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NO. COA06-489

NORTH CAROLINA COURT OF APPEALS

Filed: 20 February 2007

STATE OF NORTH CAROLINA

v. New Hanover County
Nos. 02 CRS 5881, 6340

JOHN JOSEPH MANNING

Appeal by defendant from judgment entered 9 December 2005 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 13 February 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

Lynne Rupp for defendant-appellant.

WYNN, Judge.

Defendant appeals from a judgment entered upon his conviction of possession of a weapon of mass death and destruction, assault on a female, and false imprisonment. We find no error.

The State's evidence tended to show that Defendant invited Laura Moore to his residence on the night of 4 March 2002. In the midst of an otherwise romantic evening, Defendant "snapped"; became abusive after appearing to smoke crack cocaine; slapped Ms. Moore; forced her outside; and announced that she was going on her "last nature walk and [ha]d better enjoy it." Defendant brought a gun

with him on the walk and fired it repeatedly in Ms. Moore's direction. When she tried to run, he chased her down, beat her, and dragged her toward the Cape Fear River. Defendant threatened to push Ms. Moore into quicksand or a deep part of the river where she would be eaten by alligators. Finally, he pulled her toward an abandoned house and said he would turn her over to the "Mexicans" who lived there. After approximately forty-five minutes, Defendant turned around and walked back to his house. Alone in a dark wooded area with "nowhere to go[,]" Ms. Moore followed. When she arrived back in his house, Defendant "acted like nothing had happened, like everything was fine." Fearing for her life, Ms. Moore stayed with Defendant until the next morning. Defendant called a taxicab and paid the driver to take Ms. Moore home after her roommate telephoned his house looking for her.

New Hanover County Sheriff's Detective Sergeant Susan Johnson and Detective Mike Howell searched Defendant's house on 3 April 2002, finding, *inter alia*, a .22 caliber rifle, four boxes of .22 caliber bullets, additional .270 and .30 caliber rounds, a magazine for an M-1 rifle, an ax, a sword, several knives, a single-shot 20-gauge shotgun, three boxes of shotgun shells, a .32 caliber pistol, and a revolver. Sergeant Johnson observed "many, many spent shotgun shells and bullet casings all about the ground" outside the house. Beneath a mattress in Defendant's bedroom, the detectives found a 12-gauge shotgun with a sawed-off stock and barrel. Detective Howell measured the length of the gun's barrel as fifteen inches and the total length of the gun as twenty-two and two-thirds

inches.

At sentencing, defense counsel urged the court to suspend Defendant's sentence for possession of a weapon of mass death and destruction, asserting, "It's a sawed-off shotgun that during my closing argument the handle fell off. It's in pretty bad shape. It's not loaded." The court consolidated Defendant's convictions for judgment but imposed an active sentence of thirteen to sixteen months' imprisonment.

Preliminarily, we note that to sustain a claim of ineffective assistance of counsel, Defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). He must then show that counsel's deficient performance was so prejudicial "as to deprive the defendant of a fair trial, *a trial whose result is reliable*." *Id.* (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). Moreover, while N.C. Gen. Stat. § 15A-1419(a)(3) (2005) requires a defendant to raise claims of ineffective assistance "that are apparent from the record" on direct appeal, claims which require the development of evidence outside the record on appeal are properly addressed in a collateral post-conviction proceeding. *State v. Lawson*, 159 N.C. App. 534, 543, 583 S.E.2d 354, 361 (2003) (quoting *State v. Hyatt*, 355 N.C. 642, 668, 566 S.E.2d 61, 78 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003)). Only "when the cold record reveals that

no further investigation is required, *i.e.*, [when the] claims . . . may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing" will these claims be resolved on direct appeal. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

On appeal, Defendant contends that his counsel rendered constitutionally ineffective assistance by (I) failing to argue, as an affirmative defense to the possession of the weapon of mass death and destruction charge, that the sawed-off shotgun found in his house was inoperable, and (II) admitting his guilt for possession of a weapon of mass death and destruction to the jury without his consent.

I.

We are unable to review Defendant's first claim of ineffective assistance on direct appeal. The face of the record contains no evidence supporting an inoperability defense to the charge of possession of a weapon of mass death and destruction under N.C. Gen. Stat. § 14-288.8. To the extent such evidence was available to counsel at trial, its existence must be developed in a collateral post-conviction proceeding. Accordingly, we dismiss this assignment of error without prejudice to Defendant's right to file a motion for appropriate relief in the trial court. *See id.* at 167, 557 S.E.2d at 525.

II.

In his second claim of ineffective assistance, Defendant

asserts that his counsel admitted to the jury that he was guilty of possession of a weapon of mass death and destruction. Because an unauthorized admission of guilt by counsel is ineffective assistance *per se*, Defendant avers that he "need not show any specific prejudice in order to establish his right to a new trial."

In *State v. Harbison*, our Supreme Court held that a defense attorney's admission of guilt to the jury without the defendant's consent is a *per se* violation of the Sixth Amendment right to effective assistance of counsel. 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). However, where counsel does not expressly admit guilt or admits only certain elements of a charged offense, no *Harbison* violation occurs. *See State v. Randle*, 167 N.C. App. 547, 551, 605 S.E.2d 692, 694 (2004) (citing *State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (no *Harbison* violation where defense counsel did not admit guilt of murder but only that "if he's guilty of anything, he's guilty of accessory after the fact"), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002); *State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (no *Harbison* violation where defense counsel did not concede that the defendant himself had committed any crime); *State v. Fisher*, 318 N.C. 512, 532-33, 350 S.E.2d 334, 346 (1986) (no *Harbison* violation where counsel conceded malice element of murder and voluntary manslaughter but did not clearly admit guilt)).

In support of his *Harbison* claim, Defendant points to counsel's cross-examination of Sergeant Johnson regarding the

weaponry allegedly found in Defendant's house on 3 April 2002, and displayed to the jury:

> Q. Let me ask you about all those weapons, actually. *Other than the sawed-off shotgun, is it illegal*, or was it illegal, for him, in any way, to own a single gun, any one of those guns, knives or ammunition?
>
> A. No, sir.

(Emphasis by Defendant). Counsel then elicited an admission from Sergeant Johnson that it was likewise not "against the law to shoot guns out in the county, on your own property[,]" an allusion to the shell casings Sergeant Johnson reported finding outside Defendant's house.

We find no merit to the suggestion that counsel's query to Sergeant Johnson admitted Defendant's guilt to the charge of possession of a weapon of mass death and destruction. Rather, counsel directed the witness to address whether any of the other items described and displayed to the jury were considered to be contraband. It was undisputed that the State had charged Defendant with a crime based on his alleged possession of the sawed-off shotgun. In acknowledging the evidentiary basis for the charge, counsel did not admit that his client was guilty.

Defendant also cites a series of remarks made by counsel during his closing argument to the jury which, Defendant contends, "emphasize[d]" the sawed-off shotgun's status as a prohibited weapon and suggested to the jury that there was no legitimate "legal basis" to find him not guilty of possessing it. On the issue of counsel's improper emphasis, Defendant quotes counsel as

follows:

> . . . [T]he State of North Carolina has spent a lot of time introducing a lot of evidence that, frankly, has absolutely nothing to do with this case. . . . All this evidence, shotgun shells, knives, guns, well, . . . the [S]tate contends that *this sawed-off shotgun is evidence of a crime*. . . . [O]kay, let's give them the .22 rifle, because they allege the .22 rifle was used in this fictional assault on Ms. Moore. What does any of the rest of this stuff have to do with the case? . . . It has absolutely nothing – not a single one of these weapons, *other than this* [*sawed-off shotgun*], the [S]tate even contends is against the law to possess.
>
> . . .
>
> In the search, they find this thing (Indicating [the sawed-off shotgun]) and, at some point later, charge him with possession of a weapon of mass [death and] destruction.

(Emphasis by Defendant). As for counsel's alleged suggestion that the jury had "no legal basis" to acquit Defendant on the charge, Defendant offers the following passage at the conclusion of counsel's argument:

> . . . [*Y*]*ou ought certainly find him not guilty of everything involving Laura Moore*; and, frankly, *you would be justified* in going back and finding him not guilty of everything because of – because of the presentation by the [S]tate in this case.

(Emphasis by Defendant).

Having carefully reviewed counsel's argument, we find no basis for a claim of ineffective assistance *per se* under *Harbison*. Rather than admitting Defendant's guilt for possession of a weapon of mass death and destruction, counsel reviewed the State's contentions and evidence and asked the jury to reject them. He

argued that the jury should not accept the testimony of Detective Howell and Sergeant Johnson on this charge in light of their "unreasonable" proffer on the charges involving Ms. Moore. Specifically, counsel argued the State's witnesses failed to acknowledge the inconsistencies in Ms. Moore's statements, presented extraneous evidence to the jury in order to paint Defendant in an unfavorable light, withheld potentially exculpatory evidence or findings, and conducted an incomplete and unfair investigation. The record fails to show that counsel conceded Defendant's guilt or suggested that the jury should find him guilty of any offense. *See Randle*, 167 N.C. App. at 552, 605 S.E.2d at 694. Moreover, counsel's assertion that the State's witnesses were not sufficiently credible to establish Defendant's guilt beyond a reasonable doubt provided the jury a "legal basis" for his acquittal. *See generally Hyatt*, 355 N.C. at 666, 566 S.E.2d at 77 ("[I]t is the province of the jury . . . to assess and determine witness credibility.").

In sum, we hold that Defendant received a fair trial that was free from prejudicial error. We note further that although the record on appeal includes additional assignments of error, those assignments are deemed abandoned because Defendant did not address them in his brief to this Court. N.C. R. App. P. 28(b)(6).

No error.

Judges ELMORE and GEER concur.

Report per Rule 30(e).