IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1150

Filed: 17 December 2019

Mitchell County, Nos. 15 CRS 50346, 50474, 16 CRS 28

STATE OF NORTH CAROLINA

v.

HARLEY AARON ALLEN

Appeal by defendant by petition for writ of certiorari from judgments entered 9 February 2018 by Judge Alan Z. Thornburg in Mitchell County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

ZACHARY, Judge.

Defendant Harley Aaron Allen appeals from judgments entered upon jury verdicts finding him guilty of selling buprenorphine, delivering buprenorphine, and possession of buprenorphine with intent to sell or deliver. After careful review, we remand for further proceedings.

Background

Defendant, born in 1986, is intellectually disabled.[1] Defendant was also subject to "severe abuse and neglect" during his early childhood, which further impaired his development. Defendant received special education assistance throughout his schooling, and although he received a certificate of attendance upon completion of the 12th grade, he is unable to live independently or maintain a job because of his intellectual disability. In addition to his intellectual disabilities, for which he receives disability benefits, Defendant suffers from opiate abuse, and has been diagnosed with bipolar disorder.

On 22 October 2015, Defendant was arrested for allegedly having sold a single pill of buprenorphine—a Schedule IV controlled substance and opium derivative—to a confidential informant for the Mitchell County Sheriff's Office. Defendant was subsequently indicted for (1) sale, (2) delivery, and (3) possession with the intent to sell or deliver buprenorphine, a Schedule IV controlled substance; and (4) keeping or maintaining a vehicle for the purpose of selling buprenorphine. Defendant was also indicted for having attained the status of an habitual felon.

During the period between his arrest and trial, Defendant was involuntarily committed on three separate occasions and was twice found "not capable of proceeding" to trial. After Defendant's first involuntary commitment, a forensic

[1] A 2017 forensic evaluation noted that "although available IQ scoring seems to place [Defendant] in the borderline to mild intellectual disability range," various other factors exist that "contribute to him being more impaired than IQ scores alone . . . would suggest."

screener conducted a psychiatric evaluation on 21 November 2016 and opined that Defendant's "prospects of restorability [we]re limited," due to his "profound fund of knowledge deficits." On 28 February 2017, Defendant was again found incapable of proceeding. Following Defendant's third involuntary commitment, a psychiatric report dated June 2017 noted that Defendant had "regained his capacity to proceed" to trial. Based on that report, and despite defense counsel's sentiments to the contrary, on 23 August 2017, the trial court found that Defendant "currently ha[d] the capacity to proceed" to trial.[2] The case came on for trial nearly six months after the trial court's competency determination, and eight months after Defendant's final psychiatric evaluation.

Defendant's trial commenced on 8 February 2018 in Mitchell County Superior Court before the Honorable Alan Z. Thornburg. At the trial's conclusion, the jury found Defendant guilty of selling buprenorphine, delivering buprenorphine, and possession of buprenorphine with the intent to sell or deliver. The jury found Defendant not guilty of keeping or maintaining a vehicle for the purpose of selling buprenorphine. Defendant subsequently pleaded guilty to having attained the status of an habitual felon. The trial court arrested judgment on Defendant's conviction for delivering a controlled substance,[3] and sentenced Defendant for the remaining two

[2] It is unclear from the record before this Court whether one of the parties moved for the trial court to assess Defendant's capacity to proceed, or whether the trial court did so *sua sponte*.

[3] The trial court's form arresting judgment incorrectly states that the court was arresting judgment on Defendant's conviction for selling a controlled substance.

convictions to concurrent terms of 58 to 80 months and 8 to 19 months in the custody of the North Carolina Division of Adult Correction.

On 9 February 2018, Defendant filed a procedurally inadequate *pro se* notice of appeal. Thereafter, Defendant filed a petition for writ of certiorari asking this Court to review the merits of his appeal, which we allowed by order entered 10 July 2019.

Standard of Review

"[T]he conviction of an accused person while he is legally incompetent [to proceed to trial] violates due process[.]" *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979) (citation omitted). "The defendant bears the burden of demonstrating he is incompetent [to proceed]." *State v. McClain*, 169 N.C. App. 657, 663, 610 S.E.2d 783, 787 (2005) (citation omitted). "The [trial] court's findings of fact as to [the] defendant's mental capacity are conclusive on appeal if supported by the evidence." *State v. Baker*, 312 N.C. 34, 43, 320 S.E.2d 670, 677 (1984) (internal citations omitted). We review a trial court's determination of a defendant's competency to proceed under an abuse of discretion standard. *See McClain*, 169 N.C. App. at 663, 610 S.E.2d at 787. "[T]he trial court's decision that [the] defendant was competent to stand trial will not be overturned, absent a showing that the trial judge abused his discretion." *Id.*

Discussion

I. Competency Hearing

Defendant argues that, "[i]n light of [his] mental health history and prior findings of incompetence, the trial court erred by failing to hold a competence hearing before starting [his] trial" six months after he was found to be competent. We agree.

N.C. Gen. Stat. § 15A-1001(a) (2017) provides that:

> 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."

"If a defendant is deficient under any of these tests he or she does not have the capacity to proceed." *State v. Mobley*, 251 N.C. App. 665, 667, 795 S.E.2d 437, 439 (2017) (citations and internal quotation marks omitted).

"A defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time. For this reason, a defendant's competency is assessed at the time of trial." *Id.* at 675, 795 S.E.2d at 443 (internal citations and quotation marks omitted). Nevertheless, "[t]he question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." N.C. Gen. Stat. § 15A-1002(a).

Whenever there is a bona fide doubt as to the defendant's competency to proceed to trial, the trial court is required to hold a competency hearing. *Mobley*, 251

N.C. App. at 668, 795 S.E.2d at 439. The trial court "has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent [to stand trial]." *Id.* (internal citations omitted).

The trial court's failure to "protect a defendant's right not to be tried or convicted while [incompetent to proceed] deprives him of his due process right to a fair trial." *State v. McRae*, 139 N.C. App. 387, 389, 533 S.E.2d 557, 559 (2000) [hereinafter "*McRae I*"].

In the present case, there was substantial evidence before the trial court that Defendant might have been incompetent to stand trial. It is evident that the trial court correctly recognized its duty to assess Defendant's capacity to proceed, and did so approximately six months prior to trial, on 23 August 2017. However, the competency hearing should have been held closer to trial.

Various factors can raise a bona fide doubt as to the defendant's competency to proceed to trial. "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a bona fide doubt inquiry." *Id.* at 390, 533 S.E.2d at 559. Here, Defendant's lengthy and varied history of severe mental health issues and cognitive disabilities—which led to repeated involuntary commitments and psychiatric evaluations—together with defense counsel's reluctance to agree with the evaluating physician's report that

Defendant was capable of proceeding to trial, was sufficient to raise a bona fide doubt as to Defendant's competency at the time of trial, thereby triggering the trial court's duty to conduct a hearing immediately prior to trial.

As previously mentioned, Defendant was involuntarily committed three times during the period between his 22 October 2015 arrest and 8 February 2018 trial, due to his severe mental health issues. When Defendant was discharged from his second involuntary commitment in February 2017, the forensic screener's psychiatric report noted that Defendant's mental health diagnoses included "Methamphetamine Use Disorder, Severe, Opioid Use Disorder, Severe, Adjustment Disorder with Depressed Mood, Antisocial Personality Disorder/Traits, [and] Suicidal Ideation, Resolved." Additional reports established that Defendant had also been diagnosed with bipolar disorder, "Attention Deficit/Hyperactivity Disorder Not Otherwise Specified, Mood Disorder Not Otherwise Specified, Polysubstance/Dependence, and a Personality Disorder Not Otherwise Specified."

The psychiatric reports in the record also demonstrate Defendant's history of noncompliance with mental health treatment. Defendant's November 2016 evaluation noted that "Mission Hospital currently has plans to engage [Defendant] in a long-term inpatient treatment." Three months later, Defendant's February 2017 report indicated that Defendant was not consistently compliant with mental health treatment recommendations. Specifically, it detailed that Defendant (i) "has never

been compliant [or] consistent with medication treatment (either not taking any medication or taking too much at one time) or mental health follow through"; (ii) that "[a]s an adult there is no clear record of [Defendant] consistently being compliant with mental health treatment recommendations"; and (iii) that Defendant "has not been compliant with treatment in an outpatient setting, and his last two hospitalizations in 2016 were on an involuntary basis, where he appeared to lose behavioral control, threatening suicide and becoming confrontational."

It is also well-documented that Defendant has a significant intellectual disability. As previously noted, the February 2017 psychiatric evaluation placed Defendant "in the borderline to mild intellectual disability range" based on available IQ scoring criteria. However, the evaluation further stated that when combined, certain of Defendant's conditions—including his significantly impaired adaptive functioning, attention and learning deficits, difficulty moderating his own behavior, and a mood disorder—actually contributed to Defendant "being more impaired than IQ scores alone . . . would suggest." One psychiatric report noted that Defendant's "cognitive deficits . . . have been with him since early childhood, . . . [that] he will likely struggle with them for the remainder of his life[,]" and that "[g]iven the nature of his impairments, . . . [Defendant's] prospects of restorability are limited." The report indicated that Defendant's cognitive disabilities were believed to stem, in part, from "extreme abuse and neglect" that he suffered before his second birthday.

Additionally, although he receives disability benefits as a result of his intellectual disability, Defendant "did not know the amount of the award[,]" which the examiner noted was "somewhat rare in [his] experience[.]" The report further noted that Defendant's "mom is his representative payee because he is unable to manage his own finances."

During the period between his arrest and trial, Defendant was twice found to be incapable of proceeding to trial. *See McRae I*, 139 N.C. App. at 391, 533 S.E.2d at 560 ("In our opinion, the numerous psychiatric evaluations of [the] defendant's competency that were conducted before trial with various findings and expressions of concern about the temporal nature of [the] defendant's competency [to proceed] raised a bona fide doubt as to [the] defendant's competency at the time of his second trial.").

Only one of the reports in which Defendant was found incapable of proceeding to trial noted Defendant's appearance and conduct. In particular, it noted that Defendant "was an average-sized young adult white male who appeared to be in no acute physical distress, displayed no unusual or bizarre mannerisms, and had no obvious physical deformities." Defendant's "beard and haircut were neatly groomed"; he was "initially . . . fairly soft-spoken, but when encouraged to speak up, he did"; and he "maintained intermittent eye contact." This forensic screener's notes demonstrate that, despite the ultimate determination of incompetence, Defendant's physical appearance did not immediately evince his lack of capacity to proceed to trial.

In addition, during the final competency hearing six months before trial, defense counsel expressed reservations concerning Defendant's competency to proceed.

> [C]ourts often look to whether the defense attorney has disputed competency before trial as evidence of competency. Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent.

State v. McRae, 163 N.C. App. 359, 369, 594 S.E.2d 71, 78, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004) [hereinafter "*McRae II*"].

At the 23 August 2017 hearing in the instant case, the trial court asked Defendant's attorney whether he agreed with "the doctor's assessment of [Defendant's] ability to understand the nature of the proceedings." While acknowledging that he observed some improvement in Defendant's condition, counsel nevertheless expressed doubt about Defendant's capacity to stand trial:

> THE COURT: All right, [defense counsel], have you had an opportunity to review the [psychiatric evaluation]?
>
> [DEFENSE COUNSEL:] I have, Your Honor.
>
> THE COURT: And do you agree with the doctor's assessment of [Defendant's] ability to understand the nature of the proceedings against him?
>
> [DEFENSE COUNSEL:] Your Honor, . . . I will leave that in the Court's discretion based on the report. I spoke with

[Defendant]. I can't tell with the time I've spent with him – I can tell a lot of changes in him. . . . [W]e've discussed his case and he does seem to understand more of what's going on than he did.

THE COURT: Has he been able to communicate his thoughts and feelings to you?

[DEFENSE COUNSEL:] Yes, sir.

THE COURT: So if you don't agree with this report, I want you to tell me what part you don't agree with?

[DEFENSE COUNSEL:] Well . . . I don't agree that [Defendant is] necessarily capable. . . . [H]e goes in two or three different directions sometimes . . . as far as talking to him. He does understand the charges now. He understands what he's charged . . . we've talked a couple of times since this report since he was released. He does understand what he is facing as far as the felonies, and when he was here the first time he didn't understand that. I think that . . . it may be that . . . they have improved his capability.

[Defendant] is on medication now and he is taking that. He tells me he is taking that on a regular basis. And . . . there is some question in my mind, but I'm not a doctor. I mean, there is some question in my mind because I've dealt with [Defendant] for a number of years. I handled a case for him about two years ago and I've noticed when he came back earlier, earlier this year, the first time in court that he . . . wasn't tracking. We were out there and he . . . didn't understand what was going on. He kept asking me over and over in different ways what was going on. He is not doing that now.

I don't really feel like I'm in a position to judge necessarily if I – I'm not a doctor to judge his condition. But we just ask the Court to look at the report and make a determination, to make a finding . . . based on that. . . . [T]here's really nothing specific that I can disagree with in

> the report because I have seen some improvement in his condition.
>
> THE COURT: All right, [Defendant], you having any trouble thinking today? Do you feel confused in anyway today?
>
> DEFENDANT: No, sir.
>
> THE COURT: You been able to talk with your attorney about your case?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Has your attorney gone over the [psychiatric report] with you?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Are you in agreement with that report?
>
> DEFENDANT: Yeah, yes, sir.
>
> THE COURT: All right, what says the State?
>
> [THE STATE:] Your Honor, we don't have any reason to believe he is not competent.
>
> THE COURT: All right, I will find that the defendant does currently have the capacity to proceed.

Defense counsel also addressed the issue of capacity during sentencing, after Defendant was found guilty at trial:

> [M]y client is on disability. He's been on that . . . for years. He has a very low – he's a very low-functioning individual. His IQ is somewhere around 82. You can see from the record, . . . that he . . . was found to be incompetent and then found to be competent at a later date when he was

> sent down to Broughton [Hospital] for some time.

Nonetheless, as our dissenting colleague correctly states, a defendant's behavior during the course of trial may also be a relevant consideration in a bona fide doubt inquiry. *See McRae I*, 139 N.C. App. at 390, 533 S.E.2d at 559. However, a defendant's amiable acquiescence in a colloquy with the trial court is not necessarily indicative of the individual's capacity to stand trial, particularly where, as here, there exists substantial evidence of the defendant's long history of myriad complex mental health issues.

A defendant need only answer a few brief questions in order for his plea to be accepted by the trial court. Here, Defendant's brief responses to those few questions were sufficient to raise doubts about his capacity to stand trial, and therefore warranted further inquiry by the court. In the present case, after the jury rendered its verdicts, but before sentencing, Defendant pleaded guilty to attaining the status of an habitual felon. The following relevant portions of the plea colloquy between the trial court and Defendant should have raised a bona fide doubt as to Defendant's capacity to proceed:

> THE COURT: At what grade level can you read and write?
>
> [DEFENDANT:] Second or third.
>
> THE COURT: . . . Are you now under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances?

> [DEFENDANT:] No, sir.
>
> THE COURT: When was the last time that you used or consumed any such substance?
>
> [DEFENDANT:] I can't really remember. Probably about two or three months ago.

Minutes later, at sentencing, Defendant testified that he had "[n]ever failed a drug test[,]" and was "still currently going to RHA three days a week. That's through Broughton [Hospital], kind of intensive outpatient." Stated another way, Defendant told the trial court that he was not presently taking any medication, despite his enrollment in an intensive outpatient program, which he was still attending three days a week.

These statements—combined with Defendant's well-documented history of drug abuse, as well as his noncompliance with medication and outpatient treatment recommendations—while perhaps not indicative of irrational or erratic behavior, nonetheless tend to support defense counsel's concerns at the 23 August 2017 hearing.

Defendant's brief communication with the trial court during the plea colloquy also raises doubts as to his general understanding of the proceedings:

> THE COURT: Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] Yes, sir.
>
> THE COURT: You are pleading guilty – you pled guilty to

> attaining the status of habitual felon, but was there actually a plea arrangement?
>
> [DEFENDANT:] No.
>
> [DEFENSE COUNSEL:] There's not a plea arrangement, Your Honor.
>
> THE COURT: So let me ask you that again. Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] No, sir.

"A guilty plea must be made knowingly and voluntarily and the record must affirmatively show it on its face." *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (citing *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969)). Again, Defendant was twice found incompetent to stand trial during the pendency of this case. The second time, the forensic screeners determined that Defendant was "currently not capable of proceeding" because he did "not have the capacity to understand his current charges, potential penalties and d[id] not have the ability to participate in a meaningful way in his legal proceedings and work with this attorney in an affirmative way."

Six months later, on 23 August 2017, Defendant's attorney opined at another competency hearing that for the first time, Defendant seemed to understand the charges against him. However, as the record before us establishes, much can happen in six months. Indeed, Defendant was found incompetent and then competent in a period of six months. It should not strain credulity, then, to suggest that the opposite

could have occurred during the six months between Defendant's 23 August 2017 competency hearing and his 8 February 2018 trial.

As this Court has observed, "[a] defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time." *Mobley*, 251 N.C. App. at 675, 795 S.E.2d at 443. Accordingly, the trial court must evaluate the defendant's competency to proceed *at the time of trial*. *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975) (noting that a defendant's competency to proceed is assessed "at the time of trial").

Although Defendant's June 2017 psychiatric evaluation indicated that he was competent to proceed to trial, that evaluation was not current, and may not have accurately reflected Defendant's mental state at trial in February 2018. *See State v. Silvers*, 323 N.C. 646, 654-55, 374 S.E.2d 858, 864 (1989) (vacating a defendant's conviction where the trial court, in evaluating the defendant's competency to stand trial, excluded testimony of witnesses who had recently observed the defendant's condition, and wholly relied on two psychiatric reports written three and five months prior to the hearing). The record before the trial court established that Defendant "suffered from lifelong cognitive defects, mild mental retardation, and mental illness," together with frequent, severe, and varied mental health issues during the period between Defendant's arrest and trial. Consequently, there was a legitimate

question as to whether the psychiatric evaluation accurately reflected Defendant's capacity eight months later.

The dissent maintains that the trial court would have had a duty to hold another competency hearing "if there was any indication that Defendant had relapsed[,]" but was not required to do so, because neither Defendant nor his counsel raised "any concern that Defendant was incapable of proceeding or participating in his own defense." However, the decision to inquire into a defendant's competency to proceed is not shouldered solely by the Defendant or his attorney. *See, e.g., Mobley*, 251 N.C. App. at 668, 795 S.E.2d at 439 (explaining that the trial court "has a constitutional duty to institute, *sua sponte*, a competency hearing, if there is substantial evidence before the court indicating that the accused may be mentally incompetent" to stand trial. (internal citations omitted)); N.C. Gen. Stat. § 15A-1002(a) ("The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court.").

The trial court properly determined that it needed to assess Defendant's competency to proceed. However, the time for the trial court to make such an assessment was immediately prior to trial, not more than six months earlier. *See Mobley*, 251 N.C. App. at 675, 795 S.E.2d at 443. Accordingly, the trial court erred in

failing to determine whether, *at the time of trial*, Defendant was competent to proceed.

II. Clerical Errors

Defendant further contends, and the State concedes, that "[t]wo clerical errors require remand for correction." We agree.

Defendant first observes that "[t]he trial court's written order arresting judgment erroneously indicates the charge of selling a controlled substance was arrested." The State concedes that this is a clerical error because the trial court actually arrested judgment on Defendant's conviction for *delivery* of a controlled substance.

Defendant next notes that the trial court's written judgment improperly classified buprenorphine as a Schedule III controlled substance, because buprenorphine was classified as a Schedule IV controlled substance on the date of the offense. Buprenorphine was classified as a Schedule IV controlled substance until N.C. Gen. Stat. § 90-91(d)(9) was amended by 2017 N.C. Sess. Law 115. Again, the State concedes that this is a clerical error.

Thus, in order that "the record speak the truth," the errors must be corrected on remand. *State v. May*, 207 N.C. App. 260, 263, 700 S.E.2d 42, 44 (2010) (internal quotation marks omitted).

Conclusion

Accordingly, we remand this case for the trial court to conduct a hearing to determine Defendant's competency at the time of trial, and to correct the clerical errors identified herein. "If the trial court determines that a retrospective determination is still possible, the court should review the evidence which was before it preceding" Defendant's trial, including medical records, psychological evaluations, and any other evidence presented by counsel. *McRae I*, 139 N.C. App. at 394, 533 S.E.2d at 562. If the trial court "concludes from this retrospective hearing that [D]efendant was competent at the time of trial, no new trial is required." *Id.* However, if "the trial court determines that a meaningful hearing is no longer possible, [D]efendant's conviction must be reversed and a new trial granted when he is competent to stand trial." *Id.*

REMANDED.

Judge BROOK concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I believe that Defendant had a fair jury trial, free from reversible error. I do not believe that Judge Thornburg was required to hold a competency hearing when the matter was called for trial in February 2018 or at any time during the trial. Therefore, I respectfully dissent from the majority's holding granting Defendant a retrospective competency determination. Nonetheless, as the State concedes, the matter needs to be remanded for the sole purpose of correcting certain clerical errors in the judgments.

In October 2015, Defendant was arrested for a variety of drug offenses. Two and a half years later, in February 2018, Defendant was tried and convicted.

As late as a year *prior* to trial, in February 2017, Defendant was found *not* to be mentally competent to stand trial.

Months later, though, Defendant underwent a psychiatric evaluation in which it was determined that he had "regained his capacity to proceed." Shortly thereafter, in August 2017, just six months prior to trial, the trial court held a hearing and concluded that Defendant had the capacity to proceed.

Our Supreme Court has held on a number of occasions that a trial court has no duty to conduct a competency hearing when a matter is called for trial unless "*there is substantial evidence before the court* indicating that the accused may be mentally

incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2006) (emphasis in the original).[4]

For instance, our Supreme Court has held on more than one occasion that evidence that the defendant had suffered from mental health issues months *prior* to trial does not constitute "*substantial evidence*" to require a competency hearing, where during the trial the defendant appears to understand the proceedings and questions from the trial judge and to be able to participate in his defense.[5]

And our Supreme Court has held that a trial court was not required to hold a competency hearing where the defendant had been evaluated and determined to be competent a few months prior to trial, the defendant appeared competent at the time of trial and no concern regarding his competency was raised at the time of trial *even though* the evaluation of the defendant before trial was prompted by the concern expressed by his counsel regarding his competency to stand trial just two months prior to trial and the trial court ordered the defendant to be committed and evaluated.

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[4] This quote appears in a number of other cases with the italicized language emphasized. *See, e.g.*, *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001); *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977).

[5] In *Badgett*, our Supreme Court held that the defendant's outburst during the trial, his statement during sentencing implying his desire to be sentenced to death, and his mental health problems experienced *before* trial "was outweighed by substantial evidence that the defendant was competent to stand trial[,]" namely his ability to interact rationally with the trial judge and to work with his counsel in his defense and by his overall demeanor during the trial. 361 N.C. at 260, 644 S.E.2d at 221.

In *King*, our Supreme Court held "that evidence of treatment for depression and suicidal tendencies several months before trial did not constitute substantial evidence requiring the trial court to hold a competency hearing." *Badgett*, 361 N.C. at 261, 644 S.E.2d at 222 (describing the holding in *King*, 353 N.C. at 467, 546 S.E.2d at 585).

State v. Young, 291 N.C. 562, 569, 231 S.E.2d 577, 581 (1977). Indeed, in *Young*, our Supreme Court held that where a defendant is examined and determined to be competent even months prior to trial and that nothing comes to the trial court's attention to suggest that the defendant's condition has deteriorated when the matter is called for trial, the trial court is not required to hold another competency hearing. *Id.* at 568, 231 S.E.2d at 581 ("[W]here, as here, the defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings.")

Here, the last evaluation of Defendant before trial indicated that he was competent to stand trial, as did the trial court's finding at the last competency hearing conducted before the trial. And there was no indication "at the time his trial commenced" that "defendant 'lacked the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense[.]'" *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975). There is every indication that Defendant was able to participate in his defense. For instance, he engaged in a colloquy with Judge Thornburg in which he stated that he had made the decision to waive his right to testify on his own behalf. Further, at no time during the trial did either Defendant,

his counsel, or anyone else express any concern regarding Defendant's competency to proceed.[6]

I do not agree with the majority's characterization of certain portions of the trial transcript that Judge Thornburg should have had some doubt about Defendant's competency. For instance, I do not agree that Judge Thornburg should have been concerned that Defendant was not taking his medication when he responded, "No, sir," to the trial court's question, "Are you now under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances?" The context of the question is clearly that Judge Thornburg was asking Defendant if he was *under the influence* of some impairing substance that would make him unable to understand his plea of guilty to attaining the status of a habitual felon. The context, in no way, indicates that Judge Thornburg was asking if Defendant was still taking his medication that had been prescribed for him. Indeed, Defendant's attorney had already assured Judge Thornburg that Defendant was taking his medication. And,

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[6] Defendant's counsel indicated at trial that his client was much improved and seemed to understand what was going on and that he was taking his medication. Though he expressed some concern, he indicated that he was no expert, he did not state that he had seen his client's condition deteriorate since the August 2017 determination of competency, and that his concern was based on how Defendant had behaved prior to August 2017. Unlike the defendant in *State v. Hollars*, there was no indication from Defendant's behavior *during the course of the trial*, that Defendant's condition ever deteriorated. *See State v. Hollars*, ___ N.C. App. ___, ___, 2019 N.C. App. LEXIS 648, *16-17 (2019) (noting that during the trial, the defendant's counsel alerted the court about concerns regarding the defendant's capacity). And unlike the defendant in *State v. McRae*, there was no indication that Defendant had not taken his medication. *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 560 (2000).

as the majority points out, Defendant followed up his answer by stating that he was participating in an "intensive outpatient" program.

Also, I do not agree that Defendant's exchange with Judge Thornburg, when asked about his agreement to plead guilty without a plea arrangement, indicates that Defendant did not understand what was happening. To the contrary, this exchange showed that he totally understood. Admittedly, his response, "Yes, sir," when asked by Judge Thornburg if he had "agreed to plead guilty as part of a plea arrangement," was not technically correct. Though he had agreed to plead guilty, no plea arrangement had been agreed to. But it is clear that Defendant was merely responding to the first part of Judge Thornburg's question, that he had agreed to plead guilty. For when Judge Thornburg followed up to ask specifically about any agreement *to a plea arrangement*, Defendant immediately responded correctly.

I have reviewed Defendant's other arguments and conclude that he was afforded a fair trial, free from reversible error. However, as the State concedes, I agree that the judgments contain clerical errors; specifically, that it lists the wrong judgment being arrested and identifies the controlled substance involved as a Schedule III substance rather than a Schedule IV substance.

In conclusion, my vote is to find no error in Defendant's trial, but to remand the matter to correct certain clerical errors in the judgments.