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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-523

Filed: 17 December 2019

Wilson County, No. 16 CRS 50973

STATE OF NORTH CAROLINA

v.

CORNELIUS GENENTHIUS GIBBS, Defendant.

Appeal by defendant from judgment entered 7 June 2018 by Judge James K. Roberson in Wilson County Superior Court. Heard in the Court of Appeals 13 November 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Regina T. Cucurullo, for the State.*

*Paul F. Herzog, for Defendant-Appellant.*

YOUNG, Judge.

This appeal arises out of an ineffective assistance of counsel claim. Defendant's trial counsel did not provide ineffective assistance of counsel when he failed to move to dismiss the charge of malicious conduct by a prisoner. Any variance in the indictment and the evidence was harmless. Therefore, we affirm.

I. Factual and Procedural History

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On 21 March 2016, Wilson County probation officer Phillip Cheek, II (“Officer Cheek”) arrested Cornelius Genenthus Gibbs (“Defendant”) on warrants for parole violations and obtaining property by false pretense. As Officer Cheek tried to walk Defendant through the jail door, Defendant tried to pull away, refused to comply with orders, and spat in Officer Cheek’s face. As a result, the officer sought additional charges. The indictment for malicious conduct by a prisoner stated that Defendant

unlawfully, willfully and feloniously did knowingly while in the custody of a local confinement facility, Wilson County Detention Center, caused to be used as a projectile bodily fluid, saliva, at Probation Officer Phillip Cheek, an employee of a local government, the Department of Corrections/ Division of Community Service, Wilson, North Carolina, while the employees were in the performance of their duties, escorting the defendant to the Wilson County Jail.

(emphasis added) As a result of being spat on, Officer Cheek was subjected to health treatments to be tested for diseases, and had to refrain from certain activities with significant others to avoid transmitting any possible diseases.

The jury found Defendant guilty of resisting a public officer and malicious conduct by a prisoner. The trial court sentenced Defendant to a minimum of 25 months and a maximum of 39 months with the North Carolina Division of Adult Correction.

Defendant failed to give oral notice of appeal at his sentencing hearing, but on 8 June 2018 he filed a handwritten note entitled “Notice of Appeal.” We recognize

that this notice of appeal was deficient because it failed to satisfy the requirements in Rule 4 of the North Carolina Rules of Appellate Procedure. The notice, while timely, failed to identify the court to which his appeal was taken and failed to demonstrate service on the district attorney. We suspend the appellate rules and in the exercise of our discretion grant Defendant's writ of certiorari.

## II. Standard of Review

It is well established that 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."

*State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)).

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted) (2006).

III. Ineffective Assistance of Counsel

Defendant contends that he did not receive effective assistance of counsel when his trial counsel failed to dismiss the charge of malicious conduct by a prisoner where the indictment and the evidence offered at trial may have varied on who was the legal custodian of Defendant at the time of the offense. We disagree.

On review of the cold record, it is abundantly clear that there was not ineffective assistance of counsel. This Court held that a defendant must show that he was actually misled by a variance when preparing for trial, or that the variance otherwise hampered his defense before the variance will be considered error. *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996). Defendant must show that the variance affects the nature of the offense charged. *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997). The verdict of the trial court should not be reversed unless the defendant is prejudiced as a result of the variance. *Weaver*, 123 N.C. App. at 291, 473 S.E.2d at 371.

Defendant was charged with malicious conduct by a prisoner under N.C. Gen. Stat. § 14-258.4. This statute provides five elements which must be alleged and proved by evidence offered at trial. *State v. Crouse*, 169 N.C. App. 382, 386, 610 S.E.2d 454, 457 (2005). The elements are: (1) that a person in legal custody; (2) knowingly and willfully (3) threw, emitted, or caused to be used as a projectile, bodily

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fluids or excrement (4) at a State or local government employee (5) in the performance of the employee's duties. *Id.* N.C. Gen. Stat. § 14-258.4 (2019).

Defendant takes issue with the first element arguing that when he spat on Officer Cheek he was in the custody of Wilson County Detention Center but the State only offered evidence that Defendant was in the custody of his probation officer. "A variance will not result where the allegations and proof, although variant, are of the same legal significance." *State v. Craft*, 168 N.C. 208, 212, 83 S.E. 772, 774 (1914). To satisfy the custody element of malicious conduct by a prisoner, the State needed only to show that Defendant was in legal custody. The evidence offered by the State clearly proved that Defendant was in legal custody when he spat on Officer Cheek. Defendant acknowledges the indictment does not require an allegation of a particular law enforcement facility, agency, or person. He nonetheless urges this Court to hold that where the State elected to allege a particular law enforcement facility, agency, or officer, the State is required to prove that Defendant was in the custody of that particular law enforcement facility, agency, or officer. We decline to so hold.

Furthermore, Defendant did not show that he was prejudiced by the variance. Absent prejudice, the variance is immaterial and would not have led to a different result at trial. *Allen*, 360 N.C. at 310-11, 626 S.E.2d at 282. Because there is not a material variance in the indictment, Defendant's trial counsel's failure to move to dismiss the malicious conduct by a prisoner charge based on the indictment was not

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deficient. *Id.* at 316-17, 626 S.E.2d at 286-87. Accordingly, Defendant cannot show that the result of Defendant's proceedings would not have been different had trial counsel moved to dismiss that charge. Therefore, Defendant was not deprived of effective assistance of counsel.

AFFIRMED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).