Affirmed and Memorandum Opinion filed October 7, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00042-CR
NO. 14-09-00043-CR

CHARLES WAYNE WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Court Cause Nos. 08-06-05878 CR & 08-06-05879 CR

M E M O R A N D U M O P I N I O N

Appellant Charles Wayne Williams was convicted in a bench trial of burglary of habitation in cause number 08-06-05878-CR and assessed punishment of 30 years' confinement. Appellant also was convicted of aggravated assault with a deadly weapon, unlawful possession of a firearm by a felon, and cruelty to non-livestock animals in cause number 08-06-05879-CR; his punishment for these offenses was assessed as confinement for 30 years, 20 years, and two years, respectively. The trial court ordered the sentences to be served concurrently. Appellant contends on appeal that (1) the trial court erred by

failing to conduct a *sua sponte* inquiry into appellant's competency to stand trial; and (2) his jury trial waiver was involuntary. We affirm.

Background

Appellant was arrested in May 2008 for burglary of habitation and indicted for that offense in June 2008. He also was indicted for aggravated assault with a deadly weapon, unlawful possession of a firearm by a felon, and cruelty to non-livestock animals. The indictments arose in connection with a May 3, 2008 incident in which appellant was identified as the assailant who knocked on the door of a former neighbor's mobile home at 3 a.m.; entered; pointed a pistol at the occupant; and subsequently fired shots at the occupant, striking and killing the occupant's dog.

Appellant pleaded not guilty to all charges and true to the enhancement paragraphs. Appellant remained in custody in the Montgomery County Jail while awaiting trial.

On August 29, 2008, appellant filed a motion asking for his trial to be scheduled before September 22, 2008. Appellant contended he was not receiving proper medical treatment in jail for an open wound related to severe burns he received in a 2006 car accident.

Appellant asserted that the jail's medical staff failed to change the bandages on an open, infected wound on his left foot as frequently as required. He also asserted that the improperly treated foot wound left him vulnerable to further injury from a bone infection in his leg. The trial court issued a scheduling order on September 24, 2008 setting the trial for October 13, 2008.

On October 1, 2008, appellant filed a motion to continue the trial so he could seek medical attention. Appellant's trial counsel subsequently filed a motion to withdraw on grounds that he could not communicate effectively with appellant and thus could not provide adequate representation.

At a hearing conducted on October 8, 2008, trial counsel said he was unable to

meet and communicate with appellant: ". . . I asked for a continuance because I can't meet with my client. He just — he won't talk about anything but his leg. He is trying to save his leg." Trial counsel stated, "All I am saying, Judge, is I can't meet with him because he says he is in pain and he can't communicate very well."

Trial counsel also stated: "He's real worried about losing his leg. He's already lost his arm. And the infection thing, if you don't get that treated, he will lose his leg. That is also my speedy trial motion, the one I talked about back in August." The trial court granted the continuance and reset the trial for November 4, 2008.

During the October 8 hearing, appellant waived his right to a jury trial. Trial counsel stated: "And I want to also get it on the record, Mr. Williams, that he is going to waive a trial by jury . . . ." Appellant testified as follows at the October 8 hearing in response to questioning by his trial counsel:

> Q. And you know in a criminal trial you have a right to a trial by jury and a right to be tried by the Judge; is that correct?
>
> A. Yes, sir.
>
> Q. I went over that with you. And you're telling this Judge that what you want to do on both of these cases, because we don't have an agreement, let the Judge — Judge Stovall hear the facts and decide what happened and what she wants to do. Is that what you want to do?
>
> A. I want something done about my foot, ma'am. I have been there eight months and the medical department in the jail has postponed it, postponed it, postponed it. That's my main concern, man. I have been through a lot. I don't want to lose my leg. I have lost my arm. Make these people get me in there and get this taken care of, man.
>
> Q. We are going to do that as soon as you get that taken care of. Do you want a trial by the Judge or do you want a trial by the jury because —
>
> A. I want to go before Ms. Stovall and have her hear the facts.
>
> Q. Let her hear the facts and decide the punishment and everything?
>
> A. That's - -
>
> Q. That's what you want to do?
>
> A. Yes, sir.
>
> Q. Cause No. 08-06-05878. You are going to do it on that one or do

you want to do it also on Cause No. 08-06-05879? Is that correct?

A. Yes.

Q. And you know — you know what you are charged with; is that right?

A. Yes, sir.

Q. I will give you a copy. You say you waive your right to jury trial and it says I want a bench trial. You know that means a trial by Judge. Is that what you want to do?

A. Yes, sir.

Appellant executed two written jury trial waivers on the same date. The waivers were signed by appellant, his attorney, and the State, and were approved by the trial court. Both waivers stated that appellant had been advised by counsel of his right to a jury trial, and that he voluntarily waived his right to a jury trial.

On October 17, 2008, appellant filed a motion requesting release on a personal bond so he could seek medical attention. A hearing held on October 29, 2008 addressed appellant's request and his complaints regarding the adequacy of his medical treatment in jail.

Appellant testified at the October 29 hearing and described the severity of his burn injuries. He also testified as follows in response to questioning by his trial counsel:

Q. How do you feel today?

A. Well, I feel the same way I've felt for — you know, it's gotten worse. Infection is getting worse. I am in constant pain, and it seems like they are all very aware and been aware since I got there on the medical record that I have an infection in the bone and this medical department has slowly just been taking their time, to get me to fight the infection on my own. I have my own insurance that are treating me. I can't go on with this stuff, man, with nothing. I can't even think straight every day. I am in constant pain, ma'am. I am afraid I am going to lose my freaking leg. I have lost my arm. I have been through a lot. I want to ask somebody to do something about it, man.

Q. I understand. Are you worried about losing your leg or is it the pain? What is it?

A. Well, it's both. I am in constant pain. On top of that, I'm worried

about I am going to lose — there is a good chance I am going to lose my leg, and I will lose more of it the longer I go on. The more the infection moves up the bone in my leg, it seems —

* * *

Q. . . . in your own words, what do you have to do to stop the pain? What do you have to do?

A. I have to have surgery. It's depending upon surgery. That is the only thing that is going to maybe might save my leg, and it might not. But it is not going to ever stop until I have the surgery. If I have to lose my leg they will amputate part of my leg. Once that heals up and I go through all the different treatments, then I might — I will deal with a little bit of pain the rest of my life. Nowhere near what I am going through now. This is suffering.

* * *

Q. Okay. Is it fair to say that we can't even communicate because you have pain all the time now? I can't talk to you very much?

A. That's very fair to say.

* * *

Q. Are you still in pain today?

A. Yes, sir, I am.

Jail medical supervisor Edsel West testified at the October 29 hearing about efforts to address appellant's medical condition during his pretrial incarceration. These efforts included requesting medical records from Memorial Hermann Hospital; providing pain medicine allowable under the jail's non-narcotics policy; transporting appellant to multiple appointments with treating physicians outside the jail; transferring appellant to a specially equipped cell to accommodate his disabilities; and later transferring him to a cell in the infirmary to facilitate wound care. West testified that the jail had not received any directives for surgery from appellant's treating physicians. The jail's documentation did not reflect that wound care had been administered to appellant on three days during a three-month period. The trial court denied appellant's motion for release on a personal bond.

On October 31, 2008, appellant filed a motion for continuance on grounds that his

infected foot wound was draining heavily and required daily bandage changes. The motion contended that trial counsel could not communicate effectively with appellant because appellant was in constant pain and could not obtain effective pain-relieving medication in jail. The trial court conducted a hearing on that motion on November 4, 2008.

At the November 4 hearing, trial counsel requested that appellant be released to obtain medical treatment for his leg and pain medication. Trial counsel contended that he was unable to effectively communicate with appellant because of appellant's pain. The trial court also heard from the jail medical supervisor, who informed the judge that appellant was receiving an opiate-based pain-killer; residing in the medical unit; and receiving daily bandage changes. The court denied appellant's request for release and continued the trial, which was reset for November 10, 2008.

At the beginning of the November 10 bench trial, the following exchange occurred between appellant and his trial counsel:

> Q. We talked many times about we have the absolute Constitutional right to have a trial by jury and trial by Judge. I went over those rights with you, did I not?
>
> A. Yes.
>
> Q. Did you understand those rights?
>
> A. Yes, sir.
>
> Q. Okay. And I'm thinking a couple of weeks ago we signed a waiver of trial by jury and you signed that waiver; is that correct?
>
> A. Yes, sir.
>
> Q. Did you do it freely and voluntarily?
>
> A. Yes, sir, I did.
>
> Q. Okay. Did anyone force you to do that?
>
> A. No, sir.
>
> Q. Okay. And today you still have that right. Are you telling the Court that you still want to go to trial by judge?
>
> A. Yes, I do.

Q. Just briefly, why do you want to go to the Judge for trial?

A. The reason I want to go before the Judge is due to my accident, the way I look, I'm afraid that — I am burned up. My face, my nose, my ears. I am missing my arm. I'm afraid that appearance would definitely intimidate the jurors and I don't think the Judge will judge me on my appearance.

Q. Okay. So, that's — that is why you want to go with the Judge.

A. And I know that — I also know that the Judge will not go on what they hearsay. I want to make sure is goes by ways of the law.

Q. Okay. So today you want to still proceed with trial by Judge Stovall; is that correct?

A. Yes, sir. That's correct.

Q. Okay.

Appellant later testified in detail at trial regarding his recollection of the events on May 3, 2008 leading up to his arrest. He demonstrated no difficulty in understanding and answering questions during trial. In response to a question asking whether he previously had sold drugs to the mobile home's occupant, appellant denied doing so and testified, "I'm not an ignorant man." He continued, "I have been to prison before for selling drugs. I am not going to go out there where I know a landlord is an ex-police officer and force drugs on people or even let them know that I did sell drugs." He added, "I've got that much snap, you know."

The trial judge found appellant guilty of all offenses charged in the indictments and sentenced appellant after a punishment hearing. The trial court certified appellant's right of appeal. On November 11, 2008, appellant timely moved for a new trial based on contentions that (1) "[t]he verdict in this cause is contrary to the law and the evidence;" (2) facts outside the record warrant a new trial; and (3) "[t]he trial court has the discretion to grant a new trial in the interests of justice . . . ." The motion for new trial did not address appellant's competency to stand trial or the voluntariness of his jury trial waiver. The motion was overruled by operation of law. Appellant timely filed a notice of appeal on November 17, 2008.

Analysis

In his first issue, appellant contends the trial court erred by failing to conduct an informal inquiry into appellant's competency to stand trial. In his second issue, appellant contends his jury trial waiver was involuntary because it resulted from duress and coercion. We address each issue in turn.

I. Competency

A defendant is incompetent to stand trial if he lacks (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or (2) a rational and factual understanding of the proceedings. Tex. Code Crim. Proc. Ann. art. 46B.003(a)(1), (2) (Vernon 2006). A defendant is presumed to be competent to stand trial unless proved incompetent by a preponderance of the evidence. *Id*. art. 46B.003(b).

If evidence suggesting that the defendant may be incompetent to stand trial comes to the trial court's attention, then the court on its own motion shall suggest that the defendant may be incompetent to stand trial. *Id*. art. 46B.004(b). On suggestion that the defendant may be incompetent to stand trial, the court "shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." *Id*. art. 46B.004(c). A trial court should conduct a competency inquiry if the trial judge has a *bona fide* doubt about the competency of the defendant. *Montoya v. State*, 291 S.W.3d 420, 425 (Tex. Crim. App. 2009). A *bona fide* doubt is "a real doubt in the judge's mind as to the defendant's competency." *Alcott v. State*, 51 S.W.3d 596, 599 n.10 (Tex. Crim. App. 2001).

A *bona fide* doubt may exist if the defendant "exhibits truly bizarre behavior or has a recent history of severe mental illness or at least moderate mental retardation." *Montoya*, 291 S.W.3d at 425. Evidence raising a *bona fide* doubt about a defendant's competency may come from a trial court's observations, known facts, evidence submitted, motions, affidavits, or any other claim or credible source. *Houston v. State*, Nos. 01-06-01000-CR & 01-06-01001-CR, 2008 WL 597285, at *2 (Tex. App.—

Houston [1st Dist.] Mar. 6, 2008, no pet.) (mem. op., not designated for publication) (citing *Brown v. State*, 129 S.W.3d 762, 765 (Tex. App.—Houston [1st Dist.] 2004, no pet.)).

In the trial court, neither appellant nor the State suggested by motion that appellant may have been incompetent to stand trial. Appellant contends that the trial court erred by failing to conduct an inquiry into his competency *sua sponte* pursuant to article 46B.004(c).[1] We review a trial court's decision not to conduct a competency inquiry under an abuse of discretion standard. *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999); *LaHood v. State*, 171 S.W.3d 613, 617-18 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). A trial court abuses its discretion if its decision is arbitrary or unreasonable. *Montoya*, 291 S.W.3d at 426. In performing this review, we are mindful that trial courts are in a superior position to make competency judgments because they can observe the defendant's conduct and demeanor directly. *Montoya*, 291 S.W.3d at 426.

There is no evidence of mental illness or bizarre behavior on this record; appellant does not contend that he lacked a rational and factual understanding of the proceedings. He contends only that he lacked sufficient ability to consult with his lawyer. Appellant argues there was a "clear indication" sufficient to create a *bona fide* doubt about appellant's ability to consult with his lawyer based upon (1) repeated assertions during hearings that pain from appellant's infected foot wound interfered with counsel's communication with appellant; and (2) appellant's testimony that he experienced constant pain and "can't even think straight every day."[2]

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[1] The State argues that appellant did not preserve this issue because he failed to raise it during proceedings in the trial court. We reject this argument because the trial court is required to conduct a competency inquiry *sua sponte* if the evidence raises a *bona fide* doubt about a defendant's competency. *See Montoya*, 291 S.W.3d at 425; *Mitchell v. State*, No. 14-03-00923-CR, 2004 WL 3202866, at *1 n.1 (Tex. App.—Houston [14th Dist.] Nov. 24, 2004, pet. ref'd) (mem. op., not designated for publication).

[2] Appellant also argues that a *bona fide* doubt existed based on the State's comments during the November 4 hearing. According to appellant, the State "request[ed] . . . that the court order the jail to administer narcotic medication to Appellant so that Appellant can effectively communicate with

On this record, the trial court acted within its discretion in concluding that no competency inquiry was warranted. This conclusion applies even if it is assumed solely for argument's sake that pain can affect rational understanding for purposes of an article 46B inquiry.[3]

Incompetence is judged by the ability of a defendant to consult with his lawyer — not by the actual consultations. *Baugh v. State*, No. 14-06-00553-CR, 2007 WL 1247311, at *3 (Tex. App.—Houston [14th Dist.] May 1, 2007) (mem. op., not designated for publication) (citing Tex. Code Crim. Proc. art 46B.003(a)). "A defendant's failure to cooperate with counsel is not probative evidence of incompetence." *Id.* (citing *Burks v. State*, 792 S.W.2d 835, 840 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd)). Similarly, evidence of impairment does not support a competency inquiry where there is no evidence indicating the defendant is unable to consult with his attorney with a reasonable degree of rational understanding. *See Moore*, 999 S.W.2d at 395; *Reed v. State*, 112 S.W.3d 706, 710-11 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

Trial counsel's assertions of communication difficulty neither established incompetency nor necessitated a hearing. *See Moore*, 999 S.W.2d at 394-96; *McWherter v. State*, 607 S.W.2d 531, 534 (Tex. Crim. App. 1980) (motion asserting appellant was incompetent and requesting a psychiatric evaluation, which was not supported by evidence, did not raise *bona fide* doubt as to appellant's competency). Appellant's assertion that "I can't even think straight," does not mandate a competency inquiry. *See McDaniel v. State*, 98 S.W.3d 704, 711 (Tex. Crim. App. 2003) (assertion that "I am incompetent" does not establish necessity of competency inquiry); *Rojas v. State*, 228 S.W.3d 770, 773 (Tex. App.—Amarillo 2007, no pet.) (appellant's statement that he did

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Appellant's trial counsel." This contention is not persuasive. The State asserted during the hearing, "[W]hatever the doctors prescribe, give him." When the trial court asked appellant's trial counsel whether pain medications had been prescribed by appellant's private doctors, counsel stated: "I don't think so, Judge."

[3] The State argues that article 46B does not apply here because appellant's asserted inability to consult with his attorney involved only physical impairment. In light of our disposition, we do not address this contention.

not always understand what counsel told him did not show inability to consult with his attorney). The trial court has discretion to distinguish between evidence exhibiting impairment and evidence demonstrating incompetency as contemplated by the law. *See Moore*, 999 S.W.2d at 396. The trial court acted within its discretion here in concluding that trial counsel's statements regarding communication difficulties did not raise a *bona fide* doubt concerning appellant's ability to consult with his attorney with a reasonable degree of rational understanding.

We note that appellant readily answered questions on direct and cross-examination when he testified at trial. He testified in detail and without difficulty regarding his recollection of the events leading to his arrest on May 3, 2008; he also asserted that he had sufficient knowledge and "snap" to avoid dealing drugs after a previous drug conviction. Appellant's detailed and lucid trial testimony underscores the appropriateness of the trial court's exercise of discretion. *See McDaniel*, 98 S.W.3d at 712 (defendant's clear and lucid testimony is important in determining whether evidence raised a *bona fide* doubt as to defendant's competency); *Kostura v. State*, 292 S.W.3d 744, 747-48 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (history of mental illness and bizarre behavior was insufficient to raise a *bona fide* doubt requiring a competency inquiry in light of appellant's lucid testimony); *Ryan v. State*, 937 S.W.2d 93, 106 (Tex. App.—Beaumont 1996, pet. ref'd) (appellant's trial testimony is a "good barometer" of competency).

We overrule appellant's first issue.

II. Waiver of Right to Jury Trial

In his second issue, appellant argues that his jury trial waiver was the result of duress and coercion by the State. Appellant asserts that the waiver was involuntary because he received inadequate medical treatment and pain medication during his pretrial incarceration in the Montgomery County Jail.

A defendant in a criminal proceeding has an absolute right to a jury trial. U.S.

Const. amend 6; Tex. Const. art. I, § 15; Tex. Code Crim. Proc. Ann. art. 1.12 (Vernon 2005); *see also Hobbs v. State*, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009). The State must establish an express, knowing, and intelligent waiver of the right to a jury trial by the defendant. *Hobbs*, 298 S.W.3d at 197.

A defendant who wishes to relinquish his right to a jury trial must do so expressly. *Marin v. State*, 851 S.W.2d 275, 278-79 (Tex. Crim. App. 1993) (en banc), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). An express waiver is not sufficient if it does not amount to the "'intentional relinquishment or abandonment of a known right or privilege.'" *Id*. at 279 (quoting *Janecka v. State*, 739 S.W.2d 813, 829 (Tex. Crim. App. 1987)). An effective waiver exists when a written waiver is signed by a defendant, his counsel explains the advantages and disadvantages of a jury trial, and the defendant considers the waiver to be voluntary and knowing. *Hoang v. State*, 825 S.W.2d 729, 732 (Tex. App.—Houston [14th Dist.] 1992 pet. ref'd). A jury trial waiver in a criminal proceeding other than a capital felony murder proceeding in which the death penalty is sought must be made in person by the defendant in writing in open court with the consent and approval of the court and the State. Tex. Code Crim. Proc. Ann. art. 1.13(a) (Vernon 2005).

Appellant does not contend that article 1.13(a) was not satisfied, or that he sought to revoke his waiver. The written waivers executed at the October 8 hearing are prima facie evidence that appellant's waivers were voluntary. Appellant nonetheless contends that his waiver was involuntary; he points to his testimony at the October 8 hearing in which he responded to a question about trying his case to the bench by describing his complaints regarding the adequacy of his medical care in jail.

The record does not support appellant's involuntariness contention. While appellant complained at multiple hearings about the medical care he received in jail, he did not state that he was waiving his right to a jury trial with the goal of obtaining better medical care. He did not testify about his reason for waiving his right to a jury trial at the October 8 hearing. When he was asked point-blank at the beginning of trial on

November 10 to state why he wanted his case tried to the bench, appellant responded as follows: " . . . I am burned up. My face, my nose, my ears. I am missing my arm. I'm afraid that appearance would definitely intimidate the jurors and I don't think the Judge will judge me on my appearance." This testimony demonstrates a motivation for the jury trial waiver that is unrelated to appellant's complaints regarding the adequacy of the medical care he had received. This record does not establish that appellant's waiver of his right to a jury trial was involuntary. *See Benjamin v. State*, No. 14-06-00147-CR, No. 14-06-00148-CR, 2007 WL 1470222, at *3 (Tex. App.—Houston [14th Dist.] May 22, 2007, pet. ref'd) (mem. op., not designated for publication) (defendant's assertion that he was "not thinking clearly" and his testimony regarding concerns about his safety in jail did not establish that jury trial waiver was involuntary).

We overrule appellant's second issue.

Conclusion

Accordingly, the judgments of the trial court are affirmed.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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