

ORIGINAL

IN THE SUPREME COURT OF OHIO,
COLUMBUS, OHIO

11-0244

STATE OF OHIO,

Appellee,

-vs-

MICHAEL T. SWIDAS,

Appellant.

CASE NO.

On Appeal from the Eleventh District Court
of Appeals, Case No. 2009-L-104

Lake County Court of Common Pleas, Case
No. 08 CR 000719

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT,
MICHAEL T. SWIDAS

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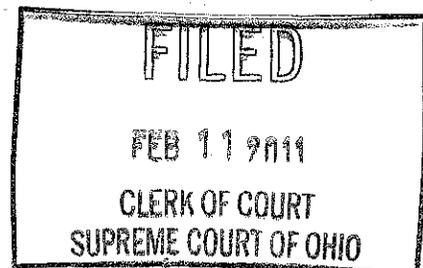


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This matter presents several issues of first impression to this Court, all of which relate to the firearm specification of R.C. 2941.146 where the shooter is near the vehicle, and the vehicle is not integral to the shooting. As the Dissenting Opinion in this matter sets forth, the trial court and the majority go well beyond the plain meaning of “from a motor vehicle”, to allow for conviction under the specification where shots are fired while the defendant is standing on the ground, not leaning against the vehicle, standing on it, or otherwise in contact with it. As the Dissenting Opinion states:

Now, a jury may reach the R.C. 2941.146 issue if the facts merely show a defendant discharged a firearm near or, perhaps, within the vicinity of a motor vehicle. Not only is this outcome contrary to common sense, it also renders the requirement that the firearm be discharged “from a motor vehicle” mere surplusage.

The Dissent then blatantly states that:

Even though the actus reus did not obviously match socially prohibited conduct set forth in R.C. 2941.146, the trial court nevertheless allowed the matter to go to the jury. The “rule of lenity,” is a principle of statutory construction codified under R.C. 2901.04(A). It provides, in relevant part 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.” Application of the rule of lenity requires a court to strictly construe a criminal statute to apply *only* to conduct that is clearly proscribed. ***Appellant’s actions in this case were not “clearly proscribed” by R.C. 2941.146. Therefore, appellant was entitled to a dismissal of the specification.

Among the other meritorious issues presented in this Memorandum, it appears that the first three Propositions of Law, all of which concern State and Federal Constitutional issues and statutory construction, have never been considered by this Court. Appellant prays that this Court will accept jurisdiction over this matter to resolve these novel issues and correct the injustices described herein.

I. STATEMENT OF THE CASE

Appellant, Michael T. Swidas, was charged on January 15, 2009 with one count of Attempted Murder, two counts of Felonious Assault, one count of Tampering with Evidence, and one count of Carrying a Concealed Weapon. Each of the Attempted Murder and Felonious Assault counts also carried firearm specifications pursuant to R.C. 2941.145 and R.C. 2941.146. Appellant entered a plea of not guilty as to all counts and the matter proceeded to trial, where the jury found Appellant not guilty of Attempted Murder, but guilty of all remaining counts and specifications. The trial court sentenced Appellant to: eight years on Count 2 (Felonious Assault); three years on Count 3 (Felonious Assault); three years on Count 4 (Tampering with Evidence) and one year on Count 5 (Carrying a Concealed Weapon). Counts 2, 3 and 4 were to run consecutive to each other but concurrent to count 5. The court further ordered that Appellant serve eight years, as to the two firearm specifications attached to Count 2, three years as to the firearm specification charged by R.C. 2941.145 and five years as to the firearm specification R.C. 2941.146. Appellant filed a timely Notice of Appeal. The Eleventh District Court of Appeals affirmed Appellant's convictions in a Judgment Entry dated December 28, 2010. This appeal follows.

II. STATEMENT OF FACTS

Appellant was a regular victim of violence at the hands of Ulysses "Cory" S. Altizer, IV. The bartender at Horvath's Pub on the evening of November 12, 2008 noticed that Altizer was there when she arrived at 11:30pm. Appellant arrived sometime thereafter, noticed Altizer, and went to the other end of the bar. Altizer noticed Appellant when Altizer was walking to the restroom. By the time Altizer walked out of the restroom, Appellant had left the bar without ever having ordered a drink, testifying that he retreated from the bar because of those prior

assaults he had suffered at Altizer's hands.

Outside of Horvath's, Appellant ran into and talked to a friend. After the conversation, and as Appellant approached his car, he remotely unlocked it, causing the headlights to illuminate. Just as he had opened his driver's side door to enter his vehicle, Appellant heard someone say "hey", and saw Altizer, and a man he later learned to be named Joseph Naples approaching.

Fearing that another severe beating at Altizer's hands was imminent, Appellant reached into his car, pulled out a nine-shot revolver (loaded with eight rounds) and, from a standing position outside of his vehicle, fired five shots in rapid succession to scare away his attackers. Though one of his shots did strike Altizer's hand, Appellant testified that he was not trying to shoot anyone; he shot out of fear, not anger. With his proficiency handling firearms, Appellant could have easily hit all of his attackers if shooting them had been his objective. Quickly starting his car and leaving, Appellant could have exited Horvath's parking lot by driving through his attackers but, instead, sped away from them. Other facts relevant to the issues raised herein will be addressed in the Argument portion of this Memorandum.

ARGUMENT

Proposition of Law No. I: R.C. 2941.146 is unconstitutionally vague as applied to a defendant who discharges a firearm while standing outside of a motor vehicle.

Defense counsel argued that the motor vehicle firearm specification at R.C. 2941.146 is unconstitutional, as the term "from" a motor vehicle could not be deciphered. The court overruled Appellant's objection, but noted that it could find no Ohio case law on the matter.

In State v. Hull (1999), 133 Ohio App.3d 401, the court stated:

When reviewing a void for vagueness claim, one must focus on the following three values:

"These values are first, to provide fair warning to the ordinary citizen so behavior may comport with the dictates of the statute; second, to preclude arbitrary, capricious and generally discriminatory enforcement by officials given too much authority and too few constraints; and third, to ensure that fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited."

Under the first value of the vagueness doctrine, we must consider whether R.C. 3599.12 provides adequate notice and fair warning so that persons of ordinary intelligence can conform their conduct to the law. A statute is not unconstitutionally vague unless it is "impermissibly vague in all of its applications." Therefore, to demonstrate that a statute is void for vagueness, it must be shown that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." [Internal citations omitted]

The specification in question requires that one "purposely or knowingly caus[ed] or attempt[ed] to cause the death of or physical harm to another *** by discharging a firearm from a motor vehicle." General rules of statutory construction as well as R.C. 1.42 require that words be construed according to the rules of grammar and common usage. State v. Dorso (1983), 4 Ohio St. 3d 60. Words in common usage will be construed in their ordinary acceptance and significance. Eastman v. State (1936), 131 Ohio St. 1.

Appellant's argument is not that the statute is vague on its face. In all of the situations in which one might rationally imagine a person firing a weapon "from" a motor vehicle, the vehicle is used as an instrument of the offense, and is very near in both proximity and immediacy. In this case, as fully set forth *supra* and, *infra*, when Appellant fired, he was standing between the open door of his car and the car itself - in the area of the door's hinges. Appellant did not drive the car to the parking lot, open the door, and immediately begin firing. Rather, his car had been parked for the time that it took him to eat at a business next to Horvath's, walk to and enter Horvath's, encounter Altizer, and exit Horvath's. Appellant did not fire his gun while inside of his car. Rather, he fired his gun while *near* his car and the car was in no way integral to the use of the gun.

Appellant did not discharge a firearm “from” a vehicle, as that term is normally used and defined. “From” is “used as a function word to indicate a starting point” or “to indicate the source or original or moving force of something.” Webster’s Third International Dictionary of the English Language, 1993. The vehicle was not the starting point or the source of the shots. This was not the case of what one imagines to be a “drive-by” shooting where one drives to a victim and shoots from inside of the car, or stops the car just long enough to fire a gun. Instead, while the car did bring Appellant to the scene of the shooting, that travel was incidental, not integral to the shooting. Appellant did not drive to Horvath’s to shoot anyone. The car, though near the shooting in both space and time, was not an instrument of the shooting. Appellant was not firing “from” his vehicle.

Proposition of Law No. II: R.C. 2941.146 creates a separate class of offenders, subject to greater punishment, without a rational relationship to a legitimate state purpose.

This Court discussed equal protection in State v. Williams (2000), 88 Ohio St.3d 513, 2000-Ohio-428, stating:

The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws.” The Equal Protection Clause prevents states from treating people differently under its laws on an arbitrary basis. “Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances.”

Under the Equal Protection Clause, a legislative distinction need only be created in such a manner as to bear a rational relationship to a legitimate state interest. These distinctions are invalidated only where “they are based solely on reasons totally unrelated to the pursuit of the State’s goals and only if no grounds can be conceived to justify them” [internal citations omitted].

Defense counsel argued that the specification is unconstitutional “as it bears no rational relationship to any legitimate State purpose.” R.C. 2929.145 adds a three year sentence for anything from the mention of a firearm to its actual display and use in the course of an offense.

Aside from his argument of self-defense negating the commission of any crime, Appellant has never argued that he did not use his firearm to repel his attackers. In fact, he testified that he had used the gun for the very purpose of defending himself.

Through R.C. 2941.146, the legislature has created a separate class of offenders. They are the same offenders who have used a weapon in the course of an offense as defined by R.C. 2941.145, cannot only be punished with a more severe penalty - five years - but can be punished by both statutes for the same conduct if the defendant fired a weapon from a motor vehicle. R.C. 2941.145 satisfies the State's legitimate, rational interest in preventing and punishing offenders for the use of a firearm to facilitate an offense. R.C. 2941.146 as a mere specification is, by necessity, always duplicative of either the underlying offense or R.C. 2941.145, or both. The only difference is the motor vehicle.

The facts of this case illustrate the absurdity of R.C. 2941.146. If Appellant had walked to Horvath's from his home, worn his gun in a holster, fired to ward off his attackers outside of Horvath's, and left on foot, he could not be convicted of the motor vehicle specification but, for the sake of argument, could be convicted of the underlying offenses and R.C. 2941.145. The fact that Appellant retrieved the gun from his car has subjected him to five consecutive years beyond the sentences for the underlying convictions *and* for using the gun to facilitate the offense!

Clearly, firing a weapon from a motor vehicle does not cause any further physical or mental injury to a victim. Likewise, an offender on a bicycle might just as easily approach and escape a gun-facilitated offense as one using a motor vehicle. Yet, the bicycle shooter is not subjected to additional punishment for his or use of a conveyance.

Proposition of Law No. III: R.C. 2941.145 is a lesser included offense of R.C. 2941.146.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall *

* * be subject for the same offence to be twice put in jeopardy of life or limb” and Section 10, Article I, Ohio Constitution provides, “No person shall be twice put in jeopardy for the same offense.” If a defendant’s actions “can be construed to constitute two or more allied offenses of similar import,’ the defendant may be convicted (i.e., found guilty and punished) of only one. State v. Rance (1999), 85 Ohio St.3d 632, 636. “If the elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.” * * * If the elements do not so correspond, the offenses are of dissimilar import and the court’s inquiry ends—the multiple convictions are permitted.” Id.

In State v. Deem (1988), 40 Ohio St.3d 205, paragraph 3 of the syllabus, this Court stated, “[a]n offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.” Here, R.C. 2941.146 carries a mandatory five year sentence, while R.C. 2941.145 carries a mandatory three year sentence. R.C. 2929.14(D)(1)(c). Further, one cannot ever violate R.C. 2941.146 (the greater offense) without also violating R.C. 2941.145 (the lesser offense). One cannot be guilty of “discharging a firearm from a motor vehicle” without also having “a firearm on or about the offender’s person or under the offender’s control while committing the [underlying] offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.” Yet, one could easily violate R.C. 2941.145 (the lesser offense) without violating R.C. 2941.146 (the greater offense) by using a firearm to facilitate an offense without firing it. Therefore, under the Deem test, a specification under R.C. 2941.145 is a lesser included offense of a specification under R.C. 2941.146. Pursuant to the constitutional

prohibitions against double jeopardy, a defendant may not be convicted of both.

Proposition of Law No. IV: A trial court errs by failing to declare a mistrial where a jury states that it is hopelessly deadlocked and that no amount of time would change their decision.

The jury sent a question back to the court after about five hours of deliberation, asking “What do we do if we are hung on two charges and agree on three charges?” Defense counsel argued that the jury was hung, and without waiving that argument, agreed that the simple instruction of “keep deliberating” was appropriate. Approximately three and a half hours later, the jury sent another message to the court, stating “We are hopelessly deadlocked on two of the five charges. . . No amount of deliberation will change this outcome.” The court proposed giving the Howard charge as set forth in OJI 429.09. Defense counsel objected, stating that, under the circumstances, and based upon the express terminology of the jury’s statement, the jury should be considered hung, and a mistrial declared. Again, without waiving the objection, counsel agreed to the form of the response, which the trial court then gave to the jury.

The jury returned another question the next day, asking about the possibility of Appellant being retried with new evidence if the jury is declared to be hung. For the third time, counsel objected, arguing that the jury was hung. Counsel noted that the jury clearly felt that it was being held hostage, that it was looking for a way to escape further deliberation, and that any verdict at that point would be a verdict based upon compromise - not the evidence.

A trial court has discretion to declare a mistrial, including those circumstances listed in R.C. 2945.36. State v. Widner (1981), 68 Ohio St.2d 188, 190. In State v. Sabbah (1982), 13 Ohio App.3d 124, the court stated:

R.C. 2945.36 sets forth four grounds upon which to discharge a jury in a criminal case. There has been some suggestion that these causes for discharge are permissive rather than exclusive. See State v. Workman (1977), 60 Ohio App.2d

204, 208 [14 O.O.3d 181]. R.C. 2945.36 states, in pertinent part:

"The trial court may discharge a jury without prejudice to the prosecution:

* * *

"(B) Because there is no probability of such jurors agreeing; * * *"

This Court has also followed the nearly identical standard set by the American Bar Association that a "jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement." State v. Howard (1989), 42 Ohio St.3d 18.

Here, the jury first indicated deadlock, then outright expressed it, even stating that no amount of time would help. The fact that it did reach a verdict as to all charges does **not** indicate that it somehow overcame the deadlock through proper deliberation. Instead, by reaching a verdict after stating that such was impossible strongly indicates that the jury either reached a compromise verdict, giving-in to the trial court's coercion.

Proposition of Law No. V: A trial court's instructing a jury that the defendant fled the scene of an offense, and that such flight might indicate consciousness or awareness of guilt, constitutes an unconstitutional comment upon the evidence.

Defense counsel objected to the inclusion of a "flight" instruction to the jury both times that instructions were discussed during the trial. Despite those continuing objections, the trial court instructed the jury that testimony indicating that Appellant fled the scene had been admitted, and that such conduct "may tend to indicate the defendant's consciousness or awareness of guilt."

As stated in State v. Hutton (March 8, 1984), Cuyahoga App. No. 45417, unreported, "The purpose of instructions to a jury is to clearly define the issues in a case, and, by a statement of the law applicable to the facts developed at the trial, assist the jury in arriving at a proper verdict." Hutton, citing Thomas v. Lewis (1961), 88 Ohio L. Abs. 84. The question to be answered is whether the court's comment upon the evidence "operated to the prejudice of the

appellants as an expression of opinion that the evidence proved them guilty.” Hutton, citing State v. Cala (1940), 31 Ohio L. Abs. 97.

In this case, as discussed in the arguments, *infra*, Appellant’s defense was not that he had not fired his revolver or left Horvath’s Pub immediately after doing so; Appellant openly acknowledged these facts during his testimony. Instead, rather than fleeing the scene of a crime, Appellant was continuing his retreat, and avoiding further attack by Altizer, Naples, and others. However, the trial court’s instruction was that there had been testimony that Appellant fled the scene. Appellant did not flee from the scene, he fled from Altizer and imminent physical harm.

As noted by counsel during his objection to the instruction, the court’s lack of logic clear when the corollary is considered. There is no instruction in Ohio law that remaining at the scene of a possible crime may give an indication of consciousness or awareness of innocence. Yet, the conduct of anyone who leaves what is later charged is a crime is likely to be commented upon by a court as possible consciousness or awareness of guilt.

Proposition of Law No. VI: A trial court’s instruction to the jury that the defendant fled the scene of a criminal offense is an abuse of discretion where the facts do not support such an instruction.

As set forth *supra*, defense counsel lodged objections to the subject instruction each time that it was discussed. Appellant maintains that such an instruction is an improper comment upon the evidence. Even assuming *arguendo* that such an instruction is generally permissible, however, the instruction was improper under the facts of this case.

The decision whether to issue a valid jury instruction rests within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Sims (1984), 13 Ohio App.3d 287, 289. In State v. Bowles, (May 11, 2001), Lake App. No. 99-L-075, unreported, the court found that, while the instruction itself does not constitute error, such an

instruction to the jury when the facts do not support it is error. The Court stated that:

There was no evidence presented that appellant deliberately fled the area or was trying to avoid arrest or detection. Thus there is want of credible evidence from which the jury could conclude that appellant's after the fact conduct constituted flight within the meaning and import of that concept. The trial court's jury charge on flight, and its implications, is therefore error.

While the error was found to be harmless due to the "overwhelming" evidence of Bowles' guilt, this case provides a very different set of facts.

Here, Appellant's guilt was not overwhelming. While there is no question that Appellant fired the revolver near Altizer and Naples, Appellant's motive for such was the primary issue of a two-day trial. As discussed in the arguments that follow, Appellant proved his case of self-defense and left Horvath's Pub as part of that self-defense; he fired to repel his attackers and fled to avoid further attack. As he left, he did not have a clear idea of where he was going, and passed an ambulance and police car traveling the opposite direction. When they conducted a felony stop of Appellant's vehicle, Appellant illuminated his interior lights and placed his hands on the dashboard to show that he would comply. Though he was not blocked-in by police vehicles, Appellant did not attempt to flee, cooperated during the stop.

The jury, apparently, did not find evidence of Appellant's guilt overwhelming. As set forth in Proposition of Law No. IV, *supra*, the jury sent two questions to the court from its deliberations, stating that they were unable to reach a verdict, that they were "hopelessly deadlocked" and that no amount of time would change the situation.

Proposition of Law No. VII: A criminal defendant's convictions are not supported by sufficient evidence, where the record reveals that the state fails to present any evidence of one or more of the elements of the charges.

In State v. Thomkins (1997), 78 Ohio St.3d 380, this Court explained that "sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go

to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” “Whether the evidence is legally sufficient to sustain a verdict is a question of law.” *Id.* Additionally, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982) 457 U.S. 31, 45. Here, defense counsel moved for acquittal at the close of the State’s case, at the close of all evidence, and after the jury’s verdict was read

Joseph Naples was not physically harmed by Appellant. Therefore, in order to be convicted of committing a felonious assault upon Naples, Appellant had to “knowingly” “attempt to cause physical harm” to Naples. R.C. 2903.11(A)(2). However, Appellant testified that was not attempting to shoot anyone. As set forth more fully below, Appellant’s motive was to scare away his attackers, not to shoot them.

“Attempt” for purposes of R.C. 2903.11 is defined in R.C. 2923.02(A) as follows: “No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, **if successful**, would constitute or result in the offense.” (Emphasis added). Appellant’s express goal for success was to scare his attackers, not to shoot them. Therefore, his actions did not constitute an attempt to cause physical harm to Naples.

Pursuant to R.C. 2921.12, Tampering with Evidence requires that the defendant “alter, destroy, conceal, or remove” a thing, “with **purpose to impair its value or availability as evidence** in such proceeding or investigation.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Appellant admitted to tossing the revolver out of his moving car window. He did so only *after* he saw that a police vehicle made a U-turn to follow him, and **with the purpose of not being shot by police**. Though Appellant was wearing gloves when he fired the revolver, he did not throw those out of his car window.

At to the motor vehicle specification, in State v. Marshall, (August 14, 1998) 6th Dist. Ct.

App. No. L-97-1199, the court stated:

Pursuant to R.C. 2941.146, in order for an accused to be found guilty of discharging a firearm from a motor vehicle, the state must establish that he: "**** purposely or knowingly caus[ed] or attempt[ed] to cause the death of or physical harm to another *** by discharging a firearm from a motor vehicle."

This court has thoroughly considered the entire record of proceedings in the trial court. The evidence includes testimony from the victim that appellant had one foot in the car and one foot out and appellant's statement to Detective Marzec immediately after the shooting that "I was like half-way in and half-way out of the car." This testimony was sufficient for the jury to find that appellant discharged a firearm "from a motor vehicle."

Further, the defendant in that case was the passenger in a car that drove up to the victim. Marshall partially exited the vehicle and shot the victim. In that case, the car was an instrument of the offense.

Appellant did not fire the revolver from his vehicle. Appellant testified that he had opened the door of his car and was about to get inside when he saw Altizer and the others charging toward him. Joseph Naples testified that when he saw Appellant shooting, Appellant was "by a black car." There was no testimony that Appellant was seated in the car, or that he even had one foot inside of his car. Appellant testified that he had his car door open, and he was standing between the door and the car - in the area of the door hinges.

Unlike Marshall, Appellant's car was not used as the instrument of any offense. To the contrary, the car was part of Appellant's means of avoiding and retreating from an attack.

Proposition of Law No. VIII: A criminal defendant's convictions are against the manifest weight of the evidence, where the record reveals that the jury clearly lost its way in relying upon unproven, unreliable, uncertain, conflicting, and contradictory evidence.

In State v. Tompkins (Oct. 25, 1996), Clark App. No. 95-CA-0099, unreported, the court stated that a court reviewing whether a conviction is against the manifest weight of the evidence

“weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created . . . a manifest miscarriage of justice.”

In order to establish self-defense, a defendant must prove: "(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger." State v. Barnes, 94 Ohio St. 3d 21, 24, 2002-Ohio-68.

Appellant did not create the hostile situation that led to the incident on the night of November 12, 2008. Appellant testified that he left the bar because he feared being beaten by Altizer yet again and left without placing a drink order. By exiting Horvath's, Appellant fulfilled any duty he had to avoid or retreat from the danger of Altizer - assuming that even being near such a bully required Appellant to leave the premises. However, in the parking lot, the very situation he was trying to avoid by leaving Horvath's was now upon him. In fear of imminent, serious physical harm, Appellant reached for his revolver and fired.

With his skill, Appellant testified, he could have easily fired fatal shots at all of his attackers. Instead, Appellant's shots were scattered and only hit Altizer's hand by chance. Appellant's revolver was loaded with eight rounds, and he could have fired all of them at his attackers. Instead, Appellant fired only five shots. Appellant could have driven his car right over Altizer and Naples as he sped away from the attack. Instead, he drove in the opposite direction. He did all of these things because, Appellant testified, he was trying to scare his attackers, not shoot them. He was trying to get away from Altizer yet again.

Appellant's conduct upon encountering police further bolsters the argument for self-

defense. As soon as he saw police lights behind him, Appellant stopped his vehicle, illuminated the interior lights and placed his hands on the dashboard. Though he was not blocked by the officers, Appellant did not attempt to speed away. When stopped, Appellant cooperated and complied with police instructions.

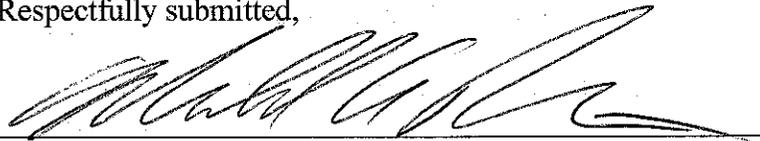
Proposition of Law No. IX: A trial court errs by sentencing a criminal defendant to serve a term greater than the minimum term, the maximum, and consecutive terms of incarceration based upon certain factual findings where such findings were not made by the jury nor admitted by the defendant.

In State v. Foster, 109 Ohio St.3d, 2006-Ohio-856, this Court held that R.C. 2929.14(B) and (C), R.C. 2929.14(E)(4), and R.C. 2929.19(B)(2) are unconstitutional violations of a defendant's rights under the Sixth and Fourteenth Amendments. At the close of Appellant's sentencing hearing, however, the trial court made extensive findings, nearly mirroring the language of those very statutes to support its imposition of consecutive sentences. These findings are in direct opposition to Foster. Consequently, all of Appellant's sentences, which are greater than the minimum, the maximum, and/or consecutive, are unconstitutional and must be vacated.

CONCLUSION

For the reasons set forth above, Appellant prays that this Court accept jurisdiction over this matter and find that the judgment of the trial court was improper and the matter must be reversed and remanded for further proceedings consistent with Ohio law.

Respectfully submitted,



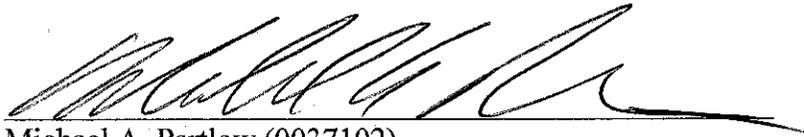
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(216) 621-4244 Attorney for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction**, is being served via regular U.S. Mail, postage prepaid on this 10th day of February, 2011, upon:

Charles Coulson
Lake County Prosecutor
105 Main Street
Painesville, Ohio 44077



Michael A. Partlow (0037102)
MORGANSTERN, MacADAMS & DeVITO CO., L.P.A.

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,

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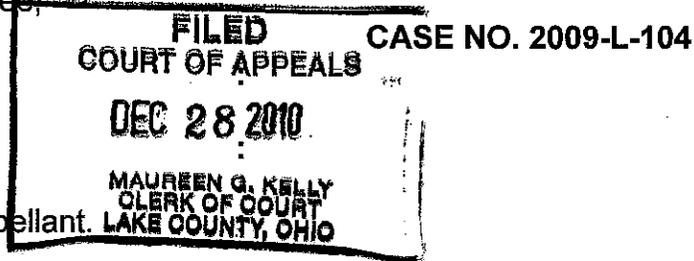
OPINION

Plaintiff-Appellee,

- vs -

MICHAEL T. SWIDAS,

Defendant-Appellant.



Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000719.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Following a jury trial, appellant, Michael T. Swidas, was convicted on two counts of felonious assault, felonies of the second degree, both with a firearm specification pursuant to R.C. 2941.145 and a motor vehicle specification pursuant to R.C. 2941.146; one count of tampering with evidence, a felony of the third degree; and one count of carrying concealed weapons, a felony of the fourth degree. The Lake County Court of Common Pleas subsequently sentenced appellant to an aggregate

term of 22 years. Appellant filed a timely notice of appeal from the conviction. For the following reasons, we affirm the judgment of the Lake County Court of Common Pleas.

{¶2} Appellant and one of the victims, Ulysses Altizer, had known one another for approximately ten years. Over the years, appellant and Altizer had engaged in physical altercations.

{¶3} In November 2008, at approximately 12:00 a.m., Altizer, along with one of his friends, Joseph Naples, arrived at a local bar. Unbeknownst to Altizer, appellant was also at the bar. On his way into the restroom, Altizer noticed appellant and said, "Hey, Sweets, how you doin'?" Appellant responded, "Better than you." When Altizer came out of the restroom, appellant was gone. At approximately 1:30 a.m., Altizer and Naples exited the bar. Upon their exit, appellant yelled, "Hey, bitch." Altizer testified that as he turned around, he saw appellant standing at his vehicle holding a firearm. Appellant's vehicle was backed into a parking space, his door was open, and he was standing between the door and the vehicle. Altizer stated that appellant started shooting. Appellant fired five shots, one of which struck Altizer in his finger.

{¶4} Naples testified that as he was about to open the passenger's door of Altizer's vehicle, he heard a male yell, "What bitches." He glanced over his shoulder and observed an unidentifiable man by the driver's side of a vehicle. Naples then stated he heard approximately five gunshots.

{¶5} Appellant immediately left the scene in his vehicle. A police officer responding to the incident observed appellant's vehicle and began to follow him. Noticing that the police officer was about to follow him, appellant threw the firearm out of

the window of his vehicle. Appellant was apprehended, and the firearm was subsequently located by the police.

{¶6} Appellant was indicted on one count of attempted murder, in violation of R.C. 2923.02, with firearm specifications as set forth in R.C. 2941.145 and 2941.146 (“count one”); two counts of felonious assault, in violation of R.C. 2903.11(A)(2), each with firearm specifications as set forth in R.C. 2941.145 and 2941.146 (“counts two and three”); one count of tampering with the evidence, in violation of R.C. 2921.12(A)(1) (“count four”); and one count of carrying concealed weapons, in violation of R.C. 2923.12(A)(2) (“count five”), with an additional finding that the defendant has previously been convicted of an offense of violence. The jury found appellant guilty of counts two, three, four, and five. Appellant was found not guilty on count one. The trial court sentenced appellant to an eight-year term of imprisonment on count two; a three-year term of imprisonment on count three; a three-year term of imprisonment on count four; and a one-year term of imprisonment on count five. The trial court ordered counts two, three, and four consecutive to each other but concurrent to count five.

{¶7} Appellant was also sentenced to serve an additional term of eight years—three years pursuant to the firearm specification of R.C. 2941.145 and five years pursuant to the firearm specification of R.C. 2941.146. The trial court ordered the firearm specifications to be served consecutive to each other pursuant to R.C. 2929.14(E)(1)(a).

{¶8} Appellant filed a timely notice of appeal and asserts nine assignments of error for our review. As they both relate to R.C. 2941.146, we address appellant’s first

and second assignments of error in a consolidated fashion. Under his first and second assignments of error, appellant maintains:

{¶9} “[1.] The trial court erred by failing to dismiss the motor vehicle firearm specifications and find that R.C. 2941.146 is unconstitutionally vague as applied to appellant.

{¶10} “[2.] The trial court erred by failing to dismiss the motor vehicle firearm specifications and find that R.C. 2941.146 violates appellant’s right to equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution.”

{¶11} Appellant argues that R.C. 2941.146 is overly vague in its application to appellant based on the facts of the instant case.

{¶12} At trial, appellant objected to the motor vehicle specification, noting that “the only evidence in this case clearly showed that [appellant] was standing behind the front driver’s-side door of his motor vehicle, but not in the vehicle, at the time that the shots were fired.” The trial court denied appellant’s objection stating, in part:

{¶13} “‘From a motor vehicle’ is an easily determined standard. Anybody knows whether something is ‘from a motor vehicle?’ *** The legislature certainly knows the words. If they intended the motor vehicle to be in motion, or if they intended the shooter to be occupying *** the motor vehicle, or in or upon the motor vehicle, the legislature could have written it that way. *** So, the Court overrules the [appellant’s] objection to the constitutionality of that statute or its inclusion here under the facts of this case.”

{¶14} This court reviews the interpretation of a statute de novo—without deference to the interpretation of the trial court. *State v. Evankovich*, 7th Dist. No. 09 MA 168, 2010-Ohio-3157, at ¶6. (Citation omitted.)

{¶15} “In order to determine legislative intent it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself. *** ‘If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.’ ***

{¶16} “To determine the intent of the General Assembly “(i)t is the duty of this court to give effect to the words used (in a statute), not to delete words used or to insert words not used.” ***

{¶17} “A court may interpret a statute only where the words of the statute are ambiguous. *** Ambiguity exists if the language is susceptible of more than one reasonable interpretation. *** If a statute is ambiguous, the court, in determining the intent of the General Assembly, may consider several factors, including the object sought to be obtained, the legislative history, and other laws upon the same or similar subjects. ***

{¶18} “Statutes defining criminal offenses and penalties are to be strictly construed against the state and liberally in favor of the accused. R.C. 2901.04(A). However, ‘(t)he canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose.’ *** ‘The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly.’ ***.” Id. at ¶¶6-9.

{¶19} R.C. 2941.146 states, in pertinent part:

{¶20} “(A) Imposition of a mandatory five-year prison term upon an offender *** for committing a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was

committed by *discharging a firearm from a motor vehicle* other than a manufactured home ***.” (Emphasis added.)

{¶21} Appellant argues that R.C. 2941.146 is inapplicable, as the vehicle in this case was not the “starting point or the source of the shots” nor was this a “drive-by” shooting. The statute is plain on its face—all that is required for the enhancement is that the firearm is discharged “from a motor vehicle.” The term “drive-by” does not appear in the statute nor does the statute require the vehicle to be the starting point of the shooting.

{¶22} A review of case law reveals that the specification of R.C. 2941.146 has applied in scenarios where an individual discharged a firearm while his body was within the framework of the vehicle. See, e.g., *State v. Clark*, 7th Dist. No. 08 MA 15, 2009-Ohio-3328, at ¶5. (“As the car passed the house, Stoney Williams sat on the door frame of the passenger window and fired two shots across the roof of appellant’s vehicle[.]”)

{¶23} In *State v. Marshall* (Aug. 14, 1998), 6th Dist. No. L-97-1199, 1998 Ohio App. LEXIS 3700, the appellant was a passenger in a vehicle when it stopped and approached the victim. The appellant got out of the vehicle—leaving one foot inside the vehicle. *Id.* at *3. The appellant shot the victim, got back inside the vehicle, and left. The driver of the vehicle did not turn the engine off during the incident. *Id.*

{¶24} The appellant in *Marshall* was found guilty of the specification that the offense of felonious assault was committed by discharging a firearm from a motor vehicle, pursuant to R.C. 2941.146. *Id.* at *7-9. In *Marshall*, the appellant argued “that the evidence established that the shooting occurred from outside [the vehicle]. Appellee

[responded] that several witnesses testified that [the] appellant had one foot in the car and one foot out of the car when he shot [the victim]." Id. at *8.

{¶25} The *Marshall* court upheld the appellant's conviction finding that the evidence was sufficient to find that he discharged a firearm "from a motor vehicle," stating that the appellant had "one foot in the car and one foot out [of the car]." Id. at *9. The court also observed that the appellant, in his statement immediately after the shooting, stated, "I was like half-way in and half-way out of the car." Id.

{¶26} Under the facts of the instant case, it was appropriate to allow the jury to consider whether appellant was subject to the firearm specification of R.C. 2941.146. Here, the evidence introduced at trial reveals that appellant's vehicle was running, the headlights were on to illuminate where the victims were located, the driver's door was open, and appellant was standing within the framed area of the door and the vehicle, leaning on the vehicle as he discharged his weapon.

{¶27} If there is evidence that the discharge of the firearm occurred when the defendant was in physical contact with the vehicle and used the vehicle to facilitate the discharge of the firearm, then it is appropriate to instruct the jury on the specification contained in R.C. 2941.146. The statute clearly gives great weight to the mobile nature of the vehicle. If the legislature wanted to limit the application of the specification to circumstances where the defendant was "within" or "while riding in" the motor vehicle, it could have easily done so. The term "from" encompasses a much broader range of activity.

{¶28} Appellant further maintains that "there is *** no rational basis for the creation of a separate class of firearm-related offenders – those who discharged a

firearm from a motor vehicle – and subjecting them to give years of punishment beyond the three years mandated by the general firearm specification.”

{¶29} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides: “No State shall *** deny to any person within its jurisdiction the equal protection of the laws.” Ohio’s Equal Protection Clause, Section 2, Article I of the Ohio Constitution, states: “All political power is inherent in the people. Government is instituted for their equal protection and benefit ***.”

{¶30} The parties do not dispute that this case involves the rational-basis review, as it does not involve a fundamental right or suspect classification.

{¶31} “The rational-basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational.’ ***

{¶32} “Under the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification.’ *** ‘(S)tatutes are presumed to be constitutional and *** courts have a duty to liberally construe statutes in order to save them from constitutional infirmities.’ ***. The party challenging the constitutionality of a statute ‘bears the burden to negate every conceivable basis that might support the legislation.’ ***.” (Internal citations and citations omitted.) *Pickaway Cty. Skilled Gaming, LLC v. Cordray*, 2010-Ohio-4908, at ¶19-20.

{¶33} Appellant has failed to meet his burden. In his brief, appellant merely states that firing a weapon from a motor vehicle does not cause any further physical or mental injury to a victim.

{¶34} In its brief, the state of Ohio cites to *People v. Bostick* (Cal.App. 1996), 46 Cal.App.4th 287, 292, a California Court of Appeals opinion referring to a similar statute.¹ In that case, the court stated:

{¶35} “[F]iring a gun from a motor vehicle is an especially treacherous and cowardly crime. It allows the perpetrator to take the victim by surprise and make a quick escape to avoid apprehension ***. The Legislature could rationally have determined that the foregoing considerations justify imposing an increased sentence on the perpetrator.”

{¶36} We agree with this rationale. The statute provides protection of public safety. In enacting such a statute, the legislature gave great weight to the mobile nature of the vehicle, as it provides a rapid escape from the scene of the crime. Further, a vehicle may provide the offender with additional coverage or concealment.

{¶37} Appellant’s first and second assignments of error are without merit.

{¶38} Appellant’s third assignment of error states:

{¶39} “The trial court erred by sentencing appellant to consecutive sentences for R.C. 2941.146 and R.C. 2941.145, violating the constitutional prohibition against double jeopardy.”

{¶40} Appellant argues that a specification under R.C. 2941.145 is a lesser included offense of a specification under R.C. 2941.146, and, therefore, the trial court

1. Section 12022.55 stated: “*** [A]ny person, *** as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony, shall, upon conviction of the felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 5, 6, or 10 years.”

erred by sentencing the firearm specifications consecutive to each other pursuant to R.C. 2929.14(E)(1)(a).

{¶41} R.C. 2929.14(D)(1)(c) provides that if the offense at issue is properly accompanied by a firearm specification under R.C. 2941.146 and R.C. 2941.145, the firearm specifications do not merge. See *State v. Bates*, 10th Dist. No. 03AP-893, 2004-Ohio-4224, at ¶¶8, 10. Further, the trial court did not err by sentencing the firearm specifications consecutively. R.C. 2929.14(E)(1)(a).

{¶42} The First Appellate District has rejected appellant's argument that imposing multiple terms for the gun specifications violated his rights under the Double Jeopardy Clause of the United States Constitution. *State v. Reese*, 1st Dist. Nos. C-060576 & C-060577, 2007-Ohio-4319, at ¶¶28.

{¶43} "The General Assembly has *** provided in R.C. 2929.14(E)(1)(a) that any person convicted of a five-year gun specification, for discharging a firearm from a motor vehicle under R.C. 2941.146, must serve a consecutive sentence in addition to any sentence imposed for a conviction on either the one-year or the three-year gun specification. Thus, the trial court was correct in imposing consecutive sentences on the one-year and five-year gun specifications." *Id.* at ¶¶27.

{¶44} Accordingly, we overrule appellant's third assignment of error.

{¶45} Appellant's fourth assignment of error states:

{¶46} "The trial court erred by failing to declare a mistrial when the jury expressly stated that it was hopelessly deadlocked and that further deliberations would have no affect on the deadlock."

{¶47} Under this assigned error, appellant argues that the trial court erred when it ordered the jury to keep deliberating after the jury notified the trial court that it was “hopelessly deadlocked on two of the five charges” and that “no amount of deliberation will change this outcome.”

{¶48} After the jury spent approximately five hours deliberating, it sent the trial court the following question: “What do we do if we are hung on two charges and agree on three charges?” This question was sent at 10:55 a.m. The trial court instructed the jury to “keep deliberating.”

{¶49} Approximately four hours later, at 2:25 p.m., the jury informed the trial court that they were “hopelessly deadlocked on two of the five charges. No amount of deliberation will change this outcome.” The jury then asked the trial court if it had to stay until 5:00 p.m.

{¶50} The court issued a supplemental instruction to the jury, commonly referred to as the *Howard* charge. See *State v. Howard* (1989), 42 Ohio St.3d 18, paragraph two of the syllabus. The *Howard* charge reads:

{¶51} “The principal mode, provided by our Constitution and laws, for deciding questions of fact in criminal cases, is by jury verdict. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of your fellows, each question submitted to you should be examined with proper regard and deference to the opinions of others. You should consider it desirable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a

jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors."

{¶52} After giving the *Howard* charge, the trial court instructed the jury to continue its deliberations.

{¶53} The next day, the jury began deliberating at 8:40 a.m. At 8:45 a.m., the jury presented the following question: "Should, in a month or three months, evidence come up that was not brought up in this trial, if we were a hung jury, can Michael S. be retried versus finding him not guilty, for which he cannot be retried?"

{¶54} After discussion with the attorneys, the trial court asked the jury, "after a reasonable additional period of time today and Monday, do you believe that the jury might reach a verdict?" The jury foreperson answered in the affirmative. The jury resumed its deliberations and, subsequently, reached a verdict that same day.

{¶55} Appellant claims that the jury was deadlocked and, although it reached a verdict, it was a "compromised verdict, giving-in to the trial court's coercion."

{¶56} “Whether the jury is irreconcilably deadlocked is essentially ‘a necessarily discretionary determination’ for the trial court to make. *Arizona v. Washington* (1978), 434 U.S. 497, fn. 28. In making such a determination, the court must evaluate each case based on its own particular circumstances. *State v. Mason* (1998), 82 Ohio St.3d 144, 167. There is no bright-line test to determine what constitutes an irreconcilably deadlocked jury.” *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, at ¶37.

{¶57} The jury in this case heard testimony from 16 witnesses spanning three days. After initially indicating that it was deadlocked, the trial court instructed the jury using a *Howard* charge, as that charge is “intended for a jury that believes it is deadlocked, so as to challenge them to try one last time to reach a consensus.” *State v. Robb* (2000), 88 Ohio St.3d 59, 81. After receiving the *Howard* charge, the jury was able to continue its deliberations and reach a verdict. While the jury did make a further inquiry, they never informed the trial court that they continued to be deadlocked. In fact, the jury informed the trial court that they were able to reach a verdict. Consequently, we do not find the trial court abused its discretion in finding that the jury was not irreconcilably deadlocked.

{¶58} Appellant’s fourth assignment of error is without merit.

{¶59} As appellant’s fifth and sixth assignments of error are interrelated, we address them in a consolidated analysis. As his fifth and sixth assignments of error, appellant asserts:

{¶60} “[5.] The trial court erred by instructing the jury as to ‘flight’, thereby denying appellant his right to a fair trial and due process of law, in violation of the Sixth

and Fourteenth Amendments to the United States Constitution and in violation of Article I, Sections 10 and 16 of the Ohio Constitution.

{¶61} “[6.] The trial court erred and abused its discretion by instructing the jury, over repeated objections, that appellant had fled the scene and that flight may indicate consciousness or awareness of guilt, where the facts did not support such an instruction.”

{¶62} Appellant argues the trial court erred in instructing the jury, over objection, on flight. The trial court instructed the jury as follows:

{¶63} “Testimony has been admitted indicating that the defendant fled the scene or threw the handgun out of the motor vehicle. You are instructed that conduct alone does not raise a presumption of guilt, but it may tend to indicate the defendant’s consciousness or awareness of guilt. If you find the facts do not support that the defendant fled the scene or threw the handgun out of the motor vehicle, or if you find that some other motive prompted the defendant’s conduct, or if you are unable to decide what the defendant’s motivation was, then you should not consider this evidence for any purpose, except as to count four. However, if you find the facts support that the defendant engaged in such conduct, and if you decide that the defendant was motivated by a consciousness or awareness of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crimes charged. You alone will determine what weight, if any, to give this evidence.”

{¶64} We review a trial court’s issuance of a jury instruction for an abuse of discretion. *State v. Williams*, 8th Dist. No. 90845, 2009-Ohio-2026, at ¶50. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-

making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶¶61-62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. “It has long been recognized that it is not an abuse of discretion for a trial court to provide a jury instruction on flight if there is sufficient evidence presented at trial to support that the defendant attempted to avoid apprehension.” *State v. Kilpatrick*, 8th Dist. No. 92137, 2009-Ohio-5555, at ¶16. (Citations omitted.)

¶65} Appellant contends that the trial court erred in giving the instruction based on the evidence presented during trial. Appellant argues that although he immediately left the scene of the incident, he was not fleeing. Rather, he was continuing his retreat and “avoiding further attack by Altizer, Naples, and others.”

¶66} We find no abuse of discretion in the trial court’s instruction. The evidence in this case revealed that immediately after firing five shots, appellant left the scene of the incident in his motor vehicle. An eyewitness testified that appellant’s “car went squealing out right after [the shooting].” Further, appellant testified that he threw the firearm out of his vehicle’s window upon observing a police cruiser begin to follow him.

¶67} As the evidence presented at trial provided a sufficient evidentiary basis for the jury instruction, we find appellant’s fifth and sixth assignments of error without merit.

¶68} Appellant’s seventh assignment of error states:

¶69} “Appellant’s convictions for felonious assault upon Joseph Naples, tampering with evidence and the motor vehicle firearms specifications are not supported by sufficient evidence.”

{¶70} When measuring the sufficiency of the evidence, an appellate court must consider whether the state set forth adequate evidence to sustain the jury's verdict as a matter of law. *Kent v. Kinsey*, 11th Dist. No. 2003-P-0056, 2004-Ohio-4699, at ¶11. A verdict is supported by sufficient evidence when, after viewing the evidence most strongly in favor of the prosecution, there is substantial evidence upon which a jury could reasonably conclude that the state proved all elements of the offense beyond a reasonable doubt. *State v. Schaffer* (1998), 127 Ohio App.3d 501, 503, citing *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *14-15.

{¶71} Appellant challenges the legal sufficiency of the evidence to sustain his convictions on the following: (1) count three, felonious assault, as to Naples; (2) count four, tampering with evidence; and (3) the firearm specification, pursuant to R.C. 2941.146.

{¶72} Appellant was convicted of felonious assault, in violation of R.C. 2903.11(A)(2). In order to convict appellant on felonious assault, the state had to prove, beyond a reasonable doubt, that appellant did knowingly cause or attempt to cause physical harm to Naples by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A)(2).

{¶73} R.C. 2901.22(B) provides: "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."

{¶74} The jury heard testimony that as Altizer and Naples exited the bar, appellant began to fire toward them. Naples testified that “there were a few shots that came relatively close [to him], where I heard the bullet go by.” Naples stated that he heard the bullets go by “his face; one on [his] right side and one on [his] left side.” See *State v. Dixon*, 1st Dist. No. C-030227, 2004-Ohio-2575, at ¶28. (Affirming appellant’s felonious assault conviction where the state presented evidence that Dixon had knowingly fired a gun at the four occupants of a vehicle.) We hold a rational jury could conclude, beyond a reasonable doubt, that appellant knowingly attempted to cause Naples physical harm by means of a deadly weapon, to wit: a firearm.

{¶75} Appellant also claims that the evidence was insufficient to prove that he tampered with evidence. The offense of tampering with evidence, as set forth in R.C. 2921.12(A)(1) provides:

{¶76} “(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

{¶77} “(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]”

{¶78} Appellant concedes that he threw the firearm out of his vehicle’s window; however, he maintains that he threw it out of the window “with the purpose of not being shot by the police.” Upon a review of the record, we find that appellant’s conviction for tampering with evidence is supported by ample evidence.

{¶79} The jury heard appellant testify that after he discharged five rounds of ammunition, he immediately left the scene in his vehicle. While driving, appellant

observed emergency personnel coming toward his vehicle. Appellant stated that he knew the police were investigating or would be investigating the shooting. Then, when one of the police vehicles made a U-turn to follow him, he threw the firearm out the window. The police vehicle followed appellant's vehicle with its lights activated. When the officer conducted a pat-down search of appellant's person, appellant did not inform the officer that he had thrown a firearm, containing live rounds, out of his vehicle window. Appellant, in fact, indicated to the officer that he did not have a firearm. Therefore, the jury could have found beyond a reasonable doubt that appellant was attempting to conceal or remove the firearm with the purpose to impair its availability as evidence in a legal proceeding or investigation.

{¶80} Appellant also maintains that the evidence was insufficient to prove the firearm specification, pursuant to R.C. 2941.146. We resolve whether the evidence was sufficient to submit the question concerning the automobile specification to the jury. R.C. 2941.146 states, in pertinent part:

{¶81} "(A) Imposition of a mandatory five-year prison term upon an offender *** for committing a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another and that was committed by *discharging a firearm from a motor vehicle* other than a manufactured home ***." (Emphasis added.)

{¶82} At trial, evidence was introduced that appellant's car was running, the headlights were on to illuminate the area where Altizer and Naples were located, the driver's door was open, and appellant was standing within the framed area of the door and the vehicle, leaning on the vehicle as he discharged his weapon. The evidence

clearly demonstrated that the discharge of the firearm occurred while appellant was in physical contact with the vehicle and used the vehicle to facilitate the discharge of his firearm. Under the facts presented, the jury could have found appellant guilty of the firearm specification, R.C. 2941.146, beyond a reasonable doubt.

{¶83} Appellant's seventh assignment of error is without merit.

{¶84} Under his eighth assignment of error, appellant states:

{¶85} "The appellant's convictions are against the manifest weight of the evidence."

{¶86} In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶87} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶88} Appellant argues that the "jury clearly lost its way by failing to find that [his] actions toward Altizer and Naples were in self-defense." Under Ohio law, self-defense is an affirmative defense for which an accused must prove the following by a preponderance of the evidence: (1) the accused was not at fault in creating the situation giving rise to the affray; (2) the accused had a bona fide belief that he was in imminent danger of death or great bodily harm and that the only means of escape from such

danger was in the use of force; and (3) the accused must not have violated any duty to retreat or to avoid the danger. *State v. Gardner* (Feb. 5, 1987), 8th Dist. No. 51678, 1987 Ohio App. LEXIS 7182, at *10.

{¶89} At trial, appellant asserted that he acted in self-defense. The jury heard the testimony of appellant who outlined three previous encounters with Altizer. He stated that he first met Altizer in 2002 at a graduation party. On that occasion, Altizer punched appellant in the face, he fell to the floor, and “a lot of people” starting kicking him.

{¶90} In 2006, appellant again encountered Altizer while at a bar in Wickliffe. A fight ensued, whereby Altizer grabbed, pushed, and kicked appellant.

{¶91} Appellant testified that, approximately one year later, he had another run in with Altizer. Appellant testified that he was at a gas station when “a couple of people” began attacking him. Appellant recognized one of the individuals as Altizer. Appellant informed the jury that he was “beat” with “fists, feet, knees.”

{¶92} Appellant then described the incident at issue. Appellant stated that he observed Altizer at the bar. Appellant was alone; Altizer was with a group of people. When appellant became aware of Altizer’s presence, he left the establishment because he was “scared of [Altizer].” As appellant was opening the door to his vehicle, appellant testified that a “couple of guys” began “charging toward [him].” Appellant recognized one of the men as Altizer. Appellant testified that he knew Altizer was going to try to attack him again. At this point, appellant testified that he reached for his pistol, which was located under the driver’s seat. Appellant “grabbed it and pointed it in their

direction and just fired off a few shots, trying to scare them away.” Appellant stated that he “was just trying to buy time so [he] could leave.”

{¶93} The jury also heard the testimony of Altizer, who described the previous encounters between himself and appellant. Altizer noted that, in the past, appellant had threatened to shoot him. Further, Altizer testified that appellant had a gun on his person during the incident in 2006.

{¶94} Altizer and Naples further testified regarding the incident at issue. Altizer and Naples stated that as they were leaving the bar, they heard someone yell. They observed appellant standing by his vehicle. Appellant’s car was backed into a parking space, his door was open, and he was standing between the door and frame of his vehicle. Altizer stated that appellant pointed the firearm and started shooting.

{¶95} The jury also heard the testimony of Detective Bruce LaForge of the Willowick Police Department. Detective LaForge testified, inter alia, to the location of the bullet strikes. Detective LaForge noted the location of appellant’s vehicle as well as the location of the bullet strikes.

{¶96} Although the testimony of appellant differed from that of Altizer and Naples, the weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In assessing the witnesses’ credibility, the trial court, as the trier of fact, had the opportunity to observe the witnesses’ demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at *5-6. Thus, in this matter, the trial court was “clearly in a much better position to evaluate the credibility of witnesses than [this] court.” *Id.* at *6.

{¶97} We defer to the judgment of the trial court and find that its verdict did not create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶98} Appellant's eighth assignment of error is without merit.

{¶99} Appellant's ninth assignment of error states:

{¶100} "The trial court's imposition of a sentence greater than the minimum term permitted by statute, it's [sic] imposition of a maximum sentence, and its imposition of consecutive sentences, based upon findings not made by a jury nor admitted by appellant is contrary to law and violates appellant's right to a trial by jury and due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution."

{¶101} Appellant argues that the trial court erred when it made findings to support the imposition of consecutive sentences. Appellant maintains that these factual findings run afoul of the Supreme Court of Ohio's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. We disagree.

{¶102} In *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, at ¶14 & ¶20, we held:

{¶103} "In the wake of *Foster*, the General Assembly neither revised nor repealed R.C. 2929.14(E)(4). In fact, the Ohio legislature has kept the statutory mandates inherent in R.C. 2929.14(E)(4) intact through eleven amendments since *Foster's* release. The most recent amendment occurred after the issuance of the decision in *Ice*, on January 14, 2009. The effective date of this amendment was April 7, 2009. In light of *Ice* and the General Assembly's most recent amendment to R.C. 2929.14, we hold a

sentencing judge, pronouncing a sentence after April 7, 2009, must again, as before *Foster's* release, make certain specific findings of fact before imposing consecutive sentences on a defendant. ***

{¶104} ****

{¶105} "It is the judiciary's role to apply properly enacted laws to the extent they are constitutional. *** In *Ice*, the United States Supreme Court held statutory sentencing provisions that require judicial factfinding as a prerequisite to imposing consecutive sentences to be constitutional. This ruling was based upon *Apprendi* and its progeny, the same body of law upon which the Ohio Supreme Court based its decision in *Foster*. Because *Foster* extrapolated from *Apprendi* and its progeny that laws which require judicial factfinding as a necessary precondition to imposing consecutive sentences are unconstitutional, it, as to this issue, was improperly decided. Subsequent to *Ice*, the legislature re-imposed the requirement that a sentencing judge must make certain findings before imposing consecutive sentences. Pursuant to the holding in *Ice*, this legislation is constitutional and thus it is a trial court's duty to apply that law as it is written." (Footnote omitted.)

{¶106} As appellant in this case was sentenced on July 23, 2009, after the effective date of the General Assembly's most recent re-enactment to R.C. 2929.14(E)(4), the trial court was required to make findings prior to imposition of consecutive sentences. Consequently, we find no error by the trial court in making findings prior to imposition of consecutive sentences. Appellant's ninth assignment of error is without merit.

{¶107} Based on the opinion of this court, we affirm the judgment of the Lake County Court of Common Pleas.

DIANE V. GRENDALL, J., concurs,

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

{¶108} While I agree with the majority's analysis of appellant's fourth through ninth assignments of error, I believe the trial court erred in failing to dismiss the R.C. 2941.146 firearm specification. For the reasons that follow, I believe the evidence on this charge was insufficient as a matter of law. I therefore respectfully dissent from the majority's resolution of appellant's first, second, and third assignments of error to the extent its disposition of these arguments allow the R.C. 2941.146 specification (and the sentence attached to it) to stand.

{¶109} R.C. 2941.146, the firearm specification at issue, required the state to produce evidence that appellant purposely or knowingly caused or attempted to cause the death of or physical harm to another by discharging a firearm from a motor vehicle. Although there was evidence that appellant committed felonious assault, thereby meeting the initial elements, I believe no evidence was adduced to establish appellant discharged a firearm from a motor vehicle.

{¶110} At trial, the only evidence tending to show appellant discharged a firearm from a motor vehicle was that appellant fired shots while standing between the open door and the vehicle, perhaps leaning against the vehicle. It was therefore uncontroverted that appellant was completely outside of the vehicle at the time he fired the weapon. In light of these facts, defense counsel moved to dismiss the R.C. 2941.146 specification. The trial court overruled appellant's motion, reasoning:

{¶111} "From a motor vehicle' is an easily determined standard. Anybody knows whether something is 'from a motor vehicle?' *** The legislature certainly knows words. If they intended the motor vehicle to be in motion, or if they intended the shooter to be occupying *** the motor vehicle, or in or upon the motor vehicle, the legislature could have written it that way."

{¶112} The court consequently allowed the issue to go to the jury and the panel eventually convicted appellant.

{¶113} I believe the trial court drew an erroneous conclusion on this issue. The applicability of R.C. 2941.146 is a matter of law which, given the circumstances of this case, should have been resolved in appellant's favor.

{¶114} First of all, although the statute does not specifically state a shooter must be "occupying" the motor vehicle when he discharges a firearm, this does not imply a defendant can be held criminally culpable under R.C. 2941.146 when he or she is fully outside of the vehicle when the firearm is discharged. The statute states the firearm must be discharged "from" a motor vehicle. In the statute, the preposition "from" is used to denote the place where the shooting originates, i.e., a motor vehicle. The facts of this case show the motor vehicle was not the starting point of appellant's movement of

discharging the firearm. Rather, the shots originated from the parking lot in which the motor vehicle was parked.

{¶115} The majority highlights the facts that the vehicle was running, its headlights were on, and the door was open to buttress its conclusion. These facts, however, do not change the pivotal point that the firearm was shot while appellant was standing in the parking lot. The majority's resolution of this issue is both legally and pragmatically unsettling. Now, a jury may reach the R.C. 2941.146 issue if the facts merely show a defendant discharged a firearm near or, perhaps, within the vicinity of a motor vehicle. Not only is this outcome contrary to common sense, it also renders the requirement that the firearm be discharged "from a motor vehicle" mere surplusage.

{¶116} In addition to these points, there are additional, perhaps periphery, bases which lend support to my position. Courts, and other commentators, in this state have commonly referred to R.C. 2941.146 as the "drive-by" shooting specification. See *State v. Coffman*, 10th Dist. No. 09AP-727, 2010-Ohio-1995, at ¶16 (Tyack, P.J., dissenting); *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, at ¶7; *State v. Walker*, 2d Dist. No. 17678, 2000 Ohio App. LEXIS 2952, *32; see, also, Ohio Criminal Sentencing Commission Report. (May 2008), Chief Justice Thomas J. Moyer, Chairman, 33 (referring to R.C. 2941.146 as the "drive-by shooting add on.") The phrase "drive-by" shooting plainly connotes a situation in which a shooter discharges a firearm from a vehicle while being physically located, at least in part, within that vehicle.

{¶117} Moreover, a survey of cases which included R.C. 2941.146 specifications further demonstrates that R.C. 2941.146 has been applied in limited situations; to wit, circumstances involving either drive-by shootings or situations in which an individual

has discharged a firearm from within, or partially within the framework of a vehicle. See *State v. Hodge*, 5th Dist. No. 09 CA 23, 2010-Ohio-2717 (firearm discharged while the defendant was traveling in his vehicle); *State v. Clark*, 7th Dist. No. 08 MA 15, 2009-Ohio-3328 (shooter sat on the door frame of moving vehicle, discharging the firearm across the roof of the car); *State v. Varney*, 5th Dist. No. 08 CA 3, 2009-Ohio-207 (firearm discharged through the open passenger window); *State v. Holdbrook*, 12th Dist. No. CA2005-11-482, 2006-Ohio-5841 (firearm discharged while inside a vehicle); *State v. Jones* (Mar. 5, 2002), 10th Dist. No. 01AP-649, 2002-Ohio-880 (firearm discharged by driver of vehicle through passenger side window). Even *State v. Marshall* (Aug. 14, 1998), 6th Dist. No. L-97-1199, 1998 Ohio App. LEXIS 3700, a case cited by the majority, is fundamentally aligned with the foregoing authority in that the shooter in that matter “had one foot in and one foot out of [the car],” i.e., the firearm was discharged while the shooter was at least partially in the vehicle. *Id.* at *9.

{¶118} The facts of this case demonstrate that appellant was not involved in a drive-by shooting and he was neither inside nor partially situated in the vehicle. Appellant was standing in the parking lot next to the vehicle when he discharged his firearm. Even though the actus reus did not obviously match socially prohibited conduct set forth in R.C. 2941.146, the trial court nevertheless allowed the matter to go to the jury. The “rule of lenity,” is a principle of statutory construction codified under R.C. 2901.04(A). It provides, in relevant part 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.” Application of the rule of lenity requires a court to strictly construe a criminal statute to apply *only* to conduct that is clearly proscribed. *State v.*

Elmore, 122 Ohio St.3d 472, 481, 2009-Ohio-3478, citing *United States v. Lanier* (1998), 520 U.S. 259, 266. Appellant's actions in this case were not "clearly proscribed" by R.C. 2941.146. Therefore, appellant was entitled to a dismissal of the specification.

{¶119} For these reasons, I respectfully dissent to affirming appellant's conviction on the R.C. 2941.146 specification.

STATE OF OHIO
COUNTY OF LAKE

IN THE COURT OF APPEALS

FILED
COURT OF APPEALS ELEVENTH DISTRICT

DEC 28 2010

MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

JUDGMENT ENTRY

- vs -

CASE NO. 2009-L-104

MICHAEL T. SWIDAS,

Defendant-Appellant.

For the reasons stated in the opinion of this court, appellant's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed. Costs to be taxed against appellant.



JUDGE TIMOTHY P. CANNON

DIANE V. GRENDALL, J., concurs,

CYNTHIA WESTCOTT RICE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.