

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-L-104
MICHAEL T. SWIDAS,	:	
Defendant-Appellant.	:	

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

Judgment: Affirmed.

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

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

TIMOTHY P. CANNON, J.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

{¶73} R.C. 2901.22(B) provides: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

{¶104} ****

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

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

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

DIANE V. GRENDELL, J., concurs,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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