NO. COA14-464

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Cherokee County
No. 10 CRS 051499

JOHN PATE,
Defendant.

Appeal by defendant from judgment entered 20 November 2013 by Judge Gary M. Gavenus in Cherokee County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Narcisa Woods, for the State.

Richard J. Costanza for defendant-appellant.

BRYANT, Judge.

Where defendant's attorney acknowledged factual admissions by defendant, and used the term "creep" as part of his trial strategy to argue that defendant's admitted actions, although improper and crude, were not criminal, defendant cannot successfully claim ineffective assistance of counsel.

On 3 January 2011, defendant John Pate was indicted for one count of taking indecent liberties with a child. The charge

came on for trial during the 19 November 2013 criminal session of Cherokee County Superior Court, the Honorable Gary M. Gavenus, Judge presiding. At trial, the State's evidence tended to show the following.

On the morning of 5 October 2010, defendant's wife, Chystal Pate, called police to report that she had seen her husband, defendant, masturbating while nude in front of the couple's naked sixteen-month-old daughter. Upon arriving at the couple's home, Deputies Mitchell Morgan and Helen Malinowski of the Cherokee County Sheriff's Department interviewed defendant and Ms. Pate. Deputy Morgan first interviewed Ms. Pate, who said that she and defendant woke up around 6:30 a.m. that morning. Ms. Pate stated that defendant tried to engage her in sexual intercourse but she had refused defendant's advances because their daughter, who slept in a crib in the couple's bedroom, was beginning to wake up. After their daughter had awoken, defendant got up and took his daughter downstairs to change her diaper and feed her. Ms. Pate said that because she and defendant routinely slept in the nude, defendant was unclothed when he carried his daughter downstairs.

Ms. Pate stated that a few minutes after defendant took their daughter downstairs, she began to feel uneasy due to her

"mothering instinct" and got up to check on them. Ms. Pate said that when she looked downstairs, she saw her daughter sitting on the couch with defendant standing over her. Both defendant and their daughter were unclothed, and defendant appeared to be masturbating "[j]ust a couple of inches away from" their daughter's face. Ms. Pate immediately ran downstairs and grabbed her daughter. She then grabbed her three-year-old son from his downstairs bedroom and locked herself and her children in a bathroom. After calling her mother and defendant's mother from the bathroom, Ms. Pate called the police.

After interviewing Ms. Pate, Deputy Morgan went downstairs to the basement of the home, where defendant was working at his computer, to interview defendant. Defendant told Deputy Morgan that after he brought his daughter downstairs, he placed her on the couch to undress her so she could "go potty." Defendant admitted that he grabbed his penis and shook it at his daughter while she sat unclothed on the couch, but he did so out of irritation at his daughter for interrupting sexual intercourse with Ms. Pate. Defendant told Deputy Morgan that while he did this, he told his daughter "[t]his is what your momma could have had," or "this is what I wanted to give your mother." When interviewed a short time later by Deputy Malinowski, defendant

repeated what he had told Deputy Morgan. Deputy Morgan arrested defendant for taking indecent liberties with a child.

On 20 November 2013, defendant was convicted of one count of taking indecent liberties with a child and sentenced to 16 to 20 months imprisonment. Defendant appeals.

In his sole issue on appeal, defendant contends he received ineffective assistance of counsel. Specifically, defendant argues he received ineffective assistance of counsel because his attorney made certain admissions to the jury and referred to defendant as a "creep." We disagree.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561—62, 324 S.E.2d 241, 248 (1985) (citation omitted). To prevail on an ineffective assistance of counsel claim, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a

> fair trial, a trial whose result is reliable.
>
> Both prongs of this test must be demonstrated in order to claim successfully ineffective assistance of counsel.

State v. Roache, 358 N.C. 243, 279, 595 S.E.2d 381, 405 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Moreover,

> ineffective assistance of counsel claims brought on direct review 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. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122—23, 604 S.E.2d 850, 881 (2004) (citations and quotation omitted).

As the record before us is sufficient and does not require further investigation, we address defendant's ineffective assistance of counsel claim.

Defendant argues he received ineffective assistance of counsel because his attorney admitted "facts forming the *actus reus*" of defendant's charge of taking indecent liberties with a

child. Defendant's argument lacks merit, for while it is well established that an attorney's admission of his client's guilt without the informed consent of his client amounts to "ineffective assistance of counsel *per se*," *State v. Berry*, 356 N.C. 490, 512, 573 S.E.2d 132, 147 (2002) (citing *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507—08 (1985)), an attorney's admission of specific facts does not. *See State v. Maniego*, 163 N.C. App. 676, 684, 594 S.E.2d 242, 247 (2004) ("Admitting a fact is not equivalent to admitting guilt." (citation omitted)). In order to rise to the level of *Harbison* error in this case, defendant's attorney's admission would have had to have been an admission to both the act and the purpose of the act; in other words, an admission of guilt to the charged offense.

North Carolina General Statutes, section 14-202.1, holds that:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> > (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2013). In order to convict a defendant of the offense of taking indecent liberties with a child, the State must show that the defendant willfully committed an immoral, improper, or indecent act, or attempted to commit such an act, against a child under the age of sixteen, for the purpose of sexual gratification. *See State v. Rhodes*, 321 N.C. 102, 104—05, 361 S.E.2d 578, 580 (1987); *see also State v. Hicks*, 79 N.C. App. 599, 602—04, 339 S.E.2d 806, 808—09 (1986) (in addition to proving the act of the offense of taking indecent liberties with a child, the State must also prove the intent to commit such an act — "the purpose of arousing or gratifying sexual desire.").

The record indicates that while defendant did not testify or otherwise put on direct evidence at trial, Deputies Morgan and Malinowski testified about defendant's statements which were made shortly after the incident in which defendant grabbed and shook his penis at his daughter while both were unclothed. Defendant's attorney acknowledged the uncontested evidence that was before the jury, to the effect that defendant had grabbed

and shook his penis in the presence of his daughter while both were unclothed, but did not make an admission of defendant's guilt of the crime of taking indecent liberties with a minor. Rather, defendant's attorney repeatedly argued during his closing argument that although defendant had performed the act of grabbing his penis while standing unclothed in front of his infant daughter, defendant lacked the required intent to establish guilt of the offense because defendant's physical act was performed not for the purpose of sexual gratification but rather out of annoyance that his daughter had interrupted defendant's intimacy with Ms. Pate. As such, the fact that defendant's attorney used the facts in evidence during his closing argument to the jury did not amount to a *Harbison* violation, nor did it amount to ineffective assistance of counsel. *See Harbison*, 315 N.C. at 178—81, 337 S.E.2d at 506—08; *Maniego*, 163 N.C. App. at 683—84, 594 S.E.2d at 246—47. Accordingly, defendant's attorney's acknowledgement of uncontested facts, coupled with a denial of defendant's criminal intent or purpose in committing the act, did not amount to an admission of guilt or constitute ineffective assistance of counsel.

Defendant further argues he received ineffective assistance of counsel because defendant's attorney referred to defendant as a "creep" during the trial. We disagree, since a review of the record indicates that defendant's attorney most likely used the term "creep" as part of his trial strategy.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694. "Trial counsel are necessarily given wide latitude in these matters [of trial strategy]. Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." *State v. Milano*, 297 N.C. 485, 495—96, 256 S.E.2d 154, 160 (1979) (citation and quotation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

> 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[.]

Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694 (citation omitted).

As previously discussed, defendant admitted to grabbing and shaking his penis in his daughter's face while both were nude. It is clear that because of this admission by defendant, defendant's attorney had to, and indeed did, adopt a trial strategy of arguing that defendant lacked criminal intent; that his actions were not undertaken for the purpose of sexual gratification. Indeed, to contend defendant lacked the requisite intent necessary to be convicted of the offense of taking indecent liberties with a child would be the only logical strategy defendant's attorney could have pursued in order to counteract defendant's admission of his improper actions towards his daughter. As such, by referring to defendant as a "creep," defendant's attorney intended not to demean his client but, rather, to remind the jury that while defendant's actions may have been improper and crude, they were not criminal. Defendant's attorney commented several times to the jury during both opening and closing statements that while they could "dislike [defendant for] being a creep, acting in this manner[,]" "being a creep isn't being a criminal." It would appear then that, viewed within the context of the trial, defendant's attorney used the term "creep" when referring to defendant as part of his defense strategy to remind the jury

that simply because the jury might find defendant's actions to be offensive, those actions were not necessarily illegal.

Further, defendant has failed to establish prejudice. A review of the record shows that the State presented strong evidence against defendant, including the testimony of Ms. Pate and Deputies Morgan and Malinowski, as well phone messages from defendant to Ms. Pate in which defendant admitted that he "did it." Defendant did not testify or present any evidence at trial to counter the State's evidence; however, defendant's attorney cross-examined each of the State's witnesses in an attempt to cast doubt upon each witness' credibility. "After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Accordingly, defendant's ineffective assistance of counsel claim has no merit.

No error.

Judge ELMORE concurs.

Judge ERVIN concurs in part and concurs in the result in part.

Report per Rule 30(e).

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ERVIN, Judge, concurring in part and concurring in the result in part.

Although I concur in the result reached by the Court and the majority of its reasoning, I am unable to agree with my colleagues' decision to reach the issue of whether Defendant received deficient representation from his trial counsel as that concept is defined in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), when he referred to Defendant as a "creep" in his final argument. However, given my agreement with my colleagues' conclusion that the present record provides no basis for a determination that the comments in question prejudiced Defendant's chances for a more favorable outcome at trial, I have no hesitation in agreeing with their ultimate conclusion that Defendant is not entitled to relief from the trial court's judgment on the basis of his *Strickland*-based ineffective assistance of counsel claim.

As a result, I concur in the Court's opinion in part and concur in the result reached in the Court's opinion in part.

In concluding that Defendant did not receive deficient representation from his trial counsel, my colleagues conclude "that defendant's attorney most likely used the term 'creep' as part of his trial strategy." More specifically, my colleagues reason that, in light of Defendant's admission that he had "grabb[ed] and shak[en] his penis in his daughter's face while both were nude," his trial counsel "had to, and indeed did, adopt a trial strategy of arguing that defendant lacked criminal intent"; that, "by referring to defendant as a 'creep,' defendant's attorney intended not to demean his client but, rather, to remind the jury that[,] while defendant's actions may have been improper and crude, they were not criminal"; and that statements to the effect that, while the jury should feel free to "'dislike [defendant for] being a creep,'" "'being a creep isn't being a criminal,'" were made as part of a "defense strategy to remind the jury that[,] simply because the jury might find defendant's actions to be offensive, those actions were not necessarily illegal." I am unable to join this portion of the Court's opinion given that my colleagues have, in essence, made determinations concerning the strategic

calculations made by Defendant's trial counsel that I do not believe that we are in a position to make given the record that has been presented for our review.[1]

"Ordinarily, the extent to which a defendant's trial counsel made a particular strategic or tactical decision is a question of fact." *State v. Hernandez*, __ N.C. App. __, __, 742 S.E.2d 825, 831 (2013). "In the absence of additional information concerning the nature and extent of [Defendant's trial counsel's] preparation and the defense strategy that [he] elected to adopt," I do not believe that we are in a position to "determine whether [the challenged conduct of Defendant's trial counsel] resulted from oversight or from a legitimate strategic or tactical decision without speculating about the answer to questions about which we lack sufficient information." *Id.* In other words, given that Defendant's *Strickland*-based ineffective assistance of counsel claim has been asserted on direct appeal rather than in the context of a motion for appropriate relief,

[1]I freely concede that my colleagues' inferences about the strategy employed by Defendant's trial counsel may well be correct. However, given the absence of any evidence concerning the strategy that Defendant's trial counsel intended to employ during the trial of Defendant's case and the tactics that he hoped to utilize in order to carry that strategy out, I am reluctant to make what is, in effect, a factual determination given the procedural posture in which we find ourselves in this case.

we simply lack sufficient information to determine the extent, if any, to which the decision by Defendant's trial counsel to refer to his client as a "creep" had any grounding in appropriate strategic or tactical considerations. As a result, given that we lack sufficient information to make a factual determination concerning the extent, if any, to which the challenged statements by Defendant's trial counsel had any strategic or tactical justification, I would refrain from making any decision with respect to the deficient performance issue and disagree with my colleagues' decision to reach that issue.

I do not, however, see any need to dismiss Defendant's *Strickland*-based ineffective assistance of counsel claim "without prejudice to [Defendant's] right to reassert [it] during a subsequent [motion for appropriate relief] proceeding," *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002), given my belief that the Court has correctly concluded that any deficient performance that Defendant might have received from his trial counsel did not prejudice his chances for a more favorable outcome at trial. As best I have been able to determine from an examination of the record, Defendant does not contend that the evidence received at trial would have been

different in the event that Defendant's trial counsel had refrained from referring to Defendant as a "creep." In other words, Defendant's *Strickland*-based ineffective assistance of counsel claim essentially rests on an assertion that, based solely on an analysis of the record developed at trial, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. In view of the undisputed nature of the evidence concerning Defendant's conduct and the weakness of his "lack of intent defense," I am unable, like my colleagues, to see that there is any reasonable probability that the outcome at Defendant's trial would have been more favorable to Defendant than was actually the case had Defendant's trial counsel refrained from describing him as a "creep." Thus, although I am unable to agree with all of the reasoning utilized by my colleagues in reaching this conclusion, I agree with them that Defendant's *Strickland*-based ineffective assistance of counsel claim has no merit. As a result, I concur in the Court's opinion in part and concur in the result reached by my colleagues in part.