

State of Minnesota

District Court

County of Hennepin

Fourth Judicial District

State of Minnesota,
Plaintiff,

Referee Lori D. Skibbie
Case Type: Criminal

v.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING DEFENDANT'S
COMPETENCY TO PROCEED**

Aaron Dashaun Cherry,

Defendant.

Case Number(s): 27-CR-23-3198;
27-CR-21-19577

The above-entitled matter came before Lori D. Skibbie, Referee of District Court, on November 17, 2023, for an evidentiary hearing upon the Defense's objection to the competency opinion rendered by Dr. Lauren Herbert, Director of the Department for Human Services Forensic Evaluation Department, dated August 31, 2023. Joshua Luger, Assistant Hennepin County Attorney, appeared for the State. Chelsea Knutson appeared with and on behalf of the Defendant who was present. Dr. Lauren Herbert testified, and the Court received her report dated August 31, 2023. Chelsea Knutson also testified. Also present at the hearing was Susan Herlofsky, Defense co-counsel. The Court took the matter under advisement. Based upon the arguments presented and all the files and records herein, the Court orders as follows:

1. Defendant is **INCOMPETENT** to proceed.

PROCEDURAL HISTORY AND FINDINGS OF FACT

Mr. Cherry is charged with one count of Violating a No Contact Order and one count of Domestic Assault – Felony. On July 31, 2023, probable cause was found that a crime had been committed, and a Rule 20.01 evaluation was ordered by Judge Koch. Dr. Lauren Herbert of Fourth Judicial District Psychological Services was assigned to complete the 20.01 evaluation of the defendant, Mr. Cherry. Dr. Herbert filed her report with the court on August 31, 2023, and opined that Mr. Cherry was competent to proceed. The Defendant requested an evidentiary hearing.

In her report filed August 31, 2023, Dr. Herbert stated that due to Mr. Cherry's lack of participation in the interview, relevant background information could not be obtained directly from Mr. Cherry. Therefore, the background information was obtained by looking at Dr. Coffin's April 3, 2023, Rule 20 Report. Rule 20 Report. p. 4. Dr. Herbert noted that Mr. Cherry reported he was born in Illinois and has a poor relationship with his parents. *Id.* He was raised by his father's sister who he considers his mother. *Id.* Mr. Cherry had previously denied in a 2009 psychological evaluation any mental health treatment of any kind. However, during this evaluation he was diagnosed with Conduct Disorder, Mild to Moderate and History of Alcohol and Cannabis Abuse. *Id.* According to Hennepin Healthcare records from April 26, 2018, Mr. Cherry presented with "severe attention deficit". *Id.* Mr. Cherry, according to a 2018 PSI, had consumed alcohol to the point of blacking out, but did not consume alcohol every day. *Id.* This PSI stated Mr. Cherry had also started using cannabis in 2007 or 2008 and had used it everyday until 2017. *Id.* However, a 2022 PSI stated that Mr. Cherry denied ever experimenting with cannabis or alcohol ever in his life. *Id.* at 5. Mr. Cherry has never had symptoms of psychosis, including auditory or visual hallucinations, delusional or paranoid thoughts, or ideas of reference. *Id.* However, medical records reported that Mr. Cherry had suicidal behavior in 2018 while in Ramsey County Jail. *Id.*

Dr. Herbert also reviewed Mr. Cherry's prior three competency to proceed evaluations. The first evaluation was done by Dr. Bruce Renken on November 17, 2021. *Id.* at 8. Dr. Renken stated that Mr. Cherry was minimally cooperative. *Id.* His responses were disjointed or in unfinished sentences or phrases. *Id.* He then began to respond in a very slow manner before eventually speaking at a normal pace. *Id.* Dr. Renken questioned why Mr. Cherry was able to speak normally and asked if Mr. Cherry was playing games. *Id.* Mr. Cherry responded, "I won't play games." *Id.* Dr. Renken also noted that at another evaluation, Mr. Cherry presented as if he could not understand basic instructions. *Id.* Dr. Renken opined that Mr. Cherry was incompetent to proceed and noted, "Mr. Cherry's history suggests an atypical clinical picture, with possible factors of substance and malingers, as well as likely symptoms of mental illness." *Id.* Mr. Cherry was diagnosed with Antisocial Personality Disorder and Unspecified Anxiety Disorder. *Id.*

The second competency hearing was administered by Dr. John Anderson on May 13, 2022. Dr. Anderson opined that Mr. Cherry was competent to proceed and Mr. Cherry's cooperation was inconsistent throughout the interviews. *Id.* Dr. Anderson noted that Mr. Cherry would sometimes respond to questions and other times "stared as if to convey he did not hear a question". *Id.* Dr.

Anderson administered a screening instrument to test for malingering and noted that Mr. Cherry responded yes to all but one item, which is atypical for someone with genuine psychiatric or cognitive disorder. *Id.* Dr. Anderson opined that Mr. Cherry was feigning and deemed him competent to proceed. *Id.* Mr. Cherry was diagnosed with Antisocial Personality Disorder, Alcohol Use Disorder and Cannabis use Disorder, both in a controlled environment. *Id.*

Mr. Cherry's most recent competency evaluation was completed on April 3, 2023, by Dr. Richard Coffin. *Id.* at 9. Dr. Coffin noted that Mr. Cherry was not cooperative in answering questions. *Id.* Mr. Cherry communicated through gesturing and writing various case numbers, statements, phone numbers and emails from the collection of documents Mr. Cherry had brought into the interview. *Id.* During another interview with Dr. Coffin, Mr. Cherry was mostly mute except to complain of abdominal pain. *Id.* He was clutching his abdomen and rocking back and forth throughout the majority of the interview. *Id.* Mr. Cherry was able to participate in some discussion, but his thoughts were disorganized outside of those few interactions. Dr. Coffin noted Mr. Cherry can communicate about topics he chooses, but otherwise has disjointed communications. *Id.* at 11. Dr. Coffin diagnosed Mr. Cherry with Antisocial Personality Disorder, Malingering and Cannabis Use Disorder, in a controlled environment. *Id.* at 13. Dr. Coffin opined that Mr. Cherry was competent to proceed. *Id.*

Dr. Herbert, after reviewing these files and conducting her own interviews with Mr. Cherry opined that Mr. Cherry was competent to proceed. *Id.* at 17. Dr. Herbert's report noted that Mr. Cherry did not speak throughout their interview. *Id.* at 16. She noted that Mr. Cherry showed her his inmate bracelet at one point, but otherwise provided no communication. *Id.* Dr. Herbert stated that Mr. Cherry's history presents an atypical clinical picture and the symptom he presents with most consistently is mutism. *Id.* She notes mutism, with the exception of Schizophrenia, is generally not a feature of mental illness. However, she does state mutism can be a symptom of cognitive impairment, "typically related to a developmental and/or neurocognitive disability." *Id.* Dr. Herbert noted, "Mutism alone is not sufficient to render an individual incompetent to proceed." *Id.* Dr. Herbert further states that Mr. Cherry has demonstrated an ability to understand what is being said to him by responding behaviorally that is relevant. *Id.* Finally, Dr. Herbert concluded in her report that because Mr. Cherry remained mute that she was "unable to formally obtain information relevant to his ability to consult with counsel, understand the proceedings, or participate in his defense." *Id.* at 17.

In addition to her report, Dr. Herbert provided testimony in this matter. Dr. Herbert testified that she reviewed the prior competency proceedings, including the reports done by Dr. Renken, Dr. Anderson and Dr. Coffin. She also reviewed a 2018 PSI report. Dr. Herbert also personally interviewed Mr. Cherry. Her interview with Mr. Cherry only lasted about 5 minutes. She testified that typically evaluations last between an hour and a half to two hours. Dr. Herbert testified that despite the short-time frame in her personal evaluation, she opined that Mr. Cherry was likely competent to proceed. She testified that her determination comes from the totality of the information available, and that it is important not to weigh one source heavier than another. However, Dr. Herbert testified that she was not able to say with certainty that Mr. Cherry could rationally consult with counsel.

Dr. Herbert testified further that she did not do psych, cognitive or malingering testing on Mr. Cherry. When Dr. Herbert was asked if one component of malingering is different presentations with different individuals, she answered yes. However, she further testified that she did not find it necessary to speak to friends or family of Mr. Cherry. She also stated that she did not speak to other deputies in the jail that had more routine contact with Mr. Cherry as she didn't find it necessary to seek out that information. Dr. Herbert also testified that psych testing would be useful to making a diagnosis of malingering but did not test Mr. Cherry for it. She further testified that mutism could be a result of cognitive impairment or deficit. However, Dr. Herbert stated she did not do cognitive testing for Mr. Cherry as she did not see the need for it.

Ms. Knutson, Mr. Cherry's counsel, also provided testimony in this matter. Ms. Knutson testified that she has been a public defender in Minneapolis since April 2018. She stated she currently represents around 80 clients and has provided legal services for several hundred throughout her five-year tenure as a public defender. Ms. Knutson testified that she has only requested Rule 20.01 competency evaluation for three clients, including Mr. Cherry, since she became a public defender. She stated that she met with Mr. Cherry three to four times before making a Rule 20.01 motion, and two to four times since, and had spoken with his previous counsel as well. During these meetings with Mr. Cherry, he did not speak with Ms. Knutson verbally. She stated that he would only communicate through writings that did not give direction on how to proceed in his current case. Ms. Knutson tried open and closed-ended questions, asked specific questions about the writings Mr. Cherry would give her and attempted to solicit nonverbal communication by gesture to ascertain a level of understanding. These meetings, in total, lasted

approximately two to three hours, and in that time, there was never a verbal response from Mr. Cherry.

Ms. Knutson further testified that due to the lack of communication with Mr. Cherry, it makes certain decisions with his case impossible. She states that Mr. Cherry must be able to make a decision about whether to plea and whether or not to testify, which cannot be ascertained without any logical communication from Mr. Cherry. Ms. Knutson also stated that she has not been able to gather any information from Mr. Cherry. When asked if Ms. Knutson believed Mr. Cherry could understand the charges, she said it was unclear because she has never received an answer. She stated that decisions must come from Mr. Cherry and if he does understand, he still is not communicating with her. She further testified that she could see no benefit to Mr. Cherry not communicating. When asked if Mr. Cherry's mutism was delaying moving forward in his case, she replied yes and that he has been in custody since February 2023. Ms. Knutson stated that even when Mr. Cherry would gesture or write something down, it was nonsensical and not in response to the questions she asked him. She stated that she did not find his responses to be meaningful. Finally, Ms. Knutson stated she would not be able to effectively represent Mr. Cherry due to his lack of communication.

LEGAL CONCLUSIONS

"A defendant has a due process right not to be tried or convicted of a criminal charge if he the Minnesota Rules of Criminal Procedure requires the Court to find a defendant not competent unless the greater weight of the evidence shows that the defendant is competent to proceed. Minn.R.Crim.P. Rule 20.01, subd. 5 (c). A defendant is not competent if, due to mental illness or cognitive impairment he is unable to "(a) rationally consult with counsel or (b) understand the proceedings or participate in the defense." *Id.*, subd. 2. The determination of whether a defendant is able to rationally consult with the defense attorney or understand and participate in the proceedings turns on the facts of each particular case. Moreover, fact-finders, including district courts, are not required to accept an expert's testimony or recommendations. *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016). Foremost, throughout the criminal proceedings the trial court must be mindful of its protective duty to ensure that a defendant is competent to proceed. See *State v. Bauer*, 245 N.W.2d 848, 852 (Minn. 1976) (ruling that the court should have conducted further inquiry into the important matter of defendant's competency). It is the State's burden, by a

preponderance of the evidence, to prove that a defendant is competent. *State v. Curtis*, 921 N.W.2d 342, 348 (2018). The standard to be applied is a fair preponderance of the evidence. *Id.*

Based on the totality of the facts noted above, the Court finds that the State has not met its burden of proving, by greater weight of the evidence, that Mr. Cherry is currently able to rationally consult with counsel, understand the proceedings, and participate in his defense. While Dr. Herbert opined in her report that Mr. Cherry would be competent, Mr. Cherry's mutism has significantly hindered his ability to consult with counsel and participate in his defense. The Court finds Dr. Herbert's report to be credible, but not persuasive. Mr. Cherry's competency proceeding history shows that Mr. Cherry has not been able to communicate or show understanding in a way that is meaningful towards his criminal proceedings. Dr. Herbert herself also stated she was not able to say with certainty that Mr. Cherry could rationally consult with counsel.

The Court finds Ms. Knutson's testimony that Mr. Cherry has not verbally spoken with her and has not provided any communications regarding any decisions with his case to be persuasive. Mr. Cherry has only provided a few writings, all of which have not made sense or shown that he has a requisite understanding of his criminal case. There has not been any communication in a logical or sensical way between Mr. Cherry and Ms. Knutson since Ms. Knutson took over the case, despite six to eight meetings between them. For these reasons, the Court finds that Mr. Cherry does not have a rational understanding of the proceedings, lacks the ability to rationally consult with counsel, and lacks the ability to participate in his defense.

Therefore, the court finds that the defendant, Mr. Cherry (Aaron Deshaun Cherry) is **INCOMPETENT**.

Order Recommended By:

BY THE COURT:

Referee of District Court

Judge of District Court