[Cite as *State v. Ford*, 2009-Ohio-6724.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	W. Scott Gwin, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 158
	:	
	:	
AARON P. FORD	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Licking County Court of Common Pleas Case No. 08 CR 449
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 16, 2009

APPEARANCES:

For Plaintiff-Appellee

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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

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES

JAE/r1002

[Cite as *State v. Ford*, 2009-Ohio-6724.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
AARON P. FORD	:	
Defendant-Appellant	:	CASE NO. 2008 CA 158

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES