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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-476

No. COA20-723

Filed 7 September 2021

Rockingham County, Nos. 11 CRS 52900, 11 CRS 52904, 14 CRS 51578

STATE OF NORTH CAROLINA

v.

JUSTIN STEPHEN HERR

Appeal by Defendant from Order entered 15 August 2019 by Judge Edwin G. Wilson in Rockingham County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

North Carolina Center on Actual Innocence, by Christine C. Mumma and Guy J. Loranger, for defendant-appellant.

HAMPSON, Judge.

¶ 1

Justin Stephen Herr (Defendant) appeals from an Order denying his Motion for Appropriate Relief, as amended, in which Defendant alleged he received ineffective assistance of counsel from his trial counsel prior to Defendant's guilty plea to two counts of Taking Indecent Liberties with a Child in violation of N.C. Gen. Stat. § 14-202.1. After an evidentiary hearing, the trial court ultimately concluded that

even if trial counsel's performance was deficient, this deficient performance was not prejudicial to Defendant's decision to enter his guilty plea. On the Record before us, we conclude the trial court did not err in determining Defendant had not shown that, but for his trial counsel's alleged errors, there was more than a reasonable probability Defendant would not have pleaded guilty. As a result, we affirm the trial court's Order denying Defendant's Motion for Appropriate Relief. The Record before us tends to reflect the following:

Factual and Procedural Background

¶ 2

On 5 July 2011, Defendant's daughter (K.C.), then fifteen years old, filed a police report with the Stoneville Police, where she alleged three specific interactions involving Defendant. First, K.C. alleged on 2 May 2011 Defendant "pushed [her] onto [her] sister's bed and told [her] to spread [her] legs" (the First Allegation); K.C. kicked him in retaliation. Second, K.C. alleged on 11 June 2011 Defendant "started rubbing [her] right inside thigh" when she was in a bedroom with her friend and two cousins while she was getting ready for bed (the Second Allegation); again, K.C. kicked him. K.C.'s third allegation (the Third Allegation) read as follows:

July 1st [2011] . . . I went out and told my mom to come in and look at my rash I had on my chest [Defendant] came in and raised my shirt, and started feeling my breasts and rubbing them. I told him I wasn't comfortable and he stopped He came over and pulled my pants down to my ankles and said, 'You got it going everywhere,' reference to the rash. I told him again that I wasn't comfortable while pulling up my pants. And he was like 'Well,

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you were just fine with it the other week.’ And I said, ‘No, I was not. I was just scared to tell you because you were drunk.’ He then got out of my room and I called [my] Aunt . . . in tears because I was so scared.

¶ 3 On 16 August 2011, Defendant was arrested on the charge of taking indecent liberties with a child; two days later, Mark Keeney (Keeney) was appointed as Defendant’s trial counsel. On 6 February 2012, Defendant was indicted on two counts of Taking Indecent Liberties with a Child, based on K.C.’s First Allegation (11 CRS 052904) and Second Allegation (11 CRS 052900), respectively. Defendant was not charged on the basis of K.C.’s Third Allegation against him.

¶ 4 The matters came on for trial in Rockingham County Superior Court during the trial court’s 27 September 2012 criminal session, where Defendant, through Keeney, pleaded guilty to both counts. Before accepting the guilty plea, the trial court inquired of Defendant:

THE COURT: Have you and your lawyer discussed the possible defenses, if any, you may have to the charges?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with your lawyer’s legal services?

THE DEFENDANT: Yes, sir

THE COURT: You understand, then, that you do have the right to plead not guilty and be tried by a jury?

THE DEFENDANT: Yes, sir.

THE COURT: You understand if you have a jury trial, you have the right to confront and cross-examine the witnesses against you?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand if you enter this

guilty plea, you give up those and other valuable constitutional rights that come with a jury trial?

THE DEFENDANT: Yes, sir.

....

THE COURT: Do you now personally plead guilty to the two charges . . . described?

THE DEFENDANT: Yes, sir.

THE COURT: Are you in fact guilty?

THE DEFENDANT: Yes, sir.

....

THE COURT: You agree that there are facts to support your guilt and agree to a summary of the evidence against you?

THE DEFENDANT: Yes.

¶ 5

The trial court then stipulated to the following factual basis submitted by the

State:

[K.C.] reported that the [D]efendant had been touching her inappropriately [H]e was under the influence of alcohol. [K.C.] reported that [on] three different occasions the [D]efendant has touched her inappropriately. The first one, in May [2011], she was in her room, and he came and pushed her down on her sister's bed and told her to spread her legs, and he was trying to spread them with his knee. She kicked him and told him she was sick and told him to get out, and he left. In June [2011], she was in her room with some friends who were spending the night. He came in and sat on the bed and began rubbing on her thigh on the inside and reaching up toward her private area. She again kicked him and told him to get out. And the third, in July [2011], she had a rash and got out to try to talk to her mother about it. Her mother said she would come in and check to see what was going on with her. The [D]efendant came in her room, raised her shirt and started rubbing her chest. He grabbed her breast. She told him to stop. She pulled her shirt down. She tried to walk away from him, and he pulled her shorts down and then he told her to

bend over and spread her legs because he needed to check the rash.

¶ 6

The State continued:

Upon investigation, [an] officer spoke with [Defendant], who initially had medical reasons why he was doing this touching. One, he said [K.C.] had a tick on her leg and that's why he was rubbing up toward her private area, the medical explanation why he was touching this 15-year-old girl. Then [Defendant] was interviewed again, and at that time he denied any — even remembering the events, saying he was blackout drunk and he wasn't sure what he had done. When [K.C.'s] mother learned of these allegations, she immediately removed [K.C.] from the family situation and they went out of state. [K.C.] was unhappy when she left the state and recanted the allegations, saying it wasn't true because she wanted to come back to where she had lived The [D]efendant has a prior conviction, Your Honor, in the military for indecent liberties with a child.¹ I was able to obtain reports from that case and provide those in discovery. I believe that assisted us in resolving the case the way it is at this point. Even though he is a recidivist, we offered a probationary-type sentence, based on the allegations in this case. I was concerned.

At this point, the trial court stated: “Recantation is definitely a jury issue.” Neither Defendant nor Keeney objected to the State’s factual basis or responded to the trial court’s comment about K.C.’s alleged recantation.

¶ 7

In the end, the trial court found: “there is a factual basis for entry of the plea[,]” that “[D]efendant is satisfied with his lawyer’s legal services” and “is competent to

¹ Defendant pleaded guilty in 1998 to the charge of indecent liberties with a child when he was in the military. According to Defendant, he had pleaded guilty because he “wanted out of the military[,] [a]nd [his] military attorney said it was the quickest way out.”

stand trial[,]” and that “[t]he plea is an informed choice, given freely, voluntarily and understandingly.” The trial court sentenced Defendant as a Prior Record Level II, Class F felony offender to consecutive terms in the presumptive range of nineteen-to-twenty-three months, suspended for sixty months supervised probation. The trial court also ordered Defendant to register as a sex offender and to be subjected to satellite-based monitoring for his natural life.

¶ 8 On 8 January 2018, Defendant filed a Motion for Appropriate Relief (MAR) through new counsel, arguing new evidence of K.C.’s full recantation, which he claimed was unavailable at the time of his conviction, established his innocence. Accordingly, he asked that the trial court vacate his convictions, end his lifetime GPS monitoring, and remove him from the sex offender registry. On 17 April 2018, Defendant filed a Motion to Stay a Decision on his MAR “until counsel has an opportunity to file an amended motion for appropriate relief based upon the post-conviction discovery recently provided by the State.” According to Defendant, the partial post-conviction discovery received from the State included, among other things, “investigative reports, and interviews with witnesses and [K.C.]”

¶ 9 On 30 July 2018, Defendant filed an Amended Motion for Appropriate Relief (Amended MAR), alleging as an additional ground for relief that Keeney provided ineffective assistance of counsel. In summary, Defendant alleged:

- a. [Keeney] did not believe that the terms of the plea agreement

regarding lifetime monitoring were actually appropriate;

- b. [Keeney] did not investigate [D]efendant's innocence claim;
- c. [Keeney] did not tell [D]efendant that [K.C.] tried to recant her allegations, nor did he show [D]efendant the video of her interview with DSS; and
- d. [Keeney] committed an intentional obstruction of justice by failing to pursue certain defenses on behalf of . . . [D]efendant.

Particularly, Defendant alleges Keeney should have “[a]t a minimum” interviewed K.C. and her mother to “assess not only their credibility, but which version of [K.C.]’s story the jury might hear if the case proceeded to trial.” Additionally, Defendant alleged, at the time of his trial, he “was completely unaware that [K.C.] had tried to recant her statements[,]” Keeney “never told [Defendant] she had recanted[,]” and Defendant “was never shown the video of her interview with DSS.” The Amended MAR also stated: “Although the recantation was briefly mentioned during the plea hearing, [Defendant] did not appreciate what was being said because all he was thinking about was that, despite his innocence, his life had just been ruined.”

Defendant then concluded:

100. No rational person would accept a plea offer that included lifetime GPS monitoring and lifetime inclusion on the sex offender registry knowing the alleged victim—whose testimony was the entirety of the evidence against him—had recanted her allegations.

101. Had trial counsel informed [Defendant] that [K.C.] had recanted, there is more than a reasonable probability that he would not have accepted a plea offer and he would have insisted

on going to trial. If the State was even able to proceed to trial, given the lack of evidence, [Defendant] certainly would have been acquitted.

Defendant also filed a Motion for Post-Conviction Discovery, which the trial court granted.

¶ 10 On 18 December 2018, the trial court ordered an evidentiary hearing be held with respect to K.C.'s recantation and Defendant's ineffective assistance of counsel claim. The evidentiary hearing was held on 8 and 9 May 2019. Defendant called as witnesses himself, K.C., K.C.'s mother, K.C.'s attorney, Defendant's fiancée, and Keeney. "The State called as witnesses the [A]ssistant [D]istrict [A]ttorney originally assigned to [D]efendant's case, as well as a former coordinator and therapist at the Kaleidoscope Child Advocacy Center." "The State also published to the [c]ourt [the] video recording of [K.C.]'s forensic interview . . . [from] August 2, 2011" at the center of Defendant's Amended MAR.

¶ 11 During his evidentiary hearing testimony, Defendant denied ever touching K.C. inappropriately or for sexual gratification. However, he also admitted to providing a statement to police during their investigation where he stated "if she says these things happened, then I guess they did. But I don't remember anything happening and I'm not going to say I did something, if I don't remember it." Defendant stated to the police he had no recollection of any of the three allegations because he was "blackout drunk" at the time of each one. Defendant claimed he had

met with Keeney only once prior to pleading guilty, that he had only pleaded guilty to the two charges because Keeney had informed him that the State “had a picture, and that [the State] w[as] going to charge [Defendant’s] wife . . . with aiding and abetting[,]” and that if Defendant had known K.C. had tried to recant her accusations, he would not have pleaded guilty “at all.”

¶ 12 During the evidentiary hearing, K.C., now an adult, was asked whether her First Allegation made in 2011 to the Stoneville Police was true. K.C. replied, “No[,]” and explained:

I was in my room and I had something on my leg. [Defendant] was putting the kids to bed and he s[aw] it. He asked what it was. I told him I didn’t know. He looked at it closer, s[aw] it was a tick. [Defendant] [t]old me to lay down, so he could take it off. And [he] told me I had to loosen up my legs, so he could take the tick off.

When asked why she had originally made this allegation to the Stoneville Police, K.C. replied: “I was mad at [Defendant] at the time because he wasn’t letting me go to [my aunt’s] house.” K.C. later testified that she and her aunt were close at the time, and K.C. routinely confided in her “basically everything that happened at [K.C.’s] house.”

¶ 13 When asked whether the Second Allegation was true, K.C. testified “[Defendant] had touched [her] leg when he was trying to sit down on the bed” because the room they were in was dark at the time. “[W]e had the lightbulb unscrewed because we were getting ready to go to bed and we wanted the fan on.” When asked to clarify what she meant when she stated Defendant “touched” her leg, K.C. replied:

“Just touched it. Didn’t rub, or grab, or anything, he just touched it when he was trying to sit down.” At the evidentiary hearing, K.C. claimed she did not feel as though Defendant was “trying to do something sexual with [her] when he touched [her] thigh.” When asked why she had made the Second Allegation to the police, K.C. replied: “I was told to exaggerate it, so I could get what I wanted[,]” stating her aunt had encouraged K.C. to exaggerate the facts.

¶ 14 When asked whether her Third Allegation was true, K.C. replied, “Not like that.” She elaborated:

I had a rash. I went out and told my mom. [Defendant] was there, he heard it. They both told me that I needed to go in and take an oatmeal shower/bath [sic]. And after that, I did, I was in my room. He called me out to look at it. He lifted up my shirt to look at the rash, didn’t lift up my bra or anything. And then, he looked at the rash around my panty line.

According to K.C., she then called her aunt, who then told K.C. Defendant’s interaction with K.C. “wasn’t right, since [the rash] was right there near [K.C.’s] breast.” K.C. testified she did not tell her aunt that Defendant had “rubbed her breasts[.]”

¶ 15 K.C. stated she was attending the evidentiary hearing “[t]o try to get [Defendant] free of these false accusations.” K.C. testified that she herself had made these accusations and she blamed her aunt, with whom she no longer had a relationship, for telling K.C. “to exaggerate them[.]” K.C. also recalled a moment in

2011 when her mother was contacted by the police, after which her mother told K.C. they “really had to” report Defendant “or [K.C.’s mother] could have been charged.” At that time, the only people who knew about K.C.’s allegations against Defendant were her mother and aunt.

¶ 16 K.C. next recalled that, on 29 July 2011, a few weeks after making her original allegations against Defendant, she called the Stoneville Police to say “that the accusations were false and [she] wanted to stop it.” At the evidentiary hearing, K.C. explained: “I wanted to drop it because the accusations were false.” When she made this call to the police, K.C. was in Pennsylvania after her mother had removed her from the family home in North Carolina.

¶ 17 On 2 August 2011, after returning to North Carolina from Pennsylvania, K.C. went to Help, Incorporated for a forensic interview. The video of the interview was entered as part of Defendant’s evidence during the evidentiary hearing.

¶ 18 In the video, then-teenage K.C. addresses the three allegations against Defendant as follows:

¶ 19 About the First Allegation, K.C. states Defendant was drunk, pushed K.C. onto her sister’s bed, and asked her to spread her legs. She also states Defendant tried to get K.C. to spread her legs by using his knees and told her he wanted “more than a father-daughter relationship.” K.C. states she then said “no,” kicked Defendant, and Defendant left. K.C. follows this statement by saying: “Nothing happened that night

. . . nothing sexual.” K.C. also describes feeling afraid in the moment that Defendant was trying to “do something sexual” to her.² About the Second Allegation, K.C. states Defendant rubbed her leg, she kicked him, and he left. About the Third Allegation, K.C. states Defendant lifted her shirt from behind to look at K.C.’s rash on her back. K.C. stated she was “a little upset” that Defendant had raised her shirt to look at her rash because she “did not want him to[.]”

¶ 20 In the video, K.C. states she wants to drop the charges against Defendant, “since nothing happened[.]” explaining: “[Defendant] tried, but never did” touch her in “private areas,” and “didn’t rape” or “force [her] to do anything” during these three interactions. K.C. also states she had exaggerated her allegations to the Stoneville Police, specifically the allegation Defendant had touched her chest and pulled down her pants during the third alleged encounter.

¶ 21 During Keeney’s testimony at the evidentiary hearing, when asked whether Defendant ever maintained his innocence, he replied:

[Defendant] never outright said, “I did these things.” He made a lot of passive type of expressions, like similar to the one [Defendant] made that’s been referenced, “Well, I guess, if she says I did, then I did,” that kind of thing.

He . . . had a very kind of defeatist attitude from the inception of the case, but never outright said that until we discussed it before his plea. And I indicated to him that according to the plea that

² At no point during the forensic interview does K.C. make reference to a tick being on her leg during the first alleged encounter.

he would have to admit his guilt.

Defendant's MAR counsel inquired of Keeney:

Q. Do you recall telling me [over the phone in May 2018] that [Defendant] always maintained his innocence?

A. I think I responded to your question in less elaborate terms, but essentially the same thing.

¶ 22 Next, Keeney was asked about how many contacts he had had with Defendant while working as his trial counsel:

Q. How many times did you meet with [Defendant] outside of court?

A. It's very difficult to say, but multiple.

Q. So would it surprise you to know that [Defendant] says you never met with him outside of court, except for when he was in jail?

A. No.

Q. It wouldn't surprise you?

A. No, not based on his testimony today.

¶ 23 Next, the evidentiary hearing addressed K.C.'s recantations:

Q. Were you aware, prior to his plea, that [Defendant]'s daughter had recanted the most serious of the allegations?

A. I was aware that she recanted the circumstance where she alleged that he had felt her breasts and pulled her pants down when he was checking on a rash

Q. . . . Did you watch the [forensic] interview?

A. I did.

Q. Did you tell [Defendant] about the interview?

A. [Defendant] and I discussed the interview. We discussed the case.

(Pause.)

Q. Did you show [Defendant] the video?

A. That, I am not certain of, frankly. He was certainly given the option to watch the video. Generally at that time with forensic interviews, I would caution my clients as to whether they

wanted to take that with them when they were provided discovery or leave it at my office and review it either at the courthouse at some time that was convenient or at my office.

That was just my normal protocol, but if he wanted the video, he was allowed to have the video.

Then, Keeney confirmed he had worked a total of twelve hours, excluding time spent in court, during his year-long role as Defendant's trial counsel.

¶ 24 Defendant's MAR counsel, reading from the transcript of Defendant's plea hearing, questioned Keeney:

Q. "[K.C.] reported that [on] three different occasions, the Defendant had touched her inappropriately," was that statement correct?

(Pause.)

A. No, I don't believe it is.

Q. Did you object to the- or clarify for the judge that although she had reported it, she had recanted?

A. No, ma'am.

Q. And . . . "Defendant came in her room, raised her shirt, started rubbing her chest," was that one of the incidents that he was taking a plea to?

A. No, ma'am.

Q. And he grabbed her breast, was that one of the incidents?

. . . .

A. No, ma'am.

Q. You didn't feel it was necessary to clarify these facts for the judge?

A. No, I did not.

Q. Why is that?

A. Well, there are decisions that need to be made sometimes assessing when you're doing a plea: your judge, other things of that nature. And looking back, knowing who my judge was at that time, usually if you were doing a plea, my experience

was if there was any contention back and forth that that usually caused this particular judge some pause.

Q. So it was a strategic decision not to clarify that he did not touch her breast or tell her to spread her legs?

A. Well, I didn't think that that was what- first of all, what this soliloquy was meant to get at. I, frankly, believe the best I can recall, thinking that this description was leading to an end of when she reported. But I did not feel like it was prudent for fear that the judge would reject the plea, which my client wanted.

¶ 25 When asked whether Keeney conducted any interviews while working on this case, he replied he had not. Keeney testified that, though he “was willing” to interview K.C., “it didn’t seem to be the prudent thing to do at that point after speaking with [Defendant][,]” because Defendant “expressed some reluctance in [Keeney] reaching out to [Defendant’s] wife.” Keeney then stated, “depend[ing] on the case,” he “generally” decides to conduct interviews once he knows whether his client is going to trial, either “after a plea is rejected . . . [o]r there’s an indication that a plea’s not going to be offered.”

¶ 26 Keeney further testified, during his interactions with Defendant prior to the guilty plea, Defendant’s primary concern “was just not going back into custody in any way, shape, or form.” Keeney explained that he negotiated a “scripted plea” with the State at Defendant’s request in an attempt to secure a probationary sentence. Keeney told Defendant he could not give assurances that Defendant would not receive an active sentence if the case went to trial or if Defendant simply entered a plea of guilty.

¶ 27 Keeney testified that he did not know K.C.’s mother had felt threatened to

report Defendant, and admitted he “[p]otentially” could have found out had he interviewed her. Keeney also elaborated on his practice of investigating a case only when it is going to trial without a plea deal:

Well, it would depend on the case. Often times, it’s just a strategic thing. For instance, one of the things that I started to talk about was [Defendant] had told me that he had reviewed some of the materials and [said] “Hey, there were other people in this room when I’m alleged to have gone up, tried to go up her leg. Should we talk to these people?”

We talked about that. I told him that [in] my experience, that sometimes it’s not the prudent thing to do. Right now, the burden is on the State. If we don’t get the plea offer you want to get and we end up in a trial, we can use that. That it’s their burden, and that they would need to bring those people forth, and they didn’t inquire about it themselves.

And it would be much more useful in that regard, than interviewing them and finding out, “Oh, yeah, I did know about that,” and how that could potentially harm this case.

¶ 28

On 15 August 2019 the trial court entered its Order denying relief to Defendant on each of the grounds asserted in the Amended MAR. On Defendant’s ineffective assistance of counsel claim, the trial court articulated the legal standard it applied:

18. To bring a successful ineffective assistance of counsel claim, a criminal defendant “must first show that his defense counsel’s performance was deficient and, second, that counsel’s deficient performance prejudiced his defense.” *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (citing *Strickland [v. Washington]*, 466 U.S. [668,] 687 . . . [(1984)]).

.....

21. “[T]o 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.” *Thompson*, 359 N.C. at 115, 604 S.E.2d at 876-77

22. In the context of a guilty plea, the Supreme Court of the United States has modified the prejudice prong of the *Strickland* test to require a defendant to show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill [v. Lockhart]*, 474 U.S. [52,] 59 . . . [(1985)].

23. . . . [T]his [c]ourt applies the modified prejudice standard from *Hill* to [D]efendant’s ineffective assistance of counsel claims in this case.

¶ 29

Applying this standard, the trial court found³:

26. . . . [D]efendant’s trial counsel, . . . Keeney, testified, *inter alia*, that he spent only twelve hours working on [D]efendant’s case outside of court . . . that he never conducted an investigation or any interviews in relation to [D]efendant’s case . . . and that he did not object during [D]efendant’s plea hearing to the court’s introduction of allegations that were unrelated to the two incidents for which [D]efendant was charged Keeney gave this testimony in the context of having also testified that, in May 2018, he told [D]efendant’s post-conviction counsel in some terms that [D]efendant had always maintained his innocence

27. In light of [Keeney’s] testimony, this [c]ourt recognizes that some of Keeney’s conduct in representing [D]efendant certainly appears questionable; however, it is unnecessary for this [c]ourt to determine whether the representation actually fell below an objective standard of reasonableness because the [c]ourt

³ The trial court’s Order combines evidentiary recitations, findings of fact, and conclusions of law under the broader heading of Conclusions of Law. The trial court’s labelled Findings of Fact are limited to a brief procedural history of the case.

concludes that counsel’s representation was not prejudicial to [D]efendant’s decision to plead guilty. *See Hill*, 474 U.S. at 60 . . . (declining to conduct analysis on reasonableness because the defendant failed to satisfy the prejudice requirement).

28. Keeney may have failed to inform [D]efendant that [K.C.] had recanted certain of [sic] her original allegations, . . . but those allegations were unrelated to the two incidents for which defendant was charged and to which he ultimately pled guilty. Furthermore, although there is some question as to whether [D]efendant was shown the video recording of [K.C.]’s forensic interview, [K.C.]’s recantation in that interview was related to the incident for which [D]efendant was not charged. Otherwise, in the interview, [K.C.] actually repeated, in detail, the allegations for which [D]efendant was charged and to which he pled guilty.

29. None of [D]efendant’s other bases for alleging ineffective assistance of counsel are relevant to [D]efendant’s decision to plead guilty, particularly as [D]efendant has failed to demonstrate that further investigation by Keeney would have uncovered support for [D]efendant’s alleged innocence.

30. Accordingly, [D]efendant’s allegations and arguments in his amended MAR and the testimony and other evidence presented at the evidentiary hearing fail to establish that “but for counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59

The trial court denied Defendant’s Amended MAR in whole.⁴ On 20 December 2019, Defendant filed a Petition for Writ of Certiorari, which this Court granted on 9

⁴ By separate Order, the trial court terminated Defendant’s lifetime satellite-based monitoring in light of “*State v. Grady*, No. 179A 14-3, 2019 WL 3916828, at *20 (N.C. Aug. 16, 2019).”

March 2020, limiting review to Defendant's ineffectiveness of trial counsel claim.

Issue

¶ 31 The sole issue on appeal is whether the trial court erred in concluding Keeney's performance as Defendant's trial counsel did not prejudice Defendant in entering his guilty plea.

Analysis

¶ 32 "A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief." N.C. Gen. Stat. § 15A-1420(c)(6) (2019). "If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5). As a result, a defendant seeking an MAR bears the burden of proof before the trial court. *State v. Hyman*, 371 N.C. 363, 386, 817 S.E.2d 157, 172 (2018). "[A]ppellate courts review trial court orders deciding motions for appropriate relief to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Id.* at 386, 817 S.E.2d at 169 (citations and quotation marks omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* (citations and quotation marks omitted; alteration in original). "Conclusions of law, on the other hand, are fully reviewable." *Id.* (citation omitted).

¶ 33

In relevant part, Defendant’s Amended MAR alleged trial counsel provided ineffective assistance of counsel and, thus, his guilty plea was obtained in violation of his constitutional rights. “The Sixth Amendment to the Constitution guarantees criminal defendants the right to counsel, which courts have recognized necessarily includes the right to effective assistance or representation by counsel.” *State v. Lane*, 271 N.C. App. 307, 311, 844 S.E.2d 32, 37, *review dismissed*, 376 N.C. 540, 851 S.E.2d 367, *review denied*, 376 N.C. 540, 851 S.E.2d 624 (2020) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984)). “In *Strickland*, the United States Supreme Court established the two-part test for ineffective assistance of counsel subsequently adopted by our Supreme Court” under the North Carolina Constitution. *Id.* Thus, to make a showing of ineffective assistance of counsel “[a] defendant must first show that his defense counsel’s performance was deficient and, second, that counsel’s deficient performance prejudiced his defense.” *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

¶ 34

As the trial court in this case correctly identified: “To satisfy the second or ‘prejudice’ requirement in the context of a guilty plea, the Supreme Court emphasized that ‘the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’ ” *State v. Goforth*, 130 N.C. App. 603, 604-05, 503 S.E.2d 676, 678 (1998)

(quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 88 L. Ed. 2d 203, 210 (1985)). “A mere allegation by the defendant that he would have insisted on going to trial is insufficient to establish prejudice.” *Id.* at 605, 503 S.E.2d at 678 (citation and quotation marks omitted).

¶ 35 Here, Defendant argues Keeney provided ineffective service of counsel by, among other things, avoiding conducting any interviews or investigations, by failing to clarify to the trial court that Defendant was not charged for K.C.’s Third Allegation during the State’s recitation in support of the plea, and by failing to inform Defendant of K.C.’s alleged recantation from the forensic interview. Indeed, the trial court acknowledged “some of Keeney’s conduct in representing [D]efendant certainly appears questionable[.]” However, the trial court did not reach the issue of whether Keeney’s performance was constitutionally deficient because it determined Defendant had not shown Keeney’s questionable performance resulted in prejudice to Defendant in entering his guilty plea.

¶ 36 Defendant argues Keeney’s alleged failures, however, were prejudicial and created “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *See id.* at 605, 503 S.E.2d at 678 (citation and quotation marks omitted). Defendant contends, had Keeney conducted investigation and interviews, he may have uncovered that it was K.C.’s aunt who encouraged K.C. to report her accusations and who instigated the police

investigation, and that there may have been witnesses—K.C.’s sister and other teens—to the alleged occurrences who might have corroborated Defendant’s claims as to the First and Second Allegations. Moreover, Defendant asserts reasonable investigation by Keeney would have uncovered discrepancies in voice stress tests performed on K.C. in 2011. Thus, Defendant concludes, had investigation and interviews been undertaken, it would have been rational for him to proceed to trial and reject the plea.

¶ 37 The trial court, however, found these allegations of ineffective assistance of counsel had no relevance to Defendant’s decision to tender his guilty plea because Defendant failed to show that any such investigation and interviews “would have uncovered support of [D]efendant’s alleged innocence.” We agree with the trial court. As far as the potential witnesses are concerned, there is no evidence—beyond Defendant’s speculation—as to what version of events, if any, those witnesses would have corroborated. Moreover, purported evidence of who instigated the investigation or discrepancies in the stress test, while perhaps creating an avenue to challenge witness credibility, would not directly prove Defendant’s claims of innocence.

¶ 38 Similarly, Defendant contends he received ineffective assistance when Keeney failed to object to the State’s recitation of facts or otherwise clarify to the trial court that Defendant was not charged based on the since-recanted Third Allegation of Defendant feeling K.C.’s breasts during the plea hearing. Defendant does not

articulate how the State's recitation of facts impacted his decision not to go to trial, but instead argues, had he gone to trial, the absence of the Third Allegation undermined the State's case because it was the only act allegedly committed with an overt sexual purpose from which a jury could infer the First and Second Allegations were committed with a sexual purpose. However, again, this would not constitute direct proof of Defendant's claim of actual innocence. Moreover, it does not necessarily follow that, because Defendant was not charged based on the Third Allegation, the evidence of the Third Allegation would not have been admissible for other purposes.

¶ 39 Defendant also argues Keeney never made Defendant aware that K.C. had recanted any portion of her allegations and had not informed Defendant of the existence of the video of K.C.'s forensic interview. As the trial court's Order acknowledges, there is conflicting evidence as to whether Keeney informed Defendant of the recantation or if Defendant had the opportunity to view the video. It also appears on this Record that, during Defendant's initial plea hearing, the State and the trial court, in the presence of Defendant, openly acknowledged the fact that K.C. had made attempts to recant and the trial court noted "recantation is definitely a jury issue."

¶ 40 As the trial court found, however, any conflict in the evidence is immaterial: in the video then-teenage K.C. recants only a part of her Third Allegation against

Defendant, for which Defendant was never charged. In fact, in the video, even though K.C. states she no longer wants to report Defendant, K.C. otherwise repeats the other two allegations, for which Defendant actually faced charges, nearly identically as she had originally reported to the Stoneville Police a few weeks earlier. Given all of this, the trial court, having heard the evidence presented in support of the Amended MAR, concluded “Defendant’s allegations and arguments in his Amended MAR and the testimony and other evidence presented at the evidentiary hearing fail to establish that ‘but for counsel’s [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial[.]”

¶ 41 On the Record before us, we cannot conclude the trial court erred in reaching this conclusion based on the evidence from the MAR evidentiary hearing. Indeed, the evidence tends to reflect Defendant admitted his own actual guilt in open court when tendering his plea and that his primary goal in accepting a scripted plea agreement was to avoid prison, which he was provided the opportunity to do through a probationary sentence. Moreover, even if his trial counsel, but for trial counsel’s alleged errors, may have developed some form of trial strategy challenging the State’s case, there is no indication on this Record that this would have made it reasonably probable that Defendant would have rejected the scripted plea and proceeded to trial. To the contrary, the “mere allegation that he would have insisted on going to trial” but for these alleged errors of counsel is “insufficient to establish prejudice” or,

specifically, show Defendant would have otherwise chosen to go to trial. *See Goforth*, 130 N.C. App. at 604, 503 S.E.2d at 678.

¶ 42 Thus, the trial court did not err in concluding Defendant had not shown he was prejudiced by his counsel's alleged errors. Therefore, the trial court properly concluded Defendant had not established that he received ineffective assistance of counsel in tendering his guilty plea. Consequently, the trial court did not err in denying Defendant's Amended MAR on this basis.

Conclusion

¶ 43 Accordingly, for the foregoing reasons, we affirm the trial court's Order denying Defendant's Amended MAR.

AFFIRMED.

Judges ZACHARY and JACKSON concur.

Report per Rule 30(e).