

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-726

Filed: 7 May 2019

Forsyth County, No. 15 CRS 51537

STATE OF NORTH CAROLINA

v.

ANTON THURMAN MCALLISTER

Appeal by defendant from judgment entered 22 August 2016 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 13 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Anton Thurman McAllister (“Defendant”) appeals by petition for writ of certiorari from a judgment entered after a jury’s conviction of one count of habitual misdemeanor assault. We find no error.

I. Background

Defendant met the victim, Stephanie Leonard, at a drug treatment facility group session in Winston-Salem. Soon after they met, Defendant moved into Ms. Leonard’s apartment.

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On the evening of 16 February 2015, Defendant and Ms. Leonard jointly consumed a large bottle of wine at a table inside Ms. Leonard's apartment. Around 9:00 p.m., they decided to walk to a nearby BP gas station to purchase cigarettes. Before arriving at the BP gas station, Ms. Leonard decided she wanted more wine and the pair began walking towards another store.

At this point, Defendant realized Ms. Leonard had not disclosed to him that she had money. Ms. Leonard testified that Defendant hit her in the face and knocked her to the ground, causing her to lose her wallet in the fall. Ms. Leonard got up and began to walk back towards the BP station. Defendant continued to strike her in the face. A cashier at the BP heard the struggle and saw Defendant "jerk" Ms. Leonard around outside of the store. The cashier called the police. Winston-Salem police responded to the call, but did not find Defendant or Ms. Leonard. An officer recovered Ms. Leonard's wallet and identification card at the scene.

The couple eventually returned to Ms. Leonard's apartment. Ms. Leonard testified that her face was bleeding and Defendant continued to hit her and drag her around the apartment. During the struggle, as Ms. Leonard struck at Defendant, her fingers entered his mouth and his fingers entered hers. Ms. Leonard testified that she bit Defendant's fingers and he bit her fingers back. At some point during the altercation, Ms. Leonard got into the bathtub. Defendant washed blood off of her body and splashed the blood-water mixture onto the walls.

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Ms. Leonard went into her bedroom. Defendant attempted to force Ms. Leonard to perform fellatio. Defendant and Ms. Leonard then engaged in sexual intercourse and both fell asleep.

The next day, 17 February, Winston-Salem police arrived at the BP station to meet Ms. Leonard and investigate the assault. Officer P.M. Felske testified he observed Ms. Leonard's "cut lip and swollen lip and that it appeared that she had been assaulted." Law enforcement officers also entered and examined Ms. Leonard's apartment. Officer Christopher Ingram observed and photographed Ms. Leonard's injuries and the blood stains the officers had observed in the apartment, on the floor of the bathroom and walls of the bathtub.

Officer J.A. Henry collected a security video recorded at the BP station on 16 February and observed Defendant present in the area of that same BP on the evening of 17 February. Defendant agreed to go to the police department to speak with officers about an unrelated incident. At the police station, Defendant agreed to discuss the incident between himself and Ms. Leonard. Defendant purportedly admitted he had pushed Ms. Leonard and engaged in other physical contact.

Defendant was indicted for habitual misdemeanor assault and charges of second-degree rape, second-degree sex offense, and assault by strangulation.

On 22 August 2016, the jury returned verdicts finding Defendant guilty of assault on a female, the underlying felony for habitual misdemeanor assault, and not

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guilty of all the other offenses. Defendant admitted to the predicate misdemeanor assault convictions for habitual misdemeanor assault. The trial court entered judgment sentencing Defendant to a term of 15 to 27 months imprisonment for habitual misdemeanor assault.

Defendant failed to file a notice of appeal. On 19 July 2017, Defendant filed a *pro se* “Motion to Modify and Terminate Sentence for Ineffective Assistance of Counsel.” The trial court treated Defendant’s motion as a motion for appropriate relief (“MAR”) and denied the motion without an evidentiary hearing.

Defendant filed a petition for writ of certiorari with this Court on 11 August 2017. By order entered 29 August 2017, this Court allowed the petition “for the purpose of reviewing the judgment entered . . . on 22 August 2016.”

On 17 October 2018, Defendant filed an appellate brief, and at the same time filed a second petition for writ of certiorari seeking review of the trial court’s 27 July 2017 order denying the MAR. The second petition was referred to this panel for consideration.

II. Jurisdiction

This Court reviews Defendant’s criminal conviction by writ of certiorari granted on 29 August 2017 pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) (2017).

III. Issue

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Defendant asserts his counsel conceded his guilt to the offense of habitual misdemeanor assault on a female which constitutes a *per se* denial of his constitutional right to effective assistance of counsel.

IV. Standard of Review

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

V. *State v. Harbison*

In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), our Supreme Court held that where “counsel admits his client’s guilt without first obtaining the client’s consent, the client’s rights to a fair trial and to put the State to the burden of proof are completely swept away.” The Court stated the practical effect is the same as if defense “counsel had entered a plea of guilty without the client’s consent.” *Id.*

Our Supreme Court in *Harbison* requires a defendant’s consent to be on the record to allow his counsel’s concession of defendant’s guilt of one or more of the offenses for which he is charged. An “ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, [is] established in every criminal case in which the defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent.” *Id.* at 180, 337 S.E.2d at 507-08.

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Defendant argues his trial counsel admitted or conceded his guilt on the misdemeanor charge of assault on a female without his consent and asserts he is entitled to a new trial. The State argues that no *Harbison* violation occurred because counsel did not expressly concede Defendant's guilt to a charged crime or only admitted one element of a charged offense.

The facts and statements of the present case fall squarely within the rationale of the precedents cited by the State from the Supreme Court of North Carolina and our Court, where Defendant's counsel may have admitted an element of the offense, but he did not expressly concede the crime charged or all other elements of the charged crime.

A. State v. Gainey

In *State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (2002), our Supreme Court rejected the defendant's assignment of error asserting his counsel's argument violated *Harbison*. The Court recognized that "defense counsel never conceded that defendant was guilty of any crime." *Id.* Counsel merely noted defendant's involvement in the events surrounding the death of the victim, and argued that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." *Id.* (defendant was charged with murder, kidnapping, and robbery). The Court noted the defendant had "taken defense counsel's statements out of context to form the basis of his claim, and . . . fail[ed] to note the consistent

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theory of the defense that defendant was not guilty.” *Id.* The defendant’s *Harbison* objections were overruled. *Id.*

B. State v. Fisher

In *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), the defendant was charged with and tried for first-degree murder. His counsel argued:

His Honor is going to submit to you a verdict form—Madam Clerk, do we have it drawn up yet? Thank you. In which its going to say, Ladies and Gentlemen of the Jury, Do you find the defendant guilty of murder in the first degree and then down below that it’s going to say Do you find him guilty of second degree. Second degree is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard Johnny testify, there was malice there and then another possible verdict is going to say Do you find him guilty of voluntary manslaughter. Voluntary manslaughter is the killing of a human being without malice and without premeditation. It’s a killing. And it also has not guilty, remember that too. I asked you about that and it’s not a not guilty as in some trial I wasn’t there, I don’t know a darn thing about it, I wasn’t there, never been to Silversteen, never will go there. There are some that say, some defenses that say not guilty, that I was there. It’s stupid to be there, it don’t make mama proud of being there but I was there.

Id. at 533, 350 S.E.2d at 346.

Our Supreme Court held defendant-Fisher was not entitled to a new trial as the counsel’s comments did not admit his guilt and counsel’s statement did not fall within the line of cases showing a *Harbison* violation. *Id.* Even though Fisher’s

counsel admitted malice, an element of the offense, the Court held that his counsel did not admit his client was guilty to murder as charged. *Id.*

Our Court has also recognized, “[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.” *See, e.g., State v. Wilson*, 236 N.C. App. 472, 477, 762 S.E.2d 894, 897 (2014) (“Because this purported admission by Defendant’s counsel did not refer to either the crime charged or to a lesser-included offense, counsel’s statements in this case fall outside of *Harbison*. At best, an admission by Defendant’s trial counsel that Defendant pointed a gun at [victim] while still maintaining Defendant’s innocence of attempted first-degree murder, would appear to place counsel’s statements within the rule in [*State v.*] *Fisher*, and thus still outside of *Harbison*.”).

C. State v. Randle

In *State v. Randle*, 167 N.C. App. 547, 550, 605 S.E.2d 692, 693 (2004), this Court reviewed a defendant’s assertion his counsel had implicitly conceded his guilt to a lesser-included offense during closing argument without first obtaining his consent. Defendant’s counsel told the jury

they must be entirely convinced of each and every element of the crimes. As serious injury is the essential difference between first and second degree rape, defense counsel then attempted to cast doubt on the seriousness of the mental and physical injuries to [the victim] by arguing [the victim] did not suffer serious injury.

Id. at 549, 605 S.E.2d at 693.

Defendant's counsel also summarized evidence that the defendant had ejaculated on himself. *Id.* In his final sentence to the jury, defense counsel argued, "Teddy Randle is not guilty of first degree rape. Teddy Randle is not guilty of first degree sexual offense." *Id.* Our Court distinguished the *Randle* case from the requirements of *Harbison* because "counsel in the case at bar never actually admitted the guilt of defendant to any charge, nor did counsel claim that defendant should be found guilty of some offense." *Id.* at 552, 605 S.E.2d at 695.

D. State v. Maniego

The State also cites *State v. Maniego*, 163 N.C. App. 676, 683, 594 S.E.2d 242, 246, *appeal dismissed, review denied*, 358 N.C. 737, 602 S.E.2d 369 (2004), in which the defendant argued his counsel's opening statement violated *Harbison*. The defendant's counsel stated:

Maniego put himself in the vehicle with Clifford Miller and David Brandt. He put himself driving the vehicle, he put himself at the scene where David Brandt was murdered by Clifford Miller. Through his statements, you'll hear his testimony in this case and he did make three different statements. The first two are incomplete. The third one is the final version. It's the truth about his involvement in these crimes, and it will show to you that he did not aid and abet in the killing of David Brandt by Clifford Miller, nor did he act in concert with Clifford Miller to kill David Brandt. The fact that he's at the scene where these acts occurred is not enough for you to find him guilty of these crimes.

Id. at 684, 594 S.E.2d at 247. This Court held no *Harbison* violation had occurred to award a new trial because “[a]dmitting a fact is not equivalent to admitting guilt.” *Id.* (citation omitted).

E. Defendant’s Cases

A review of cases cited by Defendant, wherein this Court awarded new trials based upon counsels’ admissions of their client’s guilt in closing arguments, also reflects the fallacy of Defendant’s argument. Defendant’s assertion that his counsel’s statements in closing argument denied his constitutional right to effective counsel under *Harbison* is clearly not supported by these cases.

In *State v. Maready*, 205 N.C. App. 1, 4-5, 695 S.E.2d 771, 774-75 (2010), the defendant pled not guilty and was tried before a jury. During his closing argument, defense counsel “conceded that the State had met its burden with respect to the charges of DWI, reckless driving, DWLR and misdemeanor ‘larceny and/or possession of stolen property.’” *Id.* at 4, 695 S.E.2d at 774. Counsel also made the following statements:

We do have the two misdemeanor assaults. . . . We don’t contest those. They are inclusive in the events that have significant issues associated with them, but we don’t contest those. And you can go and make your decisions accordingly. . . . [Defendant] holds absolute—holds responsibility for [the death of the victim]. I just argue it’s not murder. It’s Involuntary Manslaughter.

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Id. at 4, 695 S.E.2d at 774-75. This Court found:

Defendant's counsel discussed the elements of involuntary manslaughter with the jury, stating that the second element was "that . . . [D]efendant's impaired driving proximately caused the victim's death. That's true. [Defendant's] guilty of that and should be found guilty of that." Defendant's counsel also stated that: "[Defendant's] already admitted to you guilt . . . to . . . Assault with a Deadly Weapon times two[.]"

At the close of all the evidence and after closing arguments, but before jury instruction, Defendant's counsel again admitted Defendant's guilt to the charges of reckless driving, DWI, DWLR and misdemeanor possession of stolen goods.

Id. at 4-5, 695 S.E.2d at 775. The facts before us are clearly distinguishable from counsel's admissions and statements in *Maready*. *See id.*

Defendant also cites *State v. Spencer*, 218 N.C. App. 267, 275, 720 S.E.2d 901, 906 (2012), wherein the defendant was charged with resisting a public officer and eluding arrest. *See* N.C. Gen. Stat. § 20-141.5(a) (2017) ("It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.").

The defendant's counsel's closing argument in *Spencer* admitted the defendant "chose to get behind the wheel after drinking, and he chose to run from the police" and "Officer Battle was already out of the way and he just kept on going, kept running from the police." *Spencer*, 218 N.C. App. at 275, 720 S.E.2d at 906. This Court held

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counsel had conceded defendant's guilt to resisting a public officer and to eluding arrest. This Court remanded the case for a determination of whether the defendant had received the proper *Harbison* warnings. *Id.*

VI. Crimes Charged

Defendant's other charges of second-degree rape, second-degree sexual offense, and assault by strangulation were submitted to the jury, in addition to the habitual misdemeanor assault charge. The habitual misdemeanor assault premised upon an assault on a female, was the only count the jury convicted defendant of committing. The State's evidence tended to show Defendant had assaulted and struck Ms. Leonard by pushing her down, biting her, and hitting her in the face, causing injuries of scrapes and bruises to her back and fingers, and bleeding and swelling of her lips.

The trial court instructed the jury that in order for them to find Defendant guilty, the State must prove three things beyond a reasonable doubt: (1) Defendant intentionally assaulted the alleged victim by hitting her; (2) the alleged victim was a female; and, (3) Defendant was a male over the age of 18. The elements of habitual misdemeanor assault are: (1) a simple assault or a simple assault and battery or affray; (2) which causes physical injury; and, (3) two or more prior convictions for either misdemeanor or felony assault. N.C. Gen. Stat. § 14-33.2 (2017).

Counsel's closing argument asserted two people had gotten drunk and argued, which escalated into a fight. Counsel stated, "You heard him admit that things got

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physical. You heard him admit that he did wrong. God knows he did.” Counsel’s statements relayed and summarized the evidence before the jury, which included both the officer’s testimony and Defendant’s recorded hour-and-a-half long video interview with officers, shown to the jury. In the video interview, Defendant made the statements that were summarized in counsel’s closing argument. Counsel repeated his assertion that Defendant and Ms. Leonard were “[t]wo drunk people [who] got into an argument.”

While defense counsel acknowledged the jurors may “dislike Mr. McAllister for injuring Ms. Leonard,” he did not state Defendant “assaulted,” struck, pushed, bit, or committed any of the specific acts or elements as alleged by the State. Further, counsel did not acknowledge Defendant’s age or prior criminal record, both elements of habitual misdemeanor assault.

Our controlling precedents above hold that where counsel admits an element of the offense, but does not admit defendant’s guilt of the offense, counsel’s statements do not violate *Harbison* to show a violation of the defendant’s Sixth Amendment rights. Counsel’s statements before us are not consistent with the facts of either *Maready* or *Spencer*, in which *per se* violations are presumed by counsel’s admission of a client’s guilt to crimes or all the elements thereof without the client’s consent. *Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *Wilson*, 236 N.C. App. at 476, 762 S.E.2d at 897.

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Here, counsel's conduct was not *per se* deficient under *Harbison* to award a new trial.

VII. *Strickland v. Washington*

Since counsel's statements do not fall within *Harbison* as *per se* ineffective assistance, Defendant's claim of ineffective assistance of counsel must be analyzed using the *Strickland* factors. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). A defendant's claim of ineffective assistance of counsel has two components:

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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

However, here, Defendant presents no argument tending to show he was prejudiced by counsel's asserted deficient performance to such an extent the outcome of the trial would have been different, but for the alleged errors. Defendant has not demonstrated or argued any prejudice. Defendant is not entitled to a new trial on this issue. *Id.*

VIII. Motion for Appropriate Relief

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Defendant petitioned this Court on 18 October 2018 to issue another writ of certiorari to review on the merits the trial court's denial of his "Motion to Modify and Terminate Sentence for Ineffective Assistance of Counsel," which the trial court treated as a motion for appropriate relief ("MAR"). The trial court found Defendant's motion presented only matters of law and raised no factual issues to require an evidentiary hearing. The court summarily denied defendant's MAR on 27 July 2017.

Defendant had filed his earlier 11 August 2017 petition for writ of certiorari to this Court. On 29 August 2017, this Court allowed Defendant's petition for the limited purpose of reviewing the 22 August 2016 habitual misdemeanor assault judgment entered immediately after defendant's trial.

In his MAR, Defendant asserted, *inter alia*, his trial counsel had a conflict of interest because his law firm had represented the victim in a similar criminal matter. He asserted claims of ineffective assistance of counsel by his failure to object to alleged false statements of the police, failure to share discovery materials with defendant, and "many constitutional violations."

Defendant failed to provide any supporting affidavits or other evidence beyond the bare assertions in his motion. The General Statutes require a MAR to be supported by affidavit or other documentary evidence. N.C. Gen. Stat. § 15A-1420(b) (2017). "A defendant who seeks relief by motion for appropriate relief must show the

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existence of the asserted ground for relief. Relief must be denied unless prejudice appears.” N.C. Gen. Stat. § 15A-1420(c)(6) (2017).

Defendant’s failure to provide affidavits or other evidence provided no basis for the trial court to review and be able to determine whether an evidentiary hearing would be required. *See State v. Payne*, 312 N.C. 647, 669, 325 S.E.2d 205, 219 (1985) (Because defendant submitted no supporting affidavits or other documentary evidence with his motion for appropriate relief and the alleged fact was not ascertainable from the record or transcripts submitted, the Court “cannot address the merits of defendant’s request for appropriate relief”); *State v. Aiken*, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (1985) (“Since defendant did not comply with G.S. 15A–1420(c)(6), the trial court’s summary denial of the motion for appropriate relief was not error.”).

Without any factual support, the trial court’s summary denial of Defendant’s MAR was proper. Defendant’s subsequent and pending petition for writ of certiorari filed 17 October 2018 is denied.

IX. Conclusion

This case is controlled by the precedents and holdings in *Gainey*, *Fisher*, *Randle*, and *Maniego*. Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant admitted to his prior assault convictions to support the charge for habitual misdemeanor assault.

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There is no error in the jury's verdict or in the judgment entered thereon. Defendant's pending petition for writ of certiorari filed 17 October is denied. *It is so ordered.*

NO ERROR.

Judge STROUD concurs.

Judge ARROWOOD dissenting with separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. I would hold that, under *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), there was a *per se* violation of defendant's right to effective assistance of counsel.

On appeal, defendant first argues that he was denied his constitutional right to effective assistance of counsel when his counsel conceded he was guilty of assault on a female during closing arguments. Defendant relies on our Supreme Court's decision in *Harbison*, and contends his counsel's concession amounts to a *per se* violation of the Sixth Amendment, thereby requiring a new trial.

In *Harbison*, the Court noted that it recently adopted in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), the two-part test for resolving claims of ineffective assistance of counsel enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). *Harbison*, 315 N.C. at 178, 337 S.E.2d at 506. That two-part 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.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693) (emphasis omitted). Our Supreme Court has more recently explained the test and the required showings as follows:

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to 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.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

In *Harbison*, however, the Court recognized that, “[a]lthough [it] still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist ‘circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.’ ” 315 N.C. at 179, 337 S.E.2d at 507 (quoting *United States v. Cronin*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984)). For example, “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. The Court reasoned,

[w]hen counsel admits his client’s guilt without first obtaining the client’s consent, the client’s rights to a fair

trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. Consequently, the Court held that “ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent.” *Id.* at 180, 337 S.E.2d at 507-508.

In the present case, the State brought the potential for a *Harbison* issue to the trial court's attention prior to opening statements. The State explained that defendant did make some admissions in a statement to law enforcement and cautioned that the court may need to make a *Harbison* inquiry if defense counsel is going to address the admissions in the opening statements. The trial court then questioned the defense as follows:

THE COURT: Does the defense have any Harbison issues?

[DEFENSE]: Not immediately, Your Honor. That's not something I was expecting yet.

THE COURT: Are you expecting to make any comments in your opening with regard to admissions?

[DEFENSE]: Well, Judge, we have a lot to say about how and why he was interrogated which may brush up against --

THE COURT: Well, can you get more specific than that. Because I want to make sure your client understands that

the State has the burden to prove each and every element of each claim and if you're going to step into an admission during opening then I need to make sure that he understands that and he's authorized you to do that.

[DEFENSE]: Not in opening, I can stipulate to that.

The exchange ended with the court stating, "[l]et's rereview that when we get back from lunch." The court, however, did not come back to the issue. In fact, there is no further mention of the potential *Harbison* issue in the record.

The evidence presented by the State at trial included a video of defendant's interview with police. In that interview, defendant admitted to a physical altercation with the alleged victim that resulted in the alleged victim sustaining injuries.

It appears from the record that defense counsel knew the interview was damaging to defendant's case and addressed it during the closing arguments. Defense counsel suggested to the jury that the interview was coercive, noting that it was "9:00 at night, surrounded by cops, pulled off the street to make a voluntary statement[.]" and they begin talking to defendant about a moped that is unrelated to these charges. Defense counsel then, however, made the following statements:

You heard [defendant] admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. Now they run with his one admission and say "well, then everything [the alleged victim] -- everything else [the alleged victim] said must be true."

Because [defendant] was being honest, they weren't honest with him.

Following these statements, defense counsel returned to highlighting the coercive nature of the interview, stating, “[t]wo detectives for three hours into midnight. The whole time he’s thinking he’s going home.”

Later in the closing argument, defense counsel stated that “[the alleged victim] was injured by [defendant]” and addressed the severity of the charges by stating, “[t]his is as serious as it gets, second-degree rape, second-degree sexual assault, assault by strangulation.” Defense counsel did not mention the assault on a female charge serving as the underlying offense for habitual misdemeanor assault. Finally, in concluding the arguments to the jury, defense counsel stated,

Jury, what I’m asking you to do is you may dislike [defendant] for injuring [the alleged victim], that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did. He didn’t rape this girl. . . .

. . . All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can’t. Please find him not guilty.

Defendant now contends these statements by defense counsel during closing arguments amounted to a concession of guilt to the charge of assault on a female without his consent, in violation of *Harbison*. In response to defendant’s *Harbison* argument, the State briefly contends that this case does not fall under the prohibition in *Harbison* because “there was never any specific concession of guilt” because

“[c]ounsel never stated to the jury that defendant was guilty of assault on a female in contrast to the counsel in *Harbison*.” The State cites various cases in which our courts have determined there were no *Harbison* violations, such as cases in which counsel admitted an offense that was not charged, *see State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d. 165 (2002); *State v. Wilson*, 236 N.C. App. 472, 762 S.E.2d 894 (2014), or cases in which counsel did not concede all elements of the offense charged, *see State v. Hinson*, 341 N.C. 66, 459 S.E.2d 261 (1995); *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986); *State v. Maniego*, 163 N.C. App. 676, 594 S.E.2d 242 (2004). The State further contends that defense counsel in this case “asked the jury to find defendant not guilty of the charged offenses” at the close of his argument.

Upon review of these cases, I would hold defense counsel’s statement to the jury in closing arguments amounted to a concession of defendant’s guilt to assault on a female. Defense counsel did not simply recite evidence, he choose to highlight specific evidence that defendant physically injured the alleged victim and argued to the jury that defendant honestly admitted to police what he did. It appears defense counsel used this strategy in order to cast doubt on the allegations of more serious offenses that defendant did not admit to police. Defense counsel further indicated defendant was wrong for his actions, defendant felt bad about his actions, and explicitly stated “he did wrong, God knows he did.” I agree with defendant that

defense counsel's statements amount to an admission to assault on a female, distinguishing this case from those cases cited by the State. Furthermore, the State mischaracterizes defense counsel's final plea to the jury to find defendant not guilty. As shown above, defense counsel only emphasized the serious nature of second-degree rape, second-degree sexual assault, assault by strangulation. Defense counsel then, after repeating those three charges, asked the jury to find defendant not guilty.

Considering defense counsel's argument in full, it is evident defense counsel acknowledged defendant's guilt on the assault on a female charge in an attempt to cast doubt on the evidence of the more serious charges.

For the majority of the State's response, the State does not focus on the substance of defense counsel's argument. Instead, the State focuses on defense counsel's strategy. The State emphasizes that the uncontroverted evidence was that defendant admitted to police during the interview that he got physical with the alleged victim and contends it was a valid trial strategy for defense counsel to accept the evidence of assault on a female and argue doubt in the evidence of the more severe charges. The State asserts that this was defendant's "only viable defense" and acknowledges that it was successful because defendant was acquitted of the more severe charges. Thus, the State argues defense counsel was not ineffective and defendant cannot show prejudice. This argument by the State, however, does not address the *Harbison* issue.

“[M]atters of trial strategy . . . are not generally second-guessed by this Court.”

State v. Prevatte, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). However, just as our Supreme Court explained in *Harbison*, this Court has explained that

[a] concession of guilt by a defendant’s counsel has the same practical effect as a guilty plea, because it deprives the defendant of his right against self-incrimination, the right of confrontation and the right to trial by jury. Therefore, a decision to make a concession of guilt as a trial strategy is, like a guilty plea, a decision which may only be made by the defendant and a concession of guilt may only be made with the defendant’s consent. Due process requires that this consent must be given voluntarily and knowingly by the defendant after full appraisal of the consequences and a clear record of a defendant’s consent is required.

State v. Perez, 135 N.C. App. 543, 547, 522 S.E.2d 102, 106 (1999) (citations omitted), *appeal dismissed and disc. review denied*, 351 N.C. 366, 543 S.E.2d 140 (2000).

[This Court] reject[ed], however, [the] defendant’s argument that an acceptable consent requires the same formalities as mandated by statute for a plea of guilty. Our Supreme Court has found a knowing consent to a concession of guilt in compliance with *Harbison* where the record showed the defendant was advised of the need for his authorization for the concession, defendant acknowledged that he had discussed the concession with his counsel and had authorized it, and the defendant thereafter acknowledged that his counsel had made the argument desired by him.

Id. at 547-48, 522 S.E.2d at 106 (citations omitted).

Here, defendant does not question the strategy of defense counsel, because that is not at issue. Defendant only challenges defense counsel's concession of guilt on the charge of assault on a female without his authorization. I agree with defendant that there is nothing in the record to show that he agreed to defense counsel's concession. Therefore, under *Harbison*, there was a *per se* violation of defendant's right to effective assistance of counsel. No further showing is required. Accordingly, I would hold defendant is entitled to a new trial on the charge of assault on a female, the underlying offense for habitual misdemeanor assault.

Defendant also seeks for this Court to review the trial court's denial of his MAR pursuant to his second petition for *writ of certiorari* filed at the same time as his appellate brief on 17 October 2018. Unlike the majority, I would simply deny defendant's second petition as moot because of my determination defendant is entitled to a new trial on the first issue.

For the reasons above, I dissent.