

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22838
v.	:	T.C. NO. 2007 CR 3147
THOMAS E. EVERETTE, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 30th day of October, 2009.

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FROELICH, J.

{¶ 1} Thomas E. Everette, Jr., was convicted after a jury trial in the Montgomery County Court of Common Pleas of two counts of aggravated murder, aggravated robbery, and grand theft of a motor vehicle, all with firearm specifications. Everette was also convicted by the court of having a weapon while under disability. The two aggravated

murder counts were merged, as were the firearm specifications, and Everette was sentenced to an aggregate term of life imprisonment with the possibility of parole after 28 years.

{¶ 2} Everette appeals from his convictions, claiming that his fundamental rights were violated when certain proceedings occurred in his absence, that the court erred in admitting certain autopsy photographs, that the court erred in giving the jury an instruction pursuant to *State v. Howard* (1989), 42 Ohio St.3d 18, and that the indictment failed to include a mental state for the firearm specifications. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} According to the State's evidence, on July 29, 2007, Everette shot Phillip Cope in the back of his head with a .9 mm handgun. At the time, Cope was in the bathroom of his apartment with Ashley Ross, who was staying in his apartment, bathing his dogs. Cope died from that single gunshot wound, and he was found in his bathroom by police at approximately 1:45 p.m. on the following day based on information received from Jason Snell, who was also staying with Cope.

{¶ 4} Immediately after the shooting, Everette asked Ross to "wipe some things down and grab the cup he was drinking out of" and to go with him. Everette told Ross to drive his Oldsmobile while he (Everette) drove Cope's green Camaro. Everette left the Camaro at a home near Nottingham Trailer Park, and the two drove together in Everette's vehicle to the trailer park. Everette told Ross that he had killed Cope because "Phil had robbed the wrong person" and that he had gotten money for shooting Cope. Everette later traded the .9 mm handgun to Daryl Stollings for drugs. Everette told Stollings "not to hold

onto the gun for a lengthy period of time, not to be caught with the gun because the gun was hot, it had a body on it.” Everette said the “body” was “a couple hours old.”

{¶ 5} Everette asserted that he had an alibi for the time of the shooting. At trial, he presented evidence that he was at the Dayton Tall Timbers Resort KOA campground in Brookville from 8:38 p.m. on July 28, 2007, until 12:37 p.m. on July 29, 2007. Witnesses on Everette’s behalf testified that, upon returning from camping, he took a shower, and went to bed. Everette next left the house after dinner to go to his brother’s home. Everette asserted that other individuals could have shot Cope, including Ross, Stollings, and Snell, who had stolen Cope’s television and pawned it on July 30, 2007.

{¶ 6} On August 13, 2007, Everette was indicted for aggravated murder (prior calculation and design) with a firearm specification, aggravated murder (while committing or fleeing immediately after committing an aggravated robbery) with a firearm specification, aggravated robbery with a firearm specification, grand theft of a motor vehicle with a firearm specification, and having a weapon while under disability. In February 2008, a jury trial was held on the charges. On February 28, 2008, the trial court declared a mistrial due to the jury’s inability to reach a unanimous verdict.

{¶ 7} In June 2008, a second jury trial was conducted on the aggravated murder, aggravated robbery, and grand theft charges; the charge of having a weapon while under disability was tried to the bench. During deliberations, the jury sent several questions to the judge and also asked if they could re-hear Ross’s testimony. After approximately six hours of deliberations, excluding breaks and meals, the jury informed the court that it was deadlocked. Over defense counsel’s objection, the court gave the jury Ohio’s version of

the so-called “dynamite charge,” in accordance with *Howard* and 2 Ohio Jury Instructions (2008), Section 429.09(2), and gave the jury the option of continuing deliberations at that time or returning in the morning. The jury decided to return the following day, to the dismay of one of the jurors who orally expressed her frustration as the group was walking to the garage.

{¶ 8} The following day, the court informed counsel of the one juror’s comments, which prompted Everette’s counsel to move for a mistrial. That motion was denied. After further deliberations, the jury convicted Everette of the four charges before it and the accompanying firearm specifications. The same day, the court found Everette guilty of having a weapon while under disability. Everette was sentenced accordingly.

{¶ 9} Everette appeals from his convictions, raising four assignments of error.

II

{¶ 10} Everette’s first assignment of error states:

{¶ 11} “THE TRIAL COURT ERRED BY CONDUCTING PROCEEDINGS OUTSIDE THE PRESENCE OF APPELLANT, VIOLATING HIS RIGHTS UNDER ARTICLE I § 10 OF THE CONSTITUTION OF THE STATE OF OHIO.”

{¶ 12} In his first assignment of error, Everette claims that his constitutional rights were violated when he was not present for two critical proceedings during jury deliberations.

{¶ 13} A criminal defendant has a fundamental right to present at all “critical stages” of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A); *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, at ¶100. “An accused’s absence, however, does not necessarily result in prejudicial or constitutional error.” *State v. Davis*, 116 Ohio St.3d 404,

2008-Ohio-2, at ¶90. “[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”

Id., quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-108, 54 S.Ct. 330, 78 L.Ed. 674, overruled on other grounds, *Duncan v. Louisiana* (1968), 391 U.S. 145, 154, 88 S.Ct. 1444, 20 L.Ed.2d 491.

{¶ 14} Everette asserts that his fundamental rights were violated when he was absent from two discussions between the court and counsel after the jury retired to deliberate. On the first occasion, the court noted that Everette “is not present since he remains at the County Jail. But, for this particular proceeding since we’re not in the presence of the jury, I feel comfortable proceeding without him.” Everette’s counsel informed the court that, “for what it’s worth I’ll waive his presence. My intention is after we break here on – on this brief session, I’m going to go over to the jail and bring him up to speed on everything that we’ve done.” The court and counsel then discussed a series of questions sent by the jury regarding various witnesses’ testimony and whether the jurors could rehear Ashley Ross’s testimony. After consulting with counsel, the court sent written responses to the jury.

{¶ 15} We find no violation of Everette’s fundamental rights when the court spoke with counsel and responded to jury questions during deliberations. Everette’s counsel waived his presence at the conference concerning the jury’s questions. *Hale* at ¶103. Moreover, the Supreme Court of Ohio has stated that a trial court’s written response to a jury question is not a critical stage of the criminal proceeding, *State v. Campbell*, 90 Ohio St.3d 320, 346, 2000-Ohio-183, and a defendant’s constitutional rights are not violated when he is absent during the conference regarding the court’s response to the jury questions. E.g., Id.

(defendant “had no right to be present at the legal discussion of how the [jury] question should be answered”); *State v. Martin*, Montgomery App. No. 22744, 2009-Ohio-5303; *State v. Williams*, Miami App. No. 2004 CA 6, 2004-Ohio-6218, at ¶10. See, also, *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶147 (absence from conference on jury instructions did not prevent a fair trial); *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶52 (same).

{¶ 16} Second, Everette complains that he was absent when his counsel made a motion for a mistrial. On the second day of deliberations, the trial court informed counsel, without Everette present, that, upon the jurors’ being escorted to the parking lot by the bailiff at the end of the previous day’s deliberations, one juror became “rather loud” and “said a few obscenities essentially to the effect *** that she was quite upset that she was being forced to come back today to continue deliberations, that continued deliberations were going to be of no use, and that the Court simply should not be forcing her and her fellow jurors to come back.” The court informed counsel that the juror had returned to the courtroom with the bailiff, and the judge had told her that he expected her to return the next day to continue deliberations. The juror left without incident and returned the following day. Everette’s counsel moved for a mistrial on the ground that the jury was hung. The court overruled the motion.

{¶ 17} Everette’s absence when his counsel moved for a mistrial was not prejudicial. The jury was not present, and no evidence or testimony was presented in Everette’s absence. See *Frazier* at ¶145. Further, Everette’s interests were protected by his counsel’s motion, which was a legal matter within counsel’s professional competence, and Everette’s

presence at this hearing would not have contributed to his defense. See *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶215 (stating that defendant’s absence from conferences was not prejudicial where counsel was present and participated, and the conferences “mostly involved legal issues within the professional competence of counsel, not issues that appellant must personally decide”).

{¶ 18} The first assignment of error is overruled.

III

{¶ 19} Everette’s second assignment of error states:

{¶ 20} “THE TRIAL COURT ERRED BY ADMITTING EVIDENCE WHERE ITS PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.”

{¶ 21} In his second assignment of error, Everette contends that the trial court abused its discretion in admitting, over his objection, State’s Exhibits 6 through 9, which consisted of graphic autopsy photographs. Everette argues that the unfair prejudice caused by the gruesome nature of the photographs substantially outweighed the photographs’ probative value.

{¶ 22} In general, relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A). The decision whether to admit evidence is left to the sound discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion means more than a mere error of law

or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 23} At trial, the State stated its intention to present ten photographs of Cope during the testimony of Dr. Bryan Casto, forensic pathologist and deputy coroner with the Montgomery County Coroner's Office.¹ Exhibit 6 was a photograph of Cope's left eye with the eyelid retracted, which showed the path that the bullet traveled through Cope's eye. Exhibit 7 depicted the significant skull fracture caused by the bullet. Exhibit 8 showed the base of the skull with the top of the skull and the brain removed. Exhibit 9 was a photograph of the bottom of the brain after it had been removed from the skull.

{¶ 24} Everette objected to Exhibits 6 through 9, arguing that the photographs were inflammatory and did not add to the case or to proving the cause of death. The State replied that the photographs were relevant to whether Everette had purposefully caused Cope's death, for which the State had the burden of proof. Everette's counsel responded that he was willing to stipulate to Dr. Casto's expertise in the field of forensic pathology and to his qualifications to testify at trial regarding the cause of death. Everette was also willing to stipulate to Dr. Casto's opinion that Cope's death was caused by a gunshot wound to the

¹Exhibits 1 and 2 displayed Cope's body as he was received from his apartment, one photograph from the left side and one from the right. Everette objected to the introduction of both photographs, arguing that one view was sufficient. The court admitted both over Everette's objection, stating that the two photographs did not have "that type of prejudicial, shocking impact upon the jury." Everette has not appealed from this ruling. Exhibit 3 was the identification photograph for Cope. Exhibit 4 showed the entrance wound to the back of Cope's head, taken after his hair had been shaved. Exhibit 5 was a close-up of Cope's eye and showed the exit wound. Exhibit 10 showed two metal fragments of the bullet, which were recovered from Cope's head. Everette did not object to Exhibits 3, 4, 5, and 10.

back of the head. The court determined that it needed to voir dire Dr. Casto to “see from his perspective as an expert how the four photographs advance the issue of purpose.”

{¶ 25} During the voir dire examination of Dr. Casto outside the presence of the jury, Dr. Casto explained that the purpose of Exhibit 6 was to show the path of the bullet, and the photograph helped “connect the dots between what structures are being injured as the bullet passes from the back of the head through the left upper eyelid.” As to Exhibit 7, Dr. Casto stated: “This photograph is of value because it demonstrates [that Cope was] clearly alive when he sustains the gunshot wound. In other words, he is not dead from drowning in the tub and then subsequently shot, or dead from an overdose and subsequently shot.” Dr. Casto explained that Exhibit 8 helped confirm that the entrance wound was, in fact, to the back of the head as in an execution-style shooting rather than the bullet entering through the eye and exiting out the back of the head. Exhibit 9 demonstrated the large amount of destruction to the right side of the brain caused by the gunshot wound and the bruising of the brain on the left side.

{¶ 26} After the voir dire examination of Dr. Casto, the State indicated that it would accept Everette’s stipulation as to Dr. Casto’s expertise, but would not accept the second part of the stipulation regarding Dr. Casto’s opinion of the cause of death.

{¶ 27} The trial court admitted Exhibit 6, stating that it is “not so graphic that it has any application to Evidence Rule 403.” The court found Exhibit 7 to be relevant, because it demonstrated that Cope was alive when then gunshot wound was inflicted. The court admitted that exhibit despite the fact that it was “quite graphic.” As to Exhibit 8, the court

stated: “Exhibit 8 will help confirm that this was a back of the head shot, an execution style killing, which it does obviously go to the issue of whether or not this was a purposeful killing. Therefore, even though once again it is quite graphic, I will allow it.” In contrast, the court excluded Exhibit 9 under Evid.R. 403, stating that it only showed that death was not immediate, which was not relevant because “we know that that caused the death and it’s a very graphic photo.”

{¶ 28} We find no fault with the trial court’s ruling. As we stated in *State v. Wade*, Montgomery App. No. 21530, 2007-Ohio-1060, “[a]utopsy photos are inherently prejudicial when they depict gruesome, graphic wounds, but when offered to prove elements of the offense that the State has the burden of proving, they are usually not *unfairly* prejudicial. That is the case here.” *Id.* at ¶35; see, also, *State v. Whitfield*, Montgomery App. No. 22432, 2009-Ohio-293, at ¶120-127.

{¶ 29} The State had the burden to prove that Everette had purposefully killed Cope. As found by the trial court, Exhibit 8 helped to explain that the bullet wound entered the back of the skull, as in an execution-style shooting, and not through the left eye. Exhibit 7 established that Cope was alive when he was shot, and Exhibit 6 helped explain the cause of death. The State presented a limited number of autopsy photos, they were not cumulative, and each of the disputed photographs was probative of the manner of Cope’s death. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, at ¶113. Although the photographs are graphic, their probative value was not substantially outweighed by unfair prejudice. The trial court did not err in admitting the autopsy photographs, Exhibits 6-8.

{¶ 30} The second assignment of error is overruled.

IV

{¶ 31} Everette’s third assignment of error states:

{¶ 32} “THE TRIAL COURT ERRED IN ITS SUPPLEMENTAL INSTRUCTIONS TO THE JURY, VIOLATING APPELLANT’S RIGHTS TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS.”

{¶ 33} In his third assignment of error, Everette claims that the trial court erred in providing a *Howard* instruction, over the objection of defense counsel, after the jury informed the court that it could not reach a unanimous verdict. He argues: “The jury had clearly and unreservedly communicated that it was deadlocked and going further would require the surrender of honest convictions. The Trial Court did not appear to take into account that this was the second communication from the jury indicating difficulty in reaching unanimity. The fact that the case had previously hung a jury appeared to press the Trial Court to give the instruction after only six hours of deliberations, which in turn pressed the jurors to bring in a verdict.” Alternatively, Everette asserts that the trial court’s failure to give an instruction under 2 Ohio Jury Instructions (2008), Section 429.09(3) rendered the *Howard* instruction unduly coercive.

{¶ 34} At approximately 10:30 p.m., after approximately six hours of deliberations, the jury sent the judge a note, which stated: “We, the jury, have come to the conclusion that we cannot make a unanimous decision without the surrender of honest convictions in order to be congenial or to reach a verdict solely because of the opinion of other jurors.” Over defense counsel’s objection, the court responded to the note by instructing the jury in accordance with *Howard* and 2 Ohio Jury Instructions (2008), Section 429.09(2), as follows:

{¶ 35} “The principle mode provided by our Constitution and our laws for deciding questions of fact in a criminal case is by jury verdict.

{¶ 36} “In a large proportion of cases, absolute certainty cannot be obtained or expected.

{¶ 37} “Although the verdict must reflect the verdict of each individual juror and must not be mere acquiescence in the conclusion of your fellow jurors, each question submitted to you should be examined with proper regard and deference to the opinions of others.

{¶ 38} “You should consider it desirable that the case be decided.

{¶ 39} “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.

{¶ 40} “Likewise, there is no reason to believe that more or clearer evidence will – will be produced by either side.

{¶ 41} “It is your duty to decide the case if you can do so with a clean conscious [sic].

{¶ 42} “You should listen to one another’s arguments with a disposition to be persuaded.

{¶ 43} “Do not hesitate to re-examine your views and change your position if you are convinced it is erroneous.

{¶ 44} “If there is disagreement, all jurors should re-examine their positions given that a unanimous verdict has not been reached.

{¶ 45} “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.

{¶ 46} “Likewise, jurors for conviction should ask themselves whether they might reasonably doubt the correctness of a judgment not concurred in by all other jurors.”

{¶ 47} Section 429.09(3), which was not given to the jury, states:

{¶ 48} “It is conceivable that after a reasonable length of time honest differences of opinion on the evidence may prevent an agreement upon a verdict. When that condition exists you may consider whether further deliberations will serve a useful purpose. If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations.”

{¶ 49} “Jury instructions are within the trial court’s discretion. Accordingly, a trial court’s decision whether to give a *Howard* instruction is within its discretion, and this court will not reverse that decision absent an abuse of discretion.” (Citations omitted). *State v. Lightner*, Hardin App. No. 6-09-02, 2009-Ohio-4443, at ¶11.

{¶ 50} Upon review of the record, the trial court did not abuse its discretion when it instructed the jury in accordance with *Howard* upon receipt of the jury’s note. The trial court’s supplemental instruction tracked the language approved by the Supreme Court of Ohio in *Howard*. Although a previous trial had ended in a mistrial due to that jury’s inability to reach a unanimous verdict, this jury had not previously indicated that it could not reach a verdict, and it had been deliberating for six hours, having received the case earlier in

the day on the fourth day of trial. Further, the fact that the jury indicated that it could not reach a verdict without surrendering honest convictions did not require the court to accept this untested belief or to give an instruction under Section 429.09(3). As we stated in *State v. Smith*, Montgomery App. No. 19370, 2003-Ohio-903:

{¶ 51} “We do recognize, of course, that in most cases of this nature, a note from a jury simply reports the existence of a deadlock. In the present case, the forelady went further, expressing an opinion that additional deliberation would not change the situation. In our view, however, such an assertion is implicit in virtually every instance when jurors report an inability to reach a unanimous verdict. Indeed, if jurors thought that continued deliberation might break a deadlock, they presumably would continue deliberating rather than stopping to report a deadlock. As a result, we find nothing particularly significant about the language employed by the forelady in this case. Her untested belief that further deliberation would prove futile did not prohibit the trial court from exercising its discretion to read the *Howard* charge.” (Footnote omitted) *Id.* at ¶7.

{¶ 52} The trial court was entitled to encourage the jury to make continued efforts to reach a verdict, if they could conscientiously do so. *Howard*, 42 Ohio St.3d at 25. The court did not coerce the jury to reach a verdict or mislead the jury, by failing to give the instruction under Section 429.09(3), into believing that a deadlocked jury was not an option.

{¶ 53} The third assignment of error is overruled.

V

{¶ 54} Everette’s fourth assignment of error states:

{¶ 55} “THE TRIAL COURT COMMITTED STRUCTURAL ERROR IN

CONVICING APPELLANT OF THE FIREARM SPECIFICATION, IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF OHIO.”

{¶ 56} In his fourth assignment of error, Everette claims that the firearm specifications in the indictment fail to include recklessness as the culpable mental state and that the failure to include the mental state amounts to structural error. We recently addressed and rejected this argument in *State v. Vann*, Montgomery App. No. 22818, 2009-Ohio-5308, reasoning:

{¶ 57} “*** [A] firearm specification is not an element of the predicate offense, and it does not raise the felony level of the offense. Neither is a firearm specification a separate criminal offense that requires proof of a culpable mental state separate from commission of the predicate offense. *State v. Cook*, Summit App. No. 24058, 2008-Ohio-4841; *State v. Gilbert*, Cuyahoga App. No. 90615, 2009-Ohio-463. Rather, a firearm specification is merely a penalty enhancement that attaches to some predicate offense.

{¶ 58} “R.C. 2941.145 provides that an offender may be sentenced to an additional three year term of imprisonment where the indictment specifies that ‘the offender had a firearm on or about the offender’s person or under the offender’s control *while committing the offense*, and either displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used the firearm to facilitate the offense.’ As the Court of Appeals in *Cook* noted, ‘by its own terms, the statute requires that an underlying offense occur for the firearm specification to be applicable.’ *Id.* at ¶9. It cannot stand alone, and is not itself a separate offense. *Id.* Therefore, a firearm specification does not require its own

mens rea. Id. at ¶8.

{¶ 59} “Simply put, the holdings in *Lozier* [*State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732] and *Colon* [*State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624] do not apply to firearm specifications because they are neither elements of the predicate offense to which they are attached nor separate criminal offenses. Therefore, convictions for firearm specifications do not require proof of a culpable mental state. *Cook; Gilbert.*” *Vann* at ¶12-14.

{¶ 60} Based on our opinion in *Vann*, Everett’s fourth assignment of error is overruled.

VI

{¶ 61} The judgment of the trial court will be affirmed.

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FAIN, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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