[Cite as *State v. Murphy*, 2016-Ohio-1165.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA3475
vs.	:	
LOGAN A. MURPHY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Katherine R. Ross-Kinzie, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-10-16
ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. A jury found Logan A. Murphy, defendant below and appellant herein, guilty of aggravated murder in violation of R.C. 2903.01. Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "LOGAN MURPHY WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN TRIAL COUNSEL FAILED TO HAVE HIS TREATING

PSYCHOLOGIST, DR. PAMELA THIES, QUALIFIED AS AN EXPERT."

SECOND ASSIGNMENT OF ERROR:

"MR. MURPHY WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN THE JURY FOUND HIM GUILTY OF AGGRAVATED MURDER AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

{¶ 2} On January 10, 2013, appellant, an inmate at the Ross Correctional Institution, was released from mental health observation and placed in a cell with Michael Ferrara. The next day, a corrections officer found Ferrara laying on the floor and unresponsive. Ferrara was unable to be revived and was later declared dead. Law enforcement officers asked appellant what happened to Ferrara, and appellant claimed that Ferrara committed suicide and that appellant had no involvement in Ferrara's death.

{¶ 3} On February 28, 2013, appellant confessed that he killed Ferrara, but stated that he did so because a person named Mitch told appellant that he should "send [Ferrara] to Jesus."

{¶ 4} On April 19, 2013, a Ross County Grand Jury returned an indictment that charged appellant with aggravated murder, a special felony, in violation of R.C. 2903.01. Appellant subsequently entered not guilty and not guilty by reason of insanity pleas.

{¶ 5} Beginning on December 9 and continuing through December 12, 2014, the trial court held a jury trial. Ohio State Highway Patrol Trooper James Hannon testified that he spoke with appellant on January 11, 2013, shortly after Ferrara's murder. Trooper Hannon explained that appellant stated that he woke up in his cell and found Ferrara laying on the floor. Trooper Hannon stated that appellant claimed Ferrara committed suicide. Trooper Hannon related that

he spoke with appellant again on January 15, 2013, and appellant reiterated that Ferrara committed suicide.

{¶ 6} Ohio State Highway Patrol Sergeant Coy Lehman testified that on February 28, 2013, appellant confessed to murdering Ferrara. The confession was recorded and played for the jury at trial. During his confession, appellant claimed that on January 11, 2013, he "woke up in the middle of the night, Jesus talked to me, I, told me to kill the man, so I, I had a sheet around his neck, started pounding * * *." Appellant later clarified that "Mitch" told appellant to "send [Ferrara] to Jesus." Trooper Lehman asked appellant whether he initially denied guilt because he "didn't want to get in trouble." Appellant stated: "Yeah, I didn't want to go down for murder but it's been hitting, haunting the shit out of me, I can't take it anymore."

{¶ 7} Trooper Lehman further questioned appellant whether he acted "like [he was] kind of out of your mind or crazy because you didn't want to seem like you were guilty?" Appellant responded: "I don't, I just didn't, yeah, I didn't want to go down for it at the time. But I, I'm not acting, I mean, I don't know, dude, I just * * * ." The trooper asked appellant whether he knew his conduct "was wrong at the time." Appellant stated: "Yeah. All at the time, yeah. I mean, yes and no, I mean, I'm not a bad person, but I hear demons, so." The trooper asked appellant, "[a]s far as breaking the law goes, you knew you would get in trouble for it." Appellant stated: "Yeah."

{¶ 8} In his defense, appellant asserted that at the time he committed the offense, he did not know, as a result of a severe mental disease or defect, the wrongfulness of his conduct. To establish that he did not know the wrongfulness of his conduct due to a severe mental disease or defect, appellant presented expert testimony from Dr. Bob Stinson and sought to introduce expert

testimony from Dr. Pamela Thies, a prison psychologist who observed appellant's behavior in the month prior to Ferrara's murder. Appellant asserted that Dr. Thies would testify that appellant's behavior was consistent with schizoaffective disorder or schizophrenia. The state, however, argued that the trial court should not permit Dr. Thies to testify as an expert because appellant failed to comply with Crim.R. 16(K) because appellant did not provide Dr. Thies's curriculum vitae or an expert report until approximately ten to fifteen minutes earlier. The state thus argued that the court should not allow Dr. Thies to offer an expert opinion regarding appellant's mental state or mental health diagnosis.

{¶ 9} The trial court agreed with the state and precluded Dr. Thies from testifying "as an expert witness concerning the state of mind of [appellant] on the date of the offense." Appellant's counsel then explained:

> "I was never intending to ask her if she had an opinion as to his mental state at the time of the offense or whether he knew the wrongfulness of his actions based on a mental disease or defect, and I'm not even sure that during the course of her examination she may say that she has an opinion."

The court limited Dr. Thies's testimony to what she observed, and did not allow her to testify concerning any alleged mental health diagnosis.

{¶ 10} Appellant properly proffered Dr. Thies's testimony. Dr. Thies would have testified that appellant was psychotic and/or delusional on December 24 and 25, 2012, and that she believed his behavior was symptomatic of depression, schizophrenia, or a schizoaffective disorder.

{¶ 11} During appellant's case-in-chief, Dr. Thies explained that she was not appellant's

treating psychologist and "had only sporadic contact with him." She did, however, observe appellant on a few occasions during November and December 2012. Dr. Thies stated that she first encountered appellant on November 8, 2012, when he had been under mental health observation. She next saw him on December 11 and 24, 2012. Dr. Thies testified that when she saw appellant on December 24, 2012, he was "very agitated, very confused. He had been banging his head, he had said that he was just tired of everything and wanted to die." She further stated that appellant appeared to be hallucinating. Dr. Thies explained that she saw appellant the next day and he appeared "much calmer" and "more willing to engage in conversation." Dr. Thies testified that she had discussed with another prison psychologist placing appellant on the mental health caseload, but appellant "did not want to participate in the evaluation." She believed that appellant should be referred to the Residential Treatment Unit.

{¶ 12} Dr. Thies did not interact with appellant again until January 11, 2013–after Ferrara's murder. When she saw appellant following Ferrara's murder, she noted that he appeared "calm, he made eye contact, his speech was not spontaneous, he answered questions, appeared to be depressed. He did not appear to be" hallucinating. Dr. Thies stated that appellant informed her that his cell mate committed suicide.

{¶ 13} Dr. Stinson testified that in June 2013, he evaluated appellant to determine whether, at the time of the offense, appellant suffered from a severe mental disease or defect that prevented him from understanding the wrongfulness of his conduct. Dr. Stinson explained that he tested appellant for "malingering," which "is the intentional production of gross exaggeration of symptoms for some external gain." Dr. Stinson found that appellant was not malingering and, instead, found the opposite, i.e., that appellant "minimized his symptoms, he denied being

mentally ill, which is very common for individuals who have mental illnesses." Dr. Stinson concluded that appellant "presented as * * * very much like a psychotic patient in a hospital might present." Dr. Stinson stated that appellant's test results "were indicative of somebody who is psychotic. They held delusional beliefs, meaning that they had false ideas about what was happening in reality, they might be paranoid, they might be experiencing hallucinations * * *." Dr. Stinson explained that appellant would not have been hallucinating all of the time: "It may happen at times when you're under the most stress, it may happen every day, but it's certainly not going to happen all day every day." Dr. Stinson further related that individuals who are psychotic are not "literally crazy all the time."

{¶ 14} Dr. Stinson stated that he reviewed appellant's mental health records, which indicated appellant was showing signs of mental illness around age 14. He stated that when appellant was 16, appellant was diagnosed with bipolar disorder with psychotic features and was showing paranoia and hallucinations. Dr. Stinson testified that by age 19, mental health records show that appellant suffered from depression and was losing touch with reality. He stated that by October 2012, appellant "clearly was becoming psychotic." Dr. Stinson testified that given appellant's mental health history, he would have referred appellant to a psychiatrist and would have "identified [appellant] as being in the throes of a psychotic episode, particularly in the context of his history, we would have known that he was worsening * * *."

{¶ 15} Dr. Stinson further explained that appellant's denial of treatment was a "lack of insight" into his mental health state and "part and parcel to psychosis." Dr. Stinson stated that a psychotic individual cannot "recognize the bizarreness of their behavior * * * and so * * * any patient who's severely psychotic, would be very hard pressed to say he[y], I'm sick or I'm

experiencing psychosis."

{¶ 16} Dr. Stinson ultimately opined that appellant suffers from a "severe mental illness," which he characterized as schizoaffective disorder. Dr. Stinson explained that appellant had a long history of mental illness, with a rapid deterioration beginning in October 2012 and by the time of the offense in January 2013, appellant "was acutely psychotic." Dr. Stinson further opined that appellant did not understand the wrongfulness of his conduct as a result of a severe mental disease.

{¶ 17} On cross-examination, Dr. Stinson admitted that he was aware that other mental health providers expressed concern that appellant's behaviors were due to secondary gain issues and that some prison psychologists described appellant "as being highly manipulative * * * and goal directed in his behavior." He also recognized that in February 2013, appellant "stated that he needed to act out to get what he wanted," and appellant admitted "that he would act out in order to manipulate his housing situation." The state questioned Dr. Stinson how he determined that appellant had a severe mental disease at the time of the offense in light of the foregoing considerations and when (1) the day before the offense, a prison psychologist had removed appellant from mental health watch, (2) the individual who observed appellant the day before the offense described appellant "as alert, responsive, organized and showed no evidence of impairment or distress," and (3) shortly after the offense, appellant appeared coherent enough to deny that he killed Ferrara and did not appear to be having any hallucinations or delusions. The state asked: "So, if I understand your testimony, you're stating that [appellant], perhaps immediately before and immediately after the offense, knew what he did was wrong, but for a brief moment, temporarily, he was insane. Is that what your testimony is?" Dr. Stinson

responded:

> "Well, I think insanity as it's used in this context, is always temporary, it's, we're asking at the moment of the offense, what was their thinking, and almost always insane defendants come to realize the wrongfulness of their behavior and almost always preceding the behavior, the[y] realize the wrongfulness of it. The issue is, what did they understand to be right and wrong at the time of the offense, during the throes of their psychotic episode."

{¶ 18} The state additionally questioned Dr. Stinson concerning his opinion that appellant did not understand the wrongfulness of his conduct when "the evidence seems to indicate * * * that [appellant] very quickly, if not immediately, recognized that what he was in [the] process of doing, or did, was wrong[.]" Dr. Stinson explained: "[T]he evidence indicates that he believed other people would say it was wrong and that they may try to impose consequences on him. I would not say that he, himself, immediately believed what he did was wrong." Dr. Stinson agreed that "it is possible for a person to only briefly not realize the wrongfulness of their actions[.]" He further explained:

> "[Appellant] definitely was unaware of the wrongfulness of his acts at the time of the offense charged. Going forward, he at moments, clearly knew that other people would think what he did was wrong. I think it's an inaccurate characterization to say he immediately knew the wrongfulness of it. In fact, when I evaluated him months later, there was still, at points in time, where he believed he may have done a good deed at the hands of God. So, he didn't immediately, personally, believe that what he had done was wrong. What he knew, in his delusional way of thinking, is that the other people whom he believed were on the other side plotting against him and doing evil, would try to impose consequences, when he thought he was saving the world."

{¶ 19} To rebut appellant's insanity defense, the state presented expert testimony from Dr. Jayne Speicher-Bocija (Dr. Speicher) and Dr. James Hagen. Dr. Speicher testified that she administered psychological tests to appellant and that his scores indicated that he was "over reporting" or exaggerating symptoms. She explained that appellant's responses showed that he

had "more symptoms than you usually see in the general population and more items tha[n] you usually see in a psychiatric population." Dr. Speicher further testified that she reviewed appellant's past mental health records, spoke with appellant's family, and reviewed appellant's police interviews following Ferrara's murder. She stated that based upon her review of all of the available material, she did not believe that appellant suffered from a severe mental disease or defect at the time of the offense. Dr. Speicher explained the factors that led to her conclusion as follows:

> "Primary for me were the statement and behavior that [appellant] made immediately upon being interviewed within * * * that first period right after the offense, that * * * his composure at that time, his relevant speech, being able to communicate effectively with the people that were interviewing him, respond accurately to the questions that they were asking him, did not report to them or, as I observed on the video tape, I did not see any indicators that he was experiencing any kind of auditory hallucinations or any other types of symptoms that were observable in his behavior. So, that, as well as the treatment records at the time in the days leading up to the offense, there was, his behavior was erratic, which I felt is consistent with a personality disorder, which is a different type of behavioral problem that an individual can experience, but I did not feel that it was consistent with a severe mental health, a severe mental health illness."

She testified that appellant's behaviors as documented in the month prior to Ferrara's murder were "more consistent with the impulsivity and the behaviors you would see with a personality disorder, rather than a severe mental illness." Dr. Speicher also explained that she reviewed appellant's February 28, 2013 taped interview, but that she did not weigh it heavily when formulating her opinion. She stated that appellant's behaviors closer to the time of Ferrara's murder weighed more heavily.

{¶ 20} Dr. Speicher further opined that appellant understood the wrongfulness of his conduct. She explained:

> "[Appellant], per the report that I received, immediately stated that he had nothing to do with the death of the cellmate. It was based on that he presented an alternative explanation, basically, that the cellmate had killed himself and those factors of bringing up a[n] alternative explanation and of indicating that you have nothing to do with it are consistent with knowing that the act is wrong, knowing that a crime has been committed and that * * * it is wrong to commit that act."

She stated that appellant did not have a severe mental disease or defect at the time of the offense and that he knew his conduct was wrong.

{¶ 21} Dr. James Hagen testified that appellant did not suffer from a "loss of a reality contact or impaired judgment due to mental illness, at the time of the incident itself." Dr. Hagen explained the basis for his opinion as follows:

> "In reviewing all of the treatment information, there certainly was evidence that he'd been treated for some symptoms of mental illness, specifically, auditory hallucinations, delusional thoughts. In individuals with those symptoms of a psychosis, severe mental illness, impaired thinking, impaired auditory hallucinations, those are fairly constant, they don't come and go, they don't happen in one hour, two hour, one day, two day episodes, it's pretty much an on-going set of symptoms, particularly if you are not being medicated adequately. So, my opinion that at the time there was insufficient evidence of impaired reality contact is essentially from the investigative report. He was lucid, coherent, not exhibiting or displaying any symptoms to the investigators or to the corrections officers that he was acting in any way like he was not in contact with reality. He was talking, answering questions, explaining, as best he could, his actions. And again, nothing from those investigative reports, and these were people observing him immediately after and for a period of days afterwards. They would have noticed if he was exhibiting symptoms, because he would have said those, he would have demonstrated those. People who are hallucinating who are responding to internal stimuli, you can see that in a sense, they'll go, tune out, black out and not pay attention to you. There was no indication that he had difficulty doing that. Individuals with delusions make attempts to convince everyone of the truthfulness of their delusional beliefs, rather than hide them or deny them. So, it's, it's based on the total lack of any evidence of those things going on immediately after, a few hours, a number of days after the incident that leads me to the opinion that he was not experiencing loss of reality contact during that time."

Dr. Hagen further concluded that appellant understood the wrongfulness of his conduct:

> "There were at least three different explanations offered by [appellant] immediately after the, the body was discovered. One was that Mr. Ferrara hung himself. Another explanation was, I woke up, looked down and saw the dead body. A third explanation was, maybe the CO came in and killed him. All of those three are externalizing the blame, all of those three are saying I didn't do it. If indeed he did, and he's saying no I didn't, that's knowledge of wrongfulness. So, it's for those reasons I felt there was no evidence that he could not appreciate the wrongfulness."

{¶ 22} On cross-examination, appellant's counsel asked Dr. Hagen whether an individual with schizoaffective disorder could still have the disorder, yet not display any symptoms of hallucinating or being paranoid. Dr. Hagen responded that if an individual he had diagnosed with schizoaffective disorder was not exhibiting signs of hallucinations or paranoia, he "would question whether [he] made the right diagnosis." Dr. Hagen stated that an individual with the disorder can display "some variation in symptoms and intensity of symptoms from the course of a few days or a few weeks, but no dramatic remissions for brief periods of time." Appellant's counsel further questioned Dr. Hagen whether he believed that appellant was "malingering" while housed at Ross Correctional Institution. He explained that he could not form a strong opinion, but he did note that by appellant's "own self report, he said at times I have to act up to get what I want and there were observations among corrections officers that perhaps there was secondary gain or some other purpose by acting mentally ill." Appellant's counsel further questioned him whether an individual suffering from schizoaffective disorder would be "hallucinating all the time?" Dr. Hagen responded: "That's the operative question. If an individual is suffering from schizoaffective disorder, sure." He explained that the individual would display hallucinations "[a]ll the time," "[u]nless they're medicated." He further stated that an individual suffering from schizoaffective disorder would be delusional "[a]ll the time."

{¶ 23} Appellant presented a surrebuttal witness, Dr. John Tilley. Dr. Tilley explained that he evaluated appellant in September 2013, and determined that appellant was not malingering. Dr. Tilley stated in September 2013 that appellant was mentally ill, was delusional and hallucinating. He believed appellant was suffering from schizophrenia. Dr. Tilley stated that a person with schizophrenia can have periods of lucidity and periods when they are not displaying signs of hallucinations or delusions. He further stated that a person with schizoaffective disorder may be symptomatic one day, but not another. He explained:

> "We know that mental illness tends to be variable in its force, we know that we can make some predictions about mental illness, for instance, severe mental illness like [appellant]'s is not going to go away typically on its own without some type of treatment and that tended to * * * that played out in this particular case because he actually go better once we gave him medication."

{¶ 24} On December 17, 2014, the jury found appellant guilty of aggravated murder. On December 23, 2014, the trial court sentenced appellant to life in prison with parole eligibility after 30 years. This appeal followed.

I

{¶ 25} In his first assignment of error, appellant argues that his trial counsel did not provide effective assistance of counsel. In particular, appellant alleges that trial counsel performed ineffectively by failing to comply with Crim.R. 16(K), which resulted in the trial court precluding Dr. Thies from testifying as an expert witness. Appellant claims that counsel's failure to comply with Crim.R. 16(K) constituted deficient performance and that this deficient performance prejudiced his defense. He asserts that if Dr. Thies had been allowed to testify as an expert, she would have testified that appellant suffered from schizoaffective disorder or schizophrenia. Appellant contends that Dr. Thies's testimony would have "bolstered" Dr.

Stinson's testimony and would have caused the jury to afford more credibility to Dr. Stinson's testimony regarding appellant's mental state at the time of the offense.

{¶ 26} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); State v. Creech, 188 Ohio App.3d 513, 2010–Ohio–2553, 936 N.E.2d 79, ¶39 (4th Dist.).

{¶ 27} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. Strickland, 466 U.S. at 687; State v. Powell, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶85. "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Conway, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶95 (citations omitted); accord State v. Wesson, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶81. "Failure to establish either element is fatal to the claim." State v. Jones, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶14. Therefore, if one element is dispositive, a court need not analyze both. State v. Madrigal, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the

other").

{¶ 28} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." State v. Taylor, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶10, citing State v. Smith, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. State v. Gondor, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62; State v. Hamblin, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 29} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the trial would have been different. State v. Short, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶113; State v. White, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. State v. Clark, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; State v. Tucker, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002).

{¶ 30} In the case at bar, even if we assume for purposes of argument that trial counsel

performed deficiently by failing to comply with Crim.R. 16(K),[1] we do not believe that appellant can show prejudice. Even if Dr. Thies had testified that appellant suffered from schizoaffective disorder, she would not have related any opinion regarding appellant's ability to appreciate the wrongfulness of his conduct. Affording her proffered testimony the most liberal interpretation, she would have opined, at most, that appellant suffered from a mental disease or defect at the time of the offense. None of her proffered testimony shows, however, that she held any opinion regarding appellant's ability to appreciate the wrongfulness of his conduct. Thus, while Dr. Thies's expert testimony may have helped establish that appellant suffered from a mental disease or defect at the time of the offense, her testimony would not have shown that appellant failed to appreciate the wrongfulness of his conduct. Consequently, the omission of her testimony, even if due to trial counsel's deficient performance, did not affect the outcome of appellant's trial.

{¶ 31} Furthermore, had Dr. Thies testified as proffered, her testimony would have been cumulative to Dr. Stinson's expert testimony. Therefore, the absence of Dr. Thies's expert testimony did not mean that the jury was unable to hear testimony from a defense expert that appellant suffered from a severe mental disease or defect at the time of the offense and did not appreciate the wrongfulness of his conduct. Instead, the jury heard the same testimony appellant claims Dr. Thies would have provided from appellant's retained expert, Dr. Stinson.

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[1] Crim.R. 16(K) states:

> An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

{¶ 32} Appellant's assertion that Dr. Thies's testimony would have "bolstered" Dr. Stinson's, and would have caused the jury to find Dr. Stinson's testimony more believable than the state's experts, is speculative. As we have repeatedly recognized, speculation is insufficient to demonstrate the prejudice component of an ineffective assistance of counsel claim. E.g., State v. Jenkins, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶22; State v. Simmons, 4th Dist. Highland No. 13CA4, 2013–Ohio–2890, ¶25; State v. Halley, 4th Dist. Gallia No. 10CA13, 2012–Ohio–1625, ¶25; State v. Leonard, 4th Dist. Athens No. 08CA24, 2009–Ohio–6191, ¶68; accord State v. Powell, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶86 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim). Consequently, appellant cannot show that trial counsel performed ineffectively.

{¶ 33} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 34} In his second assignment of error, appellant asserts that his conviction is against the manifest weight of the evidence. He claims that the jury clearly lost its way by rejecting his insanity defense.

{¶ 35} An appellate court that is reviewing a claim that a conviction is against the manifest weight of the evidence must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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. Dean, — N.E.3d —, 2015-Ohio-4347, ¶151; State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. State v. Issa, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); State v. Murphy, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" Barberton v. Jenney, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶20, quoting State v. Konya, 2nd Dist. Montgomery No. 21434, 2006–Ohio–6312, ¶ 6, quoting State v. Lawson, 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). As the Eastley court explained:

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"

Id. at ¶21, quoting Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. State v. Picklesimer, 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶24; accord State v. Howard, 4th Dist. Ross No. 07CA2948, 2007–Ohio–6331, ¶6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶ 36} Once the reviewing court finishes its examination, the court may reverse the

judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting Martin, 20 Ohio App.3d at 175; State v. Lindsey, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 37} Moreover, we observe that a verdict is not against the manifest weight of the evidence simply because the fact-finder chose to believe the state's witnesses. E.g., State v. Chancey, 4th Dist. Washington No. 15CA17, 2015-Ohio-5585, ¶36, citing State v. Wilson, 9th Dist. Lorain No. 12CA010263, 2014–Ohio–3182, ¶24, citing State v. Martinez, 9th Dist. Wayne No. 12CA0054, 2013–Ohio–3189, ¶16. The fact-finder is free to believe all, some, or none of a witness's testimony. E.g., State v. Scott, 4th Dist. Washington No. 15CA2, 2015-Ohio-4170, ¶25; State v. Jenkins, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶37.

{¶ 38} In the case at bar, we do not believe that the jury clearly lost its way by rejecting appellant's insanity defense. Instead, the record contains ample competent and credible evidence to support the jury's finding that at the time of the offense, appellant was sane. Sanity generally is presumed. State v. Lott, 97 Ohio St.3d 303, 2002-Ohio-6635, 779 N.E.2d 1011, ¶21; see State v. Curry, 45 Ohio St.3d 109, 115, 543 N.E.2d 1228 (1989) (upholding trial court's finding that defendant failed to overcome presumption of sanity). Thus, a claim of insanity "is an affirmative defense that a defendant must prove by a preponderance of the evidence." State

v. Waller, 4th Dist. Scioto No. 10CA3346, 2011-Ohio-2106, ¶9, citing State v. Hancock, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶35. Under R.C. R.C. 2901.01(A)(14), "[a] person is 'not guilty by reason of insanity' * * * only if the person proves * * * 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."

{¶ 39} "'The weight to be given the evidence and the credibility of the witnesses concerning the establishment of the defense of insanity in a criminal proceeding are primarily for the trier of the facts.'" Curry, 45 Ohio St.3d at 114, quoting State v. Thomas, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. If the record demonstrates that the trier of fact considered the insanity defense, the reviewing court should defer to the trier of fact's interpretation of the evidence. See id. "Indeed, a trial court's judgment as to the defense of insanity will be reversed only where overwhelming and uncontradicted evidence to the contrary is arbitrarily ignored." State v. Duncan, 9th Dist. Medina No. 3117-M (Sept. 12, 2001), citing State v. Brown, 5 Ohio St.3d 133, 449 N.E.2d 449 (1983); accord State v. Sudberry, 12th Dist. Butler No. CA2000-11-218 (Nov. 13, 2001). Furthermore, when experts express conflicting opinions regarding a defendant's sanity, which expert to believe is a credibility question for the jury. State v. Browne, 7th Dist. Columbiana No. 05CO25, 2006-Ohio-5229, ¶65, citing State v. Bryant, 9th Dist. Summit No. 22723, 2006-Ohio-517, ¶19, reversed on other grounds by In re Ohio Criminal Sentencing Statutes Cases, 109 Ohio St.3d 509, 2006-Ohio-2721, 849 N.E.2d 284; accord State v. Ooten, 10th Dist. Franklin No. 01AP-234, 2002-Ohio-367; Sudberry; State v. Caes, 2nd Dist. Montgomery No. 17917 (Mar. 9, 2001); State v. Solomon, 10th Dist. Franklin No. 00AP-723 (Feb. 13, 2001).

{¶ 40} In the case sub judice, the parties presented conflicting expert testimony regarding appellant's sanity at the time of the offense. The defense expert, Dr. Stinson, opined that at the time appellant murdered his cell mate, appellant was unable to appreciate the wrongfulness of his conduct due to a severe mental disease. The state's two experts, however, opined that appellant did not suffer from a severe mental disease or defect at the time of the offense and that he knew the wrongfulness of his conduct. All of the experts provided the rationales underlying their opinions, and the jury was entitled to weigh those rationales and determine which expert opinion was most plausible. Based upon our review of the record, we are unable to state that the jury clearly lost its way and committed a manifest miscarriage of justice by choosing to find the state's expert witnesses' testimony more credible. Instead, the evidence and expert testimony supports a finding that at the time of the offense, appellant did not suffer from a severe mental disease and understood the wrongfulness of his conduct.

{¶ 41} The state's experts testified that appellant did not suffer from a severe mental disease at the time of the offense, but instead, perhaps suffered from a borderline personality disorder. Moreover, the evidence shows that the day before the offense, appellant was not exhibiting any signs of hallucinating or being paranoid and was released from mental health observation. The individual who observed appellant the day before the offense described appellant "as alert, responsive, organized and showed no evidence of impairment or distress." Also, shortly after the offense, appellant was described as calm and coherent. The jury was entitled to infer that appellant thus was not suffering from a severe mental disease at the time of the offense. Simply because appellant submitted contrary expert testimony does not render the jury's finding against the manifest weight of the evidence.

{¶ 42} Furthermore, we believe that the evidence supports a finding that appellant understood the wrongfulness of his conduct. Appellant initially lied about the manner of Ferrara's death and denied his guilt. Not until forty-five days after Ferrara's death did appellant admit that he killed Ferrara and claim that it was a command from Jesus via "Mitch." The jury could have rationally determined that appellant's initial denial that he killed his cellmate, followed by his attempt forty-five days after Ferrara's death to explain that he murdered his cellmate as a command from Jesus,[2] showed that appellant displayed consciousness of thought and consciousness of wrongdoing. The jury may have determined that in the forty-five days between Ferrara's death and appellant's confession, appellant willingly concocted a story in an attempt to excuse his actions. Appellant also admitted during his confession that he knew killing Ferrara would "get [him] in trouble." Appellant stated: "Yeah, I didn't want to go down for murder." Although appellant's expert testified that appellant's mental disease caused him to initially deny and then confess to the killing, the jury was entitled to disbelieve the defense expert's explanation and to instead find the state's experts' explanations more credible. Consequently, we are unable to conclude that the jury clearly lost its way and that this is one of the exceptional cases that weighs heavily against conviction. Instead, the jury could have rationally rejected appellant's insanity defense.

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[2] Although not raised during the trial or appellate proceedings, we observe that courts have held that "a defendant who knows his actions are against the law but acts under a command from God understands the 'wrongfulness' of his actions under R.C. 2901.01(A)(14)." State v. Carreiro, 2013-Ohio-1103, 988 N.E.2d 21 (12th Dist.), ¶25; State v. Jennings, 10th Dist. Franklin No. 05AP-1051, 2006-Ohio-3704, ¶22 (stating that "if a defendant knows his or her conduct violates the law and commonly held notions of morality, that defendant cannot avoid criminal responsibility when he or she acts on subjective rules even though delusions led him or her to believe he or she was acting as or like a superior power").

{¶ 43} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, J. & *Piper, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

*Judge Robin N. Piper, 12th District Court of Appeals, sitting by assignment of the Ohio Supreme Court in the Fourth Appellate District.