

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-649

Filed: 5 May 2020

New Hanover County, No. 17CRS053352

STATE OF NORTH CAROLINA

v.

WILLIAM BERNICKI, Defendant.

Appeal by Defendant from judgment entered 13 December 2018 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant.

DILLON, Judge.

Defendant appeals from a judgment convicting him of first-degree murder. He was sentenced to life in prison without the possibility of parole.

I. Background

In August 2018, several months before the trial, Defendant underwent a competency evaluation, where he was adjudged competent, though showing some indications of mental illness.

During jury selection, defense counsel expressed concern regarding Defendant's competency to assist during the trial. The trial court, therefore, ordered a second competency evaluation for Defendant before a jury was empaneled.

Defendant was tested and observed by the same doctor who had conducted his August evaluation. Based on the doctor's report and other factors, the trial court found Defendant competent to stand trial.

The jury found Defendant guilty of first-degree murder and of breaking and entering with intent to terrorize and injure. The trial court arrested judgment on the latter charge and only punished Defendant for first-degree murder, which resulted in lifetime imprisonment with no possibility of parole. Defendant timely appealed.

II. Analysis

Defendant makes four arguments on appeal. We address each in turn.

A. Defendant's Competency

Defendant argues that the trial court abused its discretion in determining that he was competent to stand trial.

A trial court abuses its discretion if its ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."

State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). The burden rests with the Defendant in proving that the trial court abused its discretion. *See State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971).

Before the jury was empaneled, the trial judge considered the second evaluation and her own observation of Defendant in the courtroom. The results of the evaluation indicated one with impaired capacity. The doctor performing the evaluation noted, though, that Defendant's performance during the evaluation was due, in part, to his mental health condition, but also due, in part, to his willful malingering behavior. The doctor concluded that, given the combination of Defendant's impaired mental health and his willful malingering, it was "improbable that [he] will assist in his defense."

The trial judge considered the doctor's report and found that Defendant was malingering during the evaluation. The trial court found that Defendant was not credible in his responses during the evaluation. The trial judge also made findings concerning her own observations, that Defendant was calm during jury selection, he laughed at appropriate times, and he was attentive during questioning of jurors.

Based on the foregoing, we conclude that the trial court did not abuse its discretion in determining that Defendant did not meet his burden of showing he lacked capacity to proceed with his trial.

B. Jury Selection

Defendant argues that the trial court erred in proceeding with the jury selection while his competency was in question. Indeed, our Supreme Court has instructed that jury selection is a critical stage of the trial. *See, e.g., State v. Hayes*, 291 N.C. 293, 297, 230 S.E.2d 146, 149 (1976). “[A] trial court has a constitutional duty to institute . . . a competency hearing if 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 (2007). A question of a party’s capacity can be raised at any time. *See* N.C. Gen. Stat. § 15A-1001(a) (2018).

Here, after Defendant’s counsel alerted the trial court of his concern that Defendant might not be competent to stand trial, the trial court allowed jury selection to proceed before Defendant would be re-evaluated and a determination would be made regarding his competency. We note, though, that Defendant’s counsel did not lodge any objection to continuing with jury selection, and the jury was not empaneled until after the re-evaluation and the competency determination was made. The trial court made its competency determination before the jury was actually empaneled.

Assuming, though, that the trial court erred in proceeding with jury selection without first determining Defendant’s competency, we conclude that any error was not reversible in this case, as we hold that the trial court did not abuse its discretion in determining that Defendant was competent to stand trial.

C. Jury Charge

Defendant next argues that the trial court judge failed to fulfill its duty in having the clerk read portions of the jury charge. At trial, the judge was suffering from an illness that impaired her ability to speak. So that the jury could hear and understand the instructions, she delegated part of the reading of the instructions to the clerk in the courtroom.

The statutory language that governs this process states:

At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. . . . The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

N.C. Gen. Stat. § 15A-1231(b). Defendant did not object to the clerk reading the instructions. But even if Defendant's argument is preserved on appeal, we conclude that Defendant was not prejudiced by the clerk reading the instructions. The judge was present in the room and told the clerk which instructions to give. Moreover, Defendant makes no argument the instructions given were incorrect or incomplete.

D. *Ex mero motu* intervention

In Defendant's final argument, he contends that the trial court erred by failing to intervene *ex mero motu* during a portion of the State's closing argument. During that portion, the prosecutor made the following statements:

[T]he wolf that was brought to the door in this case, that is even more deadly than that drug [heroin], is sitting 25 feet from you, in the man of [Defendant]. And what he did was cold, calculating, and as deadly as any drug injected in the veins.

...

[S]ometimes people get into a courtroom and say, “Wait . . . I thought there must be a mystery. Why am I even here?”

...

Because everyone has the right to a jury trial, sometimes when someone refuses to take full responsibility for their deeds, we have to put twelve people in a box to take that responsibility for them. And that’s why we are here.

...

[H]e’s putting you into the position of having to send him to prison cell for life.

Our Supreme Court has stated that “only an extreme impropriety on the part of the prosecutor will compel [a reviewing court] to hold that the trial judge abused [her] discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.” *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010). And the trial judge is given “wide latitude” when deciding whether to intervene with counsels’ arguments. *See State v. McKenna*, 289 N.C. 668, 687, 224 S.E.2d 537, 550 (1976). As stated by our Supreme Court:

when defense counsel fails to object to the prosecutor’s improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.

State v. Huey, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017).

Here, the prosecutor made an analogy of Defendant to a wolf and also made an analogy of Defendant's actions to the effects of heroin, which has been held by our Supreme Court as nonprejudicial. *See State v. Craig*, 308 N.C. 446, 457-58, 302 S.E.2d 740, 747 (1983) ("The references to wolves and wolfpack were made to illustrate by way of analogy how concert of action leads to each of the defendants' responsibility [and were not abusive].").

Even if the prosecutor's language crossed the line, we conclude that it was not prejudicial error for the trial court *not* to intervene *ex mero motu*.

III. Conclusion

The trial court did not err or abuse its discretion in finding Defendant competent to stand trial. And Defendant, otherwise, received a fair trial, free from reversible error.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).