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NO. COA09-1604

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v.

Moore County
Nos. 08 CRS 53977-79

DAVID CLAYTON HARPER

Appeal by defendant from judgments entered 6 August 2009 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 11 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Randolph and Fischer, by J. Clark Fischer, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to show that an actual conflict of interest adversely affected his lawyer's performance, defendant is not entitled to a new trial.

I. Factual and Procedural Background

On the evening of 23 August 2008, David Clayton Harper (defendant) and his then wife, M.H., got into an argument because M.H. had gone to her sister's house with their two children without telling defendant. When she arrived home, defendant jumped over the coffee table and said, "I ought to just beat your ass." Moments later, defendant slapped M.H. in the face twice. Defendant

grabbed her ponytail and dragged her into the bedroom. Defendant pushed M.H. backwards on the bed, straddled her, and resumed slapping her in the face. Defendant stated, "I know I'm going to jail and I'm going to get laid before I go to jail." Defendant then forced M.H. to perform oral and vaginal sex.

On 8 September 2008, defendant was indicted for second degree rape, second degree sexual offense, and assault on a female. (R. 6-8). On 6 August 2009, a jury found defendant guilty of all charges. The trial court determined that defendant was a prior record level III for felony sentencing purposes and sentenced defendant to concurrent terms of 93 to 121 months imprisonment. Defendant was also sentenced to a consecutive sentence of 150 days imprisonment for assault on a female. Defendant appeals.

II. Alleged Conflict of Interest

In his sole argument, defendant contends that the trial court erred by failing to make an inquiry into a potential conflict of interest raised by his defense counsel's prior representation of M.H. We disagree.

At the outset, we note defendant did not object to any potential conflict of interest at trial. Both defendant and the State contend that we should review this argument for plain error. However, it is well-settled that plain error analysis is only applicable to evidentiary matters and jury instructions. *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, cert. denied, ___ U.S. ___, 175 L. Ed. 2d 362 (2009). The failure to object to a potential conflict of interest is reviewed as discussed *infra*.

A criminal defendant subject to imprisonment has a Sixth Amendment right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972). The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment of the United States Constitution. *State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993). Sections 19 and 23 of the North Carolina Constitution also provide criminal defendants in North Carolina with a right to counsel. *Id.* The right to counsel includes a right to "representation that is free from conflicts of interests." *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981).

State v. Mims, 180 N.C. App. 403, 409, 637 S.E.2d 244, 247-48 (2006). "When a defendant fails to object to a conflict of interest at trial, a defendant 'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* at 409, 637 S.E.2d at 248 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L. Ed. 2d 333, 346-47 (1980)). If a defendant can demonstrate this, he need not show prejudice to obtain relief. *Id.*

Defendant primarily relies upon *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993), to support his contention that the trial court committed reversible error and that he is entitled to a new trial. In *James*, the defense attorney *simultaneously* represented the defendant in one matter and represented a prosecution witness in an unrelated matter. *Id.* at 788, 433 S.E.2d at 757 (emphasis added). The defendant argued that he was deprived of his federal and state constitutional rights to the full and effective assistance of counsel and due process of law by his trial counsel's conflicting interests. *Id.* This Court stated:

We believe representation of the defendant as well as a prosecution witness

(albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

Id. at 790, 433 S.E.2d at 758. This Court held that "in a situation of this sort, the practice should be that the trial judge inquire into an attorney's multiple representation once made aware of this fact." *Id.* at 791, 433 S.E.2d at 758.

[T]he failure of the trial judge to conduct an inquiry, in and of itself, constitutes reversible error. Ordinarily, we would remand the case to the trial court for a hearing to determine if the actual conflict adversely affected the lawyer's performance. However, where the record, as in this case, clearly shows on its face that the conflict adversely affected counsel's performance, we will not remand for an evidentiary hearing, but order a new trial.

Id. at 791, 433 S.E.2d at 759.

This Court determined that the defendant was entitled to a new trial because the record clearly showed that "the overlap of representation prior to and at the time of trial of both parties . . . resulted in an unavoidable conflict as to confidential communications, and affected counsel's ability to effectively impeach the credibility of [the] witness" *Id.* at 790, 433 S.E.2d at 758.

The facts of the instant case are readily distinguishable from *James*. Here, none of the "avenues of possible conflict for an

attorney" as articulated in *James* are implicated. Defense counsel was not simultaneously representing defendant and M.H. Upon beginning his cross-examination, defense counsel introduced himself to M.H. as if the two had never met. M.H. stated that defense counsel had represented her ten years prior to this trial on a collateral matter concerning an assault charge against her ex-husband (not the defendant in this case). Defense counsel clearly did not recall this prior representation, and proceeded with his cross-examination. See *State v. Thomas*, 187 N.C. App. 140, 143-44, 651 S.E.2d 924, 926 (2007) (holding that where there was no concurrent conflict of interest, *i.e.*, defense counsel had represented a prosecution witness three years prior to the defendant's trial and was no longer representing him; in addition to the defense counsel having no recollection as to the specifics of the witness's case, the trial court did not err by denying the defense counsel's motion to withdraw).

Defendant has failed to point to any evidence or articulate how his attorney's performance was adversely affected by his prior representation of M.H., and we have found none. Although the trial court should have inquired into the potential conflict of interest, the face of the record clearly shows that defendant's representation was not adversely affected and defendant is not entitled to a new trial. See *State v. Bunch*, 192 N.C. App. 724, 728, 666 S.E.2d 188, 191 (2008) (holding that because the defendant failed to show how his counsel's performance at his probation

violation hearing was adversely affected, the defendant was not entitled to a new trial). Defendant's argument is without merit.

Defendant's remaining assignments of error are not argued in his brief and they are deemed abandoned. N.C.R. App. P. 28(b)(6).

NO ERROR.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).