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NO. COA01-590

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 99 CRS 62919,
00 CRS 23225

DAVID DESHON SIMMS

Appeal by defendant from judgments entered 26 October 2000 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 13 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Dolly Bevan Manion for defendant-appellant.

WALKER, Judge.

Defendant appeals his convictions on two counts of robbery with a dangerous weapon. The State's evidence tends to show the following: On 14 September 1999, defendant spent the day with Kenneth Brown (Brown), Tereece Roseboro (Roseboro) and Lynette Potts (Potts) driving throughout Guilford County consuming alcoholic beverages and smoking marijuana. That evening, Potts suggested that the group drive to her and Roseboro's place of employment at the Greensboro airport food pavilion and rob it.

Upon their arrival, Potts remained in the car while defendant, Roseboro and Brown proceeded to the airport food pavilion. Both Brown and defendant were wearing green t-shirts similar to ones worn by food pavilion employees. Brown also carried with him a nine millimeter handgun. Thereafter, Roseboro directed defendant and Brown to the food pavilion's office area and returned to the car.

Inside the office area, two employees were counting their daily cash register receipts and another was using the telephone. Brown pulled out the handgun and demanded money from one of the employees. Defendant then proceeded to tape their wrists and mouths. At some point, either he or Brown removed a necklace and bracelet from one of the employees. They left the office area with approximately one thousand dollars in cash and the employee's jewelry.

Defendant and Brown returned to the car and Potts drove the four of them to a housing complex known as Hampton Homes. When they arrived, Brown entered a house while defendant and the two women remained in the car. Shortly thereafter, Brown returned and suggested they go to a nearby motel and get a room for the evening. Potts drove to the motel and, as they arrived, a state trooper approached the car. When Brown noticed the trooper, he pulled out his handgun and told Potts to drive away.

A vehicle chase ensued which involved several law enforcement officers and lasted approximately thirty minutes. At one point, Potts returned to the Hampton Homes area, pulled onto a sidewalk,

and slowed down so that Brown could jump out of the car. A short time later, an officer rammed the rear end of the car forcing it to stop. Defendant then exited the car and attempted to flee on foot; however, he was subdued and arrested.

Defendant testified that he believed Potts was joking when she suggested robbing the food pavilion and that it was Brown who insisted they go through with the plan. He stated Brown had pointed the handgun at him and he felt as if Brown would have killed him if he had not participated. Defendant also testified that, following his arrest, Brown continued to pressure him into keeping silent and threatened to kill his fiancée if he did not.

I.

Defendant first contends he was denied his constitutional right to effective assistance of counsel in that his court-appointed attorney failed to: (1) timely move the trial court to withdraw as his attorney and (2) actively pursue at trial an affirmative defense of coercion.

A defendant's constitutional right to counsel includes "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 25 L. Ed. 2d 763, 773 (1970); *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984). Affording a defendant with competent counsel who subjects the evidence to the adversarial process ensures a fair trial which leads to a reliable outcome. Accordingly, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 80 L. Ed. 2d at 692-93.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 80 L. Ed. 2d at 693; see also *State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000). This showing requires the satisfaction of a two-part test: (1) counsel's performance must be deficient, and (2) the deficient performance must be so serious as to deprive the defendant of a fair trial. See *Grooms*, 353 N.C. at 64, 540 S.E.2d at 722.

Failure to Move to Withdraw

Defendant first maintains he was provided with ineffective assistance of counsel on grounds that his attorney failed to timely move to withdraw as his attorney. He asserts that, for an extended period of time, an irreconcilable conflict existed between him and his attorney such that the attorney had an ethical obligation to withdraw.

On the day before his trial was to begin, defendant filed a *pro se* motion to dismiss his attorney. Upon inquiry from the trial court, defendant stated he wanted his attorney to pursue a defense of coercion at his trial; however, the attorney refused. The attorney responded that he had previously discussed this defense with defendant and had conveyed to defendant his opinion that there was no factual basis for such a defense. He also told defendant that if he insisted on pursuing a coercion defense at trial, he

would have no choice but to withdraw as his attorney. Thereafter, defendant expressed to the trial court his desire that his attorney be removed and that he be permitted to act as his own counsel. The trial court granted defendant's request and appointed the attorney as stand-by counsel for defendant. After the trial court denied defendant's request for a continuance, defendant elected to proceed to trial with his attorney rather than represent himself.

Defendant contends his attorney's failure to timely withdraw as his attorney constitutes ineffective assistance of counsel. We disagree.

It is well established that when the attorney-client relationship has so deteriorated that effective representation is no longer possible, the attorney should be removed and substitute counsel should be appointed at that time. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977); *State v. Sweezy*, 291 N.C. 366, 230 S.E.2d 524 (1976). In order to be granted substitute counsel, a defendant must show "good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict." *Sweezy*, 291 N.C. at 372, 230 S.E.2d at 528-29 (citations omitted). Here, the record shows that the extent of the conflict between defendant and his attorney was not apparent to defendant's attorney until the day before the trial. Defendant's attorney had previously expressed to defendant his reservations concerning the pursuit of a coercion defense and had instructed defendant that he would move to withdraw if defendant persisted in going through with this defense at trial.

Once the conflict became apparent, the trial court granted defendant's motion to have his attorney removed. Defendant thereafter elected to be represented by the attorney rather than represent himself. We conclude that, under these circumstances, the conduct of defendant's attorney did not fall below an objective standard of reasonableness; therefore, we overrule defendant's assignment of error on this issue.

Failure to Pursue a Defense of Coercion

Defendant also maintains he was provided with ineffective assistance of counsel by reason of his attorney's failure to actively pursue the affirmative defense of coercion at trial. He asserts that, because coercion was his only plausible defense to the armed robbery charges, his attorney's failure to argue this defense amounted to ineffective counsel.

"The decision whether or not to develop a particular defense is a tactical decision that is part of trial strategy. Such decisions are generally not second-guessed by our courts." *State v. Lesane*, 137 N.C. App. 234, 246, 528 S.E.2d 37, 45 (2000) (citing *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986)). Notwithstanding defendant's assertion, the record shows that, in presenting his evidence, defendant was able to fully develop his contention that he was coerced into participating in the crimes. Furthermore, during closing arguments, defendant's attorney asked the jury to listen closely to the trial court's instructions and to consider all the evidence presented. Thereafter, the trial court instructed the jury that if it found the elements of coercion

present, it could consider those in determining whether defendant was guilty. We conclude defendant has not established that his attorney's performance was deficient or that, as a result, he was deprived of a fair trial. Therefore, this assignment of error is overruled.

II.

Defendant next contends the trial court erred by permitting the prosecutor to ask him questions regarding his fidelity to his fiancée while at the same time having a relationship with Roseboro. Defendant argues the trial court should not have permitted the prosecutor to question him about his relationship with these two women as such evidence was lacking in probative value and was otherwise prejudicial.

Generally, a trial court "has broad discretion over the scope of cross-examination." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998); *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 548 (2001). Assuming *arguendo* the trial court erred in permitting the prosecutor to question defendant about his relationship with two women, defendant fails to show the existence of a reasonable possibility that, but for the admission of this evidence, a different result would have been reached. See N.C. Gen. Stat. § 15A-1443 (1999); see also *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981) (burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error). Indeed, as we have previously discussed, the evidence clearly

established defendant's involvement in the armed robberies. Accordingly, we overrule defendant's assignment of error.

We conclude defendant received a fair trial free from prejudicial error.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).