NO. COA07-277

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

STATE OF NORTH CAROLINA

v. Guilford County
No. 05 CRS 76825

GEORGE ALEXANDER MATTHEWS, SR.,
Defendant.

Appeal by defendant from judgments entered 11 August 2006 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 24 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Ashby T. Ray, for the State.

Terry W. Alford for defendant-appellant.

BRYANT, Judge.

On 19 September 2005, George Alexander Matthews, Sr. (defendant) was indicted for driving while impaired, driving while license revoked, and habitual impaired driving. Prior to trial, defendant pled guilty to driving while license revoked. At trial defendant admitted his three prior convictions for purposes of the habitual impaired driving offense, and was convicted by the jury of driving while impaired. The trial court consolidated the driving while impaired and habitual impaired driving offenses and sentenced defendant to an active term of twenty to twenty-four months imprisonment. Defendant was further sentenced to 120 days

imprisonment for the offense of driving while license revoked. Defendant appeals.

The State's evidence tends to show: on 30 April 2005 State Highway Patrol Officer H.S. Martin ("Martin") stopped defendant for speeding. As Martin approached defendant's motorcycle, he detected a strong odor of alcohol emanating from defendant, and observed defendant had red, glassy eyes and slurred speech. Martin arrested defendant for impaired driving, and a breathalyzer test revealed defendant had a blood alcohol content of 0.22.

Defendant presents the issues of whether the trial court erred in: (I) failing to hold a competency hearing *sua sponte* at the start of the trial; and (II) denying defendant's motion for a mistrial after the jury deadlocked at eleven jurors to one. We first note that defendant has also assigned error to the denial of his motion to dismiss the charge at the close of the State's evidence. Defendant stipulates in his brief, however, that he is abandoning this assignment of error and we consider it so abandoned. N.C. R. App. P. 28(b)(6).

I

Defendant's first argument that the trial court should have held a competency hearing stems from his contention he was under the influence of heavy pain medication and was confused in the courtroom. N.C. Gen. Stat. § 15A-1001(a) states:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the

> proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

N.C. Gen. Stat. § 15A-1001(a) (2005). The trial court "has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (citations and quotations omitted) (emphasis in original). "[I]t is well established that significant weight is afforded to a defense counsel's representation that his client is competent." *State v. McRae*, 163 N.C. App. 359, 369, 594 S.E.2d 71, 78 (citations omitted), *appeal dismissed and disc. review denied*, 358 N.C. 548, 599 S.E.2d 910 (2004). A trial court's conclusion that a defendant is competent to stand trial will be upheld as long as it is supported by competent evidence. *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654, *appeal dismissed and disc. review denied*, 360 N.C. 180, 626 S.E.2d 838 (2005), *cert. denied*, 547 U.S. 1081, 164 L. Ed. 2d 537 (2006).

The matter came on for hearing on 8 August 2006. Defense counsel informed the trial court that she understood defendant was on "some pretty heavy medications" and that defendant was almost asleep. The trial court ordered defendant into custody and asked for a doctor or a nurse to evaluate defendant and report back to the court. The following day the case resumed and the trial court adjudicated defendant's guilty plea to the charge of driving while

license revoked. Defense counsel related to the court that defendant had been on oxycodone, a pain killer, the previous day. The following exchange then took place just after 11:30 a.m.:

> THE COURT: . . . Does he make any contention that he is presently impaired either as to his mental or physical faculties by ingesting this oxycodone?
>
> [DEFENSE COUNSEL]: Your Honor, I don't think he's had the oxycodone today. I think this morning they gave him a strong dosage of Tylenol.
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: He said he took that at about five a.m. He certainly -
>
> THE COURT: Tylenol is another pain killer.
>
> [DEFENSE COUNSEL]: Right, Your Honor. Apparently that's what they gave him at the jail.
>
> THE COURT: Mr. Matthews, yesterday you didn't look in such good shape. I had the nurse look at you; she's filed a report. Today you look just fine. I mean, I see you've got a bandage on your leg and you've got - you've got some right bad skinned-up place on your arm, but you - you look to be - you know, to my view, you look to be in full possession of your mental and physical faculties. Are you making any contention that you are in any way impaired by drugs?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: All right. Does - does counsel notice anything that would suggest impairment here?
>
> [DEFENSE COUNSEL]: No, Your Honor, he seems to be as -
>
> THE COURT: All right. The Court will find that he is in full possession of his mental and physical faculties at this time and is not impaired in any degree by any - any medication

> or pills or medicines or any other impairing substances, and is capable of proceeding in every way.

Although defendant claims he exhibited confusion and that his need for medical attention demonstrates "substantial evidence" requiring a competency hearing, the above exchange shows the trial court had sufficient basis for declaring defendant competent to stand trial. The trial court was able to observe defendant's demeanor both on 8 August when defendant was on oxycodone, and 9 August when he was on Tylenol. The trial court questioned defendant and defense counsel as to defendant's competency and neither one expressed any concern about defendant's competency at that point. In light of the evidence supporting the trial court's decision, we are unable to say the trial court erred in determining defendant was fit to stand trial. Accordingly, this assignment of error is overruled.

II

Defendant next assigns error to the trial court's failure to declare a mistrial after the jury informed the court of a potential deadlock. A criminal defendant has an absolute right to a fair trial. *State v. Jones*, 292 N.C. 513, 521, 234 S.E.2d 555, 559 (1977). A trial court may not coerce a jury into reaching a verdict and any instruction that "might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous." *State v. Holcomb* 295 N.C. 608, 614, 247 S.E.2d 888, 892 (1978) (citations omitted). In determining whether a trial court has impermissibly

coerced a jury into a verdict, we must look to the totality of the circumstances. *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002).

The jury deliberated for approximately two hours before sending a note out to the trial judge stating that the jury was at an impasse. The trial court brought the jury into the courtroom and questioned the foreman as follows:

> THE COURT: . . . Based on the - based on the - your statement, then, is it your opinion that the jury is presently deadlocked?
>
> FOREMAN: Yes, sir.
>
> THE COURT: In your opinion as foreman of the jury, is the jury hopelessly deadlocked?
>
> FOREMAN: No, sir.
>
> THE COURT: Is it your opinion that further deliberations may be helpful?
>
> FOREMAN: Possibly.

The trial court asked the foreman for the division and was informed the jury was divided eleven to one. The court then gave the following instructions to the jury:

> Okay. Members of the jury, members of the jury, your foreman informs me that so far you have been unable to agree upon a verdict and that you are presently deadlocked.
>
> The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict. You, the jury, should reason the matter over together as reasonable men and women and reconcile your differences, if you can, without the surrender of conscientious convictions.
>
> Now, I'm going to give you some additional instructions, and then I'm going to ask you to

> resume your deliberations in an attempt to return a verdict. We have plenty of time.
>
> I've already instructed you, of course, that your verdict must be unanimous; that is, each of you must agree on the verdict. Let me give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment.
>
> Second, of course each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Thirdly, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold your own views and opinions if you remain convinced that they are correct.
>
> And fourthly and finally, I'll simply point out that none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Now, please be mindful that I'm in no way trying to force you or coerce you to reach a verdict. I've been doing this a long time and I recognize the fact that there are simply sometimes reasons why jurors cannot agree. But through these additional instructions that I've given to you, I merely want to emphasize that is your duty to do whatever you can to reason the matter over together as reasonable people and reconcile your differences if such is possible without the surrender of conscientious convictions and to reach a verdict.

Defendant did not object to these instructions. The jury spent another half hour deliberating before reaching a verdict of

guilty on the charge of impaired driving. The trial court accepted the verdict.

Defendant argues the trial court's comments emphasizing the jury's duty to reach a verdict and that the jury had "plenty of time" were coercive, particularly where only one juror dissented from the rest of the jury. We disagree. The above charge to the jury is consistent with the instructions in N.C. Gen. Stat. § 15A-1235, which provides guidance on instructions to a potentially deadlocked jury and has been upheld numerous times. *E.g., State v. Williams*, 315 N.C. 310, 325-27, 338 S.E.2d 75, 84-85 (1986). These instructions need not be delivered verbatim from the language of the statute. *State v. Jeffries*, 57 N.C. App. 416, 421, 291 S.E.2d 859, 862, *appeal dismissed and disc. review denied*, 306 N.C. 561, 294 S.E.2d 374 (1982). We find the jury charge taken as a whole is not impermissibly coercive where the trial judge properly used the statutory guidelines and stated more than once that a juror should not surrender a conscientious conviction for the purpose of returning a verdict or merely to follow the opinions of the other jurors. In addition, the court's statement that "[w]e have plenty of time" does not constitute error. *See State v. Porter*, 340 N.C. 320, 335-37, 457 S.E.2d 716, 724-25 (1995) (no error where trial court told jury, "we've got all the time in the world"). Accordingly, the trial court did not commit error by not declaring a mistrial.

For the foregoing reasons, we hold defendant's trial was held free from error.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).