

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-534

Filed 07 February 2023

Forsyth County, Nos. 20 CRS 2003, 20 CRS 60137

STATE OF NORTH CAROLINA

v.

JAMES ELVE FLOWERS

Appeal by defendant from judgments entered 1 December 2021 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 10 January 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Bradley D. Brecher, for the State.*

*Gilda C. Rodriguez for defendant.*

ARROWOOD, Judge.

James Elve Flowers (“defendant”) appeals from judgments convicting him of larceny from the person and attaining the status of habitual felon. Defendant contends that although he authorized defense counsel to admit that he committed the offense of misdemeanor larceny, he did not consent to counsel’s implied admission of larceny from the person, a felony. For the following reasons, we find no error.

STATE V. FLOWERS

*Opinion of the Court*

I. Background

On 19 April 2021, defendant was indicted by a Forsyth County Grand Jury for common law robbery and having attained the status of habitual felon. These matters came on for trial on 29 November 2021 in Forsyth County Superior Court, Judge Bray presiding. The evidence presented at trial established the following:

On 13 September 2020, Troy Bottoms (“Mr. Bottoms”) was employed as a store clerk at a Speedway in Winston-Salem. Mr. Bottoms was working the night shift, which began at 10:00 or 11:00 p.m. and concluded at 6:00 or 7:00 a.m., when he was confronted by defendant. Defendant approached the counter with a case of beer “and asked for cartons of cigarettes[.]”

Per store policy, cartons of cigarettes were kept behind the counter “because people [would] steal them, . . . so [they were] locked in a safe.” Thus, Mr. Bottoms “grabbed the cartons and scanned them and kept them behind the counter[.]” so “[defendant] wouldn’t just walk off [with the cartons] without paying[.]” Mr. Bottoms testified that defendant then “threatened [him]” and “came behind the counter and attacked [him][.]” According to Mr. Bottoms, defendant said something along the lines of “[g]ive me those and no one gets hurt,” or “[i]f you don’t give me those, I’m going to come back there[.]” As “[he] would rather . . . not get attacked over cigarettes,” he handed them to defendant “so he would go away.” Defendant did not have a weapon.

STATE V. FLOWERS

*Opinion of the Court*

On 14 September 2020, robbery Detective Bobby Hatcher (“Detective Hatcher”) with the Winston-Salem Police Department, was assigned to the case. After viewing the surveillance video from Speedway, Detective Hatcher “took . . . pictures from the video . . . of the suspect and the suspect vehicle[.]” Detective Hatcher sent the pictures, “via email to every sworn officer to be on the lookout” for the suspect. After further investigation, defendant was eventually identified in a traffic stop and “agreed to be transported to the Public Safety Center for a voluntary, non-custodial interview.”

Detective Hatcher testified that defendant “admitted to stealing the cigarettes and the beer[.]” but “denied threatening [Mr. Bottoms].” Defendant “was adamant that he made no threats” but did state he took the beer and cartons of cigarettes without paying.

On 1 December 2021, the last day of trial, defense counsel filed an “Authorization to Make Admission of Criminal Culpability” document, which defendant signed. The document stated, in pertinent part:

Defendant hereby notifies the [c]ourt that after due consultation with counsel, the defendant specifically authorizes counsel to make the following admission in this case, fully realizing that said admission subjects defendant to criminal responsibility. Defendant authorizes counsel to admit as follows: [Defendant] was the person Mr. Bottoms handed the bag of cigarettes to on September 13, 2020. [Defendant] accepted the bag, and picked up a case of beer, and he left the Speedway without paying for the items. [Defendant] has committed the crime of misdemeanor larceny.

## STATE V. FLOWERS

### *Opinion of the Court*

Prior to closing arguments, the trial court conducted a colloquy wherein defendant indicated that he consented to his counsel's strategy and fully understood the implications of the admission.

Defendant was found guilty of larceny from the person, a Class H felony, and he pleaded guilty to being a habitual felon. As a prior record level VI offender, defendant was sentenced to a mitigated term of 77 to 105 months incarceration. Defendant gave notice of appeal in open court.

## II. Discussion

Defendant argues defense counsel's implied admission of larceny from the person was a *Harbison* error subjecting him, *per se*, to a violation of the Sixth Amendment right to effective assistance of counsel. We disagree. Because we find no *Harbison* issue, we find defendant's trial was free from error.

### A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

### B. Implied Admission of Guilt

A *Harbison* error occurs where “the defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent.” *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-508 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). Because a *Harbison* violation has “[t]he practical effect” of defense counsel “enter[ing] a plea of guilty without the client’s consent[.]” a defendant’s Sixth Amendment right to effective assistance of counsel is automatically hindered when a *Harbison* error arises. *Id.*

A defendant claiming ineffective assistance of counsel must ordinarily show both that counsel’s performance was deficient, and that counsel’s deficient performance prejudiced the defense. However, “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.*” Statements by defense counsel “must be viewed in context to determine whether the statement was, in fact, a concession of defendant’s guilt of a crime[.]”

*State v. Moore*, \_\_ N.C. App. \_\_, \_\_, 880 S.E.2d 710, 714 (2022) (alterations in original) (citations omitted) (emphasis added). “Where ‘defense counsel’s statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy.’” *Id.* (quoting *State v. McAllister*, 375 N.C. 455, 475, 847 S.E.2d 711, 723 (2020)). It is the trial court’s duty to ensure that “ ‘prior to any admissions of guilt at trial by a defendant’s counsel, the defendant must have given knowing and informed consent[.]’ ” *State v. Foreman*, 270 N.C. App. 784, 790,

842 S.E.2d 184, 189 (2020) (citation omitted).

Here, defendant's trial strategy included an attempt to avoid a conviction for common law robbery by admitting culpability to the lesser-included offense of misdemeanor larceny. On appeal, defendant asserts that although he consented to his counsel's admission of misdemeanor larceny, counsel impliedly admitted to the felony of larceny from the person, which he did not consent to. In support of his contention, defendant relies on *State v. McAllister*, 375 N.C. 455, 847 S.E.2d 711 (2020).

The glaring distinction between *McAllister*, and defendant's case here, rests on the issue of consent. In *McAllister*, "[p]rior to opening statements, the State informed the trial court of a potential *Harbison*-related issue[.]" *McAllister*, 375 N.C. at 459, 847 S.E.2d at 714. However, defense counsel did not foresee a potential *Harbison* issue and they proceeded to trial with "[n]o other discussion of any *Harbison*-related issues . . . [for] the remainder of the trial." *Id.* at 459-60, 847 S.E.2d at 714.

Here, prior to closing arguments, Judge Bray ensured defendant was fully aware of the consequences of admitting culpability to the lesser-included crime. The following dialogue transpired:

THE COURT: All right. Let me go over that with him. All right, Mr. Flowers. You've had a chance to read this authorization document?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. And do you understand that [defense

STATE V. FLOWERS

*Opinion of the Court*

counsel] on your behalf is going to make an admission that you have committed the crime of misdemeanor larceny?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you've discussed that with her and you are in agreement with that?

THE DEFENDANT: Yes, ma'am.

THE COURT: She's going to argue to the jury that the store clerk handed you the bag of cigarettes. You accepted the bag, picked up the case of beer, and left without paying --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- is that correct? All right. Thank you.

Contrary to the record in *McAllister*, the record here reflects defendant's voluntary and knowing consent, thus, *Harbison* does not apply. *Id.* at 475, 847 S.E.2d at 723 (finding a "*Harbison* error exists unless the defendant has previously consented to such a trial strategy.").

Moreover, when viewing defense counsel's closing argument in context, counsel ultimately argued for the jury to find defendant guilty of misdemeanor larceny. In pertinent part, counsel argued as follows:

[Defendant] did not have to make any admissions whatsoever, and he knew it, but he was taking responsibility for what he had done. He knew that he didn't pay for the items. He knew that that was wrong. But he also knew that he had not threatened anybody, and that was never his intent.

. . . .

STATE V. FLOWERS

*Opinion of the Court*

Ladies and gentlemen, I'll ask you to remember that he told Detective Hatcher, [y]ou won't have to find me. I'm not running. He even handed his cell phone voluntarily. He wasn't asked for it. He said, [h]ere, take my phone. Call yourself. My number will be on Caller ID. You call me if you need me. He was found in Winston-Salem, he never left, and he's here today. A crime was committed that day, and [defendant] acknowledges that, but that crime, ladies and gentlemen, was misdemeanor larceny.

Our Supreme Court has held previously, where “[t]he clear and unequivocal argument was that the defendant was innocent of all charges[,]” the statements do not constitute *Harbison* error. *Id.*, at 467, 847 S.E.2d at 718 (quoting *State v. Green*, 332 N.C. 565, 572, 422 S.E.2d 730, 734 (1992)). “Because [d]efendant consented to his counsel’s implied concession of . . . guilt . . . no *Harbison* error exists, and [d]efendant did not receive per se ineffective assistance of counsel.” *Moore*, \_\_ N.C. App. at \_\_, 880 S.E.2d at 714 (citation omitted). Accordingly, defendant’s argument is overruled.

III. Conclusion

For the foregoing reasons, we find defendant received a fair trial free from error.

NO ERROR.

Judges WOOD and GORE concur.

Report per Rule 30(e).