[Cite as *State v. Swanson*, 2014-Ohio-549.]

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

State of Ohio — Court of Appeals No. WD-12-003

Appellee — Trial Court No. 2010CR0431

v.

Peter Swanson — **DECISION AND JUDGMENT**

Appellant — Decided: February 14, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aaron T. Lindsey and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Eric Allen Marks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Wood County Court of Common Pleas. Following a trial to the court, defendant-appellant, Peter Swanson, was found guilty of assault and vandalism and sentenced to

three years community control. Appellant now challenges that judgment through a single assignment of error:

Appellant's conviction was against the manifest weight of the evidence.

{¶ 2} On October 7, 2010, appellant was indicted and charged with one count of assault of a peace officer, in violation of R.C. 2903.13(A) and (C)(3), a fourth degree felony, and one count of vandalism of government property, in violation of R.C. 2909.05(B)(2), a fifth degree felony. The charges arose from the events of August 22, 2010. At around midnight, Officers Dickson and Spees of the Wood County Sheriff's Office, each responded to a call of a suspicious person in the area of Sycamore and Front Streets in Grand Rapids, Ohio. Upon approaching the intersection, they witnessed a naked man, subsequently identified as appellant, standing in the road screaming into his cell phone. Initially, appellant lunged at and struck Officer Spees. He then started to flee, but after the officers chased him, he stopped, turned towards Officer Dickson and struck him in the side of the head. After a struggle, the officers handcuffed appellant and, after a further struggle, placed him in the back of Dickson's patrol car. Once he was inside the cruiser, appellant began kicking the roof and back window of the vehicle. This continued for 10 to 15 minutes while Dickson transported appellant to the police station. It was subsequently determined that appellant caused approximately $2,000 in damage to the patrol vehicle.

{¶ 3} Because appellant was still combative when they arrived at the station, officers had to use a restraining chair to move him into a holding cell. As Officer

Dickson was walking into the booking area, he noticed a pain in his right bicep. Upon raising his sleeve, Dickson discovered a bite mark on his arm. Dickson also sustained other scrapes and abrasions as a result of his struggle with appellant. After receiving treatment for his injuries, Dickson returned to the police station to present appellant with criminal charges. Approximately three hours had passed since appellant was first apprehended. Dickson testified at the trial below that while he was standing by the booking intake window, appellant approached him and apologized for biting him. Dickson stated that appellant's behavior and demeanor were completely different from earlier and that appellant seemed to be a different person. Because he was concerned about his own possible exposure to HIV or hepatitis, Dickson asked appellant what drugs he had taken. Appellant responded that he had taken five hits of acid and also told Dickson that it was more than he could handle.

{¶ 4} Appellant initially entered a plea of not guilty to the charges. Subsequently, however, appellant filed a motion for leave to change his plea to not guilty by reason of insanity ("NGRI"). Appellant also filed a motion for the appointment of an expert in psychology/psychiatry and a request that the court order an evaluation of his mental health on the night of August 22, 2010. The court set the matter for a hearing on appellant's unopposed motion to change his plea and ordered Dr. Charlene A. Cassel, a clinical psychologist with the Court Diagnostic and Treatment Center, to examine appellant. Following a hearing on appellant's motion, at which Dr. Cassel's initial report was admitted into the record, the court granted appellant leave to change his plea from

not guilty to NGRI. The court further ordered Dr. Cassel to determine whether appellant qualified for NGRI under the statute and to submit a report to the court on that issue.

{¶ 5} Dr. Cassel submitted her second report to the court on April 21, 2011. In that report, Dr. Cassel concluded:

> It is my opinion to a reasonable degree of psychological certainty that Mr. Swanson suffered from a mental disorder at the time of the offenses with which he is charged. This mental disorder was a substance induced psychosis which resulted in him believing that persons were trying to steal his organs. He wanted to be picked up by the police which is why he took off all of his clothing. However, his psychosis prevented him from recognizing the police were real. His mental illness led him to believe that the police were imposters and that they were trying to steal his soul. His attempts to prevent this included trying to kick out the roof of the police car, biting the police officer, biting himself and doing other acts to harm himself. It is my opinion to a reasonable degree of psychological certainty that Mr. Swanson was mentally ill at the time of the offenses charged. Because of this mental illness he was unable to know that his acts at the time of each offense charged were wrong.

{¶ 6} In light of Dr. Cassel's determination, the court concluded, in a judgment entry of September 26, 2011, that appellant had established an NGRI defense.

Thereafter, appellant waived his right to a jury trial and the case was set for a trial before the court.

{¶ 7} At the trial, Officer Dickson testified to the facts of the offenses as set forth above. Appellant then moved for a directed verdict on the ground that he was not guilty by reason of insanity. Appellant cited the two written reports by Dr. Cassel in support of his argument and further argued that the state had not introduced an expert opinion to contradict that of Dr. Cassel. The court denied the motion and appellant called Dr. Cassel in his defense.

{¶ 8} Consistent with her written reports, Dr. Cassel testified that she based her opinion on her personal interview of appellant and records documenting earlier mental health evaluations of appellant. Appellant had previously been diagnosed with a schizotypal personality disorder and polysubstance abuse when he was in treatment at the Children's Resource Center. Dr. Cassel explained that schizotypal personality disorder is a disorder in which a person can manifest delusions or false beliefs and that in some individuals it is a precursor to schizophrenia. She testified that, in her opinion, at the time that appellant committed the offenses with which he was charged, he was in the middle of a drug-induced psychosis which made him unable to recognize that his behavior was against the law. Appellant has a history of substance abuse dating back to the seventh grade, when he began inhaling computer cleaner. Marijuana subsequently became his drug of choice, but he would also take Xanax, ecstasy, LSD and hallucinogenic mushrooms. In her interview of appellant, appellant told her that he acts

especially paranoid on drugs and that hallucinogenic drugs were particularly bad for him. Appellant believed that he acted "weirder than other people do on hallucinogenic drugs." Appellant had reported to Dr. Cassel that at the time of the offenses, he had taken marijuana, alcohol, LSD, mushrooms, and maybe PCP. Under the DSM-IV, Dr. Cassel diagnosed appellant, at the time of the offenses, as having a mental disorder identified as hallucinogen-induced psychosis. She further testified, however, that prior to that break with reality, appellant voluntarily ingested the drugs.

{¶ 9} On October 13, 2011, the lower court issued a written decision that included findings of fact and conclusions of law. Initially, the court found that the state had proved all of the essential elements of the crimes of assault, in violation of R.C. 2903.13(A) and (C)(3), and vandalism, in violation of R.C. 2909.05(B)(2), beyond a reasonable doubt. Addressing appellant's NGRI defense, the court found that while appellant did suffer from psychosis and mental illness at the time of the offenses, he does not usually suffer from those and they were brought on by appellant's voluntary ingestion of drugs. The court therefore concluded that appellant failed to establish that he was not guilty by reason of insanity and convicted him of the underlying offenses. Appellant was subsequently sentenced to a term of three years community control, with a number of conditions, and reserved consecutive sentences of 18 months in prison on the assault charge and 12 months in prison on the vandalism charge, should he violate the terms of his community control.

{¶ 10} In his sole assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence. Appellant does not contend that the state failed to prove the elements of the offenses of assault and vandalism. Rather, appellant argues that he established the elements of an NGRI defense and should have been found not guilty.

{¶ 11} Under a manifest weight standard, the appellate court must sit as the "thirteenth juror," analyzing the entire record to deduce the relative weight of credible evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). However, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The conviction should be reversed, and a new trial ordered, only in those "'exceptional case[s] in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Thus, a conviction will only be overturned under the manifest weight standard when the trier of fact "'clearly lost its way and created * * * a manifest miscarriage of justice.'" *Id.*, quoting *Martin* at 175.

{¶ 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* (1977), 51 Ohio St.2d 95, [364 N.E.2d 1354], 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). A person is not guilty by reason of insanity only if he 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." R.C. 2901.01(A)(14).

{¶ 13} Appellant asserts that through the unrebutted testimony of Dr. Cassel, he established that at the time of the commission of the offenses, he was in the midst of a psychotic break that prevented him from knowing the wrongfulness of his actions. As such, he contends that he established the affirmative defense of NGRI by a preponderance of the evidence and the court erred finding him guilty of assault and vandalism.

{¶ 14} It is well-established that "the defense of insanity cannot be successfully established simply on the basis that the condition resulted from the use of intoxicants or drugs, where such use is not shown to be habitual or chronic." *State v. Toth*, 52 Ohio St.2d 206, 210, 371 N.E.2d 831 (1977), *modified on other grounds in State v. Muscatello*, 55 Ohio St.2d 201, 378 N.E.2d 738 (1978). Where the insanity is simply a temporary condition brought on by the voluntary ingestion of drugs or alcohol, it does not suffice to establish an NGRI defense.

{¶ 15} Appellant asserts, however, that section 421.27 of the Ohio Jury Instructions, carves out an exception to the general rule set forth above. That section reads in relevant part:

> Voluntary intoxication, no matter how extreme, is not an insane condition. However, a defect or disease of the mind caused by the use of (intoxicants) (drugs) and resulting in insanity, as previously defined, is a defense to an offense.

{¶ 16} Appellant relies on the second sentence of that instruction for his assertion that a drug-induced psychosis as a result of voluntary ingestion of drugs is not synonymous with voluntary intoxication and does support an NGRI defense. In our view, however, the second sentence of that jury instruction addresses the holding set forth by the Supreme Court of Ohio in *Rucker v. State*, 119 Ohio St. 189, 162 N.E. 802 (1928), that it is only in those instances where the habitual or chronic use of intoxicants or drugs has created a "fixed and continued" derangement that a defendant can successfully rely on his resulting insanity as a defense. *See also State v. Mosher*, 37 Ohio App.3d 50, 523 N.E.2d 527 (9th Dist.1987).

{¶ 17} Dr. Cassel testified that appellant suffered from a drug-induced psychotic break at the time of the offenses. While appellant further suffered from a personality disorder that can include delusions, the fact that appellant told Officer Dickson, after the drugs wore off, that he had taken five hits of acid and that it was more than he could handle, supports the court's finding that appellant's psychosis was the result of his voluntary ingestion of drugs and not a delusion brought about by his personality disorder.

{¶ 18} Finally, appellant argues that because the state did not counter Dr. Cassel's opinion with any contrary evidence, the court erred in failing to find appellant not guilty by reason of insanity.

{¶ 19} The lower court, however, did not discount Dr. Cassel's opinion. Rather, the court agreed with Dr. Cassel's opinion that appellant suffers from a personality disorder known as schizotypal, that appellant suffered from a drug-induced psychosis at the time of the offense, and that appellant does not usually suffer from that psychosis or require inpatient treatment care. The court nevertheless concluded, as a matter of law, that because appellant's temporary insanity was caused by his voluntary ingestion of drugs, he did not establish the defense of NGRI by a preponderance of the evidence. The court did not require further evidence to reach this conclusion.

{¶ 20} Upon review of the evidence presented in this case, we cannot say that the trier of fact, the lower court, clearly lost its way in finding appellant guilty of assault and vandalism and concluding that appellant had not established the defense of not guilty by reason of insanity. The sole assignment of error is not well-taken.

{¶ 21} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Wood County Court of Common Pleas is affirmed. Court 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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE