[Cite as *State v. Berecz*, 2010-Ohio-285.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	Case No. 08CA48
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JASON A. BERECZ,	:	
Defendant-Appellant.	:	**Released 1/21/10**

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} A Washington County jury convicted Jason Berecz of a total of thirteen felony and misdemeanor counts stemming from an incident that occurred when an angry, intoxicated Berecz began shooting a rifle inside his home. After Berecz's mother called 911 to report a domestic disturbance at the home, Berecz shot the deputy who responded. Another shot hit the vehicle of two passersby, a mother and son. After arresting Berecz, deputies searched his residence and found marijuana plants and other contraband. When the jury convicted Berecz, the trial judge sentenced him to thirty-eight years in prison.

{¶2} Initially, Berecz argues that the trial court erred in failing to dismiss an attempted murder charge. He claims that the indictment was defective because it referred to two mental states, "knowingly" and "purposely." Although the crime of attempted murder is committed "purposely," the inclusion of "knowingly" in the

introductory language of the indictment in this instance is not fatal. The specific language that identifies the attempted crime clearly indicates the required mental state is "purposely." Because the grand jury was able to determine whether there was probable cause to believe Berecz acted with the necessary mental state to constitute attempted murder, i.e., "purposely," the indictment was not defective.

{¶3} Next, Berecz argues that the trial court erred in denying his motion for a change of venue. However, when Berecz filed his motion, the court had not yet conducted voir dire and thus could not determine whether there was a sufficient pool of fair and impartial jurors in Washington County. And because nothing in the subsequent voir dire indicates any actual bias on the part of any juror, the court properly denied the motion.

{¶4} Berecz also contends that the trial court erred in refusing a requested jury instruction regarding the "personal use" defense to a charge of cultivation of marijuana. However, Berecz failed to produce evidence that would allow a reasonable juror to question whether the marijuana plants were "solely for his own personal use." Therefore, no instruction was warranted.

{¶5} Berecz next argues that the trial court erred in denying his motion for a directed verdict on two counts of felonious assault involving the deputy he wounded. He contends that the State did not prove that the deputy suffered "serious physical harm" in spite of the facts that: 1) the bullet grazed his eyelid and went through the bridge of his nose; 2) he required emergency treatment and subsequent surgery; and 3) the deputy now has permanent scarring, loss of vision, astigmatism and must wear

corrective glasses. The trial court correctly determined that a reasonable juror could conclude, beyond a reasonable doubt, that the deputy suffered serious physical harm.

{¶6} Berecz also claims that the trial court erred in denying his motion for a directed verdict on the felonious assault counts involving the passersby because there was insufficient evidence of his intent. He claims that their distance and the time of night indicate that he could not have intentionally shot at them. But Berecz's intent could be inferred from his conduct, i.e., within a very short time of observing the passersby driving away from him, he fired bullets across a public roadway in the direction they traveled. Thus, reasonable jurors could conclude, beyond a reasonable doubt, that Berecz knowingly caused or attempted to cause serious physical harm to the passersby. The trial court properly denied this motion as well.

{¶7} Next, Berecz claims that the trial court erred in imposing consecutive sentences for both a firearm specification and a peace officer specification on the count of attempted murder. Because the felony sentencing statute prohibits a trial court from imposing a prison term for both the firearm specification and the peace officer specification to the same underlying offense, we agree that the trial court erred as a matter of law in that regard.

{¶8} Berecz also claims that the trial court erred in imposing an excessive prison sentence. However, Berecz's thirty-eight year sentence was within the statutory guidelines and was not excessive given the circumstances.

{¶9} Finally, Berecz claims that he received ineffective assistance of counsel when his attorney refused to allow him to testify and failed to investigate certain individuals who may have testified in his defense. Because this assertion relies on

evidence outside of our record, we cannot reach the merits of his argument. Accordingly, we reject this last assignment of error.

I. FACTS

{¶10} Berecz, who had been drinking all afternoon, was at home with his mother and his girlfriend, Victoria Kyer. In the late evening Berecz wanted to drive to Columbus to obtain drugs but Kyer felt that Berecz should not drive in his current state – so she tried to disable his car. Apparently, this sent Berecz into a rage. In response, Berecz's mother called 911 and indicated that her son was highly agitated and was breaking things in her home. As the dispatcher talked to his mother, Berecz could be heard shouting in the background. At one point he loudly threatened to shoot any officers who came to the house. He grew increasingly agitated and began firing a rifle inside the home.

{¶11} Before peace officers arrived Berecz struck Kyer, who then fled the home as Helen Gragan and her son Jared happened to be driving by. Mrs. Gragan stopped the car when she saw Kyer, who appeared like she had been in an accident. Kyer indicated she needed help but ran away without explaining the situation.

{¶12} Then Washington County Sheriff's Sergeant Scott Parks pulled up near the Gragans' parked vehicle. When Parks observed Berecz come out from the back of the house holding a rifle, Parks ordered Berecz to drop the gun but Berecz responded by firing at the deputy. The Gragans took off down the road and quickly stopped when Helen Gragan thought they were at a safe distance. At almost the same time, Parks decided to drive away from the scene and wait for backup to arrive. As he drove away, his front passenger window shattered. Parks felt like he had been shot in the head. He

could not see through his right eye and blood was streaming down his face. Parks continued to drive and quickly came upon the Gragans' stopped vehicle. As he passed them, a bullet shattered the glass of the Gragans' back window. The round went through the seats and hit the dashboard without injuring the Gragans.

{¶13} Parks drove to a nearby firehouse where he received emergency medical treatment for his bullet wound. He was later flown to a Columbus hospital, where he had reconstructive eye surgery the following day.

{¶14} After more deputies arrived on scene, they arrested Berecz. The officers searched the residence and located additional guns, smoking devices, and some Klonopin pills. They also discovered twenty-nine small marijuana plants growing in Styrofoam cups in Berecz's room.

{¶15} The grand jury indicted Berecz on seventeen different counts, however, one misdemeanor was dismissed before trial. The petit jury found Berecz not guilty of two counts of attempted murder, and not guilty of one count of domestic violence. It convicted him on the remaining thirteen counts, and the trial court sentenced him to a total of thirty-eight years in prison.

II. ASSIGNMENTS OF ERROR

{¶16} Berecz assigns the following errors for our review:

> I. THE TRIAL COURT ERRED IN FAILING TO DISMISS COUNT NUMBER ONE, ATTEMPTED MURDER, WHERE THE INDICTMENT WAS DEFECTIVE IN FAILING TO CLEARLY SPECIFY THE MENS REA REQUIRED FOR THAT COUNT.
>
> II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE.

III. THE TRIAL COURT ERRED IN DENYING A REQUESTED JURY INSTRUCTION ON THE PERSONAL USE DEFENSE TO THE CHARGE OF CULTIVATION OF MARIJUANA.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S RULE 29 MOTION FOR A DIRECTED VERDICT AS TO THE TWO COUNTS OF FELONIOUS ASSAULT INVOLVING SCOTT PARKS.

V. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A DIRECTED VERDICT AS TO THE FELONIOUS ASSAULT CHARGES INVOLVING HELEN GRAGAN AND JARED GRAGAN.

VI. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES FOR THE FIREARM SPECIFICATION AND THE PEACE OFFICER SPECIFICATION TO COUNT ONE OF INDICTMENT.

VII. THE TRIAL COURT ERRED IN IMPOSING AN EXCESSIVE PRISON TERM OF THIRTY-EIGHT YEARS IN THIS CASE.

VIII. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE FOR VARIOUS REASONS, AS SET FORTH IN THE ATTACHED LETTER FROM APPELLANT, RECEIVED APRIL 27, 2009.

III. LEGAL ANALYSIS

A. SUFFICIENCY OF THE INDICTMENT

{¶17} Initially, Berecz argues that the indictment is defective because it failed to clearly specify the required mental state of "purposely" for the crime of attempted murder. We review the legal sufficiency of an indictment as a matter of law, i.e., we use a de novo standard of review. *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶26.

{¶18} The indictment reads, in part:

{¶19} "Jason A. Berecz did purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, to-wit: Murder,

engage in conduct that, if successful, would constitute or result in the offense of Murder, in that the said Jason A. Berecz purposely attempted to cause the death of another[.]"

{¶20} The first clause of the indictment includes language of the attempt statute R.C. 2923.02, which states:

{¶21} "(A) 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."

{¶22} Ohio defines murder as "purposely" causing the death of another. See R.C. 2902.02. Thus, Berecz argues that "knowingly" should not have appeared in the language of the indictment because the grand jury could have indicted him for knowingly attempting to cause the death of another, a lower level of culpability than purposely. In essence he contends the misleading language in the indictment violated his right to have his case presented to and indicted by the grand jury in contravention of Section 10, Article I, Ohio Constitution.

{¶23} However, a simple reading of the indictment indicates that the grand jury indicted Berecz for purposefully attempting to murder Scott Parks. "Knowingly" appears in the indictment because it is an alternative mental state in the Revised Code's definition of the crime of attempt, and that portion of the indictment seemed to be copied word for word from the statute. The alternative mental state provided by the attempt statute must be read in conjunction with the mental state required for the principal offense. Katz & Gianelli, Baldwins Ohio Practice, Criminal Law (2 Ed.) Section 93.3. The following portion of the indictment that specified the actual crime of attempted murder omits the "knowingly" element. It reads: " * * * in that said Jason A. Berecz

purposely attempted to cause the death of another * * *[.]" Although the introductory wording of the indictment is in the alternative, the language identifying the principal offense that Berecz attempted is not. Thus, we have no doubt that the grand jury considered whether there was probable cause to believe Berecz acted purposely when he attempted to kill Deputy Parks.

{¶24} We regard the inclusion of "knowingly" in the indictment as mere surplusage, which is "an averment which may be stricken, leaving sufficient description of the offense." *State v. Kittle*, Athens App. No. 04CA41, 2005-Ohio-3198, at ¶15, quoting *State v. Bush* (1996), 83 Ohio Misc.2d 61, 65, 679 N.E.2d 747. Here, "knowingly" is surplusage because it is not relevant to a charge of attempted murder and could have been removed from the indictment while leaving all the essential elements of the crime. See, also, *State v. Yockey* (Sept. 9, 1987), Wayne App. No. 2257, 1987 WL 16914 (affirming the trial court's decision to amend an indictment to strike the word "knowingly" as surplusage where the indictment contained the words "purposely/knowingly" and purposely was the requisite mental state).

{¶25} Moreover, R.C. 2941.08 lists certain defects in an indictment that do not render the indictment invalid. An indictment is valid when it contains "surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged[.]" R.C. 2941.08(I). The same code section also permits "other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits." R.C. 2941.08(K). And finally, Crim.R. 7(C) permits a court to strike surplusage from the indictment.

{¶26} Because we find no error in the indictment, we reject Berecz's argument that *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (*Colon I*) compels us to find a structural defect in the proceedings. In *Colon I*, the Supreme Court of Ohio held that the indictment, which failed to include the mental state of recklessness for the crime of robbery, was structurally defective because it so permeated the proceedings that the trial was not a reliable vehicle for determining the defendant's guilt. Id. at ¶44.[1]

{¶27} On reconsideration in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 (*Colon II*), the Court explained that structural defect analysis is appropriate only in rare cases where, as in *Colon I*, the defect in the indictment led to multiple errors at trial. Id. at ¶6. Specifically, the Court noted the following errors occurred at trial as a result of the defective indictment: (1) the defendant was not put on notice that recklessness was an element of the crime of robbery; (2) the state did not argue that the defendant's conduct was reckless; (3) the trial court did not include recklessness as an element of the jury instruction; and (4) in closing arguments, the prosecutor treated robbery as a strict liability offense. Id.

{¶28} Here, we have found no defect in an indictment that included the proper mens rea element of "purposely," while also including the surplusage of "knowingly." Obviously, there must be an error before it can be characterized as structural in nature.

{¶29} Even if we were to assume that the indictment was defective, Berecz has not argued that the alleged defect in the indictment caused any additional errors at trial, and we have found none. Nor does Berecz argue that he lacked notice of the elements

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[1] In *Colon I*, the defendant failed to object in the trial court to the defect. That is not the case here. Thus, this purported error is reviewable if it cannot be characterized as "structural."

of the crime of which he was charged. Nonetheless, we note that at arraignment, the trial court notified Berecz that "purposeful" was the requisite mens rea for the crime of attempted murder. The court also instructed jurors on the definition of "purposely" and explained that it was the required mental state for attempted murder. There is no structural error present even if the indictment is deemed defective. Accordingly, this assignment of error is meritless.

B. CHANGE OF VENUE

{¶30} Berecz claims that the trial court erred in denying his motion for a change of venue. Our standard of review for denial of a motion to change venue is abuse of discretion. *State v. Fairbanks* (1972), 32 Ohio St.2d 34, 37, 289 N.E.2d 352. An appellate court should reverse a trial court's decision regarding change of venue only upon a clear showing of abuse of discretion. *State v. Metz* (April 21, 1998), Washington App. No. 96CA48, 1998 WL 199944, at *6, citing *State v. Gumm*, 73 Ohio St.3d 413, 430, 1995-Ohio-24, 653 N.E.2d 253. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶31} Prior to jury selection, Berecz moved for a change of venue. He attached transcripts of television news coverage, newspaper articles, and internet postings covering the incident to his motion. The trial court concluded the motion was premature and proceeded to conduct voir dire in order to determine whether a fair and impartial group of jurors could be assembled in Washington County. The trial court permitted

individual voir dire of jurors on the issue of pre-trial publicity. At the conclusion of voir dire, Berecz did not renew his motion for a change of venue.

{¶32} Nonetheless, Berecz asserts that extensive pre-trial media coverage of the case prevented his ability to secure a fair trial. He notes that during jury selection, fifty-three potential jurors had heard about the case. He also notes that of the twelve empanelled jurors, seven had heard about the case before the trial.

{¶33} Crim.R. 18(B) states in part:

> Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

See, also, R.C. 2901.12(K).

{¶34} The rule requires a defendant to make the motion prior to trial. See Crim.R. 18(B)(1). However, "a defendant claiming that pretrial publicity has denied him a fair trial must show that one or more jurors were actually biased." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, at ¶39. "[A] searching voir dire provides the best test to determine whether a pool of prospective jurors is prejudiced against a criminal defendant." *Metz* at *6. Prior to voir dire, Berecz was likely incapable of demonstrating that any jurors were actually biased. All he could offer the trial court was newspaper clippings, internet blog postings, and transcripts of television segments. But newspapers articles do not themselves suffice to show that a fair and impartial trial is not possible. *Fairbanks* at 37. In the absence of showing resulting bias, "pretrial publicity-even pervasive, adverse publicity-does not inevitably lead to an unfair trial."

State v. Lundgren, 73 Ohio St.3d 474, 479, 1995-Ohio-227, 653 N.E.2d 304, quoting *Nebraska Press Assn. v. Stewart* (1976), 427 U.S. 539, 554, 96 S.Ct. 2791.

{¶35} The trial court did not abuse its discretion in denying Berecz's motion for a change of venue. The trial court properly determined that it was premature to rule on the motion until it could conduct voir dire and determine whether it could seat a fair and impartial jury. The court then engaged in an extensive voir dire, which takes up greater than one third of our 1695 page trial record. And the trial court conducted individual voir dire of jurors on the issue of pre-trial publicity. Of the final seated jury, seven of the twelve jurors heard about the case prior to the voir dire. Regardless, all twelve swore that they could fairly and impartially decide the case.

{¶36} Berecz did not renew his motion for a change of venue after voir dire. Likely this is because he was satisfied with the seated jury or else he knew that he was still incapable of showing actual juror bias. Accordingly, the trial court properly denied the motion when Berecz brought forth no evidence clearly indicating actual juror bias. This assignment of error is meritless.

C. "PERSONAL USE" JURY INSTRUCTION

{¶37} Next, Berecz argues that the trial court erred in denying a requested jury instruction on the personal use defense to the charge of cultivation of marijuana. Generally, a trial court should give a requested jury instruction if it is a correct statement of the law as applied to the facts of that particular case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828; see, also, *Cincinnati v. Epperson* (1969), 20 Ohio St.2d 59, 253 N.E.2d 785, at paragraph one of the syllabus. While the trial court has some discretion in the actual wording of an instruction, the issue of

whether an instruction is required presents a question of law for de novo review. *Murphy*; *Epperson*, supra; and *State v. Mitchell* (1989), 60 Ohio App.3d 106, 108, 574 N.E.2d 573.

{¶38} Under R.C. 2901.05, the burden of going forward on an affirmative defense is on the defendant. In *State v. Powell* (Sept. 29, 1997), Ross App. No. 96CA2257, 1997 WL 602864, at *1, we indicated:

> The standard for determining whether a criminal defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable people concerning the existence of that defense.

{¶39} R.C. 2925.04(F) sets out the personal use defense applicable to the charge of cultivation:

> It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for a fifth degree felony violation of illegal cultivation of marihuana that the marihuana that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed or cultivated under any other circumstances that indicate that the marihuana was solely for personal use.
>
> Notwithstanding any contrary provision of division (F) of this section, if, in accordance with section 2901.05 of the Revised Code, a person is charged with a violation of illegal cultivation of marihuana that is a felony of the fifth degree sustains the burden of going forward with the evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the person may be prosecuted for and may be convicted of or plead guilty to a misdemeanor violation of illegal cultivation of marihuana.

{¶40} Accordingly, when a defendant is charged with cultivating marijuana under 2925.04(A) & (C)(5)(c) (fifth degree felony cultivation), a trial court must give a personal use instruction when the defendant produces sufficient evidence from which a reasonable jury could find that the marijuana was cultivated solely for personal use.

However, if the defendant's evidence generates only "a mere speculation or possible doubt," the defendant has not met the burden of going forward and is not entitled to an instruction on the affirmative defense. *State v. Melchoir* (1978), 56 Ohio St.2d 15, 20, 381 N.E.2d 195.

{¶41} The trial court denied the instruction on the personal use defense on the basis that Kyer testified that she smoked marijuana the day of the incident and that she had received the marijuana from Berecz. We have previously held that the personal use defense was not meant to apply to situations where the alleged cultivator distributed marijuana non-commercially, i.e., as a gift. *State v. Jackson* (1993), 86 Ohio App.3d 29, 35, 619 N.E.2d 1135. In other words, for the defense to apply, the marijuana must be solely for the defendant's use. This means that the defendant did not willingly share or distribute the marijuana in any fashion. We further noted that the "apparent legislative justification for the 'personal use' defense is that those charged with possessing modest amounts of controlled substances or cultivating marijuana may have intended to merely consume the drug rather than distribute it." Id., citing *State v. Allen* (Jan. 23, 1992), Montgomery App. No. 12675, 1992 WL 15158. The trial court found that Kyer testified that she knew about the plants and that she smoked them with Berecz. The record does not necessarily support this finding. Our review of her testimony reveals that Kyer admitted that she "consumed" marijuana with Berecz in that room (she did not specify when). She specifically stated that she did not observe Berecz smoking marijuana on the day of the incident. Kyer admitted smoking one or two bowls of marijuana in the late afternoon on the day in question. But she did not testify as to where she obtained that marijuana. Even though she admitted receiving marijuana from Berecz sometime in the

past, she did not indicate she received anything from the twenty-nine plants that form the basis of this charge.

{¶42} Berecz argues that the trial court should have given the personal use instruction because an officer familiar with the drug trade in Washington County did not have Berecz on his “radar” as someone selling marijuana. Berecz further argues that during their search of his bedroom, the deputies did not find any digital scales, which are indicative of illicit drug trade. Rather, they did locate a marijuana pipe and a bong, which imply personal use. Berecz also contends that there was no testimony establishing that the marijuana that Kyer smoked came from the plants located in his room. He alleges that the marijuana that Kyer smoked came from a separate stash located next to his bed. Apparently, he was not charged with possession of that marijuana.

{¶43} We do not believe that Berecz introduced sufficient evidence to cause a reasonable juror to question the existence of the personal use defense. The mere lack of digital scales in his room and the presence of a pipe and a bong are insufficient to lead a reasonable juror to the belief that the twenty-nine small marijuana plants were intended solely for personal use. The lack of digital scales and baggies in the proximity of immature or seedling plants has minute probative value on the issue of active drug trafficking, i.e., weighing amounts of marijuana for sale. The presence of a pipe and bong indicates Berecz was a marijuana user himself, but it does not rule out other illicit activities. We indicated in *Jackson*, supra, the defense is intended for possessing modest amounts of marijuana. By any measure, twenty-nine plants would seem to exceed a reasonable definition of modest. Neither the absence of scales and baggies

nor the presence of a bong/pipe lead to the reasonable conclusion that the twenty-nine plants were cultivated solely for his own individual use.

{¶44} Moreover, the fact that one officer testified that Berecz was not on his "radar" as a seller of drugs is entitled to only minimal weight on the issue of personal use. Moreover, this testimony would not indicate to a reasonable juror that the twenty-nine plants were solely for Berecz's personal use.

{¶45} Berecz did not testify at trial, and thus did not offer any evidence as to his own personal use of marijuana. At best, the evidence supporting Berecz's request for an instruction can only be characterized as creating "a mere speculation or possible doubt." Thus, he was not entitled to the instruction.

D. CRIMINAL RULE 29 MOTION ON FELONIOUS ASSAULT CHARGES INVOLVING PARKS

{¶46} Berecz's next challenge is to the court's denial of his Crim.R. 29 motion for a judgment of acquittal on the two counts of felonious assault involving Parks. Crim.R. 29(A) requires a trial court to enter a judgment of acquittal of an offense if the evidence is insufficient to sustain a conviction. We review this assignment of error de novo because "[w]hether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. As an appellate court, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis sic). *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781.

{¶47} In pertinent part, R.C. 2903.11 reads:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶48} In Count Two, Berecz was found guilty of violating subsection (A)(1), i.e., causing serious physical harm to Parks. In Count Three, Berecz was found guilty of using a deadly weapon to cause physical harm to Parks, in violation of subsection (A)(2). In his assignment of error, Berecz challenges the denial of his motion for a directed verdict on both counts. But he limits his argument to whether the State's evidence of serious physical harm was legally insufficient to go to the jury. We therefore limit our review to the trial court's denial of a directed verdict on Count Two. See App.R. 12(A)(2) and App.R. 16(A).

{¶49} Berecz claims that Parks did not lose consciousness, and the wounds he suffered were superficial, "basically a bad cut." Under R.C. 2901.01(A)(5), "serious physical harm" means:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree or prolonged or intractable pain.

{¶50} We recently addressed whether a minor orbital fracture (a fracture of the bone encasing the eyeball) that did not require surgery was a sufficient injury to constitute "serious physical harm." See *State v. Jarrell*, Scioto App. No. 08CA3250, 2009-Ohio-3753. We held that a reasonable juror could conclude that such an injury met the statutory definition. Id. at ¶15. We examined other cases and noted that a broken tooth and a fracture of the orbit bone that penetrated the sinus cavity were sufficient to take the issue of serious physical harm to the jury. Id. at ¶13, citing *State v. Phillips*, Medina App. No. 06CA0027-M, 2006-Ohio-6906, at ¶2 and ¶¶16-18.

{¶51} Parks testified that as he was trying to escape in his cruiser, the passenger side of the vehicle exploded, he saw a flash, and then he went blind in his right eye. Parks testified that the bullet burned his eyelashes off, cut his eyelid in half, and then went through the bridge of his nose. As he drove to get help, blood was pouring from his wound into his mouth. He testified that he had trouble using his police radio because he had to blow blood out of his mouth so that he could speak.

{¶52} After receiving first aid, Parks was taken to a local Marietta hospital and then flown by helicopter to a Columbus hospital. He stayed in the trauma unit overnight and then went to the Havner Eye Institute the next morning for reconstructive surgery. To repair his nose, doctors had to burn the inside of the nose to close it and then stitch it from the outside. Doctors also had to stitch his eyelid back together.

{¶53} Parks testified that he now has a scar across the bridge of his nose. He has also developed an irregular astigmatism as a result of the incident. This condition is apparently uncorrectable, and will require him to wear glasses. In addition, Parks has a "smear" in his vision, caused by the manner in which his eyeball and eyelid healed.

Finally, Parks testified that he suffers anxiety attacks as a result of the shooting. The record also contains several photographs of Park's injuries that corroborate his testimony.

{¶54} In spite of Berecz's attempt to trivialize the matter, we have little trouble finding that the evidence was legally sufficient to allow the jury to decide whether Parks' injuries constituted serious physical harm. Parks' injuries could fall within a number of the Revised Code's definitions of serious physical injury. The bullet hit Parks in the face, thus, under R.C. 2901.01(A)(5)(b), the physical harm that he suffered carried with it a substantial risk of death. Parks' injuries could also fall within R.C. 2901.01(A)(5)(c), as an injury resulting in some permanent partial incapacity. Parks testified that he now suffers from astigmatism, causing some permanent partial incapacity in his right eye. Furthermore, his injuries could fall under R.C. 2901.01(A)(5)(d) as an injury causing some permanent disfigurement. He testified that he has a scar through the bridge of his nose and that his eyelid and eyeball are now deformed. Finally, a reasonable juror could conclude that being shot through the eyelid and nose is likely to result in "acute pain" under R.C. 2901.01(A)(5)(e).

{¶55} Parks' injuries were more serious in nature than a minor orbital fracture that required no surgery. They were not equivalent to a "bad cut" as Berecz suggests. There was sufficient evidence upon which a reasonable juror could find Berecz guilty of felonious assault. In fact, we find this assignment of error borders on being frivolous.

E. CRIMINAL RULE 29 MOTION ON FELONIOUS ASSAULT CHARGES INVOLVING THE GRAGANS

{¶56} Berecz challenges the trial court's denial of his Crim.R. 29 motion for a judgment of acquittal on Counts Five and Seven, which charge Berecz with felonious

assault against Helen and Jared Gragan. He claims that those charges should not have gone to the jury because there was insufficient evidence of his intent to injure them. As in the previous assignment of error, we conduct a de novo review to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson* at 319.

{¶57} In effect, Berecz is arguing that he could not have "knowingly" shot at the Gragans because they were parked far away, over a hill, and it was dark. As his attorney explained, "I don't think it's knowingly, because that would probably cause that certain result or be of a certain nature, and from that distance and that angle and that darkness, I don't see it." The State counters by arguing that there was abundant evidence of Berecz's intent to shoot sheriff's deputies responding that night, and to specifically fire rounds at Parks and Kyer. The State contends that Berecz's intent to shoot Parks and Kyer applied to the Gragrans through the doctrine of transferred intent.

{¶58} "[A] person acts knowingly, when regardless of his purpose, 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." R.C. 2901.22(B). "Knowingly" is a lesser level of culpability than "purposely." Although a crime committed "purposely" requires the specific intent to cause the resulting harm, to commit an act "knowingly" requires only that the criminal defendant be aware "that [the] result is practically certain to follow from his conduct, whatever his desire may be as to that result." *United States v. Bailey* (1980), 444 U.S. 394, 404, 100 S.Ct. 624, quoting *United States v. United States*

Gypsum Co., 483 U.S. 422, 445, 98 S.Ct. 2864. Thus, courts have often affirmed a finding that the defendant acted knowingly when the defendant shot a gun in a place where there is a real and substantial risk of injury to persons. Many of these cases involve a defendant shooting toward houses or residential areas. See, for example, *State v. Butticci* (Nov. 26, 1986), Lake App. No. 95-L-121, 1996 WL 702473 (defendant fired multiple times at a house and although the occupants may not have been visible, evidence sufficient to overrule motion for judgment of acquittal). See, also, *State v. Phillips* (1991), 75 Ohio App.3d 785, 600 N.E.2d 825; *State v. Dunaway* (June 24, 1993), Cuyahoga App. No. 62683, 1993 WL 227135, both cited in *Butticci*. But see, *State v. Powell* (Sept. 25, 1998), Lake App. No. 97-L-130, 1998 WL 682348 (reversing a conviction for improperly discharging a firearm into a habitation as against the manifest weight of the evidence and distinguishing between "knowingly" and "recklessly").

{¶59} Viewed in a light most favorable to the prosecution, there was sufficient evidence to allow a reasonable juror to conclude beyond a reasonable doubt that Berecz acted knowingly when he fired multiple rounds towards the Gragans' vehicle. The Gragans were parked in a lit area of the road when Berecz fired on Parks. It is reasonable to assume that he observed their vehicle when it was parked and the direction it traveled as it drove away. A moment later, a bullet struck that vehicle. When Berecz shot the rifle, he was firing multiple rounds across a public road. Clearly, a public road is a place where persons face a substantial risk of injury if they are fired upon. And even if it was too dark for Berecz to have actually seen the Gragans' vehicle when he hit it, his knowledge may still be inferred from the fact that he was firing his weapon down a public road where he had just seen that vehicle travel. Based upon the

temporal and spatial proximity of their car to the shooting spree, a reasonable juror could find that Berecz knowingly fired on the Gragans' vehicle.[2] Accordingly, the trial court properly denied Berecz's motion for a judgment of acquittal.

F. THE SENTENCING

{¶60} First, Berecz asserts that the trial court erred in sentencing him to multiple consecutive prison terms in addition to his sentence of ten years for the attempted murder of Parks. He received mandatory consecutive prison terms for a firearm specification imposed under R.C. 2929.14(D)(1)(a) and a peace officer specification imposed under R.C. 2929.14 (D)(1)(f).

{¶61} Under the Supreme Court of Ohio's decision in *State v. Kalish*, 120 Ohio App.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, appellate review of felony sentencing requires a two-step approach. First, we must ensure that the sentencing court has adhered to all applicable rules and statutes in imposing the sentence. This purely legal question is subject to review only to determine whether the sentence is clearly and convincingly contrary to the law. Id. at ¶14. If the trial court has followed the proper procedure and applied the appropriate statutory analysis, we review the trial court's decision concerning the appropriate sanction under an abuse of discretion standard. Id.

{¶62} Under R.C. 2929.14(D)(1)(a), the court imposed a three year mandatory prison term for a specification concerning the use of a firearm during the offense. See, also, R.C. 2941.145. Under R.C. 2929.14(D)(1)(f), the court imposed a seven year mandatory prison term for a specification concerning discharging a firearm at a peace officer while committing the underlying offense. See, also, R.C. 2941.1412. Thus,

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[2] In light of our decision on the jury's right to infer knowledge and the court's omission of a jury instruction on transferred intent, we do not address the State's argument concerning that doctrine.

Berecz was sentenced to a total of twenty years in prison for the attempted murder of Parks. Berecz argues that because the two specifications were both part of the same act, they should have been merged for the purposes of sentencing.

{¶63} The State agrees that the trial court improperly imposed the three year prison term for the specification of discharging a firearm, although for a different reason. Admirably, the State directs our attention to R.C. 2929.14(D)(1)(f). That section governs the imposition of a mandatory seven year prison term for the peace officer specification contained in R.C. 2941.1412. The last sentence of that code section reads: "[i]f a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense."

{¶64} Applying the first prong of *Kalish*, supra, we agree that the trial court's imposition of prison terms under both divisions R.C. 2929.14(D)(1)(a) and (D)(1)(f) is clearly and convincingly contrary to law. The trial court sentenced Berecz to an additional seven year mandatory term under section (D)(1)(f). The plain language of that section precluded the trial court from also imposing a prison term for a firearm specification under (D)(1)(a).

{¶65} In his next assignment of error, Berecz broadly argues that the trial court erred "in imposing numerous, consecutive prison terms in this case." Again, our appellate review is guided by *Kalish*, supra. In essence, Berecz contends a thirty-eight year prison sentence is too long for a defendant who has no previous felony convictions and who has never refused treatment for his obvious drug and alcohol abuse.

{¶66} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Supreme Court of Ohio held that trial courts now generally have discretion to impose more than the minimum, maximum, and consecutive sentences. And, certain consecutive sentencing provisions of R.C. 2929.14 are mandatory. Under R.C. 2929.14(E)(1)(c), if a mandatory prison term of seven years is imposed pursuant to the specification for discharging a firearm at a peace officer, it also must be served consecutively to and prior to the sentence imposed for the underlying offense. We see no legal error in the courts imposition of consecutive sentences, whether they are of the discretionary or mandatory type.

{¶67} Berecz also argues that his sentence is excessive because some of the factors contained in R.C. 2929.12 indicate he was less likely to recidivate. He points to the facts that he had no previous felony convictions and has not refused treatment for drug and alcohol abuse. However, the court recited a number of findings that indicated the seriousness of the crime and the likelihood that Berecz will recidivate. Those findings include: 1) the defendant caused serious physical harm to the victim; 2) the defendant used a deadly weapon to threaten the victims; 3) the defendant committed the offense while on probation; 4) the defendant has prior juvenile and adult convictions; 5) the defendant demonstrated a pattern of drug and alcohol abuse related to the offense and prior efforts at treatment have been unsuccessful. These factors clearly outweigh the favorable ones cited by Berecz.

{¶68} Berecz's claim that the sentence is excessive rings hollow when we review the statutory ranges available to the trial court. R.C. 2929.14 lists the range (in one-year increments) of definite prison terms that a judge may impose in felony

sentencing. For felonies of the first degree -- three to ten years; second degree -- two to eight years; third degree -- one to five years; fourth degree -- six to eighteen months; and fifth degree, six to twelve months. R.C. 2929.14(A)(1) – (A)(5). A trial judge has full discretion to impose a sentence within this basic statutory range. *Foster* at ¶100. If the sentence exceeds this statutory range, then it is clearly and convincingly contrary to law. *Kalish* at ¶15.

{¶69} For Count One, the attempted murder of Scott Parks, a first degree felony, the trial court imposed a ten year sentence with a seven year consecutive term for a peace officer specification.[3] For Count Five, the felonious assault of Helen Gragan, a second degree felony, the trial court imposed a consecutive eight year sentence with an additional three year consecutive term for the gun specification. For Count Ten, the felonious assault of Kyer, also a second degree felony, the trial court imposed a consecutive three year sentence with an additional three year consecutive term for the gun specification. Finally, for Count Sixteen, cultivation of marijuana, a fifth degree felony, the trial court imposed a one year consecutive sentence.

{¶70} Clearly, the trial court remained within the basic statutory ranges when sentencing Berecz. He was ordered to serve the maximum term on the attempted murder charge, one felonious assault charge, and the cultivation charge. But his sentence is still within the statutory guidelines and thus not contrary to law.

{¶71} Furthermore, we see no abuse of discretion in this sentence. Berecz engaged in wildly criminal behavior on the night in question. He recklessly fired bullets inside his mother's home, violently assaulted his girlfriend, and came within inches, if

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[3] We have already reversed the additional three-year firearm specification.

not less, of ending the lives of a deputy and two innocent passersby. His criminal background reveals a pattern of alcohol and drug abuse and a propensity to engage in domestic violence. His sentence was not contrary to law, was commensurate with the seriousness of his crime, and was within the trial court's discretion. This assignment of error is also meritless.

7. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶72} In Berecz's last assignment of error he alleges that his trial counsel was ineffective because "my lawyer would not let me take the stand and tell my side of the story[,]" and because "he did not investigate my case and witnesses after I gave him addresses and names to my mom and neighbors who I wanted to call as witnesses in my defense." Berecz claims that the outcome of the trial would have been different because "I know that if these people would have been called to testify, and I would have been able to take the stand, I would have been able to tell my side of the story and quite possible not be in the situation I am in today (sic)."

{¶73} We are unable to address the merits of Berecz's claims of ineffectiveness. To do so would require us to consider matters outside the record, which consists of "[t]he original papers and exhibits filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court * * *." App.R. 9. Berecz's assertions that his attorney denied him the chance to take the stand and failed to investigate witnesses rely on facts outside that record. The proper procedure for Berecz to assert these allegations is to petition the trial court for post-conviction relief under R.C. 2953.21. Accordingly, we overrule this assignment of error.

IV. CONCLUSION

{¶74} We overrule Berecz's first, second, third, fourth, fifth, seventh, and eighth assignments of errors. We sustain his sixth assignment of error, vacate his sentence as to Count One, and remand for resentencing on that Count.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: ________________________
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.