[Cite as *State v. Morris*, 2010-Ohio-786.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1032 (C.P.C. No. 04CR07-4866)
Kristoffer Morris,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 4, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher,* for appellee.

Kristoffer Morris, pro se.

ON APPLICATION FOR REOPENING

CONNOR, J.

{¶1} Defendant-appellant, Kristoffer Morris ("defendant"), filed a pro se application pursuant to App.R. 26(B) seeking to reopen his appeal resolved in this court's decision in *State v. Morris*, 10th Dist. No. 05AP-1032, 2007-Ohio-2382, claiming ineffective assistance of appellate counsel. The State of Ohio filed a memorandum in opposition to defendant's application. Because defendant's application was filed untimely

without good cause, and because he failed to demonstrate a genuine issue that he was deprived of effective assistance of counsel, we deny his application to reopen.

{¶2} In his appeal, defendant, through counsel, argued that his convictions for aggravated murder and felonious assault, both of which also contained firearm specifications, were not supported by sufficient evidence, while his convictions for murder, aggravated murder, and attempted murder, which also contained firearm specifications, were against the manifest weight of the evidence.[1] Defendant also argued the trial court erred in giving him maximum consecutive sentences when there were no facts proven to a jury to support such sentences. Finally, defendant argued the trial court erred in giving a jury instruction that violated his right to remain silent.

{¶3} App.R. 26(B) allows applications to reopen an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. App.R. 26(B)(1) provides that an application for reopening shall be filed within 90 days from the journalization of the appellate judgment. Additionally, App.R. 26(B)(2)(b) requires a showing of good cause for an untimely filing where the application is filed more than 90 days after the journalization of the appellate judgment.

{¶4} An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]" App.R. 26(B)(2)(c).

[1] Defendant was also convicted on charges of aggravated burglary, involuntary manslaughter, and having a weapon under disability.

The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶5} To prevail on an application to reopen, defendant must make "a colorable claim" of ineffective assistance of appellate counsel under the standard established in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. See *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶2, citing *State v. Sanders*, 75 Ohio St.3d 607, 1996-Ohio-38. Under *Strickland*, defendant must demonstrate the following: (1) counsel was deficient in failing to raise the issues defendant now presents; and (2) defendant had a reasonable probability of success if the issue had been presented on appeal. *Lee* at ¶2, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005-Ohio-3991.

{¶6} An appellate attorney has wide latitude and the discretion to decide which issues and arguments will prove most useful on appeal. Furthermore, appellate counsel is not required to argue assignments of error that are meritless. *Lee* at ¶3, citing *State v. Lowe*, 8th Dist. No. 82997, 2005-Ohio-5986, ¶17.

{¶7} In his application, defendant alleges appellate counsel rendered ineffective assistance of counsel for failing to raise the following five assignments of error in his direct appeal:

FIRST ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR IN FAILING TO INSTRUCT THE JURY AS TO WHAT CONSTITUTED TRESPASSING WHEN HE WAS INDICTED FOR AGGRAVATED BURGLARY.

SECOND ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED REVERSIBLE AND PREJUDICIAL ERROR IN ENTERING A JUDGMENT OF

CONVICTION FOR AGGRAVATED BURGLARY WHERE THE VERDICT FORM IS INCONSISTENT WITH R.C. 2945.75.

THIRD ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO DISMISS THE AGGRAVATED BURGLARY COUNT WHERE THE INDICTMENT FAILS TO CHARGE AN OFFENSE.

FOURTH ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION OR REQUEST THAT A LESSER INCLUDED OFFENSE OF NEGLIGENT ASSAULT BE GIVEN FOR FELONIOUS ASSAULT.

FIFTH ASSIGNMENT OF ERROR

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO DISMISS THE FELONIOUS ASSAULT COUNTS PURSUANT TO R.C. 1.51.

{¶8} Here, defendant's application for reopening was filed more than 21 months after the journalization of our appellate judgment. App.R. 26(B)(2)(b) requires a showing of good cause where an application for reopening is filed more than 90 days after the journalization of the appellate judgment. Defendant has clearly failed to file his application within 90 days of the journalization of the appellate judgment. Therefore, we must determine whether defendant has established good cause for his failure to file a timely application.

{¶9} Defendant contends he can establish good cause for his untimely filing, due to his alleged diagnosis and classification by the Ohio Department of Rehabilitation and Corrections as "seriously mentally ill" under a "C1" standard. However, the documents

submitted by defendant fail to explain whether he is classified as a "C1 categorical" or a "C1 functional."

{¶10} Defendant unsuccessfully advanced this same argument in his petition for habeas relief in federal district court, whereby he claimed he had established cause for failing to exhaust state court remedies. See *Morris v. Kerns* (Sept. 2, 2009), S.D.Ohio No. 2:08-cv-1176. We too reject the argument that his alleged classification as "seriously mentally ill" under a "C1" standard establishes good cause for his untimely filing. There is nothing in the record to support his claim that his mental health issues prevented him from filing a timely application to reopen. See also *State v. Haliym* (Aug. 27, 2001), 8th Dist. No. 54771 (court rejected the defendant's claim of mental impairment arising from a gunshot wound to the head as sufficient to establish good cause for waiting more than ten years to file his application).

{¶11} Furthermore, even in considering the merits of defendant's application, defendant has failed to demonstrate a genuine issue that his appellate counsel was ineffective.

{¶12} Defendant's first, second, and third assignments of error all revolve around the aggravated burglary conviction, which was not specifically challenged on appeal. In his first assignment of error, defendant argues his counsel erred in failing to raise the issue of the trial court’s failure to define trespass within its instruction on the aggravated burglary offense. Defendant's counsel did not raise this issue during the trial proceedings.

{¶13} Under Crim.R. 30, a defendant is prohibited from contesting the trial court’s jury instructions on appeal unless the defendant raised a specific objection prior to the

start of jury deliberations. Additionally, a defendant must specifically state his objection and the grounds for the objection. See Crim.R. 30.

{¶14} Any alleged error in the direct appeal as to jury instructions that might have been raised by appellate counsel on appeal is subject to a plain error analysis, since there is nothing before us to indicate that trial counsel objected to the jury instructions. *State v. Davis*, 7th Dist. No. 05 MA 235, 2008-Ohio-2927. The Supreme Court of Ohio has taken a limited view of the plain error rule with respect to jury instructions. "[A] jury instruction * * * does not constitute a plain error or defect under Crim. R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise. Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 96-97.

{¶15} Furthermore, failure of the trial court to separately and specifically instruct the jury on every essential element of each crime with which a defendant is charged does not per se constitute plain error under Crim.R. 52(B). *State v. Adams* (1980), 62 Ohio St.2d 151, paragraph two of the syllabus. A defendant bears the burden of demonstrating that plain error affected his substantial rights. Even if a defendant satisfies this burden, a reviewing court has the discretion to disregard the error and should correct it only to prevent a manifest miscarriage of justice. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297. The reviewing court must examine the record in order to determine whether that failure may have resulted in a manifest miscarriage of justice. *Adams*, paragraph three of the syllabus, citing *Long*, paragraph three of the syllabus.

{¶16} Here, we have only a limited record to review. Given this, and the lack of evidence indicating that he objected to the aggravated burglary instruction, defendant has failed to demonstrate a reasonable probability of success, even if the issue had been raised in his direct appeal. Furthermore, he has not demonstrated how this deficiency prejudicially affected his appeal and created a manifest miscarriage of justice. Therefore, we find defendant's first assignment of error to be without merit.

{¶17} In his second assignment of error, defendant argues that the verdict form for his aggravated burglary conviction is inconsistent with R.C. 2945.75, and thus his counsel was ineffective for failing to raise this error. We disagree.

{¶18} R.C. 2945.75 provides that a guilty verdict form must state either the degree of the offense of which the offender is found guilty, or that an additional element or elements are present. Otherwise, the guilty verdict constitutes a finding of guilty for the least degree of the offense charged. Here, a conviction for aggravated burglary can only constitute a conviction for a first degree felony offense, as this statute does not provide for offenses of varying degrees. Also, there are no additional elements which could elevate the degree of the offense for an aggravated burglary conviction, as it is always a first degree felony. Therefore, appellate counsel was not ineffective in failing to raise this meritless claim.

{¶19} In his third assignment of error, defendant argues his counsel was ineffective for failing to move to dismiss the aggravated burglary count because the indictment failed to set forth a culpable mental state for the "stealth, force or deception" element. Defendant also argues that the jury should have been instructed on the element of recklessness. We disagree with both assertions.

{¶20} Here, defendant appears to be arguing that the holding in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon I*"), is applicable to his application to reopen his appeal. Although it appears defendant would be barred from raising this claim, given the timing of this case, assuming for the sake of argument that the holding in *Colon I* is applicable to the extent that defendant's case had not yet concluded,[2] we find that the holding in *Colon I* is not applicable to a conviction for aggravated burglary. *Colon I* is not applicable to burglary indictments. See *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554. See also *State v. Mills*, 10th Dist. No. 08AP-687, 2008-Ohio-6609, citing to *State v. Davis*, 8th Dist. No. 90050, 2008-Ohio-3453 (burglary statutes contain the mental state of purposefully; furthermore, the mental state of knowingly is required by trespassing and is also incorporated by reference into the burglary statutes).

{¶21} In his fourth assignment of error, defendant argues his counsel should have requested an instruction for negligent assault as a lesser included offense of felonious assault. We disagree.

{¶22} Felonious assault is committed by causing serious physical harm or by causing or attempting to cause physical harm by means of a deadly weapon or dangerous ordnance, thereby creating separate, alternative offenses. *State v. Danko*, 9th Dist. No. 07CA0070-M, 2008-Ohio-2903 (discretionary appeal not allowed). As a result, negligent assault is a lesser included offense of felonious assault where it is statutorily defined in the alternative of causing physical harm. Id. A charge on such a lesser

[2] *Colon I* is applicable to situations where a case had not yet concluded and was pending when the rule in *Colon I* was announced. Here, given the number of appeals defendant has filed and the federal habeas petition, and given the limited information provided to the court on this issue, it is unclear whether or not defendant's case was still pending at the time *Colon I* was decided.

included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *Danko*, citing *State v. Kidder* (1987), 32 Ohio St.3d 279. Here, however, such an instruction is not supported by the evidence, given that the evidence demonstrated that defendant fired his weapon over his shoulder in the direction of pursuing police officers, without striking the officers, as he attempted to flee the area. Thus, the evidence sufficiently supports the position that defendant *attempted* to cause physical harm, not that he actually caused physical harm. Negligent assault is not a lesser included offense of this alternative.

{¶23} Furthermore, the Supreme Court of Ohio has recognized that the "[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel." *State v. Griffie* (1996), 74 Ohio St.3d 332, 333, 1996-Ohio-71. Without some additional evidence from the record, which has not been provided, we cannot simply say that the failure to request an instruction for the lesser-included offense constitutes ineffective assistance of counsel, particularly when the limited evidence before us does indicate that defendant instructed his attorney to object to any lesser-included offenses being given to the jury. See also *State v. Clayton* (1980), 62 Ohio St.2d 45.

{¶24} Finally, in his fifth assignment of error, defendant submits his counsel was ineffective in failing to file a motion to dismiss the felonious assault charges under R.C. 1.51. This statute provides that if a general provision is in conflict with a special or local provision, and if the conflict is irreconcilable, the special or local provision must prevail as an exception to the general provision, unless the general provision was adopted later and

the manifest intent is that the general provision should prevail. Defendant contends felonious assault is a general provision which is in conflict with the local provision for negligent assault contained under Columbus City Code 2303.14, and therefore, he should have been charged with the local provision for the less serious offense of negligent assault. Again, we disagree, based in part upon our analysis as set forth above.

{¶25} As previously stated, felonious assault is defined as knowingly causing serious physical harm to another, or knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance. Under the facts as alleged in the instant case, felonious assault was properly defined in the jury instructions as knowingly causing or attempting to cause physical harm by means of a deadly weapon or dangerous ordnance. Because the victims of the felonious assault counts were peace officers, the offenses were indicted as felonies of the first degree. See R.C. 2903.11. Negligent assault, on the other hand, is defined as negligently causing physical harm to another by means of a deadly weapon or dangerous ordnance. R.C. 2903.14. There is no provision within the negligent assault statute which elevates the level of the offense when the victim of such offense is a peace officer.

{¶26} While negligent assault can sometimes be a lesser-included offense of felonious assault, here, we previously determined there was sufficient evidence to support the jury's conclusion that defendant attempted to cause physical harm via a deadly weapon. Defendant's felonious assault convictions were based upon evidence demonstrating that defendant fired his weapon over his shoulder in the direction of pursuing police officers, without striking the officers, as he attempted to flee the area. The evidence does not support the position that defendant actually negligently caused

physical harm by means of a deadly weapon. Thus, defendant's argument that the more "specific" provision of negligent assault more appropriately described his conduct is not supported by the evidence. Accordingly, defendant's counsel did not err in failing to request to dismiss the felonious assault charges.

{¶27} In conclusion, we find defendant's appellate counsel was not deficient in failing to raise the issues defendant has presented in this application. Furthermore, we find defendant has not demonstrated a reasonable probability of success even if the issues had been presented in his direct appeal. Therefore, we deny his application for reopening.

Application for reopening denied.

BRYANT and McGRATH, JJ., concur.

_____