

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA01-446

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2001

STATE OF NORTH CAROLINA

v.

Cherokee County
No. 94 CRS 152
94 CRS 893

JODY LARRY MORROW

Appeal by defendant from order entered 13 January 2000 by Judge Richard D. Boner in Cherokee County Superior Court. Heard in the Court of Appeals 11 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Glover and Petersen, P.A., by Ann B. Petersen and James R. Glover, for defendant.

BIGGS, Judge.

Jody Morrow (defendant) was convicted on 25 January 1996 of second degree murder and armed robbery, and received prison terms totaling 90 years. He filed a motion for appropriate relief in February, 1999, which was denied on 13 January 2000. Defendant appeals from the denial of his motion. We affirm the trial court.

The evidence concerning the underlying offense tended to show the following: In the early evening hours of 27 February 1992, the badly beaten and stabbed body of 69 year old Edward Mann (Mann) was discovered at his home, near Murphy, in Cherokee County, North

Carolina. Evidence collected at the scene included blood samples, fingerprints, and a concrete slab with a bloody shoe print. Almost two years later, in 1994, investigating officers obtained statements from Scott Turner (Turner) and Scott Cole (Cole), that implicated defendant in Mann's murder. Thereafter, defendant was arrested, and was tried in January, 1996.

At defendant's trial, the State relied heavily upon the testimony of Turner and Cole. Turner testified that he and defendant were close friends, who frequently socialized and used drugs together. Six months after Mann was murdered, at a time when Turner and defendant were alone, defendant told Turner that he and another person had killed Mann. Cole testified that he was a lifelong friend of the defendant, and that the two had often used drugs together, and engaged in other criminal activity. Several days after Mann's death, Cole noticed that defendant had a black eye and bruises. Defendant told Cole in 1993 that he and others had killed and robbed Mann, and admitted to Cole that he sustained these injuries during Mann's murder. The defendant sought to impeach Turner and Cole with evidence of their pending drug and larceny charges, their prior criminal activity, and their history of drug abuse. In addition, evidence was presented that Turner had previously been subject to involuntary mental commitment proceedings.

A third witness, Faye Stroud (Stroud), testified that in early 1992, her 17 year old niece, Tracy Carroll (Carroll), associated with a group that included defendant, Heather Rogers (Rogers), and

Marvin Patterson (Patterson). During the spring of 1992, Carroll became upset whenever she received phone calls from Rogers or Patterson. Stroud testified further that in May, 1992, Carroll told her that she had been present when Mann was killed and robbed, and that she was afraid of the other people involved in the murder. She was very upset, crying and shaking, when she recounted this. Within two weeks of this conversation, Carroll died of a drug overdose.

Evidence was also presented that the bloody shoeprint taken from the scene of Mann's death was made by a size 9½ or 10 Nike brand athletic shoe. Defendant presented alibi evidence for the time of the murder and the days immediately following. He also presented evidence that he wore a size 10½ athletic shoe.

Defendant was convicted of second degree murder and armed robbery; these convictions were upheld in an unpublished opinion of this Court, filed 7 October 1997. His motion for appropriate relief, which is the subject of the present appeal, raises two issues: (1) the prosecutor's alleged use of false or misleading testimony at trial, and; (2) ineffective assistance of trial counsel.

To prevail on a motion for appropriate relief, the defendant must (1) prove the existence of every fact essential to his claim by a preponderance of the evidence, and (2) demonstrate prejudice. N.C.G.S. § 15A-1420(c) (5) and (6); *State v. Serzan*, 119 N.C. App. 557, 561, 459 S.E.2d 297, 301 (1995), *cert. denied* 343 N.C. 127, 468 S.E.2d 793 (1996) ("defendant moving for appropriate relief

must show the existence of the asserted grounds for relief, and relief must be denied unless prejudice appears"). To show prejudice, a defendant must establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C.G.S. § 15A-1443(a) (1999).

On appeal, "this Court is bound by the trial court's findings of fact if they are supported by any competent evidence, and 'the trial court's ruling on the facts may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law.'" *State v. Doisey*, 138 N.C. App. 620, 627, 532 S.E.2d 240, 245, *disc. review denied*, 325 N.C. 678, 545 S.E.2d 434 (2000) (quoting *State v. Harding*, 110 N.C. App. 155, 165, 429 S.E.2d 416, 423 (1993)).

I.

Defendant argues first that the trial court erred in denying defendant's claim that the prosecutor knowingly presented false or misleading testimony at trial. We disagree.

A prosecutor's knowing use of false or misleading testimony violates a defendant's right to due process, guaranteed by the U.S. and N.C. constitutions. *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 1221 (1959); *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois* at 269, 3 L. Ed. 2d at 1221; *Sanders* at 336, 395 S.E.2d at 424.

The defendant is entitled to a new trial upon a showing that "the testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction." *State v. Robbins*, 319 N.C. 465, 514, 356 S.E.2d 279, 308 (1987). The standard for materiality was established by the United States Supreme Court in *Giglio v. U.S.*, 405 U.S. 150, 153-154, 31 L. Ed. 2d 104, 108 (1972), which held that "a finding of materiality of the evidence is required," and that a new trial is required "if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury[.]"

Defendant has urged us to adopt a relaxed standard regarding the State's knowledge of the evidence's falsity, that the State knew or should have known the testimony was false when it was offered. However, the North Carolina Supreme Court follows the "knowing use" standard, *State v. Call*, 349 N.C. 382, 405, 508 S.E.2d 496, 511 (1998), and we are not persuaded that we should do otherwise.

In the case *sub judice*, defendant contends that the prosecutor knowingly presented, or allowed to stand uncorrected, certain false or misleading testimony by Turner. The trial court made the following pertinent findings and conclusions related to the challenged testimony:

. . . .

8. . . . Turner testified at trial that defendant's truck was at Patterson's residence when Turner went to sleep. He stated that the defendant's truck was gone when he awoke on February 27th. A truck owned by Brian Newton had taken its place. He also testified that

he and Marvin Patterson had driven by Eddie Mann's house during the day of February 27th and saw law enforcement officers at the house.

9. At the MAR hearing, Turner said he did not know at trial the specific calendar date he had been at Marvin Patterson's residence[, and] relied upon the dates used in the prosecutor's questions. Turner testified that he realized for the first time during the MAR hearing that the dates were incorrect. He stated that he now believes he spent the night of February 27th at the Patterson residence, the night after Eddie Mann was murdered.

10. Turner contacted defendant's MAR counsel . . . to inform them that the dates . . . were incorrect. Defendant's counsel pointed out that Turner could not have seen law enforcement officers at the Mann residence during the day of February 27th because Mr. Mann's body was not discovered until late evening on that date and law enforcement officers did not arrive at the scene until approximately 6 p.m. This discrepancy was present before the jury at the defendant's trial.

. . . .

12. If Turner's testimony was inaccurate, the inaccuracy was inadvertent. There is no evidence that the State's counsel or Deputy Sheriff White deliberately and knowingly permitted false testimony to be given by Scott Turner or knowingly failed to correct it. Indeed, . . . White . . . contradicted Turner's testimony that he spent the night of February 26th, 1992 at Patterson's residence. This inconsistency was before the jury for its consideration. If the State wished to tailor Turner's testimony . . . it is very doubtful that it would have introduced a contradictory pre-trial statement.

13. The defendant has failed to prove that the State deliberately and knowingly elicited false testimony from Scott Turner about his whereabouts on February 26, 1992 or failed to correct it. Furthermore, the Court is not satisfied that there is any reasonable probability that the outcome of the

defendant's trial would have been different if the inaccuracies in Turner's testimony had not occurred.

We conclude that competent evidence supports the trial court's findings of fact and its conclusion that any error regarding the dates was inadvertent.

More significantly, we agree with the trial court's conclusion that defendant failed to show any reasonable likelihood that the subject testimony affected the outcome of his trial. Defendant argues that the "false manipulation of Turner's testimony" was intended to "make it appear that his evidence directly conflicted with the defense evidence of alibi and make it appear that Morrow and Patterson were involved in suspicious activity in vehicles the night of Mann's murder[.]" However, Turner's testimony about the truck neither implicated defendant, nor contradicted defendant's evidence. The real significance of Turner's testimony was Turner's assertion that defendant had confessed to him that he participated in killing Mann. Turner has never recanted this testimony, and, in fact, reiterated it at the hearing on defendant's motion for appropriate relief. The primary factual issue for the jury to resolve at trial was the credibility of the testimony of Turner and Cole, that defendant had admitted to each of them that he participated in Mann's murder. It was the resolution of this question, and not the date when someone had borrowed or "switched" a truck, that determined the outcome of the trial.

We hold that the trial court applied the correct standard in making its findings of fact, and did not abuse its discretion in

its denial of relief on this ground. This assignment of error is overruled.

II.

Defendant argues next that trial court erred by not granting his motion for appropriate relief on the ground that he was denied his right to the effective assistance of trial counsel. In the instant case, evidence was presented at the hearing on defendant's motion for appropriate relief establishing that defense counsel was experienced and reputable, and that he had spent considerable time preparing for trial. However, defendant contends that his trial counsel was ineffective as a matter of law, in that he (1) did not call Patterson as a witness; (2) did not call Terry Owenby as a witness, and; (3) did not present more evidence of defendant's shoe size. We disagree.

"A defendant's right to counsel includes the right to effective assistance of counsel." *State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000). The standard for judging claims of ineffective assistance of counsel was articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed.2d 674, 693 (1984). This two-part test, which was adopted by the North Carolina Supreme Court in *State v. Braswell*, 312 N.C. 553, 562-563, 324 S.E.2d 241, 248 (1985), requires a defendant to first establish that his "counsel's performance was deficient" to the extent that "[his] counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland*, 466 U.S. at 687, L. Ed. 2d at 693. Defendant also must

show prejudice, for "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal . . . unless there is a reasonable probability that, but for counsel's errors, there would have been a different result[.]" *Braswell* at 563, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698). "[C]ourts rarely grant relief based upon such a claim, and . . . [a] stringent standard [of proof] is required because 'every practicing attorney knows that a 'hindsight' combing of a criminal record will in nearly every case reveal some possible error in judgment or disclose at least one trial tactic more attractive than those employed at trial.'" *State v. Lesane*, 137 N.C. App. 234, 246, 528 S.E.2d 37, 45 (2000) (quoting *State v. Sneed*, 284 N.C. 606, 613, 201 S.E.2d 867, 871 (1974)).

In the instant case, defendant's trial counsel testified at the MAR hearing that his strategy at trial relied upon attacking the credibility of the State's primary witnesses, Turner and Cole. Defense counsel did not call Patterson as a witness because he was concerned about the jury's reaction to Patterson's criminal record, his history of drug use, and his involvement in Tracy Carroll's death, for which he was serving a prison sentence at the time of defendant's trial. In sum, defense counsel felt that Patterson carried a lot of "baggage." Owenby was also serving a prison sentence at the time of defendant's trial. Thus, defense counsel made a tactical or strategic decision not to call either Patterson or Owenby as a witness. "The decisions on what witnesses to call, whether and how to conduct cross-examination, . . . and all other

strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.' Trial counsel are necessarily given wide latitude in these matters." *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979) (citation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). Moreover, this Court has stated that it "will not second guess counsel on questions of trial strategy." *State v. James*, 60 N.C. App. 529, 533, 299 S.E.2d 451, 454 (1983). "[D]efendant's counsel was making a reasoned strategy decision. Where the strategy of trial counsel is 'well within the range of professionally reasonable judgments,' the action of counsel is not constitutionally ineffective." *State v. Campbell*, 142 N.C. App. 145, 152, 541 S.E.2d 803, 807 (2001) (quoting *Strickland*, 466 U.S. at 699, 80 L. Ed. 2d at 701).

In the instant case, the thrust of potential testimony by Patterson and Owenby is that Owenby and others were involved in Mann's death. Significant parts of this testimony might have been inadmissible at defendant's trial. "Evidence that another committed the crime for which the defendant is charged . . . [is] admissible [if it] point[s] directly to the guilt of the other party. Under Rule 401 such evidence must tend both to implicate another and be inconsistent with the guilt of the defendant." *State v. Floyd*, 143 N.C. App. 128, 132, 545 S.E.2d 238, 241 (2001). Turner and Cole both testified that defendant had told them that he and others had committed the murder. Therefore, evidence tending

to show that Owenby was also involved would not be inconsistent with defendant's guilt, and, thus, would not be admissible.

Moreover, if Owenby were called as a defense witness, it appears unlikely that defendant could have cross-examined Owenby regarding certain letters he had written to Rogers, confessing to Mann's murder. A party may impeach his own witness with prior inconsistent statements only if he is "genuinely surprised by the witness's change of his or her version of facts." *State v. Williams*, 341 N.C. 1, 9, 459 S.E.2d 208, 213 (1995). At Rogers' trial, which occurred before defendant's, Owenby testified that his letters to Rogers were false and had been written while he was intoxicated. Therefore, defendant would have known in advance that Owenby would deny killing Mann, and would testify that the notes were false. He could not claim to be "genuinely surprised," and, thus, would not be able to introduce the letters to Rogers.

Finally, we conclude that defendant did not demonstrate a reasonable probability that the introduction of the subject testimony by Patterson and Owenby would have affected the outcome of the trial. The crux of this case was the testimony by Turner and Cole, that defendant had confessed to each that he had taken part in killing Mann. Evidence that others had also participated would not have contradicted defendant's alleged statements, or undermined the credibility of Turner or Cole.

Defendant also contends that his trial counsel provided ineffective assistance because he did not proffer more direct evidence of his shoe size. Evidence was introduced at trial that

a bloody shoe print, from a size 9 ½ or 10 Nike brand shoe, had been found at Mann's house the day after his death. We note again that, given defendant's alleged statements to Turner and Cole that he *and others* had murdered Mann, the fact that one of the other participants left the footprint does not appear to have great significance. Further, defendant in fact presented evidence that his shoe size was 10 ½. We conclude that there is no reasonable probability that further evidence on this point would have had an effect on the jury's verdict.

We conclude that defendant has proven neither that his counsel's performance was below the objective standard of reasonableness, nor that he was deprived of a fair trial. Thus, the trial court did not abuse its discretion in denying defendant relief on the ground of ineffective assistance of counsel. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err in its denial of defendant's motion for appropriate relief. Accordingly, we affirm the trial court.

Affirmed.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).