NO. COA13-212
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v.

Guilford County
No. 09 CRS 96501

TIMOTHY LEE HARRIS

Appeal by defendant from judgment entered 3 September 2010 by Judge William Z. Wood, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 27 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

M. Alexander Charns for Defendant.

ERVIN, Judge.

Defendant Timothy Lee Harris appeals from a judgment sentencing him to 175 to 219 months imprisonment for trafficking in cocaine by possession. On appeal, Defendant argues that the trial court erred by failing to make findings of fact concerning the issue of Defendant's competency to stand trial, allowing a mental health evaluator to testify concerning Defendant's competency to stand trial after having been held in contempt by the trial court, allowing Defendant to represent himself at the competency hearing, determining that he was competent to stand

trial and waive his right to the assistance of counsel, allowing his standby counsel to participate in the trial, and failing to intervene without objection to preclude a particular prosecutorial comment. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

After receiving information that Defendant was involved in cocaine-related trafficking activities, Detective Matthew Alan Holder of the Guilford County Sheriff's Office undertook an investigation into the validity of those reports. Although Detective Holder ascertained that Defendant lived at an address off McConnell Road by searching information contained in certain law enforcement databases, surveillance undertaken at this address did not produce any useable information after investigating officers were spotted while following Defendant and his friends.

At that point, Detective Holden undertook surveillance activities at Defendant's Burlington address. During the surveillance process, investigating officers determined that Defendant went to a residence on Hayden Drive in Greensboro on a

regular basis. Although Defendant did not have any tangible connection to the Hayden Drive residence, Detective Holden suspected that Defendant lived there.

On 19 October 2009, Detective Holden's team engaged in surveillance-related activities concerning Defendant's brother, Charles Harris, who was believed to be involved in Defendant's drug trafficking activities. On that date, investigating officers observed Charles Harris engage in what appeared to be a drug transaction with another individual. After stopping the unknown individual's vehicle, investigating officers found cocaine.

On 20 October 2009, investigating officers stopped Charles Harris and found cocaine in his vehicle. During the course of the traffic stop, Charles Harris was observed speaking with someone on his cell phone. At approximately the same time, Defendant was seen leaving the Hayden Drive residence on foot while talking on his cell phone, an act which investigating officers considered to be unusual given that Defendant typically drove rather than walked when he left that location. As a result, investigating officers obtained and executed a warrant authorizing a search of the Hayden Drive address.

During their search of the Hayden Drive address, investigating officers found cocaine residue and items

consistent with the manufacture and packaging of cocaine. In addition, investigating officers seized a large blue duffle bag containing cocaine, firearms, a kitchen scale, nearly $19,000 in cash, and a respirator from an exterior trashcan. Under questioning by investigating officers, Defendant admitted that he knew that the bag contained cocaine. In total, investigating officers found 530 grams of powder cocaine, 283 grams of crack cocaine, and cutting agents at the Hayden Drive residence.

B. Procedural Facts

On 20 October 2009, magistrate's orders were issued charging Defendant with trafficking in more than 500 grams of cocaine by possession, trafficking in more than 500 grams of cocaine by manufacturing, conspiring with Charles Harris to traffic in more than 500 grams of cocaine by possession, and manufacturing cocaine. On 2 February 2010, the Guilford County grand jury returned bills of indictment charging Defendant with trafficking in more than 400 grams of cocaine by possession and conspiring with Charles Harris to traffic in more than 400 grams of cocaine by possession.

The charges against Defendant came on for trial before the trial court and a jury at the 30 August 2010 criminal session of the Guilford County Superior Court. On 30 August 2010, the trial court, acting on its own motion, ordered that Defendant

undergo a competency evaluation. After an evaluation conducted on 31 August 2010, the trial court determined that Defendant was competent to stand trial and to represent himself.

On 3 September 2010, the jury returned a verdict convicting Defendant of trafficking in more than 400 grams of cocaine by possession and indicating that it was unable to reach a unanimous verdict with respect to the conspiracy to traffic in cocaine charge. As a result, the trial court declared a mistrial with respect to the conspiracy charge. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to 175 to 219 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

At the time that he noted his appeal, Defendant asserted his right to represent himself. However, Defendant never took any of the steps required to perfect his appeal. On 17 June 2011, Defendant, acting *pro se*, filed a "Writ of Error" with this Court, which we dismissed on 29 June 2011. On 29 July 2011, Defendant, again acting *pro se*, filed a "Writ of Error" with this Court, which we denied on 18 August 2011. On 16 March 2012, Defendant, now represented by counsel, filed a petition for the issuance of a writ of *certiorari* with this Court, which we denied on 27 March 2012. On 7 May 2012, Defendant filed a

petition for the issuance of a writ of *certiorari* with the Supreme Court. The Supreme Court, in turn, entered an order on 13 June 2012 issuing the requested writ for the limited purpose of remanding this case to this Court for consideration of Defendant's challenges to the trial court's judgment.

II. Legal Analysis

A. Competency-Related Issues

In his first challenge to the trial court's judgment, Defendant argues that the trial court erred by determining that he was competent to stand trial and to represent himself. More specifically, Defendant contends that the trial court erred by failing to make findings of fact regarding competency-related issues, making a competency determination based upon the testimony of an evaluator that the trial court was in the process of holding in contempt, holding a competency hearing while Defendant was not represented by counsel, and finding that Defendant was competent to represent himself. We do not find Defendant's arguments persuasive.

1. Relevant Facts

At the beginning of the trial, Defendant asserted that he did not understand the charges that had been lodged against him. As the trial court attempted to explain the underlying charges, Defendant made a series of outbursts, claiming to be a "secured

party of a corporate straw man," stating that the court proceedings were a "play," asserting that his account had been "paid," and appointing the trial court as a trustee for his account. After continuing to make such statements despite having been warned not to do so, the trial court cited Defendant for contempt. Upon asking Defendant whether he wanted to be represented by counsel and being told that Defendant would not take part in this "play," the trial court appointed counsel to represent Defendant at a contempt hearing to be held later that day.

Although an assistant public defender appeared for the purpose of representing Defendant at the time designated for the contempt proceeding, this individual informed the trial court that Defendant denied having any need for his services. After being brought into the courtroom, Defendant informed the trial court that he was competent and wished to proceed *pro se*. At that point, the trial court began to question Defendant for the purpose of ascertaining whether he was competent to stand trial. In response, Defendant informed the trial court that he did not want to speak with the assistant public defender, refused to answer questions posed by the trial court, and asserted that he did not recognize either state or federal authority as a result

of the fact that had been born in the North Carolina republic, but not in the "corporate" United States.

Although the trial court asked if Defendant had a history of mental illness given the nature of Defendant's conduct and the similarity between his conduct and certain symptoms displayed by other defendants, Defendant failed to make any response to the trial court's inquiry. At that point, the trial court asked about the possibility of having a forensic examination performed and was told that evaluations were conducted at a facility across the street. As a result of Defendant's continued refusal to respond to any of the trial court's questions and his repeated assertions that he would not take any "part in this play," the trial court found Defendant in contempt and ordered him to report to the forensic evaluator's office that afternoon, stating in the written order providing for the evaluation that, if the evaluator was unable to complete a written report by the following morning, he or she should come to the courtroom for the purpose of presenting live testimony. During this process, Defendant reiterated his assertion that he was competent to stand trial, stated that he refused to take part in the trial court's "play," challenged the trial court's jurisdiction, and stated, "I can't represent myself" because "I am myself."

When court reconvened on the following morning, the trial court discovered that Cheyanne Taylor, the evaluator whom Defendant had seen on the preceding afternoon, had failed to either send a written report or to report to the courtroom in person for the purpose of presenting live testimony. For that reason, the trial court had a representative of the Guilford County Sheriff's Office bring Ms. Taylor to court. Upon arriving in the courtroom, Ms. Taylor stated that she had not provided a written report or come to the courtroom that morning because she had not read the relevant portion of the trial court's order. After explaining that she had given Defendant a Friday appointment because no earlier appointment was available, Ms. Taylor agreed to evaluate Defendant promptly and informed the trial court that she could prepare a report by 2:00 p.m. that day. The trial court emphasized that it was important for Ms. Taylor to come to her own conclusions, requested Ms. Taylor to let the trial court know if she needed more time, and indicated that prompt completion of her work was important. The trial court found Ms. Taylor in contempt for failing to come to court as instructed and ordered her to pay a $200 fine.

After evaluating Defendant, Ms. Taylor concluded that he was competent to stand trial. More specifically, Ms. Taylor expressed the opinion that Defendant comprehended the charges

that had been lodged against him, stated that Defendant did "understand the court process," and concluded that Defendant was "just refusing to believe in it" or to "agree with it." According to Ms. Taylor, Defendant had no history of mental health problems and simply denied the legitimacy of the judicial process. At the conclusion of the competency hearing, the trial court found that Defendant was competent to stand trial and represent himself and struck the order holding Ms. Taylor in contempt.

2. Competence to Stand Trial

a. Standard of Review

As this Court has consistently stated:

> evaluation of a defendant's capacity to stand trial remains within the trial judge's discretion. Defendant has the burden of persuasion with respect to establishing his incapacity. . . . Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion before reversal is required.

State v. Gates, 65 N.C. App. 277, 283-84, 309 S.E.2d 498, 502 (1983) (citations omitted). As a result, given that the "question of [a] defendant's capacity is within the trial judge's discretion and his determination thereof, if supported by the evidence, is conclusive on appeal," *State v. Reid*, 38 N.C. App. 547, 548-49, 248 S.E.2d 390, 391 (1978), *disc. review*

denied, 296 N.C. 588, 254 S.E.2d 31 (1979), the ultimate issue raised by Defendant's competency-related arguments is whether the trial court utilized lawful procedures and whether the record contains sufficient evidence to support a determination that Defendant was competent to stand trial.

b. Failure to Make Findings of Fact

Among other things, Defendant argues that the trial court erred by failing to make written findings of fact concerning the issue of Defendant's competency. According to Defendant, the trial court's failure to make written findings of fact constituted error because, had findings of fact actually been made, he would have been able to demonstrate the lack of support for the trial court's competency determination on appeal. We do not find this argument persuasive.

"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." N.C. Gen. Stat. § 15A-1001(a).

> In determining a defendant's capacity to stand trial, the test is whether he has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed.

State v. Bundridge, 294 N.C. 45, 49-50, 239 S.E.2d 811, 815 (1978).

"'[A] 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. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) (alteration in original) (quoting *Crenshaw v. Wolff*, 504 F.2d 377, 378 (8th Cir. 1974), *cert. denied*, 420 U.S. 966, 95 S. Ct. 1361, 43 L. Ed. 2d 445 (1975)). "[W]hen a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated" and "[t]he method of inquiry is still largely within the discretion of the trial judge." *Gates*, 65 N.C. App. at 282, 309 S.E.2d at 501. "[I]t is not error for the trial court to fail to [make findings of fact] where the evidence would have compelled the ruling made." *Id.* at 283, 309 S.E.2d at 502.

Admittedly, the trial court did not make findings of fact in the course of determining that Defendant was competent to stand trial and waive his right to the assistance of counsel. However, we do not believe that the trial court's failure to make such findings and conclusions constituted error in this instance. Although Defendant points to the length of time that Ms. Taylor spent with Defendant prior to reaching a conclusion

concerning his competency, this Court has held that "the plain language of [N.C. Gen. Stat.] § 15A-1002 does not establish a minimum period of observation for competency evaluations." *State v. Robertson*, 161 N.C. App. 288, 291, 587 S.E.2d 902, 904 (2003) (holding that an evaluation lasting one hour and forty-five minutes was sufficient to permit a valid competency determination). Moreover, Defendant fails to explain how the evidence presented during the competency hearing failed to support the trial court's decision or was otherwise deficient. Both the trial court and Ms. Taylor recognized that Defendant was familiar with the trial process. Ms. Taylor testified that Defendant understood his role and the roles played by other courtroom personnel, understood the nature of the charges that had been lodged against him, and understood the length of the sentence that might be imposed upon him in the event of a conviction. After noting that Defendant had no history of mental health issues, Ms. Taylor expressly stated that she believed that Defendant was simply engaging in oppositional behavior stemming from his refusal to recognize the legitimacy of the judicial process. As a result, we have no difficulty in concluding that the record before the trial court more than sufficed to support the trial court's determination that Defendant was competent to stand trial, obviating the necessity

for an award of appellate relief based upon the trial court's failure to make findings of fact and conclusions of law.

c. Treatment of Evaluator

In addition, Defendant challenges the trial court's reliance upon Ms. Taylor's testimony in making its competency determination. According to Defendant, Ms. Taylor was not, as required by statute, an impartial evaluator, N.C. Gen. Stat. § 15A-1002(b)(1) (providing that the court "[m]ay appoint one or more impartial medical experts"), and was not given enough time to complete her evaluation. *See* N.C. Gen. Stat. § 15A-1002(b) (providing that "[r]easonable notice shall be given to the defendant and prosecutor" in connection with the performance of competency evaluations). Defendant has not, however, established any basis for questioning either Ms. Taylor's impartiality or the adequacy of the amount of time available to Ms. Taylor for the purpose of evaluating Defendant's competence.

As the record clearly reflects, the trial court never made any attempt whatsoever to induce Ms. Taylor to reach any particular result with respect to the competence issue. Although the trial court did hold Ms. Taylor in contempt, it never suggested that the contempt order would be stricken if Ms. Taylor reached a particular conclusion. On the contrary, the trial court specifically ordered Ms. Taylor to develop "[her]

own opinion as to whether or not he's competent, oriented, [and] everything." Moreover, aside from the fact that the relevant statutory provisions make no reference to the amount of notice which the evaluator, as compared to counsel for the parties, is entitled to receive or the amount of time which the evaluator is to be given in connection with the performance of a competency evaluation, nothing in the present record in any way tends to show that the trial court failed to give Ms. Taylor sufficient time within which to perform the requested evaluation. On the contrary, the trial court specifically informed Ms. Taylor that she could have more time to complete the evaluation process if she needed it. As a result, none of Defendant's challenges to the evaluator's impartiality or the amount of time within which the evaluator was given to complete the evaluation have any merit.

3. Competence to Waive Counsel

a. Self-Representation at the Competency Hearing

In his brief, Defendant also contends that the trial court erred by allowing Defendant to represent himself at the competency hearing. We do not find Defendant's argument persuasive.

In challenging the trial court's decision to allow him to proceed *pro se* during the competency hearing, Defendant argues

that "[t]he trial judge failed to recognize that[,] if [Defendant] was incompetent, he wouldn't be able to meaningfully participate in the competency hearing." According to Defendant, an attorney would have challenged Ms. Taylor's credentials and the thoroughness of her evaluation at the competency hearing had one been made available to Defendant. The fundamental problem with Defendant's argument is that he had waived his right to the assistance of counsel prior to the competency hearing and has not provided any justification for refusing to recognize the validity of his earlier waivers before this Court.

"When a defendant waives counsel at or before the trial phase of the proceedings against him or her, the record must show that the defendant was literate and competent, that he or she understood the consequences of the waiver, and that, in waiving the right, the defendant was voluntarily exercising his or her own free will." *State v. Warren*, 82 N.C. App. 84, 85, 345 S.E.2d 437, 439 (1986) (citing *State v. Thacker*, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980)). "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *Id.* at 89, 345 S.E.2d at 441. According to the record, Defendant executed written waivers of

his right to the assistance of counsel on 21 October 2009 before Judge Margaret Sharpe and of his right to the assistance of counsel on 2 March 2010 before Judge Edwin G. Wilson, Jr. As a result, in the absence of some reason to question the validity of these written waivers or a request for the appointment of counsel by Defendant, the trial court lacked the authority to appoint counsel to represent Defendant at the competency hearing.

In seeking to persuade us that his prior written waivers of his right to the assistance of counsel were invalid, Defendant notes that these written waivers were executed at times which were relatively remote from the competency hearing and argues that this temporal disparity sufficed to invalidate Defendant's waivers. Although competency determinations made some distance in time from trial pose obvious potential concerns, *State v. McRae*, 139 N.C. App. 387, 390-91, 533 S.E.2d 557, 559-60 (2000), the present record contains no indication that Defendant's level of intellectual functioning changed between the date upon which he executed these written waivers and the date upon which the competency hearing was held. In the absence of such evidence, a decision to accept Defendant's argument would necessarily require us to hold that no criminal defendant could ever be allowed to proceed *pro se* at a competency hearing, a result

which would be fundamentally inconsistent with a defendant's well-established right to self-representation. *Faretta v. California*, 422 U.S. 806, 814, 95 S. Ct. 2525, 2530, 45 L. Ed. 2d 562, 570 (1975) (stating that "the Sixth Amendment right to the assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 241, 87 L. Ed. 268, 274 (1942)) (internal quotation marks omitted). Although a trial court may, as Defendant notes, compel a defendant who, while competent to stand trial, lacks the capacity to conduct his or her own defense to accept representation by counsel, *Indiana v. Edwards*, 554 U.S. 164, 178, 128 S. Ct. 2379, 2388, 171 L. Ed. 2d 345, 357 (2008) (holding that trial judges may "insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"), the trial court found that Defendant was, in fact, competent to waive his right to the assistance of counsel, rendering the principle enunciated in *Edwards* irrelevant. *State v. Lane*, 365 N.C. 7, 22-23, 707 S.E.2d 210, 220 (stating that, given that "the trial court properly conducted a thorough inquiry and determined that defendant's waiver of his

constitutional right to counsel was knowing and voluntary," *Edwards* "does not guide our decision here"), *cert. denied*, __ U.S. __, 132 S. Ct. 816, 181 L. Ed. 2d 529 (2011). As a result, the trial court did not err by allowing Defendant to represent himself at the competency hearing.

b. Waiver of Right to Counsel

Finally, Defendant contends that the trial court erred by determining that he was competent to waive his right to the assistance of counsel and to exercise his right to represent himself at trial. Once again, we conclude that Defendant's argument lacks merit.

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> > (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
> >
> > (2) Understands and appreciates the consequences of this decision; and
> >
> > (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242. "The inquiry described in [N.C. Gen. Stat.] § 15A-1242 is mandatory in every case where the defendant requests to proceed *pro se*." *State v. White*, 78 N.C.

App. 741, 746, 338 S.E.2d 614, 616 (1986). As a general proposition, compliance with N.C. Gen. Stat. § 15A-1242 ensures compliance with relevant constitutional principles, such as the Sixth Amendment right to the assistance of counsel and to self-representation, as well. *State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002) (stating "that [N.C. Gen. Stat.] § 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiries"). Although "[p]rior cases addressing waiver of counsel [issues] under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, . . . they do, as a practical matter, review the issue *de novo*." *State v. Watlington*, __ N.C. App. __, __, 716 S.E.2d 671, 675 (2011).

As we have already noted, "when a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *Warren*, 82 N.C. App. at 89, 345 S.E.2d at 441. The record clearly reflects that Defendant had signed two written waivers of his right to the assistance of counsel or appointed counsel and unequivocally told the trial court at the beginning of the trial proceedings that he wanted to represent himself. Moreover, a careful review of the record clearly

demonstrates that the trial court informed Defendant of his right to the assignment of counsel and made an inquiry into whether Defendant understood the consequences of his actions in the course of discussing Defendant's opposition to the appointment of standby counsel:

> THE COURT: Okay. Please have a seat. Mr. Harris, I need to tell you this. I've observed you for the last couple of days here in the courtroom. It seems like you're an intelligent man. You have a good understanding of the English language. Once again, I'm going to ask you if you would like to have an attorney or at least a standby attorney to ——
>
> [DEFENDANT]: No, sir.
>
> THE COURT: —— sit —— well, just listen a second. I understand you don't. If you have a standby attorney, for example, if we had to —— if you were removed from the courtroom, that standby attorney could at least try to represent your interests.
>
> [DEFENDANT]: No, sir.
>
> THE COURT: That's a consideration. Also, as a layperson you don't know the rules of evidence with the same degree of familiarity an attorney does. You may or may not know how to object. You might possibly waive certain important rights by failing to object to things the DA says or the way the district —— district attorney asks questions. Certainly, you might have difficulty asking questions in the proper format. That —— that could cause problems to you, because the DA could object and then you'd have to rephrase the question and possibly more than one time and might get frustrated if it doesn't get in.

> [DEFENDANT]: I'm ——
>
> THE COURT: Wait. I know. So, there's a lot of considerations about having an attorney. Are you sure you don't want me to appoint you a standby attorney ——
>
> [DEFENDANT]: I'm positive.
>
> THE COURT: —— to at least sit through the trial?
>
> [DEFENDANT]: I'm positive.
>
> THE COURT: So, you don't want an attorney?
>
> [DEFENDANT]: No, sir.

Finally, the record reflects that Defendant understood the nature of the charges that had been lodged against him and the potential punishment that he might receive in the event that the jury returned a guilty verdict. For example, Ms. Taylor testified that she had discussed the sentence that might be imposed upon Defendant in the event that he was convicted and that, despite Defendant's refusal to acknowledge that he understood the information in question, she believed that he did understand this information. As a result, given that the trial court did, in fact, examine the extent to which Defendant knowingly and voluntarily waived his right to the assistance of counsel, the fact that Defendant had previously executed written waivers of his right to the assistance of counsel, and that

Defendant has failed to explain why his prior written waivers of his right to the assistance of counsel should be deemed ineffective, the trial court did not err by allowing Defendant to exercise his right of self-representation. Thus, none of Defendant's challenges to the trial court's competency-related determinations have merit.

B. Participation by Defendant's Standby Counsel

Secondly, Defendant contends that the trial court erred by allowing his standby counsel to participate in the trial proceedings given that he had asserted his right to self-representation. We do not find Defendant's argument persuasive.

1. Relevant Facts

After determining that Defendant was competent to stand trial and represent himself, the trial court appointed standby counsel to provide any advice that Defendant might wish to receive, to assume responsibility for representing Defendant if he decided to accept appointed counsel, and to appear on Defendant's behalf if Defendant was removed from the courtroom because of his disruptive conduct. On the following day, prior to the making of opening statements and outside the presence of the jury, Defendant launched into a tirade during which he accused the trial court of "treason, extortion, and fraud from the bench." After refusing to cross-examine the State's first

two witnesses, Defendant questioned each of the State's remaining witnesses on the second day of the trial.

As the third day of trial began, Defendant started to engage in seriously disruptive conduct, making repeated assertions that his real name was "Timothy Lee Harris El Shabazz," refusing to be seated, disputing the trial court's "jurisdiction," and asking whether the trial court had a "claim" pending against him. As Defendant persisted in this conduct, the trial court sent the jury from the courtroom, found Defendant in contempt, ordered that Defendant be shackled, and that his shackles be bolted to the floor.

After the jury reentered the courtroom and the State called its last witness to the stand, Defendant began interrupting the proceedings again, causing the court reporter to complain that she was unable to take down the proceedings. As Defendant continued to interrupt the proceedings and as the court reporter continued to complain about the impact of Defendant's interruptions on her ability to perform her assigned task, the trial court ordered Defendant's standby counsel to proceed on his behalf and had Defendant removed from the courtroom. Although the trial court allowed Defendant to return to the courtroom on numerous subsequent occasions for the purpose of attempting to ascertain whether Defendant was willing to act in

a more appropriate manner, Defendant persisted in disrupting the trial by repeatedly correcting the trial court as to what his name was, accusing the trial court of treason and other unlawful actions, inquiring if a "claim" had been asserted against him, and refusing to answer the trial court's inquiries concerning the extent to which he would behave himself properly. Although Defendant was returned to the courtroom during the taking of the jury's verdict, he was removed from the courtroom after that process had been completed. Thus, Defendant was essentially absent from the courtroom during the last part of the trial.

During Defendant's absence, his standby counsel took a number of actions on his behalf, including unsuccessfully moving for a mistrial based upon Defendant's conduct and challenging the validity of the prosecutor's reasons for exercising a peremptory challenge directed to an African-American prospective juror. In addition, Defendant's standby counsel cross-examined Detective Holder, who was the State's final witness. Lastly, Defendant's standby counsel participated in the jury instruction conference and made a closing argument on Defendant's behalf.

2. Applicable Legal Principles

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel

before he can be validly convicted and punished by imprisonment." *Faretta*, 422 U.S. at 807, 95 S. Ct. at 2527, 45 L. Ed. 2d at 566. However, the Supreme Court has also "recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help." *Id.* at 814, 95 S. Ct. at 2530, 45 L. Ed. 2d at 570 (quoting *Adams*, 317 U.S. at 279, 63 S. Ct. at 241, 87 L. Ed. at 274) (quotation marks omitted). For that reason, "[t]o thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment" on the theory that, "[u]nless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Id.* at 819-20, 95 S. Ct. at 2533-34, 45 L. Ed. 2d at 573-74. As a result, while "the trial judge in his discretion may determine that standby counsel should be appointed to assist the defendant when called upon and to bring to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion," N.C. Gen. Stat. § 15A-1243, "[a]llowing standby counsel to advocate any position over a *pro se* defendant's objection . . . interferes with his exercise of his right to represent himself." *State v. Thomas*, 346 N.C. 135, 138, 484 S.E.2d 368, 370 (1997). "The

standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

3. Lawfulness of Standby Counsel's Participation

The trial court's decision to remove Defendant from the courtroom in response to his disruptive behavior was clearly lawful. In *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), the United States Supreme Court addressed the extent to which a criminal defendant's right to be personally present at his trial could be deemed to have been forfeited based upon the defendant's misbehavior in the courtroom. In *Allen*, the defendant expressly rejected the assistance of court-appointed counsel and conducted his own defense. *Id.* at 339, 90 S. Ct. at 1059, 25 L. Ed. 2d at 357. During the course of the trial, the defendant argued with the trial judge, spoke in an abusive manner, appeared to threaten the judge's life, and ripped trial documents and threw them to the ground. *Id.* at 339-40, 90 S. Ct. at 1059, 25 L. Ed. 2d at 357. After Defendant engaged in similar conduct despite having been clearly warned about what would happen in the event of a recurrence, the trial court had the defendant removed from the courtroom and continued the trial in the defendant's absence.

Id. at 340, 90 S. Ct. at 1059, 25 L. Ed. 2d at 357. Similar disruptive events and removals recurred throughout the remainder of the trial. *Id.* at 340-41, 90 S. Ct. at 1059, 25 L. Ed. 2d at 357-58. In holding that "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," *Id.* at 343, 90 S. Ct. at 1060-61, 25 L. Ed. 2d at 359, the Court stated that:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

Id. at 343, 90 S. Ct. at 1061, 25 L. Ed. 2d at 359.

Defendant, like the defendant in *Allen*, engaged in behavior that was "so noisy, disorderly, and disruptive that it [was] exceedingly difficult or wholly impossible to carry on the trial." *Id.* at 338, 90 S. Ct. at 1058, 25 L. Ed. 2d at 356. On two separate occasions, the court reporter complained that she

could not do her job because of Defendant's conduct. In addition, Defendant constantly interrupted the trial court and other trial participants, made irrelevant statements at completely inappropriate times, refused to keep his seat, and engaged in other disruptive activities despite being shackled, gagged, and held in contempt at different points during the trial. Defendant's conduct worsened during the course of the trial, as the trial court noted, stating that:

> when we started this trial [Defendant] throughout jury selection and through the chemist, both chemical analysts, sat quietly and did nothing, almost —— he sat there but participated in the trial very little. Did nothing to interrupt it or disrupt it. Then when the officers started testifying he cross-examined the officers who had things to say about his —— the people, the search of the pickup truck with the man and the woman and the surveillance and the stop of his brother and brought out on every one of those that he was not present, they didn't see him, you know, surveillance didn't see much except him being there. And it was only when the lead officer was coming back for the second day and the only possible evidence left was the evidence which [Defendant] knew which was the finding of cocaine in the trash can that the dog handler referred to in the duffel bag that he had confessed to and that —— and his confession was about to come in that he started attempting to disrupt the trial.

Thus, we have no hesitation in concluding that Defendant's conduct was sufficiently disruptive to support, if not necessitate, the trial court's decision to remove Defendant from

the courtroom and to allow the proceedings to continue in his absence.

Admittedly, "[s]ince the right of self-representation is a right that[,] when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 950 n.8, 79 L. Ed. 2d 122, 133 n.8 (1984). However, not every instance of participation by a defendant's standby counsel results in a violation of the defendant's right to self-representation. For example, given that "[a] defendant can waive his *Faretta* rights," "[p]articipation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable." *Id.* at 182, 104 S. Ct. at 953, 79 L. Ed. 2d at 136. As a result, even when a defendant "insists that he is not waiving his *Faretta* rights, a *pro se* defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably." *Id.* Moreover, a defendant's right of self-representation is "adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel

and the *pro se* defendant are resolved in the defendant's favor." *Id.* at 179, 104 S. Ct. 951, 79 L. Ed. 2d at 134. Finally, even un-consented to intrusions into the trial process in the presence of the jury by a defendant's standby counsel do not suffice to establish the existence of a violation of a defendant's right to self-representation in the event that they "were simply not substantial or frequent enough to have seriously undermined [the defendant's] appearance before the jury in the status of one representing himself." *Id.* at 187, 104 S. Ct. at 955-56, 79 L. Ed. 2d at 139. However, such a violation does occur when standby counsel "advocate[s] any position over a *pro se* defendant's objection," *Thomas*, 346 N.C. at 138, 484 S.E.2d at 370, either in or outside the presence of the jury.

Defendant's standby counsel did not begin to participate in the trial in any substantial way until after Defendant's disruptive conduct led to his removal from the courtroom. In other words, had Defendant refrained from engaging in the consistently disruptive conduct delineated in the record, the trial court would have never found any reason to allow Defendant's standby counsel to become actively involved in his defense. Although the State contends that we should hold that Defendant forfeited his right to self-representation by

repeatedly engaging in disruptive conduct, we need not reach that issue given the peculiar facts at issue here in light of the fact that other factors appear to justify rejection of Defendant's claim.

A careful review of the record indicates that the participation of Defendant's standby counsel in the trial proceedings consisted of making a mistrial motion and a record preservation statement outside the presence of the jury, cross-examining the State's final witness, participating in the jury instruction conference, and making a final argument to the jury. In view of the fact that the mistrial motion, record preservation statement, and jury instruction conference all occurred outside the presence of the jury and the fact that Defendant would, except for his persistently disruptive conduct, have been allowed to say whatever he wished, this aspect of the participation by Defendant's standby counsel in the trial proceedings did not violate Defendant's right of self-representation. Although Defendant made a number of comments to the effect that his standby counsel could not represent him because Defendant was "himself," he never explicitly objected to standby counsel's role in cross-examining Detective Holder. In addition, although he knew that his standby counsel would make an argument to the jury, Defendant never indicated that he had

any specific objection to that aspect of his standby counsel's participation in the trial. Finally, unlike the situation before the Supreme Court in *Thomas*, Defendant has not contended that the representation provided by his standby counsel was in any way inconsistent with the manner in which he wanted his defense to be conducted. Although the trial court might have been better advised to simply allow the trial to continue in Defendant's absence without any direct involvement by Defendant's standby counsel, we are unable to conclude that Defendant's right of self-representation was violated in this case given that his inability to participate resulted from his own misconduct, that none of standby counsel's actions were inconsistent with Defendant's own contentions, and the fact that Defendant never specifically objected to any of the actions that his standby counsel took on his behalf. As a result, Defendant is not entitled to relief from the trial court's judgment based upon the fact that his standby counsel participated in the trial proceedings during his absence.

C. Closing Argument

Finally, Defendant contends that the trial court erred by failing to intervene *ex mero motu* to preclude the prosecutor from making an impermissible comment about his decision to

refrain from testifying on his own behalf. We do not find Defendant's argument persuasive.

In the course of making their final arguments to the jury, "[c]ounsel may not argue . . . incompetent and prejudicial matters," "may not 'travel outside the record' by injecting into his argument facts of his own knowledge or other facts not included in the evidence," or make "remarks not warranted by either the evidence or the law" or "calculated to mislead or prejudice the jury." *State v. Lynch*, 300 N.C. 534, 551, 268 S.E.2d 161, 171 (1980) (citing *State v. Westbrook*, 279 N.C. 18, 39, 181 S.E.2d 572, 584 (1971), *death sentence vacated*, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972), and *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975)), *disapproved on other grounds in Batson v. Kentucky*, 476 U.S. 79, 82 n.1, 106 S. Ct. 1712, 1715 n.1, 90 L. Ed. 2d 69, 77 n.1 (1986). Among other things, "any comment by counsel on a defendant's failure to testify is improper and is violative of his Fifth Amendment right" to remain silent. *State v. Ward*, 354 N.C. 231, 250-51, 555 S.E.2d 251, 264 (2001) (citing *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840, *cert. denied*, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001)). The "[a]rgument of counsel is largely within the control and discretion of the trial judge," with counsel being "allowed wide latitude in the

argument of hotly contested cases." *Lynch*, 300 N.C. at 551, 268 S.E.2d at 171. "Where there is no objection, 'the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial.'" *State v. Gaines*, 345 N.C. 647, 673, 483 S.E.2d 396, 412 (quoting *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995)), *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

In his closing argument, the prosecutor asserted that:

> And I would submit, ladies and gentlemen, do what the defendant refuses to do for himself, despite the mountain of evidence against him, despite his right to have his day in court. Ultimately, it is the responsibility of the jury through your verdict to speak the truth. What I'm asking of you, ladies and gentlemen, is to do what the defendant refuses to do for himself. Find him responsible for his criminal conduct.

Although Defendant argues that this comment represented an impermissible comment upon his decision to refrain from testifying on his own behalf, the challenged statements were, at worst, a very oblique and indirect reference to Defendant's refusal to take the witness stand. In light of the relatively isolated nature of the challenged comments, the lack of any direct prosecutorial comment on Defendant's failure to testify,

and the strong evidence of Defendant's guilt, we have no hesitation in concluding that the challenged prosecutorial comment was not so improper as to call for judicial intervention despite the absence of an objection. As a result, Defendant is not entitled to relief from the trial court's judgment based upon this argument.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).