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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-678

Filed: 6 February 2018

Rowan County, Nos. 15 CRS 2358, 50759–60

STATE OF NORTH CAROLINA

v.

ERIN LYNN UPRIGHT

Appeal from judgment entered 2 November 2016 by Judge Anna Mills Wagoner in the Rowan County Superior Court. Heard in the Court of Appeals 2 January 2018.

Attorney General Joshua H. Stein, by Outreach & Policy Counsel Hugh A. Harris, for the State.

Kimberly P. Hoppin for defendant-appellant.

BRYANT, Judge.

Where defendant's trial counsel's stipulation did not constitute a *Harbison* violation, and where counsel's limited concession appears to fall within the bounds of reasonable defense tactics, we overrule defendant's ineffective assistance of counsel claim and find no error in the judgments of the trial court.

The State's evidence tended to show that defendant Erin Lynn Upright was employed as an Assistant Manager for a McDonald's restaurant on East Innes Street in Salisbury, North Carolina. As an assistant manager, defendant was responsible

for collecting and counting the money received by the restaurant during her shift, entering the amount collected into the restaurant's computerized In Store Processing ("ISP") system, preparing a bank deposit ticket, depositing the money into the employer's bank account, and entering the amount from the validated deposit ticket into the ISP system. Each assistant manager had a unique ISP login code which they used to enter their deposit data. Because company policy prohibited nighttime bank deposits, the assistant manager who worked the night shift would place the deposit bag in the restaurant's safe overnight. If the day-shift assistant manager was too busy to make the deposit immediately, she could also place the deposit bag in the safe until she was able to go the bank.

On 17 November 2014, defendant spoke by phone with the restaurant's owner, Mr. Austin, and asked if she could meet with him. Mr. Austin said that he would come to the restaurant the next day. Defendant worked the night shift on 17 November 2014. When Mr. Austin arrived on 18 November 2014, defendant asked to borrow $1,700.00 in order "to pay off traffic tickets." Defendant told him that "if she didn't have the money by 5:00, she would probably be picked up and put in jail." Mr. Austin replied that he was sorry but could not lend her "that kind of money."

On 18 November 2014, defendant's manager, Ms. Hill, went to the bank to retrieve the deposit ticket from the previous night's deposit and discovered the deposit had not been made. When Ms. Hill informed defendant that the deposit was

not at the bank, defendant replied that "she needed the money." Defendant told Ms. Hill that she had the deposit with her in her car, but "it was $800 off." Ms. Hill insisted that she "fix this deposit now." When defendant said she did not have the money, Ms. Hill loaned her the missing $800. Defendant deposited the money into the restaurant's account on 20 November 2014. Ms. Hill elected not to notify the owner about the incident.

On 7 December 2014, defendant worked a day shift and was relieved in the afternoon by the restaurant's First Assistant Manager, Ms. Conway. Ms. Conway remained on the floor while defendant completed her "cash out" in the restaurant's office, counting the money and preparing the deposit from her shift. A deposit in the amount of $3,796.00 was entered into the ISP system using defendant's login code at 4:12 p.m. on 7 December 2014. At approximately 4:00 p.m., defendant came out to the floor and told Ms. Conway that she had completed her cash out and was going home, but was leaving the deposit in the safe in case Ms. Conway needed additional $5 and $1 bills. Ms. Conway did not go to the safe for the remainder of her shift.

On Friday, 12 December 2014, Ms. Conway was preparing cash sheets for the restaurant's owner by checking the validated bank deposit tickets against the ISP system entries and noticed there was no deposit ticket for defendant's shift on 7 December 2014. Thinking the ticket had been misplaced, Ms. Conway contacted the bank and asked it to determine whether the deposit had been made and, if so, to

provide her a copy of the missing deposit ticket. She left a note for the restaurant's manager, Ms. Hill, advising her of the missing ticket.

Ms. Hill came into work on the morning of Saturday, 13 December 2014. Defendant showed her Ms. Conway's note about the missing deposit from 7 December 2014 and said, "Ms. [Hill], you know I always drop my deposits."

When Ms. Hill went to the bank on Monday, there was "no record of the deposit being dropped." She then telephoned defendant about the missing deposit. Defendant told Ms. Hill that she had "left it in the safe for fives and ones." When Ms. Hill informed her that the bank had never received the deposit, defendant "hung up." Ms. Hill attempted to call defendant again but was unable to reach her. On 17 December 2014, Ms. Hill reported the missing money to the police.

Defendant was scheduled to work on 16 December 2014 but called in sick. Defendant called the next morning and asked Ms. Conway to work for her because "her son had fallen and they had to take him to the hospital." On 18 December 2014, Ms. Conway learned defendant had quit her job.

On 15 January 2015, a detective with the Salisbury Police Department interviewed defendant about "the $3,796 missing from her shift." Defendant told the detective that she had not been informed of the missing deposit "until after she quit[,]" when she came to the restaurant the week before Christmas to collect her final paycheck. Defendant explained that she left her job because "McDonald's was

working her too much[.]" She ended the interview when the detective "tried to press her about the missing deposit[.]" The detective also interviewed Ms. Conway, Ms. Hill, and Mr. Austin, whose statements corroborated their trial testimony.

Defendant did not testify or offer any evidence in response to the State's case.

A jury found defendant guilty of two counts of embezzlement by employee, whereupon she pled guilty to being an habitual felon. The trial court consolidated defendant's convictions for judgment and sentenced her to an active prison term of 110 to 144 months. Defendant gave notice of appeal in open court.

On appeal, defendant claims her counsel violated her constitutional right to effective assistance of counsel under U.S. Const. amend. VI, XIV, and N.C. Const. art. 1 §§ 19, 23 by stipulating at trial that the 7 December 2017 bank deposit was never made. We disagree.

Counsel for defendant entered the stipulation at issue during Ms. Hill's testimony, as follows:

> Q. When was the next time you contacted [the bank]?
>
> A. The next day of – the bank . . . had called the main office to see if [the deposit] had got thrown out of one system into the other system, and it did not, so it was not there.
>
> [DEFENSE COUNSEL]: Your Honor, if it please the Court, in order to overcome any hearsay problem, [defendant] is going to stipulate that F&M Bank did not locate the deposit in question . . . .

> [PROSECUTOR]: Or the deposit was never made, that's fine.
>
> . . . .
>
> THE COURT: All right. Ladies and gentlemen of the jury, the defense and the State have stipulated for purposes of the missing 2000-plus dollars that the –
>
> [PROSECUTOR]: $3,796.
>
> THE COURT: . . . 3796, the deposit was never – a deposit of that amount was never made.
>
> [PROSECUTOR]: At F&M Bank.
>
> THE COURT: At F&M Bank. Is that fine with you, [counsel], yes?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. All right.
>
> THE COURT: Okay.

Defendant argues that her counsel's stipulation amounted to a concession of guilt without her consent, which is prohibited by *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). Defendant further contends that counsel undermined her credibility with the jury by directly contradicting her statement to Ms. Hill that she always made her deposits.

In order to obtain relief for ineffective assistance of counsel ("IAC"), a defendant must show both (1) unreasonably deficient performance by her counsel and (2) a reasonable probability that, but for counsel's error, she would have obtained a

more favorable outcome at trial. *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984); *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for purposes of N.C. Const. art. 1, §§ 19, 23). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

We first conclude that defendant has not shown a *Harbison* violation based on counsel's stipulation. Under *Harbison*, "a defendant receives ineffective assistance of counsel *per se* when counsel concedes the defendant's guilt to the offense or a lesser-included offense without the defendant's consent." *State v. Berry*, 356 N.C. 490, 512, 573 S.E.2d 132, 147 (2002).

The essential elements of embezzlement are as follows:

> "(1) that the defendant was the agent of the [principal], and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment, and (4) knowing it was not his own, converted it to his own use."

State v. Block, 245 N.C. 661, 663, 97 S.E.2d 243, 244 (1957) (citation omitted); *see also* N.C. Gen. Stat. § 14-90 (2015). The fact that the bank never received the deposit from 7 December 2014, as stipulated by counsel, does not amount to an admission of defendant's guilt to embezzlement, because it does not establish that defendant converted the missing money to her own use. Indeed, defendant's most contemporaneous statement about the deposit was that she was leaving it in the restaurant safe for Ms. Conway in case she needed additional $1 or $5 bills during her shift. As counsel never conceded that defendant "committed any crime whatsoever," we find no constitutional violation *per se*. *State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995).

We further hold that defendant has failed to show either unreasonable performance by counsel or prejudice arising therefrom, as required by *Strickland* and *Braswell*. The record before this Court shows that, absent counsel's stipulation, the State was prepared to introduce authenticated bank records to prove that the deposit in question was never made. *See* N.C. Gen. Stat. § 8C-1, Rules 803(6) ("Records of Regularly Conducted Activity"), 902(8) ("Acknowledged Documents") (2015). Counsel's limited concession thus appears to fall well within the bounds of reasonable defense tactics. *See generally State v. Milano*, 297 N.C. 485, 495–96, 256 S.E.2d 154, 160 (1979) (quoting *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978)) ("Trial counsel are necessarily given wide latitude in [tactical] matters. [IAC] claims are 'not

intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.' "), *overruled in non-pertinent part by State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) (ruling that "polygraph evidence is no longer admissible in any trial").

Moreover, as noted above, counsel's stipulation was consistent with defendant's initial statement to Ms. Conway and her second statement to Ms. Hill that she left the deposit in the safe on 7 December 2014. Regardless of counsel's action, defendant's initial statement to Ms. Hill that she "always" made her deposits was at odds with her earlier statement to Ms. Conway and her subsequent statement to Ms. Hill. Any damage to defendant's credibility arose from her inconsistent statements rather than counsel's attempt to construct a successful defense around them. Defendant's IAC claim is overruled.

NO ERROR.

Judges HUNTER, JR., and INMAN concur.

Report per Rule 30(e).