

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO :
Plaintiff : **CASE NO. 2012 CR 00234**
vs. : **Judge McBride**
MICHAEL WAYNE GORMLEY : **DECISION/ENTRY**
Defendant :

Lara A. Molnar, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

William J. Rapp, attorney for the defendant Michael Wayne Gormley, One East Main Street, Amelia, Ohio 45102.

This cause came before the court for trial on June 8, 2012. At the conclusion of the trial, the court took the issues raised at trial under advisement.

The defendant Michael Wayne Gormley is charged in a three-count indictment with: (1) one count of Felonious Assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, with a firearm specification; (2) one count of Interference with custody in violation of R.C. 2919.23(A)(1), a misdemeanor of the first degree; and (3) one count of Aggravated Menacing in violation of R.C. 2903.21(A), a misdemeanor of the first degree.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

The court makes the following findings of fact based upon the testimony it found to be credible and reliable as presented at trial:

In the summer of 2011, Shawn Wisby began to allow his minor son Cole Wisby to stay with Angela Gormley (his ex-sister-in-law) for six days a week so that Cole could help Angela, who has a medical condition, with various household duties. On Sundays, Shawn would pick up Cole, spend the day with him, and return Cole to Angela Gormley's home in the afternoon or evening.

Shawn Wisby shares joint custody of Cole with his ex-wife. While Shawn and Angela discussed the possibility of Angela adopting Cole, Shawn had not yet made a decision to allow an adoption and no paperwork had been filed.

On the morning of Sunday, January 15, 2012, Shawn Wisby conversed with Angela Gormley via text. Angela indicated in her texts that she intended to claim Cole as a dependent on her taxes, and Shawn told her that he did not approve of this idea. Shawn texted Angela at some point to let her know that he would be picking up Cole around noon as usual, but he is not sure whether Angela received that text because she did not respond to it.

Sometime around 11:00 a.m. or noon, Shawn arrived at Angela Gormley's residence at 82 Deer Meadow Lane, East Fork Crossing, Batavia Township, Clermont County, Ohio, to pick up Cole. He went to the back sliding glass door (which was the door he always used), knocked on the door, and Cole came to the door, unlocked it, and let him in. Angela came out to the kitchen where Shawn was standing and said they "needed to talk about this." The two began to discuss the tax situation and, although the topic was contentious, they were not yelling or screaming and they were standing approximately two feet from one another during this discussion. Eventually, Shawn stated that Cole was coming home with him permanently and he handed Cole a garbage bag and told him to collect his belongings.

The defendant Michael Gormley, who recently moved back in with his mother Angela Gormley, came out of the bedroom he had been sharing with Cole with a twelve-gauge, pump action, pistol-grip shotgun. This gun had been located behind the door of the bedroom and was not kept in a locked box but was instead immediately accessible to any member of the household. Cole Wisby had last fired the shotgun in late December or early January.

After walking into the kitchen area where Angela and Shawn were talking, the defendant cocked the gun, held it sideways, and said "you're not taking him nowhere," and then put the gun to Shawn's throat and took the safety off. Shawn said "really Michael, you're going to do this" to which the defendant replied "yeah, I'll f***ing do it, get the f*** out." This was the first time anyone in the home asked Shawn Wisby to leave.

Shawn was unable to tell whether or not the shotgun was loaded but he believed from all of the circumstances and from the defendant's statements that the defendant would fire the gun. Shawn walked backwards to the door and, once outside, he turned and walked to his car. When he reached his car, Shawn turned back toward the porch, where Michael was now standing still holding the gun, and told Michael he was calling the sheriff.

Shawn Wisby then drove back to his home and called the Clermont County Sheriff's Office. Deputy Shawn Schubert responded to Wisby's residence, took a report, and then went to Angela Gormley's house. Michael Gormley was not present in the home because he ran into the woods immediately after Shawn Wisby drove away. When the defendant ran, he took the shotgun with him and that shotgun has never been recovered by authorities.

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.¹ R.C. 2901.05(E) states that " 'reasonable doubt' is present when the [trier of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such

¹ R.C. 2901.05(A).

character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.”

LEGAL ANALYSIS

(A) FELONIOUS ASSAULT

Pursuant to R.C. 2903.11(A)(2) “[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.” A defendant 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.”² Ohio law defines “physical harm” as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.”³

As there is no evidence that the defendant caused any physical harm to Shawn Wisby, the question before the court is whether the defendant attempted to cause physical harm to Shawn Wisby by means of a deadly weapon or dangerous ordnance.

“To prove an ‘attempt’ to cause physical harm by means of a deadly weapon, the evidence must demonstrate that the defendant knowingly engaged in conduct that, if successful, would have resulted in physical harm to another.”⁴ “Proof of a criminal attempt requires evidence of a ‘substantial step in a course of conduct planned to

² R.C. 2901.22(B).

³ R.C. 2901.01(A)(3).

⁴ *State v. Mincy* (March 23, 2007), 1st Dist. No. C-060041, 2007-Ohio-1316, ¶ 65, citing R.C. 2923.02(A).

culminate in [the] commission of the crime.’ ”⁵ “A ‘substantial step’ requires conduct that is ‘strongly corroborative of the defendant’s criminal purpose.’ ”⁶

R.C. 2923.11(A) defines “deadly weapon” as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.” The shotgun used by the defendant meets this definition of a deadly weapon.⁷ This court does not have credible evidence before it establishing whether the shotgun was loaded or unloaded at the time the defendant retrieved it from the bedroom. However, the Ohio Supreme Court has found that “ ‘[s]ince an unloaded gun used in a robbery has been determined to be a ‘deadly weapon,’ an unloaded gun used in an assault is likewise a ‘deadly weapon.’ ”⁸ Therefore, whether the shotgun was loaded or unloaded, it qualifies as a deadly weapon for the purposes of the offense of felonious assault.

“Under Ohio law, ‘[e]vidence that a defendant pointed a deadly weapon at another, without further evidence regarding the defendant’s intention, is insufficient to sustain a conviction for felonious assault under R.C. 2903.11(A)(2).’ ”⁹ “By contrast, ‘the act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use the weapon to cause harm, is sufficient evidence’ to sustain a conviction for felonious assault under R.C. 2903.11(A)(2).”¹⁰

⁵ Id., quoting *State v. Green* (1991), 58 Ohio St.3d 239, 241, 569 N.E.2d 1038, quoting *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059.

⁶ Id.

⁷ *State v. Bryant* (Feb. 21, 2012), 12th Dist. No. CA2011-06-109, 2012-Ohio-678, ¶ 20.

⁸ *State v. Goode* (Nov. 4, 2010), 8th Dist. No. 93475, 2010-Ohio-5347, ¶ 13, quoting *State v. Tate* (1978), 54 Ohio St.3d 444, 446, 377 N.E.2d 778. See, also, *State v. Jackson* (Sept. 23, 2010), 8th Dist. No. 93815, 2010-Ohio-4486, ¶ 14.

⁹ *State v. Henderson* (Sept. 20, 2011), 10th Dist. No. 10AP-1029, 2011-Ohio-4761, ¶ 14, quoting *State v. Mincy*, supra, at ¶ 66, citing *State v. Brooks* (1989), 44 Ohio St.3d 185, 542 N.E.2d 636, syllabus.

¹⁰ Id., quoting *State v. Green*, supra, syllabus.

In *State v. Smiley* (April 19, 2012), 8th Dist. No. 97047, 2012-Ohio-1742, the defendant pointed a gun at the victim's chest and said "don't move."¹¹ The appellate court found that the act of pointing the gun at the victim's chest coupled with the threat of "don't move" constituted sufficient evidence to convict the defendant of felonious assault.¹² In *State v. Bryant* (Feb. 21, 2012), 12th Dist. No. CA2011-06-109, 2012-Ohio-678, ¶ 20, the defendant walked into his place of work with a rifle, pointed the rifle at two people and said "you are going to listen to me or I'm going to blow your f***ing brains out" and "I don't want to kill you, but if I have to, I will[.]"¹³ The court noted that there was ample evidence that the defendant pointed the gun at the two victims and threatened to kill them and, as a result, it could not find that the jury lost its way in convicting the defendant of felonious assault.¹⁴ In *State v. Phillips* (Feb. 3, 2011), 8th Dist. No. 94881, 2011-Ohio-475, the defendant held a gun to his step-sons' heads and ordered them to perform sex acts on him or he would kill them.¹⁵ The court found this testimony sufficient to sustain the defendant's conviction for felonious assault.¹⁶

The defendant in *State v. Battle* (Sept. 13, 2010), 5th Dist. No. 09CA0001, 2010-Ohio-4327, pointed a gun at a deputy and yelled "get out of my house."¹⁷ The appellate court found the defendant's action of pointing the gun along with the order to get out of the house "constituted an ample manifestation of intent to cause injury sufficient to constitute a 'threat[.]'" and, consequently, upheld the defendant's conviction of felonious

¹¹ *Smiley* at ¶ 29.

¹² *Id.*

¹³ *Bryant*, supra, 2012-Ohio-678 at ¶ 4.

¹⁴ *Id.* at ¶ 20.

¹⁵ *Phillips* at ¶ 19.

¹⁶ *Id.*

¹⁷ *Battle* at ¶ 99.

assault.¹⁸ In *State v. Morris* (Nov. 13, 2009), 11th Dist. No. 2008-T-0110, 2009-Ohio-6033, after a fight was broken up, the defendant pulled out a gun, pointed the gun at everyone in the room and said “I’ll kill all of you.”¹⁹ When the defendant cocked the gun, almost everyone ran out of the apartment.²⁰ The appellate court found this evidence sufficient to convict the defendant of felonious assault.²¹ In *State v. Ryan* (June 30, 2009), 10th Dist. No. 08AP-481, 2009-Ohio-3235, the defendant held a knife to the victim’s throat and said it wouldn’t take any thought to kill the victim.²² Witnesses heard the defendant threaten to cut the victim’s throat.²³ The appellate court found that “the state presented sufficient evidence that, if believed, would convince the average mind beyond a reasonable doubt that appellant knowingly attempted to cause the victim physical harm by means of a deadly weapon.”²⁴ Similarly, in *State v. Tayse* (March 18, 2009), 9th Dist. No. 23978, 2009-Ohio-1209, the defendant put a knife to a baby’s throat and told another person to drive or he would cut the baby.²⁵ The court found this evidence sufficient to support the defendant’s felonious assault conviction.²⁶

In *State v. Anderson* (Dec. 5, 2008), 11th Dist. No. 2008-P-0002, 2008-Ohio-6413, the defendant placed his gun on the victim’s chest and said “give me a ride or you die.”²⁷ The court noted that the gun was loaded and operational.²⁸ Based on the Ohio Supreme Court’s holding in *State v. Green* that pointing a gun coupled with a threat was

¹⁸ Id.

¹⁹ *Morris* at ¶ 46.

²⁰ Id.

²¹ Id.

²² *Ryan* at ¶ 34.

²³ Id.

²⁴ Id.

²⁵ *Tayse* at ¶ 19.

²⁶ Id.

²⁷ *Anderson* at ¶ 30.

²⁸ Id.

sufficient evidence to convict under the felonious assault statute, the appellate court upheld the defendant's conviction.²⁹ In *State v. Kelley* (Dec. 3, 2007), 5th Dist. No. 2006CA00371, 2007-Ohio-6517, the defendant pointed a loaded firearm at the victims and said "I'll shoot both you * * *."³⁰ Pursuant to *Green*, the appellate court found that the defendant's conviction of felonious assault was not against the manifest weight of the evidence.³¹

In the case at bar, the defendant walked toward Shawn Wisby, cocked the gun, and said Wisby wasn't taking Cole anywhere. The defendant then put the gun to Shawn Wisby's throat at which point Shawn asked the defendant if he was seriously going to do this. The defendant replied "yeah, I'll f***ing do it, get the f*** out." The act of pointing the gun at Wisby and putting the gun to his throat, combined with the defendant's threat that he would "do it" is sufficient under Ohio law to convict the defendant of felonious assault pursuant to R.C. 2903.11(A)(2). The defendant's threat is sufficient evidence of his intention to use the shotgun to cause bodily injury to Wisby, and his actions in total constitute a substantial step in the course of his conduct towards the culmination of causing physical harm to Shawn Wisby. Therefore, all of the elements of felonious assault have been proven beyond a reasonable doubt by the state of Ohio, to wit, the defendant knowingly attempted to cause physical harm to Shawn Wisby by means of a deadly weapon.

²⁹ Id., discussing, *Green*, supra.

³⁰ *Kelley* at ¶ 20.

³¹ Id.

(B) FIREARM SPECIFICATION

In the indictment in the case at bar, the charge of Felonious Assault includes a firearm specification. Pursuant to R.C. 2941.145 this specification requires that the court find that “the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.”

R.C. 2923.11(B)(1) provides that a “firearm” is defined as “deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant[,]” and “includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.” Therefore, the shotgun must be operable for the firearm specification to apply. “In determining operability, the trier of fact ‘may rely upon circumstantial evidence, including * * * the representations and actions of the individual exercising control over the firearm.’”³²

In the case at bar, the firearm at issue, namely the twelve-gauge shotgun, was on or about the defendant’s person and under his control while committing the offense of felonious assault and the defendant brandished, displayed and used the firearm to facilitate the assault.

The shotgun had been used only a few weeks prior to the offense by Cole Wisby and was in working order at that time. The defendant represented to the victim that he would use the firearm. The court finds that the circumstantial evidence presented in the case sub judice supports a finding that the shotgun was operable at the time of the

³² *State v. Hayes* (March 30, 2005), 9th Dist. No. 22168, 2005-Ohio-1464, ¶ 19.

offense. As a result, the court finds that the state has proven all of the required elements of the firearm specification beyond a reasonable doubt.

(C) INTERFERENCE WITH CUSTODY

Pursuant to R.C. 2919.23(A)(1):

“(A) No person, knowing the person is without privilege to do so or being reckless in that regard, shall entice, take, keep, or harbor a person identified in division (A)(1), (2), or (3) of this section from the parent, guardian, or custodian of the person identified in division (A)(1), (2), or (3) of this section:

(1) A child under the age of eighteen, or a mentally or physically handicapped child under the age of twenty-one[.]”

Cole Wisby is a child under the age of eighteen. Shawn Wisby and his ex-wife share joint custody of Cole.

On January 15, 2012, the defendant pointed a shotgun at Shawn Wisby and said “you’re not taking [Cole] nowhere” after Wisby told Angela Gormley that he was taking Cole home permanently. Shawn Wisby was allowing Cole to stay at Gormley’s home; however, Shawn Wisby and his ex-wife were the only two parties who had legal custody of Cole at the time of the offense. Therefore, Shawn Wisby had the legal right at any time to remove Cole from Gormley’s home.

The defendant pointed a gun and threatened Shawn Wisby and told him to leave the residence after he indicated he was taking Cole with him. The defendant had no legal right to keep Cole without Wisby’s permission. While the subject of a possible adoption was discussed on prior occasions between Shawn and Angela, no paperwork had been filed. The defendant knew he had no right to keep Cole in the Gormley home

against the wishes of his father, who had legal joint custody of Cole, or at the very least the defendant was reckless in that regard.

As a result, the state has proven all the elements beyond a reasonable doubt of Interference with Custody.

(D) AGGRAVATED MENACING

Pursuant to R.C. 2903.21(A), “[n]o person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family.”

In the case at bar, there is no question that the defendant’s actions on the date at issue constituted the crime of aggravated menacing. The defendant knowingly cocked a shotgun, pointed the gun at Shawn Wisby, and placed the gun to his throat. Shawn Wisby testified that he believed he might get shot and that he believed from all the circumstances that the defendant would fire the gun. As noted by the Ohio Supreme Court, the pointing of a deadly weapon would undoubtedly justify a trier of fact in concluding that the accused had committed the offense of aggravated menacing as defined by R.C. 2903.21.³³

The defendant knowingly caused Shawn Wisby to believe that the defendant would cause Wisby serious physical harm. As a result, the state has proven all of the elements of Aggravated Menacing beyond a reasonable doubt.

³³ *Brooks*, supra, 44 Ohio St.3d at 192.

CONCLUSION

The court finds that the state has proven all the essential elements of the offenses of (1) Felonious Assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, with a firearm specification; (2) Interference with Custody in violation of R.C. 2919.23(A)(1), a misdemeanor of the first degree; and, (3) Aggravated Menacing in violation of R.C. 2903.21(A), a misdemeanor of the first degree.

However, the court shall withhold finding the defendant guilty of any of these offenses pending a determination as to the issue of merger of offenses.

On or before July 11, 2012, counsel shall conference by telephone and call the Assignment Commissioner in order to schedule the sentencing hearing, which shall be scheduled no earlier than July 20, 2012 and no later than August 10, 2012. Counsel for each side shall submit a memorandum no later than July 12, 2012 at 10:00 a.m. setting forth each counsel's position on the issue of possible merger of offenses. Each side's memorandum shall set forth the legal authority in support of that side's position.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 6th day of July 2012 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride