An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-279
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Nash County
Nos. 09 CRS 53407, 53409-12

JIMMIE ISAAC BAINES

Appeal by defendant from judgments entered 10 November 2011 by Judge Walter H. Godwin, Jr. in Nash County Superior Court. Heard in the Court of Appeals 6 September 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for the State.*

*Richard Croutharmel for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

On 10 November 2010, a jury found defendant guilty of five counts of indecent liberties with a child. The trial court consolidated defendant's convictions into four judgments and sentenced defendant to four consecutive terms of 21 to 26 months imprisonment. Defendant gave written notice of appeal on 14 November 2010.

On appeal, defendant argues that he received ineffective assistance of counsel because his attorney's attempt to "draw the sting" from defendant's prior conviction of sexual battery precluded a limiting jury instruction on the matter. We find no error.

This Court's review of ineffective assistance of counsel claims "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Campbell*, 177 N.C. App. 520, 525, 629 S.E.2d 345, 349 (citation and quotation marks omitted), *disc. review denied*, 360 N.C. 578, 635 S.E.2d 902 (2006). Here, the cold record indicates no further investigation is required for our review.

On a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and "that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland v.*

*Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 684, 693 (1984); *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (expressly adopting the *Strickland* test).

The Supreme Court of the United States requires our restraint in second-guessing attorneys' strategic decisions made at trial:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

*Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-95 (citations omitted).

Here, defendant's attorney asked defendant at trial about his past convictions, and defendant admitted that he had previously entered a guilty plea to a charge of sexual battery. Defendant further admitted that the guilty plea was "nothing but a lie. Yes I lied then . . . . I took a plea." As a result, defendant could not receive a jury instruction limiting the jury's consideration of this conviction. Defendant argues that his counsel was deficient because his trial attorney should have waited for the prosecution to bring up the prior conviction, objected, and then asked for limiting jury instructions. We disagree.

This Court has held that the trial court's failure to give a limiting jury instruction based on the defendant's prior convictions when the defendant is the party who elicited the information at trial is not reversible error on appeal. *See State v. Jackson*, 161 N.C. App. 118, 124, 588 S.E.2d 11, 15-16 (2003). In *State v. Campbell*, this Court found no error where the defendant's trial attorney admitted to the jury that the defendant had repeatedly lied to him. 177 N.C. App. 520, 525, 629 S.E.2d 345, 349. The Court further held that where the "defendant himself explicitly participated in this defense strategy" by admitting this on the stand, he "thereafter cannot

complain that defense counsel utilized the strategy in closing argument." *Id.* at 528, 629 S.E.2d at 350.

Revealing damaging information on direct examination instead of waiting for it to be revealed on cross examination is a strategy known as "pulling the sting" or "drawing the sting." *Id.* at 527, 629 S.E.2d at 349-50. Defendant admits that this strategy "precludes the prosecutor from introducing the evidence, which might give it greater dramatic impact and make the defendant appear less truthful." Defense counsel knew that defendant's prior conviction for sexual battery would eventually be revealed. Revealing this fact on direct examination allows defense counsel more control over the introduction of the prior conviction and is a reasonable way to "draw the sting" from evidence that may show defendant to have a propensity for sexual crimes. Furthermore, just as the defendant in *Campbell* "actively participated" in the strategy by admitting his lies on direct examination, defendant did the same by admitting his prior conviction.

We cannot conclude the strategy employed by defendant's counsel was unreasonable or that counsel's performance was otherwise deficient. Because we hold the performance of defendant's trial counsel was not deficient, and that defendant

actively participated in the "draw the sting" strategy, we need not address whether such performance deprived defendant of a fair trial. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Accordingly, we find no error.

No error.

Judges MARTIN and THIGPEN concur.

Report per Rule 30(e).