An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-91

Filed: 3 December 2019

New Hanover County, Nos. 17 CRS 61032; 18 CRS 50125-26

STATE OF NORTH CAROLINA

v.

DEKOYA EVANS

Appeal by Defendant from judgments entered 29 August 2018 by Judge Tanya T. Wallace in New Hanover County Superior Court. Heard in the Court of Appeals 18 November 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter and Certified Law Student Daniel Lautzenheiser, for the State.

Mary McCullers Reece for Defendant-Appellant.

DILLON, Judge.

Defendant Dekoya Evans appeals from judgments and commitments entered upon her conviction of one count of common law robbery and three counts of obtaining property by false pretenses ("OPBFP"). Because Defendant's claim that she received ineffective assistance of counsel ("IAC") cannot be fairly determined by a review of

the trial court record, we dismiss this appeal without prejudice to Defendant's right to raise her IAC claim in a motion for appropriate relief ("MAR") filed in the trial court.

In her lone argument on appeal, Defendant claims she was denied effective assistance of counsel in violation of the Sixth Amendment. Specifically, Defendant faults her counsel for failing to object on several occasions when the prosecutor asked questions and elicited testimony alluding to her failure to speak to law enforcement. Defendant contends the prosecutor's questions amounted to an impermissible comment on her exercise of the constitutional right to remain silent. *See State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) ("A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional."); *see also* U.S. Const. amends. V, XIV and N.C. Const. art. I, § 23.

To succeed on her IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. 1, §§ 19, 23). Moreover, "[D]efendant must overcome the presumption that, under the

circumstances, the challenged action 'might be considered sound trial strategy' " inasmuch as "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955)).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525.

We conclude we are unable to decide Defendant's IAC claim based on the "cold record" on appeal. *Id.* at 166, 557 S.E.2d at 524. While it is true defense counsel raised no objection when the prosecutor asked witnesses regarding Defendant's silence before law enforcement officers, it may be that counsel's failure to object was consistent with an overall strategy.

Accordingly, we dismiss her appeal without prejudice to file an MAR in the trial court.

DISMISSED.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).