[Cite as *State v. Steele*, 2004-Ohio-4628.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 83388

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
JOHNNIE STEELE	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	SEPTEMBER 2, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-424186
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee:

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant appeals his conviction and the sentence imposed by the Cuyahoga County Court of Common Pleas, relative to the shooting death of his girlfriend, Sabrina Franklin. Upon review of the record presented and arguments of the parties, we hereby affirm the trial court for the reasons set forth below.

{¶2} Appellant, a 75-year-old man with no criminal record, was convicted of the aggravated murder of his girlfriend, Sabrina Franklin. The two had an on-again, off-again relationship for several years prior to the murder. On the night in question, the couple had gone out for the evening before returning to the appellant's apartment. At approximately 1:30 a.m., appellant and the victim had an argument, which culminated in appellant retrieving a gun from his bedroom and shooting the victim, first in the leg and then, fatally, in the chest.

{¶3} Approximately one hour after the shooting, appellant called his sister, who arrived at his apartment approximately one hour later. Appellant never called 911 or summoned medical assistance for the victim. He called authorities after his sister arrived and did not resist the search of his apartment or his arrest at the scene. After a jury trial, he was convicted of aggravated murder with a firearm specification resulting in a sentence of 20 years to life with a mandatory three years, run consecutively, for the specification. Appellant now presents four assignments of error for our review in this timely appeal.

{¶4} Appellant's first and second assignments of error are related in law and fact; therefore, they will be addressed together.

{¶5} "I. Johnnie Steele was deprived of his constitutional right to effective assistance of counsel by trial counsel's failure to request a jury instruction on an appropriate lesser offense."

{¶6} "II. Johnnie Steele was denied both his federal and state constitutional right to a fair trial before a jury when the trial court did not instruct the jury on the inferior degree crime of voluntary manslaughter."

{¶7} Appellant argues, first, that he was entitled to a jury instruction on any and all lesser included offenses of murder. He further argues that trial counsel's failure to insist on jury instructions as to voluntary manslaughter rises to the level of ineffective assistance of counsel. We do not agree that appellant was entitled to an instruction on voluntary manslaughter, therefore, both assignments of error fail.

{¶8} A jury instruction on a lesser 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." *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. The evidence must be reviewed in the light most favorable to the appellant in this situation. *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 303.

{¶9} In the instant case, the jury was instructed on both aggravated murder and murder. Appellant argues that the jury should have been instructed on voluntary manslaughter, a lesser crime of inferior degree. An inferior degree of the indicted offense is one whose elements are contained within the indicted offense, except for one or more additional mitigating elements. *State v. Deem* (1988), 40 Ohio St.3d 205, 209. The test for whether a judge should give a jury an instruction on a crime of inferior degree is the same test to be applied as when an instruction on a lesser included offense is sought. *State v. Hill* (1995), 108 Ohio App.3d 279, 283, citing *State v. Tyler* (1990), 50 Ohio St.3d 24, 37.

{¶10} The jury in this case was provided with the option of finding appellant guilty of the lesser included offense of murder, and it did not do so; it is not reasonable to then surmise that presented with the option of conviction on another lesser offense, they would have instead chosen that crime. The evidence showed that appellant and the victim had a disagreement that started in the bar where the two were drinking earlier in the evening. Testimony revealed that the appellant stated to one of the victim's friends at the bar during the disagreement that the victim "wouldn't be happy until [he] killed her." Upon arriving at the appellant's apartment, the appellant and the victim had another argument. Appellant testified that the argument was not particularly heated or violent; in fact, he testified that he would

not have classified the discussion he had with the victim at his apartment as an argument, but merely a "statement," and he further testified only that he was made to feel "less than a man" during that discussion. After this argument or "statement," appellant calmly proceeded to his bedroom, retrieved a loaded gun from the closet, returned to the living room where the victim was sitting, and shot her in the leg. The autopsy later showed that this shot broke the victim's femur and lodged in her thigh. Appellant testified that after the first bullet, the victim told him he would have to kill her since he had already shot her in the leg, and appellant immediately shot the victim again, through the heart. Appellant did not summon medical help for the victim, but instead waited hours after the shooting to call his sister and, eventually, the police.

{¶11} This evidence does not support acquittal on the crime charged; indeed, there is an abundance of evidence that the appellant committed this crime with prior calculation and design. R.C. 2903.01(A) states that "no person shall purposely and with prior calculation and design, cause the death of another." A person acts purposely when it is his specific intention to cause a certain result. R.C. 2901.22(A). "Prior calculation and design" is not defined under the Revised Code, but is generally understood to encompass the calculated decision to kill. *State v. Jones* (2001), 91 Ohio St.3d 335, 348. Voluntary manslaughter, on the other hand, is a knowing killing "while under the influence of

sudden passion or in a sudden fit of rage" which is the result of a serious provocation reasonably sufficient to incite the use of deadly force, and the provocation must have been brought about by the victim. R.C. 2903.03; *State v. Shane* (1992), 63 Ohio St.3d 630, 634. There is no evidence that the victim provoked the appellant into action on the night in question, which provocation would support a conviction as to the lesser offense. Appellant admits that he was not in a fit of rage or a sudden passion at the time of the murder, nor did the victim attack him or do anything else that may have been construed as provocation. Therefore, the two-part test, as set forth in *Thomas*, supra, is not satisfied, and a jury instruction on voluntary manslaughter was not necessary.

{¶12} Because we find that the appellant was not entitled to a jury instruction on voluntary manslaughter, we cannot find that his trial counsel's failure to request that instruction amounts to ineffective assistance of counsel. 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, 104 S.Ct. 2052, 80 L.Ed.2d 674, *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. Appellant cannot meet either prong of this test, as discussed

above. Therefore, his first and second assignments of error are hereby overruled.

{¶13} "III. Johnnie Steele has been deprived of his liberty without due process of law by his conviction for aggravated murder which was not supported by sufficient evidence to prove his guilt beyond a reasonable doubt."

{¶14} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 Ohio Op. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed. 2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560. A judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent credible evidence which goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶15} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court reexamined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence:

{¶16} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of

defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" Id. at paragraph 2 of the syllabus.

{¶17} In the instant case, appellant has admitted causing the death of the victim by shooting her. The question then is whether he committed that killing with prior calculation and design pursuant to R.C. 2903.01(A). Appellant argues that he was seriously provoked by the victim by her interest in other men and obvious unfaithfulness to their relationship, which he considered to be exclusive. Yet appellant testified that their disagreement on the night in question was not heated and that he was not overtly angry. He also made a statement earlier in the evening about killing the victim. Whether a defendant's prior statement of intent to kill constitutes evidence of prior calculation and design depends largely upon the totality of other facts and circumstances surrounding the killing. *State v. Jones* (2001), 91 Ohio St.3d 335, 346. His prior statements, coupled with the time it took to walk from the living room to the bedroom, retrieve the gun, carry it back to the victim's presence outside of her line of sight, shoot her in the leg, converse briefly with her and then discharge the fatal shot evidence an intent to end her life. These circumstances can support the jury's finding of premeditation because they do not

evidence an "instantaneous eruption of events." *State v. Taylor*, (1997), 78 Ohio St.3d 15, 22, citing *State v. Jenkins* (1976), 48 Ohio App.2d 99 at 102. Therefore, when viewed in the light most favorable to the prosecution, there exists sufficient evidence to support the appellant's conviction of aggravated murder, and this assignment of error is overruled.

{¶18} "IV. Johnnie Steele's conviction for aggravated murder is against the manifest weight of the evidence."

{¶19} The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. Instead, "the [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172,175, 485 N.E.2d 717, citing *Tibbs v. Florida*, (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 752.

{¶20} There is no evidence that the jury lost its way here. As discussed above, there was little credible evidence as to provocation or any other mitigating factor. The jury was presented with a great deal of evidence, including the appellant's own assessment of the events of the night in question, and reasonably

concluded that he committed the aggravated murder of the victim. Therefore, this assignment of error is overruled.

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.

FRANK D. CELEBREZZE, JR.
JUDGE

PATRICIA A. BLACKMON, P.J., AND

COLLEEN CONWAY COONEY, J., CONCUR.

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(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).