the reasons set forth in this opinion, we affirm.

## I. FACTS & PROCEDURAL HISTORY

Defendants' convictions arise from the fatal shooting of J.B. Watson and the nonfatal shooting of Phillip Reed. The jury convicted defendant Derrico Devon Searcy of one count of second-degree murder and three counts of assault with intent to murder. He is serving 30 to 50 years in prison for second-degree murder and 20 to 30 years for each assault conviction. The same jury convicted defendant Darrell Rashard Ewing of one count of first-degree murder, three counts of assault with intent to murder, and felony-firearm. The court sentenced him to life in prison for first-degree murder, 16 to 30 years for each assault conviction, and 2 years for felony-firearm.

This Court summarized the background facts in its opinion on defendants' direct appeals:

These consolidated appeals arise from a shooting at the intersection of Harper and Van Dyke, in the city of Detroit on December 29, 2009. At the time of the shooting, J.B. Watson and his girlfriend, LaRita Thomas, were in Thomas's van along with Phillip Reed and Willie Williams. The van was stopped at the intersection of Harper and Van Dyke in Detroit for a traffic signal. Raymond Love testified that while driving on Harper, a turquoise vehicle turned onto Harper and the two vehicles drove side by side for a short while. Love identified the driver of the turquoise vehicle as Searcy. In that turquoise vehicle, there were also two other black males, one of which was later identified as Ewing. When Love reached the red traffic light at the Van Dyke intersection, the turquoise car pulled to the curb, staying back about six or seven car lengths. [According to Love,] Ewing then exited the vehicle with a handgun drawn, approached Thomas's van, and fired many shots into the rear of the van. [Love testified that, a]fter shooting, Ewing retreated to the turquoise car, which by that time had moved into the middle of Harper, and the car left in the opposite direction on Harper.

Watson died of injuries he received from the gunshot wounds. Reed was injured in the attack, with a bullet striking him in his left hand. Watson, Reed, and Williams are cousins and members of a gang identified as the Knock Out Boys (KOB). Searcy and Ewing were alleged to be members of a rival gang called the Hustle Boys. [*People v Searcy (Searcy I)*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2013 (Docket Nos. 301751 & 301758).]

At trial, defendants presented the testimony of Christopher Richardson, who claimed Tyree Washington and William Beal carried out the shooting, not Ewing and Searcy. Richardson testified that Washington told him that he "laid Isaiah down," which meant he had killed a designated person, and that the killing occurred at Harper and Van Dyke. Washington purportedly bragged about these events in jail. Richardson also characterized Washington as Beal's "flunky," meaning that Washington would do what Beal told him to do.

Ewing's mother, Lasonya Denise Dodson, who testified for the prosecution, claimed Ewing was attending a "funeral repast" with her at the time of the shooting. Ewing called other witnesses who supported his alibi. LaJoia Stevenson, who was dating Washington at the time and is Ewing's cousin, testified that on the night of the shooting, Washington told her he had just shot someone on Van Dyke and that Ewing had "nothing to do with it."

Deliberations began on November 11, 2010, and on November 15th the jury indicated it could not agree on a verdict and asked whether the trial court could declare a hung jury. The trial court, however, directed the jury to continue its deliberations. The next day, the jury convicted defendants as stated.

While defendants' appeals to this Court were pending, Ewing filed a motion for a new trial, presenting an affidavit from Kathleen Byrnes, a juror at his and Searcy's joint trial, who attested, among other things, that two other jurors used the Internet to research various issues related to the case, including photographs from Ewing's Facebook page, the victim's eulogy, and information about gang hierarchies and culture and that this information was discussed during deliberations. The trial court denied the motion.<sup>1</sup>

On appeal, defendants raised numerous issues, including claims for a new trial based on the asserted extraneous influences on the jury. As to Searcy, this Court found that he did not preserve the issue in the trial court; that he abandoned the issue on appeal by failing to make an adequate argument; and that he did not establish plain error. *Id.* at 6-7. With regard to Ewing, who preserved the issue by filing a motion for a new trial, this Court determined that the extraneous information was duplicative of evidence presented at trial and that Ewing did not demonstrate "how any extraneous influence created a real and substantial possibility that it could have affected the jury's verdict." *Id.* at 10. Accordingly, this Court concluded that the trial court did not abuse its discretion in denying Ewing's motion for a new trial and it otherwise affirmed defendants' convictions. The Supreme Court denied leave to appeal. *People v Searcy*, 495 Mich 934 (2014); *People v Ewing*, 495 Mich 935 (2014).<sup>2</sup>

Ewing then filed a petition for writ of habeas corpus in federal district court, claiming he was denied a fair trial and impartial jury on the basis of the extraneous Internet research brought into jury deliberations. The federal district court concluded the state trial court erred when it denied Ewing an evidentiary hearing after he raised the issues of extraneous information. Based on Byrnes's affidavit, the federal district court concluded Ewing had shown that the information obtained from the Internet could have tainted the jury and it was unable to conclude the use of the information during deliberations was harmless error. The federal district court concluded Ewing was entitled to a writ of habeas corpus on the basis of the extraneous information that entered jury

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<sup>1</sup> While their claims of appeal were pending, defendants moved this Court for remand. The motions were premised on three affidavits provided by Washington and Washington's indication that he was willing to testify. He had previously exercised his Fifth Amendment right and declined to testify. This Court denied defendants' motions for remand.

<sup>2</sup> After the Supreme Court denied his application for leave to appeal, Searcy moved for relief from judgment, again raising issues related to the affidavits of Washington and Byrnes, and also arguing that his appellate attorney was ineffective. The trial court denied Searcy's motion because it relied on issues previously raised in his appeal, and found no ineffective assistance of counsel. Searcy unsuccessfully sought leave to appeal in this Court and our Supreme Court. *People v Searcy*, unpublished order of the Court of Appeals, entered November 4, 2015 (Docket No. 327968), lv den 499 Mich 984 (2016).

deliberations, and ordered he be released from custody absent action from the state court to provide him a new trial.<sup>3</sup>

The prosecution appealed to the United States Court of Appeals for the Sixth Circuit, and the parties agreed on appeal that Ewing was unconstitutionally denied the chance to show actual prejudice from the extraneous information the jury considered during deliberations. *Ewing v Horton*, 914 F3d 1027, 1030 (CA 6, 2019). However, the Sixth Circuit determined that the appropriate remedy was to condition his release on the outcome of an evidentiary hearing rather than grant a new trial. *Id.* at 1030-1032. Accordingly, on remand the federal district court conditionally granted Ewing's request for habeas relief, conditioning his release on the failure of the state trial court to provide him an evidentiary hearing on his juror-misconduct claim.<sup>4</sup> Searcy also sought habeas relief, and the parties agreed Searcy, like Ewing, was entitled to an evidentiary hearing on the juror-misconduct claim, and an order conditionally granting habeas relief to Searcy was entered.<sup>5</sup>

An evidentiary hearing was held in Wayne Circuit Court on August 26, 2019, almost nine years after the trial. Byrnes testified about the information that other jurors brought into the jury room during deliberations. Byrnes testified that one juror looked up Facebook photographs of Ewing, including one that said "Mr. and Mrs. Nasty" and others with firearms. Byrnes testified the pictures were not brought into the jury room but were discussed during deliberations, but she indicated that this did not affect her verdict. Byrnes also testified that a juror also mentioned that he or she read Watson's eulogy on the Internet, and she discussed the "experiments" that the jurors conducted regarding Raymond Love's eyewitness testimony.

Byrnes testified that she was unsure whether Searcy and Ewing were guilty and that she was the holdout juror that caused the jury to report a deadlock. Byrnes found particularly troubling the testimony that Washington had confessed to the crime Ewing was accused of. According to Byrnes, another juror, Karen James, researched information about gangs and gang hierarchies on the Internet and reported her findings to Byrnes during deliberation. James explained to Byrnes that gangs had a hierarchy, meaning certain members were more important to the gang than others. James's opinion was that, on the basis of her research, Ewing was at the top of the Hustle Boys' hierarchy, while Washington was at the bottom, and that Washington was claiming the murder in an attempt to take the fall for Ewing. Byrnes agreed that James's gang information helped persuade her that Washington was willing to falsely claim the murder for Ewing, and as a result, Byrnes discredited Washington's confession. Byrnes agreed that "the information" James provided as well as her opinion regarding the hierarchy of the Hustle Boys made Byrnes change her decision from not guilty to guilty. Before the introduction of the information related to gang

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<sup>3</sup> *Ewing v Horton*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued November 20, 2017 (Case No. 2:15-CV-10523), rev'd 914 F3d 1027 (CA 6, 2019).

<sup>4</sup> *Ewing v Woods*, unpublished order of the United States District Court for the Eastern District of Michigan, entered April 30, 2019 (Case No. 2:15-CV-10523).

<sup>5</sup> *Searcy v Palmer*, unpublished order of the United States District Court for the Eastern District of Michigan, entered May 31, 2019 (Case No. 4:16-cv-13779).

codes and hierarchies, Byrnes did not believe the charges against Searcy and Ewing were proven beyond a reasonable doubt.

According to Byrnes, once the jurors concluded Ewing was guilty, their deliberations about Searcy's guilt did not last long because "[e]veryone felt that they were being tried together so if we were finding one guilty we had to find the other one guilty." Although three other jurors testified at the evidentiary hearing, their recollection of the deliberations was not as clear as Byrnes's, and, to the extent that they recalled extraneous information coming into the jury room, it did not impact them in the same way as it did Byrnes.

In October 2019 the trial court announced its ruling from the bench that defendants were entitled to new trial. The court found "[t]here doesn't seem to be much question that extraneous information came into the deliberati[ve] process." The court first addressed whether the extraneous information influenced the jury's verdicts and found Byrnes's testimony to be the most important. The court found Byrnes's testimony "pretty clear and convincing and amazingly vivid," concluding that the information about "gang culture, gang hierarchy, [and] gang nomenclature or signing" had the most impact on Byrnes's decision to change her verdicts. But the court also noted additional information was brought into the process that, cumulatively, also contributed to her decision to change her votes. The court concluded, in no uncertain terms, that the extraneous information was brought into deliberations for the specific purpose of pressuring Byrnes to change her verdicts and that it was outcome-determinative, i.e., it caused Byrnes to agree to a guilty verdict, and that the information was not duplicative to the evidence at trial:

[I]t is just inescapable from Byrnes's testimony that the outside influences, the inappropriate influences caused her to change her mind. There is just no way to get around that based on her testimony. And that the information, particularly about gang culture, gang hierarchy, gang signs, et cetera, were highly prejudicial. . . .

The trial evidence . . . was insufficient to convince Byrnes beyond a reasonable doubt that the [defendants] were guilty. It was the extraneous information that did so. . . . [O]ne can't say it was just duplicative. There was some evidence that dribbled into the trial about gang signs and gang culture and hierarchy. But I think it is very important to note that pretrial, the trial [j]udge disallowed evidence from a People's so-called expert witness that was [proposed], a witness by the name of Terry Graves who apparently is a police officer who fancies herself to be an expert in gang culture and in a pretrial hearing to determine the admissibility of Graves's testimony the trial [j]udge excluded the testimony, wouldn't let her testify as an expert. . . . Graves testified that much of the information that she has acquired to arm herself with expert's credentials comes from the Internet. We can imagine much of the same information that juror Byrnes was exposed to inappropriately or improperly during the course of jury deliberations.

So, the evidence was not directly duplicative of evidence [w]hat was introduced at the trial.

The trial court also found that evidence of defendants' guilt was not overwhelming. The court noted Love's testimony that he was able to identify Ewing from a mirror inside his vehicle while he was "crouched down to the floor of the car" as "virtually impossible to imagine." The court also noted the testimony that Washington had purportedly confessed to the crime and concluded that "it wasn't an ironclad case by any means."

## II. ANALYSIS

The prosecution argues the trial court erred when it granted defendants a new trial. We disagree.<sup>6</sup>

During deliberations, the members of a jury are permitted to consider only the evidence that was admitted in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). A jury's consideration of extraneous information that was not introduced at trial constitutes a deprivation of a defendant's Sixth Amendment rights of confrontation, cross-examination and assistance of counsel. *Id.* "[W]here there is evidence to suggest the verdict was affected by influences external to the trial proceedings, courts may consider juror testimony to impeach a verdict." *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). "Any conduct, even if misguided, that is inherent in the deliberative process is not subject to challenge or review." *Id.* at 540.

To obtain a new trial, a defendant must first "prove that the jury was exposed to extraneous influences." *Budzyn*, 456 Mich at 88. Next, the defendant must show that the "extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 89. Proof of the second prong generally requires a demonstration "that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse burden." *Id.* If the defendant successfully proves these points, the burden shifts to the prosecution to demonstrate that the error, which is constitutional in nature, was harmless beyond a reasonable doubt. *Id.* The prosecution's burden may be satisfied by proving either that the extraneous influence did not affect deliberations because it was merely duplicative of evidence admitted at trial, or that the evidence of guilt was overwhelming. *Id.* at 89-90.

As an initial matter, we disagree with the prosecution's argument that we are bound by the prior rulings in *Searcy I* regarding the extraneous information under the law-of-the-case doctrine.

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<sup>6</sup> We review a trial court's decision to grant or deny a motion for a new trial based on extraneous influences on the jury for an abuse of discretion. See *People v Garay*, 320 Mich App 29, 39; 903 NW2d 883 (2017). See also *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001) (reviewing for an abuse of discretion the trial court's denial a motion for a new trial based on juror misconduct). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *People v Sharpe*, 502 Mich 313, 324; 918 NW2d 504 (2018). We review a trial court's factual findings for clear error. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016).

“[A]s a general rule, an appellate court’s determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals.” *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). “The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). However, the doctrine does not apply if there has been a material change in the facts, *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996), or an intervening change in the law, see *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). Whether the doctrine applies is reviewed de novo.<sup>7</sup> *Ashker*, 245 Mich App at 13.

Several considerations counsel against applying the law-of-the-case doctrine in this case. In the prior appeal, this Court was reviewing the trial court’s decision to deny Ewing’s motion for a new trial based on Byrnes’s affidavit. Based on the limited record before us, we concluded that the trial court did not abuse its discretion when it denied the motion and that Searcy could not show plain error. *Id.* 9-10. In the habeas proceedings, however, the prosecution eventually conceded that it was constitutional error to make that determination without an evidentiary hearing. That evidentiary hearing has now been held. Thus, the question now before us is whether the trial court abuse its discretion when, in light of the evidence produced at the hearing, it granted, rather than denied, defendants a new trial. In other words, because the trial court effectively revisited its prior decision, the procedural posture of the case has changed. *Cf. People v Hermiz*, 235 Mich App 248, 254; 597 NW2d 218 (1999), *aff’d* on other grounds 462 Mich 71 (2000) (holding that the law of the case did not apply when the Michigan Supreme Court remanded to the trial court to address the issue we previously ruled on). In addition, while this Court’s analysis in *Searcy I* was based only on Byrnes’s affidavit, further evidence of the impact of the extraneous information on her verdict was provided through the evidentiary hearing. Because the evidentiary hearing brought to light new information on the question of extraneous influence, the material facts relating to this issue are no longer the same. Finally, the evidentiary hearing ordered by the federal court to determine the effect of the extraneous information would have served no purpose if we were bound to follow our prior ruling that there was insufficient prejudice to merit a new trial. For these reasons, we conclude that the law-of-the-case doctrine does not apply to issues relating to defendants’ claim of extraneous influence.

Turning to the merits, the prosecution concedes that extrinsic information was brought into the jury deliberations and that Byrnes changed her verdict after James discussed the information she had found about gang hierarchies. It is the prosecution’s position, however, that Byrnes’s verdict was affected by James’s arguments based on the Internet research she obtained, not the information itself. In other words, the prosecution argues that it was not the gang-hierarchy information that changed Byrne’s mind but rather James’s “hypothesis” based on that information that Washington was a lower-ranking gang member who was claiming the murder and shooting in this case to take the fall for Ewing, who James posited was a high-ranking gang member. The prosecution further argues that James’s discussion of gang hierarchy and her theory of the case is inherent to the deliberative process and cannot be used to impeach the verdict.

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<sup>7</sup> The trial court rejected the prosecutor’s argument that it was bound by this Court’s prior opinion.

Contrary to the prosecution's argument, Byrnes's testimony at the evidentiary hearing makes clear that her decision was affected by the gang information, in and of itself. Byrnes testified that James reported that she "looked up information about gangs" and that "all gangs have like a pecking order." When asked if "this information" affected her deliberations Byrnes answered affirmatively and explained as follows:

I was feeling that there was—that things hadn't been proven beyond a reasonable doubt and a lot of that . . . was based on the fact that another person had confessed to the murder and she brought that information in to show me. I kept saying, "Why would anyone confess to a murder they didn't", and she brought that in to show me why that this other person, Mr. Washington I believe was his name, that he would have confessed because the gang told him to.

Byrnes repeatedly confirmed that "the information" James found about gang hierarchies on the Internet caused her to change her vote:

*Q.* . . . . Now as far as your own verdict in this particular case, did the information that Ms. James gave you that there's a pecking order that she found on the internet, did that specific information affect your verdict?

*A.* Yes.

At the hearing, Byrnes was not asked whether she would have been convinced by James's theory in the absence of supporting extraneous information. Perhaps an outside authority, even one as general as "the Internet," lent needed credence to that idea. In any event, Byrnes's testimony, which the trial court found highly credible, leaves no doubt that the extraneous information itself played a substantial part in changing her mind. We defer to the trial court in matters of credibility. See MCR 2.613(C); *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

We also agree with defendants that the prosecution's attempt to distinguish the extraneous information from arguments made in deliberations based on that information is unavailing. Any arguments made to Byrnes about the hypothetical hierarchy in this case flowed directly from the information stemming from James's Internet research. After James described that information to Byrnes she, contrary to her views up to that point, discredited Washington's confession to the crime concluding that it resulted from the gang hierarchies described in the Internet research performed by James. Byrnes's conclusions stemmed from the extraneous information shared within the jury room, thereby depriving defendants of a jury deciding the case on information solely introduced at trial. And as defendants argue, if an improper, extraneous influence could be shielded from review merely because its significance was discussed in the jury room, any improper outside influence could be rendered immune from attack. But this result is exactly the harm *Budzyn* seeks to avoid. See *Budzyn*, 456 Mich at 88 (holding that consideration of extraneous information not admitted into evidence deprives a defendant of his "rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.").

We also note that although Byrnes indicated that the gang-hierarchy information was the extraneous information that ultimately changed her vote, we cannot completely ignore the other external information brought into deliberations. For example, Byrnes testified that one juror found



Facebook photographs of Ewing with a gun and shared that information during deliberations. Byrnes recalled one juror stating during that discussion, “You know they’re guilty of something.” Notably, before trial Ewing successfully sought to suppress a photograph depicting him holding a gun. Similarly, the trial court also precluded the testimony of Terri Graves, a police officer who the prosecutor sought to present as an expert in gangs and gang signs. Yet, as the trial court reasoned after the evidentiary hearing, this is precisely the type of information that was brought into deliberations through the extrinsic material.

The prosecution also argues that, even if the gang-hierarchy information was an extrinsic influence in Ewing’s case, there is little evidence of a direct connection between it and Searcy’s verdict. The prosecution did not raise this argument before the trial court and so failed to properly preserve it for appeal. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Moreover, the link to Searcy’s conviction is not, as the federal court recognized, difficult to perceive. According to Richardson, Washington said that Beal and Adrienne Allen were in the vehicle with him at the time of the crime, i.e., Searcy was not the driver or even in the vehicle. Thus, the extrinsic information that caused Byrnes to discredit Washington’s claims *did* relate to Searcy since, if Washington’s alleged confession was true, the eyewitness testimony—the central evidence against Searcy would be wholly discredited. In addition, Byrnes testified that in her mind if Ewing was guilty then so was Searcy, a conclusion wholly consistent with the prosecution’s case. Thus, the extrinsic information did affect her verdict as to Searcy. For the reasons stated, we find no plain error in the trial court’s determination that both defendants were entitled to a new trial. See *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003) (unpreserved issues are reviewed for plain error).

In sum, defendants demonstrated that extraneous information was brought to the jury for deliberation, and that information was used by the jurors to support their verdict. Further, given Byrnes’s testimony and the trial court’s conclusion that her testimony was highly credible, it is clear that it was the extraneous information that convinced Byrnes to change her vote from not guilty to guilty. Accordingly, the trial court did not err by finding that defendants carried their burden under *Budzyn*.

Finally, the prosecution argues that the extraneous information was harmless beyond a reasonable doubt. This argument is first premised on the prosecution’s position that the extraneous information is duplicative of evidence admitted at trial. The prosecution again relies on this Court prior opinion where we concluded that the extrinsic material was duplicative to evidence presented at trial. As it pertains to gang-hierarchy information, this Court reasoned:

James also allegedly learned through her Internet research “that gangs have a pecking order.” This information is duplicative of an inference to be drawn from Christopher Richardson’s testimony, in which he opined that Washington’s assertions that he was the perpetrator amounted to “bragging” and an attempt to prove himself. Richardson also characterized Washington as a “flunky,” intimating a hierarchical relationship in gang membership. Hence, any error would be harmless because the information regarding gang structure was duplicative . . . . [*Searcy I*, unpub at 10.]

As already discussed, we are not bound by this ruling under the law-of-the-case doctrine. But we also find the underlying reasoning unpersuasive. *Budzyn* did not hold that the prosecution could demonstrate harmless error by showing that the extraneous information was “duplicative of an inference” that could be drawn from the evidence, but rather that extrinsic material must be duplicative of the evidence itself. Further, Richardson did not testify that Beal was a “flunky” in the context of explaining gangs, gang hierarchy, or the relationship between Washington and Ewing. Even assuming that an inference regarding gang hierarchies could have been drawn from Richardson’s testimony, that did not occur in this case.<sup>8</sup> Instead, James found and presented to the jury extrinsic information about gang hierarchies, which caused the lone holdout juror to change her votes. Under these circumstances, the trial court did not err by finding that the extraneous material was not duplicative.<sup>9</sup>

The prosecution also argues that the evidence establishing defendants’ guilt is overwhelming and overcomes any prejudice resulting from the erroneously considered extrinsic information. We see no error in the trial court’s finding to the contrary. The jury was deadlocked until the extraneous information was brought into deliberations and discussed. As defendants point out, courts have routinely held that lengthy deliberations before juror misconduct and a relatively quick verdict after the misconduct strongly suggests the trial evidence was not overwhelming. See *United States v Harber*, 53 F3d 236, 243 (CA 9, 1995) (concluding that a deadlocked jury suggests evidence was not overwhelming); *United States v Stone*, 9 F3d 934, 937 (CA 11, 1993) (same). See also *Ayers v Hudson*, 623 F3d 301, 317 n 12 (CA 6, 2010) (“Additionally, we note that in light of the initial deadlock by the jury, it would have been problematic for the prosecution to assert that the constitutional error was harmless beyond a reasonable doubt.”). Further, although Raymond Love and his wife, Jendayi, who were present at the scene of the shooting, identified Ewing as the shooter and Searcy as the driver of the vehicle involved in the shooting, there was clearly a question about the reliability of the Loves’ observations, given the brief time that they viewed the perpetrators who were not previously known to them. Although Raymond testified he saw Searcy driving the turquoise vehicle involved in the shooting, that identification was based on brief glances after a near collision between the Loves and the turquoise vehicle and the identification of Ewing was based on brief observations by Mr. Love in his driver’s side mirror.<sup>10</sup>

Although the evidence presented at trial was sufficient to find defendants guilty, it was by no means overwhelming. We are also mindful of the evidence presented by the defense that

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<sup>8</sup> Indeed, whether or not the information is deemed duplicative to us in the abstract, it was *not* duplicative for the witness who changed her vote.

<sup>9</sup> The jury’s consideration of photographs showing Ewing with a gun and the other information James presented about gangs cannot be deemed duplicative when the trial court excluded evidence of such photos and the testimony of a police officer, Graves, who would have testified as an expert on gangs. We note that this Court’s prior opinion contained no discussion of Graves and her proposed testimony.

<sup>10</sup> The only significant other evidence against Searcy was that when he was arrested some 9mm cartridges were found in the car he was driving. However, that vehicle was not the turquoise Oldsmobile involved in the shooting and Searcy did not own it.

Washington admitted to the crime and his claim that Beal and Jackson, not Searcy, were in the vehicle involved in the shooting. Further, multiple witnesses testified that Ewing was at a funeral repast at the time of the shooting. Considering the totality of the evidence, the trial court did not err when it found that the extraneous information that influenced the jury's guilty verdict could not be deemed harmless.

Affirmed.

/s/ Patrick M. Meter  
/s/ Douglas B. Shapiro  
/s/ Michael J. Riordan