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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-840

Filed: 19 May 2020

Wake County, No. 18 CRS 201830

STATE OF NORTH CAROLINA

v.

JOHNNY JOHNSON JR.

Appeal by defendant from judgments entered 1 February 2019 by Judge Andrew Taube Heath in Wake County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence Steed, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant.

DIETZ, Judge.

Defendant Johnny Johnson Jr. challenges his convictions and sentences for assault by strangulation and assault inflicting serious bodily injury, raising several arguments concerning the evidence at trial and the performance of his counsel.

As explained below, the State presented sufficient evidence of two distinct assaults separated by a period of time, and thus the trial court properly entered judgments on both assault charges. Johnson's ineffective assistance of counsel claim is unsuited for review on direct appeal and we therefore dismiss it without prejudice. Finally, Johnson has not met his burden to show plain error in the admission of a domestic violence protective order related to the events giving rise to these criminal charges. Accordingly, we find no error in part and no plain error in part in the trial court's judgments, and dismiss the ineffective assistance claim without prejudice to pursue it through a motion for appropriate relief in the trial court.

Facts and Procedural History

In 2018, Defendant Johnny Johnson Jr. arrived at the apartment of his ex-wife, Helen Everett.¹ Johnson repeatedly used violent language and threats when speaking to Everett and ultimately turned violent and raped her. At some point after the rape, Everett said she was going to get a glass of water. Johnson told Everett she was not allowed to leave, but Everett went to the kitchen anyway. While she was drinking water, Johnson tackled her to the floor, pulled out a cord he brought with him, and wrapped it around her neck. Johnson told Everett he was going to kill her and strangled her, causing her to repeatedly lose consciousness.

¹ We use a pseudonym to protect the identity of the victim.

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When Everett finally came to and got her bearings, she used her hands to loosen the cord around her neck. Johnson noticed this and wrapped his arms around her neck. Everett then bit into Johnson's arm and a violent struggle ensued. During the struggle, Johnson struck Everett and knocked out her tooth. Johnson then told Everett to stay still or else he would stab her with a knife. As Johnson walked away, Everett tried to escape through the front door of her apartment, but Johnson wrestled her outside and dragged her back into the apartment. Once inside, Johnson threatened Everett by telling her he was going to find a way to shut her up. Everett told Johnson she would not tell anyone about the incident and sat in her living room.

After some time had passed, Johnson told Everett he had to go back to a shelter to get supper. Everett told Johnson she needed to go to a dentist so she called for a driver to pick them both up. After the driver dropped Johnson off at the shelter, Everett went to her dentist's office. A nurse took her to a private room, and Everett explained that she had been attacked by Johnson. The dentist called the police, and Everett was taken to a hospital where she was examined by a doctor, a nurse, and a counselor for sexual abuse victims. Law enforcement officers arrested Johnson later that night.

After a trial, the jury found Johnson guilty of assault by strangulation, second-degree rape, and assault inflicting serious bodily injury. The trial court imposed consecutive sentences of 11 to 23 months for assault by strangulation, 110 to 192

months for second-degree rape, and 25 to 42 months for assault inflicting serious bodily injury. Johnson timely appealed.

Analysis

I. Challenge to the assault charges

Johnson first argues that the trial court erred by entering judgment on, and imposing consecutive sentences for, assault by strangulation and assault inflicting serious bodily injury. Both crimes are codified under N.C. Gen. Stat. § 14-32.4, which states that a trial court can find a defendant guilty of either (a) assault inflicting serious bodily injury, which is a Class F felony, or (b) assault by strangulation, a Class H felony.

Johnson contends that the State's evidence only established one continuous assault, not two separate ones. Thus, he argues, he could not be convicted and sentenced under both sections (a) and (b) of the statute. We reject this argument because its premise—that there was only one continuous assault—is flawed.

We review questions of statutory interpretation *de novo*. *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014). Assault inflicting serious bodily injury and assault by strangulation are codified under N.C. Gen. Stat. § 14-32.4(a) and (b) respectively. This Court has explained that although assault inflicting serious bodily injury and assault by strangulation contain distinct elements, the language of the statute indicates that even if the assault satisfied the elements of both crimes, the

General Assembly intended “that a defendant only be sentenced for the higher of the two offenses, assault inflicting serious bodily injury.” *State v. Williams*, 201 N.C. App. 161, 174, 689 S.E.2d 412, 419 (2009). Accordingly, a defendant can only be convicted of both crimes if the State presents “evidence of a distinct interruption in the original assault followed by a second assault.” *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604–05 (2003).

Here, the State presented evidence of two assaults separated by a distinct interruption. The first one occurred when Everett left to get a glass of water after Johnson forbade her from doing so. During that assault, Johnson tackled Everett to the floor and repeatedly choked her with a cord until she passed out. There is no evidence that Everett fought back at that time, during which she repeatedly lost consciousness.

Then, at some point, Johnson stopped strangling Everett and she regained consciousness. Everett then began to resist and fight back. This triggered a physical struggle between the two in which Johnson struck Everett and knocked out her tooth.

Although the time period between these two assaults was brief, there was a pause that separates the first, involving a sudden attack and strangulation that rendered Everett unconscious, and the second when Johnson ceased the strangulation and Everett regained her bearings and fought back, triggering a physical confrontation. Under our precedent, these facts are sufficient to establish

two separate assaults with a distinct interruption separating them. *Id.* Accordingly, the trial court properly entered judgments on these two separate assaults.

II. Ineffective assistance of counsel

Johnson next argues that he was deprived of effective assistance of counsel because his attorney argued to the jury that he should be convicted solely of assault by strangulation and simple assault. Johnson contends that he did not knowingly and voluntarily consent to this trial strategy. Thus, he argues, the judgments against him should be vacated or, alternatively, the matter should be remanded for a hearing to determine if Johnson consented to his counsel's strategy. We decline to address this issue on direct appeal and dismiss it without prejudice to pursue it in a motion for appropriate relief in the trial court.

Ineffective assistance of counsel claims are reviewed *de novo*. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). The merits of an ineffective assistance of counsel claim will be decided on direct appeal only "when the cold record reveals that no further investigation is required." *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004). Where the claim raises "potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001). In our Supreme Court's recent decision in *State v. Todd*, the Court emphasized that an issue in an

ineffective assistance claim that examines whether defense counsel “made a particular strategic decision remains a question of fact, and is not something which can be hypothesized” by an appellate court on direct appeal. 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017).

In *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), our Supreme Court “held that 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). Thus, if trial counsel’s strategy is to concede that the defendant is guilty of the crimes charged, the trial court must conduct a *Harbison* inquiry to determine whether the defendant knowingly and voluntarily consented to this strategy. *Thompson*, 359 N.C. at 119–20, 604 S.E.2d at 879.

Here, the trial court engaged in two colloquies with Johnson regarding his knowledge and understanding of his counsel’s trial strategy. The first occurred at the close of the State’s evidence:

THE COURT: Could we discuss whether the defense is going to put on any evidence in this case?

[DEFENSE COUNSEL]: Your Honor, I believe that we will be, and I think that a *Harbison* hearing should be conducted.

THE COURT: Okay.

[DEFENSE COUNSEL]: Just to give of the court the outline, I believe that Mr. -- after conferring with Mr. Johnson numerous times over the course of the last few days, I believe he is prepared to testify and acknowledge his guilt on on [sic] assault by strangulation and with respect to assault inflicting serious injury; and otherwise, of course, maintain his innocence. But I believe he is prepared to testify. Or will be shortly prepared to testify, and consistent with again guilt for assault by strangulation and assault inflicting serious injury. And I believe I am stating his position correctly.

THE COURT: Okay. So you have discussed with your client that he is going to testify and in the course of his testimony, he will likely give testimony that would establish one or more elements of the two crimes that you listed, and he has agreed upon that as a matter of trial strategy.

[DEFENSE COUNSEL]: He has. And, Your Honor, just to clarify, he would testify to all of the elements with respect to assault by strangulation. His testimony would satisfy all of the elements of that. And also I find it would be difficult given that for him not to also acknowledge assault inflicting serious injury as well.

THE COURT: Alright. He has agreed upon that as a matter of trial strategy?

[DEFENSE COUNSEL]: He has at our last conference on the subject.

THE COURT: Okay. Very good. Mr. Johnson, I want to speak with you now about your decision regarding testifying, and with respect to the issue that your testimony may satisfy one or more elements of the crimes for which you are charged with. First of all, you don't have to talk to me and you may remain silent. Your attorney tells me that you have decided to testify and that your testimony may include some evidence that would establish some of the elements of the crimes for which you are

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charged, but you have agreed to do so as part of a trial strategy. If this is correct, you don't need to say anything. However, if this is not correct, then now is your opportunity to address the court.

(Whereupon, there was no response.)

THE COURT: Okay. Let the record reflect that we have had this conversation on the record with counsel present, and after being given the opportunity to address the court, the defendant has chosen not to, which is his prerogative, and that will be fine.

Then, after the charge conference, the trial court engaged in a second *Harbison* inquiry to once again to determine whether Johnson knowingly and voluntarily consented to his counsel's strategy of conceding guilt for some of the crimes:

THE COURT: Alright. Mr. Johnson, I would like to address you once more. You don't need to say anything and you do have the right to remain silent. But I just want to revisit the issue of a case called *Harbison*, that we want to make sure that you understand in closing arguments your attorney has indicated that he will be admitting one or more elements of crimes for which you are charged, and that he is doing that as a matter of trial strategy. If you understand and consent to that, then you don't need to say anything, but if you disagree with that for any reason, now is your opportunity to be heard by the court.

THE DEFENDANT: I don't even understand what that is.

THE COURT: You don't understand what that is?

THE DEFENDANT: No.

THE COURT: Do you want to take a minute to speak with your attorneys about that?

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THE DEFENDANT: Yes.

THE COURT: Alright. Thank you, sir.

(Whereupon, there was a pause.)

[DEFENSE COUNSEL]: Your Honor, we have discussed it with Mr. Johnson. I believe he understands.

THE COURT: Okay. Alright, sir, do you have any questions about what I have just said to you?

THE DEFENDANT: No.

THE COURT: Alright. Thank you, sir. Do you have any disagreement with what your attorney has informed the court?

THE DEFENDANT: No.

Johnson contends that these colloquies are insufficient as a matter of law because the trial court did not first place Johnson “under oath” before questioning him and did not “thoroughly question Mr. Johnson or otherwise make clear that Mr. Johnson understood that the defense attorney’s proposed strategy involved an admission of guilty to one or more offenses.”

Johnson’s argument is an aggressive reading of our precedent that would require more specific questioning of the defendant than the case law prescribes. *Harbison* emphasized that the responsibility is on counsel, not the court, to fully explain these rights and obtain the client’s consent to admitting guilt to some charges or to a lesser-included offense as part of a trial strategy. 315 N.C. at 180, 337 S.E.2d

at 507. The court's role is to confirm that this discussion between lawyer and client took place and that the defendant knowingly and voluntarily consented to counsel's strategy. *Id.* The Supreme Court thus has held that "an on-the-record exchange between the trial court and the defendant is the *preferred* method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument." *Thompson*, 359 N.C. at 120, 604 S.E.2d at 879 (emphasis added). But the Court also "decline[d] to define such a colloquy as the sole measurement of consent or to set forth strict criteria for an acceptable colloquy." *Id.*

Here, Johnson's counsel explained in open court, in Johnson's presence, that Johnson agreed to "testify and acknowledge his guilt" to certain offenses as part of a trial strategy. The court then spoke directly with Johnson and explained that "[i]f this is correct, you don't need to say anything. However, if this is not correct, then now is your opportunity to address the court." Johnson remained silent. Then, before closing argument, a similar exchange occurred, in which Johnson indicated he did not understand the court's explanation of *Harbison* and his counsel's plan to argue guilt to the lesser charges Johnson had admitted in his testimony. The court provided Johnson time to discuss the matter privately with his counsel before again asking: "Do you have any disagreement with what your attorney has informed the court?" to which Johnson responded "No."

In this context, we cannot hold as a matter of law that the trial court's colloquy was insufficient and violated the requirements of *Harbison*. Instead, the issue is a fact-driven one that turns on the exchange that occurred between Johnson and his counsel. That determination is not one suited for review on direct appeal. Accordingly, we dismiss this ineffective assistance of counsel claim without prejudice so that Johnson can bring it "pursuant to a subsequent motion for appropriate relief in the trial court." *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

III. Admission of evidence of domestic violence protective order

Lastly, Johnson argues that the trial court committed plain error by admitting evidence that Everett successfully obtained a DVPO against him. Johnson argues that this evidence was inadmissible because it "unambiguously demonstrated that a judge believed that Ms. Everett's account was credible and that Mr. Johnson was guilty."

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* In other words, the defendant must show that, "absent the error, the jury probably would have returned a different verdict." *Id.* At 519, 723 S.E.2d at 335.

Johnson contends that admission of the DVPO was prejudicial because it established that a judge found Everett's allegations to be credible. Even assuming that it was error to admit this testimony, Johnson cannot meet the high burden of showing that, but for the challenged evidence, "the jury *probably* would have returned a different verdict." *Id.* (emphasis added). Johnson admitted to the jury that he placed his hands around Everett's neck, strangled her with both a cord and his hands, and later knocked her tooth out with his forearm. Moreover, the State presented testimony from several witnesses corroborating Everett's testimony. Because Johnson cannot show that the challenged evidence had the necessary probable impact on the verdict, we find no plain error with the trial court's admission of the challenged evidence.

Conclusion

We find no error in part, and no plain error in part, in the trial court's judgments. We dismiss the ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART; NO PLAIN ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).