[Cite as *State v. Brown*, 2013-Ohio-839.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-11-031

Appellee — Trial Court No. 09 CR 1359

v.

Lamont Brown — **DECISION AND JUDGMENT**

Appellant — Decided: March 8, 2013

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Lamont Brown, appeals from a judgment of the Sandusky County Court of Common Pleas which found him guilty of attempted aggravated murder, aggravated burglary, tampering with evidence and, carrying a concealed weapon. For the reasons that follow, we affirm.

{¶ 2} On November 30, 2009, appellant was indicted for attempted aggravated murder, aggravated burglary, receiving stolen property, having a weapon while under a disability, tampering with evidence, and carrying a concealed weapon. On December 7, 2009, appellant's counsel, on appellant's behalf, filed a suggestion of incompetency pursuant to R.C. 2945.37 and a plea of not guilty by reason of insanity. The court ordered appellant to undergo a competency evaluation within 30 days.

{¶ 3} On February 17, 2010, citing appellant's evaluation by Dr. Thomas Sherman, medical director of the Court Diagnostic and Treatment Center, the court found appellant incompetent to stand trial. Time for his trial was tolled and he was committed to Twin Valley Psychiatric Hospital in Columbus, Ohio, for continuing evaluation and treatment for a period not to exceed one year. On August 26, 2010, appellant appeared before the court for a competency hearing. After reviewing a status report from Dr. Kristen Haskins, consulting clinical and forensic psychologist at Twin Valley Hospital, which concluded that appellant was now capable of understanding the nature and objective of the proceedings against him and of assisting in his legal defense, the court found appellant competent to stand trial. He was then sent back to the Court Diagnostic and Treatment Center for a determination of his mental condition at the time of the offense. Prior to trial, the state dismissed the charge of receiving stolen property. Also, appellant withdrew his not guilty by reason of insanity plea with regards to the charge of having a weapon while under a disability and entered a guilty plea.

{¶ 4} A trial to the bench commenced on the remaining counts on June 21, 2011. Tina Price testified that on November 13, 2009, she was sitting outside of her trailer park, in Clyde, Ohio, with her daughter, when she saw a green Aerostar van driving around the park. The van passed her approximately three times. The van then pulled over and Price watched as the man who was driving the van knocked on the door of her neighbor, Carlos Popoca's, trailer. Popoca opened the door and let the man in. Within five minutes, she heard a loud bang from Popoca's trailer. She watched as the man came out the trailer, wipe down the door handle with "something white," and quickly walked to his van. Witness Matt Ernest described the "something white" as a towel. Price testified that she and her daughter immediately went to check on Popoca and found that he had been shot in the head. In court, Price identified appellant as the man in the green van she saw go into Popoca's trailer before he was shot. Ernest testified that appellant quickly left the scene and headed towards Fremont, Ohio.

{¶ 5} Carlos Popoca testified that on November 13, 2009, he remembers appellant coming to his trailer. The two had previously been acquainted at church. Popoca testified that he was surprised to see appellant because the two had not talked in months. When asked why he let appellant in, Popoca responded:

> I was taught to accept poor people and help them out as much as I could. And [appellant] was in a situation where he was living out of his van in the wintertime at the time, so I was reaching out to him so where he could come take a shower for free or he could eat for free, he could stay at

my house and read. And I just opened up my door to him and it was a mistake I would say.

{¶ 6} Popoca, who is now blind from his injury, remembers letting appellant into his trailer and turning around. The next thing he knew, he woke up in a hospital. He remembered that he saw nothing in appellant's hands when he let him in.

{¶ 7} Fremont police officer, Michael Dohanas, testified that he was on duty the afternoon of November 13, 2009, when he received a call over his radio that there had been a shooting in nearby Clyde, Ohio. He was told to be on the lookout for a green van driven by a black male in his 40's, wearing a hat. Almost immediately, a van matching the description passed Dohanas. He turned around and began to pursue it. Other officers joined in the pursuit. Eventually they pulled the van over and ordered the driver out of the van. In court, Dohanas identified appellant as the driver of the van.

{¶ 8} Fremont police sergeant Dean Bliss testified that he was present when appellant's van was stopped. Appellant was removed from the van and when he was asked if he had a weapon, he acknowledged that he did. The weapon was found concealed in the back of appellant's pants. He described appellant as cooperative.

{¶ 9} Forensic scientist James Smith testified that he thoroughly examined the weapon taken from appellant on November 13, 2009, as well as a single bullet found in Popoca's trailer near where he was shot. He testified that to a reasonable degree of scientific certainty, the bullet came from appellant's weapon.

{¶ 10} On July 5, 2011, the court, rejecting appellant's affirmative defense, found him guilty on all counts. He was sentenced to serve 23 years in prison. Appellant now appeals setting forth the following assignments of error:

I. The trial court erred in finding that appellant failed to establish the affirmative defense of not guilty by reason of insanity.

II. The trial court abused its discretion and erred to the prejudice of appellant in failing to merge his consecutive sentences.

III. The trial court's denial of appellant's affirmative defense and finding of guilty was against the manifest weight of the evidence.

{¶ 11} Appellant's first and third assignments of error will be addressed together. In both assignments of error, he challenges the court's finding that he failed to establish his defense of not guilty by reason of insanity.

{¶ 12} A criminal defendant's sanity is not an element of an offense that the prosecution must prove. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 35. Rather, a "plea of not guilty by reason of insanity is an affirmative defense, *State v. Humphries*, 51 Ohio St.2d 95, 364 N.E.2d 1354 (1977), paragraph one of the syllabus[,] which must be proved by a preponderance of the evidence, R.C. 2901.05(A)." *State v. Brown*, 5 Ohio St.3d 133, 134, 449 N.E.2d 449 (1983).

{¶ 13} The insanity defense has been defined by the Ohio Supreme Court in *State v. Staten*,18 Ohio St.2d 13, 21, 247 N.E.2d 293 (1969).

> In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence that disease or other defect of his mind had so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.

{¶ 14} When from the evidence reasonable minds may reach different conclusions upon the question of insanity, such question is one of fact for the trier of fact. *State v. Ross*, 92 Ohio App. 29, 108 N.E.2d 77 (8th Dist.1952). "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 facts." *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982).

{¶ 15} Dr. Sherman testified he saw appellant again in 2011 to determine, in relation to his NGRI plea, his mental state at the time the crimes were committed. Sherman's conclusion was that at the time of the crimes, appellant suffered a severe mental illness which prevented him knowing the wrongfulness of his acts. He added that even with the most aggressive of treatment, appellant will never be normal. On a scale of one to ten, Sherman described the severity of appellant's illness as an "8." He noted that appellant had no logical motive for the crime. The only discernible motive appellant provided was that he was a helpless pawn in a large conspiracy involving the government. Sherman also noted that before the shooting, appellant acted strangely at the Bureau of Motor Vehicles when he attempted to renew his suspended license.

Appellant was convinced he was being persecuted, that the state was committing murder and that it was actually Popoca's license that should be suspended. He also believed that others were influencing him through supernatural means and through television programs. He suffered from auditory hallucinations. He had previously been taking prescribed medication for his illness but had been off it a year at the time of the incident.

{¶ 16} Sherman was asked about the fact that appellant wiped down Popoca's door after he shot him. Sherman explained that in appellant's case, there could be any number of explanations not limited to appellant's attempt to hide his fingerprints. Appellant, for example, could have believed he was wiping off a microchip or bacteria. Sherman further testified:

> But the important thing is out of the entire time I spent with [appellant], what came out of this was very peculiar thinking, the inability to really logically conclude things as we would see them. And a sense of helplessness. He was against forces that were far more powerful than he could control. * * * He committed a crime that had no motive and it was based upon bizarre thinking. That, to me, is insanity defense.

{¶ 17} On cross-examination, Sherman acknowledged that a diagnosis of paranoid schizophrenia does not automatically preclude a person from knowing right from wrong.

{¶ 18} Dr. Charlene Cassel testified that she is a psychologist also employed by the Court Diagnostic and Treatment Center and she also evaluated appellant to determine, in relation to his NGRI plea, his mental state at the time the crimes were committed.

Initially, she disagreed with Dr. Sherman regarding appellant's ability to know the wrongfulness of his acts at the time of the crime based on his behavior at the time of the crime. She noted that appellant covered the automatic gun with a mesh bag when he shot Popoca. The bag, she explained, would catch the shells so that no evidence would be left behind. Appellant appeared to her to be "an individual who was trying not to get caught."

{¶ 19} Later, Dr. Cassel testified, she learned that the mesh bag had been on the gun for two years prior to appellant shooting Popoca. Since the use of the bag no longer seemed to be part of a premeditated plan concocted by appellant on the day of the crime, and given the fact that appellant, as a paranoid schizophrenic, was hearing auditory hallucinations, Dr. Cassel changed her opinion and joined with Dr. Sherman in his conclusion that at the time of the crimes, appellant suffered a severe mental illness which prevented him knowing the wrongfulness of his acts.

{¶ 20} Though he did not testify, the state introduced a confidential report from clinical psychologist, Dr. Gregory E. Forgac, who also evaluated appellant. He agreed that appellant suffered from paranoid schizophrenia but he concluded that appellant was able to know the wrongfulness of his acts at the time of the crime.

{¶ 21} In finding that appellant had failed to establish the defense of not guilty by reason of insanity, the court used a "scorecard approach to the evaluations by the experts" and found the "the score is 1 ½ for insanity and 1 ½ against." The court, in particular,

found Dr. Cassel's testimony less convincing in that she changed her position based on information that the court concluded may or may not have been true.

{¶ 22} The court, in its decision, enumerated certain facts in support of finding that appellant had not proved his NGRI defense. He noted that appellant had previously served a 16-year prison sentence in Illinois for murder. When denied his driver's license, he angrily announced at the Bureau of Motor Vehicles shortly before arriving at Popoca's trailer that "[I] just gotta do what I gotta do." He was knowingly in possession of a 9mm handgun despite his prior felony conviction. He attached a mesh net over the gun which is used to catch the casings. He had concealed the gun's ammunition in a jewelry box found in his van. He circled the trailer park before parking some distance from Popoca's trailer. He concealed the gun before entering the trailer. He shot the victim in the back of the head. He was seen wiping the door knob off and quickly exiting the trailer. He walked to his van and sped out of the trailer park. Once he was on the road, he maintained a normal speed. When he was stopped, his gun was found concealed in the back of his pants. Finally, he denied ever being at the trailer park. In sum, the court stated: "[A]ll of these actions give indication that he appreciated the wrongfulness of his actions. He was an intimidator * * * prior to the shooting and, and the denier and blamer after the shooting."

{¶ 23} The trier of fact in this case, the trial court, was presented with conflicting opinions. It is evident from the court's judgment entry that the court carefully weighed all of the testimony and evidence. The court obviously found Dr. Forgac's conclusion,

contained in a confidential report, more persuasive. As there is evidence to support this conclusion, we will not disturb the trial court's finding. Appellant's first and third assignments of error are found not well-taken.

{¶ 24} In his second assignment of error, appellant contends that the court abused its discretion in failing to merge his consecutive sentences. Appellant was sentenced to serve ten years for attempted aggravated murder and ten years for aggravated burglary. The sentences were ordered to be served consecutively. Appellant argues that the sentences should have been merged because attempted aggravated murder and aggravated burglary are allied offenses of similar import.

{¶ 25} Under R.C. 2941.25, if a defendant's conduct results in the commission of allied offenses of similar import subject to merger, the defendant may ordinarily be convicted of only one of the offenses. But if the defendant commits each offense with a separate animus, then convictions may be entered for all the offenses. *See* R.C. 2941.25(B); *see also State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 51.

{¶ 26} In *Johnson*, the Supreme Court of Ohio announced a new test focused on the defendant's conduct to determine whether merger is required. *Id.* at ¶ 44. To determine whether offenses are allied offenses of similar import under R.C. 2941.25(A), the first question "is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other." (Emphasis sic.) *Id.* at ¶ 48. "If the offenses correspond to such a degree that the

conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Id.*

{¶ 27} Next, "[i]f the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id*. at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id*. at ¶ 50.

{¶ 28} "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Id.*

{¶ 29} The crime of aggravated murder, defined by R.C. 2903.01(A), provides that, "[n]o person shall purposely, with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy." Pursuant to R.C. 2923.02, the attempt statute, "no person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2911.11, which sets forth the elements of the offense of aggravated burglary, provides:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion

> of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts or threatens to inflict physical harm on another; (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶ 30} In this case, appellant committed aggravated burglary when he entered the home of Popoca, concealing a weapon, and acting as if he was just a harmless visitor. He committed attempted aggravated murder when he shot Popoca. As a result, the offenses at issue were committed separately and with a separate animus. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 31} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE