IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-291

Filed 20 February 2024

Moore County, No. 20CRS51858

STATE OF NORTH CAROLINA

v.

LLOYD MICHAEL STEWART

Appeal by Defendant from Judgment entered 4 August 2022 by Judge Kevin M. Bridges in Moore County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Todd H. Neal, for the State.

Reid Cater for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Lloyd Michael Stewart (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of one count of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. The Record before us tends to reflect the following:

Defendant and Daniel Priest (Priest) met in 2019 when both men were residents of a drug recovery halfway house. After leaving the halfway house, Priest allowed Defendant to stay with him at his apartment while Defendant was "passing through" town. On the night of 3 July 2021, Defendant and Priest were drinking together at Priest's apartment. At some point that night, Priest told Defendant he needed to leave his apartment the next morning. Defendant kept asking to stay another day, and eventually, Priest told him he had to get out of his apartment immediately. Priest walked Defendant to the door, but Defendant told him he was too drunk to drive. When Priest insisted Defendant leave his property, Defendant sliced Priest's neck with a boxcutter. Priest wrapped a blanket around his neck to stop the bleeding and walked to a neighbor's apartment to seek help. Defendant was arrested at the apartment complex, and the boxcutter was found in Defendant's pocket.

On 24 August 2020, a Moore County Grand Jury indicted Defendant on one count of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. Defendant's case came on for trial on 1 August 2022 in Moore County Superior Court. Following a hearing on pre-trial motions, defense counsel requested an inquiry consistent with *State v. Harbison*. Defense counsel, Defendant, and the trial court engaged in the following colloquy:

> [DEFENSE COUNSEL]: This is not necessarily a motion, but I believe there needs to be a *Harbison* colloquy, and for the --

THE COURT: I thought about that when you said that, you stood there and argued that your client sliced Mr. Priest's neck.

[DEFENSE COUNSEL]: Yes, sir. I'm not going to inject error in this case, nor ineffective assistance of counsel intentionally.

THE COURT: All right.

[DEFENSE COUNSEL]: Judge, that is the extent of the *Harbison* admission. We're -- [Defendant] has authorized me to admit to the jury that he sliced the neck of Daniel Lester Priest with a, it's been referred to as a box cutter or a utility knife. I'm not going to refer to it as he assaulted the victim with a box cutter or utility knife. I may say that he sliced his neck or cut him with a box cutter or utility knife. But that's the extent of what I'm authorized to admit to the jury. Is that correct, [Defendant]?

THE DEFENDANT: Yes.

THE COURT: And you would want to say that in all phases during the trial, even jury selection?

[DEFENSE COUNSEL]: Jury selection, opening statements, just to give them an idea of why we're here.

THE COURT: All right. Sir, would you stand? Would you state your name for the record?

THE DEFENDANT: Lloyd Michael Stewart.

THE COURT: You have the right to remain silent and any statement you make may be used against you. Sir, your attorney has just told me that he intends to say, with your permission to this jury when we select and impanel the jury, that you sliced or cut Daniel Lester Priest's neck with a box cutter or a utility knife. Does he have your permission to say that to this jury?

THE DEFENDANT: Yes.

THE COURT: You've discussed this with him?

> THE DEFENDANT: Yes, sir.
>
> THE COURT: You've decided that based on the facts of this case and your legal situation at this time that it is in your best interest that you permit him to say these things to the jury?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. So noted. So no Harbison issue at this point.

Following the close of the State's evidence, defense counsel, Defendant, and the trial court engaged in a second *Harbison* colloquy:

> [DEFENSE COUNSEL]: I would like to extend the *Harbison* admission in this case to the extent that [Defendant] has authorized me to concede he committed an assault. I'm not conceding the deadly weapon status, the serious injury status of Mr. Priest's injuries or intent to kill, but we are conceding that an assault took place. This is in addition to the earlier *Harbison* concession that [Defendant] authorized where we've acknowledged that he did slice Mr. Priest with a box cutter across the neck.
>
> THE COURT: Sir, would you stand again, please? [Defendant], your lawyer has just informed the Court that you have authorized him to state to this jury that you have committed an assault; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You have given your lawyer permission to state that in front of the jury?
>
> THE DEFENDANT: Yes, sir.

Both the State and defense counsel gave closing arguments; however, neither party moved for the complete recordation. Therefore, there is no transcript of either

parties' closing argument. The jury found Defendant guilty of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. On 4 August 2022, the trial court entered a Judgment sentencing Defendant to 83 to 112 months of imprisonment. Defendant provided oral Notice of Appeal in open court.

Issue

The sole issue on appeal is whether, to the extent defense counsel's admissions during opening and closing statements of the existence of elements of the charged offense triggered the requirement the trial court inquire of Defendant as to Defendant's consent to those admissions, the trial court made an adequate inquiry of Defendant pursuant to *State v. Harbison*.

Analysis

As a threshold matter, the Record and transcript do not include closing arguments. However, the transcript does include the trial court's colloquy with Defendant and defense counsel where the trial court asked Defendant whether he consented to defense counsel's admissions. Therefore, the Record is sufficient for this Court to review whether the trial court made an adequate inquiry of Defendant pursuant to *Harbison*. 315 N.C. 175, 178, 337 S.E.2d 504, 506 (1985), *cert. denied*, 476 U.S. 1123, 106 S. Ct. 1992, 90 L. Ed. 2d 672 (1986) (holding, although there was no transcript of counsel's closing remarks, the record was sufficient where the trial court based its denial of defendant's motion on the contents of the motion and answers to interrogatories submitted with the motion).

In *Harbison*, our Supreme Court held "that a criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020) (citing *Harbison*, 315 N.C. at 175, 337 S.E.2d at 504). However, "[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) (citation omitted). Our Supreme Court has stated "an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument." *State v. Thompson*, 359 N.C. 77, 120, 604 S.E.2d 850, 879 (2004) (citing *State v. McDowell*, 329 N.C. 363, 368-87, 407 S.E.2d 200, 213 (1991)).

Defendant contends the trial court did not conduct a sufficient inquiry to determine if Defendant knowingly consented to an admission of guilt to assault. Here, the trial court engaged in two *Harbison* colloquies with Defendant. First, prior to opening statements, defense counsel informed the trial court Defendant authorized him "to admit to the jury that he sliced the neck of Daniel Lester Priest with a, it's been referred to as a box cutter or utility knife." Defendant was addressed personally by the trial court and affirmed: (1) he gave defense counsel permission to make this

admission; and (2) he decided it was in his best interest to permit defense counsel to make the admission. Second, prior to closing arguments, defense counsel informed the trial court Defendant authorized him "to concede he committed an assault." Again, Defendant was addressed personally by the trial court and affirmed he authorized and permitted defense counsel to concede to the jury that he committed an assault.

Here, it is not clear defense counsel's proffered concession during opening statements to the fact of Defendant slicing Priest's neck was sufficient in and of itself to trigger a *Harbison* inquiry. *Wilson*, 236 N.C. App. at 476, 762 S.E.2d at 897 (citing *State v. Fisher*, 318 N.C. 512, 533, 350 S.E.2d 334, 346 (1986)) ("Admission 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."). Nevertheless, the Record reflects the trial court inquired of Defendant as to his knowing consent to this factual admission prior to counsel making any such admission. *See Thompson*, 359 N.C. at 120, 604 S.E.2d at 879.

Moreover, the Record indicates prior to closing arguments, Defendant knowingly and voluntarily consented to defense counsel conceding Defendant committed an assault. In this second colloquy, defense counsel not only stated he would be conceding Defendant committed an assault, but he also specified he would not be "conceding the deadly weapon status, the serious injury status of Mr. Priest's injuries, or intent to kill[.]" The Record illustrates Defendant was aware of and

consented to his counsel admitting Defendant's commission of the lesser-included offense of assault. *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004) ("For 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.").

Thus, on the facts of this case, the trial court made an adequate inquiry as to Defendant's consent consistent with *Harbison*. Therefore, in light of Defendant's knowing consent to the admissions by his counsel as established on the Record by the trial court, Defendant did not receive ineffective assistance of counsel. Consequently, the trial court did not err in permitting counsel to proceed with making either admission to the jury.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the trial court's 4 August 2022 Judgment.

NO ERROR.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).