[Cite as *State v. Benson*, 2026-Ohio-4303.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	C.A. No. 30744
Appellee	:	
	:	Trial Court Case No. 2024 CR 02512/1
v.	:	
	:	(Criminal Appeal from Common Pleas
ANTAWAN BENSON	:	Court)
	:	
Appellant	:	**FINAL JUDGMENT ENTRY & OPINION**

. . . . . .

Pursuant to the opinion of this court rendered on October 30, 2026, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), the clerk of the court of appeals shall immediately send a copy of the court's ruling to each party and note that action on the docket. Additionally, pursuant to App.R. 27, the clerk of the court of appeals shall send a certified copy of this judgment, which constitutes a mandate, to the clerk of the trial court and note the service on the appellate docket.

For the court,



CHRISTOPHER B. EPLEY, JUDGE

TUCKER, J., and HANSEMAN, J., concur.

OPINION
MONTGOMERY C.A. No. 30744

CHRISTOPHER BAZELEY, Attorney for Appellant
MICHAEL P. ALLEN, Attorney for Appellee

EPLEY, J.

{¶ 1} Antawan Benson appeals from his conviction in the Montgomery County Court of Common Pleas on one count of murder, two counts of improperly discharging a firearm at or into a habitation, two counts of felonious assault, two counts of having weapons while under disability, one count of discharge of a firearm on or near prohibited premises, and one count of aggravated menacing. The trial court imposed an aggregate sentence of 67 to 72.5 years to life in prison and ordered Benson to pay restitution and court costs. For the following reasons, the trial court's judgment is affirmed.

I. Facts and Procedural History

{¶ 2} Shortly after midnight on August 23, 2024, Benson and a co-defendant fired Draco (pistol version of an AK-47) and AR-15 pistol-style firearms toward 39 and 41 West Fairview Avenue, a duplex, and 33 West Fairview Avenue, a single-family home next door. Each residence was hit numerous times. Several bullets penetrated the front upstairs bedroom of 33 West Fairview; one of the bullets struck 12-year-old I.C., killing her. The other two residences were occupied as well, but no one in the duplex was injured by the gunfire. During the police investigation, 37 spent cartridge casings (17 7.62 x 39 caliber and 20 Remington .223 caliber) were located at 34 West Fairview Avenue, an abandoned home across the street from the three residences.

{¶ 3} On September 9, 2024, Benson was charged in a twelve-count indictment with two counts of felony murder (Counts 1 and 5), three counts of felonious assault (Counts 6,

7, and 8), three counts of discharging a firearm into a habitation (Counts 2, 3, and 4), one count of discharging a firearm on or near prohibited premises (Count 9), one count of aggravated menacing (Count 10), and two counts of having a weapon while under disability (Count 11 and 12). Counts One through Nine included three-year firearm specifications.

{¶ 4} Approximately five weeks later, Benson moved for a competency evaluation, and the court promptly granted the motion. On December 4, 2024, after the evaluation by Dr. Kara Marciani of Forensic Psychiatry Center for Western Ohio concluded that Benson was competent, Benson asked for a second evaluation, to be conducted by Dr. Richard Bromberg. The trial court granted that motion as well. Dr. Bromberg concluded that Benson was not competent to stand trial. After Dr. Bromberg submitted his report, the State requested a third evaluation of Benson's present competency and of his sanity when the offenses occurred. The court ordered an additional evaluation by Forensic Psychiatry Center for Western Ohio, which was conducted by Dr. Massimo De Marchis.

{¶ 5} On May 16, 2025, the trial court held a competency hearing during which Drs. Bromberg, De Marchis, and Marciani testified regarding their respective reports on Benson's competency. Approximately a month later, after considering the reports and the testimony, the trial court concluded that Benson was competent to stand trial. A jury trial ultimately was scheduled for December 2, 2025.

{¶ 6} On the day before trial, Benson pled guilty to aggravated menacing (Count 10), a first-degree misdemeanor, and he waived his right to a jury trial on the two counts of having weapons while under disability (Counts 11 and 12). Benson's trial began on December 2, 2025, as scheduled. At the conclusion of the trial, the jury found him guilty of Counts 1 through 9 and the accompanying firearm specifications. The court ordered a presentence investigation. Defense counsel filed a sentencing memorandum on Benson's behalf.

{¶ 7} On December 22, 2025, the trial court found Benson guilty of both counts of having weapons while under disability and proceeded to sentencing on all charges and specifications. Defense counsel requested that Counts 1, 2, 5, 6, and 9 (all related to 33 West Fairview) merge, that Count 3 merge with Count 7 (both related to 39 West Fairview), and that Counts 5 and 8 also merge (both related to 41 West Fairview). Counsel asked the court to impose concurrent sentences (two firearm specifications excluded), for an aggregate sentence of 21 years to life in prison. The State requested consecutive sentences totaling no less than 73 years to life in prison. The court sentenced Benson as follows:

Count	Offense	Sentence
1	Murder (I.C.)	15 years to life + 3 years for firearm specification
2	Improperly discharging a firearm at or into a habitation (33 West Fairview)	Merged into Count 1
3	Improperly discharging a firearm at or into a habitation (39 West Fairview)	8 to 12 years
4	Improperly discharging a firearm at or into a habitation (41 West Fairview)	8 to 12 years
5	Murder (I.C.)	Merged into Count 1; 3 years for firearm specification
6	Felonious assault (occupants – 33 West Fairview)	Merged into Count 1
7	Felonious assault (occupants – 39 West Fairview)	8 to 12 years
8	Felonious assault (occupants – 41 West Fairview)	8 to 12 years
9	Discharging a firearm on or near prohibited premises (public road)	11 to 16.5 years
10	Aggravated menacing	180 days
11	Having weapons under disability	3 years
12	Having weapons under disability	3 years

{¶ 8} The trial court ordered that Counts 3, 4, 7, 8, and 9 be served consecutively to each other and to the sentence for Count 1. The firearm specifications in Counts 1 and 5 were to be served consecutively and prior to the definite sentence for Count 1. Counts 10

through 12 were ordered to be served concurrently with each other and with the other offenses. The court ordered that the remaining firearm specifications "not be imposed and shall run concurrently with each other and with the previous prison terms imposed." Benson's aggregate sentence was a stated minimum of 67 years to a maximum of 72½ years to life in prison. Benson was notified of his duty to enroll as a violent offender, and he was ordered to pay restitution of $1,965.98 to I.C.'s father, and court costs.

{¶ 9} Benson appeals from his convictions. He originally raised four assignments of error, but at his request, his second assignment of error was stricken.

II. Competency

{¶ 10} In his first assignment of error, Benson claims that the trial court erred when it found him competent to stand trial. Notably, none of the individuals who evaluated Benson found that he was a mentally ill individual. Rather, they differed on whether he was an intellectually disabled individual and whether he was capable of understanding the criminal proceedings and of assisting in his defense.

{¶ 11} A criminal defendant is presumed to be competent to stand trial. R.C. 2945.37(G); *State v. Lawson*, 2021-Ohio-3566, ¶ 48. However, "i[t] has long been recognized that 'a person [who] lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.'" *State v. Smith*, 89 Ohio St.3d 323, 329 (2000), quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975). Accordingly, under fundamental principles of due process, a criminal defendant who is legally incompetent may not be tried. *E.g., State v. Thomas*, 2002-Ohio-6624, ¶ 36.

{¶ 12} Consistent with the constitutional standard, a defendant is incompetent to stand trial if, "because of the defendant's present mental condition, the defendant is

incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense." R.C. 2945.37(G). The test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Lawson* at ¶ 49, quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960).

{¶ 13} Incompetency is not the same as "mere mental or emotional instability" or even "outright insanity." *State v. Bock*, 28 Ohio St.3d 108, 110 (1986). "A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him [or her] and of assisting his [or her] counsel." *Id*. Moreover, a defendant with intellectual deficiencies may still be competent to stand trial. *State v. Davis*, 2026-Ohio-52, ¶ 18 (2d Dist.).

{¶ 14} The defendant bears the burden to prove, by a preponderance of the evidence, that he or she is incompetent. *State v. Schooler*, 2018-Ohio-3295, ¶ 29 (2d Dist.); *see* R.C. 2945.37(G). A trial court's finding that a defendant is competent to stand trial will not be disturbed on appeal when some reliable and credible evidence supports that finding. *State v. Neyland*, 2014-Ohio-1914, ¶ 33; *State v. McCoy*, 2024-Ohio-98, ¶ 12 (2d Dist.).

{¶ 15} At the May 16, 2025 competency hearing, Benson presented the testimony of his expert, Dr. Bromberg. Dr. Bromberg reviewed police reports, spoke with Benson's mother and Benson, and administered several psychological tests, namely (1) the Peabody Individual Achievement Test-Revised ("PIAT-R"), a reading comprehension test; (2) Weschler Abbreviated Scale of Intelligence, Second Edition ("WASI-II"), an intelligence test; (3) Minnesota Multiphasic Personality Inventory-2-Restructured-Form ("MMPI-2-RF"), a test of abnormal behavior; (4) Evaluation of Competency to Stand Trial-Revised ("ECST-

R"); and (5) Vineland Adaptive Behavior Scales, Second Edition ("Vineland-II"), a test of the ability to apply skills to daily life. Dr. Bromberg emphasized the need for objective testing, particularly the intelligence test in this case.

{¶ 16} Dr. Bromberg determined that Benson read at a third-grade seventh-month level (the literacy level in Ohio is fourth-grade reading ability) and had an IQ of 67, which was in "the extremely low range of intellectual functioning." The Vineland test, which was administered through an interview with Benson's mother, reflected that Benson's adaptive functioning was in the "severe deficit" range. Dr. Bromberg testified that the ECST-R was not standardized for someone with extremely low intelligence. Dr. Bromberg found that Benson had a significant lack of understanding about the court process and roles of essential court participants and that he might have difficulty with considering options. Dr. Bromberg concluded that Benson's cognitive deficits were significant and would likely interfere with his ability to assist his attorney in his own defense. Dr. Bromberg told the trial court that Benson was not competent to stand trial.

{¶ 17} Drs. Marciani and De Marchis reached the opposite conclusion after their evaluations. Dr. Marciani conducted a two-hour clinical interview with Benson and administered the Fitness Interview Test-Revise ("FIT-R") to measure his knowledge related to competency to stand trial. She also considered numerous additional sources of information, including information from Benson's mother, case-related documents, records from the jail (including his mental health screening), and school records from Webster Street Academy (including a diagnostic assessment). Both Dr. Marciani and Dr. Bromberg noted that the information that Benson's mother had provided to Dr. Marciani was markedly different from the information she later provided to Dr. Bromberg.

{¶ 18} Dr. Marciani concluded that Benson's level of intellectual ability was in the average range owing to his verbal presentation and her observation of his general fund of knowledge. She noted that none of Benson's medical records indicated deficits in his intellectual or adaptive functioning; Benson's mother reported that Benson had not been diagnosed with an intellectual disability. Benson had an individualized education program ("IEP"), but that was based on behavioral issues. Benson's employment history consisted of "working the grill" at two different restaurants and working as a self-trained mechanic, servicing brakes and motors. Benson attributed his failure to maintain long-term employment to legal difficulties. Dr. Marciani noted that Benson had specific learning disabilities, but she found nothing to suggest that he had global deficits in intellectual ability.

{¶ 19} As to Benson's ability to understand the criminal proceedings against him, Dr. Marciani stated that his responses suggested the absence of significant impairment. She indicated that he correctly identified the charges against him, understood the difference between felony and misdemeanor offenses, and said that murder was the "most serious charge that you can get." Benson was familiar with the concept and requirements of probation (he was on probation when he was arrested in this case) and said that he could be ordered to serve "a long time" in prison if convicted on the pending charges. Benson understood the difference between guilty and not guilty pleas. Benson did not know or was unsure about other plea information, but he demonstrated the ability to learn about them.

{¶ 20} Dr. Marciani also assessed Benson's understanding of the adversarial process and his ability to assist in his defense. Benson had spoken with police after his arrest, explaining that he was high, but said he would not do so again because they would use any information against him. Benson expressed his understanding of the purpose of a trial, correctly identified the roles of individuals involved in a trial, and provided examples of

common types of evidence in criminal proceedings (weapon, phone, DNA, fingerprints, apparel). Benson understood the importance of being true to an oath ("promise"). He was able to learn about his rights concerning testifying on his own behalf. Benson knew that he needed to control his behavior in the courtroom and could be removed if he did not. Finally, Benson discussed his relationship with defense counsel, voiced motivation to work with him, and expressed "a rational preference regarding how he would like his case to be handled." Dr. Marciani noted that Benson exhibited insight into gaps in his knowledge and was open to discussing concepts he did not understand. She concluded that Benson was capable of understanding the court proceedings and assisting his defense.

{¶ 21} Dr. De Marchis interviewed Benson for approximately 1 hour and 45 minutes, during which he conducted a competency screening, followed by a mental status examination and then a clinical interview. Dr. De Marchis also reviewed information regarding Benson's criminal case and the prior two competency evaluation reports. Dr. De Marchis was aware of Benson's learning difficulties; Benson also told Dr. De Marchis that he could not read. Dr. De Marchis testified that Benson was able to communicate logically and answer questions appropriately, and while Dr. De Marchis found some limitations in Benson's abstraction abilities, it did not raise concerns as to Benson's competency.

{¶ 22} As with Dr. Marciani, Dr. De Marchis administered the FIT-R to assess Benson's understanding of the criminal trial process. Benson identified his charges as "murder and menacing," and knew the murder was a felony offense, which was more serious than a misdemeanor. Benson described the purpose of a trial as "see if you did it or not," the role of defense counsel as "help me," and the role of the prosecutor as "against me." Benson stated that the judge's role was "yes or no, at the end of the trial, finds you guilty or

not guilty." He said that witnesses "talk about whatever they know" and that police officers "talk about how they investigated it." Benson's role was to "listen." He did not know the role of the jury. Benson knew he could say something to his lawyer if a witness lied about him. Benson described the difference between a plea of guilty versus not guilty; he did not know what pleas of no contest and of not guilty by reason of insanity were. After Dr. Marchis provided an explanation of the role of the jury and other relevant terms, such as the meaning of taking of oath, Benson was able to repeat that information a few minutes later.

{¶ 23} Dr. De Marchis spoke with Benson about the penalty he faced for murder, the possibility that he could receive probation, and his chances of a not guilty finding. Benson estimated his chances of acquittal as "as high as you can get" but knew he faced prison if found guilty. When informed that some charges were not eligible for probation, Benson retained the information. Benson was able to identify his defense counsel by name, and he believed counsel was doing a good job for him. Benson indicated that he would be honest with his attorney, share confidential information with him, and follow his advice. When asked what he would do if he did not get along with his attorney, Benson said that he would get a new one.

{¶ 24} Dr. De Marchis testified that Benson's answers reflected that he had an ability to learn and that he could relay information about the charged offenses to his attorney. Dr. De Marchis did not conduct an intelligence test, because he did not believe that Benson "qualified for an intellectual disability of that magnitude." Considering Benson's vocabulary, logical thinking, and abstraction ability, Dr. De Marchis estimated Benson's intelligence quotient as between borderline intellectual functioning and the low average range. He stated that a future intelligence test may provide a score higher than 67. Dr. De Marchis opined

that Benson was capable of understanding the court proceedings and of assisting in his defense and thus competent to stand trial.

{¶ 25} The trial court was presented with divergent views regarding the extent of Benson's intellectual and adaptive abilities and of his ability to understand the criminal justice process. While there was some evidence that Benson had severely deficient intellectual and adaptive abilities, Drs. De Marchis's and Marciani's evaluations indicated that he could understand the nature and objective of the criminal proceedings against him and could assist in his defense. The trial court found Drs. De Marchis and Marciani to be more credible. Because there was reliable, credible evidence to support the trial court's conclusion that Benson was competent to stand trial, we will not disturb the trial court's competency ruling.

{¶ 26} Benson's first assignment of error is overruled.

III. Restitution

{¶ 27} Benson's third assignment of error claims that the trial court erred in ordering him to pay restitution of $1,965.98 without considering his ability to pay. He highlights that he had been unable to maintain a job for more than two months and that he was facing a minimum of 67 years in prison. The State responds that the trial court considered Benson's ability to pay and that he is, in fact, able to pay restitution.

{¶ 28} R.C. 2929.18(A)(1) permits a trial court to order restitution "by the offender to the victim of the offender's criminal offense or the victim's estate in an amount based on the victim's economic loss." If the court imposes restitution, the court must determine, at sentencing, the amount of restitution to be made by the offender. R.C. 2929.18(A)(1). The victim, the prosecutor, and the offender, among others, may provide information relevant to the determination of the amount of restitution. *Id*. The court must hold a hearing on restitution if the offender or victim disputes the amount. *Id*.

{¶ 29} Before imposing restitution, the trial court must consider the offender's present and future ability to pay the amount of the sanction. R.C. 2929.19(B)(5); *State v. Barker*, 2025-Ohio-56, ¶ 47 (2d Dist.). The statute does not identify any specific factors that the trial court must consider when determining the offender's present and future ability to pay; the only requirement is that the court "consider" the offender's present and future ability to pay. *State v. T.O.*, 2025-Ohio-15, ¶ 13 (2d Dist.), citing *State v. Philbeck*, 2015-Ohio-3375, ¶ 27 (2d Dist.). "Although preferable, the trial court is not required to state on the record that it considered an offender's present and future ability to pay so long as there is evidence in the record from which a reviewing court can infer that the trial court considered the offender's present and future ability to pay prior to imposing restitution." *Id.*, citing S*tate v. Hull*, 2017-Ohio-7934, ¶ 9-10 (2d Dist.). "For example, '[t]he trial court may comply with its obligation by considering a presentence investigation report ("PSI"), which includes information about the defendant's age, health, education, and work history.'" *Hull* at ¶ 10, quoting *State v. Willis*, 2012-Ohio-294, ¶ 4 (2d Dist.).

{¶ 30} Neither the State nor Benson has addressed the effect of Marsy's Law on the requirement that a trial court consider a defendant's present and future ability to pay before imposing restitution. We decline to address that issue sua sponte.

{¶ 31} In this case, the trial court made no findings about Benson's ability to pay before ordering him to pay $1,965.98 in restitution to I.C.'s father. However, the court stated before imposing sentence that it had reviewed the PSI. The trial court had also presided over Benson's competency hearing, which revealed that he did not have a mental illness and had average (highest) to extremely low (lowest) intellectual abilities.

{¶ 32} According to the PSI, Benson was 24 years old at sentencing, was in good physical health, and had around a ninth-grade education. Benson had received special

education while in school. Benson worked at Rooster's from 2023 until July 2024, when he quit. He also reported working as a mechanic for his uncle's shop off and on over the years and working seasonally for Kohl's Distribution. Benson told the PSI investigator that, while in prison, he planned to learn some trades and get his GED, and that he wanted to start a business upon his release. Benson denied that he had shot I.C., but he said that he was willing to pay restitution.

{¶ 33} The trial court was aware that Benson faced life in prison and would not be eligible for parole for more than six decades. In addition, Benson has two children and, according to the Montgomery County Child Support Enforcement Agency, a support order of $97.92 per month, with an arrearage of $1,442.45.

{¶ 34} Nevertheless, the trial court had adequate information from which to evaluate Benson's present and future ability to pay, and we can infer that the trial court fulfilled its duty to consider his present and future ability to pay the restitution. The trial court could have reasonably concluded that Benson would be able to work for many years while incarcerated. Although Benson likely will never work outside of the prison system, we cannot conclude that the trial court abused its discretion when it ordered Benson to pay restitution of $1,965.98.

{¶ 35} Benson's third assignment of error is overruled.

IV. Allied Offense of Similar Import

{¶ 36} In his fourth assignment of error, Benson contends that the trial court erred by failing to merge several of his offenses as allied offenses of similar import. Benson identifies three errors in this respect: (1) failing to merge discharge of a firearm on or near prohibited premises with the other offenses related to the shooting at 33 West Fairview; (2) failing to merge discharge of a firearm on or near prohibited premises with improperly discharging a

firearm at or into a habitation; and (3) failing to merge improperly discharging a firearm at or into a habitation with felonious assault. We reject each of Benson's claims.

{¶ 37} The allied-offense statute, R.C. 2941.25, provides:

> (A) Where the same conduct by [a] defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

This statute implements the protections of the Double Jeopardy Clauses of the United States and Ohio Constitutions, which prohibit a second punishment for the same offense. *State v. Fritz*, 2009-Ohio-2175, ¶ 9 (2d Dist.).

{¶ 38} "As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered." *State v. Ruff*, 2015-Ohio-995, ¶ 31; *State v. Earley*, 2015-Ohio-4615, ¶ 12 (quoting *Ruff*). Offenses are of dissimilar import within the meaning of the allied-offense statute "when the defendant's

conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Ruff* at ¶ 23.

{¶ 39} The defendant bears the burden of establishing that offenses should be merged as allied offenses. *State v. Albertson*, 2021-Ohio-2125, ¶ 95 (2d Dist.). We review the trial court's merger ruling de novo. *State v. Barnes*, 2020-Ohio-4150, ¶ 10 (2d Dist.).

{¶ 40} Benson first argues that the trial court should have merged all of the offenses surrounding the shooting at 33 West Fairview Avenue, including the offense of discharge of a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3) (Count 9). R.C. 2923.162(A)(3) provides that no person shall "[d]ischarge a firearm upon or over a public road or highway."

{¶ 41} A violation of R.C. 2923.162(A)(3) is generally a misdemeanor of the first degree. R.C. 2923.162(C)(1). The degree of the offense is increased when there is a substantial risk or actual physical harm to a person or the offense caused serious physical harm to property. *See* R.C. 2923.162(C)(2) through (4). Of relevance here, the offense is a first-degree felony if the violation caused serious physical harm to any person. R.C. 2923.162(C)(4). Benson was charged with R.C. 2923.162(A)(3) as a first-degree felony.

{¶ 42} We have repeatedly held that firing across a roadway involves harm to the public at large, even when the violation has caused physical harm to a person. *See State v. Thompson*, 2025-Ohio-2168, ¶ 74 (2d Dist.) (felonious assault and discharging a firearm on or near prohibited premises were of dissimilar import); *State v. Coleman*, 2021-Ohio-968, ¶ 28 (2d Dist.) (where defendant fired single shot at a victim at close range in the roadway, offenses of murder and discharge of a firearm on or near a prohibited premises did not merge); *State v. Davison*, 2021-Ohio-728, ¶ 33 (2d Dist.). In contrast, Counts 1, 5, and 6

(murder and felonious assault) are directed to the harm to I.C. personally. Consequently, while we might agree with Benson that Counts 1, 5, 6, and 9 were all committed with the same conduct and the same animus, we nevertheless conclude that Count 9 was of dissimilar import or significance and was not subject to merger with the offenses arising from the shooting of I.C. at 33 West Fairview Avenue.

{¶ 43} Similarly, the offenses of discharge of a firearm on or near prohibited premises (Count 9) and improperly discharging a firearm at or into a habitation in violation of R.C. 2923.161(A)(1) (Counts 2, 3, and 4) involve separate harms. A violation of R.C. 2923.161(A)(1) occurs when the offender discharges a firearm "at or into an occupied structure that is a permanent or temporary habitation of any individual." It is irrelevant whether people are present in the home. *State v. Lambert*, 2021-Ohio-17, ¶ 61 (2d Dist.), citing *State v. Grayson*, 2017-Ohio-7175, ¶ 8 (8th Dist.). Instead, the harm caused by firing into the habitation was to the occupied structure itself. *Id.* Thus, Count 9 involved a victim (the public at large) that was different from the victims of Counts 2, 3, and 4 (the structures). Accordingly, the trial court did not err by failing to merge Count 9 with Counts 2, 3, and 4.

{¶ 44} Finally, Benson asserts that the trial court should have merged the offenses of improperly discharging a firearm at or into a habitation and felonious assault related to the same address: Counts 3 and 7 for West Fairview Avenue and Counts 4 and 8 for 41 West Fairview Avenue. Again, the two offenses at issue had dissimilar import: Counts 3 and 4 (improperly discharging a firearm at or into a habitation) involved a harm to the residences whereas the harm from Counts 7 and 8 (felonious assault) was to the individuals inside. *See State v. Craft*, 2025-Ohio-2045, ¶ 48 (2d Dist.). The trial court did not err in failing to merge these offenses.

{¶ 45} Benson's fourth assignment of error is overruled.

V. Conclusion

{¶ 46} The trial court's judgment is affirmed.

. . . . . .

TUCKER, J., and HANSEMAN, J., concur.