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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 17-349

Filed: 19 December 2017

Guilford County, No. 15 CRS 24301, 15 CRS 68639

STATE OF NORTH CAROLINA

v.

JOHN SHADRICK MATTHEWS, III, Defendant.

Appeal by Defendant from judgments entered 14 April 2016 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Stuart M. Saunders, for the State.

Geeta N. Kapur, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

John Shadrick Matthews, III ("Defendant") appeals following a jury verdict convicting him of voluntary manslaughter and possession of a firearm by a convicted felon. Following the verdicts, the trial court imposed a sentence of 83 to 112 months for voluntary manslaughter, to be followed by a sentence of 17 to 30 months for

possession of a firearm by a convicted felon. On appeal, Defendant contends he received ineffective assistance of counsel. We disagree.

I. Factual and Procedural History

A Guilford County Grand Jury indicted Defendant for first-degree murder on 16 March 2015, and for possession of a firearm by a felon on 15 June 2015. A superseding indictment for possession of a firearm by a felon was issued on 25 January 2016, amending the date of the offense. On 11 April 2016, Defendant filed a notice of intent to assert self-defense, but did not request a *Harbison* hearing. The same day, the Guilford County Superior Court called Defendant's case for trial.

Prior to trial the presiding judge asked defense counsel whether there would be any admissions during opening statements. Counsel replied "[n]o, sir" yet, her co-counsel stated, "[a]ctually, Your Honor . . . [i]n our opening statements, we are going to acknowledge [Defendant] was a convicted felon and he obtained a firearm after having been a convicted felon." The judge then addressed Defendant and the following exchange occurred:

> THE COURT: You have the benefit of two very skilled and experienced attorneys, but I want to make sure I am doing my job. So you heard [your attorneys] may mention those two things: You have a prior felony conviction, and [your attorney] may admit at some point you possessed some type of firearm after having been convicted of a felony. Have you had an opportunity to talk to your attorneys about [the] strategic advantages of doing that and any disadvantages that may be associated with that?

> DEFENDANT: Yes, sir.
>
> THE COURT: And do you authorize your attorneys to make those admissions if they believe it to be in your best interest?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Do you have any concerns about that, sir?
>
> DEFENDANT: No, sir.

During opening arguments, the defense counsel stated:

> [Defendant] did only what he needed to do to keep himself safe and nothing more. When Demetria Lane and Kevin Lane started a fight with [Defendant] that was going to end in him being badly beaten or worse. He did the only thing he knew to do; he pulled out a knife. And when Kevin Lane kept coming at him even when he had the knife out [Defendant] did the only thing he could do, he stabbed Kevin Lane. . . . [Defendant] also owned a knife that he used for hunting that he uses as part of his job occasionally. And that knife that he uses sometimes at work and in the truck that he uses for work. [Defendant] also owns a firearm a few years ago he [bought] for his own protection, the protection of his family, a 40 caliber semiautomatic handgun. . . . [I]t was two men coming at him and he did what he could think to do, he pulled out that knife. He warned them to stay back, [s]tay away. Kevin already comes up to him and chest bumped him. So he pulled out the knife, backed up to tell Kevin to back off. Kevin didn't back off. Kevin came at [Defendant] again. . . . [Defendant] did the only thing he could do and he swung the knife. He hit Kevin in the back one time. . . .

The state called Demetria Lane ("Lane") who is the father of the victim, Kevin Lane ("Kevin"). On 15 February 2015, Kevin called Lane, frantically declaring

"[Defendant] said I took his gun." Lane immediately went to meet Kevin at the apartment they shared with Lane's mother. Lane waited in the parking lot until Kevin, Defendant, and Scotty Snow arrived. Lane got out of his truck, and the three men walked towards him, while arguing about the gun. Lane assured Defendant his gun was not in their apartment.

Kevin and Defendant continued to argue about the gun and Lane tried keep Kevin quiet. Kevin said to Defendant "[w]atch this mother f*****, I'm going to show you. I don't got your mother f******* gun[.]" Kevin called Defendant a punk a** mother f****, and Defendant then pulled out a knife and lunged at Kevin. Kevin slipped backwards, and Defendant hit him in his side. Defendant took off running, jumped over a chain barrier, and ran to his truck. Later that afternoon Kevin died from his wound. Lane testified neither he nor Kevin had a weapon on their person at the time, and Kevin had been drinking prior to the incident.[1]

The State next called Christen Franklin, who was dating Kevin at the time of the incident.[2] On the day of the incident she and Kevin went to Defendant's house to purchase marijuana. While they were there, Defendant accused Christen and Kevin of stealing his gun. Kevin told Defendant, "[w]e can go over to my grandma's house,

[1] The State next called Officer Sean Patterson who responded to the scene of the incident and interviewed Lane. Officer Patterson corroborated Lane's testimony.

[2] A few months prior to the incident Christen and Kevin periodically separated, and Christen was involved with Defendant.

I will prove to you that I do not have your gun." Christen and Kevin then left in her vehicle, and Defendant followed in his truck along with Snow.

When they arrived at Kevin's apartment, Christen remained in the vehicle. Kevin got out of the vehicle and he, Defendant, and Snow walked out of her line of vision. Christen testified Kevin did not have a weapon. Later Christen saw Defendant and Snow run back to Defendant's truck. She testified "[Defendant] looked at me. He was pale white, he had no color, his soul just gone. I could tell something wasn't right . . . ." She then exited her car and walked towards Kevin's apartment. She saw Kevin lying on the ground, surrounded by blood.

The State next called David Willis, who lived in the same apartment complex as Kevin. On the day of the incident, Willis saw Kevin, his father, and two other men in the parking lot and he went outside to ask them for a cigarette. Upon approaching the group, Willis noticed Defendant "getting in Kevin's face" and "it looked like he wanted to fight." He noticed Kevin "was . . . more hands down, . . . wanting to resolve whatever was going on, ..." He then stated "[Defendant] got in Kevin's face. I don't know if he was pushed back . . . but they separated for a minute. And [Defendant] pulled out a knife, . . . and came towards Kevin and Kevin stepped back and then

[Defendant] reached around and stabbed him on his backside." Defendant then taunted Kevin, stating "Yeah, ni****" and ran off.[3]

At the close of the State's evidence Defendant moved to dismiss both charges and the court denied the motion.[4]

Defendant called Mary Pannell, Defendant's fiancé. Pannell was with Defendant on the date of the incident. She corroborated earlier testimony regarding Kevin and Christen purchasing marijuana from Defendant, and the conversation which took place concerning Defendant's missing gun. She stated Defendant remained amicable, and Kevin seemed slightly agitated after Defendant accused him of taking the gun.

When the group arrived at Kevin's apartment, Mary remained in the vehicle, and could not see the incident which took place. When Defendant and Scotty returned to the car "[Defendant] said that they rushed him and he stabbed Kevin." They then drove away, and Defendant threw the knife out of the window.[5]

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[3] The State then called Detective Robert Mayo who interviewed Willis after the incident. Mayo's testimony regarding the interview was consistent with Willis's testimony. In the interview Willis stated after Defendant stabbed Kevin, he stood back and nodded his head up and down saying "Yeah, ni****."

[4] The State also called Detective Benjamin Mitchell who testified regarding the recovery of the knife and sheath which were used in the attack. The State next called Ryan Dutko, a forensic specialist who performed a laboratory examination on the knife and sheath, and determined the knife had blood on it consistent with Kevin's DNA profile. The State then called Craig Nelson, as an expert in forensic pathology. Dr. Nelson performed an autopsy on Kevin Lane and determined the cause of death was a stab wound to the victim's left flank. He also performed a toxicology report and determined Kevin's blood alcohol concentration was .08 milligrams per deciliter.

[5] Defendant also called two character witnesses, Charles Marion and Suresh Vaswani, who testified concerning their opinion of Defendant as a truthful, peaceful individual.

Defendant then called Scotty Snow who was also with Defendant at the time of the incident. He stated on the way to Kevin's apartment, the group stopped at a gas station and there was no indication of a problem between Defendant and Kevin. Yet, upon arriving at Kevin's apartment, the situation quickly changed. As the group exited their cars, Kevin started yelling for his father, and when Lane exited his car Kevin's demeanor changed from "peaceful to wanting to just start something." Kevin "started yelling and ranting and raving at [Defendant] and then [Defendant] said something to him." Kevin bumped Defendant with his chest, knocking him back, and Defendant pulled out a knife stating: "[l]ook, man, I'm not here for this, I just want to get my property back and then I am leaving[.]" Kevin and his father started coming towards Defendant, and Defendant swung the knife in what looked like an attempt to keep them back. Kevin again moved towards Defendant and Defendant stabbed him.

Defendant then testified on his own behalf. On the date of the incident, after completing the marijuana transaction, Defendant asked Kevin and Christen in a calm manner: "[w]hat gives you [the] right to come to my house and [steal] my pistol?" After denying they stole the gun, Kevin invited Defendant to search his house. He suspected Christen to have taken his gun because she knew where Defendant kept it, and she was the only person to have the code to the keyless entry of his house.

Defendant stated he considered Kevin to be a friend, and he never intended to have a fight with Kevin.

When the group arrived at Kevin's apartment, Defendant took his knife "just in case something was to happen I [would] have something to defend myself with." As they walked towards the apartment, Kevin was in front of him, and motioned for someone to come over. Then Kevin spun around and his demeanor changed. Kevin pushed him, and Defendant backed up and pulled out his knife. He pointed it at Kevin and stated "I am not here for this." Defendant stated "I didn't think he was going to come at me again. He [came] at me again so I stabbed and defended myself." Although Defendant did not believe Kevin had a weapon, he felt the need to use his knife because Kevin, who was much larger than Defendant, acted like he was going to beat Defendant up. Defendant denied ever taunting Kevin. Defendant's intention was not to kill Kevin, but to "get him off of me. To get him away from me because I was trying to leave."

At the close of all the evidence, Defendant renewed his motions to dismiss both charges and the court denied the motions. The jury returned a verdict of guilty of voluntary manslaughter and guilty of possession of a firearm by a felon. The trial court imposed consecutive sentences of 83 to 112 months imprisonment for voluntary manslaughter, and 17 to 30 months imprisonment for possession of a firearm by a convicted felon. Defendant gave timely notice of appeal to this Court.

II. Standard of Review

"[T]his Court reviews whether a defendant was denied effective assistance of counsel *de novo*." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (italics added). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (*quoting In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

Defendant argues his trial counsel conceded his guilt during opening and closing arguments, without his consent. Thus, he contends his counsel provided *per se* ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 23 of the North Carolina Constitution. We disagree.

We note, ordinarily "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). The North Carolina Supreme Court has instructed "should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them 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, 153 L. Ed. 2d 162 (2002). However, in this case we can determine from the face of the record Defendant did not receive ineffective assistance of counsel.

Both the United States Constitution and the North Carolina Constitution guarantee the right to effective assistance of counsel. U.S. Const. amend. VI, XIV, N.C. Const. art. I, § 19, 23. Ordinarily to establish ineffective assistance of counsel, Defendant must show "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). This requires Defendant to 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.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). In *State v. Harbison* our Supreme Court stated "[a]lthough this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *State v. Harbison*, 315 N.C.

175, 179, 337 S.E.2d 504, 507 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986) (quoting *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984)). The court held "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison* at 180, 337 S.E.2d at 507-08. And in *State v. Holder* this Court held "a defendant receives ineffective assistance of counsel *per se* when the defendant's counsel concedes the defendant's guilt to either the offense charged or a lesser-included offense without the defendant's consent." 218 N.C. App. 422, 424, 721 S.E.2d 365, 367 (2012).

In *Harbison* the defense counsel expressly stated during closing argument, he did not think the jury should find the defendant innocent. He stated, without the defendant's consent: "I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." *Harbison* at 178, 337 S.E.2d at 506. The court determined this constituted ineffective assistance of counsel and afforded the defendant a new trial. *Id.* at 180, 337 S.E.2d at 507-08.

This Court has noted "[a]dmission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." *State v. Wilson*, 236 N.C. App. 472, 476, 762 S.E.2d

894, 897 (2014); *see also State v. Fisher*, 318 N.C 512, 533, 350 S.E.2d 334, 346 (1986) ("Although counsel stated there was malice, he did not admit guilt . . . . [Therefore,] this case does not fall with the *Harbison* line of cases[.]").

Here, Defendant first argues his counsel admitted his guilt by stating he possessed a knife and he stabbed the victim. Defendant argues this constitutes *per se* ineffective assistance of counsel as it amounts to an admission of guilt. However, it was evident counsel's entire trial strategy relied on the theory of self-defense and Defendant's lack of specific intent to kill. The defense counsel's opening and closing statements were both consistent with the overwhelming evidence admitted at trial. Five witnesses testified Defendant stabbed the victim, including Defendant himself. Furthermore, the evidence admitted at trial was uncontroverted, and is not disputed on appeal. Even *assuming arguendo* Defendant did not consent to this trial strategy, such an admission does not amount to a *Harbison* error—counsel did not admit Defendant's guilt. Instead counsel repeatedly asserted Defendant acted in self-defense, which would negate Defendant's guilt of murder and of any lesser-included offense. In closing arguments counsel repeatedly maintained Defendant's innocence.

> John Matthews is innocent. He told you how he perceived what happened in that parking lot, and he told you why he believed he had to do what he did. He told you that he believed that if he did nothing, he would suffer great bodily injury. And so he pulled that knife and ultimately stabbed Kevin Lane in an effort to protect himself from that possibility. . . . John Matthews was not required to take a beating on February 17, 2015, he was not required to let

> Kevin Lane's assault go unanswered. The law in North Carolina gives John Matthews the right to use whatever force he deemed necessary to defend himself, so that is exactly what he did. . . . And that is, ladies and gentlemen, self-defense. . . . [Y]our verdict should be not guilty. . . . Find him not guilty.

Because this case does not fall within the *Harbison* line of cases, ineffective assistance of counsel is not presumed. Defendant's only argument on appeal concerns *per se* ineffective assistance of counsel under *Harbison*; therefore, he waives review under the ordinary *Strickland* test.

Defendant next argues his counsel admitted his guilt to the charge of possession of a firearm by a convicted felon, without his consent. In *Harbison* the Supreme Court acknowledged "[b]ecause of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences." *Harbison* at 180, 337 S.E.2d at 507. Yet, "[n]either *Harbison* nor any subsequent case specifies a particular procedure that the trial court must invariably follow when confronted with a defendant's concession[.]" *State v. Berry*, 356 N.C. 490, 514, 573 S.E.2d 132, 148 (2002).

In *State v. Matthews* our Supreme Court stated "[f]or us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession." 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004). And in *State v. Maready* this Court held "*Harbison* and *Matthews* clearly indicate that the trial court

must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." 205 N.C. App. 1, 7, 695 S.E.2d 771, 776 (2010).

Defendant asserts his consent to plead guilty to this charge was not made knowingly and voluntarily, because the trial court failed to ask Defendant whether he understood the consequences of his decision—specifically, the sentence he would face. Although *Maready* states the defendant must be aware of the potential consequences of his admission, it does not stand for the proposition the trial court must tell Defendant the specific sentence he will face.

We conclude the trial court's inquiry of Defendant was sufficient to demonstrate Defendant knowingly admitted his guilt to the charge of possession of a firearm by a convicted felon. Furthermore, on both direct and cross examination Defendant admitted the same, and the uncontroverted testimony of several witnesses further established Defendant possessed a firearm while a convicted felon. On direct examination the following exchange occurred.

> Q. So at that point in time, did you own a gun?
> A. At the time, did I have one in the house?
> Q. Yes, sir.
> A. Yes, I did.
> Q. How long had you had the gun prior to it turning up missing?
> A. Roughly about a year after I moved there, so roughly five or six years.

> Q. You are a convicted felon and were not permitted to have a gun, so why did you?
> A. For my home protection. . . .

[T. 376] On cross examination the State elicited testimony regarding Defendant's prior convictions and the following exchange occurred.

> Q. Were you aware when you were convict[ed] of that first felony in 2006 that it was against the law for you to own or possess or touch a firearm?
> A. Yes, sir.
> Q. And yet you have told us that you owned a 40 caliber pistol, is that right?
> A. Yes, sir.
> Q. When did you obtain that pistol?
> A. . . . let's say about . . . six or seven years ago.
> Q. Did you know at the time when you did that you were violating the law?
> A. Yes, sir.
> . . . .
> Q. And were you aware that you had committed that crime at that point?
> A. Yes, sir.
> Q. That's one of the charges facing you today, isn't it?
> A. Yes, sir.
> Q. You admitted you are guilty of that?
> A. Yes, sir.

Therefore, we conclude Defendant did not receive ineffective assistance of counsel.

IV. Conclusion

For the foregoing reasons, we hold Defendant received a fair trial free from error.

NO ERROR.

Judges STROUD and TYSON concur.

Report per Rule 30(e).