

NO. COA14-595

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Guilford County  
Nos. 11 CRS 24659-65

BONRICK LEE BARKSDALE,  
Defendant.

Appeal by Defendant from judgments entered 16 January 2014  
by Judge Anderson D. Cromer in Guilford County Superior Court.  
Heard in the Court of Appeals 6 October 2014.

*Attorney General Roy Cooper, by Assistant Attorney General  
Teresa M. Postell, for the State.*

*Massengale & Ozer, by Marilyn G. Ozer, for defendant-  
appellant.*

DIETZ, Judge.

Defendant Bonrick Lee Barksdale appeals from a lengthy  
series of felony convictions stemming from a violent attack and  
sexual assault on two women. Barksdale broke into the victims'  
home intending to steal laptops visible through a window. But  
after discovering the couple and their young child in the home,  
Barksdale forced the two women to kiss and touch each other. He  
then sexually assaulted and attempted to rape one of the victims

and later shot the other when she tried to fight him off, nearly killing her.

On appeal, Barksdale argues that his appointed counsel improperly disclosed to the court (outside the presence of the jury) that Barksdale knew how strong the case against him was, but wanted a trial to "take the chance that maybe lightning strikes, or I get lucky, or something." He also argues that the trial court improperly considered his decision to go to trial in determining the severity of his sentence. Finally, Barksdale argues that his sentences for first degree kidnapping based on sexual assault and for the underlying sexual assault itself violate the double jeopardy clause—an error that the State concedes on appeal.

For the reasons set forth below, we hold that Barksdale did not receive ineffective assistance because his trial counsel's remarks, even if improper, did not prejudice Barksdale. We likewise hold that the trial court did not improperly increase Barksdale's sentence based on his decision to go to trial. Because the State concedes error in Barksdale's sentence—and we agree—we vacate his sentence and remand for resentencing consistent with this opinion.

### **Facts and Procedural History**

In the early morning hours of 25 August 2011, Barksdale broke into an apartment occupied by Jane Doe, Jill Smith, and Smith's young child, whom the couple raised together.<sup>1</sup> Barksdale had seen two laptops through the window and entered the apartment with the intention of taking them. Ms. Doe, Ms. Smith, and their child were asleep in the bedroom when Ms. Doe woke up and noticed a light was on in the kitchen. Ms. Doe got up to turn off the light and discovered Barksdale standing in her kitchen. She confronted Barksdale and he pulled out his gun. Ms. Doe ran back to the bedroom, yelling for Ms. Smith to take the child and escape out the window.

Ms. Smith took her child and hid in the bathroom. Ms. Doe attempted to hold the bedroom door closed and block Barksdale from entering, but Barksdale threatened to shoot through the door if she didn't let him in. Barksdale entered the bedroom and asked who else was there. Ms. Doe told him that her girlfriend was in the bathroom. Barksdale then made Ms. Smith and the child come out of the bathroom and sit on the bed with Ms. Doe.

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<sup>1</sup> This opinion uses pseudonyms in place of the victims' names to protect their privacy.

Barksdale asked them if they had any money and they responded that they didn't. He then told them to "touch each other." Barksdale stood at the foot of the bed, holding his gun, and watched while Ms. Doe and Ms. Smith touched and kissed. After about two minutes, Barksdale instructed them to stop kissing and to go into the other bedroom.

As they were walking through the hallway to the other bedroom, Barksdale pulled Ms. Smith away from Ms. Doe and began "dry humping" her back and touching her breasts. Barksdale, gun still in hand, asked if they had any condoms. When they informed him that they did not, he asked if they had any sandwich bags. Ms. Doe told him where they were in the kitchen, and Barksdale went to get them, returning approximately thirty seconds later. Barksdale told Ms. Smith to get down on the floor, where he removed her clothes and attempted to rape her. Barksdale was unable to rape Ms. Smith with the sandwich bag around his penis, and instead instructed Ms. Smith at gunpoint to get on her knees and "suck my dick." Ms. Smith did as she was instructed because she wanted her family to "make it out alive." Barksdale inserted his penis, with the sandwich bag on it, into Ms. Smith's mouth against her will.

At that point, Ms. Doe grabbed Barksdale and began choking him. Ms. Smith then grabbed and twisted Barksdale's penis. During the struggle, Barksdale fired three or four shots at Ms. Doe. Two of the shots hit her, one in the abdomen and one in the leg. Barksdale also punched Ms. Doe several times, leaving her with a black eye and chipped tooth. Ms. Doe eventually managed to drag Barksdale out to the living room where she yelled for Ms. Smith to "open the door so I can get him out." Ms. Smith opened the door and Ms. Doe pushed Barksdale out of the apartment. Ms. Doe shut and locked the door while Ms. Smith called 9-1-1.

When the ambulance arrived, Ms. Doe was taken away to the hospital. The responding police found a pry mark on one of the apartment's sliding glass doors as well as gunshot damage on furniture inside the apartment. Police also found Barksdale's Maryland driver's license, his hat, his glasses, his cell phone, and a plastic sandwich bag with his DNA on the inside. Barksdale was arrested in Maryland on 26 August 2011 and later extradited to North Carolina.

The State charged Barksdale with possession of a firearm by a felon, two counts of first degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury,

first degree sexual offense, attempted first degree rape, two counts of attempted robbery with a dangerous weapon, and first degree burglary.

Barksdale declined the plea agreement offered by the State and his case went to trial on 13 January 2014. Barksdale's appointed counsel informed the court, on the record but before the jury was impaneled, that he had advised Barksdale of the strength of the State's case. He also explained that he advised Barksdale to accept the State's plea agreement (which carried a maximum 30-year prison sentence), but that Barksdale was unwilling to accept the agreement and wanted to "take the chance that maybe lightning strikes, or I get lucky, or something."

Before counsel disclosed this information, Barksdale consented to the disclosure:

COUNSEL: What he told me -- and I think it's appropriate to tell the Court this. What he told me was --

THE COURT: As long as it's okay with him.

COUNSEL: Is it?

BARKSDALE: Yes.

After disclosing the information, Barksdale's counsel explained that "the big reason why I want to put all this on the record is to let the record reflect that we have done everything

in our power to try to convince-try and resolve this case short of trial."

On Barksdale's motion at the close of the State's evidence, the court dismissed the charge of possession of a firearm by a felon. The jury convicted Barksdale on the remaining charges, except that it convicted him of the lesser-included offense of assault with a deadly weapon inflicting serious injury instead of the indicted charge of assault with a deadly weapon with intent to kill inflicting serious injury. The court sentenced Barksdale to consecutive sentences on each conviction, totaling a minimum of 83 years and a maximum of 106 years in prison. After announcing the sentence, the trial judge commented that Barksdale had "affected two lives entirely" and "affected 13 other people's lives, not to mention everyone else that heard anything about this case." Barksdale's counsel timely appealed.

### **Analysis**

#### **I. Ineffective Assistance of Counsel**

Barksdale first argues that he was denied effective assistance of counsel. Barksdale contends that his trial counsel improperly revealed attorney-client communications about Barksdale's desire to go to trial and "take the chance that maybe lightning strikes, or I get lucky, or something."

We note that Barksdale expressly consented to the disclosure of this attorney-client communication, which seems to undermine his claim that the disclosure was improper. But we need not address whether counsel's conduct was constitutionally deficient because, as explained below, Barksdale failed to show that this purportedly deficient conduct prejudiced him.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that "his counsel's performance was deficient" and that "counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). To prove 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." *Id.* (quotation marks omitted). "[I]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, [the court] need not determine whether counsel's performance was deficient." *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (quotation marks omitted).

Here, Barksdale has not shown that, but for counsel's disclosure of the confidential information, the result of his trial would have been different. First, counsel revealed the



information outside of the presence of the jury, before a jury had even been impaneled. Thus, counsel's conduct could not have affected the jury's finding of guilt.

Second, Barksdale has not shown that his counsel's comments affected the trial court's decision at sentencing. Barksdale argues that counsel's statements "could have led the judge to regard the defendant in a negative light." But this argument ignores the incredibly heinous crimes that Barksdale committed. He broke into the victims' home in the middle of the night to rob them. He forced the victims to kiss and fondle each other at gunpoint for his own pleasure. He attempted to rape one victim and then forced her to perform oral sex on him. When the women found the courage to fight back, he fired four shots at one of them, hitting her twice and nearly killing her.

Simply put, the trial court would have viewed Barksdale in a "negative light" even without the purportedly deficient conduct of his counsel. Given the monstrous nature of Barksdale's crimes, he has not shown that, but for his counsel's comments concerning rejection of the plea deal, he would have received a more lenient sentence. See *Strickland v. Washington*, 466 U.S. 668, 699-700 (1984) (holding that, considering the totality of the evidence, there was no reasonable probability

that a lesser sentence would have been imposed but for counsel's alleged error); *State v. Braswell*, 312 N.C. 553, 563-64, 324 S.E.2d 241, 249 (1985) (holding that there was no reasonable probability that the outcome would have been different in the absence of counsel's alleged errors because the evidence against defendant was overwhelming).

Barksdale also argues that he need not show prejudice because his counsel's purportedly deficient conduct resulted from a conflict of interest. The conflict, according to Barksdale, arose from his counsel's desire to protect himself from a future claim of ineffective assistance by disclosing Barksdale's reasons for going to trial. Barksdale argues that this conflict of interest is *per se* prejudicial. We reject this argument because, even if counsel's comments stemmed from a conflict of interest (and we are not persuaded that they did), it is not the type of conflict that is *per se* prejudicial.

In *Cuyler v. Sullivan*, the U.S. Supreme Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." 446 U.S. 335, 349-50 (1980). But as our Supreme Court has explained, "[t]he applicability of the *Sullivan* line of cases has been carefully

cabined by the United States Supreme Court.” *Phillips*, 365 N.C. at 121, 711 S.E.2d at 137. It applies in cases involving “an attorney’s multiple representation of more than one defendant or party, either simultaneously or in succession, in the same or related matters.” *Id.* at 118, 711 S.E.2d at 135.

In *Phillips*, our Supreme Court declined to extend *Sullivan* to a case involving an attorney who continued to represent the defendant after learning that he may need to testify as a fact witness. *Id.* at 121-22, 711 S.E.2d at 137. Similarly, this Court recently declined to apply *Sullivan* where the defendant’s attorney had contact with the alleged victim. *State v. Smith*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 749 S.E.2d 507, 509 (2013). In *Smith*, we emphasized that the *Sullivan* exception applies only to “alleged conflicts of interest arising from defense counsel’s representation of multiple adverse parties.” *Id.*; see also *Mickens v. Taylor*, 535 U.S. 162, 175 (2002) (rejecting lower federal courts’ expansive readings of *Sullivan* because “the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application”).

Barksdale asks this Court to do what our appellate courts were unwilling to do in *Phillips* and *Smith*: extend *Sullivan* beyond cases involving representation of adverse parties.

Barksdale urges this Court to follow the Colorado Court of Appeals, which applied *Sullivan* in a case where trial counsel breached client confidentiality and "reveal[ed] matters to the court and prosecutors, while keeping the same matters secret from their client." *Colorado v. Ragusa*, 220 P.3d 1002, 1006 (Colo. App. 2009).

We decline Barksdale's invitation to expand the scope of *Sullivan*. The rationale for the *Sullivan* rule is the difficulty in proving prejudice in cases where a lawyer represented multiple adverse parties. See *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137. In that circumstance, it is difficult—if not impossible—to show which decisions by counsel were made because of the purported conflict, as opposed to other reasons. But here, as in *Phillips* and *Smith*, "the facts do not make it impractical to determine whether the defendant suffered prejudice." *Phillips*, 365 N.C. at 122, 711 S.E.2d at 137. We can review the sentencing proceedings to determine whether the result would have been different but for counsel's disclosure of the confidential attorney-client communications to the court. As explained above, after reviewing the court's sentencing pronouncement, and taking into account the heinous nature of Barksdale's crimes, we conclude that the result would not have

been different. We therefore reject Barksdale's ineffective assistance of counsel claim.

## **II. Improper Sentencing Considerations**

Barksdale next argues that the trial court improperly based its sentencing determination in part on Barksdale's decision to reject the offered plea agreement and go to trial. After announcing the sentences, the trial judge made the following comment:

THE COURT: These are long sentences and it may seem that they are more than your life time, but what I heard today, yesterday, and the day before, this sentence should be a statement for more than just one life time. You've affected two lives entirely, and you've affected 13 other people's lives, not to mention everyone that heard anything about this case.

Barksdale contends that the reference to affecting "13 other people's lives" shows that the trial court sentenced him because he chose to present his case to a jury. For the reasons that follow, we find no error in the trial court's sentencing.

It is reversible error for a trial court during sentencing to take into account the defendant's decision to reject a plea offer and insist on a jury trial. See *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). In determining whether the severity of the defendant's sentence was based on this improper

factor, we look at the "totality of the trial judge's remarks" in context. *State v. Tice*, 191 N.C. App. 506, 515, 664 S.E.2d 368, 374 (2008).

This Court addressed a similar issue in *State v. Gantt*, 161 N.C. App. 265, 272, 588 S.E.2d 893, 898 (2003). There, the trial court announced the defendant's sentence with the following comment:

At the beginning of the trial I gave you one opportunity where you could have exposed yourself probably to about 70 months but you chose not to take advantage of that. I'm going to sentence you to a minimum of 96 and a maximum of 125 months in the North Carolina Department of Correction[].

*Id.* We held that "[a]lthough we disapprove of the trial court's reference to defendant's failure to enter a plea agreement, we cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished because he exercised his constitutional right to trial by jury." *Id.* (quotation marks omitted).

Similarly, in *Tice*, the trial court remarked at sentencing that "[y]ou've had ample opportunities to dispose of this case. The State has given you ample opportunity to dispose of it in a more favorable fashion and you chose not to do so." 191 N.C. App. at 513, 664 S.E.2d at 373. The court then discussed its

belief that the defendant had presented false testimony at trial. *Id.* This Court affirmed, holding that, in context, the trial court was simply acknowledging "that defendant made a bad choice, but justified the sentence he imposed on his belief that defendant's evidence was fabricated." *Id.* at 515, 664 S.E.2d at 374-75.

As in *Gantt* and *Tice*, we conclude here that the trial court did not impermissibly punish the defendant for his decision to go to trial. In context, the trial court's statement that "[y]ou've affected two lives entirely, and you've affected 13 other people's lives, not to mention everyone that heard anything about this case" is a reference to the heinousness of Barksdale's crimes. Indeed, the court's mention of not just the jurors but also "everyone that heard anything about this case" demonstrates that the court's concern was how terrible Barksdale's crimes were, not the fact that Barksdale chose to be tried by a jury. Accordingly, as in *Gantt* and *Tice*, we conclude that the trial court's remarks "do not rise to the level of the statements our Courts have held to be improper considerations of a defendant's exercise of his right to a jury trial." *Gantt*, 161 N.C. App. at 272, 588 S.E.2d at 898.

Although we reject Barksdale's argument, we take this opportunity to repeat our admonition to trial courts in *Tice* that "judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." *Tice*, 191 N.C. App. at 516, 664 S.E.2d at 375.

### **III. Double Jeopardy Violation**

Finally, Barksdale argues that sentencing him for both first degree kidnapping and the underlying sexual assault that was an element of the kidnapping charge violates the protections against double jeopardy contained in the United States and North Carolina constitutions. The State concedes this error and we agree.

When a defendant is tried under two different statutes for the same conduct, "the amount of punishment allowable under the double jeopardy clause of the Federal Constitution and the law of the land clause of our State Constitution is determined by the intent of the legislature." *State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986). A defendant cannot be sentenced under both statutes unless the legislature has authorized cumulative punishment. *Id.* at 21-22, 340 S.E.2d at 39-40.



The offense of first degree kidnapping requires that "the person kidnapped . . . [1] was not released by the defendant in a safe place or [2] had been seriously injured or [3] sexually assaulted." N.C. Gen. Stat. § 14-39(b) (2013). Our Supreme Court has held that in first degree kidnapping cases based on the sexual assault element, "the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying sexual assault." *Freeland*, 316 N.C. at 23, 340 S.E.2d at 40-41. Therefore, it is a double jeopardy violation to convict and sentence a defendant for both first degree kidnapping and the sexual offense that constituted the sexual assault element of the first degree kidnapping charge. *Id.* at 21, 340 S.E.2d at 39.

In *Freeland*, the defendant was convicted and sentenced on charges of first degree rape, first degree sexual offense, and first degree kidnapping. 316 N.C. at 14, 340 S.E.2d at 36. But because the only basis for first degree kidnapping in *Freeland* was the sexual assault element of the statute, "the jury must have relied on the rape or sexual offense to satisfy the sexual assault element." *Id.* at 21, 340 S.E.2d at 39. Therefore, our Supreme Court held that the defendant was "unconstitutionally subjected to double punishment under statutes proscribing the

same conduct.” *Id.* The Court remanded the case for resentencing, stating that “[t]he trial court may arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or it may arrest judgment on one of the sexual assault convictions.” *Id.* at 24, 340 S.E.2d at 41.

The present case is indistinguishable from *Freeland*. Barksdale was convicted of first degree kidnapping, first degree sexual assault, and attempted first degree rape of Ms. Smith. In order for the jury to convict him on the charge of first degree kidnapping of Ms. Smith, who was not seriously injured or left in an unsafe place, it was necessary for the jury to find that Barksdale sexually assaulted her. Therefore, one of the two sex offense charges must be the basis for that count of first degree kidnapping. As a result, sentencing Barksdale for all three offenses violated the constitutional protections against double jeopardy.

Accordingly, we reverse the trial court’s sentencing order and remand for resentencing with respect to the convictions for first degree sexual offense, attempted first degree rape, and the count of first degree kidnapping pertaining to Ms. Smith. At the resentencing hearing, the trial court may either

resentence Barksdale for second degree kidnapping or it may arrest judgment on one of the two sexual offense convictions.

**Conclusion**

For the reasons stated above, we find no error in Barksdale's conviction but we vacate the trial court's sentencing order in part and remand for resentencing consistent with this opinion.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge STEPHENS concur.