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NO. COA05-415

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 03 CRS 058293

JACOB CAMERON, JR.

Appeal by defendant from judgment entered 30 September 2004 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 30 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Miles & Montgomery, by Mark Montgomery, for defendant-appellant.

TYSON, Judge.

Jacob Cameron, Jr. ("defendant") appeals from judgment entered after a jury found him to be guilty of first-degree murder of Sidra Johnson ("Johnson") and sentencing him to life imprisonment without possibility of parole. We find no error.

I. Background

A. Prior Incident of Choking

Cindy Johnson ("Cindy"), Johnson's sister, testified Johnson called and told her that defendant had choked her, and she had to kick him to get away from him in June 2001. Following that conversation, Cindy went to Johnson's apartment. Upon her arrival,

Cindy found Johnson was holding her neck, and she told Cindy defendant had choked her "so severely she could have died."

On 21 June 2001, Public Safety Communications Operator Jennifer Harmon received a 911 call from Johnson. Johnson said her boyfriend, defendant, had choked her. The jury heard the recording of that call.

Officer R.E. Workman ("Officer Workman") was dispatched to Johnson's apartment following the June 2001 call. Upon his arrival, Officer Workman found defendant and Johnson standing together. He testified that he observed blood coming from Johnson's mouth and nose and abrasions around her neck.

B. Present Incident Resulting in Death

Johnson's neighbor, Tameka Alexander ("Alexander"), testified she heard stumbling, bumping, and banging noises coming from Johnson's apartment after midnight on 26 July 2003. She heard the noises for approximately ten minutes and then fell asleep. Alexander awoke when she heard police cars outside her apartment.

Public Safety Communications Operator Lisa Howard answered a 911 call at 2:19 a.m. on 26 July 2003. Defendant made the call. Defendant made a second call at 2:21 a.m. During the second call, defendant told the operator that the victim was "half dead." Both calls were recorded, and audio tapes were played to the jury.

Officer William Patterson ("Officer Patterson") was the first officer to arrive at Johnson's apartment. Defendant was waiting at the apartment and claimed he had arrived there twenty to thirty minutes before Officer Patterson. Defendant stated that he had

looked for Johnson and found her in her bedroom, but did not know what had happened to her.

Officer N.M. Blue ("Officer Blue") arrived next. He believed defendant had been drinking. Defendant told Officer Blue, "she upstairs." When Officer Blue found Johnson, he detected no vital signs, but noticed her skin was still warm.

Officer J.J. Thompson ("Officer Thompson") of the Winston-Salem Police Department was dispatched to Johnson's apartment and was the last officer to arrive on the scene. Defendant was standing inside the doorway when Officer Thompson arrived. Thompson followed Officer Blue up the stairwell and found Johnson in her bedroom lying face down next to the radiator. A cellular telephone was lying on the floor broken into two pieces. The telephone cord of the land line telephone had been pulled out of the wall. A night stand was partially blocking the doorway. Officer Thompson noticed a clear liquid coming out of Johnson's mouth, blood between her fingers, and dried blood on the back of her right hand. The broken cellular telephone, a glass ashtray, and three liquor bottles were taken from Johnson's bedroom and received into evidence. Cindy identified the cellular telephone at trial as belonging to her sister, Johnson.

Detective M.C. Rowe ("Detective Rowe") of the Winston-Salem Police Department's Homicide Division was assigned as the lead investigator in this case. Beginning at 9:00 a.m. on 26 July 2003, Detective Rowe interviewed defendant for approximately forty-five minutes at the police department. He asked identification

specialists to photograph an injury to defendant's left middle finger. Detective Rowe later traveled to the hospital where the autopsy on Johnson's body was being performed and spoke with Dr. Donald Jason ("Dr. Jason") about his findings.

Dr. Jason testified as an expert in forensic pathology. He performed an autopsy on Johnson's body and concluded manual strangulation had caused her death.

After Detective Rowe returned to the police station, he informed defendant he was being charged with first-degree murder. Defendant told Detective Rowe that he wanted to speak with him. After Detective Rowe informed defendant of his *Miranda* rights, defendant executed a written waiver of those rights and made a statement, which was tape recorded. The audio tape of that statement was played for the jury, and a twenty-five page transcript of the statement was distributed to the jury.

Defendant admitted, in his statement to Detective Rowe, that his earlier statements that he knew nothing about what had happened to Johnson were untrue. He admitted being responsible for Johnson's death and expressed regret. Defendant explained that he was jealous of Johnson's other boyfriend. He stated that Johnson picked him up from work on 25 July 2003. He drank wine and consumed a "twenty cent piece" of crack cocaine. Defendant and Johnson began arguing about 1:30 or 2:00 a.m. on 26 July 2003. Defendant grabbed Johnson, wrestled her down, and choked her. Defendant stated that while he wanted to hurt Johnson, he did not intend to kill her. When Johnson did not wake up, defendant

panicked and called 911. Defendant did not dispute the accuracy of the recording or the voluntariness of his confession. Defendant did not offer any other evidence in his defense. A jury found defendant to be guilty of first-degree murder. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant appeals.

II. Issues

____Defendant argues: (1) the trial court erred when it admitted evidence he had choked Johnson on a previous occasion; and (2) he was denied effective assistance of counsel when his trial counsel argued to the jury that there was no excuse for defendant's conduct and conceded that defendant was guilty of second degree murder.

III. Evidence of a Prior Alleged Incident

Defendant argues the trial court erred when it admitted evidence that on a previous occasion he had choked Johnson.

A. Standard of Review

Our Supreme Court has stated:

The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court. Abuse will be found only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision."

State v. Alston, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995) (citation omitted), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996).

B. Rule 403

Rule 403 of the North Carolina Rules of Evidence provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2003).

C. Rule 404

Rule 404 of the North Carolina Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003).

Our Supreme Court has stated:

Rule 404(b) is a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Lloyd, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (citation omitted).

Here, the trial court admitted evidence that two years prior to the murder defendant had choked Johnson "almost to the point where she could have died." The State offered this evidence "as proof of motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake, entrapment or accident." *Id.* Defendant argues the trial court erred when it failed to give a limiting instruction to the jury on how it could apply that evidence to the case.

In *Alston*, the defendant murdered his former girlfriend. 341 N.C. at 216, 461 S.E.2d at 695. The trial court admitted evidence of the defendant's prior assault on the victim as relevant to an issue other than character. *Id.* at 218, 461 S.E.2d at 697. Our Supreme Court stated, "[i]n applying Rule 404(b), this Court has repeatedly held that a defendant's prior assaults on the victim, for whose murder defendant is presently being tried, are admissible for the purpose of showing malice, premeditation, deliberation, intent or ill will against the victim." *Id.* at 229, 461 S.E.2d at 703.

In *State v. Spruill*, the defendant killed his former girlfriend. 320 N.C. 688, 694, 360 S.E.2d 667, 670 (1987), *cert. denied*, 486 U.S. 1061, 133 L. Ed. 2d 63 (1988). The trial court admitted evidence of the defendant's prior assaults on the victim. *Id.* at 692, 360 S.E.2d at 669. Our Supreme Court stated that the evidence "was competent to prove his malice towards [the victim] and was admissible." *Id.* at 693, 360 S.E.2d at 669.

Our Supreme Court also held that evidence of a defendant's prior assault of a victim was properly admitted in *State v. Kyle*, 333 N.C. 687, 697, 430 S.E.2d 412, 417 (1993). The Court stated, "[t]he evidence of defendant's prior assault on the victim tends to

establish malice, an element of first-degree murder, and thus is relevant to an issue other than defendant's character." *Id.*

Here, evidence was admitted that defendant had choked Johnson on a previous occasion in June 2001. This evidence was admissible to show defendant's intent, ill will, malice, premeditation, and absence of mistake or accident pursuant to Rule 404(b). The trial court balanced the prejudice and relevance of the evidence in light of Rules 403 and 404. Defendant has failed to show the trial court abused its discretion in admitting the evidence of the prior strangulation. This assignment of error is overruled.

IV. Ineffective Assistance of Counsel

Defendant argues he was denied effective assistance of counsel when his counsel argued to the jury that there was no excuse for defendant's conduct and conceded defendant was guilty of second degree murder.

A. Standard of Review

The United States Supreme Court provided a two-prong test for a defendant to establish ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The test requires:

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.

Id.

Our Supreme Court has stated, "this court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct" when reviewing ineffective assistance of counsel claims. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004). In *State v. Lowery*, the Court stated, "[w]e ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions." 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

B. Conceding Defendant's Guilt

Defendant argues his trial counsel violated *Strickland*, 466 U.S. 668, 80 L. Ed. 2d 674, and our Supreme Court's holding in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), when trial counsel conceded defendant's guilt to a lesser included offense.

In *Harbison*, our Supreme Court held that a trial counsel's concession of guilt without the defendant's knowing and voluntary consent is ineffective assistance of counsel *per se*. 315 N.C. at 175, 337 S.E.2d at 504. The defendant in *Harbison* was charged with first-degree murder and maintained throughout the trial that he acted in self-defense. 315 N.C. at 175, 337 S.E.2d at 504. During closing argument, and without the defendant's consent, defense counsel stated, "I have my opinion as to what happened on that April night, and I don't feel that [the defendant] 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." *Id.* at 177-78, 337 S.E.2d at 506. Our Supreme Court held, "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507.

Here, defense counsel neither "admit[ted] his client's guilt," nor did he concede defendant was guilty of a lesser included offense. *Id.* Defense counsel made the following statements to the jury during his closing argument:

The evidence in this case fits the facts, much more appropriately, to second-degree murder, which is the unlawful killing of a human being with malice.

. . . .

And then there is not guilty. Not guilty in this case applies because there has to be the intent to kill in either one of these. First-degree implies intent with premeditation and deliberation. Second degree has the intent, that you intended the death. And not guilty is because he didn't intend the death. And it was tragic in what happened and it went beyond what he should have been doing -- and shouldn't have been doing at all. But it was not the intended consequence of the action, and it was not a logical result of what you were doing.

. . . .

I'd ask you to find that Mr. Cameron did not have the intent to kill Sidra Johnson at the time she died, and that as a result of that, your verdict should not be guilty.

In *Roache*, the defendant's trial counsel characterized the murders for which the defendant was being tried as "brutal" and suggested to the jury that the defendant "made the wrong choice."

358 N.C. at 281-82, 595 S.E.2d at 406-07. The defendant argued on appeal that he was denied effective assistance of counsel in violation of *Harbison*. *Id.* at 281, 595 S.E.2d at 407. The defendant contended that use of the word "brutal" amounted to an admission of an aggravating factor. *Id.* Our Supreme Court stated, "[d]escribing a murder as 'brutal' does not satisfy the legal standard in the e(9) aggravator that the capital felony was 'heinous, atrocious, or cruel,' much less 'especially' so." *Id.* The Court also stated, "a counsel's statement of a fact strongly suggesting guilt of a crime does not necessarily amount to an admission of legal guilt." *Id.* at 281, 595 S.E.2d at 406 (citation omitted).

Defense counsel did not admit defendant's guilt. He conceded defendant had no excuse for strangling Johnson. Defendant admitted that he had strangled Johnson. Defense counsel's decision to concede defendant lacked an excuse could have been a part of his trial strategy. Also, counsel urged the jury to find defendant not guilty and argued defendant did not have the intent to kill Johnson, an essential element in both first-degree and second degree murder. Trial counsel's statements to the jury were asserted "within the boundaries of acceptable professional conduct." *Id.* This assignment of error is overruled.

V. Conclusion

Defendant failed to show the trial court abused its discretion when it admitted evidence of his prior choking assault of Johnson. Defendant has also failed to show his defense counsel did not

provide effective assistance. This Court will not "second-guess counsel's tactical decisions." *Lowery*, 318 N.C. at 68, 347 S.E.2d at 739. Defendant received a fair trial free from the errors he assigned and argued.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).