NO. COA14-645

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 12 CRS 61993-61994

RAYMOND DAKIM-HARRIS JOINER

Appeal by Defendant from judgments entered 28 June 2013 by Judge R. Stuart Albright in Superior Court, Forsyth County. Heard in the Court of Appeals 3 November 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Ryan F. Haigh, for the State.

Kimberly P. Hoppin for Defendant.

McGEE, Chief Judge.

Raymond Dakim-Harris Joiner ("Defendant") was charged with two counts of malicious conduct by a prisoner and having attained habitual felon status on 28 January 2013. Two Forsyth County Sheriff's deputies were attempting to remove Defendant from his holding cell and take him to court on 30 November 2012, when Defendant resisted them and spat in both of their faces. The incident was captured on video.

One month earlier, on 30 October 2012, Defendant had been evaluated by Dr. Charles Vance ("Dr. Vance"), a forensic psychiatrist at Central Regional Hospital in Butner, in order for Dr. Vance to determine Defendant's competence to participate in a separate criminal proceeding. Dr. Vance later averred in a 27 June 2013 affidavit:

> The prison records, all from 2011, consistently reflected a sole mental health diagnosis of Antisocial Personality Disorder. The jail records, from 2012, describe his engaging in extreme behavior, such as smearing feces and flooding his cell. Consideration was given to his having a psychotic disorder, but it was ultimately felt that he was fabricating symptoms or being purposefully manipulative. [Defendant's] reviewed Sick Call Requests likewise did not reflect disordered or psychotic thinking.

Dr. Vance determined that Defendant was competent to stand trial in that separate matter.

In the present case, R. Andrew Keever ("Keever") from the Public Defender's Office was appointed to represent Defendant. However, in late 2012, Defendant informed Keever that he wished to represent himself. A hearing was conducted on 22 February 2013, in which Keever informed the trial court that Defendant had asked him to withdraw as his attorney so that Defendant could represent himself. Keever presented the trial court with a psychological evaluation of Defendant, presumably done by Dr.

Vance, and the trial court asked Defendant if he wanted to represent himself. Defendant failed to answer many of the trial court's questions in a straightforward manner, but stated multiple times that he did want to represent himself without Keever's assistance. The trial court noted that Defendant's evasive and often bizarre answers to questions appeared "to be some type of malingering like they said in the report." The trial court found that Defendant "understands the courts and the proceedings and the nature of the charges against him," and Defendant was allowed to represent himself. Keever was appointed as Defendant's standby counsel. The trial court explained to Defendant:

> Mr. Joiner, the reason I am allowing you to represent yourself is because it appears from the psychological evaluation that you don't suffer from any serious mental illness, although you do have an antisocial personality disorder, and you seem to be of average intelligence and not mentally deficient in any way.

Before the start of trial on 24 June 2013, the trial court revisited Defendant's desire to represent himself. During that hearing, Defendant refused to answer questions and declared that the trial court had no authority to conduct the trial. The trial court repeatedly asked Defendant if he wanted to represent himself, if he understood the charges against him, and if he understood the maximum prison sentence he was facing. Defendant

responded to these questions by saying, "no," answering in contradictory ways, or refusing to answer at all. Defendant also yelled obscenities at the trial court and was otherwise extremely disruptive. During the pre-trial hearing, the trial court made eight different findings that Defendant was intentionally attempting to delay the proceedings.

Following this extended colloquy with Defendant, the trial court again ruled that Defendant could represent himself, with Keever as his standby counsel. The trial court made this decision based upon its findings that Defendant understood the nature of the proceedings, could appropriately answer the questions posed to him, but refused to engage appropriately simply as a means of delaying the proceedings. The trial court repeatedly advised Defendant that he could change out of his prison clothes, but Defendant refused to do so. The trial court ordered Defendant's shackles removed, but Defendant resisted, and stated that he was going to punch the judge in the "f***ing face." The trial court then determined that Defendant would remain shackled. Later, the trial court again offered to unshackle Defendant and provide civilian clothes, but Defendant declined.

Defendant refused to leave his cell on the second day of trial and had to be forced out. Defendant threatened to stab an

officer, and while Defendant was in a holding cell at the courthouse, he defecated and smeared his feces on the cell walls. The proceedings were delayed approximately one hour and, when Defendant entered the courtroom, he was extremely disruptive and belligerent, including directing obscenities toward the judge. The trial court warned Defendant that if he did not desist in his behavior, he would be gagged. The trial court stated:

> The defendant, by my unofficial count, he talked, uninterrupted, continuously for at least 10 minutes. I gave him a warning that he would be gagged if he continued to be so disruptive. Again, he was so loud, in fact yelling, that there was basically nothing the Court could say without creating a muddled record. The Court does intend to gag the defendant if he continues to act like this.
>
> I'm going to ask the sheriff to get the appropriate measures to gag him. Make sure his nostrils are clear so he can breathe.

The trial court took a recess to give Defendant another chance to conduct himself appropriately.

> THE COURT: Let the record reflect that we're back in session. We went in -- we took a recess after the defendant's last tirade at approximately 10:57 a.m. It is now approximately 11:43, so I've given the defendant plenty of time to calm down. We'll see how it goes.
>
> He's not in the courtroom yet. We'll bring him here in a minute.

> His outstanding standby counsel Mr. Keever has been here the entire time.
>
> Mr. Keever, just so you know, I intend to proceed. If he continues to act as he has been acting, he will be gagged. I will find, I'm going to find that he's waived his right to proceed pro se. You will be representing him. Do you understand?
>
> MR. KEEVER: I understand. I would need to make the appropriate objections at the appropriate time if that happens.
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> THE COURT: Sure. You object. But the Court is concerned. I want to insure a fair trial. And if he refuses to cooperate, I want someone to be able to work as best he can under the circumstances for the defendant on his behalf. To do otherwise would be to allow every single defendant who wants a mistrial simply to act up and we'd never have a trial. So I'm going to give him another opportunity.
>
> Again, court opened at nine-thirty, just shortly after nine-thirty. It's now almost 11:45, so he has certainly succeeded in delaying this trial for quite a while. The Court has exercised as much forbearance, restraint, and patience as it can. I'm going to proceed. We are going to have a hearing about the restraint in the absence of the jury. But if he continues to act disruptive, I do intend to find that he's waived his right to proceed pro se.

Defendant was brought back into the courtroom in a restraint chair with a mesh bag over his head. When asked by the trial court if he intended to spit on anyone if the bag were removed, Defendant answered: "Yes." Defendant also responded in the affirmative when asked if he intended to hurt anyone if his

restraints were removed. The trial court then informed Defendant of its intent to conduct a hearing concerning the use of restraints, and Defendant expressed his interest in having another mental evaluation:

> At this time, in the presence of the defendant, in the absence of the jury, I want to conduct a hearing about the defendant's restraints. Let me have –
>
> THE DEFENDANT: And my mental capacity too.
>
> THE COURT: I understand. Sergeant -- you've already been evaluated for forensic evaluation.
>
> THE DEFENDANT: I have a right to get evaluated twice too.
>
> THE COURT: You've already been evaluated. At this point, sir, you're just delaying the Court, as I found yesterday. You've succeeded. I mean it's almost twelve o'clock.

The trial court called a female officer involved in the morning incidents for Defendant to question. When the officer was told to place her hand on the Bible to take the oath, Defendant stated: "It won't . . . matter if she took the oath. She a harlot." **T2 146** The trial court responded: "I understand[,]" and Defendant then said: "In other words whore." After Defendant continued to interrupt in a belligerent fashion, the trial court stated:

> THE COURT: Wait a minute. Now, Mr.

Joiner, if you keep interrupting, I am going to gag you. That is the next step. I don't want to do that. I don't intend to do that unless you keep interrupting. I have reached my limit. So, you are warned if you keep interrupting. You called this witness, I believe you just called her a whore. That is absolutely contemptible. I am exercising as much forbearance and restraint as I can. You're warned. Any more interruptions could result in you being gagged. If you continue to interrupt, I want you to be warned that I'm also going to find that you're waiving your right to proceed pro se and I will activate Mr. Keever to be your attorney.

THE DEFENDANT: Can you do that right now then?

THE COURT: Do you want me to do that?

THE DEFENDANT: Yes, sir.

THE COURT: You want Mr. Keever to represent you?

THE DEFENDANT: No. I want you to go ahead and do what you said you were going to do.

THE COURT: Well, I've told you what's going to happen. If you keep interrupting, you're going to be gagged.

THE DEFENDANT: Waive my pro se.

THE COURT: Pardon me?

THE DEFENDANT: Waive my pro se.

THE COURT: You want Mr. Keever to represent you?

THE DEFENDANT: I am myself.

THE COURT: Do you want to represent

yourself not or not?

Defendant did not answer. The trial court continued to give Defendant opportunities to ask questions concerning his restraints, but Defendant would only ask irrelevant questions. The trial court ruled that Defendant needed to remain restrained, and gave Defendant one further chance to represent himself, stating: "Mr. Joiner, when I bring the jury in, if you act disruptive, you are going to be gagged and Mr. Keever will represent you, okay?" Jury *voir dire* resumed, and when the State had finished asking questions of the first potential juror interviewed that day, the trial court asked if Defendant had any questions for the juror. Defendant responded: "I'm not going to ask nobody nothing, man. This is racism, man." The trial court sent the potential jurors out of the courtroom, and again asked Defendant if he wanted to represent himself. When Defendant failed to answer, the trial court found Defendant's silence to be a negative response, and appointed Mr. Keever to take over representation of Defendant, ruling

> that someone needs to act in the defendant's best interest, and if the defendant is not going to ask any relevant questions, all he is doing is making spontaneous statements, the Court is going to find he's waived his right to proceed pro se, and I'm going to activate Mr. Keever to represent [Defendant].

Even following this ruling, the trial court once again offered Defendant the opportunity to continue representing himself. Defendant again expressed his unwillingness to participate in the proceeding, and stated that if the trial court wanted "to hire [Mr. Keever] on [its] behalf, then go ahead, and I'll file my federal lawsuits, and you'll have to answer to the international courts." The trial court once again instructed Mr. Keever to step in and represent Defendant.

Mr. Keever then moved for a mistrial "[b]ased on what's been going on in court," arguing that Defendant had been prejudiced. The trial court denied the motion

> based on the finding that the defendant, any error has been invited error on his part. It's all his own doing. The [c]ourt hasn't incited the defendant to do anything negative. If I were to allow a mistrial in this case, a hundred percent of criminal cases will always result in a mistrial. All the defendant has to do is come in and act disorderly, willfully obstruct and delay court. Based on your motion, nevertheless, the [c]ourt finds any actions in front of the jury by the defendant have been done by the defendant willfully and voluntary.
>
> The [c]ourt, in fact, finds that the defendant has willfully obstructed and delayed the trial court proceedings by refusing to cooperate, by refusing to answer simple questions asked by the [c]ourt, by being disruptive in the courtroom, by refusing to participate in his defense in any way, by making gratuitous statements that have no relevance to any of the court proceedings, by threatening various court

> personnel, by stating his intention to spit on people in court if his spit sock was removed, by stating that he would act out in court and possibly hurt people in court if his restraints were removed. The [c]ourt finds all that to be invited error, all by the defendant's own doing. Motion for mistrial is denied.

Defendant then personally requested that the trial court include on the record "that I'm on mental health medication too for depression[.]" Following jury selection, Defendant was again given the chance to represent himself but, because Defendant did not respond to questions related to waiver of counsel, the trial court ruled that Mr. Keever would continue representing Defendant.

On the third day of trial, Mr. Keever questioned Defendant's capacity to proceed and the trial court ordered Defendant to again be evaluated to determine his capacity to proceed at trial. Edward Paul Flores ("Mr. Flores"), a licensed clinical social worker and certified forensic screener, evaluated Defendant. Mr. Flores testified that he had difficulty making a determination concerning Defendant because Defendant did not answer his questions in an appropriate manner. Mr. Flores recommended that Defendant be sent for a full forensic evaluation. Mr. Flores testified that he would ask Defendant a question "and the [Defendant had his] own agenda of the answers that [he] wanted to tell me. So that's why I

thought there was some malingering." When asked directly by the trial court if he agreed with an earlier finding that Defendant "appears to be malingering for secondary gain, possibly for transfer, release or absolution of legal charges[,]" Mr. Flores answered: "Yes."

The trial court ordered that Defendant be sent for further evaluation. Defendant was evaluated by Dr. Vance. Dr. Vance testified that, during the evaluation, Defendant "refused to engage in interview with me yesterday. He was brought to Central Regional Hospital for evaluation. He would not talk to me, though, would not even acknowledge my presence or make eye contact with me." Although Defendant's refusal to participate hampered Dr. Vance's ability to conduct his evaluation, Dr. Vance was of the opinion — based upon his earlier evaluation of Defendant as well as more recent information — that Defendant was competent to proceed to trial, that he understood the proceedings, and that he was able to assist in his defense. Dr. Vance believed Defendant's behavior, including spreading feces on his cell wall, was manipulative behavior. Following this hearing, the trial court entered findings of fact stating that Defendant was purposefully disruptive and had successfully managed to delay the proceedings on multiple occasions. The trial court concluded that Defendant was competent to stand

trial, and Defendant's motion to find Defendant incompetent to stand trial was denied.

The trial continued, and Defendant immediately began to disrupt the proceedings. The jury was sent out of the courtroom again, and the trial court found Defendant in contempt of court based upon the following:

> [I]n open court, the [c]ourt finds beyond a reasonable doubt that during the course of [Defendant's] criminal trial in 12CRS61993 and 61994 on Monday, 24 June 2013, and on Tuesday, 25 June 2013, [Defendant] continuously and willfully obstructed and delayed his trial by refusing to answer simple, straightforward questions asked by the [c]ourt, by yelling and cussing at the [c]ourt, by threatening court personnel with bodily harm, and by otherwise failing to cooperate.
>
> . . . .
>
> In addition . . . [D]efendant smeared his feces on his cell wall in an effort not to come to court.

During the contempt hearing, Defendant continued to disrupt the trial court, including calling the judge a "m*****f*****" several times, and stating that the judge should have his head cut off. After continuation of Defendant's disruptions and multiple warnings by the trial court, the trial court had Defendant gagged so the trial could proceed. Defendant twice managed to defeat the gag and yell obscenities at the judge. Finally, upon Keever's request, Defendant was removed from the

courtroom and allowed to follow the proceedings via an audio feed in a separate room in the courthouse. Keever renewed his motion for mistrial, which the trial court denied.

Defendant was convicted on 28 June 2013 of two counts of malicious conduct by a prisoner, and was found not guilty of having attained habitual felon status. Defendant appeals.

Analysis

I.

In Defendant's first argument, he contends the trial court erred in concluding that Defendant was competent to represent himself at trial. We disagree.

Defendant states "the trial court erred and abused its discretion in finding that [Defendant] was capable of representing himself at trial, and erred in finding that he knowingly and voluntarily waived his right to counsel." In his brief, Defendant includes examples of the disruptive and aberrant behavior noted above, but does not argue specifically how any of this behavior is sufficient to demonstrate incompetence when Defendant was determined to be competent by mental health professionals. Further, Defendant does not argue on appeal that the mental health professionals who testified were incorrect that Defendant showed signs of malingering, or that the trial judge erred in finding that Defendant was

malingering for the purpose of delaying and disrupting the proceedings. It is not the job of this Court to make Defendant's argument for him. *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Nevertheless, we have thoroughly reviewed the record and hold, based upon the evidence from mental health professionals and Defendant's own behavior, that the trial court did not abuse its discretion in ruling that Defendant was competent to represent himself at trial.

> [T]he decision to grant a motion for an 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).

Defendant does not contend that he was not competent to stand trial. Defendant argues that he was incompetent to represent himself at trial. However,

> [a]lthough standing trial while represented by counsel is an entirely different concept than conducting one's own defense at trial, the Supreme Court has expressly refused to adopt a higher standard of competency for self-representation than the basic *Dusky*

> standard.[1] In *Godinez*, the Court "reject[ed] the notion that competence to . . . . waive the right to counsel must be measured by a standard that is higher than (or different from) the *Dusky* standard." 509 U.S. at 398, 113 S. Ct. at 2686, 125 L. Ed. 2d at 331.

State v. Cureton, __ N.C. App. __, __, 734 S.E.2d 572, 583 (2012). "[A] state is free to adopt higher competency standards for *pro se* defendants than the *Dusky* standard, but the constitution does not require such action." *Id.* at __, 734 S.E.2d at 584 (citation omitted). This Court in *Cureton* made clear that, in North Carolina, a defendant may be allowed to represent himself so long as he has met the standard for mental competence to stand trial.

> In the present case, there is sufficient evidence that the defendant was competent to stand trial. Although defendant had a low IQ and a history of mental illness, several formal evaluations diagnosed him as malingering. Even if defendant could successfully argue that his diminished mental capacity places him in the "gray-area," *Indiana v. Edwards* and *Godinez* make it clear that the constitution does not prohibit the self-representation of a "gray-area" defendant.

Id. Even if Defendant had challenged his capacity to stand trial on appeal, because the trial court's determination that

[1] "[T]he 'test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him.'" *Dusky v. United States*, 362 U.S. 402, 402, 4 L. Ed. 2d 824, 824 (1960).

Defendant was competent was supported by the evidence, it is conclusive on appeal. *State v. Robertson*, 161 N.C. App. 288, 292, 587 S.E.2d 902, 905 (2003). Defendant fails in his burden of showing that the trial court abused its discretion in allowing Defendant to proceed *pro se*. *Gates*, 65 N.C. App. at 283-84, 309 S.E.2d at 502.

Defendant also cites to N.C. Gen. Stat. § 15A-1242, which states:

> 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 (2013). Defendant argues that the trial court failed to make the proper inquiry required by N.C. Gen. Stat. § 15A-1242. We hold Defendant's actions absolved the trial court from this requirement.

> "Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." "A defendant may

> lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial."

State v. Boyd, 200 N.C. App. 97, 102-03, 682 S.E.2d 463, 467 (2009) (citations omitted) (where "defendant willfully obstructed and delayed the trial court proceedings by refusing to cooperate with either of his appointed attorneys and insisting that his case would not be tried[,]" the defendant forfeited his right to an attorney).

This Court explained in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282 (2011):

> We have previously outlined the difference between waiver and forfeiture of a defendant's right to counsel:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a

> forfeiture of defendant's right to counsel.
>
> *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (citations and quotation marks omitted). Where a defendant forfeits his right to counsel by his own conduct, the trial court is not required to determine, pursuant to N.C. Gen. Stat. § 15A-1242, that defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*. *Id.* at 525, 530 S.E.2d at 69.

Leyshon, 211 N.C. App. at 517-18, 710 S.E.2d at 288. In *Leyshon*, as in the present case, the defendant "obstructed and delayed the trial proceedings" by refusing to answer questions, denying the jurisdiction of the trial court, and responding in contradictory ways concerning his desire to proceed *pro se*. *Id.* at 518-19, 710 S.E.2d at 288. In the present case, we hold that Defendant, by his own conduct and actions, forfeited his constitutional right to counsel. The trial court did not commit prejudicial error by failing to conduct an N.C. Gen. Stat. § 15A-1242 inquiry under these circumstances. This argument is without merit.

II.

In Defendant's second argument, he contends that the trial court erred in denying Defendant the right to continue representing himself at trial, and forcing Defendant to accept the representation of Mr. Keever. We disagree.

Our Supreme Court has stated "'that [t]he right of self-representation is not a license to abuse the dignity of the courtroom,' and 'the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.'" *State v. McGuire*, 297 N.C. 69, 83, 254 S.E.2d 165, 174 (1979) (citation and quotation marks omitted). Defendant's "actual disruption of the proceedings demonstrated what would have happened during trial if defendant had been permitted to represent himself. . . . . His trial would have been a farce. Granting defendant's motion to represent himself would have subverted the orderly administration of justice and jeopardized a fair trial of the issues." *Id.* at 83, 254 S.E.2d at, 174 (citation omitted). In light of the plenary evidence that Defendant would not allow the trial to proceed while representing himself – or even while he was present in the courtroom – we hold the trial court did not err in activating Keever's representation and having Keever take over Defendant's defense. This argument is without merit.

III.

In Defendant's third argument, he contends the trial court erred in denying Defendant's motions for mistrial. We disagree.

"The decision whether or not to grant a mistrial is within the sound discretion of the trial judge. A mistrial is

appropriate only when there are such serious improprieties as to make it impossible for a fair and impartial verdict to be rendered." *State v. Marino*, 96 N.C. App. 506, 507, 386 S.E.2d 72, 73 (1989) (citation omitted). "It is well established that arguments for a mistrial do not carry great weight when the grounds relied upon arise from a defendant's own misconduct." *State v. Perkins*, 181 N.C. App. 209, 223, 638 S.E.2d 591, 600 (2007) (citation omitted). Much of Defendant's outrageous conduct was committed outside the presence of the jury. However, "[i]f defendant was prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain." *Marino*, 96 N.C. App. at 507, 386 S.E.2d at 73. The trial court ruled that Defendant's actions were for the purpose of disrupting the trial, and that any prejudice was invited error. There was plenary evidence to support these rulings. We hold the trial court did not abuse its discretion in refusing Defendant's motions for mistrial. This argument is without merit.

No error.

Judges HUNTER, Robert C. and BELL concur.