No. COA22-932 DISTRICT SIXTEEN-A

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From Scotland County

 )

DESMOND JAKEEM BETHEA )

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# DEFENDANT-APPELLANT’S BRIEF

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# DEFENDANT-APPELLANT’S BRIEF

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## ISSUE PRESENTED

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING MR. BETHEA COMPETENT TO STAND TRIAL WHERE THE UNDISPUTED EVIDENCE SHOWED HE WAS UNABLE TO ASSIST IN HIS DEFENSE DUE TO A TOTAL LACK OF MEMORY ABOUT THE DAYS SURROUNDING THE INCIDENT?

**STATEMENT OF THE CASE**

This case came on for trial at the 21 March 2022 criminal session of Scotland County Superior Court, before the Honorable Stephan Futrell, on indictments charging Desmond Bethea with three counts of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill inflicting serious injury, two counts of assault with a deadly weapon on a government official, carrying a concealed gun, and discharging a weapon into an occupied dwelling. (R pp 10-13) On 28 March 2022, the jury found Mr. Bethea not guilty of discharging a weapon into occupied property but guilty of the remaining charges. (R pp 59-63; T pp 855-56) Mr. Bethea was sentenced to a total of 520 to 672 months’ imprisonment. (R pp 66-76; T pp 908-09) Mr. Bethea gave both oral and written notice of appeal. (R pp 77-79; T p 909)

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Mr. Bethea appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) from a final judgment entered in Scotland County Superior Court.

**STATEMENT OF FACTS**

No one knows why Desmond Bethea, a teenager with no prior criminal record, was involved in two separate shooting incidents on 26 May 2018.

Around 2:00 a.m. that day, Nathaniel Patterson was standing outside a laundromat near the Laurinburg Food Mart when he was struck by a bullet that grazed his side and wounded his arm above the elbow. Patterson did not know the person who fired the shot. There was no confrontation between Patterson and the shooter. (T pp 376-77, 401-02; State’s Exhibit 17) Patterson did not testify at the trial.

Laurinburg Police Department (“LPD”) Corporal Benjamin Teasley was among those who responded to the scene. Teasley was directed to collect evidence from the laundromat parking lot. After a few minutes, Teasley was joined by LPD Officer Jeremy Rodriguez. (T pp 437, 439-43) For reasons unexplained, Mr. Bethea entered the parking lot, despite the presence of crime scene tape and uniformed officers. When the officers confronted him, a struggle ensued. Mr. Bethea fired one shot, which missed both officers but damaged Teasley’s hearing, before running away. Officer Teasley fired approximately eleven shots as Mr. Bethea fled. (T pp 413-15, 443-47; State’s Exhibit 18) When other officers arrived, Mr. Bethea was found incapacitated on the ground across the street from the parking lot. (T pp 392-93)

Mr. Bethea suffered multiple gunshot wounds, including injuries to his head, jaw, large intestine, liver, stomach, and right arm. He was initially admitted to Scotland Memorial Hospital and then transferred to Grand Strand Regional Medical Center for emergency surgery. Physicians determined that Mr. Bethea had suffered a traumatic brain injury and would suffer lifelong effects from his injuries. (R pp 26-27) Five months after the shooting, Mr. Bethea was still experiencing “internal hemorrhaging, respiratory problems, and blood clots” so severe that he could not be housed in the local jail. (R p 15)

**The Competency Hearing**

Defense counsel filed a Motion for Capacity Hearing, alleging that Mr. Bethea was not competent to stand trial as he was unable “to assist in his defense in a rational or reasonable manner” because, due to his injuries, he had no memory of the events surrounding the alleged crime. (R pp 22-23) Attached to the motion was a report written by Dr. James Hilkey. Dr. Hilkey concluded that Mr. Bethea “lacks a rational understanding in that he has no memory for the events” and therefore “cannot assist his attorney in explaining his mental state or provide relevant information in offering a defense.” (R pp 24-30)

A competency hearing was held on 21 March 2022. Dr. Hilkey, a psychologist with 45 years’ experience, was qualified as an expert in forensic psychology and testified for the defense. (T pp 7-11) Dr. Hilkey had met with Mr. Bethea on three occasions and reviewed thousands of pages of medical records. (T pp 11-12) Dr. Hilkey testified that as a result of his injuries, Mr. Bethea lost a significant amount of blood, was placed on a respirator, and remained unconscious and unresponsive for several weeks. Mr. Bethea underwent multiple surgeries and suffered a traumatic brain injury. Dr. Hilkey described Mr. Bethea’s injuries as being among the worst he has seen in conducting thousands of evaluations. (T pp 12-13)

Dr. Hilkey administered various tests as part of his examination. Significantly, there was no evidence that Mr. Bethea was malingering his symptoms. (T p 14) Intelligence testing showed that Mr. Bethea’s IQ is in the borderline range, lower than 93% of other people. His lowest score was in processing speech, a result common in people with brain injuries. (T pp 14-16) A neurocognitive assessment showed significant impairment to his memory. (T p 16) The potential causes of Mr. Bethea’s intellectual and neurocognitive impairments include swelling of the brain secondary to being shot in the head and oxygen deprivation from significant blood loss. (T pp 25-26)

Mr. Bethea had no recollection of the events of 26 May 2018. He reported waking up in the hospital in Myrtle Beach with no idea how he got there. Such total memory loss is consistent with the degree of brain injury Mr. Bethea suffered. (T pp 16-17) Because Mr. Bethea had no memory of the events surrounding the crime, he was unable to consult with counsel about what happened and what defenses might be appropriate. (T pp 17-18) He was also unable to provide Dr. Hilkey with evidence of his mental state at the time of the shooting. (T pp 26-27) Dr. Hilkey ultimately concluded that Mr. Bethea was not competent to stand trial. (Doc. Ex. 6; T p 18)

The State presented no evidence at the hearing. The State agreed that Mr. Bethea had some level of impairment but argued that he was not incompetent under *State v. Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977). (T pp 30-33)

The trial court found that Mr. Bethea was competent to stand trial. (T p 38) The trial court did not issue a written order but stated on the record that Mr. Bethea “is capable of assisting in his defense to the extent that he can remember events before and after and can stand trial in accordance with the standards in the North Carolina Constitution and General Statute 15A-1001(a), as amended.” (*Id*.) The court referred to two cases, *State v. Willard*, and *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). (T pp 36-38)

During the subsequent trial, the State presented nine witnesses in support of its case. (T pp 360-721) Mr. Bethea’s counsel did not present any defense. (T p 733) The jury found Mr. Bethea guilty of all charges except discharging a weapon into occupied property. (R pp 59-63; T pp 855-56)

**Sentencing**

What happened on 26 May 2018 was extremely out of character for Mr. Bethea. During the sentencing proceeding, Mr. Bethea’s brother Tadarius, a military police officer, told the Court that Mr. Bethea supported him and was happy about his career in law enforcement. Tadarius further stated that Mr. Bethea had been a role model for him and that they had both hoped to work their way out of the bad neighborhood in which they were raised. (T pp 892-95) Wanda Reed, Mr. Bethea’s grandmother, raised Desmond and Tadarius. She told the trial court that Mr. Bethea was a quiet, respectful, church-going child, looked up to by his peers. She presented the court with letters of reference from members of the community. Mr. Bethea repeatedly expressed his remorse about what occurred. (T pp 896-904) The trial court sentenced Mr, Bethea to a total of 520–672 months imprisonment. (R pp 66-76; T pp 908-09)

**ARGUMENT**

**I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING MR. BETHEA COMPETENT TO STAND TRIAL WHERE THE UNDISPUTED EVIDENCE SHOWED HE WAS UNABLE TO ASSIST IN HIS DEFENSE DUE TO A TOTAL LACK OF MEMORY ABOUT THE DAYS SURROUNDING THE INCIDENT.**

1. **Standard of Review**

“When the trial court, without a jury, determines a defendant’s capacity to proceed to trial, it is the court’s duty to resolve conflicts in the evidence.” *State v. Hepinstall*, 309 N.C. 231, 234, 306 S.E.2d 109, 111 (1983). “If the trial court’s findings of fact are supported by competent evidence, they are deemed conclusive on appeal. Furthermore, the trial court’s decision that defendant was competent to stand trial will not be overturned, absent a showing that the trial judge abused his discretion.” *State v. McClain*, 169 N.C. App. 657, 663, 610 S.E.2d 783, 787 (2005) (cleaned up).

“Abuse of discretion results where the court’s 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).

1. **Legal Analysis**
2. **Core Principles**

At common law, it was recognized that, “If a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?” 4 W. Blackstone, Commentaries \*24 (1769).

Our current statute provides, “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 and reasonable manner.” N.C.G.S. § 15A-1001(a); *see also Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 903 (1975). “The statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests, he or she does not have the capacity to proceed.” *State v. Shytle*, 323 N.C. 684, 687, 374 S.E.2d 573, 575 (1989).

Of particular relevance to this appeal is the requirement that in order to be found competent, a defendant must be able to “confer with his or her attorney so that the attorney may interpose any available defenses.” *Shytle*, 323 N.C. at 689, 374 S.E.2d at 575; *see also State v. Coley*, 193 N.C. App. 458, 463, 668 S.E.2d 46, 50 (2008) (finding a defendant competent under this standard where he had “a clear recollection of the events associated with his criminal acts.”)

A defendant bears the burden of proving his incompetence by no more than a preponderance of the evidence. *Cooper v. Oklahoma*, 517 U.S. 348, 355, 116 S. Ct. 1373, 1377 (1996).

1. **The Trial Court’s Findings of Fact Were Not Supported by Competent Evidence, and Its Conclusions of Law Did Not Accurately Reflect Either the Law or the Evidence Presented.**

**Findings of Fact**

The court found that Mr. Bethea “is capable of assisting in his defense to the extent that he can remember events before and after and can stand trial in accordance with the standards in the North Carolina Constitution and General Statute 15A-1001(a) as amended.” (T p 38). The trial court’s finding of fact that Mr. Bethea “can remember events before and after” had no support in the evidence.

Dr. Hilkey’s report shows that Mr. Bethea had no memories related to the incident until he woke up in the hospital. (Doc. Ex. 3) Dr. Hilkey’s further testified that Mr. Bethea was intubated and unresponsive for an extended period of time during his hospitalization. (T p 12) Mr. Bethea could not remember anything about the day of the shooting, including the time before his injury. (T p 17) In arguing to the court, trial counsel confirmed that Mr. Bethea has no recollection of the shooting and “no memory. . . of anything that happened, you know, for several days before this incident,” and had therefore been unable to assist counsel in preparing for trial. (T pp 29, 34-35) All the evidence demonstrated that Mr. Bethea had no memory at all for several days before the incident, the incident itself, and a period of weeks after the incident. There was no evidence from which the trial court could find that Mr. Bethea was able to remember a period of time either before or after the incident that would have been relevant to the offense.

To the extent Mr. Bethea was able to remember events from his childhood or things that occurred months after his injury, those memories were of no relevance to his ability to stand trial. For example, Mr. Bethea’s recollection of first meeting his father at age twelve would be of no use to counsel in developing an affirmative defense for trial. (*See* Doc. Ex. 2) It is manifestly unsupported by reason to suggest that the retention of irrelevant memories would make a defendant competent to stand trial for an incident he could not remember.

Moreover, the trial court failed to include several relevant facts in its limited findings, including that Mr. Bethea suffered a traumatic brain injury, has thinking and reasoning abilities lower than 93% of his peers, experiences neurocognitive dysfunction, and shows no signs of malingering.

**Conclusions of Law**

The trial court’s conclusions of law are not supported by competent evidence and reflect an incorrect application of the law in two ways. First, the trial court found Mr. Bethea “capable of assisting in his defense to the extent that he can remember events before and after [the shooting].” (T p 38) Because all the evidence was that Mr. Bethea had no memory of the relevant time periods before and after the shooting, it was an abuse of discretion to find him competent on this basis. Second, the trial court appears to have misinterpreted the cases it cited to mean that memory loss is *per se* insufficient to establish incompetence. To the contrary, these cases demonstrate that memory loss may not automatically establish incompetence but must be considered as part of the totality of the circumstances in the court’s analysis.

In *State v.* *Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977), the defendant presented evidence that on the day of the crime, he consumed a fifth of liquor and some beer, and was suffering from alcohol pathological intoxication. As a result, the defendant had no memory of the offense. *Id*. at \*\* 5-6. The State presented evidence to the contrary, including evidence of malingering. *Id*. at \*\* 7-9. There are several significant differences between *Willard* and the present case: (1) the defendant in *Willard* was able to remember how much he drank immediately before he blacked out, while Mr. Bethea has no memories for several days before the incident, (2) the memory loss of the defendant in *Willard* was due to voluntary alcohol consumption, while Mr. Bethea’s was caused by a traumatic brain injury, and (3) there was evidence that the defendant in *Willard* fabricated his symptoms, but no evidence that Mr. Bethea malingered.

The trial court has misinterpreted *Willard* in several ways. First, a finding that amnesia does not render a defendant incompetent *per se* is not a holding that memory loss can never be the foundation for a finding of incompetency. The trial court appears to have believed that *Willard* closed the question and failed to analyze the facts of Mr. Bethea’s individual case. Second, the *Willard* court specifically referred to “partial amnesia.” 292 N.C. at 577, 234 S.E.2d at 593. The defendant in that case claimed only that he could not remember the five or six hours during which the crime took place. That is a far cry from the total amnesia Mr. Bethea experienced for the days and weeks surrounding this incident. Critically, the defendant in *Willard* was able to recall how much he drank prior to the assault, providing some explanation for his behavior. He was, therefore, similarly situated to defendants raising various affirmative defenses. Mr. Bethea, however, was incapable of raising any affirmative defense. He could not argue insanity or voluntary intoxication or any of the defenses suggested by the *Willard* court because he simply had no idea what happened. His defense was not merely limited; it was impossible. (*See* T p 18, Dr. Hilkey testified that it would be “substantially impossible” for Mr. Bethea to meaningfully assist counsel under these circumstances.)

The trial court also relied on *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). In *Avery*, the defendant shot himself in the head after fleeing the scene of the crime. A portion of his frontal lobe was removed as a result. At a competency hearing, the defense presented expert testimony that the defendant’s “memory impairment resulted from either organic brain damage or psychological repression.” *Id*. at 10, 337 S.E.2d at 791. The expert for the State testified that the portion of the brain the defendant injured is not responsible for memory, and so any memory loss he experienced was because he had “chosen not to remember the events of the allegations.” *Id*. Furthermore, the State’s expert found that the defendant “had a good memory of events before the week of the offenses and immediately after the offenses.” *Id*. In this case, in sharp contrast, the undisputed evidence was that Mr. Bethea’s memory impairment was not voluntary, was the result of global trauma to his brain, and encompassed a much broader swath of time.

As it did with *Willard*, the trial court seemed to misinterpret *Avery* to mean that no defendant can ever be found incompetent due in part or in whole to memory loss. What *Avery* in fact demonstrates is that even after *Willard*, courts should consider the individual facts of each case in reviewing competency determinations. *See* *also* *Shytle*, 323 N.C. at \*\* 5-6, 687-89, 374 S.E. 2d at 575-76. (considering brain injury in evaluating defendant’s competence, but finding defendant competent where she had no memory loss and an IQ in the normal range).

Here, Mr. Bethea indisputably had a total memory loss for the days preceding the shooting incident and of the incident itself due to his brain injury. Unlike the defendants in *Willard* and *Avery*, he was completely unable to “assist in his defense in a rational and reasonable manner.” See *Shytle*, 323 N.C. at 687, 374 S.E.2d at 575 (“If a defendant is deficient under any of these tests, he or she does not have the capacity to proceed.”) The trial court therefore abused its discretion in finding Mr. Bethea competent to stand trial.

1. **Mr. Bethea Was Incompetent to Stand Trial Because He Had No Recollection of the Events Before, During, or After the Incident, and Was Unable to Assist Counsel in Preparing His Defense.**

“The conviction of an accused person while he is legally incompetent to proceed to trial violates due process.” *State v. Allen*, 269 N.C. App. 24, 26, 837 S.E.2d 196, 198 (2019) (cleaned up). The standard for competency has its roots in *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 788 (1960) (the question is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – – and whether he has a rational as well as factual understanding of the proceedings against him”). The *Dusky* court observed that competency requires more than a showing that the defendant “[is] oriented to time and place and [has] some recollection of events.” *Id*. at 402. Because all the evidence was that Mr. Bethea has no recollection of the events surrounding 26 May 2018, he is incompetent under *Dusky*.

Our courts will find defendants with “nonsensical and bizarre” beliefs to be competent so long as they have some memory of what occurred. *See e.g.*, *Hepinstall*, 309 N.C. at 236, 306 S.E.2d at 112 (finding defendant with religious delusions to be competent because he “was able to recall with great detail” the events for which he was on trial, and to “respond meaningfully to questions put to him” on direct and cross-examination about those events).

In contrast, Mr. Bethea cannot remember the incident – or several days prior to the incident – at all. (T p 29) He is wholly unable to answer questions about what happened, and therefore incapable of assisting with his defense. (*Id*.) In *Ryan v. Gonzales*, 568 U.S. 57, 65-66, 133 S. Ct. 696 (2013) the U.S. Supreme Court observed that a defendant who was “unable to assist counsel in identifying witnesses and deciding on a trial strategy” would be incompetent. Mr. Bethea is just such a defendant. He can neither tell counsel whether a diminished capacity or voluntary intoxication defense is warranted, nor can he direct counsel to people he saw or places he went in the hours before the shooting, so that those witnesses might supply the missing information. Mr. Bethea is unable to assist in his defense in any way.

Most commonly, this Court considers cases where the defendant’s expert testifies that he was incompetent while the State’s expert testifies that he was. *See e.g.*, *State v. McClain*, 169 N.C. App. at 663-64, 610 S.E.2d at 788. Here, the State presented no evidence whatsoever. The testimony of Dr. Hilkey, the only evidence presented, proved Mr. Bethea’s incompetence by a preponderance of the evidence.

This is not a case where the defendant is capable of assisting counsel but declines to do so. *See e.g.*, *State v. Pratt*, 152 N.C. App. 694, 697, 568 S.E.2d 276, 278-79 (2002) (a defendant is not incompetent if his mental illness simply makes him “reluctant” to identify witnesses). Nor is it a case where there is evidence of malingering or a deliberate attempt to delay one’s prosecution. *See e.g.*, *State v. Chukwu*, 230 N.C. App. 553, 570, 749 S.E.2d 910, 921-22 (2013). Instead, the uncontroverted evidence was that Mr. Bethea was incapable of assisting in his defense because of a brain injury resulting in the complete loss of all memories around the time of the incident. The trial court therefore erred in finding Mr. Bethea competent to stand trial.

Because Mr. Bethea was tried and convicted while incompetent, he was deprived of his fundamental rights to due process and to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution. His convictions must therefore be vacated.

**CONCLUSION**

For the foregoing reasons and authorities, Mr. Bethea respectfully requests that his convictions be vacated. In the alternative, if this Court concludes that the trial court’s findings were insufficient to enable meaningful appellate review, the appropriate remedy is to reverse and remand for a new competency hearing.

Respectfully submitted, this, the 26th day May 2023.

By Electronic Submission:

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**CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)**

 I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century font and the body of the brief, including footnotes and citations, contains no more than 8750 words as indicated by the word-processing program used to prepare the brief.

This, the 26th day of May 2023.

By Electronic Submission:

 Sarah Holladay

North Carolina State Bar Number 33987

**CERTIFICATE OF FILING AND SERVICE**

 I hereby certify that the original Defendant-Appellant’s Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Special Deputy Attorney General Orlando Rodriguez, North Carolina Department of Justice, by electronic means at orodriguez@ncdoj.gov.

This, the 26th day of May 2023.

By Electronic Submission:

 Sarah Holladay

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