

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

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

STATE OF OHIO :
Plaintiff : **CASE NOS. 2017 CR 000401**
vs. : **2017 CR 000636**
STEPHEN C. CHILEWSKI : **Judge McBride**
Defendant : **DECISION/ENTRY**

Darren D. Miller, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

William J. Rapp, counsel for the defendant Stephen C. Chilewski, 1 East Main Street, Amelia, Ohio 45102.

This cause came before the court for a bench trial from February 13, 2018 to February 15, 2018. At the conclusion of the trial, the court took the issues raised in the case under advisement.

The defendant Stephen C. Chilewski was indicted in Case No. 2017 CR 000401 on the following counts: (1) attempted aggravated murder with a firearm specification in violation of R.C. 2923.02(A) and R.C. 2903.01(A), a felony of the first degree, (2) felonious assault with a firearm specification in violation of R.C. 2903.11(A)(2), a felony of the second degree, (3) improperly discharging a firearm at or into a habitation in violation of R.C. 2923.161(A)(1), a felony of the second degree, and (4) unlawful

possession of a dangerous ordnance in violation of R.C. 2923.17(A), a felony of the fifth degree.

On October 19, 2017, the defendant was indicted in Case No. 2017 CR 000636 on the following counts: (1) Improperly discharging a firearm into a habitation in violation of R.C. 2923.161(A)(1), a felony of the second degree, and (2) tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree. The state later dismissed the charge of tampering with evidence in count number two of the indictment in Case No. 2017 CR 000636.

Upon consideration of the record of the proceedings, 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 of the witnesses and the exhibits it found to be admissible, credible, and reliable as presented at trial:

The defendant Stephen C. Chilewski has lived at 4655 Cardinal Drive in Clermont County, Ohio for the past 22 years.

For nearly that entire time, he has lived across the street from Jill Spicer, who resides at 4656 Cardinal Drive. Spicer is divorced and lives with her two adult children, Colin McCarter and Katherine McCarter. Spicer had been dating Craig Campbell for 10 months as of June 2017. The defendant and Campbell were not well acquainted but

had exchanged some pleasantries in passing, including contact on a morning when Campbell left for work.

That changed in the early evening hours of Tuesday, June 20, 2017. Spicer and Campbell were on Spicer's front porch, facing the defendant's property, smoking cigarettes after eating dinner. Colin came outside and showed them a funny picture and they all laughed. The defendant was also outside, and was standing in between his property and that of another neighbor, speaking with a neighbor whose property is adjacent to his. The defendant's wife was also outside. The defendant mistakenly believed that Spicer, Campbell, and Colin were laughing at him and asked, "Do you want a microphone?" He then asked variations of, "What are you staring at? Why are you looking at me? Are you recording me? Are you going to take pictures of me?"

Campbell told the defendant to "fuck off." The defendant responded with, "Why don't you come over here and say that to me?" The defendant also said things to the effect of "go home" and "you don't live here." The two exchanged a myriad of insults and implied or explicit threats. At one point Campbell yelled to the defendant that he would "beat" the defendant's "ass" and knock him out.

At some point during this exchange, possibly after the defendant challenged Campbell to come over, Campbell told the defendant "Here I come," removed his sandals, and headed toward the defendant, stopping at or around the sidewalk or the front portion of the defendant's yard. The neighbor whom the defendant had previously been speaking with held the defendant back, while Spicer held back Campbell, and no physical altercation occurred.

Later that evening, still on June 20th, the defendant was seen in Spicer's side yard writing down the company number of Campbell's work-issued white diesel truck,

which was in Spicer's driveway. Then the defendant placed spot lights in his driveway and pointed them out from his home toward Spicer's home. The lights totally illuminated Spicer's home and the front yard.

Subsequently, the defendant called the Union Township Police Department in the early morning hours of June 21, 2017. At around 12:30 a.m., two officers were dispatched to the defendant's home. The officers spoke with the defendant and Campbell individually.

The defendant's version of the events which was related to one of the officers was as follows: Campbell had previously been staring at him from the porch across the street and he had asked Campbell if he had a problem. Campbell said that the defendant was the problem, and then Campbell crossed the street and made threats to fight the defendant.

The defendant admitted that both parties had been making threats to one another, although they did not have a physical fight. After speaking with the defendant, the officer told the defendant that she would tell Campbell to stay away from him. The defendant indicated that he wanted no contact with Campbell, and the officer told him to stay on his property.

One of the officers also spoke with Campbell, who was sitting in his truck in Spicer's driveway. Campbell was in the truck because Spicer was mad at him for the verbal argument he had engaged in with the defendant, and Campbell needed to "cool off." Because Campbell had consumed beer earlier that evening, he did not attempt to drive away, but instead sat in the truck to collect himself. The officer told Campbell to stay away from the defendant and to not have any further contact with him. Campbell

responded that he wanted no more contact with the defendant. The officer then instructed Campbell to go back inside Spicer's home.

On Wednesday, June 21st, as Campbell left Spicer's home and headed to work that morning, the defendant saw him and yelled "You still want to knock me out?" The defendant believed that Campbell was smirking at him as he drove by. The defendant repeatedly called Campbell's place of employment to complain about him, and one of the calls was eventually transferred to Campbell. Eventually Campbell texted the defendant's wife to see if she could have the defendant stop contacting him.

That same day, the defendant placed chairs on his front porch and sat on the porch during most of the day, staring at Spicer's home. Previously the defendant did not have chairs on his front porch and was not in the habit of sitting on his front porch.

Katherine arrived home from work at around 3:00 p.m., and the defendant was outside and talking with his family. As she pulled into the driveway, the defendant remarked, "God damn, she's ugly." Katherine found a note on the garage door from the defendant, which read: "[illegible] White truck Ohio # PH5-6434 STEP IN MY YARD AGAIN & 'YOU' WILL BE CHARGED WITH CRIMINAL TRESSPASSING [sic] !!! TRY ME PS: ATTN. STEVE ADAMS ATTORNEY AT LAW". Katherine crumpled the note in front of the defendant and yelled "Don't you have anything better to do?" Campbell did not visit Spicer's residence at all on Wednesday.

On Thursday, June 22nd, Campbell arrived at Spicer's home in the evening. That night he went onto her porch with her to smoke cigarettes. When he did so, the defendant came out and sat down on his front porch as well and stared at Campbell. The two did not have any direct contact that night.

By the morning of Friday, June 23rd, the defendant had been awake for almost two full days. He still felt deeply disrespected and embarrassed by his interaction with Campbell that occurred on the 20th, which his neighbor and his wife had witnessed. For most of the early morning hours on that Friday the defendant worked on lighting in his basement.

Campbell and Spicer awoke at 5:00 a.m. on Friday, June 23rd. They turned some lights on in the home that would have been visible from the defendant's property. The two sat on Spicer's front porch to drink coffee, smoke cigarettes, and chat. Campbell then headed towards his truck, which was in the driveway, and Spicer went inside the house. Campbell got into his truck, turned it on, and began to reach for a cigarette lighter when he heard a loud noise, felt an impact in his shoulder area, and saw glass fly by within his field of vision.

Several minutes prior to this, the defendant had gone into his back yard with a 12 gauge pump shotgun. The defendant was a former rifle coach in the Marine Corps. He stood behind a six foot privacy fence that shielded his back yard while the victim climbed into his truck and turned it on. The defendant then stood on the balls of his feet to see over the fence and shot toward Campbell's truck from behind the privacy fence.

Not knowing where the gunshot came from, Campbell rushed back into the house. Spicer called 911 and reported the incident, also noting in the call that she thought it may have been the defendant who shot Campbell. Officers were dispatched to Spicer's home at around 5:30 a.m. that morning, and they arrived shortly thereafter.

Officers found Craig Campbell kneeling in Spicer's kitchen while she held a towel to his shoulder. Campbell was led from the back of Spicer's home through a dense wooded area to an ambulance on a nearby street. Campbell was taken to the

University of Cincinnati Hospital for treatment for a gunshot wound on the left side of his upper back that was 8 to 9 millimeters in size. Later, in August, the victim returned to the hospital to have surgery performed to remove the projectile from his back.

When they arrived at the scene, officers observed that Campbell's white, diesel truck was running, its headlights and taillights were on, and exhaust was coming from the tailpipe. The back windshield and front windshield of the truck had been partially shattered. There were five holes in the rear of the cab to Campbell's truck. There were also three holes entering and exiting Spicer's garage, directly in front of where the truck had been parked. Clearly, Spicer had not given the defendant permission to discharge his shotgun into her home.

After officers knocked on the defendant's door and ordered people to come out, several people in the defendant's family emerged. The defendant was the last to leave the home, and he had a heavy sweat line on his shirt.

Officers recovered a spent shell casing from the defendant's back yard. The casing was for Federal double-aught buckshot, which contained 9 pellets. Officers found the same ammunition stored in the defendant's home in his gun safe. The defendant's gun safe included a number of firearms, including a 12 gauge sawed-off shotgun with a barrel length of 16 and 7/16 inches. The sawed-off shotgun had the defendant's DNA on it and was operable.

A 12 gauge shotgun, such as the sawed-off shotgun, is capable of lethal force. There were also several pistols and rifles with scopes in the gun safe, some of which are extremely accurate. Initially officers believed the sawed-off shotgun in the gun safe was the weapon the defendant used to shoot Campbell.

A neighbor who lives behind Spicer, Anne Khoury, approached officers on June 23rd to inform them that she had found a hole in her craft room window. Later, on September 27, 2017, officers returned to Khoury's residence because she discovered additional holes while moving furniture in her craft room. A pellet that matched the size of the pellets recovered on June 23rd was recovered from her home. Just the same as Spicer, she had not given permission to the defendant to fire into her home.

The same day that officers returned to Khoury's residence, they returned to the defendant's residence. Based on information from the defendant's attorney, they searched the defendant's shed. Inside the shed, they found a second 12 gauge shotgun that matched the description of the weapon the defendant provided to the police. The shotgun was operable, had the defendant's DNA on it, and after testing was confirmed as the weapon used to shoot Campbell.

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) describes reasonable doubt as follows:

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

¹ R.C. 2901.05(A).

In a criminal case, "[i]t is axiomatic that the state must prove each and every element of an offense * * *."2 As the trier of fact, the court "* * * makes the determinations of credibility and the weight to be given to the evidence."3

LEGAL ANALYSIS

I. ATTEMPTED AGGRAVATED MURDER

The defendant is charged in count number one of the indictment in Case No. 2017 CR 00401 with attempted aggravated murder in violation of R.C. 2923.02(A) and R.C. 2903.01(A), a felony of the first degree. This count includes a firearm specification.

Aggravated murder is prohibited in R.C. 2923.01(A), which provides: "No person shall purposely, and with prior calculation and design, cause the death of another * * *."4 Attempt is dealt with in R.C. 2923.02: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."5 Stated differently, "a criminal attempt is complete when a person's acts constitute a substantial

² *State v. Jones*, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163 (2001). See *State v. Brown*, 12th Dist. Warren No. CA2006-10-120, 2007-Ohio-5787, ¶ 29 ("The state has a duty to present evidence, beyond a reasonable doubt, as to each and every element of the crime as set forth in the indictment.")

³ *State v. Burrell*, 12th Dist. Fayette No. CA2016-04-005, 2016-Ohio-8454, ¶ 22, citing *State v. Clements*, 12th Dist. Butler No. CA2009-11-277, 2010-Ohio-4801, ¶ 20, citing *State v. Erikson*, 12th Dist. Warren No. CA2014-10-131, 2015-Ohio-2086, ¶ 42.

⁴ R.C. 2903.01(A).

⁵ R.C. 2923.02(A).

step in a sequence of events designed to result in the perpetuation of a crime.”⁶ A substantial step is one that is “strongly corroborative of the actor’s criminal purpose.”⁷

For the crime of attempted aggravated murder, the “elements of purpose and of prior calculation and design are distinct, and the state must prove both” for a conviction to be upheld.⁸ Under R.C. 2901.22(A), “[a] person acts purposely when it is the person’s specific intention to cause a certain result * * *.”⁹ A person’s purpose to kill can be inferred by circumstantial evidence.¹⁰

On the other hand, the term prior calculation and design “suggests advance reasoning to formulate the purpose to kill.”¹¹ It requires “evidence that supports more than the inference of purpose. Inferring prior calculation and design from an inference of purpose is mere speculation.”¹² The Ohio Supreme Court has held that there is “no ‘bright-line test that emphatically distinguishes between the presence or absence of ‘prior calculation and design.’”¹³ Instead, whether prior calculation and design is present “* * * turns upon the particular facts and evidence presented at trial.”¹⁴ Although there is no bright-line test, the Ohio Supreme Court “traditionally” considers three factors in determining prior calculation and design: “(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or

⁶ *Burrell*, 2016-Ohio-8454 at ¶ 20, citing *State v. Clements*, 12th Dist. Butler No. CA2009-11-277, 2010-Ohio-4801, ¶ 20.

⁷ *Burrell*, 2016-Ohio-8454 at ¶ 21, quoting *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶ 95.

⁸ *State v. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E. 3d 1124, ¶ 1.

⁹ R.C. 2901.22(A).

¹⁰ *State v. McGraw*, 12th Dist. Fayette No. CA2009-10-020, 2010-Ohio-3949, ¶ 12.

¹¹ *Walker*, 2016-Ohio-8295 at ¶ 18.

¹² *Id.* at ¶ 26.

¹³ *Id.* at ¶ 19, quoting *State v. Taylor*, 78 Ohio St.3d 15, 20, 676 N.E.2d 82 (1997).

¹⁴ *Walker*, 2016-Ohio-8295 at ¶ 19, quoting *Taylor*, 78 Ohio St.3d at 20.

preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost instantaneous eruption of events?'"¹⁵

The court finds the defendant not guilty of attempted aggravated murder. The court does not believe that the state met its burden of demonstrating that the defendant acted purposely. Upon reviewing the facts and evidence, the court does not find that the defendant's specific intention in firing his shotgun at the victim was to cause his death.¹⁶ There are several reasons for this finding, and the following is not intended to be an exhaustive list of the court's reasons. First, the defendant is a former rifle coach. He had several powerful and accurate rifles in his possession that he had ready access to. These weapons had scopes and would have been better suited toward killing the victim, as opposed to only injuring him. Second, the defendant waited to shoot the victim until the victim was inside his vehicle. Had the defendant wanted to kill the victim by hitting some kind of vital organ or his head, then the defendant would have likely chosen to shoot the shotgun while he could still see the victim's body before he got into his truck. Third, the court does not believe that the defendant had the purpose of killing the victim based on his appearance and demeanor during his taped police interview, during which he confessed to shooting the victim.

For some of the same reasons, the court also finds the element of prior calculation and design lacking. Although the defendant did have a strained relationship with the victim, he did not select the best murder weapon to kill the victim.¹⁷ And although the defendant's act of shooting the victim was not a spontaneous act, he also did not attempt to shoot the victim again once he got out of his truck, injured, and ran

¹⁵ *Walker*, 2016-Ohio-8295 at ¶ 20, quoting *Taylor*, 78 Ohio St.3d at 19.

¹⁶ R.C. 2901.22(A).

¹⁷ *Walker*, 2016-Ohio-8295 at ¶ 20, quoting *Taylor*, 78 Ohio St.3d at 19.

back into Spicer's home. These facts again are significant but are not intended to be an exhaustive list describing all of the facts which pertain to why the court concludes that the defendant is not guilty of attempted aggravated murder.

II. FELONIOUS ASSAULT

In count number two of Case No. 2017 CR 000401, the defendant is charged with felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. The count also includes a firearm specification. Felonious assault is criminalized in R.C. 2903.11, which provides, in relevant part: "(A) No person shall knowingly do either of the following: * * * (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."¹⁸ A "deadly weapon" is defined 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."¹⁹

Under R.C. 2901.22(B):

"A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact."²⁰

¹⁸ R.C. 2903.11(A)(2).

¹⁹ R.C. 2923.11(A).

²⁰ R.C. 2901.22(B).

"Where the accused knowingly points a gun at another person * * * he has committed the crime of felonious assault."²¹

In considering all of the pertinent evidence, the court finds the defendant guilty of felonious assault as charged in count number two of Case No. 2017 CR 000401. The overwhelming evidence, including the defendant's confession, ballistics, DNA evidence on the shotgun, and circumstantial evidence surrounding the feud between the defendant and the victim, has collectively convinced the court beyond a reasonable doubt that the defendant did cause the victim physical harm. The defendant caused the victim physical harm by lodging a pellet of Federal double-aught buckshot into the defendant's back that required emergency medical attention as well as surgery to remove the pellet. The injury was inflicted with a deadly weapon, namely the defendant's shotgun. A firearm, like the defendant's shotgun, "is an inherently dangerous instrumentality, the use of which is likely to produce death."²²

The court also finds that the defendant committed these acts knowingly due to the following non-exhaustive list of reasons: The defendant admitted that he was outside in his yard for several minutes before shooting the victim. It would have been apparent to the defendant from his back yard that the victim was in his truck before looking over the top of his fence and shooting at the victim in the truck. The defendant knew that the truck belonged to the victim, as he had copied down information from the truck and used it to call the victim's employer, and he had previously seen the victim in the truck. The victim was shot once he was in his truck, and it was turned on. The

²¹ *State v. Johnson*, 12th Dist. Clinton No. 88-02-002, 1989 WL 6171, *7 (Jan. 30, 1989), citing *State v. Tate*, 54 Ohio St.2d 444 (1978).

²² *Burrell*, 2016-Ohio-8454 at ¶ 24, citing *State v. Dunlap*, 73 Ohio St.3d 308, 316 (1995). See *State v. Guice*, 9th Dist. Lorain No. 16CA011054, 2017-Ohio-9295, ¶ 30, quoting *State v. Walker*, 5th Dist. Stark No. 2005-CA-00286, 2006-Ohio-6240, ¶ 87 ("* * * [A] firearm is an inherently dangerous instrument, the use of which is likely to produce death.").

truck's headlights were automatically on and clearly illuminated the front of Spicer's garage door in the morning darkness. Additionally, the truck's taillights were on and the truck emitted exhaust. Furthermore, the victim's truck was a diesel, and it was not quiet when operated. Based on, but not limited to, this information, the court believes that the defendant knew that the victim was in his truck when he shot at the truck, striking the truck with five pellets, one of which struck the victim.

The court also believes that, being as well versed with guns as the defendant was, he knew that shooting his shotgun with Federal double-aught buckshot could easily break the glass of the truck's cab and strike the victim, causing him physical harm. Thus, the defendant knew that shooting his shotgun at the victim's truck's cab while the victim was inside would probably cause physical harm to the victim.²³

Finally, the court does not believe the defendant's statements to police that his shot was purely a warning shot. Although it certainly sent a message to the victim, it went well beyond a warning shot. Had the defendant only intended to scare the victim, he could have aimed his gun into the air instead of directly to where the victim was seated with his back towards the defendant. For these reasons, the court finds the defendant guilty of felonious assault.

The court also finds that the gun specification has been proven. R.C. 2941.145 requires the state to show 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

²³ R.C. 2901.22(B).

used it to facilitate the offense. A "firearm" is defined to mean "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. * * *"²⁴ The court finds that the crime was committed with the use of an operable firearm, specifically the defendant's 12 gauge shotgun.

III. IMPROPER DISCHARGE OF A FIREARM AT OR INTO A HABITATION

In count number three of Case No. 2017 CR 000401 and count number one of Case No. 2017 CR 000636, the defendant is charged with improperly discharging a firearm at or into a habitation in violation of R.C. 2923.161(A)(1), a felony of the second degree. One charge relates to Spicer's home and the other charge relates to Khoury's home.

Improperly discharging a firearm at or into a habitation is criminalized in R.C. 2923.161(A): "No person, without privilege to do so, shall knowingly do any of the following: (1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual * * *."²⁵ An "occupied structure" is defined as:

"Any house * * * or any portion thereof, to which any of the following applies:

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

²⁴ R.C. 2923.11(B)(1).

²⁵ R.C. 2923.161(A)(1).

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it."²⁶

As discussed in Section II, a person acts "knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. * * *."²⁷ As already mentioned, a "firearm" is defined to mean "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. * * *"²⁸

A. SPICER'S HOME

The court finds the defendant guilty of discharging a firearm at or into Spicer's home. Spicer's home was maintained as a permanent dwelling and was her habitation. She had lived there for more than 20 years. The overwhelming evidence demonstrates that the defendant did discharge a firearm, his shotgun, at the victim. The victim was in his truck, and the truck was parked directly in front of Spicer's home. The shotgun shell contained nine pellets. Given the defendant's history with firearms and the location of the victim when the defendant shot at him, the court finds that the defendant did shoot his shotgun while aware that doing so would probably cause pellets to strike Spicer's home. And, in fact, three pellets from the shotgun did strike Spicer's home, coming in through her garage door and exiting through the back wall of the garage. Furthermore, Spicer did not give the defendant permission to shoot at or into her home. Accordingly,

²⁶ R.C. 2909.01(C).

²⁷ R.C. 2901.22(B).

²⁸ R.C. 2923.11(B)(1).

the court finds that the state has proven beyond a reasonable doubt that the defendant is guilty of improperly discharging his shotgun at or into Spicer's home.

B. KHOURY'S HOME

The court finds that the state has failed to prove that the defendant shot Khoury's home knowingly, and therefore the court finds that the defendant is not guilty as to count number one of the indictment in Case No. 2017 CR 000636. The defendant must have been aware that shooting his shotgun at Spicer's home would probably result in Khoury's home being shot as well.²⁹ The court is not convinced that the defendant would have known that shooting Federal double-aught buckshot from his shotgun in his yard would not only cross the street and strike Spicer's home, but would also travel through both of her garage walls, across her back yard, and into Khoury's home. The state did not present any evidence showing that a shotgun using Federal double-aught buckshot can typically penetrate multiple buildings and travel that far. Based on the evidence before it, the court does not believe that the evidence allows the court to draw the inference that the defendant knew that the probable result of discharging the firearm from his back yard would be to penetrate Khoury's home.

The state has alternatively argued that the intent element is satisfied because the defendant's intent to assault/murder the victim, or the defendant's intent to discharge a firearm at or into Spicer's home, transfers to the defendant's act of discharging a firearm into Khoury's home. The court finds this argument to be unpersuasive.

²⁹ R.C. 2901.22(B).

First, the state has not identified, nor can the court locate, legal support for the proposition that the doctrine of transferred intent can apply to property crimes generally or to the offense of improperly discharging a firearm at or into a habitation in particular.

Second, the doctrine of transferred intent does not, by its definition and on its face, include property crimes. “[U]nder the doctrine of transferred intent, an offender who intentionally acts to harm someone but ends up accidentally harming another is criminally liable as if the offender had intended to harm the actual victim.”³⁰ Unlike crimes such as murder or assault, the crime of improperly discharging a firearm into a habitation is “not defined in terms of conduct toward another person.”³¹ As in a burglary, the offense is committed as to the occupied structure.³² Because the doctrine of transferred intent applies to transfer intent from person-to-person, and not to structures, the court finds it inapplicable here. Accordingly, the court finds the defendant not guilty of count number one of the indictment in Case No. 2017 CR 000636 for discharging a firearm into a habitation.

IV. UNLAWFUL POSSESSION OF DANGEROUS ORDNANCE

In count number four of the indictment in Case No. 2017 CR 000401, the defendant was charged with unlawful possession of dangerous ordnance in violation of

³⁰ (Emphasis added.) *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286, ¶ 15, citing *State v. Solomon*, 66 Ohio St.2d 214, 217, 421 N.E.2d 139 (1981). See *State v. Calhoun*, 12th Dist. Clinton No. CA2015-01-002, 2015-Ohio-5505, 57 N.E.3d 139, ¶ 12, quoting *State v. Reese*, 1st Dist. Hamilton Nos. C060576 and C-060577, 2007-Ohio-4319, ¶ 21 (Emphasis added.) (“[W]here an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person, and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the second person”).

³¹ *State v. Grayson*, 8th Dist. Cuyahoga Nos. 105081 and 105082, 2017-Ohio-7175, ¶ 9, citing *State v. Allen*, 8th Dist. Cuyahoga No. 826168, 2003-Ohio-6908, ¶ 21.

³² *Grayson*, 2017-Ohio-7175 at ¶ 9.

R.C. 2923.17(A), a felony of the fifth degree. R.C. 2923.17 criminalizes acquiring and having dangerous ordnance as follows: "No person shall knowingly acquire, have, carry, or use any dangerous ordnance."³³ A "dangerous ordnance" is defined to include "[a]ny automatic or sawed-off firearm * * *."³⁴ In turn, a "[s]awed-off firearm" is defined as "a shotgun with a barrel less than eighteen inches long * * *."³⁵ To find a defendant guilty of possession of a dangerous ordnance, the state need not prove that the defendant " * * * knew of the specific characteristics of the item possessed that made it a dangerous ordnance."³⁶

The evidence establishes that the defendant admitted that he kept a gun safe in his home, inside of which he kept his firearms. He knew the combination to the safe. The sawed-off shotgun had a barrel that measured 16 and 7/16 inches in length, which is less than 18 inches long. The shotgun had the defendant's DNA on it and through testing was deemed operable. The court finds that the defendant knowingly acquired or had dangerous ordnance, namely a sawed-off 12 gauge shotgun. Accordingly, the court finds the defendant guilty of unlawful possession of a dangerous ordnance, as charged in count number four of the indictment in Case No. 2017 CR 000401.

CONCLUSION

The court finds that the state proved the following counts beyond a reasonable doubt, and as such finds the defendant guilty of the following:

³³ R.C. 2923.17(A).

³⁴ R.C. 2923.11(K)(1).

³⁵ R.C. 2923.11(F).

³⁶ *State v. Jordan*, 89 Ohio St.3d 488, 494, 733 N.E.2d 601 (2000).

- Count 2 in Case No. 2017 CR 000401, felonious assault with a firearm specification in violation of R.C. 2903.11(A)(2), a felony of the second degree;
- Count 3 in Case No. 2017 CR 000401, improperly discharging a firearm at or into a habitation in violation of R.C. 2923.161(A)(1), a felony of the second degree; and
- Count 4 in Case No. 2017 CR 000401, unlawful possession of a dangerous ordnance in violation of R.C. 2923.17(A), a felony of the fifth degree.

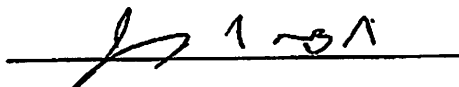
The court finds that the state has not proven beyond a reasonable doubt the following counts, and as such finds the defendant not guilty and acquits the defendant of the following:

- Count 1 in Case No. 2017 CR 000401, attempted aggravated murder with a firearm specification in violation of R.C. 2923.02(A) and R.C. 2903.01(A), a felony of the first degree; and
- Count 1 in Case No. 2017 CR 000636, improperly discharging a firearm into a habitation in violation of R.C. 2921.161(A)(1), a felony of the second degree.

Counsel shall conference and call the Assignment Commissioner (513-732-7108) within five days of the date of the Decision/Entry and shall schedule the sentencing hearing, which shall be held within four weeks of the date of this Decision/Entry. The Probation Department is directed to complete a presentence investigation and to prepare a presentence report in this case.

IT IS SO ORDERED.

DATED: 3-9-18



Judge Jerry R. McBride