

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-766

Filed 04 April 2023

New Hanover County, No. 19 CRS 59539

STATE OF NORTH CAROLINA

v.

ROBERT HOYT HUCKS, JR.

Appeal by defendant from judgment entered 24 March 2022 by Judge Joshua W. Willey, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ameshia Cooper Chester, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

ZACHARY, Judge.

Defendant Robert Hoyt Hucks, Jr., appeals from a judgment entered upon a jury's verdict finding him guilty of embezzlement. On appeal, Defendant argues that he received ineffective assistance of counsel from his trial attorney. After careful

review, we conclude that Defendant received a fair trial, free from error, and did not receive ineffective assistance of counsel.

Background

In August 2018, Defendant began his employment at Black's Tire Service, Inc. ("Black's Tire") as a "boom truck" operator. A boom truck is "a heavy[-]duty service truck equipped with an air compressor for changing tires." "[O]n the back of the truck" is a "boom," which is "a small crane designed to actually be able to lift th[e] heavy tires." Defendant had "complete control" over the boom truck during his employment, both day and night.

Defendant worked at Black's Tire during its normal business hours, as well as after hours on an on-call basis approximately one week per month. Black's Tire provided employees who were on call with a key to access the "night cage pod" in which the company stored its smaller tires for safekeeping. The larger tires, which could not be moved without the boom truck, were stored out in the open on the edge of company property.

In October 2019, John Grice, the operations manager at Black's Tire, and Jimmy Waters, a manager at one of the four Black's Tire locations in Wilmington, North Carolina, noticed that several larger tires were missing from the company's inventory, along with some smaller tires. The missing property was later determined to be worth \$18,395.88. Knowing that "a human could not just pick [the tires] up and throw them in the back of a truck" and that the tires could only be transported "by

STATE V. HUCKS

Opinion of the Court

way of a boom truck or a piece of equipment large enough” to lift them, Mr. Grice and Mr. Waters began to investigate Defendant—Black’s Tire’s only boom truck operator.

On 17 October 2019, Mr. Grice, Mr. Waters, and Heath Nance, Black’s Tire’s general counsel and human resources director, confronted Defendant regarding the missing tires. During this conversation, Defendant admitted to taking “not just passenger car tires, but really big, heavy equipment commercial tires” and selling them “to somebody else” in order to “subsidize his gambling issue.” Mr. Nance requested that Defendant memorialize his oral statement in writing, and Defendant complied. Black’s Tire terminated Defendant’s employment later that day.

Mr. Nance then reported Defendant’s theft to the New Hanover County Sheriff’s Office and provided law enforcement officers with Defendant’s written statement and documentation of the missing inventory. On 5 October 2020, a New Hanover County grand jury returned a true bill of indictment charging Defendant with embezzlement.

On 8 October 2021, Defendant tendered a cashier’s check to Black’s Tire for \$15,000.00, which he delivered to Mr. Grice. According to Mr. Grice, Defendant contacted him regarding the repayment, saying:

Hey, you know, I’m trying to -- you know, let’s figure out what’s next for me. I don’t want a criminal record, so I want to try -- I’ve got an opportunity to have some money. I want to try to pay you back so I don’t have to have a criminal record.

STATE V. HUCKS

Opinion of the Court

Upon delivering the check to Mr. Grice, Defendant said, “Here it is, and what does this mean for me[?]” Mr. Grice informed Defendant that the check was “not full payment toward the inventory that [he] took from Black’s Tire” and was “just part of the first step of [Defendant] righting some wrongs.” However, Mr. Grice also told Defendant that the leadership team at Black’s Tire was considering reemploying him, and they discussed Defendant paying the remainder of the money owed. Mr. Grice accepted the \$15,000.00 on behalf of Black’s Tire as partial restitution for the lost inventory.

This matter came on for trial in New Hanover County Superior Court on 22 March 2022. Mr. Grice, Mr. Waters, and Mr. Nance testified as witnesses for the State. Defendant’s handwritten statement and his \$15,000.00 cashier’s check to Black’s Tire were admitted into evidence as part of the State’s case. Although defense counsel challenged the admissibility of the statement, she did not object to the admission of the cashier’s check into evidence.

On 24 March 2022, the jury returned its verdict finding Defendant guilty of embezzlement. The trial court entered judgment upon the jury’s verdict, sentencing Defendant to an active term of 6 to 17 months in the custody of the North Carolina Division of Adult Correction, suspended upon a period of 24 months of supervised probation. Defendant timely filed notice of appeal.

Discussion

On appeal, Defendant argues that he “did not receive the effective assistance

of counsel when his trial attorney failed to object to the introduction of inadmissible evidence.”

I. Standard of Review

“Whether a defendant was denied the effective assistance of counsel is a question of law that is reviewed de novo.” *State v. Clark*, 380 N.C. 204, 215, 868 S.E.2d 56, 64 (2022). Ineffective assistance of counsel 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), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

II. Analysis

“When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel’s conduct fell below an objective standard of reasonableness.” *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 29 (2005) (citation omitted), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). The United States Supreme Court has articulated a two-part test that a defendant must satisfy to meet this burden:

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

STATE V. HUCKS

Opinion of the Court

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.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). A defendant establishes prejudice by demonstrating 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." *Id.* at 694, 80 L. Ed. 2d at 698.

Our appellate courts "indulge[] the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 30 (citation omitted); *see also Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694 ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . ."). Accordingly, "counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for [the] defendant to bear." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 30 (citation omitted).

In the present case, Defendant's entire ineffective assistance of counsel claim hinges on his assertion that the evidence of his \$15,000.00 payment to Black's Tire was inadmissible pursuant to Rule 408 of the North Carolina Rules of Evidence. According to Defendant, "[d]efense counsel was ineffective for failing to object to the

introduction of [Defendant's] pre-trial offer to compromise, which was admitted to prove his guilt." We disagree.

Rule 408, which governs the admissibility of evidence of compromises and offers to compromise, provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

N.C. Gen. Stat. § 8C-1, Rule 408 (2021).

Here, the State offered the evidence of the payment not to establish Defendant's civil liability for the conversion of the property but to show "an effort to obstruct a criminal investigation or prosecution" by Defendant—specifically, his attempts to avoid an embezzlement prosecution. *Id.* While arranging the payment to Black's Tire, Defendant told Mr. Grice, "I don't want a criminal record, so . . . I want to try to pay you back so I don't have to have a criminal record." Further, upon delivering the check, Defendant asked what the payment "mean[t]" for him in terms of the next steps of his case. It is plain that the evidence was offered to show that

Defendant was attempting to avoid a criminal prosecution, and not offered “to prove liability for or invalidity of the claim or its amount.” *Id.* Moreover, this evidence was not offered in a trial between Black’s Tire and Defendant to determine Defendant’s civil liability for the tort of conversion; rather, it was offered in the context of a prosecution for the crime of embezzlement. For these reasons, the admission of this evidence did not violate Rule 408. *Id.*; *see, e.g., Renner v. Hawk*, 125 N.C. App. 483, 492–93, 481 S.E.2d 370, 375–76 (concluding that a statement made by an attorney during a compromise discussion did not violate Rule 408 and was admissible to support a Rule 11 violation), *disc. rev. denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

Because Defendant’s entire ineffective assistance of counsel claim centers on the admissibility of the payment evidence under Rule 408, which we have concluded did not bar the evidence’s admission, Defendant has not and cannot “show that his counsel’s conduct fell below an objective standard of reasonableness.” *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29 (citation omitted). Accordingly, Defendant’s claim that he received ineffective assistance of counsel because his trial counsel failed to object to the admission of the payment evidence pursuant to Rule 408 fails.

Furthermore, assuming, *arguendo*, that Defendant’s trial counsel should have objected to the admission of the payment evidence, Defendant’s ineffective assistance of counsel claim nonetheless fails for lack of prejudice. At trial, Mr. Grice and Mr. Waters testified that Defendant had access to the company’s property after hours, a key to the “night cage pod” where some inventory was stored, and “complete control”

STATE V. HUCKS

Opinion of the Court

of the boom truck. They further testified that much of the missing inventory could not be transported without the use of the boom truck. In addition, Mr. Grice, Mr. Waters, and Mr. Nance all testified that Defendant admitted to them that he embezzled the tires to fuel his gambling addiction. Defendant's handwritten, dated, and signed statement, confessing that he "should be in [j]ail" for his actions, was authenticated and admitted into evidence at trial. In light of this ample evidence, Defendant cannot demonstrate "that there is a reasonable probability that, but for [his] counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Thus, Defendant's ineffective assistance of counsel claim is overruled.

Conclusion

Accordingly, we conclude that Defendant has failed to show that he received ineffective assistance of counsel from his trial attorney.

NO ERROR.

Judges CARPENTER and WOOD concur.

Report per Rule 30(e).