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NO. COA14-534
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v.

Iredell County
Nos. 09 CRS 57228, 12 CRS 1086

AJANAKU EDWARD MURDOCK

Appeal by defendant from judgment entered 6 September 2013
by Judge Gary M. Gavenus in Iredell County Superior Court.
Heard in the Court of Appeals 24 September 2014.

*Attorney General Roy Cooper, by Special Deputy Attorney
General Michael T. Wood, for the State.*

Paul F. Herzog for defendant-appellant.

McCULLOUGH, Judge.

Defendant Ajanaku Edward Murdock appeals his conviction of
assault inflicting serious bodily injury. Based on the reasons
stated herein, we find no error in part and dismiss in part.

I. Background

On 4 January 2010, defendant was indicted for assault
inflicting serious bodily injury. The indictment alleged that
defendant inflicted serious bodily injury "by striking [Jennifer

Elizabeth Edwards ("Edwards")] in the face with his fist, breaking her jaw." On 13 February 2012, defendant was also indicted for attaining habitual felon status.

Defendant's case came on for trial at the 3 September 2013 Criminal Session of Iredell County Superior Court, the Honorable Gary Gavenus, presiding.

The State's evidence at trial indicated the following: Jennifer Edwards testified that in September 2009, she had been in a two to three year relationship with defendant. On 10 September 2009, Edwards dropped defendant off at his friend's residence located on Adams Street in Statesville, North Carolina. Later on, Edwards wanted to talk to defendant and so she returned to the Adams Street residence. Edwards' two children were in the vehicle with her. Edwards pulled up on the side of the street and defendant came out of the residence and entered Edwards' car. Edwards testified to the following:

[W]e started talking. I was telling him that I was going to go out, and he began giving obscenities and calling me names.

. . . .

I asked him - I told him - I was like, you know, why you yelling, why you calling me names, and he was like, you're just a whore and all this other stuff, and he just struck me.

Edwards testified that as she was sitting in the driver's seat of her car, defendant struck her on the right side of her jaw with his fist. Defendant then exited her vehicle and "went to continue hanging out with his friends." Edwards left her children with her sister and proceeded to go to a hospital.

At the hospital, Edwards gave a statement to a police officer. Edwards read her statement to the jury and it provided that "[defendant] struck me with his closed fist on the right side of my jaw." Edwards testified that the 10 September 2009 statement was an "accurate statement of what happened."

Edwards also testified that after defendant broke her jaw, she continued to have a relationship with defendant. Defendant made requests to Edwards, through phone calls, that she help in his defense by writing a statement. Edwards testified that she wrote a second statement on 16 October 2009, "[s]aying that it didn't happen quite the way it really happened." Edwards' second statement provided the following:

[Defendant] and I had an altercation about him cheating and so forth. We started out - - yelling and screaming but soon it went really bad. He called me out by name and I almost immediately slapped him in the face and told him to get out of the car. He refused and we argued some more. I then struck him again. He then got out of the vehicle and walked around the back of the car and opened the rear driver's side and

began talking to the children. I pulled off in my rage, and he had no choice but to climb back into the vehicle. We argued and yelled some more, and this time I felt an open hand slap me across the face. Not a fist that I had previously stated. I then proceeded to jump out of the car; and as I did, the driver's side door bounced back, striking me on the side of my face causing my broken jaw. When I realized what happened, I told him - I told him - he had already got out of the vehicle and walked away towards the area where the young lady was that I accused him of cheating, as I just told him I thought my jaw was broken. That only made me madder, so I drove to the emergency room upset and crying and told the officer that [defendant] had punched me in the face during the altercation.

Edwards testified at trial that she failed to tell the truth in her second statement and agreed to write the statement at defendant's request because she "believed that he would change[.]"

Michael Lackey, a patrol deputy with the Iredell County Sheriff's Office, testified that he arrived at the Iredell County Memorial Hospital on 10 September 2009 after receiving a report that Edwards had been assaulted. Edwards gave him a written statement and Lackey described Edwards' appearance as "upset," "like she had been crying," and "her jawline had been swollen."

Doctor Tommy Johnson, an oral maxilla facial surgeon, testified that he treated Edwards on 15 September 2009. Dr. Johnson testified that Edwards had sustained a jaw fracture on her right side and that Edwards had explained that the cause of her injury was being "struck by her boyfriend." Edwards underwent surgery to repair the damage to her jaw.

On 6 September 2013, a jury found defendant guilty of assault inflicting serious bodily injury. On the same day, defendant pled guilty to attaining habitual felon status.

The trial court sentenced defendant at a prior record level V. Defendant was sentenced for a minimum term of 144 months and a maximum term of 182 months and ordered to pay a fine in the amount of \$1,000.00. From this judgment, defendant appeals.

II. Discussion

On appeal, defendant argues that (A) the trial court erred by admitting the State's exhibit number 4, a computer disk containing a recording of a 2 October 2009 phone conversation between defendant and Edwards and that (B) defendant was denied effective assistance of counsel where his counsel failed to move for a continuance and where his counsel failed to secure the attendance of the witnesses for the defense.

A. Admission of Telephone Conversation

In his first argument, defendant contends that the trial court erroneously admitted the State's exhibit number 4. Specifically, defendant argues that the trial court should have excluded this evidence because the State did not disclose this recording until the first day of trial, failing to comply with its obligation to provide timely discovery.

The State's exhibit number 4 consisted of a disk containing recordings of phone calls made by defendant from Iredell County jail. During a phone call made by defendant to Edwards on 2 October 2009 at 21:54 hours, defendant stated he did not want to go to prison. Edwards stated that she was "willing to help [defendant] but she is not going to get up there and lie." Defendant stated that she did not "have to lie, and she needs to stop saying stuff like that over the phone. . . . all she has to do is write a statement and then it won't even go as far as her getting on the stand." Defendant told Edwards that "the charges would be dismissed if she did that and there wouldn't be a trial."

"Determining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court." *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995) (citations omitted).

It is within the trial court's sound discretion whether to impose sanctions for a failure to comply with discovery requirements, including whether to admit or exclude evidence, and the trial court's decision will not be reversed by this Court absent an abuse of discretion. An abuse of discretion results from a ruling so arbitrary that it could not have been the result of a reasoned decision or from a showing of bad faith by the State in its noncompliance.

State v. McClary, 157 N.C. App. 70, 75, 577 S.E.2d 690, 693 (2003) (citations omitted).

Defendant argues that the State committed a discovery violation pursuant to N.C. Gen. Stat. § 15A-903 "which requires the State to turn over all documents and tangible objects material to the preparation of the defense." *State v. Stephens*, 347 N.C. 352, 362, 493 S.E.2d 435, 441 (1997). N.C. Gen. Stat. § 15A-903 provides as follows:

(a) Upon motion of the defendant, the court must order:

(1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant.

a. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other

matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C. Gen. Stat. § 15A-903(a)(1) (2013). Subsection (b) states that "[if] the State voluntarily provides disclosure under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section." N.C. Gen. Stat. § 15A-903(b). "If at any time during the course of the proceedings the court determines that a party has failed to comply . . . the court . . . may [p]rohibit the party from introducing evidence not disclosed." N.C. Gen. Stat. § 15A-910(a)(3) (2013).

Defendant argues that because the State was aware that Edwards had made a second statement on 16 October 2009 that contradicted her first statement made on 10 September 2009, the State should have been on notice and taken "action to find out why prior to the beginning of trial." Furthermore, defendant argues that the trial court "simply accepted the prosecutors' representations at face value [and] never tried to look 'behind the curtain.'"

However, after a careful review of the transcript at trial, we do not believe that the circumstances of this case support defendant's argument. The trial court made a thorough inquiry

as to how and when the State received notice that defendant had made phone calls from jail to Edwards, attempting to convince her to make a second statement.

On 3 September 2013, the State explained that Edwards was subpoenaed and was served on 22 August 2013 but had not made contact with the victim witness coordinator as directed in her subpoena. The prosecutor had attempted to call Edwards and Edwards had failed to appear in district court for two other pending matters. The trial court issued a show cause order and Edwards appeared.

On 5 September 2013, defendant's case was called for trial at 1:23 p.m. Prior to selecting the jury, the State informed the trial court that the State was given an opportunity to speak with Edwards for the first time on the morning of 5 September 2013. The State spoke with Edwards regarding her two inconsistent statements. It was during this meeting that Edwards first revealed to the State at 10:00 a.m. that "she gave that [second] statement while the Defendant was in jail and that he encouraged her to write that statement."

At 11:30 a.m. on 5 September 2013, the State requested a detective from the Iredell County Sheriff's Office locate phone calls made by defendant, while he was in the Iredell County

jail, to Edwards. Two copies of the State's exhibit number 4 were delivered to the State at 1:05 p.m. and defense counsel was informed of the disk at this time. As soon as the disks arrived, the prosecutor and defense counsel unsuccessfully attempted to listen to the contents of the disk together.

The trial court questioned the State as to whether it was the "first time the State knew of this statement?" and the State replied, "that's correct. First time I had an opportunity to speak with the witness concerning that second statement. Spoke with her in the presence of her [c]ounsel . . . this morning." Subsequently, the trial court allowed the admission of State's Exhibit number 4, finding no discovery violation and defendant's trial resumed on 6 September 2013.

Based on the foregoing set of circumstances, we are unable to hold that the trial court abused its discretion by finding that no discovery violation had occurred where both the State and defense learned of the 2 October 2009 conversation on the same day and the State disclosed the contents of the evidence to defense counsel as soon as it had access to the disk. Defendant's argument that the State failed to provide timely discovery is overruled.

B. Ineffective Assistance of Counsel

In his next issue on appeal, defendant argues that he received ineffective assistance of counsel where his attorney failed to move for a continuance in order to listen to the contents of the disk in the State's exhibit number 4 and where his attorney failed to secure the attendance of witnesses. We address each argument in turn.

"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). In order to satisfy this burden, a defendant must satisfy the following two-part test as set out in *Strickland v. Washington*:

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.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Prejudice is established by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694, 80 L. Ed. 2d at 698 (citation and quotation marks omitted).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Allen*, __ N.C. App. __, __, 756 S.E.2d 852, 856 (2014) (citation omitted).

As to whether an ineffective assistance of counsel claim can be dealt with on appeal, [the Supreme] Court has stated, "[I]neffective 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." Therefore, on direct appeal we must determine if these ineffective assistance of counsel claims have been prematurely brought. If so, we must dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding.

State v. Campbell, 359 N.C. 644, 691, 617 S.E.2d 1, 30 (2005) (internal citations omitted).

In regards to defendant's argument that his counsel was ineffective by failing to move for a continuance to listen to the contents of the disk contained in the State's exhibit number 4, we review the merits of defendant's argument.

Defendant's argument that his counsel's performance was deficient is based on the assumption that his counsel did not have sufficient time to review the contents of the disk. However, the record is clear that defense counsel was given notice as to the contents of the disk in the afternoon of 5 September 2013. Opening statements did not begin until 6 September 2013 and the trial court acknowledged that "[t]hat will give you sufficient time to review [the disk] and also review it with your client, who based upon what the State has told me, should have known that was there[.]" Defense counsel did not object to this statement. On the morning of 6 September 2013, defense counsel revealed to the trial court that he had had an opportunity to listen to the contents of the disk and had also received a written summary of the 2 October 2009 phone call from the State. In addition, we note, and defendant concedes, that defense counsel made a motion to exclude the challenged evidence pre-trial and objected twice when the evidence was offered at trial.

Based on the foregoing facts, defense counsel's failure to move for a continuance was unnecessary as he had sufficient time to listen to the contents of the disk. Therefore, because defendant has failed under the first prong of the *Strickland*

test, establishing that defense counsel's performance was deficient, we need not address the second prong and hold that defendant did not receive ineffective assistance of counsel.

Furthermore, defendant argues that he received ineffective assistance of counsel when his counsel failed to secure the attendance of witnesses for the defense.

After reviewing the record, we conclude that this claim of ineffective assistance of counsel cannot be properly decided on the merits based on the record before us. See *State v. Jordan*, 321 N.C. 714, 719, 365 S.E.2d 617, 620 (1988) (stating that we do not address defendant's arguments alleging ineffective assistance of counsel where the claims "are not developed on the record and are more properly addressed by a Motion for Appropriate Relief"). Therefore, defendant's argument is dismissed without prejudice to defendant's right to raise this claim through a motion for appropriate relief.

III. Conclusion

For the reasons stated above, this Court holds that the trial court did not err by admitting the State's exhibit number 4. Defendant's first claim of ineffective assistance of counsel is without merit and his second claim of ineffective assistance of counsel is dismissed without prejudice.

No error in part; dismissed in part.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).