IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-932

Filed: 6 August 2019

Watauga County, Nos. 13 CRS 2118-2121

STATE OF NORTH CAROLINA

v.

JACK HOWARD HOLLARS

Appeal by Defendant from Judgments entered 12 January 2018 by Judge William H. Coward in Watauga County Superior Court. Heard in the Court of Appeals 28 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Josephine N. Tetteh, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jack Howard Hollars (Defendant) appeals from his convictions for three counts of Indecent Liberties with a Child and three counts of Second-Degree Sexual Offense. The Record and evidence presented at trial tend to show the following:

Defendant was arrested in connection with this case on 10 February 2012. On 3 September 2013, Defendant was indicted by a Watauga County Grand Jury for one count of Statutory Sexual Offense of a Person Who Is Under 13 Years of Age, three

counts of Statutory Sexual Offense of a Person Who Is 13–15 Years of Age, and four counts of Indecent Liberties with a Child. Subsequently, on 4 May 2015, superseding indictments were entered on these offenses, charging Defendant with three counts of Indecent Liberties with a Child and three counts of Second-Degree Sexual Offense. These indictments stemmed from incidents that occurred between 1977 and 1981.

Although Defendant initially waived his right to court-appointed counsel, on 23 April 2012, the trial court in its discretion decided to provide Defendant with court-appointed counsel because Defendant "was not responsive to [the] Court's questions" during his initial appearance. On 4 May 2012, Defendant's counsel filed a motion to have Defendant evaluated because of Defendant's behavior on 1 May 2012. On that date, Defendant's counsel met with Defendant at the Watauga County Jail for approximately one hour. During this visit, "Defendant's thought process [was] scattered and random[,] and he [was] unable to focus." Defendant claimed to have no memory of the events leading to his current charges because "God closed the door and I cannot see." Further, Defendant stated that he would not take any medication because "chemicals in the water at Parris Island in 1968 when he was in the Marine Corps 'messed up [his] brain.' "

On 7 May 2012, Defendant underwent a forensic evaluation by Daymark Recovery Services, which rendered a report on Defendant's capacity to proceed to trial two days later (Daymark Report). The Daymark Report noted some of the same

concerns that Defendant's counsel had expressed previously about Defendant's behavior, such as "religious concerns and ideas to an extent that suggested a dysfunctional preoccupation"; Defendant's unwillingness to discuss the nature of the charges that he was facing; and Defendant's aversion to taking his medications. The Daymark Report concluded by stating:

> It is the opinion of the Certified Forensic Evaluator that [Defendant] is not competent to stand trial, and is impaired in providing the expected ability to assist in his defense. [Defendant] showed limited ability to cooperate in even basic discussion of his case with the undersigned despite a history of cooperative interaction over many years. [Defendant] appears psychotic and delusional, and in need of medication and treatment to relieve his condition. It seems likely, given [Defendant's] history, that a reestablishment of his psychotropic medication regimen would reestablish his capacity to proceed to trial. However, it also appears unlikely that he will allow this voluntarily in his current state of mind.

The Daymark Report also recommended further assessment and inpatient treatment of Defendant.

Based on the Daymark Report, the trial court entered an order committing Defendant to Central Regional Hospital for an examination on his capacity to proceed. On 25 July 2012, Dr. David Bartholomew (Dr. Bartholomew) of Central Regional Hospital evaluated Defendant and found him incapable to proceed in a written report dated 9 August 2012 (First Dr. Bartholomew Report). Dr. Bartholomew based his Report on, *inter alia*, Defendant's prior medical records, the Daymark Report, and a 75-minute in-person evaluation of Defendant. The First Dr.

Bartholomew Report contained many of the same concerns as the Daymark Report and concluded that:

> [Defendant] has a history of significant mental health problems including psychosis and depression. He is currently not receiving any treatment for his conditions. He is quite impaired at the present time as a result of symptoms of his mental illness. He is unable to describe a reasonable understanding of the nature and objects of the proceedings against him. He is not rational about his place in regards to the proceedings. He is unable to assist his attorney in a reasonable manner. [Defendant] is not capable to proceed.

This Report also noted Defendant "may gain capacity if he receives mental health treatment."

Based on the First Dr. Bartholomew Report, the trial court entered an order on 18 September 2012, finding Defendant incapable to proceed and involuntarily committing Defendant to Broughton Hospital. Defendant would remain at Broughton Hospital until, and throughout, his trial in January of 2018. During this time period, Defendant would undergo several other forensic evaluations with differing results.

On 14 May 2013, Dr. Bartholomew entered another report, based on a forensic evaluation from the previous month, finding Defendant competent to stand trial (Second Dr. Bartholomew Report). This Second Dr. Bartholomew Report found that Defendant's "mental health condition has improved with medication" but recommended continued psychiatric treatment of Defendant.

On 31 March 2015, Dr. Bartholomew conducted a third forensic evaluation of Defendant and entered a written report on 14 April 2015 (Third Dr. Bartholomew Report). Although this Report concluded Defendant was capable to proceed, Dr. Bartholomew noted that Defendant "has a longstanding mental illness which has been labeled as schizophrenia, schizoaffective disorder, or bipolar disorder by various clinicians." The Report further recommended that:

> Given his dementia, [Defendant] may not function well at the jail and may likely decompensate again if housed overnight in the jail. If [Defendant's] future court visits will take more than one day, I would recommend that, if possible, he stay at Broughton Hospital each night and be transported to court each morning or day. It is also possible his condition may deteriorate with the stress of a trial so vigilance is suggested if his case proceeds in a trial.

On 5 May 2015, the trial court held a competency hearing where Dr. Bartholomew testified that in his opinion Defendant was competent. However, the trial court had reservations regarding Defendant's capacity and ordered Defendant to undergo an additional psychiatric evaluation before determining Defendant's capacity to stand trial. On 23 July 2015, the trial court appointed Dr. James E. Bellard (Dr. Bellard) to conduct this evaluation.

On 9 October 2015, Dr. Bellard held a forensic interview with Defendant; thereafter, Dr. Bellard found Defendant incompetent to proceed and reduced his findings to a written report on 4 November 2015 (Dr. Bellard Report). The Dr. Bellard Report found Defendant suffered from hallucinations and diagnosed him with

schizophrenia and mild neurocognitive disorder. In the Report, Dr. Bellard expressed that "[he] simply cannot see [Defendant] as competent to stand trial" and that if Defendant proceeded to trial, he "would have difficulty refraining from irrational or unmanageable behavior during a trial."

On 7 March 2016, the trial court entered an Order on Defendant's Incapacity to Proceed (Incapacity Order) finding Defendant "lacks capacity to proceed." In the Incapacity Order, the trial court found that "Defendant suffers from Schizophrenia and experiences auditory hallucinations . . . on a regular basis." The trial court also found Defendant had a mild neurocognitive disorder that "impacts his daily life and competency[.]" Lastly, the trial court noted—"Defendant's difficulty maintaining mental stability upon transfer to the jail suggests that he would have difficulty tolerating stress at a trial or while awaiting trial, and he would have difficulty refraining from irrational or unmanageable behavior during a trial."

On 8 December 2016, Dr. Bartholomew conducted another forensic evaluation of Defendant and found he was capable to proceed, based on Defendant's progress with his treatment and continued medication. On 15 August 2017, Dr. Bartholomew and Dr. Reem Utterback (Dr. Utterback) examined Defendant and found him competent in a report dated 24 August 2017 (Final Dr. Bartholomew Report). This Report concluded that "it is reasonable to assume [Defendant] will maintain this [level of] functioning in the foreseeable future and during a trial."

Thereafter, the trial court held a competency hearing on 5 September 2017, finding Defendant competent to stand trial. On 2 January 2018, Defendant filed a Motion to Dismiss citing the delay in prosecuting his case. Defendant contended there was "no physical evidence whatsoever that any crime ever occurred[.]" Defendant further noted his "Capacity to Proceed has been in question since his initial arrest in 2012" and various treatment attempts and psychological issues "account for almost all the delay between Defendant's initial arrest in 2012 and the present." Defendant conceded the delay was "not the fault of the State" but contended the passage of time, in terms of both witness recollection and Defendant's progressing psychological issues, "has worked to substantially prejudice Defendant." That same day, Defendant also filed a Motion to Quash Indictments and a second Motion to Dismiss, citing double jeopardy and other constitutional concerns. On 5 January 2018, Defendant filed a Supplement to his Motion to Dismiss alleging additional details regarding his mental health.

On 8 January 2018, the matter proceeded to trial, and the trial court did not hold another competency hearing before commencing this trial. After the State's first witness had finished her testimony on 10 January 2018, Defendant's counsel brought to the trial court's attention his concerns regarding Defendant's competency. Specifically, Defendant's counsel stated:

> Your Honor, . . . I just had a brief conversation with [Defendant] during which I began to have some concerns about his capacity

> and I would ask the Court to address him regarding that. . . . I've been asking him how he's doing and if he knows what's going on. And up until just now he's been able to tell me what's been going on. He just told me just a few minutes ago that he didn't know what was going on. . . . I asked him if he understood what was going on. He said, no, he didn't know what [the witness] was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. . . . I feel we need to make sure. And I'm not asking for an evaluation[.] I would just ask for the Court to query him quickly to make sure . . . I'm seeing something that is not there.

The trial court suggested Defendant's lack of understanding was likely attributable to earlier discussions of Rules 403 and 404(b) of the North Carolina Rules of Evidence, not Defendant's mental state. Thereafter, the trial court stated it would address this issue the following morning. The next morning, the ensuing exchange between the trial court and Defendant's counsel occurred:

> THE COURT: Do you have any more information or arguments you want to make as to [Defendant's] capacity this morning?
>
> [DEFENSE COUNSEL]: No, Your Honor. When [Defendant] came in this morning he greeted me like he has other mornings. I interacted with him briefly and he interacted like he has been interacting every morning. And I've not had any questions about his capacity this morning. I just had some yesterday evening because he kind of looked at me and the look in his face was like he had no idea who I was.
>
> THE COURT: Yeah, well, any time you get to -- like I said, any time you get to talking about 404(b) and 403 everybody in the courtroom is going to look like that but.
>
> [DEFENSE COUNSEL]: I don't have any concerns this morning.

THE COURT: Okay.

Neither the trial court nor Defendant's counsel raised the issue of Defendant's competency again at trial. On 12 January 2018, the jury returned verdicts finding Defendant guilty on all charges. The trial court entered separate Judgments on each of the charges against Defendant, sentencing Defendant to ten years on each charge of Indecent Liberties with a Child and 40 years on each charge of Second-Degree Sexual Offense to run consecutively in the custody of the North Carolina Department of Adult Correction. Additionally, the trial court entered Judicial Findings and Order for Sex Offenders on each charge. Defendant appeals.

Issue

The dispositive issue in this case is whether the trial court violated Defendant's due-process rights by failing to conduct a competency hearing immediately prior to or during Defendant's trial.

Analysis

I. Standard of Review

"[T]he conviction of an accused person while he is legally incompetent violates due process[.]" *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979) (citations omitted). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

II. Lack of Competency Hearing

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 112-13 (1975). Our North Carolina Supreme Court has held

> under 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.

State v. Badgett, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (alteration in original) (citations and quotation marks omitted). In addition, "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." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55 (2005) (citation omitted). "[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 a bona fide doubt inquiry." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (alteration in original) (emphasis added) (citation and quotation marks omitted).

Defendant contends the trial court erred by failing to conduct *sua sponte* a competency hearing either immediately before or during the trial because substantial evidence existed before the trial court that indicated Defendant may have been incompetent. We agree with Defendant and believe *McRae* controls our analysis.

In *McRae*, the defendant suffered from schizophrenia and psychosis and had undergone at least six psychiatric evaluations over a seventeen-month period leading up to his first trial, which evaluations had differing results regarding the defendant's competency. *Id.* at 390-91, 533 S.E.2d at 559-60. Immediately following a competency hearing finding him competent, the defendant went to trial; however, this trial resulted in a mistrial. *Id.* at 391, 533 S.E.2d at 560. Thereafter, Defendant underwent an additional evaluation finding him competent, and five days later, the defendant's second trial began. *Id.* Noting "concern[s] about the temporal nature of [the] defendant's competency[,]" this Court held that the trial court erred in failing to conduct a competency hearing immediately prior to the second trial. *Id.* (citation omitted); *see also Meeks v. Smith*, 512 F. Supp. 335, 338-39 (W.D.N.C. 1981) (finding a bona fide doubt existed as to the defendant's competency where defendant was diagnosed as schizophrenic and underwent seven psychiatric evaluations yielding different conclusions as to defendant's competency).

Here, the trial court was presented with substantial evidence raising a bona fide doubt as to Defendant's competency to stand trial in January of 2018. First, on

8 January 2018, the trial court had access to Defendant's seven prior forensic evaluations. These evaluations found Defendant was psychotic at times, suffered from hallucinations, and had been diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder. Several of these evaluations also noted a temporal aspect to Defendant's mental ability to stand trial. For instance, the Third Dr. Bartholomew Report noted, "It is also possible his condition may deteriorate with the stress of a trial so vigilance is suggested if his case proceeds in a trial." Dr. Bellard expressed similar concerns in his report as well. Our Court has recognized that "[e]vidence of . . . any prior medical opinion on competence to stand trial [is] relevant to a bona fide doubt inquiry." *McRae*, 139 N.C. App. at 390, 533 S.E.2d at 559 (citation and quotation marks omitted).

In addition, Defendant's last forensic evaluation was conducted on 15 August 2017 and reduced to writing on 24 August 2017—the Final Dr. Bartholomew Report. Based on this Report, the trial court conducted a competency hearing and determined Defendant to be competent to stand trial on 5 September 2017. However, Defendant's trial did not begin until 8 January 2018, a full five months after Defendant's competency hearing and almost six months after Defendant's last forensic evaluation. Given the temporal nature of Defendant's mental illness, the appropriate time to conduct a competency hearing was immediately prior to trial. *See id.* at 391, 533 S.E.2d at 560; *Meeks*, 512 F. Supp. at 338-39; *see also State v. Cooper*, 286 N.C. 549,

565, 213 S.E.2d 305, 316 (1975) (stating a defendant's competency must be assessed "at the time of trial" (citations omitted)).

In a similar vein, we find it significant that Defendant's prior medical records disclosed numerous concerns about the potential for Defendant's mental stability to drastically deteriorate over a brief period of time and with the stress of trial. Dr. Bartholomew correctly indicated that "vigilance is suggested if [Defendant's] case proceeds in a trial[,]" as "a defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time." *State v. Whitted*, 209 N.C. App. 522, 528-29, 705 S.E.2d 787, 792 (2011) (citation omitted). Because these forensic evaluations suggested a "temporal nature of [Defendant's] competency[,]" the trial court should have conducted a competency hearing. *See McRae*, 139 N.C. App. at 391, 533 S.E.2d at 560 (citation omitted). Therefore, we conclude the trial court committed prejudicial error in failing to hold a competency hearing.

Further, we find additional support for this conclusion based on the events at trial. For instance, Defendant's counsel questioned Defendant's capacity on the third day of trial. Specifically, defense counsel stated, "I just had a brief conversation with [Defendant] during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that." Defense counsel's concerns stemmed from Defendant's responses that he "didn't know what was going on" and "didn't know what [the witness] was talking about." These concerns were raised

before the trial court, although a competency hearing was not held at this time.[1] However, our Court has observed that a defendant's demeanor is also relevant to a bona fide-doubt inquiry. *See id.* at 390, 533 S.E.2d at 559 (citation and quotation marks omitted). Moreover, Defendant never had an extended colloquy with the trial court or testified in a manner that demonstrated he was competent to stand trial. *Cf. Staten*, 172 N.C. App. at 679-84, 616 S.E.2d at 655-58 (holding that there was not substantial evidence of defendant's incompetence where defendant engaged in a lengthy voluntariness colloquy with the trial court; defendant's responses were "lucid and responsive"; and his testimony was mostly rational).

In light of Defendant's extensive history of mental illness, including schizophrenia, schizoaffective disorder, bipolar disorder, and mild neurocognitive disorder, his seven prior forensic evaluations with divergent findings on his competency, the five-month gap between his competency hearing and his trial, the concerns expressed by physicians and other trial judges about the potential for Defendant to deteriorate during trial and warning of the need for vigilance, the concerns his counsel raised to the trial court regarding his conduct and demeanor on the third day of trial, and the fact that the trial court never had an extended colloquy

[1] Although by the next morning Defendant's counsel indicated that he no longer had any concerns and the trial court proceeded with the trial, in our view, under the totality of the circumstances—including Defendant's extensive medical history and the gap between Defendant's last competency hearing and trial—there was substantial evidence giving rise to a bona fide doubt regarding Defendant's competency, notwithstanding defense counsel's failure to further pursue a competency hearing during trial.

with Defendant, we conclude substantial evidence existed before the trial court that raised a bona fide doubt as to Defendant's competency to stand trial. Therefore, the trial court erred in failing to institute *sua sponte* a competency hearing for Defendant.

III. Remedy

Because we have found that the trial court erred by failing to hold a competency hearing immediately prior to or during Defendant's trial, we follow the procedure employed in *McRae* and remand to the trial court for a determination of whether a meaningful retrospective hearing can be conducted on the issue of Defendant's competency at the time of his trial. *See McRae*, 139 N.C. App. at 392, 533 S.E.2d at 560-61 ("The trial court is in the best position to determine whether it can make such a retrospective determination of [a] defendant's competency."). On remand,

> if the trial court concludes that a retrospective determination is still possible, a competency hearing will be held, and if the conclusion is that the defendant was competent, no new trial will be required. If the trial court determines that a meaningful hearing is no longer possible, defendant's conviction must be reversed and a new trial may be granted when he is competent to stand trial.

Id. at 392, 533 S.E.2d at 561. In reaching its decision, the trial court must determine if a retrospective determination is still possible as it relates to (1) Defendant's competency immediately prior to trial, (2a) Defendant's competency during trial, and (2b) specifically Defendant's competency during the proceedings on the afternoon of

10 January 2018 when Defendant's trial counsel raised concerns over Defendant's mental state. If the trial court decides a retrospective determination is possible, the trial court must make detailed findings of fact and conclusions of law in a written order. Because it is possible on remand that the trial court concludes Defendant was not competent and orders a new trial, which would moot Defendant's arguments in his Conditional Motion for Appropriate Relief, we dismiss Defendant's Conditional Motion for Appropriate Relief without prejudice.

Conclusion

For the foregoing reasons, we remand this case to the trial court for a hearing to determine Defendant's competency at the time of trial. Further, we dismiss Defendant's Conditional Motion for Appropriate Relief without prejudice.

REMANDED.

Judge MURPHY concurs.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

There was no *bona fide* doubt as to Defendant's competence to stand trial, and there was not substantial evidence before the trial court that Defendant was incompetent. Thus, the trial court did not err when it began Defendant's trial, and proceeded with the trial, without undertaking another competency hearing, and I respectfully dissent.

A defendant lacks capacity to proceed when "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." *State v. King,* 353 N.C. 457, 465-66, 546 S.E.2d 575, 584 (2001) (citation omitted), *cert. denied,* 534 U.S. 1147 (2002). "[A] conviction cannot stand where the defendant lacks capacity to defend himself." *Id.* at 467, 546 S.E.2d at 585 (citation omitted).

"[A] trial judge 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). "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 678, 616 S.E.2d at 655. "[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 681, 616 S.E.2d at 656.

"There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* at 679, 616 S.E.2d at 655 (citations omitted). There must be "evidence before the trial court that defendant was not capable of assisting in his own defense," *State v. Blancher*, 170 N.C. App. 171, 174, 611 S.E.2d 445, 447 (2005), or otherwise lacked capacity to proceed.

There is no evidence in the record of irrational behavior or change in demeanor by Defendant at trial. The majority rests its reasoning almost entirely on Defendant's prior competency evaluations. While relevant, this factor alone is not controlling.

Defendant underwent multiple competency evaluations prior to trial. The dates of those evaluations, doctors, and results are set forth below:

May 7, 2012	Dr. Murray Hawkinson	Not Competent[2]
July 25, 2012	Dr. David Bartholomew	Not Competent
April 30, 2013	Dr. David Bartholomew	Competent
March 31, 2015	Dr. David Bartholomew	Competent
October 9, 2015	Dr. James Bellard	Not Competent
December 8, 2016	Dr. David Bartholomew	Competent
August 15, 2017	Dr. David Bartholomew Dr. Reem Utterback	Competent

[2] Dr. Hawkinson conducted a forensic screening at the Watauga County Jail.

September 5, 2017	Dr. James Bellard	Competent[3]

The reports from evaluations in which Defendant was found not competent each note that either Defendant was not taking medications to address his mental health issues, or that his medication dosage had been reduced prior to the evaluation. There is no such notation for evaluations in which Defendant was deemed competent to proceed.

In addition, Dr. Bartholomew stated in his report from the December 18, 2016 evaluation that "[g]iven the stability of [Defendant's] mental status and functioning for the last year or more at Broughton Hospital, I believe it is reasonable that [Defendant] will maintain this functioning in the foreseeable future and during a trial." A similar notation was made in the report from the August 15, 2017 evaluation by Drs. Bartholomew and Utterback. This is consistent with prior reports that Defendant's condition had improved and that his medication had helped with his symptoms.

Defendant's trial began in January, 2018. At a minimum, the trial court had information that was only four months old that Defendant was competent and would

[3] Defendant's counsel advised the trial court that Dr. Bellard spoke with Defendant that morning and found him to be competent, and defense counsel conceded to a finding of competence in open court.

In addition, a report from a June 28, 2017 evaluation by Dr. Bellard exists, but was not filed with the Watauga County Clerk of Court and not provided to the trial court. In that report, Dr. Bellard indicates that "[t]he degree to which [Defendant experiences hallucinations] is directly correlated with" Defendant's medication.

remain competent. This information was based on more than a year's worth of documentation while Defendant was housed in Broughton Hospital. This alone distinguishes this case from *State v. McRae*, 139 N.C. App. 387, 533 S.E.2d 557 (2000), and the majority's conclusion that there were concerns about the temporal nature of Defendant's competency is not reflected in the reports.

Thus, there is nothing in the record that would have required the trial court to conduct another pre-trial hearing. The Bartholomew-Utterback report clearly stated that Defendant was competent and that he would maintain capacity to proceed for the foreseeable future. Defense counsel did not alert the trial court to any concerns at any time between August 15, 2017 and January 8, 2018. To the contrary, defense counsel informed that Court that Dr. Bellard had determined that Defendant was competent to proceed in September 2017 and conceded to a finding that Defendant was competent.

In addition, prior to trial, defense counsel informed the trial court that

> [Defendant]'s been diagnosed with bipolar disorder at various times. He has been - - there are a number of times where they talk through – in the – where the evaluators in these evaluations talk about how he may well be actively psychotic at the point in time in which they were talking to him. I don't have any reason to believe he is that way as he is here today.

Here, "defendant's actions and courtroom behavior [at that time] did not indicate that [he] was incompetent. He participated in the proceedings, his demeanor

was appropriate, and his trial counsel represented that he was competent." *State v. Johnson*, 190 N.C. App. 818, 820, 661 S.E.2d 287, 289 (2008). In addition, "where, as here, the defendant has been . . . examined relative 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." *Id.* at 821, 661 S.E.2d at 289 (citation omitted).

Thus, the trial court did not err in not conducting another pretrial competency hearing because there was no evidence before the trial court that Defendant was incompetent at the time his trial began in January 2018.

Defendant also contends, and the majority agrees, that the trial court erred by failing to intervene *sua sponte* following an exchange between defense counsel and the trial court. I disagree.

There is nothing in the record that indicates Defendant was acting irrationally, or otherwise incompetent on January 8 or 9, 2018, or that his attorney or the trial court had any such concerns. On January 10, 2018, court convened for trial of Defendant's case at 9:32 a.m. Jury selection continued until 11:05 a.m. The court released prospective jurors for a recess at 11:12 a.m., and after the jury left the courtroom, neither defense counsel nor the prosecutor raised any concerns about Defendant. Court reconvened at 11:32 a.m. and jury selection continued until 12:27

p.m. Jurors were released for lunch at 12:35 p.m. After the jury left the courtroom, there was again no concern raised about Defendant.

After lunch, court resumed at 2:02 p.m. Jury selection was finalized and the jury impaneled at 3:07 p.m. At 3:16 p.m. the jury left the courtroom for the afternoon recess. Again, no issues were raised regarding Defendant when the jury left the courtroom. Court resumed at 3:32 p.m. The trial court provided instructions to the jurors, and opening statements were given by the prosecutor and defense counsel until 3:43 p.m. The State thereafter called the victim to testify as its first witness.

While the victim was testifying, defense counsel made an objection and asked to be heard outside the presence of the jury. The jury was thereafter escorted from the courtroom at 4:27 p.m. The trial court and counsel then engaged in a discussion of 404(b) evidence, and the jury returned at 4:34 p.m. The trial court then gave a limiting instruction to the jury, and the victim continued her testimony. Testimony continued, and the trial court gave an instruction prior to the jury being released for the evening at 5:00 p.m.

The trial court then mentioned 404(b) evidence again and a recess was taken at 5:03 p.m. They went back on the record at 5:03 p.m., at which time, defense counsel stated the following:

> I just had a brief conversation with Mr. Hollars during which I began to have some concerns about his capacity and I would ask the Court to address him regarding that.
> . . .

> I asked him -- I've been asking him how he's doing and if he knows what's going on *and up until just now* he's been able to tell me what's been going on. *He just told me just a few minutes ago* that he didn't know what was going on.

(Emphasis added).

The trial court replied to defense counsel:

> THE COURT: Well, when we start throwing around 404(b) and 403, you'd have to have graduated from law school to have any inkling of what we're talking about. So I'm not sure what it is you -- I want you to be more specific.
>
> [Defense counsel]: He said -- I asked him -- he said – I asked him if he understood what was going on. He said, no, he didn't know what she was talking about. And that has not been the way he has been responding throughout this event, either yesterday or earlier today. And in light of the history with him, I just want to make sure. I just – I feel we need to make sure. *And I'm not asking for an evaluation* I would just ask for the Court to query him quickly to make sure that I'm just not -- make sure I'm seeing something that is not there.
>
> THE COURT: Well, I tell you what, it's been a long day, and I'd rather inquire of Mr. Hollars in the morning and give everyone a chance to rest. Give you a chance to talk to him and try to explain to him what's going on, especially with all of these rule numbers. I don't know if anybody could explain that to a non-lawyer and have them understand it.
>
> We could take a poll around here of non-lawyers and see if they understood it. I doubt many of them would. But, you know, essentially what is going on is that the victim in this case has been telling everybody what he did, and that's about a simple concept as you can imagine. Now, if he surely does not understand that for some reason, not that he remembers it or not, or whether he can think of some defense or something, that is not the case.

> [Defense counsel]: I understand.
>
> THE COURT: But if the information coming from this woman about what he did, if he can understand that is what is happening, then I would say that the capacity situation hasn't changed any. We've got one, two -- I counted them before, three, four, five, six, capacity evaluations. The latest one was August 15, 2017, and this latest one found him capable of proceeding. We'll talk about it in the morning.
>
> [Defense counsel]: Yes, sir.
>
> THE COURT: Okay, thank you.

There was not substantial evidence before the court at this time, indicating that Defendant was incapable of proceeding, sufficient to require another competency hearing. There is nothing in the record that addresses Defendant's demeanor or behavior during trial on January 10, 2018 that would indicate or suggest Defendant was not competent. At the end of the day, defense counsel informed the trial court that he and Defendant "had a brief conversation" and Defendant told defense counsel that he did not know what was going on and that Defendant "didn't know what [the victim] was talking about."

As the trial court pointed out, the discussion concerning 404(b) evidence may have been too complicated for Defendant to understand. The trial court also informed defense counsel that Defendant's capacity may be an issue if he did not understand the victim's testimony, not merely that Defendant was denying knowledge of the

content of her testimony, or the ability to think of a defense to her testimony. The "brief conversation" by Defendant and defense counsel did not produce "*substantial evidence before the court* indicating that the accused may be mentally incompetent." *Staten*, 172 N.C. App. at 681, 616 S.E.2d at 656. Rather, at this point in the trial, there was the very real probability that Defendant did not understand the intricacies of 404(b) testimony, and that he had in fact heard and understood the victim's testimony. Perhaps at this point he fully comprehended the nature of his situation in relation to the proceedings. While there may be speculation concerning Defendant's competence, there is no *bona fide* doubt as to Defendant's competence.

On January 11, the trial court asked if there was a need "for any further inquiry as to Mr. Hollars' capacity." Defense counsel indicated there was not. Presumably defense counsel had more than a "brief conversation" with Defendant after the conclusion of court on January 10 to better understand Defendant's comments in court at the end of the 404(b) discussion. As this Court has noted, trial courts give "significant weight to defense counsel's representation that a client is competent, since counsel is usually in the best position to determine if his client is able to understand the proceedings and assist in his defense." *Blancher*, 170 N.C. App. at 174, 611 S.E.2d at 447 (citation omitted). Again, there was no substantial evidence before the court that Defendant may be incompetent at this point in the trial.

Even though not required because of the lack of substantial evidence, one could argue that the trial court's inquiry of defense counsel on the morning of January 11 satisfied the requirements of conducting a hearing on competence. *See* N.C. Gen. Stat. § 15A-1002 (b)(1); *See also State v. Gates,* 65 N.C. App. 277, 282, 309 S.E.2d 498, 501 (1983) (When a hearing is required concerning Defendant's capacity to proceed, "no particular procedure is mandated. The method of inquiry is still largely within the discretion of the [court].") The majority implies that the trial court was required to conduct a colloquy with Defendant at this point. While the trial court may do so, it is not required to do so.

Thus, because there was no *bona fide* doubt as to Defendant's competence to stand trial, there was not substantial evidence before the trial court that Defendant was incompetent. I would find the trial court did not err when it began Defendant's trial, and proceeded with the trial, without undertaking another competency hearing. In addition, I would dismiss Defendant's motion for appropriate relief without prejudice to his right to file an MAR in the trial court.