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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-50

No. COA20-820

Filed 18 January 2022

Alamance County, Nos. 17 CRS 53028, 53672; 19 CRS 1776

STATE OF NORTH CAROLINA

v.

MICHAEL DENIER JOHNSON

Appeal by defendant from judgment entered 9 December 2019 by Judge David T. Lambeth Jr. in Alamance County Superior Court. Heard in the Court of Appeals 20 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for the State.

Joseph P. Lattimore for defendant.

DIETZ, Judge.

¶ 1

Defendant Michael Johnson appeals his convictions on two assault charges. He argues that his counsel was constitutionally ineffective because counsel's questions at trial opened the door to otherwise inadmissible evidence that Johnson previously had threatened the assault victim with violence. Johnson also argues that there was insufficient evidence of two distinct assaults.

¶ 2 As explained below, there are plausible strategic reasons for counsel's questions and we therefore dismiss the ineffective assistance claim because it is not suited for review on direct appeal. We reject Johnson's challenge to the sufficiency of the evidence because there was substantial evidence of two assaults separated by a sufficient, distinct interruption.

Facts and Procedural History

¶ 3 Defendant Michael Johnson and Deborah Parker were in a dating relationship. In June 2017, Parker let Johnson borrow her car. When Johnson later picked Parker up after work, he was angry and said "you set me up" because he saw a police officer outside the grocery store where Parker worked. Parker explained that the officer was always there after hours.

¶ 4 Parker drove Johnson to his mother's home and the two argued on the way. Once they arrived, Johnson told Parker to give him money for drugs. Parker refused.

¶ 5 Johnson then punched Parker repeatedly in the side of her face and mouth. He then got out of the car and walked around to the driver's side, opened the door, and began hitting Parker again. Parker tried to escape from the car, but Johnson grabbed her throat, forced her back into the car, and threatened to kill her. Parker then fled through the passenger side of the car and Johnson got into the car and drove away.

¶ 6 The State charged Johnson with multiple felonies including habitual misdemeanor assault and assault inflicting serious injury. The jury convicted

Johnson of habitual misdemeanor assault and simple assault, a lesser-included offense of the charge of assault inflicting serious injury. The jury also convicted Johnson of attaining habitual felon status. The trial court sentenced him to 110 to 144 months in prison. Johnson timely appealed.

Analysis

I. Ineffective assistance of counsel claim

¶ 7 Johnson first argues that he received ineffective assistance of counsel because his counsel asked Parker, the victim, questions that opened the door to otherwise inadmissible evidence that Johnson previously had threatened Parker with violence.

¶ 8 “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.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). This Court will address an ineffective assistance of counsel claim 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). When 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).

¶ 9 Johnson’s ineffective assistance argument is based on questions by his counsel

that opened the door to otherwise inadmissible evidence that he previously held a knife to Parker’s throat. Earlier in the proceeding, the trial court ruled that this evidence was inadmissible. But when Johnson’s counsel cross-examined Parker, counsel asked if she recalled jumping from a second-story balcony and whether she did so “in the same fashion” that she jumped out of the car during the events at issue in this case. On redirect, the prosecutor then asked Parker *why* she jumped from that second-story balcony, and Parker explained that Johnson was abusive and held a knife to her throat that day.

¶ 10 Johnson contends that, because “trial counsel had succeeded in excluding the evidence of prior acts of violence at an earlier point in the trial, there could be no strategic reason to do an ‘about face’ and open the door to this damaging information.” But there are a number of plausible strategic reasons for pursuing this line of questioning, most notably to show that Parker acted erratically. Evidence of that erratic behavior supported the defense theory that Parker’s injuries could have occurred when she jumped out of the moving car.

¶ 11 Because there are factual issues concerning counsel’s strategy, this is not a case where we can assess the ineffective assistance claim on a cold record on direct appeal. *Id.* at 556, 557 S.E.2d at 548. We dismiss Johnson’s ineffective assistance of counsel claim without prejudice to pursue it through a motion for appropriate relief.

II. Motion to dismiss

¶ 12 Johnson next challenges the denial of his motion to dismiss. He argues that there was insufficient evidence to support two distinct assault charges.

¶ 13 “This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). When reviewing the denial of a motion to dismiss, we examine “whether the prosecution has presented substantial evidence of each essential element of the crime.” *State v. Dew*, 2021-NCSC-124, ¶ 20. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

¶ 14 Here, the jury convicted Johnson of two assault charges: habitual misdemeanor assault and simple assault. As our Supreme Court explained in *Dew*, “the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults.” *Dew*, ¶ 27. Factors that can demonstrate a distinct assault include “an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.” *Id.*

¶ 15 Applying these factors, there was substantial evidence of two distinct assaults in this case. Johnson first attacked Parker inside the car when she refused to give

him money for drugs. He hit her repeatedly in the side of her face while she was seated in the driver's seat and he was seated in the passenger seat. Johnson then left the car and walked around to the driver's side, opened the door, and began hitting Parker again. At this point, Parker fought back and jumped out of the car in an attempt to escape. As she tried to flee, Johnson grabbed her by the throat, threw her back into the front passenger seat of the car, and threatened to kill her if she got out of the car again.

¶ 16 This evidence is sufficient to show two separate, distinct assaults: one occurring when Johnson began hitting Parker in the face while both were seated inside the car, and another when Johnson got out of the car, walked around to the driver's side, and grabbed Parker by the throat to prevent her from fleeing. *Id.* The change in Johnson's location when he left the car and walked to the driver's side, combined with the interruption in the momentum of the attack when Parker tried to flee and Johnson forced her back into the car, demonstrate a sufficiently distinct interruption between these assaults. Accordingly, we hold that there is substantial evidence supporting both assault charges in this case and the trial court did not err by denying Johnson's motion to dismiss.

Conclusion

¶ 17 We find no error in the trial court's judgment. We dismiss the ineffective assistance of counsel claim without prejudice.

STATE V. JOHNSON

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Opinion of the Court

NO ERROR IN PART; DISMISSED IN PART.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).