IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-332

Filed: 16 October 2018

Pasquotank County, No. 12 CRS 51952, 13 CRS 19, 13 CRS 33

STATE OF NORTH CAROLINA

v.

SAMUEL EUGENE GEDDIE

Appeal by defendant from trial conducted by Judge J. Carlton Cole and judgments entered 30 October 2017 by Judge Walter H. Godwin, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 18 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for defendant.

ARROWOOD, Judge.

Samuel Eugene Geddie ("defendant") appeals from judgments entered on his convictions of robbery with a dangerous weapon, possession of a weapon of mass destruction, and possession of a firearm by a felon. For the reasons stated herein, we find no error in part, and dismiss in part.

I. Background

On 7 January 2013, a Pasquotank County Grand Jury indicted defendant for robbery with a dangerous weapon, possession of a weapon of mass destruction, possession of a firearm by a felon, and attaining habitual felon status. On 17 March 2014, the Grand Jury indicted defendant for carrying a concealed gun. On 5 September 2017, the Grand Jury returned an indictment for possession with intent to sell or deliver a controlled substance, a superseding habitual felon indictment, and a superseding possession of firearm by felon indictment.

The matter came on for trial on 5 September 2017 in Pasquotank County Superior Court, the Honorable J. Carlton Cole presiding. Defendant was tried jointly with James Andrew Kelly, III ("Kelly"). The State's evidence tended to show as follows.

Around 2 a.m. on 30 November 2012, Kayla Turner ("Turner") drove defendant and Kelly to a gas station to buy cigarettes. Defendant sat in the front passenger seat, and Kelly sat in the backseat. As the car approached the gas station, defendant instructed Turner to turn into a Hampton Inn parking lot. Once in the parking lot, Kelly pointed out a woman in her car, counting money.

Defendant then directed Turner to turn into the back of a Golden Corral parking lot, which was just over 50 yards from the Hampton Inn parking lot. Once parked at the Golden Corral, defendant and Kelly went to the trunk of the car, and

then "took off" towards the hotel. Turner remained in the car, with the understanding that defendant and Kelly had left to rob the woman in the Hampton Inn parking lot.

Around the same time, Dr. Gina Francis ("Dr. Francis") heard someone quickly approach her from behind as she walked from her car to the Hampton Inn. Dr. Francis turned and saw a masked assailant, holding a shotgun. Dr. Francis swung her purse at the assailant, eventually dropping it. The assailant then "cowered over [Dr. Francis] with the butt of the gun as though he was going to hit [her] in the head with it." He tapped Dr. Francis' head with the gun, as if telling her to get down. At that time, she heard another person in the parking lot say "something to the effect of, come on man, let's go." The assailant took Dr. Francis' purse, and both assailants ran towards the Golden Corral.

At approximately 2:30 a.m., Police Officer David Sutton ("Officer Sutton") noticed Turner's parked car running in the Golden Corral's parking lot. He also saw a person running through the parking lot to the area past the car, holding a black bag and a black blunt object. The person then walked towards him, no longer holding the bag or blunt object. Officer Sutton recognized the individual as defendant, who he knew from prior encounters. Defendant told Officer Sutton that he and Turner had argued, and Turner had attempted to run him over with her car. Observing Turner and Kelly in the car, Officer Sutton radioed for assistance with the alleged domestic disturbance.

Shortly after assistance arrived, Officer Sutton received information over the radio that an armed robbery had just occurred at the Hampton Inn, which was only "a little over a half a football field" from Turner's parked car. Given the close proximity and time of night, the officers detained defendant, Kelly, and Turner as suspects. The officers retrieved an air soft gun from the car and a 20-gauge shotgun shell from Kelly's coat pocket. Officer Sutton also found a loaded 20-gauge sawn off shotgun and Dr. Francis' purse in the area where defendant ran before approaching Officer Sutton. Based on this evidence, the officers arrested defendant, Kelly, and Turner for the robbery of Dr. Francis.

At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court denied the motion. Neither defendant nor Kelly presented evidence at trial. Defendant renewed his motion to dismiss, which the trial court denied.

The jury found defendant guilty of robbery with a dangerous weapon, possession of a weapon of mass destruction, and possession of a firearm by a felon, and found Kelly guilty of robbery with a dangerous weapon. Defendant pleaded guilty to possession with intent to sell or deliver a controlled substance and possession of firearm by felon. The trial court continued the habitual felon phase of the trial, postponing defendant's sentencing.

On 30 October 2017, the matter came on for sentencing before the Honorable Walter H. Godwin, Jr. Defendant pleaded guilty to attaining the status of a habitual felon. The trial court entered three consecutive sentences of 146 to 188 months for the robbery with a dangerous weapon, possession of a weapon of mass destruction, and possession of firearm by felon convictions. In accordance with the plea agreement, the trial court ordered that the remaining convictions, possession of firearm by felon and possession with intent to sell or deliver a controlled substance, run concurrently with these sentences.

Defendant appeals.

II. Discussion

Defendant argues on appeal that the trial court plainly erred by failing to submit the offense of common law robbery to the jury, and failing to instruct on aggravated armed robbery and aggravated common law robbery. He also argues that he received ineffective assistance of counsel, and that the trial court erred when it denied defendant's counsel's motion to withdraw. We address each argument in turn.

A. Common Law Robbery

Defendant argues the trial court plainly erred by failing to submit the lesser included offense of common law robbery to the jury when it submitted the offense of robbery with a dangerous weapon. However, defendant did not request this

instruction at trial. Furthermore, the following discussion took place at the charge conference:

> The Court: As to the remaining instructions, any additions and/or deletions?
>
> [Kelly's Counsel]: No, Your Honor. I talked to Mr. Kelly about this yesterday and he has requested that the jury either find him guilty of this charge or not. There is no lesser included charge.
>
> The Court: And [defendant's counsel]?
>
> [Defendant's Counsel]: Judge, we have no reservations about this, we're fine. Thank you.

This exchange demonstrates that defendant not only failed to preserve this issue for appellate review by failing to object, N.C.R. App. P. 10(a)(2) (2018), but he also invited the error. *See State v. Harris*, 338 N.C. 129, 150, 449 S.E.2d 371, 380 (1994) (holding that when a defendant agrees to an instruction during the charge conference, any purported error was invited error); *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (explaining that a defendant who invites error waives his right to all appellate review concerning the invited error, including plain error review). Therefore, this issue is waived and we need not address it on appeal.

B. Aggravated Armed Robbery and Aggravated Common Law Robbery

Next, defendant argues the trial court plainly erred by failing to submit "aggravated armed robbery" and "aggravated common law robbery" to the jury instead of the charge of possession of a weapon of mass destruction.

Defendant did not object to the jury instructions at trial, and failed to request an instruction on aggravated armed robbery or aggravated common law robbery. Therefore, the issue before us on appeal is unpreserved. *See* N.C.R. App. P. 10(a)(2). However, in criminal cases, an issue that was not preserved by objection noted at trial "may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

"[P]lain error review . . . is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted). To show plain error, a "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Accordingly, the error must have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and internal quotation marks omitted).

Defendant maintains it was error for the trial court to fail to submit aggravated armed robbery and aggravated common law robbery to the jury. Currently, there are no such substantive crimes in North Carolina. However, defendant bases his argument on the premise that the possession of a weapon of mass destruction charge is indistinguishable from the aggravating factor listed in N.C. Gen. Stat. § 15A-

1340.16(d)(8) (2017), "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Therefore, he argues, the Rule of Lenity requires that the trial court submit armed robbery and the lesser included offense of common law robbery with the aggravating factor listed in N.C. Gen. Stat. § 15A-1340.16(d)(8) to the jury as "aggravated armed robbery" and "aggravated common law robbery" instead of the possession of a weapon of mass destruction charge, as doing so would reduce defendant's sentence by eliminating the possession of a weapon of mass destruction charge and the accompanying habitual felon sentence.

The defendant in *Harris* raised a similar argument, requesting that our Court review a potential sentencing factor and a substantive offense—aggravated common law robbery—as a lesser included substantive offense to armed robbery. *See State v. Harris*, 222 N.C. App. 585, 592, 730 S.E.2d 834, 839 (2012). We held there was no merit to this argument in part because "there is no such offense as 'aggravated common law robbery' in North Carolina." *See id.* at 593, 730 S.E.2d at 840. In accordance with our Court's decision in *Harris*, we decline defendant's request that we review potential sentencing factors combined with an offense as a new substantive offense under North Carolina law. We find no merit to defendant's argument, as there is no such substantive offense as "aggravated common law robbery" or "aggravated armed robbery" in North Carolina.

C. Ineffective Assistance of Counsel

Defendant next argues that he received ineffective assistance of counsel. We decline to address this argument.

Generally, "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) (citations omitted). Such claims will only be decided on direct appeal if "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. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and internal quotation marks omitted). Therefore, on direct appeal, our Court must first "determine if these ineffective assistance of counsel claims have been prematurely brought[,]" and then, "[i]f 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) (citation and internal quotation marks omitted).

To prevail on an ineffective assistance of counsel claim, a defendant must first "show that counsel's performance fell below an objective standard of reasonableness[,] and, "[s]econd, . . . he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent

the error." *State v. Blakeney,* 352 N.C. 287, 307-308, 531 S.E.2d 799, 814-15 (2000), *cert. denied,* 531 U.S. 1117, 148 L. Ed. 2d 780 (2001) (citing *Strickland v. Washington,* 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984) and *State v. Braswell,* 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)).

"Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 30 (citations, internal quotation marks, and alteration omitted).

> 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 . . . .

Id. at 690-91, 617 S.E.2d at 30 (quoting *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694).

Here, defendant lists seven specific areas in which his counsel was allegedly deficient: (1) his counsel failed to move to dismiss the charge of possession of a weapon of mass destruction for being unconstitutionally vague; (2) his counsel failed to prohibit irrelevant and highly prejudicial information from being shown to the jury as part of the evidence supporting the possession of firearm by felon charge, (3) his

counsel failed to object or file a motion for appropriate relief contending the consecutive sentence for possession of weapon of mass destruction violates the double jeopardy clause, (4) his counsel failed to object or file a motion for appropriate relief contending the habitual felon sentences imposed violated the Eighth Amendment's requirement that sentences be "graduated," (5) his counsel failed to object or file a motion for appropriate relief contending the habitual felon sentences violated the Eighth Amendment's proportionality component, (6) his counsel failed to object or file a motion for appropriate relief when the trial court did not place on the record that he considered evidence of mitigating factors before imposing presumptive range sentences, and (7) his counsel failed to preserve the contention that the charge of possession of firearm by felon cannot trigger the habitual felon enhancement.

As defendant's arguments concern potential questions of trial strategy and counsel's impressions, the record lacks essential information required to evaluate defendant's ineffective assistance of counsel claims. Moreover, there is an absence of information related to the communications between defendant and his counsel leading up to trial. Therefore, an evidentiary hearing is required to conclusively determine these issues. We dismiss these arguments without prejudice to defendant's right to file a motion for appropriate relief in Superior Court.

D. Motion to Withdraw

Defendant argues the trial court abused its discretion by denying his counsel's motion to withdraw. We disagree.

"We review the denial of a motion to withdraw for abuse of discretion." *State v. Warren*, 244 N.C. App. 134, 142, 780 S.E.2d 835, 841 (2015) (citation omitted). Pursuant to N.C. Gen. Stat. § 15A-144 (2017), "[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

"[T]o establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." *State v. Thomas*, 350 N.C. 315, 328, 514 S.E.2d 486, 495 (1999) (citation omitted).

> In order to establish ineffective assistance of counsel, a defendant must establish (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by his attorney's performance to the extent there exists a reasonable probability that the result of the trial would have been different absent the error.

State v. Skipper, 146 N.C. App. 532, 537-38, 553 S.E.2d 690, 694 (2001) (citing *State v. Jaynes*, 353 N.C. 534, 547-48, 549 S.E.2d 179, 191 (2001)).

Defendant's counsel moved to withdraw as counsel the morning of trial because defendant "told [him] in no uncertain terms he does not want [him] representing him. [Defendant] doesn't feel like [his counsel has] represented him appropriately[.]" Defendant personally addressed the court, asserting he was unsatisfied with his counsel, and had notified the State Bar of this fact. Defendant's reasoning seemed to stem from his belief that, although counsel met with him, he did not meet with him enough. Defense counsel acknowledged the State Bar contacted him the weekend before trial to notify him that defendant submitted a complaint about his counsel.

The State asked that the motion to withdraw be denied, as defendant discharged counsel immediately before trial in two prior incidences, and it appeared defendant would "do anything to avoid having this case tried." The State also noted that the charges at issue were five years old. Based on these arguments, the trial court denied the motion.

Given defendant's history of attempting to discharge counsel on the eve of trial, it cannot be said that the trial court's denial of the motion to withdraw was arbitrary or manifestly unsupported by reason. The trial court did not abuse its discretion by denying defense counsel's motion to withdraw as defendant's counsel.

III. Conclusion

For the reasons discussed, we find no error in part, and dismiss defendant's ineffective assistance of counsel claims without prejudice to his right to file a motion for appropriate relief.

NO ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).