

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

10-0235

Ohio Supreme Court Case No. _____

Plaintiff-Appellee,

On Appeal from the Fifth District Court of Appeals, Licking County, Ohio Case No. 2008 CA 00158

v.

Trial Court Case No. 08 CR 449

AARON P. FORD

Defendant-Appellant.

NOTICE OF CONFLICT

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IN THE SUPREME COURT OF OHIO

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Plaintiff-Appellee, Ohio Supreme Court Case No. _____

On Appeal from the Fifth District Court of Appeals, Licking County, Ohio Case No. 2008 CA 00158

v.

AARON P. FORD Trial Court Case No. 08 CR 449

Defendant-Appellant.

NOTICE OF CERTIFIED CONFLICT

Now comes the Defendant-Appellant, by and through undersigned counsel, who hereby notifies this Honorable Court that the Fifth District Court of Appeals has certified a conflict between the Fifth District and the Eighth District Courts of Appeal on the following issue of law: "Whether discharging a firearm at or into a habitation (R.C. 2923.161), and a firearm specification (R.C. 2929.14(D), R.C. 2941.145) are allied offenses of similar import as defined by R.C. 2941.25(A)."

This Notice is made pursuant to Rule IV, Section 2 of the Supreme Court Rules of Practice, and in accordance with Appellate Rule 25 and Article IV, Section 3(B)(4) of the Ohio Constitution.

The Fifth District Court of Appeals held that Ohio Revised Code Section ("R.C.") 2941.145 does not apply to firearm specifications because the specification does not charge a separate criminal offense. The Fifth District granted Defendant-Appellant's motion to certify a conflict and found that its decision is in conflict with the opinion of

the Eighth District Court of Appeals in *State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209 and that it is necessary to resolve the conflict.

Defendant-Appellant has attached a copy of the opinions from the Fifth District and Eighth District Courts of Appeal, as well as a copy of the entry certifying the conflict, for this Honorable Court's review.

Respectfully Submitted,



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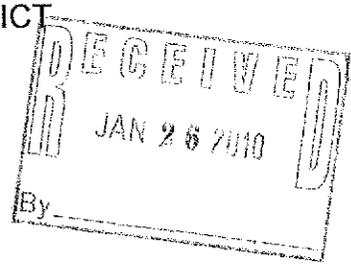
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Conflict has been served upon Daniel H. Huston, Esq., Assistant Licking County Prosecutor, Attorney for Appellee, 20 S. Second St., Newark, Ohio 43055, by ordinary U.S. Mail, this 1st day of February, 2010.



Christopher M. Shook
Attorney for Defendant-Appellant

FIFTH APPELLATE DISTRICT



COURT OF APPEALS
LICKING COUNTY OHIO
CLERK BY R. WALTERS

STATE OF OHIO

Plaintiff-Appellee

- vs -

AARON P. FORD

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 08 GA 158

This matter is before this Court upon a Motion to Certify Conflict filed by appellant Aaron P. Ford. The motion asserts that our opinion in the within action is in conflict with the opinion of the Eighth District Court of Appeals in *State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209.

Upon review, we find our opinion is in conflict with *State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209. Appellant's motion to certify conflict is sustained.

Pursuant to App. R. 25(A), we certify the following issue of law to the Ohio Supreme Court for review and final resolution:

Whether discharging a firearm at or into a habitation (R.C. 2923.161), and a firearm specification (R.C. 2929.14(D), R.C. 2941.145) are allied offenses of similar import as defined by R.C. 2941.25(A).

IT IS SO ORDERED.

Jill A. Edwards

W. Scott Giv

William B. Hoffman

JUDGES

JAE/rad/rmn

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

2009 DEC 16 A 11: 55

CLERK OF COURTS
OF APPEALS
LICKING COUNTY OH
GARY R. WALTERS

STATE OF OHIO

Plaintiff-Appellee

-vs-

AARON P. FORD

Defendant-Appellant

JUDGES:

W. Scott Gwin, P.J.
William B. Hoffman, J.
Julie A. Edwards, J.

Case No. 2008 CA 158

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from Licking County
Court of Common Pleas Case No.
08 CR 449

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, Aaron Ford, appeals a judgment of the Licking County Common Pleas Court convicting him, following jury trial, of improperly discharging a firearm at or into a habitation (R.C. 2923.161(A)(1)) with a firearm specification (R.C. 2929.14(D), R.C. 2941.145), inducing panic (R.C. 2917.31(A)(3)), and using weapons while intoxicated (R.C. 2923.15(A)). He was sentenced to three years incarceration for discharging a firearm at or into a habitation and thirty days incarceration for inducing panic and using weapons while intoxicated, to be served concurrently with the sentence for discharging a firearm at or into a habitation, and three years incarceration for the firearm specification to be served consecutively. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Around 10:00-11:00 p.m. on January 3, 2008, Ruth Seville turned off her television in her modular home on 27 South Kasson in Johnstown, Ohio, and laid down on her couch. Her husband, daughter, daughter's fiancé and two young grandsons were asleep in the home. She heard a loud bang, followed by a second bang. Her daughter's fiancé was sleeping in one bedroom with his son. A bullet entered the bedroom in which they were sleeping through the wall and passed through the bedroom door and into the living room. The bullet hit the 50" television in the living room, passed through the particle board on the television, hit the wall and landed on the carpet. Danielle Seville woke up to use the restroom and heard the loud bang. She found the bullet on the floor in front of her parents' bedroom.

{¶3} Police dispatchers received calls concerning the shots. Callers reported hearing several shots, followed by a pause, followed by several more shots.

{¶4} Officer Jason Bowman and Officer Paul Hatfield were conducting a traffic stop near the area where shots were reportedly fired. Officer Hatfield continued with the stop while Officer Bowman proceeded to the area where the shots were reported. While walking down Kasson with Officer Monica Haines, Bowman heard another gunshot. This gunshot, the sixth shot Officer Bowman heard, had a muzzle flash that “lit up the night.” Tr. 217. Officers Bowman and Haines identified a general location for the direction of the shot, known as “Post Office Alley,” located parallel to and in between Kasson and Main Street in downtown Johnstown.

{¶5} Officer Hatfield proceeded to the area after completing the traffic stop and met Officer Bowman in Post Office Alley. Officer Hatfield heard voices arguing in an apartment located behind the officers’ location in the alley. The address of the apartment building is 36 Main Street. Officer Haines took cover from a van, blocking her from that apartment building. Officer Hatfield heard an angry male voice yelling and using profanity. He also heard a female voice, which was not as loud as the male voice. Officer Hatfield heard the male voice, which he later identified to be appellant, shout, “It doesn’t fucking matter if I shot at him or not. If the motherfucker isn’t dead, there ain’t shit they can do to me.” Tr. 278.

{¶6} Officers Hatfield, Bowman and Haines surrounded the building where they heard the man and woman arguing. Officer Bowman called Sgt. William Buodinot of the Licking County Sheriff’s Department for backup. Officers knocked on the door with their weapons drawn. Appellant yelled, “What the fuck do you want, who the hell’s knocking at my door.” Tr. 224. When appellant answered the door he continued yelling, directing

profanity and racial slurs at the officers. Sgt. Buodinot took appellant to the ground and handcuffed him.

{¶7} Officers found a small semi-automatic gun in a recording studio in the apartment, located next to a box of ammunition, a shoulder holster, and a magazine. On the patio area outside the apartment officers found a handgun on the floor next to a magazine. Officers also found spent shell casings, two live rounds of ammunition, and drug paraphernalia on the porch. Appellant, who was known throughout town by the nickname "Saint," was questioned by Officer Hatfield. Appellant admitted that he was "buzzed." Tr. 285. He said he heard shots that evening, which he knew to be gunshots because he was from Chicago. Appellant stated that he had been shooting with his friend Dave on New Year's Eve, then later changed his story and said he was in Chicago on New Year's Eve. In a written statement appellant said that he and his girl, Billie Jo Mays, were relaxing and enjoying each other's company when he heard a loud crack. He wrote that they "stopped with each other" long enough to hear three or four more shots. Tr. 290. He heard a knock at the door and police yelling at him to "shut the fuck up, get on the floor." Tr. 291. A gunshot residue test was conducted on appellant's hands which showed that appellant had fired a gun or been in close proximity to a gun which had been fired.

{¶8} Detective Timothy Elliget of the Newark Police Department used a laser attached to long dowel rods to attempt to determine the trajectory of the bullet which entered the Seville home. When he physically shot the laser from the bullet holes in the Seville residence, the laser came into contact with appellant's back door. Later analysis of the bullet retrieved from the Seville residence could not definitely identify it as one

fired from the 9mm gun recovered from appellant's residence because the bullet was in a "highly skidded" condition, but the bullet had characteristics similar to the gun and could have been fired by that gun. Tr. 208-09.

{¶9} On January 11, 2008, appellant was indicted by the Licking County Grand Jury on one count of improperly discharging a firearm at or into a habitation, one count of inducing panic, and one count of using weapons while intoxicated. The indictment was dismissed on July 8, 2008. Appellant was re-indicted on July 7, 2008, on each of the previously filed charges. In addition, a firearm specification was added to the charge of improperly discharging a firearm at or into a habitation.

{¶10} The case proceeded to jury trial. Appellant testified at trial that he went to prison in 2000 for furnishing contraband to prisoners when he tried to sneak six broken cigarettes and a Bic lighter to a friend in a Michigan jail. He also admitted that he was convicted in Michigan of a misdemeanor offense for stealing diapers.

{¶11} Appellant claimed that a lot of his earlier statement to the police was "bogus." Tr. 321. He admitted that he fired a gun on the night in question out of "sheer stupidity." Tr. 322. Appellant heard noise in the alley behind his apartment, which upset him because his daughter Zowii was sick and trying to sleep. Appellant and Billie Jo Mays were doing gin shots. While appellant does not normally use profanity, he testified that he does use profanity when he is drinking. He yelled at the people in the alley, using profanity. When the people in the alley became angry and yelled back, appellant became afraid.

{¶12} Appellant testified that he sat down and tried to smoke a cigarette, but heard more noise from the alley. He then thought, "I can fix this real quick." Tr. 328.

Appellant testified, "You know, I was a boob tube kid, so I watched a lot of the John Singleton movies, 'Boyz 'n the Hood' and movies like that, someone shoots a gun up in the air, people scatter, boom, it's over." Tr. 328-329. Appellant decided he could shoot a gun and stop the noise, or do nothing and have Zowii wake up due to the noise in the alley and crawl into bed with appellant and Billie Jo.

{¶13} Appellant testified that he fired the gun several times but then the gun jammed. Appellant sat down to smoke a cigarette. Appellant testified, "[I]t's a pretty exhilarating experience, you know, firing a gun, I got to be honest." Tr. 332. He became concerned about the gun jamming, and was afraid it was a "crappy gun." Tr. 333. He decided to try again. He fired the gun once, then a second time. The second shot hit an electrical wire and scared appellant.

{¶14} Appellant testified that he didn't intend to shoot a house, but that he shot the gun upward and toward a field he drives by on his way to work. He believed the bullets would land in the field, a mile or so away. He testified that he believed the bullets would travel out of town. He knew there were houses behind him, which is why he testified that he fired the gun upward and parallel to his apartment building. In response to a question on cross-examination concerning whether his judgment was impaired by alcohol, appellant admitted, "I fired a gun into the air. Yeah, I would say so, sir." Tr. 342.

{¶15} Appellant admitted on the stand that he had no respect for the officers who came to his door investigating the shots, especially for having a gun pointed to his head when he answered the door. Appellant testified, "God says be meek, not weak." Tr. 342.

{¶16} Appellant testified that he believed some of the shells were positioned on his porch to frame him because he shot out of a crack in his door and not from the porch. He also continued to believe there was no possibility that the shots he fired could have hit the Seville house. However, he admitted that the criminal charges had been a wakeup call. He testified that he realized that he never wanted to own another gun because he was on the front page of the paper for almost hitting a little kid. He testified:

{¶17} "And it freaked me out, dude. I was, like, a child? A house? Someone's home? It blew my mind. It blew my mind, it blew my mind. That moment on I told myself, I never drink again. I'll never, I'll never touch a drop of alcohol. And, yeah, I smoked pot before back in the day. I told myself I wouldn't do anything. I said if I'm not living for my kids, I'm not living at all. Forget that, man. I said that's too big of a scare. That was God's blessing to me to let me know, all right, look, buddy, you didn't hit that house, but you better wake the hell up." Tr. 365-366.

{¶18} Appellant was convicted on all charges and sentenced to three years incarceration for discharging a firearm at or into a habitation, thirty days for inducing panic and using weapons while intoxicated to be served concurrently with the sentence for discharging a firearm at or into a habitation, and three years incarceration for the firearm specification to be served consecutively. Appellant assigns the following errors on appeal:

{¶19} "1. THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE PROSECUTOR TO IMPROPERLY ARGUE TO THE JURY THAT THE APPELLANT'S INTENT WAS IRRELEVANT TO THE CHARGE OF IMPROPERLY DISCHARGING A FIREARM AT OR INTO A HABITATION.

{¶20} "II. THE TRIAL COURT COMMITTED PLAIN ERROR BY IMPROPERLY INSTRUCTING THE JURY ON THE MENS REA REQUIRED FOR THE OFFENSE OF IMPROPERLY DISCHARGING A FIREARM AT OR INTO A HABITATION.

{¶21} "III. THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO CONSECUTIVE SENTENCES FOR THE OFFENSE OF IMPROPERLY DISCHARGING A FIREARM INTO A HABITATION AND THE FIREARM SPECIFICATION IN VIOLATION OF THE APPELLANT'S DOUBLE JEOPARDY RIGHTS."

I

{¶22} In his first assignment of error, appellant alleges that the court erred in allowing the prosecutor to make the following argument to the jury concerning intent:

{¶23} "The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act. The defendant is also responsible for the natural and foreseeable consequences in the ordinary course of events from the act. If he shoots that gun straight up and it comes straight down and hits the house, it makes no difference as if he's aiming directly for that house. In that neighborhood, that residential neighborhood behind the alley, if he's shooting the gun in that direction, it is a natural and foreseeable consequence that he could strike that house. If he knowingly pulled that trigger, intended to pull that trigger, he is charged with where that bullet ended. Whether he's shooting down the alley and it goes this way, even if it hits the wire and goes into the house, and I don't submit to you that that's what happened, but even if it did, the chance of him discharging that gun was a natural and foreseeable consequence that either a person or a house would be struck. The mere coincidence is not a

defense. The magic bullet theory is not a defense. There's no evidence that it bounced off of the frame. It went through the house and then was changed direction from there in a linear travel. It's not going here and then switching at a 45-degree angle in a totally different area.

{¶24} "Under the totality of the evidence, ladies and gentlemen, when you consider all the physical testimony, physical evidence, the testimony, and assign whatever weight you deem appropriate, even if you believe his story that he fired a gun in the air and it bounced off a wire, he's guilty of improperly discharging because of the law that the judge will instruct you." Tr. at 401-402.

{¶25} Appellant argues that the state was required to prove that he knowingly shot the gun at or into a habitation, and the prosecutor's argument negated the requirement that the state prove not only that he knowingly shot the gun but also that he knowingly shot the gun at or into a habitation. He claims this argument was prejudicial to his accident defense.

{¶26} The test for prosecutorial misconduct is whether the prosecutor's comments were improper and if so, whether those comments and remarks prejudicially affected the rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293, *cert. denied*, 534 U.S. 1147; *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883. A prosecutor's conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394. The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219.

{¶27} Appellant concedes that he failed to object to the prosecutor's argument and that we, therefore, must find plain error under Crim. R. 52(B) to reverse. In order to prevail under a plain error analysis, appellant must demonstrate that the result of the proceeding would clearly have been different but for the error. E.g, *State v. Gibbons* (March 30, 2000), Stark App. No. 1998CA00158, unreported. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, syllabus 3.

{¶28} Appellant was charged with violating R.C. 2923.161(A)(1), which provides:

{¶29} "(A) No person, without privilege to do so, shall knowingly do any of the following:

{¶30} "(1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual;"

{¶31} Pursuant to R.C. 2901.21(A)(2), a person is not guilty of an offense unless the person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the statute defining the criminal offense. We agree with appellant that the state therefore had to prove not only that he knowingly discharged a firearm, but also that he knowingly discharged it at or into an occupied structure. Knowingly is defined by R.C. 2901.22((B).

{¶32} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶33} Viewed in isolation, the prosecutor's comment that if appellant knowingly pulled the trigger he is charged with where the bullet landed is an improper statement of the law. However, viewed in its entirety, the argument did not deny appellant a fair trial. The prosecutor argued to the jury in accordance with the statutory definition of knowingly that appellant did not need to aim the gun directly at the Seville house or intend to hit a house in order to be convicted.

{¶34} Further, this argument was made in rebuttal closing argument. In his closing argument, counsel for appellant had argued that there was no testimony to show that appellant "intentionally shot at that house." Tr. 392. Counsel argued that if appellant shot as few as four and as many as seven rounds in accordance with the testimony concerning how many shots were fired, and only one shot hit a house, it is not foreseeable that the consequences of shooting a gun in that neighborhood would be that a house would be hit. Counsel also argued that all the evidence demonstrated that it wasn't appellant's "purposeful action" to shoot into the Seville house. Tr. 393-394. Therefore, in closing argument appellant attempted to shift the culpable mental state from "knowingly" to "purposely," which the state attempted to counteract by its argument concerning intent in rebuttal closing argument.

{¶35} Appellant has not demonstrated that but for this argument the result of the proceeding would have been different because there is abundant evidence to demonstrate that he knowingly discharged the gun at or into an occupied structure. By his own testimony he knew he was shooting the gun in a residential neighborhood and knew there were people in the alley below him. Officer Hatfield heard appellant say, "It doesn't fucking matter if I shot at him or not. If the motherfucker isn't dead, there ain't

shit they can do to me.” Tr. 278. While he testified that he shot the gun toward a field, he guessed that the bullet would travel about a mile to reach the field. Further, while he claimed he shot the gun up in the air and toward the field, the evidence of the trajectory of the bullet which hit the Seville house demonstrated that the bullet came from appellant’s porch, where the police found a gun from which the bullet found in the home could have been shot, spent casings, and several live rounds. Appellant has not demonstrated that, in the absence of the prosecutor’s argument, the jury would not have found that he knowingly discharged his gun into or at a habitation.

{¶36} The first assignment of error is overruled.

II

{¶37} In his second assignment of error, appellant argues that the court erred in its instructions to the jury concerning the culpable mental state for shooting the gun at or into a habitation, in accordance with his argument concerning the prosecutor’s argument in assignment of error one.

{¶38} Again, appellant did not object, so we must find plain error to reverse. The trial judge noted on the record that during the course of the trial, the court and counsel for both parties “tweaked” the instructions, and counsel for the State and for appellant were both satisfied with the instructions as read to the jury. Tr. 425. A jury instruction does not constitute plain error under Crim R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise. *Long*, supra, paragraph 2 of the syllabus.

{¶39} In the jury instructions, the court first recited the statutory definition of the crime of improperly discharging a firearm into a habitation, and recited the allegations in

the indictment. The court then defined the term "knowingly" for the jury in accordance with the statutory definition. Appellant argues that the court erred in instructing the jury as follows, rather than instructing the jury that the element of knowingly attached to the entire offense:

{¶40} "How determined. Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the defendant an awareness of the probability that the defendant discharged a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual.

{¶41} "Causation. The State charges that the act of the defendant caused the discharge of a firearm - - of a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual.

{¶42} "Cause is an essential element of the offense. Cause is an act which in a natural and continuous sequence directly produces the discharge of a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual and would - - and without which it would not have occurred.

{¶43} "Natural consequences. The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act. The defendant is also responsible for the natural and foreseeable consequences that follow in the ordinary course of events from the act." Tr. 410-411.

{¶44} Appellant makes the same argument he made in the first assignment of error concerning the prosecutor's argument. Appellant argues that the court's instructions eviscerated his defense of accident.

{¶45} Appellant has not demonstrated that but for this jury instruction, the result of the proceeding would have been different. While the trial court did not expressly tell the jury that the mental state of knowingly applied to the all the elements of the offense, the instruction did not allow the jury to find that he could be convicted if he knowingly discharged the gun without any consideration of whether he knowingly discharged the gun at or into a habitation. The court correctly instructed the jury on the elements of the crime and the statutory definition of "knowingly."

{¶46} Further, as noted in the first assignment of error there is abundant evidence to support the jury's finding that appellant knowingly discharged the firearm at or into a habitation. By his own testimony he knew he was shooting the gun in a residential neighborhood. Officer Hatfield heard appellant say, "It doesn't fucking matter if I shot at him or not. If the motherfucker isn't dead, there ain't shit they can do to me." Tr. 278. While he testified that he shot the gun toward a field, he guessed that the bullet would travel about a mile to reach the field. Further, while he claimed he shot the gun up in the air and toward the field, the evidence of the trajectory of the bullet recovered from the Seville home demonstrated that the bullet came from appellant's porch, where the police found a gun from which the bullet found in the Seville home could have been shot, spent casings, and several live rounds. Appellant has not demonstrated that in the absence of this instruction, the jury would have found that he did not knowingly discharge his gun into or at a habitation.

{¶47} The second assignment of error is overruled.

III

{¶48} In his third assignment of error, appellant argues that the court erred in sentencing him consecutively on the offense of discharging a firearm at or into a habitation and on the firearm specification, as the offenses are allied offenses of similar import and consecutive sentencing, therefore, constitutes double jeopardy.

{¶49} Appellant relies on *State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209, in which the Eighth District Court of Appeals held that because R.C. 2923.161 specifically requires that a firearm be used to commit the crime, it was error for the appellant to be convicted and sentenced to a firearm specification. *Id.* at ¶95. However, the court found the error to be harmless because the firearm specification was merged with the firearm specifications attached to the three counts of felonious assault of which appellant was convicted. *Id.* at ¶97.

{¶50} The State relies on *State v. Burks*, Franklin App. No. 07AP-553, 2008-Ohio-2463, in which the Tenth District Court of Appeals rejected the reasoning in *Elko*, finding that Ohio's felony sentencing laws required imposition of a mandatory, consecutive term of imprisonment on the firearm specification. *Id.* at ¶41-44.

{¶51} Appellant argues that his conviction for discharging a firearm at or into a habitation and his additional conviction on the firearm specification violates R.C. 2941.25, as the offenses are allied offenses of similar import. Appellant also argues that his conviction and sentence on both the underlying offense and the firearm specification violates the Double Jeopardy Clause of the Fifth Amendment.

{¶52} R.C. 2941.25(A) provides:

{¶53} “Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.”

{¶54} A firearm specification does not charge a separate criminal offense, and R.C. 2941.25(A) is not applicable. *State v. Vasquez* (1984), 18 Ohio App.3d 92, 94, 481 N.E.2d 640, 643; *State v. Turner* (June 11, 1987), Cuyahoga App. No. 52145, unreported; *State v. Wiffen* (September 12, 1986), Trumbull App. No. 3560, unreported; *State v. Price* (1985), 24 Ohio App.3d 186, 188, 493 N.E.2d 1372, 1373. The firearm specification only comes into play once a defendant is convicted of a felony as set forth in the statute. *Price*, supra, at 188. The firearm specification is merely a sentencing provision which requires an enhanced penalty if a specific factual finding is made. *Vasquez*, supra, at 95; *Turner*, supra; *Wiffen*, supra.

{¶55} Our conclusion that R.C. 2941.25 does not apply to firearm specifications is further buttressed by the fact that the legislature has set forth a separate test to determine when firearm specifications merge. R.C. 2929.14(D)(1)(b) provides that a court shall not impose more than one prison term on an offender for multiple firearm specifications if the underlying felonies were committed as part of the same act or transaction. Although crimes may be part of the same transaction and, therefore, the firearm specifications merge, it does not necessarily follow that the base charges are allied offenses of similar import and cannot be run consecutively to each other. *State v. Marshall*, Cuyahoga App. No. 87334, 2006-Ohio-6271, ¶ 36. If R.C. 2941.25(A) was intended to apply to firearm specifications in the same manner the statute applies to

other criminal offenses, there would be no need for a separate statutory provision for merger of firearm specifications.

{¶56} We next address appellant's contention that his sentence violates Double Jeopardy.

{¶57} The U.S. Supreme Court considered this issue in *Missouri v. Hunter* (1983), 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535. The defendant had been convicted and sentenced for robbery, a felony of the first degree. One Missouri statute provided that any person who commits a felony through the use of a dangerous and deadly weapon is also guilty of the crime of armed criminal action, punishable by not less than three years imprisonment, to be served in addition to any other punishment provided by law for the felony. Another Missouri statute provided that a person convicted of first-degree robbery by means of a dangerous and deadly weapon shall be punished by not less than five years imprisonment. The Missouri Supreme Court found that punishment under both statutes violated Double Jeopardy.

{¶58} The U.S. Supreme Court reversed and found the defendant's sentence did not violate Double Jeopardy. The court stated:

{¶59} "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 366, 103 S.Ct. at 678, 74 L.Ed.2d at 542.

{¶60} "[S]imply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to

those statutes. . . . Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecution may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Id.* at 368, 103 S.Ct. at 679, 74 L.Ed.2d at 543-544.

{¶61} R.C. 2929.14(D)(1)(a) provides for a mandatory term of imprisonment for conviction of a firearm specification. R.C. 2929.14(E)(1)(a) provides:

{¶62} "Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender."

{¶63} Ohio courts have held in accordance with *Missouri v. Hunter* that the sentencing statutes requiring a mandatory, consecutive term of incarceration for a firearm specification indicate a clear legislative intent to impose cumulative punishment

under two statutes regardless of whether the statutes proscribe the same conduct, and Double Jeopardy is therefore not violated by a conviction on the underlying offense and the firearm specification. *Vasquez*, supra, at 95; *Turner*, supra; *Price*, supra, at 189; *State v. Sims* (1984), 19 Ohio App.3d 87, 89-90, 482 N.E.2d 1323; *State v. Cole* (Dec. 20, 1995), Summit App. No. 17064, unreported.

{¶64} Appellant argues that this case is distinguishable because the crime of discharging a firearm into a habitation specifically requires the use of a firearm, and therefore the crime can never be committed without using a firearm, thereby automatically implicating a firearm specification. However, in *Missouri v. Hunter*, the U.S. Supreme Court held that whether two statutes proscribe the same conduct is immaterial where the legislature specifically authorizes cumulative punishment. Further, in *Hunter* the statutes in question both proscribed use of a “dangerous and deadly weapon,” therefore the statutes proscribed identical conduct and one could not be committed without committing the other. However, the U.S. Supreme Court did not reach that issue because the legislature manifested an intent to sentence cumulatively for violations of the statutes. The instant case is indistinguishable from *Hunter* in that both statutes proscribe the use of a “firearm,” as both statutes in *Hunter* proscribed use of a “dangerous and deadly weapon.” Therefore, appellant’s argument is without merit.

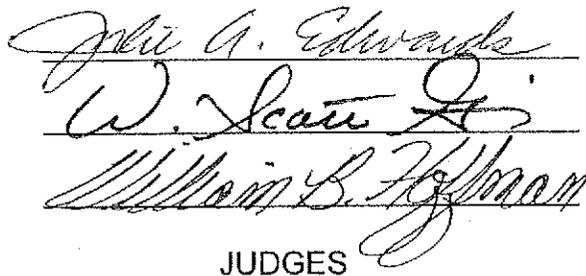
{¶65} The third assignment of error is overruled.

{¶66} The judgment of the Licking County Common Pleas Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Hoffman, J. concur


JUDGES

JAE/r1002

2004-Ohio-5209
State v. Elko
04-LW-4365 (8th)

2004-Ohio-5209

[Cite as State v. Elko, 2004-Ohio-5209]

STATE OF OHIO Plaintiff-Appellee
v.

JEFFREY ELKO Defendant-Appellant

No. 83641

8th District Court of Appeals of Ohio, Cuyahoga
County.

Decided on September 30, 2004

CHARACTER OF PROCEEDINGS Criminal appeal
from Common Pleas Court Case No. CR-436160

JUDGMENT AFFIRMED. DATE OF
JOURNALIZATION

Appearances

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} The appellant, Jeffrey Elko, appeals his criminal convictions for felonious assault and improperly discharging a firearm into a habitation following a trial by jury. The appellant also appeals from the subsequent prison sentence that was imposed by the trial court. After reviewing the record and for the reasons set forth below, we affirm the appellant's convictions and prison sentence.

{¶ 2} On April 9, 2003, the Cuyahoga County Grand Jury charged Elko with three counts of felonious assault, in violation of R.C. 2903.11, and one count of improperly discharging a firearm into a habitation, in violation of R.C. 2923.161; all charges were felonies of the second degree. Each charge also carried one- and three-year firearm specifications, pursuant to R.C. 2941.141 and R.C. 2941.145 respectively. Elko pleaded not guilty to

the entire indictment.

{¶ 3} On August 20, 2003, the jury trial commenced and the following facts were presented: On December 25, 2002, Kenneth Rutherford, his mother, Erika Rutherford, and his grandmother, Elvira Werner, were inside their home in the city of Parma watching television. Around 7:45 p.m., Kenneth and his mother ran to the side living room window when they heard what sounded like firecrackers exploding. Directly below the living room window, they saw Kenneth's former friend, Jeffery Elko, firing a small black pistol into the home's glass block basement window.

{¶ 4} Elko had been friends with Kenneth for over three years and knew that Kenneth's bedroom was located directly behind the glass block window. Kenneth's family was familiar with Elko and disapproved of their friendship. It was later discovered that Elko and Kenneth had a homosexual relationship. Kenneth, being much younger than Elko, stated he was embarrassed and frightened of his relationship with Elko. Elko had started to harass Kenneth when Kenneth tried to end the relationship.

{¶ 5} Both Kenneth and Erika testified that they clearly saw Elko's face. They stated the window they viewed Elko from was only two feet away from where he was standing. They also noted that Elko had been driving a gold colored Dodge Neon the day of the shooting, even though they knew Elko owned a Chevrolet Avalanche. Erika stated that after Elko finished shooting at the window, he looked up at her and arrogantly smiled.

{¶ 6} Elvira Werner immediately recognized the noise as being gun shots. Fearless, she proceeded outside and confronted Elko in the driveway calling him a "dirty name." Elvira stated she stood about four feet away from Elko and clearly saw his face. Elvira stated that after she confronted him, Elko got into a gold colored Dodge Neon and slowly backed out of the driveway. Elvira testified she knew the vehicle was a Neon because she had previously owned one. Elvira also stated that Elko had thrown an empty 40-ounce beer bottle at the home's front window earlier that day.

{¶ 7} After the shooting, the family called the Parma Police Department. Detective Thomas Bunyak and Patrolman Thomas Krebs removed bullet fragments from the glass block window and took statements from the family members. The family members told the police they were positive that Jeffery Elko had shot at the window, and they described the vehicle he was driving.

{¶ 8} Through his investigation, Detective Bunyak discovered that, a few days before the shooting, Elko had rented a champagne colored Dodge Neon from Thrifty Car Rental. Detective Thomas Bunyak and Patrolman Thomas Krebs testified that none of the bullets fired by Elko had penetrated into the house.

{¶ 9} On August 22, 2003, after two days of trial, a jury found Elko guilty on all charges. The trial court ordered a presentence investigation report and a psychiatric evaluation of Elko. On September 25, 2003, the trial court sentenced Elko to two years of imprisonment on each count of felonious assault and two years for improperly discharging a firearm into a habitation; these sentences were ordered to run concurrently. The trial court then sentenced Elko to three years imprisonment on the firearm specifications, merged them, and ordered this sentence to run consecutively with the two-year sentence. Elko was sentenced to a total of five years incarceration.

{¶ 10} The appellant brings this timely appeal alleging eleven assignments of error for our review. Some of the assignments will be grouped together for discussion because they are interrelated.

{¶ 11} "1. Defendant was denied effective assistance of counsel."

{¶ 12} In his first assignment of error, the appellant claims his trial attorney rendered ineffective assistance of counsel in three instances. Appellant claims his trial counsel was ineffective when he elicited prejudicial testimony during the cross-examination of Erika Rutherford that the appellant was a convicted felon and had previously pled to a two-year prison sentence. The appellant claims this error was further compounded when his trial counsel waited until the conclusion of the trial in order to move the court for a mistrial.

{¶ 13} The appellant further claims his trial counsel was ineffective for not requesting a jury instruction relating to the appellant's alibi on the day of the shooting. Finally, the appellant claims his counsel was ineffective for failing to request an instruction regarding whether the victims could identify the appellant as being the person who shot at the widow given the lighting and weather conditions on the day of the incident.

{¶ 14} It is presumed that a properly licensed attorney executed his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98. To prevail on a claim of ineffective assistance of defense counsel, a postconviction petitioner must demonstrate (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that trial counsel's deficient performance prejudiced his defense. See *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. To establish prejudice, the petitioner must demonstrate that counsel's

deficient performance "so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result." *State v. Powell* (1993), 90 Ohio App.3d 260, 266, 629 N.E.2d 13; see, also, *Strickland*, supra.

{¶ 15} Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if a better strategy had been available. See *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 16} In the instant matter, Erika Rutherford testified at trial, during cross-examination by defense counsel, that the appellant was a "convicted felon." Following this improper comment, an off-the-record discussion commenced between the trial court, prosecutor and defense counsel.

Thereafter, the cross-examination resumed and the following exchange between defense counsel and Erika Rutherford took place:

{¶ 17} "Counsel: Okay. So I guess just to rehash, you don't like -- you don't want Jeffery Elko hanging out with your son, correct?"

{¶ 18} "Erika: I don't want him destroying my property, harassing my family --"

{¶ 19} "****"

{¶ 20} "Erika: That was the agreement last year, that he was not to come around my son or my house."

{¶ 21} "Counsel: Okay. So you don't want him around your house? Yes or no."

{¶ 22} "Erika: I don't want him around us."

{¶ 23} "Counsel: Okay. And if it took putting him into prison to keep him away from your house, you would be all for that, right?"

{¶ 24} "Erika: Well there is no truth in sentencing. That has not worked either."

{¶ 25} "Counsel: Okay. So you I guess -- can you expand on that no truth in sentencing?"

{¶ 26} "Erika: Well, he pled to a two-year sentence -- ." (Tr. at 42.)

{¶ 27} After this reference about the appellant serving a two-year prison sentence, the trial court conducted another off-the-record discussion with defense counsel and the prosecutor; the trial continued without any motions being filed.

{¶ 28} At the conclusion of the trial, defense counsel asked for a mistrial based on the prejudicial testimony of Erika Rutherford. The trial court stated on the record that

he might have "given [the motion] great consideration" if the appellant had asked for it at the time the prejudicial comments were made. (Tr. at 170.)

{¶ 29} The trial court reminded defense counsel that during the two sidebar discussions, he was concerned with the line of questioning that counsel pursued during the cross-examination of Erika Rutherford. Defense counsel's questions were delving into the appellant's past convictions and prior bad acts committed against the victims. Defense counsel informed the trial court that it was his trial strategy to show the jury that Erika Rutherford had prior problems with the appellant. Specifically, to show that Erika Rutherford would assume the appellant shot at her house even if she did not see him because she hated him. Defense counsel wanted to show that Erika Rutherford's hatred of the appellant would cause her to say anything in order to convict him and get the appellant away from her son.

{¶ 30} The trial court dismissed the motion for mistrial stating defense counsel's actions were strategic. The trial court would not allow defense counsel to try a trial strategy and then ask for a mistrial when it seemed like the trial strategy might fail. However, the trial court did agree to submit a curative instruction prepared by defense counsel to the jury, advising that they should not consider any reference to the appellant's past criminal conviction during deliberations.

{¶ 31} Defense counsel's trial strategy was debatable; however, we cannot find that his representation of the appellant was deficient when the trial strategy tended to show a witness's bias and animus towards a defendant.

{¶ 32} The appellant then claims that his defense counsel was deficient for failing to request a jury instruction relating to the appellant's alibi. A review of the record indicates that the appellant did not file a notice of alibi before trial, pursuant to Crim.R. 12.1. The appellant alleges he was driving from his mother's apartment in Cuyahoga Falls to his grandmother's house in Maple Heights during the time when the shooting occurred.

{¶ 33} The appellant's mother, Janice Marcin, testified that she lives in Cuyahoga Falls and that the appellant was at her apartment for Christmas dinner on the day of the shooting. She stated that the appellant had left her home around 7:00 p.m. on December 25th. The appellant resides with his grandmother, Elizabeth Elko, who owns a home in Maple Heights. The appellant's grandmother testified the appellant returned home from his mother's apartment on December 25th around 8:00 p.m.

{¶ 34} Marcin testified that it would take her 40 to 45 minutes to drive from her apartment in Cuyahoga Falls to the appellant's grandmother's home in Maple Heights on a normal day. The appellant also produced evidence that it had snowed ten inches on the day of the shooting.

Kenneth Rutherford and Elvira Werner both testified that their house in Parma was about five miles away from the appellant's home in Maple Heights and that it would take between ten and twenty minutes to drive there. Patrolman Krebs testified he received the complaint that a gun was fired into the Rutherford house between 7:47 p.m. and 7:49 p.m. on December 25, 2002.

{¶ 35} The appellant claims it was impossible for him to leave his mother's home in Cuyahoga Falls at 7:00 p.m. on Christmas day, drive to the Rutherford's home in Parma, shoot the window, and then return to his grandmother's home in Maple Heights by 8:00 p.m.; especially when it had snowed ten inches that day. The record reveals that all of this information was before the jury even though they were not provided with a written alibi instruction.

{¶ 36} The believability of the appellant's alibi was based on the credibility of the witnesses and is a question for the jury to decide. Given the time frames testified to, we find it plausible that the appellant left his mother's house in Cuyahoga Falls, drove to the Rutherford's house in Parma, shot the window, and returned to his home in Maple Heights in one hour. The appellant's alibi is weak at best. We find that defense counsel was not deficient in failing to request an instruction on alibi.

{¶ 37} Finally, the appellant claims his defense counsel was ineffective for failing to request a jury instruction relating to the identification of the appellant on the night of the shooting. However, after reviewing the trial transcript, we find that this instruction was not needed, and defense counsel was not deficient for failing to request it.

{¶ 38} All three victims knew the appellant, recognized him on the day of the shooting, and identified the rented vehicle he was driving. Although it was dark outside and had been snowing, all three of the victims testified they clearly saw the appellant; two testified they saw him shooting at the window. Identification of the appellant was not an issue at trial; it was conceded by defense counsel.

The primary issue at trial was the credibility of the witnesses' testimony, which placed the appellant at the scene of the crime.

{¶ 39} Furthermore, if we had found that appellant's trial counsel was deficient, the deficiency would have only resulted in the granting of a mistrial. Based on the evidence presented in this case, the appellant would have been retried and surely convicted; therefore, the appellant would not have experienced any prejudice resulting from defense counsel's actions. The appellant's first assignment of error is overruled.

{¶ 40} "II. Defendant was denied due process of law when the court refused to grant a mistrial."

{¶ 41} In his second assignment of error, the appellant claims the trial court erred when it failed to grant a mistrial based on the prejudicial testimony elicited from Erika Rutherford that appellant was a convicted felon who served a two-year prison sentence.

{¶ 42} A mistrial can be granted when the impartiality of one or more of the jurors may have been affected by an improper comment. *State v. Talbert* (1986), 33 Ohio App.3d 282; *State v. Abboud* (1983), 13 Ohio App.3d 62. The grant or denial of an order of mistrial lies within the sound discretion of the trial court. *State v. Cobbins*, Cuyahoga App. No. 82510, 2004-Ohio-3736; *State v. Glover* (1988), 35 Ohio St.3d 18, 517 N.E.2d 900. Moreover, mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 580 N.E.2d 1. "An appellate court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice." *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 31 Ohio B. 375, 510 N.E.2d 343, 350.

{¶ 43} In the instant matter, a review of the trial record indicates that the trial court issued the following curative instruction to the jury: "Testimony was received concerning the possibility that defendant, Jeffery Elko, had a prior criminal conviction. Such testimony should not have been given.

It should not be considered for any purpose during your deliberation." (Tr. at 251.)

{¶ 44} A jury is presumed to follow instructions, including curative instructions, given it by a trial judge. *State v. Hardwick*, Cuyahoga App. No. 79701, 2002-Ohio-496; see, also, *State v. Loza* (1994), 71 Ohio St.3d 61, 75, 641 N.E.2d 1082. Given the overwhelming evidence of guilt produced in this case and discussed throughout this opinion, the appellant has failed to show how he suffered any material prejudice in light of the curative instruction; therefore, the trial court did not abuse its discretion in refusing to grant a mistrial based on the improper comments. The appellant's second assignment of error is overruled.

{¶ 45} "VIII. Defendant was denied due process of law when he was convicted of felonious assault."

{¶ 46} "IX. Defendant was denied due process of law when the court overruled Defendant's motion for judgment of acquittal."

{¶ 47} In his eighth assignment of error, the appellant claims he should not have been convicted of felonious assault because he did not cause physical harm to any of the victims. Furthermore, in his ninth assignment of error, appellant claims the trial court should have granted his motion for judgment of acquittal because Kenneth Rutherford lied under oath about his homosexual relationship with appellant.

{¶ 48} Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction ***." Crim.R. 29: see, also, *Cobbins*, supra. "An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. A verdict will not be disturbed on appeal unless reasonable minds could not reach the conclusion reached by the trier of fact." *State v. Watts*, Cuyahoga App. No. 82601, 2003-Ohio-6480, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. Sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 49} In the instant matter, the appellant was convicted of three counts of felonious assault, in violation of R.C. 2903.11, which states in pertinent part:

{¶ 50} "(A) No person shall knowingly do either of the following:

{¶ 51} "****

{¶ 52} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 53} Kenneth Rutherford testified that on December 25th, the light in his bedroom was on, which illuminated the basement glass block window. He further stated that, even with the bedroom light on, a person standing on the outside of the window could not see inside. The evidence shows that the appellant fired a pistol, which is a dangerous ordnance, into the glass block window. Given this testimony, the appellant could not possibly know who would be inside Kenneth's bedroom at the time of the shooting.

{¶ 54} The fact that none of the victims were physically hurt and that none of the bullets penetrated through the glass block window are irrelevant. Firing a pistol into a window, without knowing who could be behind it, satisfies a knowing attempt to cause physical harm. It is fortunate that Elvira Werner, Erika Rutherford and Kenneth Rutherford were watching television and making food in the kitchen at the time of the shooting. The evidence presented at trial was sufficient to convict the appellant of felonious assault. The appellant's eighth assignment of error is overruled.

{¶ 55} Next, the appellant claims that the trial court should have granted one of his motions for judgment of acquittal based on the fact that Kenneth Rutherford lied under oath about whether he had a homosexual relationship with the appellant. We disagree with the appellant's assertion.

{¶ 56} During the prosecution's case in chief,

Kenneth Rutherford stated to defense counsel on cross-examination that he was only friends with the appellant; he specifically denied having any sexual relationship with him. Later in the trial, it was discovered that a videotape existed that depicted the appellant and Kenneth Rutherford engaged in homosexual relations. Kenneth Rutherford was brought back to the stand where he was impeached by defense counsel and admitted he lied about his sexual relationship with the appellant because he was embarrassed and frightened.

{¶ 57} Based on Crim.R. 29, we find that even if the testimony of Kenneth Rutherford was completely excluded from the record, there

{¶ 58} would still be sufficient evidence to uphold the appellant's convictions. Erika Rutherford and Elvira Werner both heard gun shots. Both testified they saw the appellant clearly on the night of the shooting. Erika Rutherford saw a pistol in the appellant's hand and observed him shooting at the basement window. Elvira Werner confronted the appellant on the driveway. Both observed and identified the rented vehicle he was driving. The appellant's ninth assignment of error is overruled.

{¶ 59} "III. Defendant was denied due process of law by reason of improper prosecutorial argument."

{¶ 60} In addressing a claim for prosecutorial misconduct, we must determine (1) whether the prosecutor's conduct was improper and (2) if so, whether it prejudicially affected the defendant's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 Ohio B. 317, 470 N.E.2d 883. The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 71 L.Ed.2d 78, 102 S.Ct. 940. A trial is not unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. Treesh*, 90 Ohio St.3d 460, 464, 2001-Ohio-4, 739 N.E.2d 749.

{¶ 61} Appellate courts ordinarily decline to reverse a trial court's judgment because of counsel's misconduct in argument, unless (a) the argument injects non-record evidence or encourages irrational inferences, such as appeals to prejudice or juror self-interest or emotion, (b) the argument was likely to have a significant effect on jury deliberations, and (c) the trial court failed to sustain an objection or take other requested curative action when the argument was in process. *State*

v. Maddox (Nov. 4, 1982), Cuyahoga App. Nos. 44600 and 44608, at 9-10. Generally, the prosecution is entitled to a certain degree of latitude in making its closing remarks. *State v. Woodards* (1966), 6 Ohio St.2d 14.

{¶ 62} In the instant matter, the appellant claims the prosecutor made several prejudicial comments during his

closing argument. First, the prosecutor stated: "I represent all of the individuals in the State. And, of course, Mr. Powers is representing his client [the Defendant], and only his client to the detriment of everybody else." (Tr. at 199.) The appellant claims this comment polarized the jury against him. We disagree.

{¶ 63} Right after the comment was made, the defense made an objection. The trial court sustained the objection to the reference that Mr. Powers is representing the appellant "to the detriment of everybody else." The trial court then stated a curative instruction: "He is representing his client, but not to the detriment. You both have a duty to represent, and he is representing his client to the best of his ability. I will accept that statement." (Tr. at 199.)

{¶ 64} We find that the trial court's subsequent instruction cured the improper comment. Furthermore, as stated previously in this opinion, the effect of the comment would not have prejudiced the appellant because of the evidence that was produced against him in this case; the jury would have found the appellant guilty without the improper comment.

{¶ 65} Second, the appellant claims the following statements made by the prosecutor allude to the appellant's failure to take the stand and testify in his own defense. The prosecutor stated: "No other evidence, no other testimony exists to contradict those facts. And I want you to remember that when you listen to what Mr. Powers has to say." (Tr. at 202.) The prosecutor also stated: "**** there has been no testimony by anyone to state that these people are not telling the truth." (Tr. at 219.)

{¶ 66} We disagree with the appellant's interpretation of the prosecutor's argument. After reviewing the record, the prosecutor was not at all referring to the fact that the defendant did not testify in his own defense, but was instead referring to the lack of defense witnesses who could rebut the testimony of the victims. The two witnesses produced by the defense only testified to the fact that they never saw the appellant with a gun and to the approximate times appellant left and arrived at the other's home. The appellant's third assignment of error is overruled.

{¶ 67} "IV. Defendant was denied due process of law when the court failed to give any instruction concerning the willful lies by Kenneth Rutherford."

{¶ 68} "V. Defendant was denied due process of law when the court did not give any instruction concerning alibi."

{¶ 69} "VI. Defendant was denied due process of law when the court instructed the jury that defendant could be found guilty for the intervening act of another."

{¶ 70} "VII. Defendant was denied due process of law

when the court amended the indictment by allowing the Defendant to be convicted for a date of offense other than that specified in the indictment."

{¶ 71} In his fourth, fifth, sixth and seventh assignments of error, the appellant claims the trial court erred by failing to provide the jury with instructions explaining the impeachment of Kenneth Rutherford and the appellant's alleged alibi on the night of the shooting. The appellant further alleges the trial court erred in giving the jury improper instructions that the defendant could be found guilty for the intervening act of another and that the defendant could be convicted of committing the offense on a date other than that specified in the indictment.

{¶ 72} We note that appellant did not object to the jury instructions at trial and, therefore, waived all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 Ohio B. 360, 444 N.E.2d 1332, syllabus. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon*, (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16.

{¶ 73} A defective jury instruction does not rise to the level of plain error unless it can be shown that the outcome of the trial would clearly have been different but for the alleged error. *State v. Campbell* (1994), 69 Ohio St.3d 38, 630 N.E.2d 339; *Cleveland v. Buckley* (1990), 67 Ohio App.3d 799, 588 N.E.2d 912. Moreover, a single challenged jury instruction may not be reviewed piecemeal or in isolation, but must be reviewed within the context of the entire charge. See, *State v. Hardy* (1971), 28 Ohio St.2d 89, 276 N.E.2d 247; *State v. Fields* (1984), 13 Ohio App.3d 433, 469 N.E.2d 939.

{¶ 74} First, the appellant claims the trial court should have specifically instructed the jury that Kenneth Rutherford lied under oath about his sexual relationship with the appellant. The appellant claims this issue was a material fact of the case. We disagree. Kenneth Rutherford stated he was embarrassed and frightened of his sexual relationship with the appellant. He was impeached on the stand and admitted that he lied about having a homosexual relationship.

{¶ 75} The trial court instructed the jury that it is their job to consider the credibility and believability of each person testifying. The trial court stated to the jury: "If you believe from all the evidence that a witness was mistaken or has testified untruthfully to a fact, you are not required to believe the testimony simply because the witness was under oath." (Tr. at 233.) The trial court also stated: "You may believe all of the testimony of a particular witness, or you may disbelieve all of the testimony of a particular witness." *Id.* The trial court goes on in the transcript for three more pages discussing how to determine the weight and credibility of testifying witnesses. After reviewing

the credibility instruction that the trial court gave to the jury, we can find no error with the instruction; it was more than adequate.

{¶ 76} Second, the appellant claims the trial court erred by not instructing the jury about his alibi. As previously stated, the trial court could have excluded defendant's alibi evidence entirely because his notice of alibi was never filed, in violation of Crim.R. 12.1. However, the trial court did not exclude this testimony and permitted defendant to present evidence about an alibi. As we have previously discussed, the appellant's alibi is weak at best; therefore, even if the trial court had given the jury an instruction on alibi, we cannot say that the jury verdict would have been different.

{¶ 77} Finally, the appellant alleges the trial court erred when it instructed the jury that the defendant could be found guilty for the intervening act of another and also could be found guilty for committing the offense on a date other than the date specified in the indictment.

{¶ 78} The trial court stated: "[T]he defendant is responsible for the natural consequences of the Defendant's unlawful act of failure to act, even though physical harm to a person was also caused by the intervening act or failure to act of another person." (Tr. at 246-247.) The trial court also stated: "The date of the offense in this indictment allegedly occurred has previously been stated. It is not necessary that the State prove that the offense was committed on the exact day as charged in the indictment. It is sufficient to prove that the event took place on a date reasonably near the date claimed." (Tr. at 252.)

{¶ 79} The record in this case reflects that the trial court used Ohio Jury Instructions when charging the jury. We find that it was error for the trial court to state the appellant could be convicted for the intervening act of another person because this instruction does not apply to the facts of this case. However, the error was harmless and would not have affected the jury's deliberations whatsoever. No intervening acts occurred in this case, nor were any suggested by either side. Jury instructions should be simple, clear, and concise and relate to the facts of the case.

{¶ 80} Furthermore, the exact date and time that the offense was committed is immaterial unless the nature of the offense requires that the exactness of time would be essential. *State v. Tesca* (1923), 108 Ohio St. 287. The fact that the appellant failed to file notice of his alibi before trial renders the exact time and date of the offense immaterial. However, as previously discussed, even if an alibi instruction was given to the jury, reasonable minds could conclude that the appellant was more than able to commit the alleged crimes in the time frames presented.

{¶ 81} After reviewing the entire jury charge in total, we cannot find that the outcome of the trial would have been different had the trial court included or modified the

jury instructions as discussed above. The appellant's fourth, fifth, sixth, and seventh assignments of error are hereby overruled.

{¶ 82} "X. Defendant was denied due process of law when he was multiply sentenced."

{¶ 83} "XI. Defendant was denied due process of law when he was doubly sentenced for a firearm where a firearm was an element of the offense."

{¶ 84} In the appellant's tenth and eleventh assignments of error, he claims he was denied due process when he was convicted of both felonious assault and improperly discharging a firearm at or into a habitation. The appellant claims the trial court should have merged the offenses because they are allied offenses of similar import. Furthermore, the appellant claims he should not have been charged with additional firearm specifications when a firearm was an element of the underlying crimes.

{¶ 85} The crimes of felonious assault, R.C. 2903.11, and improperly discharging a firearm into a habitation, R.C. 2923.161, are not allied offenses of similar import.

{¶ 86} R.C. 2923.161, improperly discharging firearm at or into habitation; school-related offenses states:

{¶ 87} "(A) No person, without privilege to do so, shall knowingly do any of the following:

{¶ 88} "(1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual;"

{¶ 89} R.C. 2903.11, felonious assault, states:"(A) No person shall knowingly do either of the following:

{¶ 90} ****

{¶ 91} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 92} For R.C. 2923.161 to apply, it is irrelevant whether the structure is occupied or unoccupied at the time of the shooting so long as it is found to be someone's habitation. Moreover, R.C. 2923.161 specifically requires that the perpetrator uses a firearm in order to commit the crime. The revised code defines a "firearm" as a deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. R.C. 2923.11 (B)(1). R.C. 2923.161 basically applies when a firearm is discharged at a specific structure or in a prohibited area, regardless of the presence of people.

{¶ 93} R.C. 2903.11 applies when a person knowingly causes or attempts to cause physical harm to another. The crime can be committed anywhere. The perpetrator can either use a "deadly weapon" or a

"dangerous ordnance" in committing the offense. A "deadly weapon" is any instrument, device, or thing capable of inflicting death, and designed for use as a weapon, or possessed, carried, or used as a weapon. R.C. 2923.11 (A). A "dangerous ordnance" is any firearm, pistol, rifle, shotgun, cannon, or artillery piece. R.C. 2923.11(L). R.C. 2903.11 is designed to protect the person, rather than a specific structure or area.

{¶ 94} Given the plain language of the statutes, the appellant can be charged and convicted of discharging a firearm into a habitation and also for felonious assault if there are people inside the habitation at the time of the shooting. If none of the victims had been inside the house at the time the appellant shot the window, then he could only have been convicted of R.C. 2923.161. However, since all three victims were inside the habitation, and could have been behind the basement bedroom window at the time of the shooting, the appellant's convictions under both R.C. 2923.161 and R.C. 2903.11 were proper. The appellant's tenth assignment of error is overruled.

{¶ 95} In addition, the appellant claims he cannot be convicted and sentenced on the firearm specifications because they are elements of the underlying crimes. R.C. 2923.161 specifically requires that a firearm be used to commit the crime; therefore, we agree with appellant that a firearm is an element of the underlying offense, and it was error for him to have been convicted and sentenced to a three-year firearm specification.

{¶ 96} However, unlike R.C. 2923.161, R.C. 2903.11 does not require the use of a firearm in order to complete the crime. A perpetrator can commit a felonious assault using, for example, a knife, baseball bat, brick, or tire iron -- just about any object that can be used as a weapon. Since using a firearm in order to commit the offense is not a required element, it was proper for the appellant to be convicted and sentenced to a three-year firearm specification in addition to being convicted and sentenced for felonious assault.

{¶ 97} Even though we have found that it was an error to convict and sentence the appellant to a three-year firearm specification in addition to convicting and sentencing him for improperly discharging a firearm into a habitation, we hold that the error is harmless. The record indicates that the trial court sentenced the appellant to three years on each of the firearm specifications that were attached to the three counts of felonious assault. The trial court then merged all of the firearm specifications for the purposes of sentencing and ordered that the three-year firearm specifications run prior to, and consecutively with, the two-year concurrent sentence for the underlying offenses; therefore, the prison sentence the appellant received would have included a three-year consecutive firearm specification, even without the error. Because the appellant's sentence remains unchanged, his eleventh assignment of error is overruled.

Judgment affirmed.

MICHAEL J. CORRIGAN, A.J., AND KENNETH A.
ROCCO, J., CONCUR.

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Slip Opinions