

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26445
	:	
v.	:	Trial Court Case No. 2013-CR-2575
	:	
KATRESE D. McINTOSH	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 10th day of July, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Katrese D. McIntosh appeals from a judgment of the

Montgomery County Common Pleas Court continuing her commitment to Summit Behavioral Healthcare due to her mental illness. We conclude that the trial court did not err in finding that the State met its burden of establishing the elements of R.C. 2945.39(A)(2). Therefore, the judgment of the trial court is Affirmed.

I. The Course of Proceedings

{¶ 2} In September 2013, McIntosh was indicted on one count of Felonious Assault in connection with an incident that occurred the previous month. McIntosh entered a plea of not guilty by reason of insanity, and a psychological evaluation was ordered. In November 2013, McIntosh was found incompetent to stand trial and confined to Summit Behavioral. The trial court also found that there was a substantial probability that she could not be restored to competency within the statutory time limits. A second evaluation was to be completed by May 14, 2014. The second evaluation report was filed, and a hearing was conducted. Based on the evidence presented at the hearing, the trial court made the following findings:

1. The defendant did commit the offense for which she was indicted; and
2. The defendant is a mentally ill/mentally retarded person subject to hospitalization/institutionalization by court order; and
3. The defendant is incapable of understanding the nature and objective of the proceedings against her and is not presently capable of assisting in her own defense; and
4. There is not a substantial probability that the defendant will become competent to stand trial even if provided with a course of treatment.

{¶ 3} Based on these four findings, the trial court found that all elements of R.C. 2945.39(A) had been met requiring the court to retain jurisdiction over the defendant. The trial court further found that the least restrictive commitment alternative was to commit McIntosh to Summit Behavioral Healthcare, subject to review after six months. From this order, McIntosh appeals. After this appeal was filed, the trial court conducted another competency hearing on January 29, 2015, and issued an order of continued commitment based on clear and convincing evidence that McIntosh continues to be a mentally ill/mentally retarded person, subject to hospitalization/institutionalization by court order as defined by R.C. 5122.15.

II. Standard of Review

{¶ 4} As explained by the Supreme Court of Ohio, R.C. 2945.39, “along with its related statutes, authorizes a common pleas court to exercise continuing jurisdiction over a criminal defendant who has been charged with a violent first- or second-degree felony and who has been found incompetent to stand trial and remains so after the expiration of R.C. 2945.38's one-year time frame for restoring competency. R.C. 2945.39 authorizes the common pleas court to order the involuntary commitment of such a person in a mental-health facility when the statutory criteria are met.” *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 1 (2010). The Supreme Court further explained:

To retain jurisdiction, the trial court must find, by clear and convincing

evidence after a hearing, both that the defendant committed the charged offense and that the defendant is a mentally ill person subject to hospitalization by court order. R.C. 2945.39(A)(2)(a) and (b). “Mentally ill person subject to hospitalization by court order” has the same meaning as that set forth in R.C. 5122.01(B), and includes persons who, because of mental illness, represent a substantial risk of physical harm to others as manifested by evidence of recent violent behavior or present dangerousness. R.C. 2945.37(A)(7) and 5122.01(B)(2). See *In re Burton* 11 Ohio St.3d 147, 464 N.E.2d 530 (1984), paragraph one of the syllabus (a totality-of-the-circumstances test governs whether a person who is alleged to be mentally ill should be hospitalized under R.C. 5122.01(B)).

Id. at ¶ 13.

{¶ 5} “If the court does make both R.C. 2945.39(A)(2) findings, then R.C. 2945.39(D)(1) directs the court to commit the defendant to a hospital operated by the Department of Mental Health or to another appropriate facility. The court must order that the defendant be placed in the least-restrictive commitment alternative available consistent with public safety and the defendant's welfare, ‘giv[ing] preference to protecting public safety.’ ” *Id.* at ¶ 15.

{¶ 6} McIntosh is essentially arguing that clear and convincing evidence was not presented to support the trial court's finding that she is a mentally ill person subject to court order, and therefore the decision is against the manifest weight of the evidence. “It is well established that under the manifest-weight-of-the-evidence standard of review, an appellate court must uphold a trial court's judgment if some competent, credible evidence

going to all the essential elements of the case supports that judgment.” *In re Kister*, 194 Ohio App.3d 270, 2011-Ohio-2678, 955 N.E.2d 1029, ¶ 21 (4th Dist.), citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus (“Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence”) and *In re K.W.*, 10th Dist. Franklin No. 06AP-731, 2006-Ohio-4908, ¶ 6 (stating that an appellate court will not reverse a finding that a person is a mentally ill person subject to hospitalization under R.C. 5122.01 as against the manifest weight of the evidence if it is supported by some competent, credible evidence going to all the essential elements of the case).

{¶ 7} We further note that R.C. 2945.39(A)(2) requires the trial court to find that all the elements of the statute are supported by “clear and convincing evidence.” Clear and convincing evidence is evidence that “will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *In re Kister*, 194 Ohio App.3d 270, 2011-Ohio-2678, 955 N.E.2d 1029, ¶ 22 (4th Dist.), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. “The clear-and-convincing standard requires a higher degree of proof than ‘a preponderance of the evidence,’ but less than ‘evidence beyond a reasonable doubt.’” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 20. As established by the Supreme Court of Ohio in *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990), “[w]here the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof”.

{¶ 8} Therefore, we will review the trial court's order to determine if it is supported by clear and convincing evidence to meet each of the criteria in the definition of a mentally ill person, subject to hospitalization by court order.

III. The Commitment Order Is Supported by Clear and Convincing Evidence

{¶ 9} For her single assignment of error, McIntosh alleges as follows:

THE TRIAL COURT ERRED WHEN IT FOUND BY CLEAR AND
CONVINCING EVIDENCE THAT THE APPELLANT WAS SUBJECT TO
CONTINUED COURT JURISDICTION UNDER R.C. 2945.39(A)(2)

{¶ 10} McIntosh is not challenging the trial court's finding that she did commit the felonious assault offense for which she was indicted. McIntosh is challenging the trial court's finding that she is a mentally ill person, as that term is defined by R.C. 5122.01 (B), or a mentally retarded person as that term is defined by R.C. 5123.01(O). If the lack of competency is based on a finding of mental retardation, the statute, R.C. 5123.01(O), requires a finding that the defendant is "a person who is at least moderately retarded." While we agree that the record does not support that diagnosis, we do not agree that the trial court actually found McIntosh to be mentally retarded. The trial court's findings that, "the defendant is a mentally ill/mentally retarded person subject to hospitalization/institutionalization by court order" is a summary of the requirements of the statute, R.C. 2945.39(A)(2), which is intended to allow the court to order institutionalization if the court finds that the defendant meets either the definition of a mentally ill person, as that term is defined by R.C. 5122.01(B), or a mentally retarded

person, as that term is defined by R.C. 5123.01(O). The statute does not require the court to find that a defendant meets both definitions. Although the trial court's judgment could have been written with more precision, we conclude that the trial court did not commit reversible error by referring to both definitions when the evidence supported a finding that McIntosh met one of the two definitions.

{¶ 11} We also conclude that the court's finding that McIntosh fit the statutory definition of a "mentally ill person subject to hospitalization by court order" is not against the manifest weight of the evidence. Pursuant to the version of R.C. 5122.01(B) in effect at the time of the hearing,¹ a "mentally ill person subject to hospitalization by court order" is a mentally ill person who, because of the person's illness:

- (1) Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;
- (2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;
- (3) Represents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person's basic physical needs because of the person's mental illness and that appropriate

¹ The definition of a mentally ill person under R.C. 5122.01 was amended by the 130th General Assembly in SB 43, which was not effective until 9/17/14, so the new subsection (5) is not recited herein.

provision for those needs cannot be made immediately available in the community; or

- (4) Would benefit from treatment in a hospital for the person's mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or the person;

{¶ 12} At the hearing, two mental health professionals from Summit Behavioral Healthcare, who have worked directly with McIntosh, confirmed that she has been diagnosed with a "mild intellectual deficiency" and a "mental illness." Transcript pgs. 102 & 135. Both doctors agreed that she was incompetent to stand trial and that her competency was not restorable. Transcript pg. 129. They confirmed that they had been able to achieve improvement through various medications, but she needed further treatment. Transcript pg. 126. A psychiatrist verified that the treatment needed by McIntosh could be provided through institutionalization, but she could not confirm that sufficient out-patient treatment and appropriate supervision was available. Transcript pgs. 136-137. The psychiatrist also discussed a history of McIntosh's behavior towards others at the institution that was both abusive and argumentative, and testified that she had improved, but was still in need of anger-management training. Transcript pgs. 113-118, 126.

{¶ 13} Although the trial court order does not specify which of the alternative criteria found in R.C. 5112.01(B) were established by clear and convincing evidence, the State argues that the evidence does support a finding that meets the criteria set forth in R.C. 5112.01 (B)(4), because McIntosh, "[w]ould benefit from treatment for the person's

mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or the person.” There was no contradictory testimony, nor any evidence to question the credibility of the mental health professionals who confirmed that McIntosh would benefit from continued treatment and that the treatment for anger management was necessary for aggressive or abusive behavioral problems toward others. Therefore, the trial court had sufficient support in the record to find by clear and convincing evidence that the statutory requirements had been met.

{¶ 14} This is not an exceptional case in which the evidence weighs heavily against the findings made by the trial court. The judge neither lost his way nor created a miscarriage of justice in finding by clear and convincing evidence that McIntosh fit the definition of a mentally ill person subject to court order for hospitalization or institutionalization. Therefore, the sole assignment of error is overruled.

IV. Conclusion

{¶ 15} McIntosh’s sole assignment of error having been overruled, the judgment of the trial court retaining jurisdiction over McIntosh and committing her to Summit Behavioral Healthcare for continued treatment is Affirmed.

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FROELICH, P.J., and WELBAUM, J., concur.

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