

[Cite as *State v. Norris*, 2009-Ohio-2372.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90896

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NICOLE NORRIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-480656

BEFORE: Gallagher, P.J., Blackmon, J., and Celebrezze, J.

RELEASED: May 21, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the

announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶1} Defendant-appellant Nicole Norris appeals her conviction from the Cuyahoga County Court of Common Pleas. Finding no merit to her arguments, we affirm.

{¶2} Norris was charged with one count of attempted murder with firearm specifications and two counts of felonious assault with firearm specifications, stemming from an incident that occurred on April 11, 2006, at approximately 10:30 p.m., in an apartment complex in Westlake, Ohio. On that Tuesday evening, Faye Thrasher, the victim, was returning home to her apartment complex after having dinner with her boyfriend, Joseph Gaydos, when she was shot by Norris.

{¶3} The victim and Gaydos testified that they noticed Norris opening the apartment complex entrance door and looking out at them, as if she was waiting for someone. The victim testified that when she opened the door to the common area, she immediately encountered Norris, who stood in her way. The victim said, "Excuse me," to Norris, who began asking the victim "where my mother f***ing boo was?" The victim said Norris raised her arms, hands together, and fired two shots at the victim from a distance of approximately three feet. The victim turned slightly and was struck once in the right shoulder by a bullet. The victim testified that she froze

in shock, but after realizing she was shot, she began running and screaming and banging on doors.

{¶4} Gaydos testified that as he and the victim attempted to enter the apartment complex, he observed Norris with a gun in her hand. Gaydos stated that Norris began to shoot and both he and the victim ran in different directions. A neighbor let the victim in and helped her with her gunshot wound. The victim called 911. She thought she was going to die.

{¶5} The Westlake Police Department received numerous 911 calls and responded almost immediately. The victim was located, and an ambulance was called. Soon thereafter, Norris was located; she voluntarily exited her apartment at the command of the police and was arrested and transported to the station. The police confiscated a .380 Bersa handgun, bullets, gun box, receipt from the gun store, and several clips from Norris's apartment.

{¶6} Norris was described by officers as calm and cooperative. She gave both an oral and a written statement. Her oral statement was recorded on video. Norris admitted that she shot the victim because she believed the victim had stolen things from Norris's apartment and taken showers in her shower. Norris stated that when the victim entered the apartment building, the victim just stood there and did not say anything.

{¶7} At trial, Norris testified on her own behalf. She stated that the victim had admitted stealing Norris's mail and CDs. In addition, Norris testified that the victim admitted breaking into Norris's apartment and showering in her shower. The

victim testified that she had neighbor problems with Norris regarding loud music, but the victim denied breaking into Norris's apartment, showering in Norris's shower, and stealing her CDs and her mail.

{¶8} Norris was found guilty of both counts of felonious assault with the gun specifications, but was found not guilty of attempted murder with the gun specifications. She was sentenced to five years in prison, and this appeal followed. Norris advances six assignments of error for our review.

{¶9} "1. The court erred by denying defendant's request to replace counsel in violation of defendant's rights under Article 1, Section 10 of the Ohio Constitution, Amendments V, VI and XIV of the United States Constitution and Crim.R. 44."

{¶10} "An indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate 'good cause' to warrant substitution of counsel." *United States v. Iles* (C.A.6, 1990), 906 F.2d 1122, 1130. "The trial judge may * * * [deny the requested substitution and] require the trial to proceed with assigned counsel participating if the complaint * * * is unreasonable." *State v. Deal* (1969), 17 Ohio St.2d 17, 46 Ohio Op.2d 154, 244 N.E.2d 742, syllabus. The trial court's decision is reviewed under an abuse-of-discretion standard. *Iles*, 906 F.2d at 1130, fn. 8.

{¶11} Norris complains that she and her attorney had a serious breakdown in their attorney-client relationship. Specifically, she points to the fact that the attorney informed the court that Norris wanted to waive a jury, when in fact she wanted a jury trial.

{¶12} A review of the record does not support Norris's complaint. The record reflects that Norris wanted to waive a jury but then changed her mind. She was tried to a jury.

{¶13} Norris also complained that she was not satisfied with her attorney because he had communicated with other persons about her mental health issues, instead of speaking with Norris herself.

{¶14} Norris's dissatisfaction stems from her belief that she does not have a mental illness. The trial court explained to her that any attorney who it appointed would find out that she had been diagnosed with a mental illness.

{¶15} The court advised Norris that she could hire a new attorney, but a new attorney would not be appointed to her. We find that the trial court did not abuse its discretion when it denied Norris's request for a new attorney. A review of the record shows that Norris's attorney worked extensively with her and for her. Accordingly, Norris's first assignment of error is overruled.

{¶16} "II. The court erred in refusing to instruct the jury as to the inferior offense of aggravated assault in violation of the United States Constitution Amendments V and XIV and Ohio Constitution Article 1 Section 10 and R.C. 2945.74."

{¶17} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. When

a defendant requests an instruction on an inferior offense, the burden is on the defendant to persuade the fact-finder of the mitigating elements of the offense. See *State v. Livingston*, Cuyahoga App. No. 88714, 2007-Ohio-3664; *State v. Hill* (1996), 108 Ohio App.3d 279, 284, 670 N.E.2d 555; *State v. Rhodes* (1992), 63 Ohio St.3d 613, 590 N.E.2d 261, syllabus.

{¶18} Aggravated assault is an inferior offense to felonious assault, meaning that “its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation.” *State v. Deem* (1988), 40 Ohio St.3d 205, 210-211, 533 N.E.2d 294; see, also, R.C. 2903.12(A). A jury instruction should be given for an inferior offense, if under any reasonable view of the evidence, and when all of the evidence is construed in a light most favorable to the defendant, a reasonable jury could find that the defendant had established by a preponderance of the evidence the mitigating circumstance of serious provocation. *Rhodes*, 63 Ohio St.3d at 617-618.

{¶19} In *State v. Mack*, 82 Ohio St.3d 198, 1998-Ohio-375, the supreme court explained that in order to instruct on the inferior offense of aggravated assault, an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. That is, the provocation must be “sufficient to arouse the passions of an ordinary person beyond the power of his or her control.” If this objective standard is met, the inquiry shifts to a subjective standard to determine whether the defendant in the particular case

“actually was under the influence of sudden passion or in a sudden fit of rage.” *Id.*, citing *Shane* (1992), 63 Ohio St.3d 630, 634-635, 590 N.E.2d 272, 276.

{¶20} Words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations. *Shane*, 63 Ohio St.3d at paragraph two of the syllabus. Also, past incidents or verbal threats do not satisfy the test for reasonably sufficient provocation when there is sufficient time for cooling off. *State v. Huertas* (1990), 51 Ohio St.3d 22, 31-32, 553 N.E.2d 1058, 1068-1069. Finally, fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage. See *State v. Collins* (1994), 97 Ohio App.3d 438, 445-446, 646 N.E.2d 1142, 1146-1148; *State v. Williams* (Aug. 13, 1992), Cuyahoga App. No. 60819.

{¶21} Norris argued that she was suffering under the belief that the victim had broken into Norris’s apartment in the past, stolen some of her property, and defiled her food. Even if what Norris believed was true, Norris had not seen the victim for three days. The victim did not do or say anything to provoke Norris. We find that there is no evidence of any serious provocation that would arouse the passions of an ordinary person beyond his or her control. Since Norris failed to meet the objective standard, we do not even get to how Norris’s mental health problems might have affected her decision. The trial court did not err when it did not instruct the jury on the inferior offense of aggravated assault. Norris’s second assignment of error is overruled.

{¶22} “III. Defendant Nicole Norris was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution.”

{¶23} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144. “Judicial scrutiny of counsel’s performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel.” *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Further, “trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance.” *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 10.

{¶24} “[W]here facts and circumstances indicate that a plea of not guilty by reason of insanity would have had a reasonable probability of success, it is ineffective assistance of counsel to fail to enter the plea. Where, however, the facts indicate that counsel was pursuing a reasonable strategy in failing to so plead, or where the likelihood of success for the plea is low, counsel’s actions cannot be called unreasonable.” *State v. Mangus*, Columbiana App. No. 07 CO 36, 2008-Ohio-6210 (internal citations omitted); *State v. Garcia*, Lucas App. No. L-07-1104, 2008-Ohio-2095.

{¶25} R.C. 2901.01(A)(14) provides that, “[a] person is ‘not guilty by reason of insanity’ relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code [by a preponderance of the evidence], that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person’s acts.”

{¶26} In this case, Norris was evaluated by the court psychiatric clinic on four separate occasions. After the first evaluation, Norris was found to suffer from a depressive disorder not otherwise specified, making her ineligible for the mental health docket. Her attorney requested a second evaluation by a different doctor because he had information from persons close to Norris that would support a transfer to the mental health docket. A second evaluation indicated that Norris suffered from schizoaffective disorder-depressive type, making her eligible for transfer to the mental health docket.

{¶27} Norris was then evaluated for competency to stand trial and sanity at the time of the offense. It was determined that Norris was competent to stand trial and sane at the time of the incident. A hearing was held wherein Norris’s attorney relayed to the judge that he explained all the options available to Norris and the consequences, including pleading guilty, pleading not guilty, and pleading not guilty by reason of insanity.

{¶28} Norris was given an opportunity to speak. She insisted that the psychological evaluation was wrong and that she did not suffer from schizoaffective

disorder. The court felt it had no choice but to re-refer Norris to the court psychiatric clinic for a competency and sanity evaluation.

{¶29} A fourth evaluation, by another psychologist, was conducted. It was again determined that Norris suffered from schizoaffective disorder-depressive type, but that she was competent to stand trial and sane at the time of the incident.

{¶30} Norris has not alleged that she was unable to understand the wrongfulness of her conduct at the time of the alleged offenses. Norris was found to be competent to stand trial and sane at the time of the incident. In addition, Norris disputes that she has any psychological issues other than depression, which stems from her sister's murder. We find that trial counsel was not ineffective when he did not pursue the defense of not guilty by reason of insanity. Norris's appellate attorney has not shown that such defense had a reasonable probability of success. Accordingly, we overrule Norris's third assignment of error.

{¶31} The remaining assignments of error were submitted by Norris pro se, and state the following:

{¶32} "IV. My rights were violated when excessive psychological evaluations were ordered. I was denied my right to a 'fair and speedy trial.'"

{¶33} "V. My rights were violated when I was denied a self-defense plea."

{¶34} "VI. The court was provided with faulty information that I was not informed of by my attorney. My constitutional rights were violated because I have a right to face my accusers."

{¶35} We decline to address these three assignments of error because Norris fails to cite any legal authority in support of her arguments. See App.R. 12(A)(2) and 16(A)(7).

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

**PATRICIA ANN BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR**