STATE OF NEBRASKA, APPELLEE, V. MATTHEW A. FOX, APPELLANT.

806 N.W.2d 883

Filed December 30, 2011. No. S-11-045.

1. **Courts: Trial: Mental Competency: Appeal and Error.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
2. **Trial: Waiver.** Whether a defendant could and, in fact, did waive his or her right to attend all stages of his or her trial presents a question of law.
3. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Constitutional Law: Trial: Mental Competency.** A person has a constitutional right not to be put to trial when lacking mental capacity.
5. **Trial: Mental Competency.** A person is competent to stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her condition in reference to such proceedings, and to make a rational defense.
6. ____: ____. The competency to stand trial standard includes both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him or her and (2) whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding.
7. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her. The 14th Amendment makes the guarantees of this clause obligatory upon the states.
8. **Constitutional Law: Trial: Witnesses.** The Confrontation Clause guarantees the accused's right to be present in the courtroom at every stage of his or her trial.
9. **Trial: Waiver.** If a defendant is to effectively waive his or her presence at trial, that waiver must be knowing and voluntary.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Matthew A. Fox appeals his convictions for first degree murder and use of a weapon to commit a felony. Fox asserts that the district court for Lancaster County erred when it found him competent to stand trial and when it allowed him to absent himself from major portions of the trial. Because we find that the district court did not err when it found that Fox was competent to stand trial or when it allowed Fox to absent himself from trial, we affirm.

STATEMENT OF FACTS

On October 25, 2008, Fox, then 19 years old, killed his mother, Sherry Fox, by striking her repeatedly in the head with an ax in the basement of their home in Lincoln, Nebraska. Fox was arrested that day, and on November 25, the State filed an information charging Fox with murder in the first degree and use of a weapon to commit a felony. Fox pled not guilty.

On February 26, 2009, Fox's attorney filed a motion for a competency examination alleging that he had reason to believe Fox was not currently competent to stand trial. After a hearing, the district court on March 11 entered an order appointing a doctor to examine Fox to determine his competency to stand trial.

After the competency evaluation had been completed, Fox's attorney moved the court to declare Fox incompetent to stand trial. On April 28, 2009, the court entered an order finding that Fox was currently incompetent to stand trial. The court's finding was based in part on the report of psychologists who concluded that Fox was not competent to stand trial because, although he had a factual understanding of his legal situation, he was "experiencing severe depressive symptoms which impede[d] his ability to meaningfully assist his attorney and participate in his defense." The court ordered Fox to be transferred to the Lincoln Regional Center (LRC) for treatment. The court further ordered LRC staff to report to the court when Fox's disability had improved to the extent he was competent

to stand trial or, in the alternative, LRC was to submit a progress report within 6 months of commencement of treatment if Fox's disability had not so improved. After a review hearing on November 13, the court ruled that Fox remained incompetent to stand trial.

The court held another review hearing on April 27, 2010, at which the State offered a report by a psychiatrist and a psychologist which concluded that Fox was competent to stand trial because he had "demonstrated an adequate understanding of the legal system" and "appear[ed] to have the ability to assist his attorney in developing a rational defense." The report noted that although Fox had the ability to assist in his defense, "thus far, [he] has not chosen to do so." The report noted that Fox's "behavior and reluctance to discuss his legal circumstances appear[ed] volitional" and that "any symptoms that he may [have been] experiencing [did] not appear to be so severe as to prevent him from assisting in his defense, if he [chose] to cooperate with legal counsel." The psychiatrist and the psychologist testified to similar effect at the hearing.

Fox offered into evidence a forensic psychologist's report, in which the forensic psychologist retained by Fox opined that Fox "appear[ed] to have the requisite capacities associated with marginal competence to proceed with adjudication" but that he had "some serious concerns about [Fox's] propensity to decompensate under stress." The forensic psychologist testified that Fox

> still has a tremendous amount of difficulty approaching the whole topic of what happened in and around the time period that his mom died, that his mom was killed. Seems to have a lot of angst around that issue, not understanding how it came to that, having some understanding that he's the cause of it, but of not knowing why or how.

The forensic psychologist called by Fox testified that in talking about what happened in connection with his mother's death, Fox was "not sure what happened, how it came to happen . . . . [H]e always says he'll either break it off or he'll say . . . I don't want to think about this any more. And he gets shaky, angry, anxious. He gets very nervous when he talks about all of this."

At the hearing, the forensic psychologist further testified that he had concerns that Fox "might decompensate during the [criminal] proceedings or prior to the proceedings because of the stress" and that he had concerns about how Fox's "inability or desire not to talk about the circumstances leading to the death of his mother [will] affect his ability to proffer an affirmative defense of insanity or other defenses that might have elements of his mental state at the time entailed."

On May 6, 2010, the district court filed an order in which it found that Fox was competent to stand trial. The court specifically found that Fox had "the mental capacity to understand the nature and object of the proceedings against him and can comprehend his own condition in reference to the proceedings and has the ability to make a rational defense and help with that defense." The court stated that it had reviewed and considered factors set forth in Nebraska cases, including the concurrence in *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980) (Krivosha, C.J., concurring), and that after such review, the court was "compelled to conclude that [Fox] is competent to stand trial in this matter." The court further ordered that pending trial, Fox should remain at LRC.

Fox thereafter filed a notice of intent to rely upon a defense that he was not responsible by reason of insanity. The district court granted the State's subsequent motion to require Fox to be examined by a psychiatrist to determine Fox's mental capacity at the time of his mother's killing.

On July 26, 2010, Fox filed a motion in which he sought to determine whether he could waive his attendance at various critical stages of the proceedings against him. Fox expressed a desire to "not be present at his trial, but most specifically during any portions of his trial involving discussions or presentation of evidence or testimony regarding the circumstances surrounding the death of Sherry Fox." However, in the motion requesting such determination, Fox's attorney asserted that

> given [Fox's] history and prior findings regarding his mental status, the current state of the record is insufficient to determine whether a) [Fox] may waive his right to attendance at the majority (if not all) of his trial, b) [Fox] is competent to make a "knowing and intelligent" waiver of his constitutional rights [to be present at trial

> and confront the witnesses against him], and c) [Fox's] desire not to attend his trial is a manifestation of his prior and current mental illness.

Fox's attorney also cited authority to the effect that a defendant may not waive his or her presence at trial, including Neb. Rev. Stat. § 29-2001 (Reissue 2008), which states in part, "[n]o person indicted for a felony shall be tried unless personally present during the trial."

At a hearing on the motion, Fox stated that at trial he did not want to "see any of the forensic stuff." He said that he would be willing to be present during voir dire, opening statements, and testimony that did not touch on forensic evidence, but that he did not want to be present during closing statements, which would include discussion of forensic evidence. Fox stated that he did not remember and did not want to remember what happened the night his mother died. Fox clarified that forensic evidence included pictures and descriptions, including the autopsy, and that he did not want to "see it or hear it or think about it."

The district court conducted a hearing, at which Fox was present, on Fox's motion to absent himself from certain proceedings. The district court advised Fox that the purpose of the hearing was to inquire "as to whether or not [Fox] should be allowed not to be present at portions of the trial." A colloquy among the parties ensued. During the hearing, Fox's counsel indicated that "it would be . . . Fox's decision [to attend some or all of the proceedings in connection with his trial] if, in fact, he was competent to make that decision and had rational and legitimate reasons not to attend." Fox's counsel confirmed that Fox had been informed that if he were to decide at the hearing he did not wish to attend trial, he would be able to change his mind at any time, and that the court would allow him to attend any particular portion of the trial he wished to attend. The district court confirmed this was an accurate statement of the proceeding. The State also stated for the record that Fox was advised that he could change his mind at any time if he wished to be present at trial.

The district court sustained Fox's motion to waive attendance at trial in an order entered October 18, 2010. In its order, the court found that Fox understood his right to be present at

trial and at all hearings and proceedings, as well as his right to face and confront the witnesses against him. The court further found that Fox understood that he could choose to be present or not present at any portion of the trial and that he had the right to change his mind at any time and be present for any or all of the trial. The court finally found that Fox had not been threatened or coerced in any way.

The jury was selected on October 25, 2010, and the verdict was returned on October 29. Fox elected not to attend much of the trial. At times throughout the trial, the court inquired of defense counsel regarding Fox's intention to attend upcoming segments of the trial, and defense counsel informed the court that Fox did not wish to be present. Fox was advised that he could observe the trial on closed circuit television when he was not present in court. Defense counsel generally reported that Fox did not wish to observe the trial on closed circuit television but that he wished to listen to the testimony of his brother and of his sister by closed circuit. The court advised the jury that Fox had the right to be present or to be absent for portions of the trial but that the jury was "to make nothing of that and make no assumptions or take that in any way as to determining his guilt or innocence in this case."

With regard to Fox's insanity defense, a psychiatrist called by the State at trial opined that at the time of the killing, Fox suffered from depression and schizoid personality disorder, but that he was not legally insane. A psychiatrist called by the defense also opined that Fox suffered from depression and schizoid personality disorder at the time of the killing but testified that there was not enough information available to make a determination whether Fox was legally insane. The jury rejected Fox's insanity defense and found Fox guilty of first degree murder and use of a weapon to commit a felony. The court sentenced Fox to life imprisonment on the murder conviction and to a consecutive sentence of 10 to 15 years' imprisonment on the weapon conviction.

Fox appeals.

ASSIGNMENTS OF ERROR

Fox claims that the district court erred when it (1) found him competent to stand trial and (2) permitted him to absent

himself from the trial because his waiver of his right to be present at trial was not knowingly or voluntarily made.

STANDARDS OF REVIEW

[1] The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding. *Id.*

[2,3] Whether a defendant could and, in fact, did waive his or her right to attend all stages of his or her trial presents a question of law. *State v. Zlomke*, 268 Neb. 891, 689 N.W.2d 181 (2004). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

The Court Did Not Err When It Determined That Fox Was Competent to Stand Trial.

Fox first claims that that the district court erred when it found that he was competent to stand trial. We find no merit to this assignment of error.

[4,5] A person has a constitutional right not to be put to trial when lacking "mental capacity." *Indiana v. Edwards*, 554 U.S. 164, 177, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). See, also, *State v. Hessler, ante* p. 935, 807 N.W.2d 504 (2011). We have stated that a person is competent to stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her condition in reference to such proceedings, and to make a rational defense. *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *Walker, supra.*

[6] The U.S. Supreme Court has recently reiterated the standard to determine if a defendant is competent to stand trial in *Indiana v. Edwards* by stating that the competency standard includes both "(1) 'whether' the defendant has 'a rational as well as factual understanding of the proceedings against him' and (2) whether the defendant 'has sufficient present ability *to*

consult with his lawyer with a reasonable degree of rational understanding.'" 554 U.S. at 170 (emphasis in original) (citing *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam)). See, also, *Hessler, supra.* It has been stated that requiring a criminal defendant to be competent "has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Godinez v. Moran*, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). See, also, *Hessler, supra.*

In this case, the district court found that Fox was competent to stand trial. At the April 27, 2010, review hearing regarding Fox's competency, a psychiatrist and a psychologist who were called by the State as witnesses testified that Fox was competent, and a forensic psychologist who was called by Fox testified that Fox was marginally competent. The district court reached its determination based on this testimony and reports in evidence.

The State submitted a report by the psychiatrist and the psychologist which stated that Fox had "demonstrated an adequate understanding of the legal system" and "appear[ed] to have the ability to assist his attorney in developing a rational defense." Their report also noted that although Fox had chosen not to assist in his defense, his "behavior and reluctance to discuss his legal circumstances appear[ed] volitional" and that Fox's symptoms did "not appear to be so severe as to prevent him from assisting in his defense, if he [chose] to cooperate with legal counsel." The psychiatrist and the psychologist testified to similar effect.

The forensic psychologist called by Fox gave similar testimony stating that he believed Fox was marginally competent to stand trial. While noting his concern regarding Fox's propensity to "decompensate under stress," the forensic psychologist stated in his report that Fox "appear[ed] to have the requisite capacities associated with marginal competence to proceed with adjudication."

In its order finding that Fox was competent to stand trial, the district court stated that it had reviewed the evidence and considered the factors set forth in Nebraska cases, including a concurring opinion in *State v. Guatney*, 207 Neb. 501, 299

N.W.2d 538 (1980) (Krivosha, C.J., concurring). This concurrence lists 20 factors which it suggests be considered in determining whether a defendant is competent to stand trial. Fox urges us to endorse consideration of these 20 factors. We find it unnecessary in this case to adopt the 20-factor test set forth in the *Guatney* concurrence. Nevertheless, we note that the district court stated that it had reviewed each of them, along with the evidence, and indicated that it was "compelled to conclude that [Fox was] competent to stand trial in this matter."

The record shows that Fox had an understanding of the nature and object of the proceedings against him, could comprehend his own condition in reference to the proceedings, and had the ability to make a rational defense. See, *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *Guatney, supra.* The district court's determination is supported by sufficient evidence. See, *Vo, supra*; *State v. Walker,* 272 Neb. 725, 724 N.W.2d 552 (2006). For completeness, we note that, as we explain below, Fox voluntarily chose not to participate in portions of his defense, although the record showed that he had the capacity to participate. The district court did not err when it found that Fox was competent to stand trial.

Notwithstanding the record made in connection with the pretrial determination that Fox was competent to stand trial, Fox urges us to adopt a requirement of an additional posttrial competency finding as set forth by the U.S. Court of Appeals for the District of Columbia Circuit in *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968). In *Wilson*, the defendant was tried and convicted of five counts of assault with a pistol and robbery. *Id.* In a car accident following the robberies, the defendant suffered a head injury, and the medical evidence showed that he could not, and probably never would, remember anything that happened from the afternoon of the robberies until he regained consciousness 3 weeks later. *Id*. The district court found that the defendant was competent to stand trial, but the District of Columbia Circuit remanded "for more extensive post-trial findings on the question of whether the [defendant's] loss of memory did in fact deprive him of the fair trial and effective assistance of counsel to which the Fifth and Sixth Amendments entitle him." 391 F.3d at 463. For purposes

of remand, the appellate court directed the district court to make additional posttrial findings of fact regarding whether the defendant had demonstrated his competency during trial. Three opinions were filed in *Wilson*, one denominated a "concurrence," "to avoid the impasse of a 3-way split," *id*. at 466 (Leventhal, Circuit Judge, concurring), and one denominated a "dissent," (Fahy, Senior Circuit Judge, dissenting). Fox urges us to adopt the *Wilson* standard.

We decline to adopt the procedure set forth in *Wilson*. Consistent with our decision, we note that other courts have declined to adopt the *Wilson* standard in cases where the defendants claim they are incompetent to stand trial because they have suffered from amnesia for the period of time during which the alleged crime occurred. In these decisions, courts have generally stated that amnesia of the events alone does not render a defendant per se incompetent to stand trial. See, e.g., *Davis v. Wyrick*, 766 F.2d 1197 (8th Cir. 1985); *Morris v. State*, 301 S.W.3d 281 (Tex. Crim. App. 2009) (cases collected); *U.S. v. Douglas*, No. 06-00159-01-CR-W-NKL, 2007 WL 541609 (W.D. Mo. Feb. 16, 2007) (unpublished opinion). Additionally, declining to adopt the *Wilson* standard is in accord with our own jurisprudence. In *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980), we determined that the mere fact that the defendant maintained he did not recall committing the crime, but with full faculty entered a plea, did not impose upon the trial court an obligation or duty to require a competency hearing.

In this case, the record shows the district court effectively determined that Fox is not suffering from amnesia or an actual loss of memory. The record shows that Fox has elected not to discuss or remember the events surrounding his mother's death because of their disturbing nature and his risk of decompensating. Fox's case is distinguishable from *Wilson, supra*, and other cases where the defendants did not have the capacity to remember the events surrounding their alleged crimes, and our ruling in this case does not necessarily speak to refining the procedure where a defendant is unable to remember the events during the alleged crime. We decline to adopt the procedure regarding competency set forth in *Wilson*. We conclude that the

district court did not err when it found that Fox was competent to stand trial.

The Court Did Not Err When It Found That Fox Knowingly and Voluntarily Waived His Right to Be Present at Trial and Allowed Fox to Absent Himself From Trial.

Fox next generally claims that the district court erred when it allowed him to absent himself from much of the trial. We read Fox's claim as an assertion that he did not knowingly and voluntarily waive his constitutional and statutory right to be present at his trial. We find no merit to this assignment of error.

[7,8] The U.S. Supreme Court addressed the defendant's right to be present in the courtroom in *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Court stated:

> The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." We have held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. *Pointer v. Texas*, 380 U.S. 400[, 85 S. Ct. 1065, 13 L. Ed. 2d 923] (1965). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. *Lewis v. United States*, 146 U.S. 370[, 13 S. Ct. 136, 36 L. Ed. 1011] (1892).

397 U.S. at 338.

The Nebraska Constitution contains a similar provision and we have discussed the right to be present at one's criminal trial under Neb. Const. art. I, § 11, in *State v. Zlomke*, 268 Neb. 891, 689 N.W.2d 181 (2004). Neb. Const. art. I, § 11, states: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . ."

The Nebraska statutory right to be present during trial is found at § 29-2001, which provides:

> No person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a

> misdemeanor may, at their own request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court.

We have previously considered the criminal defendant's constitutional and statutory right to be present at trial, as well as the effective knowing and voluntary waiver of that right. In *Scott v. State*, 113 Neb. 657, 204 N.W. 381 (1925), we referred to the predecessor statute to § 29-2001 in a case where the defendant was released on bail and was voluntarily not present at trial. In *Scott*, we stated:

> It is insisted, and no doubt is the law, that under this statute defendant has a right to be present at all times when any proceeding is taken during the trial, from the impaneling of the jury to the rendition of the verdict, inclusive, unless he has waived such right . . . .

113 Neb. at 659, 204 N.W. at 381.

[9] We discussed the absence of a criminal defendant issue further in *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). After acknowledging that a defendant may waive his right to be present at any proceeding during his trial, we stated that "[i]f a defendant is to effectively waive his presence at trial, that waiver must be knowing and voluntary." *Id.* at 325, 476 N.W.2d at 225. In *Red Kettle*, we noted that the court advised the defendant of his right to be present at trial and read § 29-2001 to the defendant. Additionally, the court advised the jury, without objection from the defendant, that the defendant "'has a right not to be present at the trial. The fact that he has been voluntarily absent from the trial must not be considered by you as an admission of guilt and must not influence your verdict in any way.'" *Red Kettle*, 239 Neb. at 326, 476 N.W.2d at 226. In *Red Kettle*, we determined that the trial court did not err in conducting the trial in the defendant's absence.

In this case, after he had been found competent to stand trial, Fox filed a motion to waive his attendance at trial. He explained that it would be difficult for him to view forensic and other evidence depicting his mother's death. Fox contends that he would have suffered negative mental health consequences if he had viewed certain evidence; and on appeal, he seems to assert that this choice to absent himself from trial to avoid

these consequences was, therefore, not voluntary. We reject this contention.

There is nothing in the record which indicates that Fox was incapable of making the choice to attend or not attend trial. In *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), the U.S. Supreme Court acknowledged that a defendant must make numerous decisions during a trial which may affect a constitutional right such as whether to waive his privilege against compulsory self-incrimination, waive the right to a jury trial, and other strategic choices. In *Godinez*, the Court stated that "*all* criminal defendants . . . may be required to make important decisions once criminal proceedings have been initiated." 509 U.S. at 398 (emphasis in original). The fact that difficult choices must be made does not make the fact of selection or the selected option involuntary.

The record shows that the district court conducted a hearing on Fox's request to absent himself from portions of the trial and that the issue was discussed with Fox present. Fox's counsel confirmed that Fox had been informed that if Fox decided not to attend the trial, Fox could change his mind at any time and be present at any portion of the trial he wished to attend. The court confirmed that this was an accurate statement of the substance of the hearing.

In its order sustaining Fox's motion to waive attendance at trial, the district court found that Fox understood his right to be present at trial and at all hearings and proceedings, as well as his right to face and confront the witnesses against him. The district court thus found that Fox's choice to waive his right to be present was knowingly and voluntarily made. The court also found that Fox understood that he had the choice to be present or not present at any portion of the trial and that Fox had the right to change his mind at any time.

At various times throughout the trial, the court asked defense counsel if Fox intended to attend upcoming portions of the trial, and defense counsel informed the court that Fox did not wish to be present. The court also advised Fox that he could observe the trial on closed circuit television when he was not present in court. Additionally, the court admonished the jury that Fox had the right to be present or absent for portions of the

trial, but that the jury was "to make nothing of that and make no assumptions or take that in any way as to determining his guilt or innocence in this case."

Based on the facts, we conclude that the district court did not err when it found that Fox knowingly and voluntarily waived his constitutional and statutory right to be present at trial.

CONCLUSION

The district court did not err when it determined that Fox was competent to stand trial. The district court did not err when it concluded that Fox knowingly and voluntarily waived his right to be present at trial. Accordingly, we affirm.

AFFIRMED.

WRIGHT, J., not participating.