IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1192

Filed: 18 July 2017

Beaufort County, No. 14CRS050275, 14CRS050278

STATE OF NORTH CAROLINA

v.

WILLIAM HENRY BAILEY III, Defendant.

Appeal by Defendant from judgments entered 4 May 2016 by Judge J. Carlton Cole in Beaufort County Superior Court. Heard in the Court of Appeals 20 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General David D. Lennon, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for the Defendant.

DILLON, Judge.

William Henry Bailey, III, ("Defendant") was convicted of various crimes for shooting another individual. Defendant's sole argument on appeal relates to a statement made during defense counsel's opening statement to the jury that Defendant, indeed, fired the shot, a statement which Defendant contends amounted

to an admission of guilt and therefore constitutes ineffective assistance of counsel *per se* under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). We disagree.

I. Background

The evidence presented at trial tended to show that in February 2014, Defendant fired a shot out of the window of his vehicle, hitting Stefon Little. Defendant told law enforcement that while driving down the road, he saw Mr. Little begin to reach inside his waistband and assumed that he was reaching for a weapon to use against Defendant. In response, Defendant fired a single shot out of the window of his vehicle and then immediately left the scene.

At trial, Defendant's counsel made an unrecorded opening statement which apparently contained an admission that Defendant was the person who shot Mr. Little. The trial court later conducted an inquiry to determine whether the admission was made with Defendant's consent. The record reflects the following exchange:

> [TRIAL COUNSEL]: [J]ust for the record, my client is aware that part of our trial strategy today, there will be admission [sic] that a shooting did occur and my client was, in fact, the one that did the shooting, as part of the strategy that we devised for this case. . . . [W]e've discussed that strategy, that he admits that the shooting did actually occur.
>
> THE COURT: Mr. Bailey, you've heard the statements of your attorney. Are you in agreement with his representation of the strategy that you-all have discussed?
>
> [DEFENDANT]: Yes, sir. Fully and correct.

Defendant was found guilty of assault with a deadly weapon inflicting serious injury and of possession of a firearm by a felon. Defendant timely appealed.[1]

II. Analysis

On appeal, Defendant argues that Defendant's trial counsel was (1) ineffective *per se* where counsel admitted to the jury that Defendant shot Mr. Little; and (2) denied Defendant his right to effective assistance of counsel by failing to object to an officer's testimony regarding a statement Defendant made to the victim prior to the shooting.

A. *Harbison* Claim

Our Supreme Court has held that when defense counsel admits a defendant's guilt to the jury without the defendant's consent, *per se* ineffective assistance of counsel occurs. *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). However, our appellate courts have consistently rejected *Harbison* claims where defense counsel did not expressly concede guilt or admitted only certain elements of the charged offense. *See State v. Wilson*, 236 N.C. App. 472, 476, 762 S.E.2d 894, 897 (2014) ("Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison*

[1] We hereby grant Defendant's petition for writ of *certiorari* to consider his appeal after his failure to properly serve notice of appeal on the State per Rule 4 of the Rules of Appellate Procedure. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) (The Court of Appeals cannot hear defendant's direct appeal, but "it does have discretion to consider the matter by granting a petition for writ of certiorari."); *see also* N.C. R. App. P. 4.

error."); *see also State v. Fisher,* 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986); *State v. Maniego*, 163 N.C. App. 676, 685, 594 S.E.2d 242, 247-48 (2004).

In order to establish a *Harbison* claim, a defendant must first show that his trial counsel in fact made a concession of guilt. *See State v. Strickland*, 346 N.C. 443, 453-54, 488 S.E.2d 194, 200 (1997). In *Strickland*, where the defendant's trial counsel stated that "[the victim] was shot with a shotgun at the time it was in my client's hands," our Supreme Court declined to find ineffective assistance of counsel *per se* because the admission was not "the equivalent of asking the jury to find [the] defendant guilty of any charge[.]" *Id.* at 454, 488 S.E.2d at 201.

Here, Defendant's trial counsel did not admit that Defendant committed any specific crime, but simply stated that Defendant had fired a shot. Indeed, it is not even clear from the record that trial counsel admitted that Defendant shot Mr. Little specifically, only that a shooting occurred and that Defendant "did the shooting." This statement does not constitute an admission of Defendant's guilt under *Harbison*; however, even if it were, the record clearly shows that Defendant consented to the admission by his trial counsel as part of their trial strategy, which involved a theory of self-defense. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08 (holding that trial counsel's admission of a defendant's guilt to the jury is ineffective assistance of counsel *per se* only if it is done *without the defendant's consent*).

B. Ineffective Assistance of Counsel

Defendant also contends that he was denied effective assistance of counsel when his trial counsel failed to object to a detective's testimony that the victim, Mr. Little, told him that Defendant said "I'm going to kill you" prior to the shooting. Even assuming that counsel's failure to object was error, we are unable to conclude that the alleged error prejudiced Defendant.

In order to establish ineffective assistance of counsel, "a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted). "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Assuming that the admission of the detective's testimony regarding Mr. Little's statement – that Defendant was "going to kill" Mr. Little – was error, we fail to see how its admission prejudiced Defendant, considering the fact that the jury did *not* find him guilty of assault with a deadly weapon *with intent to kill*, for which he was indicted, but rather the lesser-included offense of assault with a deadly weapon inflicting serious injury. Defendant contends that this statement was the sole evidence offered by the State which tended to rebut his theory of self-defense. The detective, however, testified that Defendant initially *denied* being involved with the

shooting, but only changed his story after the detective suggested that Defendant may have fired in self-defense. In addition, there was evidence that Defendant had previously threatened Mr. Little because Defendant believed Mr. Little had broken into Defendant's mother's house and fired gunshots into the house.

In light of this evidence, we conclude that there was not a reasonable probability that if the specific statement had been excluded, the result of Defendant's trial would have been different. Accordingly, we conclude that Defendant was not denied effective assistance of counsel.

NO ERROR.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).