IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1016

Filed: 1 October 2019

Cabarrus County, Nos. 15CRS001292, -1293

STATE OF NORTH CAROLINA,

v.

CAROLYN D. "BONNIE" SIDES, Defendant.

Appeal by Defendant from judgments entered 11 November 2017 by Judge Beecher R. Gray in Cabarrus County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Josh Stein, by Special Deputy Attorney General Keith Clayton, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts finding her guilty of three counts of felony embezzlement following trial in early November 2017. Defendant contends that the trial court erred by (1) failing to conduct a competency hearing before proceeding with the trial in her absence following her mid-trial ingestion of intoxicants, and (2) amending the judgments to reflect a different date for the commission of the relevant crimes in her absence. We discern no error.

I. Background

On 7 July 2015, Defendant was indicted by a Cabarrus County Grand Jury on four counts of felony embezzlement. On 30 November 2015, superseding indictments were issued. The State dismissed one of the counts on 4 May 2017, leaving Defendant charged with two Class C and one Class H counts of felony embezzlement.

Jury trial began on 6 November 2017. Defendant was present in the courtroom on that date, as well as on 7 and 8 November 2017, as the State presented its case-in-chief. During those first three days of the trial, Defendant conferred with her trial counsel on multiple occasions, and neither Defendant nor her counsel raised the issue of Defendant's competency to the trial court.

On the evening of 8 November 2017, Defendant ingested 60 one-milligram Xanax tablets in an apparent intentional overdose, and was taken to the hospital for treatment. The trial court was made aware of this fact on the morning of 9 November 2017 before the trial resumed. The trial court told the jury there would be a delay and sent them to the jury room. The parties and the trial court then discussed the impact of Defendant's overdose on the proceedings with reference to a petition for involuntary commitment by which the treating physician sought to keep Defendant for observation and further evaluation. In the petition for involuntary commitment, the physician opined that Defendant was "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or

deterioration that would predictably result in dangerousness" and "ha[d] been experiencing worsening depression and increased thoughts of self-harm." The trial court asked the parties to draft an order for the release of Defendant's medical records and to research the legal import of a defendant's absence from trial under such circumstances, and recessed the proceedings.

When the proceedings resumed later that afternoon, the State's attorney stated that he had found case law that he believed allowed the trial to proceed in Defendant's absence, directing the trial court's attention to *State v. Minyard*, 231 N.C. App. 605, 753 S.E.2d 176 (2014), discussed below. But "in an abundance of caution," the State's attorney suggested continuing the proceedings until the beginning of the following week in case Defendant was able by that time to return to the courtroom. The trial court agreed, and released the jury. Later that afternoon, the trial court signed the order for the release of Defendant's medical records, revoked Defendant's bond, and issued an order for Defendant's arrest once she left the hospital.

When the proceedings resumed on 13 November 2017, Defendant was again absent from the courtroom and, according to her trial counsel, remained in the hospital undergoing evaluation and treatment. The trial court asked Defendant's trial counsel: "Up [until] the time that this matter occurred, Mr. Russell, you have not observed anything of [Defendant] that would indicate [Defendant] lacked

competency to proceed in this trial, would that be a fair statement?" Defendant's trial counsel agreed. The trial court then ruled that the trial would proceed in Defendant's absence because Defendant "voluntarily by her own actions made herself absent from the trial[.]" Defendant's trial counsel noted an objection to the ruling on voluntary absence, but did not ask the trial court to conduct a competency hearing or object to the trial court's decision to proceed without conducting a competency hearing.

Before bringing the jury into the courtroom and proceeding with the trial, the trial court admitted Defendant's medical records (which it had received over the weekend) and the petition for involuntary commitment, and noted for the record that it had considered this evidence in deciding to proceed. The trial court then brought the jury back into the courtroom, instructed the jurors not to consider Defendant's absence in weighing the evidence or determining guilt, and allowed the State to continue to present its case.

At the close of the State's evidence, Defendant moved to dismiss. Defendant argued that the State had presented insufficient evidence to convict, but did not argue for dismissal based upon either Defendant's absence from the trial or the fact that the trial court had not conducted a competency hearing before proceeding. The trial court denied Defendant's motion.

Defendant put on no evidence, rested, and renewed its motion to dismiss for insufficient evidence. Defendant again did not argue as bases for dismissal either

Defendant's absence from the trial or the fact that the trial court had not conducted a competency hearing before proceeding. The trial court again denied Defendant's motion. The jury deliberated and ultimately found Defendant guilty of all three charges later that afternoon.

Defendant returned to the courtroom on 16 November 2017 for sentencing, and testified on her own behalf, providing a lengthy personal statement accepting responsibility for her actions and responding to the questions of her trial counsel and the State's attorney without difficulty. The trial court then entered judgment against Defendant: (1) imposing consecutive presumptive-range sentences of 60 to 84 months' imprisonment for the Class C felonies; (2) imposing a presumptive-range sentence of 6 to 17 months' imprisonment for the Class H felony, which the trial court suspended for 60 months of supervised probation; and (3) ordering Defendant to pay $364,194.43 in restitution.

Defendant filed a written notice of appeal on 28 November 2017. Sometime before 28 December 2017, the trial court entered amended judgments in response to a request for clarification from the Combined Records Section of the North Carolina Department of Public Safety, changing the "Offense Date[s]" on each of the judgments, and the Cabarrus County Clerk of Superior Court filed Combined Records' request with a response thereto noting that the trial court had committed "clerical error, only." Defendant was not present when the judgments were amended.

II. Discussion

Defendant contends that the trial court erred by (1) failing to conduct a competency hearing before proceeding with the trial in her absence following her overdose and (2) amending the judgments in her absence. We address each argument in turn.

a. Competency Hearing

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992); *see State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) ("a conviction cannot stand where defendant lacks capacity to defend himself"). A defendant is competent to stand trial when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (applying *Dusky*).

In North Carolina, a trial court has a statutory duty to hold a hearing to resolve questions of a defendant's competency if the issue is raised by any party. N.C. Gen. Stat. § 15A-1002(b) (2017). In this case, Defendant never asserted her statutory right to a competency hearing at trial, and therefore waived that right. *Badgett*, 361 N.C.

at 259, 644 S.E.2d at 221 ("[T]he statutory right to a competency hearing is waived by the failure to assert that right at trial.").

Beyond the statutory duty, 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." *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (quotation marks, emphasis, and citation omitted); *see Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993) ("[A] competency determination is necessary only when a court has reason to doubt the defendant's competence."). Put another way, the trial court "is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654 (2005). The need for a competency hearing may arise at any point during the proceeding, "from the time of arraignment through the return of a verdict." *Moran*, 509 U.S. at 403 (Kennedy, J., concurring). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" to the determination of whether a hearing is required. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). But "[t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed[.]" *Id.*

On appeal, Defendant argues that because of her history of mental illness and her overdose, the trial court had substantial evidence following the overdose that

Defendant may have been incompetent to stand trial, and thus the trial court was constitutionally required to initiate a competency hearing *sua sponte* before proceeding, regardless of the fact that Defendant did not raise the issue. It is true that since the United States Constitution requires a trial court to institute a competency hearing *sua sponte* upon substantial evidence that the defendant may be mentally incompetent, *Young*, 291 N.C. at 568, 231 S.E.2d at 581, it follows that a defendant may not waive her constitutional right to a competency hearing (when required) by failing to raise the issue at trial.

We have held, however, that where a defendant waives their constitutional right to be present at a non-capital trial, a *sua sponte* competency hearing is not required. *Minyard*, 231 N.C. App. at 621, 753 S.E.2d at 188. A defendant waives the right to be present at trial by voluntarily absenting herself from the trial. *State v. Wilson*, 31 N.C. App. 323, 326-27, 229 S.E.2d 314, 317 (1976) (holding that a "defendant's voluntary and unexplained absence from court after his trial begins constitutes a waiver of his right to be present"); *see Diaz v. United States*, 223 U.S. 442, 455 (1912) ("[W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with

like effect as if he were present."). And this Court has held that a defendant's voluntary ingestion of intoxicants may result in voluntary absence and thus waiver of the constitutional right to be present such that a *sua sponte* competency hearing is not a prerequisite to proceeding with the trial. *Minyard*, 231 N.C. App. at 621, 753 S.E.2d at 188.

In *Minyard*, the defendant intentionally overdosed on tranquilizers and alcohol during jury deliberations, and "became lethargic and slumped over in the courtroom." *Id.* at 613, 753 S.E.2d at 183. The trial court asked the defendant to "do [his] very best to stay vertical, stay conscious, stay with us." *Id.* at 612, 753 S.E.2d at 183. But the defendant became "stuporous and non-responsive[,]" and the trial court had the sheriff escort the defendant from the courtroom to seek medical attention. *Id.* at 613, 615, 753 S.E.2d at 183-84. The jury subsequently returned with a guilty verdict, and the defendant appealed. *Id.* at 614, 753 S.E.2d at 183.

On appeal, the *Minyard* defendant argued, *inter alia*, that the trial court committed reversible error by failing to institute a competency hearing *sua sponte* before proceeding once the defendant became non-responsive. *Id.* at 615, 753 S.E.2d at 184. The *Minyard* Court noted that the defendant's conduct "provide[d] ample evidence to raise a bona fide doubt whether [the d]efendant was competent to stand trial[,]" and that "[s]uch conduct would ordinarily necessitate a *sua sponte* [competency] hearing." *Id.* at 626, 753 S.E.2d at 190. The Court also noted, however,

that the defendant "*voluntarily* ingested large quantities of intoxicants in a short period of time apparently with the intent of affecting his competency." *Id.* at 626, 753 S.E.2d at 191 (emphasis in original). Because the ingestion of the intoxicants was voluntary, the Court held that the defendant had "voluntarily waived his constitutional right to be present," accordingly "disagree[d] with [the d]efendant that a *sua sponte* competency hearing was required," and concluded that the trial court had not erred by proceeding without conducting such a hearing. *Id.* at 621, 753 S.E.2d at 188.

Minyard controls our analysis in this case. Like the *Minyard* defendant, Defendant here ingested a large quantity of intoxicants which rendered her unable to be present at her trial, and did so because she was concerned about the anticipated outcome of the trial. *Compare id.* at 612, 614, 753 S.E.2d at 183 (noting witness testimony that the defendant took 15 Klonopin because he was "worried about the outcome" of the trial), *with* Rule 9(d)(2) Ex. at 88 (attending physician's report that Defendant "took 60 mgs of Xanax in an attempt to kill herself to avoid going to jail for Embezzlement"). The question of whether Defendant's ingestion of the intoxicants was an attempted suicide rather than an attempt to render herself non-responsive does not distinguish *Minyard* from this case, because in both cases the defendants ingested a large quantity of intoxicants that rendered them unable to be

present at their trials.[1] And following *Minyard*, unless the trial court erred by concluding that Defendant *voluntarily* ingested the intoxicants that caused her absence, and thereby waived her right to be present at her trial, the failure to conduct a *sua sponte* hearing regarding the competency of the voluntarily-absent Defendant was not error. *Minyard*, 231 N.C. App. at 621, 753 S.E.2d at 188.

As such, the question is not whether there should have been a competency hearing, but whether the action resulting in the waiver of Defendant's right to be present was voluntary. *See id.* at 626, 753 S.E.2d at 191 ("Voluntary waiver of one's right to be present is a separate inquiry from competency, and in a non-capital case, a defendant may waive the right by their own actions, including actions taken to destroy competency."). We review the trial court's conclusion that Defendant voluntarily waived her constitutional right to be present *de novo*. *State v. Anderson*, 222 N.C. App. 138, 142, 730 S.E.2d 262, 265 (2012) ("The standard of review for alleged violations of constitutional rights is *de novo*." (quotation marks and citation

[1] *See United States v. Crites*, 176 F.3d 1096, 1098 (8th Cir. 1999) (rejecting defendant's argument that "an attempted suicide does not constitute a voluntary absence from trial" for purposes of Federal Rule of Civil Procedure 43, because defendant "clearly expressed his desire to be absent by intentionally ingesting a potentially lethal mix of intoxicants and by leaving a suicide note"); *Finnegan v. State*, 764 N.W.2d 856, 862 (Minn. Ct. App. 2009) (holding that "a suicide attempt can constitute a voluntary and unjustified absence from trial constituting a waiver of the right to be present"); *Bottom v. State*, 860 S.W.2d 266, 267 (Tex. Ct. App. 1993) ("The competent evidence shows [defendant] was not absent because of some sudden unexpected medical emergency, but because he chose to ingest large quantities of aspirin and arthritis medication. Because [defendant] chose to act in this way, his absence was voluntary. . . . [The defendant] cannot avoid trial by intentionally disabling himself" (emphasis omitted)); *but see Peacock v. State*, 77 So. 3d 1285, 1289 (Fla. 4th Dist. Ct. App. 2012) (noting that "[t]he case law appears to be split on whether a suicide attempt constitutes a voluntary absence from a court proceeding[,]" and collecting cases).

omitted)); *cf. State v. Ingram*, 242 N.C. App. 173, 184, 774 S.E.2d 433, 442 (2015) (reviewing voluntariness of waiver of *Miranda* rights *de novo*). Whether the action was voluntary "must be found from a consideration of the entire record[.]" *Ingram*, 242 N.C. App. at 184, 774 S.E.2d at 442 (quotation marks and citation omitted).

Defendant's arguments that she did not voluntarily waive her right to be present are not supported by the law and are belied by a holistic review of the record. In her brief, Defendant first argues that "any determination that a defendant waived the right to be present at trial is predicated on an antecedent determination that the defendant is competent to stand trial." But this argument contradicts the Supreme Court's guidance that "a competency determination is necessary *only when a court has reason to doubt the defendant's competence*." *Moran*, 509 U.S. at 401 n.13 (emphasis added); *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (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*." (emphasis added)). This argument is therefore unavailing.

Defendant also argues that her overdose was not a voluntary act, but rather the result of mental illness. There is evidence in the record that Defendant has had mental health issues in the past, including a "past medical history of retention" and a "history of a mood disorder[,]" and was diagnosed by the attending physician

following the overdose with "[a]djustment disorders, [w]ith mixed anxietyand [sic] depressed mood" and "[u]nspecified anxiety disorder."

But a consideration of the entire record does not convince us that Defendant's overdose was the result of mental illness. The record reflects that Defendant reported to the attending physician at the hospital that, prior to the overdose, (1) she had not been receiving any outpatient mental health services other than getting prescriptions from her primary care doctor, (2) she had never before been psychiatrically hospitalized, and (3) she had never before tried to hurt herself. Defendant spent the three days she was present at her trial conferring with her trial counsel, who told the trial court that he had not observed anything causing him concern about Defendant's competency prior to the overdose. And after speaking with Defendant and her stepson following the overdose, the attending physician noted that Defendant (1) had "informed her family that she was not going to go to jail" and "planned to kill herself[,]" (2) wrote goodbye letters to her grandchildren, and then (3) ingested an overdose of a powerful intoxicant "trying to kill herself." The fact that Defendant was committed involuntarily subsequent to her overdose does not change our analysis, since Defendant's involuntary commitment was a direct result of her overdose. N.C. Gen. Stat. § 15A-1443(c) (2017) ("A defendant is not prejudiced by . . . error resulting from his own conduct.").

The foregoing facts convince us that Defendant's attempt to execute a purposeful plan to commit suicide by overdosing on powerful intoxicants to avoid jail was done voluntarily. As a result, Defendant voluntarily waived her right to be present at her trial, and following *Minyard*, we conclude that the trial court did not err by proceeding with Defendant's trial in her absence without first conducting a *sua sponte* competency hearing.

b. Amended Judgments

Defendant also argues that the trial court erred by amending the judgments entered against her to reflect different "Offense Date[s]" in her absence.

A criminal defendant has a common-law right to be present at the time her sentence is imposed. *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) ("The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial."). That right includes the right to be present any time the sentence is substantively changed. *State v. Crumbley*, 135 N.C. App. 59, 67, 519 S.E.2d 94, 99 (1999) (vacating and remanding for new sentencing hearing where defendant was present when sentence was initially rendered but was not present for sentence's subsequent alteration because defendant was not afforded the opportunity to be heard on the change).

But where the trial court imposes a sentence in the defendant's presence and later amends the judgment *ex parte* to address a clerical error without changing the substance of the sentence, there is no error. *State v. Jarman*, 140 N.C. App. 198, 202-04, 535 S.E.2d 875, 878-79 (2000); *see State v. Willis*, 199 N.C. App. 309, 311, 680 S.E.2d 772, 774 (2009) ("It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record[.]" (citation omitted)). Clerical error has been defined as "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *Willis*, 199 N.C. App. at 311, 680 S.E.2d at 774 (quotation marks and citation omitted). We review the question of whether a defendant was improperly sentenced outside his presence *de novo*. *State v. Briggs*, 249 N.C. App. 95, 97, 790 S.E.2d 671, 673 (2016).

Defendant points out that the original judgments reflected "Offense Date[s]" of 1 January 2011, dates which correspond to presumptive sentence ranges lower than the presumptive ranges imposed by the trial court. Defendant argues that the amendment of the judgments to reflect different "Offense Date[s]" therefore effected substantive changes to her sentences that mandate resentencing.

But the trial court's amendment of the written judgments to reflect different "Offense Date[s]" was merely the correction of clerical error. The only differences between the original and amended judgments are that the "Offense Date[s]" thereupon were changed to dates in 2014 which fall within the "Date Range Of Offense" listed in the superseding indictments. Defendant does not direct our attention to anything in the record or the transcript indicating that the jury or the trial court determined that the crimes took place on 1 January 2011 or any other specific date. Further, the amended judgments carry the same sentences entered via the original judgments entered at the sentencing hearing in Defendant's presence, where the trial court announced that the sentences were "in the presumptive range[s]" for the two classes of felonies.

The facts that the trial court announced the sentences as "in the presumptive range[s]" and imposed the precise presumptive sentence ranges for the offenses available under the post-1 October 2013 sentencing regime—sentence ranges which would exceed the presumptive ranges for the crimes if committed on 1 January 2011, for which the pre-1 October 2013 regime would apply—indicate that the trial court intended to apply the post-1 October 2013 regime, and thus concluded at the sentencing hearing that Defendant's crimes took place on or after that date. Since (1) the "Date Range[s] of [the] Offense[s]" listed on the superseding indictments include the dates in 2014 listed on the amended judgments, (2) Defendant was

present when the trial court imposed the "presumptive range" sentences applicable to crimes committed on those dates, and (3) the amended judgments did not change the sentences imposed, we conclude that the amendment of the dates in the amended judgments did not effect a substantive change to the sentences requiring Defendant's presence. *See State v. Arrington*, 215 N.C. App. 161, 168, 714 S.E.2d 777, 782 (2011) (holding no violation of right to be present when sentence imposed where amended sentence did not "constitute an additional or other punishment" and thus caused no substantive change to sentence). We accordingly reject Defendant's argument that she must be resentenced.

III. Conclusion

Because we conclude that Defendant voluntarily ingested the intoxicants that caused her absence from trial, we accordingly conclude that Defendant waived her right to be present at the trial and that the trial court did not err by proceeding with Defendant's trial in her absence without first conducting a *sua sponte* competency hearing. And because we conclude that the trial court's amendment of the judgments to reflect different "Offense Date[s]" did not substantively change the sentences imposed, we conclude that the trial did not err by effecting those amendments outside of Defendant's presence.

NO ERROR.

Judge BRYANT concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I respectfully dissent from the majority's opinion because the trial court, and the majority, overlooked the necessity for defendant *first* to be competent to stand trial before she can voluntarily waive her constitutional right to be present for trial. *See State v. Badgett*, 361 N.C. 234, 644 S.E.2d 206 (2007). "[I]f there is substantial evidence" that defendant "*may* be mentally incompetent[,]" the trial court has a duty to hold a hearing to determine the defendant's competency to stand trial *before* proceeding and *before* determining that defendant was voluntarily absent from the trial. *Id.* at 259, 644 S.E.2d at 221 (emphasis added). Medical professionals and a magistrate determined that defendant was mentally ill and dangerous to herself or others, to the extent that she was involuntarily committed during her trial, in November of 2017. At the very least, defendant's involuntary commitment was "substantial evidence" that defendant "may be mentally incompetent[,]" triggering the need for a hearing on the issue. *Id.* In addition, a defendant *involuntarily* committed under a valid court order cannot logically be *voluntarily* absent from her trial *during* her involuntary commitment. Involuntary commitment under North Carolina General Statute § 122C-251 *et. seq.*[2] does not necessarily mean that a defendant is incompetent to stand trial, but it does raise an issue of competency to

[2] Involuntary commitment generally and on the basis of mental illness is addressed in North Carolina General Statutes § 122C-251 through § 122C-279, and much of this text has been substantially revised since 2017. *See* N.C. Gen. Stat. § 122C-251 *et. seq*. (Supp. 2018).

stand trial. *See generally id.* Had the trial court held a hearing, it is possible it would have determined defendant was competent to stand trial, but no hearing was held. And had the trial court held a hearing and determined defendant to be competent, there is no dispute that she was involuntarily committed and could not physically be present in court again until she was released.

> [U]nder the Due Process Clause of the United States Constitution, a criminal defendant may not be tried unless he is competent. As a result, 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. In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

Id. (citations, quotation marks, brackets, and emphasis omitted).

A defendant has both a constitutional right, *see id.*, and a statutory right as to competency to stand trial:

> (a) 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 (2017).

Capacity to stand trial includes three separate requirements:

> This statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed. The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.

State v. Mobley, ___ N.C. App. ___, ___, 795 S.E.2d 437, 439 (2017) (citations, quotation marks, and brackets omitted).

> A trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request. 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.

Id. at ___, 795 S.E.2d at 439 (citations, quotation marks, and brackets omitted). The State argues, and the majority agrees, that "Defendant voluntarily waived her right to be present – through her own actions inducing the condition of her absence from the trial proceeding[.]" Defendant argues otherwise, and the record does include substantial discussion of defendant's mental health and competency, although the trial court failed to determine her capacity to stand trial before determining that she voluntarily absented herself from trial by her suicide attempt.

On 9 November 2017, the trial court entered its order to obtain medical records, and it appeared the trial court would be considering the issue of capacity to

stand trial after review of the records. But instead of conducting this review, the trial court merely asked defendant's counsel: "Up till the time that this matter occurred, [defense counsel], you have not observed anything of her that would indicate she lacked competency to proceed in this trial, and would that be a fair statement?" Defense counsel confirmed that he had not previously seen anything causing him to question Ms. Sides' competency. The trial court then ruled, over defendant's objection, that defendant was voluntarily absent from trial.

Defendant argues, and I agree, that she did raise her statutory right to a hearing as to her capacity to stand trial. If so, this Court should review the trial court's action *de novo*. *State v. Johnson*, ___ N.C. App. ___, ___, 801 S.E.2d 123, 128 (2017) ("When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. Defendant alleges a violation of a statutory mandate, and alleged statutory errors are questions of law and as such, are reviewed *de novo*." (citations, quotation marks, brackets omitted)).

But even if the statutory right was waived, defendant had a constitutional right for the trial court "'to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent.' *Young*, 291 NC at 568, 231 S.E.2d at 581[.]" But the majority then skips over the question of the "substantial evidence" that the defendant may be

mentally incompetent, as did the trial court, and moves on to voluntary waiver based upon defendant's "voluntary" overdose.

The majority notes that "the trial court's conclusion that Defendant voluntarily waived her constitutional right to be present" is reviewed "*de novo*." Our Supreme Court has held that we review constitutional issues *de novo*:

> It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case.

State v. Searles, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). Therefore, I will consider whether the trial court erred as a matter of law in failing to conduct a hearing to determine if defendant was competent to stand trial as of 9 November 2017.

Even if the defendant does not raise the issue of competency, the trial court has both a statutory and constitutional duty to inquire if there is "substantial evidence . . . indicating the accused may be mentally incompetent[:]"

> The trial court has the power on its own motion to make inquiry at any time during a trial regarding defendant's capacity to proceed. General Statute 15A-1002(a) provides that this question may be raised at any time by the prosecutor, the defendant, the defense counsel, or the court on its own motion. Indeed, circumstances could exist where the trial court has a constitutional duty to make such an inquiry.
>
> A conviction cannot stand where defendant lacks capacity to defend himself. 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. Heptinstall, 309 N.C. 231, 235–36, 306 S.E.2d 109, 112 (1983) (citations, quotation marks, and brackets omitted).

Here, the trial court had a duty to hold a competency hearing upon defendant's involuntary commitment, as this alone is "substantial evidence" that she "*may* be mentally incompetent." *Id.* at 236, 306 S.E.2d at 112. After defendant was seen at the emergency department of Carolinas HealthCare System Dr. Kimberly Stover signed an "AFFIDAVIT AND PETITION FOR INVOLUNTARY COMMITMENT" for defendant, and it was filed in District Court, Cabarrus County.[3] Dr. Stover alleged that she had "sufficient knowledge to believe that the respondent is a proper subject for involuntary commitment and alleged defendant is "mentally ill and dangerous to self or others and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." Dr. Stover alleged that defendant presented "after overdosing intentionally on 60 mg of Xanax. She has been experiencing worsening depression and increased thoughts of self-harm. At this time [patient] is not stable and for her safety she will need further evaluation." A magistrate issued an order for defendant's involuntary commitment.

[3] The petition was filed under North Carolina General Statutes §§ 122C-261, -281.

Under North Carolina General Statute § 122C-266(e), defendant would have had a second examination by a physician "not later than the following regular working day" after her initial commitment to determine if she still met the criteria for involuntary commitment. N.C. Gen. Stat. § 122C-266 (2017). If defendant did not meet the criteria, she should have been released. *See generally id.* Accordingly, on 9 November 2017, Dr. Rebecca Silver examined defendant and assessed her as follows:

> Patient presents to the emergency room after a suicide attempt by overdosing on a large number of Xanax tablets. She remains suicidal even today. She is not safe for treatment in the community and requires inpatient stabilization.

Defendant's "Legal Status" is noted as "[i]nvoluntary[.]" Dr. Silver's disposition was to "Admit for Inpatient" noting "[p]atient requires inpatient psychiatric care, a bed search has been started[.]"

On the morning of 9 November 2017, counsel advised the trial court of defendant's involuntary commitment the prior evening. The trial court and counsel then discussed how to proceed. The trial court reviewed the petition and commitment order and noted:

> It might be useful to have her record for the last two years or something from the hospital if she has a record of depression and treatment and all that, but that would probably—we'd get to some point where we start to need a medical expert to interpret –
>
> [DEFENSE COUNSEL]: Yeah.
>
> THE COURT: -- what all that means.

After further discussion, as noted above, the trial court entered an Order for Medical Records for release regarding "defendant's medical treatment for the admittance date of November 8 2017, and any days following this date for the continued treatment of Carolyn Sides." It is not clear why the trial court did not order release of her prior records as mentioned on the transcript, but the order required only records starting as of 8 November, 2017. The trial court entered the order to obtain the records based upon defendant's counsel's concern that the "hospital will not accept her husband's consent while she is not in a mental state to release any -- it's going to take a court order saying you'll -- the hospital is ordered, but they're not going to accept his consent, just the liability in this situation." At that point, defendant's counsel was not sure when she would be released, although it was noted she could be released in as soon as 24 or 48 hours.

The trial court and counsel for both sides received the medical records, and when court resumed on Monday, 13 November 2017, defendant's counsel advised the court that defendant was still hospitalized and her family did not know when she would be released. Defendant was still receiving treatment under the terms of her involuntary commitment. The trial court then focused its attention on whether defendant's absence from court on Monday, 13 November 2017 was voluntary or involuntary and not whether she was competent to stand trial. Defendant's counsel argued defendant was attempting to end her life, not just her trial:

> I contend that it is somewhat of a leap for us as lay people and not doctors to consider that her actions are for the purposes of avoiding jurisdiction of the court or avoiding trial. [Defendant] . . . has quite a number of other factors in her life that are very pressing and from which certain personalities may find overwhelming. I would just contend, Your Honor, that this may be the straw that broke the camel's back, but I don't know that her efforts -- I think her efforts were to end her life, not to end her trial.
>
> And I would contend that we don't have evidence regarding whether or not she voluntarily absented herself from the trial. We know that she attempted to absent herself from life itself, but I would contend that there is some distinction of that, that she is in custody in a medical facility, and we have not investigated whether or not she chooses or would like to be here. And so we're making a leap by saying that she voluntarily absented herself from the trial, and we'd like to note our objection to that.

The State argued that defendant's overdose was voluntary, and thus defendant had waived her right to be present at her trial. The trial court ultimately ruled that defendant had "voluntarily by her own actions made herself absent from the trial at this point."

Defendant was not actually released during the remainder of her trial. After the jury returned its verdict, defendant's counsel noted that she was still hospitalized, and he had not seen her while in the hospital since "they have a one-hour period per day in which she may be visited." Defense counsel requested that her sentencing be postponed until her release, but he was not certain of when she would be released. After a conference with counsel in chambers, the trial court announced:

> As far as this trial goes, what's going to happen next is we will not be doing anything the rest of the day on this

> particular case. But we will have – we'll have the record reflect, following a lengthy conference with both counsel in chambers and we'd spoken to some medical personnel, we will speak with medical personnel again in the morning at 10:30 to update . . . [defendant's] status, and then we will proceed from there.

The Court did not resume on the next day, but instead on Thursday, November 16, for sentencing, and defendant was present.

The State argues, based upon *State v. Minyard*, 231 N.C. App. 605, 753 S.E.2d 176 (2014), that defendant's overdose was voluntary, and thus defendant had waived her right to be present during the proceedings, and the trial court, and the majority of this Court, agree. But I disagree; one crucial distinction between this case and *Minyard is that defendant was involuntarily committed to a psychiatric facility based upon her suicide attempt*, and she remained involuntarily committed when her trial resumed, and thus defendant literally could not be present in court. *See id.* And there are other important distinctions between this case and *Minyard*. *See id.*

In *Minyard*, the defendant was on trial for several sexual offenses. *Id.* at 606, 753 S.E.2d at 179. The defendant was present for trial and testified, but after jury deliberations started, the defendant's attorney

> notified the court that Defendant was "having a little problem." Defendant was asked to "stay vertical" and the trial court told him:
>
> > [Defendant], you've been able to join us all the way through this. And let me suggest to you that you continue to do that. If you go out on us, I very likely will revoke your conditions of release. I'll order you arrested. We'll call

> emergency medical services; we'll let them examine you. If you're healthy, you'll be here laid out on a stretcher if need be. If you're not healthy, we will continue on without you, whether you're here or not. So do your very best to stay vertical, stay conscious, stay with us.

Before the jury returned, the trial court received a report that Defendant had "overdosed." One of Defendant's witnesses, Evelyn Gantt, told the court that Defendant consumed eight Xanax pills because "[h]e was just worried about the outcome and I don't know why he took the pills." Defendant's counsel and the State did not wish to be heard on the issue and Defendant's pretrial release was revoked. The sheriff was directed to have Defendant examined by emergency medical services ("EMS"), and Defendant was then escorted from the courtroom. The court then made findings of fact:

> The Court finds Defendant left the courtroom without his lawyer.
>
> The Court finds that while the jury was in deliberation -- the jury had a question concerning an issue in the case -- and prior to the jurors being returned to the courtroom for a determination of the question, the Court directed the Defendant to -- who was in the courtroom at that point -- to return to the Defendant's table with his counsel. Defendant refused, but remained in the courtroom. The Court permitted that.
>
> The Court noticed that after the question was resolved with the juror, that while the jury was out in deliberations working on Defendant's case, the Defendant took an overdose of Xanax. While he was here in the courtroom and while the jury was still out in deliberations, Defendant became lethargic and slumped over in the courtroom.

. . . .

The Court finds that outside of the jury's presence the Court noted that Defendant was stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs.

. . . .

The Court finds that Defendant's conduct on the occasion disrupted the proceedings of the Court and took substantial amount of time to resolve how the Court should proceed. The Court finally ordered that Defendant's conditions of pretrial release be revoked and ordered the Defendant into the custody of the sheriff, requesting the sheriff to get a medical evaluation of the Defendant.

The Court finds that Defendant, by his own conduct, *voluntarily disrupted the proceedings in this matter by stopping the proceedings for a period of time so the Court might resolve the issue of his overdose.*

The Court notes that the — with the consent of the State and Defendant's counsel that the jurors continued in deliberation and continued to review matters that were requested by them by way of question.

The Court infers from Defendant's conduct on the occasion that it *was an attempt by him to garner sympathy from the jurors*. However, the Court notes that all of Defendant's conduct that was observable was outside of the jury's presence.

The Court notes that both State and Defendant prefer that the Court not instruct jurors about Defendant's absence. And the

> Court made no reference to Defendant being absent when jurors came in with response to — or in response to question or questions that had been asked.
>
> After the jury entered its verdict, the trial court amended its statement after EMS indicated that Defendant consumed "fifteen Klonopin" and two 40–ounce alcoholic beverages, which the court inferred were from the "two beer cans . . . found in the back of his truck."

Id. at 612–14, 753 S.E.2d at 182–83 (emphasis added).

Minyard does not state exactly how long the defendant was absent from the trial when being treated by EMS, but it appears he was absent for no more than a few hours of jury deliberations. *See id.*, 231 N.C. App. 605, 753 S.E.2d 176. The jury was unaware of what had occurred since they were in deliberations during the incident, except for coming into the courtroom regarding questions during deliberations, and the defendant was back in the courtroom the next morning for the habitual felon phase of trial and sentencing. *See id.* at 613-25, 753 S.E.2d at 183-90. The defendant in *Minyard* was not involuntarily committed based upon his overdose, nor did he have any additional medical treatment after he was evaluated by EMS. *See id.*, 231 N.C. App. 605, 753 S.E.2d 176.

Notably, there was no evidence the defendant in *Minyard* had any preexisting diagnosis or treatment for depression or other mental illness, as did defendant here, nor is there any indication that the overdose was a suicide attempt. *See id.* The defendant in *Minyard* simply took an overdose of drugs and alcohol *in court* which made him sufficiently unresponsive that emergency medical assistance was called,

but he needed no further treatment. *See id.* at 613, 753 S.E.2d at 183. The trial court determined the defendant was seeking sympathy from the jurors and disrupting court proceedings. *See id.* Defendant did not take her overdose during court, and she did not disrupt court proceedings.

Neither the State nor the majority opinion has identified *any* case in which a defendant who has been *involuntarily* committed to a psychiatric facility has been treated as "voluntarily" absent from trial despite its reliance on both federal and state cases. Aside from *Minyard*, the majority relies upon *Diaz v. United States*, 223 U.S. 442, 445, 56 L. Ed. 500, 501 (1912), wherein the defendant "voluntarily absented himself from the trial, but consented that it should proceed in his absence, but in the presence of his counsel, which it did" and *State v. Wilson*, 31 N.C. App. 323, 326, 229 S.E.2d 314, 317 (1976), wherein one of two co-defendants was twice absent from trial: once when both defendants were not present "after the court had informed the jury that the defendants had a right not to be present, the codefendant came into the courtroom and the trial proceeded in the absence of defendant" and second when defendant "left for a period of about three minutes" because he had fallen asleep and the deputy sheriff told him "to go out and wash his face." Neither *Diaz* nor *Wilson* are applicable to the issue of a voluntary absence due to involuntary commitment. *See Diaz*, 223 U.S. 442, 56 L. Ed. 500; *Wilson*, 31 N.C. App. 323, 229 S.E.2d 314.

The majority notes some non-binding cases in a footnote from other jurisdictions where defendants who have attempted suicide during trial have been

held to have voluntarily absented themselves from trial, but all are easily distinguished from this case, and one supports this dissent. In *Bottom v. State*, 860 S.W. 266 (Tex. Ct. App. 1993), the Texas Court of Appeals held the trial court did not err by determining the defendant had voluntarily absented himself from the trial by attempting suicide, *but first*, the trial court held a hearing regarding his competency to stand trial:

> After the State rested, defense counsel informed the court Bottom was not in the courtroom, but in the hospital, because he had attempted suicide, or some harm to himself. Defense counsel requested, and the court denied, a continuance. *The court did, however, order a competency hearing from which Bottom was found competent to stand trial.*

Id. at 267 (emphasis added). If the trial court here had done as the trial court in *Bottom* did and held a competency hearing in which the defendant was held competent to stand trial, I would agree that defendant voluntarily absented herself from the trial. *See id.* Suicide attempts present a difficult issue, since all suicides are "voluntary," in the sense that the person has intentionally taken action to end her own life, but if defendant was mentally ill, as both physicians determined defendant here was at the time of her inpatient treatment, the fact that she intentionally took pills to end her life does not necessarily mean she had the capacity to be "voluntarily" absent from trial. As defendant's counsel argued, "it is somewhat of a leap for us as lay people and not doctors to consider that her actions are for the purposes of avoiding jurisdiction of the court or avoiding trial."

The majority opinion also states that "a consideration of the entire record does not convince us that defendant's overdose was the result of mental illness[,]" but the lack of the proper record and consideration is the very issue at the heart of this case. Our record does not have sufficient information to make a determination regarding mental illness even if this Court were empowered to make the needed findings of fact, which it is not. *See generally State v. Chukwu*, 230 N.C. App. 553, 570, 749 S.E.2d 910, 922 (2013) (noting it is the *trial court's* duty to make findings of fact necessary to determine if a defendant has the mental capacity to stand trial). Because the trial court requested only a few days of defendant's medical records, and not a more extended period as the trial court actually noted may be needed, our record does not include information regarding defendant's history of depression noted by the physicians which had escalated into self-harm. This Court cannot determine defendant's capacity to stand trial, but the record does include "substantial evidence" that defendant "may be mentally incompetent[,]" so the trial court had a duty to hold a hearing to determine the defendant's competency to stand trial before determining that defendant was voluntarily absent from the trial. *Badgett*, 361 N.C. 234, 644 S.E.2d 206. Again, I do not speculate as to the result, but the hearing is required before defendant can be found voluntarily absent. *See id.*

The two potential remedies for the trial court's failure to hold a hearing regarding defendant's competency

> are either a new trial or a retrospective competency

> hearing. In some cases where we have determined that the trial court should have held a hearing on the defendant's competence, we have remanded for a determination of whether a retrospective assessment of the defendant's competence was possible, noting that the trial court is in the best position to determine whether it can make such a retrospective determination of defendant's competency,
>
> Nevertheless, retrospective assessments of competence are a disfavored alternative remedy to a new trial. In *McRae I*, we specifically noted that we were remanding to the trial court to determine whether a retrospective hearing could be held because that defendant was afforded several hearings before trial, and each time the trial court followed the determination made in the corresponding psychiatric evaluation. In this case, defendant's competence has never been assessed, let alone at a relevant time. Thus, it is clear that a retrospective determination of defendant's competence would not be possible here and we do not need to remand for the trial court to make such a determination.
>
> Because defendant's competence to stand trial has never been evaluated and given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here. Accordingly, we reverse defendant's convictions for assault on a person employed at a state detention facility and having attained habitual felon status and order a new trial.

State v. Ashe, 230 N.C. App. 38, 44, 748 S.E.2d 610, 615 (2013) (citations, quotation marks, and brackets omitted). Since defendant's competence to stand trial was never assessed "at a relevant time[,]" a "retrospective determination of defendant's

competence would not be possible" in this case. I would therefore reverse and remand for a new trial.[4] Thus, I respectfully dissent.

[4] Although I would not reach the second issue addressed by the majority since I would grant a new trial, I would concur with the majority's holding that the trial court did not err by correcting a clerical error in the judgment.