

[Cite as *State v. Ortiz*, 2010-Ohio-3713.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 91819**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**EFRAIN ORTIZ**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-508855

**BEFORE:** Blackmon, J., Rocco, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** August 12, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} This cause is before this court on remand from the Supreme Court of Ohio. In *State v. Ortiz*, Cuyahoga App. No. 91819, 2009-Ohio-4982, we held that the trial court erred by failing to merge Ortiz’s felonious assault counts and attempted murder count. As a result of our holding, we declined to address the second and sixth assigned errors because they were moot.

{¶ 2} The Ohio Supreme Court, relying on *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, reversed our decision stating:

**“The judgment of the court of appeals holding that the felonious-assault counts were allied offenses of similar import committed with a single animus and that the attempted-murder and felonious assault counts were**

**allied offenses of similar import committed with a single animus is reversed \*\*\*.”**

{¶ 3} The Ohio Supreme Court then reinstated the trial court’s judgment. However, based on a motion for reconsideration filed by the defendant, the Court realized that errors we deemed were moot in the original decision needed to be addressed. Accordingly, the Supreme Court remanded this case to this court for consideration of the assignments of error previously found moot.

{¶ 4} A complete recitation of the facts and other assigned errors not reversed by the Supreme Court, are set forth in our previous decision, *Ortiz*, Cuyahoga App. No. 91819, 2009-Ohio-4982.

### **Jury Instruction**

{¶ 5} In his second assigned error, Ortiz argues the trial court erred by instructing the jury that if it found Ortiz not guilty of felonious assault, then it would proceed to consider if he was guilty of the inferior offense of aggravated assault. The court should have instructed the jury that if it found Ortiz guilty of felonious assault it could proceed to consider the inferior offense.

{¶ 6} We initially note that Ortiz failed to object to the trial court’s instruction on this issue. Therefore, he has waived all error except plain error regarding the instruction. Crim.R. 52(B). Plain error as to jury instructions is proven when the outcome of the trial would have been

different but for the alleged error. *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339. We conclude plain error did not occur.

{¶ 7} Our review of the evidence indicates that the trial court should not have instructed the jury regarding aggravated assault because the evidence presented did not support such an instruction. R.C. 2903.12 defines aggravated assault as follows:

**“(A) No person under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:**

**“(1) Cause serious physical harm to another or to 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 \* \* \*.”**

{¶ 8} The essential elements of felonious assault, with which Ortiz was charged, and aggravated assault are identical. It is the mitigating circumstance of “serious provocation occasioned by the victim” that distinguishes the two offenses and makes aggravated assault an offense of inferior degree. Therefore, given the proper evidence, an accused can be found guilty of aggravated assault under R.C. 2903.12 when he is charged with felonious assault under R.C. 2903.11.

{¶ 9} The record in the instant case does not support an instruction on aggravated assault. “Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time.” *State v. Mabry* (1982), 5 Ohio App.3d 13, 449 N.E.2d 16, paragraph five of the syllabus.

{¶ 10} In the instant case, there was no evidence that the victim seriously provoked Ortiz. In fact, Ortiz’s defense at trial was that he was the victim of mistaken identity. Therefore, because the court should not have instructed the jury on aggravated assault in the first place, the fact the jury did not properly consider the offense in concluding Ortiz was guilty of felonious assault did not result in prejudicial error. Accordingly, Ortiz’s second assigned error is overruled.

### **Sentence Invalid**

{¶ 11} In his sixth assigned error, Ortiz argues his sentence was invalid because it was not supported by the record. Ortiz contends that at the sentencing hearing, the trial court imposed the sentence for the felonious

assault counts as if they were felonies of the first degree, when they were actually felonies of the second degree.

{¶ 12} Our review of the record indicates that the trial court did state at the sentencing hearing that the felonious assault counts were felonies of the first degree. However, the trial court sentenced Ortiz regarding these counts to a sentence that was statutorily correct for a second degree felony, three years on each count. R.C. 2929.14(A)(2). Moreover, in the sentencing entry, the trial court correctly designated the offenses as second degree felonies. Thus, because a statutorily legal sentence was imposed, Ortiz was not prejudiced by the trial court's misstatement. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Accordingly, Ortiz's sixth assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

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PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and  
MELODY J. STEWART, J., CONCUR