

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

AARON P. FORD

Defendant-Appellant.

Case No. 2010-0235

On Appeal from the Licking
County Court of Appeals
Fifth Appellate District

C.A. Case No. 2008 CA 158

MERIT BRIEF OF APPELLANT AARON P. FORD

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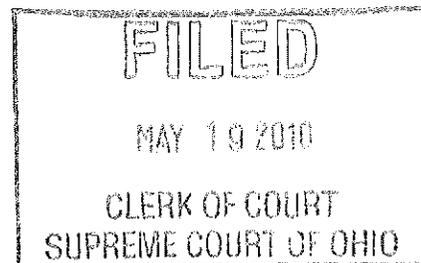


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STATEMENT OF THE CASE AND FACTS

This is a certified conflict case presenting the following question:

“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).”

The conflict case is *State v. Elko*, Cuyahoga App. No. 836.41, 2004-Ohio-5209.

In Licking County Court of Common Pleas Case No. 2008 CR 449, Appellant Aaron P.

Ford was convicted following a three-day jury trial of the following charges:

1. Count I: Improperly Discharging a Firearm At or Into a Habitation, in violation of Ohio Revised Code (“R.C.”) Section 2923.161 (A) (1), a felony of the second degree;
2. Count II: Inducing Panic, in violation of R.C. Section 2917.31 (A)(3), a misdemeanor of the first degree; and
3. Count III: Using Weapons While Intoxicated, in violation of R.C. Section 2923.15 (A), a misdemeanor of the first degree.
4. Firearm Specification attached to Count I, pursuant to R.C. Sections 2929.14 (D) and 2941.145.

(December 12, 2008 Judgment Entry)

The aforementioned convictions stem from an incident that occurred in the area of 27 South Kasson in Johnstown, Ohio on January 3, 2008. On that day, officers from the Johnstown Police Department responded to a report of shots fired in the area. (Trial Tr. at pgs. 214-216). Upon arrival, officers spoke with a resident at 27 South Kasson, who reported that one of the bullets had entered her residence. (Trial Tr. at pgs. 84-86). Further investigation led officers to an apartment at 36 Main Street in Johnstown, where the officers heard two voices, male and female, arguing about the shooting. (Trial Tr. at pg. 278). Once inside, the officers found Mr. Ford and located a small semi-automatic gun in the apartment next to a box of ammunition. (Trial Tr. at pgs. 227-228).

Through the use of a laser attached to a dowel rod, officers were able to determine that the trajectory of the bullet that entered the residence at 27 South Kasson. (Trial Tr. at pg. 137) The testing revealed that the shot came from an angle likely originating from the back door area of Mr. Ford's apartment. (Trial Tr. at pg. 145). Mr. Ford agreed to give a sample for a gunshot residue analysis, and the results demonstrated he had either been handling a weapon that had been fired or had been in close proximity to a weapon being fired. (Trial Tr. at pgs. 195-195). At trial, Mr. Ford testified on his own behalf, and admitted to firing the gun in question. (Trial Tr. at pg. 322). He stated that he did not aim the gun at 27 South Kasson and his defense was that it had been an accident. (Trial Tr. at pg. 335).

Mr. Ford appeared for his sentencing hearing on December 12, 2008. The Trial Court sentenced Mr. Ford to a stated prison term of three (3) years on Count I; thirty (30) days on Counts II and II, to be served concurrent to Count I; and to an additional three (3) years for the Firearms Specification, which ordered to be served consecutively to Count I. (December 12, 2008, Judgment Entry). Mr. Ford was granted 346 days jail credit and is currently incarcerated pursuant to this sentence until December 27, 2013.

Mr. Ford filed a timely notice of appeal of his conviction and sentence to the Fifth District Court of Appeals, raising three (3) Assignments of Error. (December 24, 2008, Notice of Appeal). In the Third Assignment of Error, Mr. Ford argued that the Trial Court erred by sentencing him consecutively for improperly discharging a firearm at or into a habitation and the firearm specification on the grounds that they are allied offenses of similar import and, therefore, consecutive sentencing constitutes double jeopardy. The Fifth District Court overruled the Assignment of Error and affirmed the Trial Court's sentence. *State v. Ford*, Licking App. No. 2008 CA 158, 2009-Ohio-6724.

The court of appeals ruled that the firearms specification does not charge a separate criminal ‘offense’ and, therefore, R.C. Section 2941.25 (A) does not apply. Id. at ¶ 54, citing *State v. Vasquez* (1984), 18 Ohio App.3d 92, 94. The appeals court further held that consecutive prison terms under R.C. Sections 2923.161 (A) and 2929.145 do not violate double jeopardy because there is a clear legislative intent to impose cumulative punishment under those two statutes regardless of whether the statutes proscribe the same conduct. Id. at ¶ 63, citing *Missouri v. Hunter* (1983), 459 U.S. 359, 103 S.Ct. 673.

The Fifth District Court certified conflict with *State v. Elko*, supra. (January 22, 2010, Judgment Entry). This Court accepted jurisdiction to hear the merits of the conflict March 24, 2010. The record was filed with this Court on April 9, 2010.

This matter is now before this Honorable Court.

ARGUMENT

PROPOSITION OF LAW

The crime of discharging a firearm at or into a habitation under R.C. Section 2923.161 and an attached firearm specification under R.C. Sections 2929.14 (D) and 2941.145 are allied offenses of similar import

I. STANDARD OF REVIEW

The issue of whether offenses are of similar import involves a legal analysis of the elements of each particular offense. *State v. Rance* (1999), 85 Ohio St.3d 632, 636. The certified conflict on appeal presents such an analysis, which is question of law and statutory interpretation. Therefore, this matter is reviewed de novo. *Dayton v. Fraternal Order of Police*, 2006-Ohio-3854, ¶15.

II. DOUBLE JEOPARDY AND R.C. SECTION 2941.25

The allied offense analysis “originates in the prohibition against cumulative punishments embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution.” *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶ 12, citing *United States v. Halper* (1989), 490 U.S. 435, 550. This Court has held that “the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense, but rather ‘prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.’” *Id.*, citing *Rance*, supra, at 635; See *Missouri v. Hunter*, supra, at 366. Thus, this Court held, “in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to

permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses.” *Id.*

The Ohio General Assembly codified the protection against double jeopardy in R.C. Section 2941.25. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at ¶ 23. This statute, referred to as the multiple-count statute, states as follows:

“(A) 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.

(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.”

The seminal case interpreting the multiple-count statute is *State v. Rance*, supra, in which this Court created a two-step analysis to determine whether crimes are allied offenses of similar import. *Rance* at 636. In order to sustain multiple convictions and sentences, the offenses must be either (1) of dissimilar import; or (2) committed separately or with separate animus. *Id.* Offenses are of similar import when they “correspondence to such a degree that the commission of one crime will result in the commission of the other.” *Id.*, citing *State v. Jones* (1997), 78 Ohio St.3d 12, 13.

There does not appear to be any dispute that the offenses and firearms specification for which Mr. Ford was convicted were part of the same animus. Therefore, the analysis in this case depends upon whether the offenses, on their face, are of similar import. This Court recently stated that this analysis requires courts to “compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if in comparing the elements of the offenses in the abstract, the offenses

are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import.” *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶ 1 of the syllabus.

With the aforementioned principles in mind, Mr. Ford submits that the offense of improperly discharging a firearm at or into a habitation, in violation of R.C. Section 2923.161 (A) and the firearm specification of R.C. Sections 2929.14 (D) and 2941.145 are allied offenses.

A. State v. Elko

The conflict case on this appeal is *State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209. In that case, the defendant had been convicted of both improperly discharging a firearm at or into a habitation under R.C. Section 2923.161 (A) and felonious assault under R.C. Section 2903.11. The defendant also had been found guilty of the accompanying three-year firearm specification under R.C. Section 2941.145. On appeal, the defendant argued that the firearm specification should not have applied since a firearm is an essential element of a violation of R.C. Section 2923.161 (A). The Court held as follows:

“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.” *Id.* at ¶ 95.

This holding, however, did not impact the sentence the defendant received since the specification could attach to the felonious assault conviction. Nonetheless, for the reasons set forth in this merit brief, Mr. Ford states that the *Elko* Court’s holding is correct and respectfully asks this Court to adopt its statement of law on review.

B. Improperly Discharging a Firearm at or into a Habitation (R.C. Section 2923.161)

Mr. Ford was convicted of Count I in the indictment for a violation of R.C. Section 2923.161(A)(1), which provides as follows:

(A) No person, without privilege to do so, shall knowingly do any of the following:

(1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual.

In order to obtain a conviction for this offense, the prosecution has the burden to establish that the defendant discharged a “firearm,” which is defined in R.C. Section 2923.11 (B). Under this section, a “firearm” consists of “any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant.” Absent such evidence that the defendant discharged a “firearm,” the State of Ohio cannot obtain a conviction under this criminal statute.

C. The Firearms Specification (R.C. Sections 2929.14(D) and 2941.145)

Mr. Ford was convicted and sentenced to an additional three years in prison on the firearms specification attached to Count I of the indictment. This specification is set forth under R.C. Sections 2929.14 (D)(1) and 2941.145. The former statute provides, in pertinent part, as follows:

“(D)(1)(a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

(ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender’s person or under the offender’s control while committing the offense and displaying the firearm,

brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;”

R.C. Section 2941.145 provides:

“(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender’s person or under the offender’s control *while committing the offense* and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or *used it to facilitate the offense*. The specification shall be stated at the end of the body of the indictment...

(D) As used in this section, “firearm” has the same meaning as in section 2923.11 of the Revised Code.”

(emphasis added)

As indicated in the plain language of the above section, the prosecution bears the burden to establish that the criminal defendant used a “firearm” and did so “while committing” the underlying offense and the used the firearm “to facilitate the offense.”

D. The commission of an offense in violation of R.C. Section 2923.161 (A)(1) necessarily results in the commission of the specification set forth under R.C. Section 2941.145.

The offense of improperly discharging a firearm at or into a habitation under R.C. Section 2923.161 (A)(1) cannot be committed without the use of a “firearm” as defined by R.C. Section 2923.11 (B). Likewise, the firearms specification under R.C. Section 2941.145 cannot attach to an offense without the use of a “firearm” as defined by the same section. In the abstract, the act of discharging a firearm at or into a habitation requires the use of a firearm while committing the offense and to facilitate the offense. Therefore, these sections are clearly allied under the analysis as set forth in *Rance*, supra, and *Cabrale*, supra.

In the court of appeals, the State of Ohio cited the case of *State v. Burks*, Franklin App. No. 07AP-553, 2008-Ohio-2463, in which the Tenth District Court held that a firearms specification under R.C. Section 2941.146 was not an allied offense of R.C. Section 2923.161(A)(1). In *Burks*, the appeals court specifically rejected the reasoning in *Elko*, supra. However, it should be noted that the issues in the two cases were not the same. R.C. Section 2941.146 is a firearms specification directed at felonies committed “by discharging a firearm from a motor vehicle.” In order to commit a violation of R.C. Section 2923.161(A)(1), the offender need not discharge a firearm from a motor vehicle. Therefore, R.C. Sections 2941.146 and 2923.161 (A)(1) would not be allied offenses. Thus, the State’s reliance on *Burks* is misplaced and this case is clearly distinguishable.

In the case *sub judice*, the underlying felony of improperly discharging a firearm at or into a habitation cannot be committed without the use of a firearm to facilitate the offense as required for a specification under R.C. Section 2941.145. Therefore, these sections do proscribe allied conduct.

E. The Firearms Specification is an “offense” under R.C. Section 2941.25

1. What is an offense?

The question becomes, as the court of appeals stated, whether the firearms specification is an “offense” as contemplated by R.C. Section 2941.25(A). *State v. Ford*, Licking App. No. 2008 CA 158, 2009-Ohio-6724, at ¶ 54. The Fifth District Court held that the specification does not charge a separate criminal offense, and therefore, the multiple-count statute was not applicable. *Id.*, citing *State v. Vasquez* (1984), 18 Ohio App.3d 92, 94. Instead, the appeals court held that the specification is “merely a sentencing provision which requires an enhanced penalty

if a specific factually finding is made. *Id.*, citing *Vasquez* at 95. Mr. Ford states that this position is in error and contradicts the plain language of R.C. Sections 2941.25 and 2941.145.

The plain language of R.C. Section 2941.25 does not define the term “offense” for purposes of the statute and the court of appeals did not attempt to define the term in a way that the supports a finding that the specification itself cannot be included. R.C. Section 2935.01 (D) states that an “‘offense,’ except where the context specifically indicates otherwise, *includes* felonies, misdemeanors, and violations of ordinances of municipal corporations and other public bodies authorized by law to adopt penal regulations.” (emphasis added). This statute is inclusionary but does not clearly exclude a firearms specification.

Webster’s Seventh New Collegiate Dictionary (1965) defines the term “offense” as “an infraction of the law.” This encompasses the firearm specification. The plain reading of R.C. Sections 2941.141, 2941.144, 2941.145 and 2941.146 indicates the legislative intent to treat those offenders who use a firearm to commit a felony more harshly under the law. Therefore, while specific criminal statutes directed at offenses such as Rape and Kidnapping themselves prohibit certain conduct, the firearm specification statutes indicate a further prohibition against the use of a firearm during their commission. The legislature clearly intended that such offenses are more serious and worthy of increased penalties when committed with a firearm. Therefore, the use of a firearm during the commission of such a crime, would be an “infraction” of that law – and thus an “offense” under the plain language of R.C. Section 2941.25 (A).

To hold otherwise would be state, as a matter of law, that the firearms specifications are not prohibitions contained within the Revised Code. As argued below, these specifications are not merely sentencing factors. They serve as the functional equivalent of an element of a greater offense.

2. The firearms specification creates the functional equivalent of an element of a greater offense

The court of appeals supported its conclusion by citing to the provisions contained in R.C. Section 2929.14 (D)(1)(b), which provides that courts may not impose more than one prison term for a firearm specification if the underlying felonies were part of the same act or transactions. The court stated, “[i]f 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 the merger of firearms specification.” *State v. Ford*, supra, at ¶ 55. This argument is misplaced and the attempted connection to the issue presented is misguided.

R.C. Section 2929.14 (D)(1)(b) does indeed prohibit multiple sentences for a firearm specification when there are two separate underlying felonies. This provision simply prevents the imposition of multiple sentences for two separate non-allied offenses. However, it is not the firearm specification itself that constitutes the separate offense. It is the firearm specification attached to the underlying felony that constitutes the separate offense. Thus, the specification becomes the functional equivalent of the element of a greater offense.

In *Apprendi v. New Jersey* (2000), 530 U.S. 466, the United States Supreme Court held that any fact that could increase the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and be proven beyond a reasonable doubt. *Id.* at syllabus. A conviction under R.C. Section 2923.161 (A)(1) would normally carry a maximum prison term of eight (8) years as a second degree felony. *R.C. Section 2929.14 (A)(2)*. However, the firearm specification mandates an additional three years without regard to the maximum sentence for the underlying felony. Therefore, under the rule of law in *Apprendi*, the state is required to prove the additional element of the use of a firearm beyond a reasonable doubt in order to increase that

maximum penalty. This makes the firearm specification the “functional equivalent of an element of a greater offense.” *Ring v. Arizona* (2002), 536 U.S. 584, at syllabus, citing *Apprendi*, at footnote 19. If there is no greater offense present, what would be purpose behind requiring a jury to find the existence of the additional fact beyond a reasonable doubt?

The firearms specification is not merely a sentencing factor such as those enumerated in R.C. Section 2929.12. It creates a greater, separate offense and must be proven beyond a reasonable doubt. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In this case, however, the firearms specification is an element already contained within the offense itself. Therein lies the problem.

3. *The term “offense” is vague and should be liberally construed in favor of the accused.*

At the very least, Mr. Ford contends that the “allied offense” statute is capable of two or more reasonable interpretations as to what would constitute an “offense,” and is, thus, vague. With respect to such ambiguous criminal statutes, R.C. 2901.04 (A) states that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” *R.C. Section 2901.04 (A)*. Therefore, should this Court determine that the term “offense” is ambiguous as applied to the firearm specification, then the “rule of lenity” mandates that the firearm specification be deemed an “offense.”

F. Consecutive Sentencing for R.C. Sections 2923.161 (A)(1) and 2941.145 would violate the right against Double Jeopardy

When a statute is ambiguous, the courts are further permitted to consider factors such as “the object sought to be attained” and the “consequences of a particular construction.” *R.C. Section 1.49*. As this Court has previously stated, the multiple-count statute under R.C. Section

2941.25 was intended to codify the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibit multiple punishments. *State v. Underwood*, supra, at ¶ 23. It is therefore appropriate to determine whether the consecutive sentencing in this case violates the principles of double jeopardy.

The Fifth District Court cited the case of *Missouri v. Hunter* (1983), 459 U.S. 359, in which United States Supreme Court held, “[w]ith 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.” *Missouri v. Hunter* (1983), 459 U.S. 359, syllabus. In that case, the defendant appealed a cumulative sentence under a Missouri statute that provided for a mandatory prison sentence of at least three years for armed criminal action, which was to be served in addition to any punishment provided by law for the underlying felony. The Supreme Court determined that such a cumulative sentence would not violate the principles of double jeopardy so as long as the state legislature specifically intended the result. The Court found that “the Missouri legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.” *Id.* at pg. 368.

However, despite the holding of *Hunter*, the Supreme Court has stated, [i]t is presumed that the legislature does not intend to impose two punishments where two statutory provisions proscribe the “same offense.” *Rutledge v. United States* (1996), 517 U.S. 292, syllabus, citing *Blockburger v. United States* (1932), 284 U.S. 299. If it is not clear from the language of the statute that the legislature intended cumulative punishments from the same conduct, then cumulative sentencing will, indeed, violate double jeopardy. The assumption underlying the

Blockburger rule is that the legislature “ordinarily does not intend to punish the same offense under two different statutes.” *United States v. Ball* (1985), 470 U.S. 856, 861.

In this case, it is unclear whether the General Assembly could have intended for a person convicted under R.C. Section 2923.161 (A)(1) to also be subjected to the mandatory three-year prison term under R.C. Section 2941.145(A). This firearm specification section requires the state to prove that the offender had a firearm in his possession “while committing the offense.” This language implies that the offense and the firearm are not one in the same. It is the act of possessing a firearm at the same time as the offense that triggers the specification.

R.C. Section 2941.145(A) goes on to require the state to prove that the offender “displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or *used it to facilitate the offense.*” (emphasis added). The term “facilitate” means, “to make easier.” *Webster’s Seventh New Collegiate Dictionary* (1965). This term implies that a firearm assisted the offender in committing the underlying felony. Under R.C. Section 2923.161(A)(1), however, the firearm does not assist the offense – it is part of the offense.

Furthermore, the imposition of multiple punishments for this underlying felony and the firearms specification does not serve to further the purpose behind the firearms specification itself. It is clear that the General Assembly intended to punish felons more harshly under the law when they commit a felony with a firearm. However, when the firearm is already included in the statutory crime itself, the degree of the offense and its corresponding maximum penalty will reflect the General Assembly’s intent regarding the appropriate punishment. The specification is therefore redundant.

This plain language and the purpose of R.C. Section 2941.145(A) thus places doubt upon the General Assembly’s intent as it relates to offenses that cannot be committed without the use

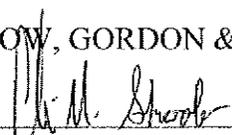
of a firearm. This is not the type of “crystal clear” statute that would justify the imposition of multiple sentences for the same conduct. Therefore, the court of appeals erred in its reliance upon *Missouri v. Hunter*, supra, to support its decision.

CONCLUSION

Appellant submits to this Court that the charge of Improperly Discharging a Firearm at or into a Habitation under R.C. Section 2923.161(A)(1) and an accompanying Firearms Specification under R.C. Section 2941.145(A) are “allied offenses of similar import” pursuant to Section 2941.25 of the Ohio Revised Code. The underlying felony offense cannot be committed with the use of a firearm as indicated in the firearms specification. Therefore, it is clear that the statutes proscribe the same conduct. The term “offense” itself is vague and should be liberally construed to include the firearms specification. Further, the statute is not clear enough to overcome the presumption that the General Assembly did not intend to impose multiple punishments for the same conduct. Therefore, multiple sentences would violate the principles of double jeopardy and frustrate the purpose behind R.C. Section 2941.25 (A). As such, Appellant asks this Court to reverse the three-year mandatory sentence he received for the firearms specification. In the alternative, Appellants asks this Court to reverse the decision of the Fifth District and remand to the Trial Court for resentencing.

Respectfully Submitted,

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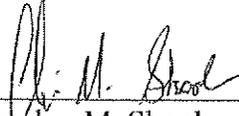
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Attorney for Appellant, Aaron P. Ford

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant was forwarded to Assistant Prosecutor Daniel H. Huston, Licking County Prosecutor's Office, 20 South Second St., 4th Floor, Newark, Ohio 43055, this 19th day of May, 2010.



Christopher M. Shook
Attorney for Appellant, Aaron P. Ford

IN THE SUPREME COURT OF OHIO

10-0235

STATE OF OHIO

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.

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LICKING COUNTY OH
GARY R. WALTERS

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NOTICE OF CONFLICT

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FILED
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SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

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 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

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.

John A. Edwards

W. Scott A.

William B. Holman
JUDGES

JAE/rad/rmn

005

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

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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} "I. 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.

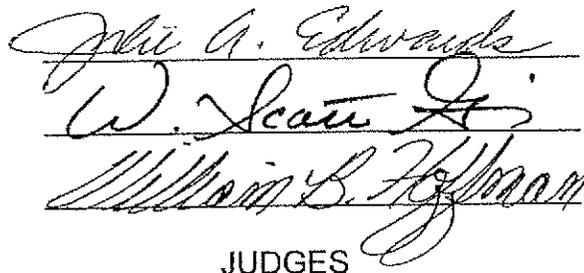
{¶65} The third assignment of error is overruled.

{¶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. Tesco* (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 fire 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.

OH

Slip Opinions

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2901. GENERAL PROVISIONS

*Current through legislation filed and passed through
4/6/2010*

**§ 2901.04. Rules of construction for statutes and rules
of procedure**

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

History. Effective Date: 03-23-2000; 09-23-2004

Ohio Statutes

Title 29. CRIMES - PROCEDURE

**Chapter 2923. CONSPIRACY, ATTEMPT, AND
COMPLICITY; WEAPONS CONTROL; CORRUPT
ACTIVITY**

*Current through legislation filed and passed through
4/6/2010*

**§ 2923.161. Improperly discharging firearm at or into
a habitation, in a school safety zone or with intent to
cause harm or panic to persons in a school building or
at a school function**

(A) No person, without privilege to do so, shall
knowingly do any of the following:

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

(2) Discharge a firearm at, in, or into a school safety
zone;

(3) Discharge a firearm within one thousand feet of any
school building or of the boundaries of any school
premises, with the intent to do any of the following:

(a) Cause physical harm to another who is in the school,
in the school building, or at a function or activity
associated with the school;

(b) Cause panic or fear of physical harm to another who
is in the school, in the school building, or at a function or
activity associated with the school;

(c) Cause the evacuation of the school, the school
building, or a function or activity associated with the
school.

(B) This section does not apply to any officer, agent, or
employee of this or any other state or the United States,
or to any law enforcement officer, who discharges the
firearm while acting within the scope of the officer's,
agent's, or employee's duties.

(C) Whoever violates this section is guilty of improperly
discharging a firearm at or into a habitation, in a school
safety zone, or with the intent to cause harm or panic to
persons in a school, in a school building, or at a school
function or the evacuation of a school function, a felony
of the second degree.

(D) As used in this section, "occupied structure" has the
same meaning as in section 2909.01 of the Revised Code.

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2941. INDICTMENT

*Current through legislation filed and passed through
4/6/2010*

**§ 2941.145. Firearm displayed, brandished, indicated
that offender possessed the firearm, or used it to
facilitate offense specification**

(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

History. Effective Date: 01-01-2002

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2941. INDICTMENT

*Current through legislation filed and passed through
4/6/2010*

§ 2941.25. Allied offenses of similar import - multiple counts

(A) 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.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

History. Effective Date: 01-01-1974

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2929. PENALTIES AND SENTENCING

Current through legislation filed and passed through 4/6/2010

§ 2929.14. Definite prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section or in division (D)(6) of section 2919.25 of the Revised Code and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

- (1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.
- (2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.
- (3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.
- (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.
- (5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section, in section 2907.02, 2907.05, or 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

- (1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.
- (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in section 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D)(1)(a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

- (i) A prison term of six years if the specification is of the type described in section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;
- (ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;
- (iii) A prison term of one year if the specification is of the type described in section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (D)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element,

purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 that involves a deadly weapon that is a firearm other than a dangerous ordnance, section 2923.16, or section 2923.121 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer, as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (D)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2)(a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3)(a) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marijuana, and the court imposing sentence upon the offender finds that the offender is

guilty of a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised

Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(7)(a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1422 of the Revised Code that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose

on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised Code;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised Code.

(b) The prison term imposed under division (D)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1423 of the Revised Code that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the same degree as the violation.

(E)(1)(a) 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.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under 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.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under 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.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (D)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code.

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) or division (J)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F)(1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical

harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) The court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(4) A person is convicted of or pleads guilty to a violation of section 2905.01 of the Revised Code committed on or

after January 1, 2008, and that section requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of section 2929.06 of the Revised Code requires the court to sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of section 2929.02 of the Revised Code requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J)(1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2)(a) If an offender is convicted of or pleads guilty to a felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and to a specification of the type described in section 2941.1421 of the Revised Code and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (J)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of section 2907.22, 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code and also was convicted of or pleaded guilty to a specification of the type described in section 2941.1421 of the Revised Code regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (J)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (J)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and any residential sanction imposed for the violation under section 2929.16 of the Revised Code. A sanction imposed under this division shall be considered to be a community control sanction for purposes of section 2929.15 of the Revised Code, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 of the Revised Code or for placement in an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive

program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of section 2903.06 of the Revised Code and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to section 2929.142 of the Revised Code.

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