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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-960

Filed 20 June 2023

Forsyth County, Nos. 20CRS051941-43, 20CRS000318

STATE OF NORTH CAROLINA

v.

JERMAINE LEMONT GALLOWAY

Appeal by Defendant from judgments entered 1 March 2022 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Hyrum J. Hemingway and Special Deputy Attorney General Lisa K. Bradley, for the State-Appellee.*

*Sarah Holladay for Defendant-Appellant.*

COLLINS, Judge.

Defendant Jermaine Lemont Galloway appeals from judgments entered upon guilty verdicts of several criminal offences, including possession of a firearm by a felon. Defendant argues that he received ineffective assistance of counsel at trial because defense counsel conceded Defendant's guilt without Defendant's prior

informed consent. As a remedy, Defendant requests an evidentiary hearing to determine whether Defendant gave knowing and voluntary consent for defense counsel to make the concession. Because the record shows that Defendant consented to the concession, no error occurred during the proceedings leading to the trial court's judgments, and no further proceedings are necessary.

### **I. Background**

On 22 February 2021, Defendant was indicted for several criminal offenses, including possession of a firearm by a felon. Defense counsel gave notice of intent to offer the defense of justification on 21 June 2021. The case was tried during the week of 1 November 2021. At trial, and before jury selection, Defendant stipulated to his status as a felon, and discussed the possible defense of justification. Defense counsel stated:

Well, what I would like to see, Judge, is that the State put on its case and whatever happens with that case happens. And I believe when it's time for the defense to put on evidence then that will be done on the defense's case, as far as us putting on evidence for justification, at that appropriate time. I do understand that for the defense of justification, you can't argue two things at once, I understand that, that the defendant didn't possess the weapon and also that it is justified, I understand that, Judge.

Shortly after the State called its first witness, the trial court excused the jury and had the following discussion with Defendant:

THE COURT: Mr. Galloway, if you will stand please. During opening statement, and your attorney forecast to

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me when they filed a notice of the affirmative defense of justification, that is, someone who is a felon, who would not ordinarily be allowed to possess a firearm, that's a felony, possessing a firearm by a felon, there is, as I characterize it, a slender opportunity for a defense, that defense is known as justification. . . . What I heard [defense counsel] forecast to the jury in opening statement was that you were in fact in possession of a firearm and that the jury was going to hear that you were carrying it because you needed it for protection, threats had been made against you, that type of thing. Am I correct in how I heard that?<sup>1</sup>

DEFENDANT: Yeah. I've got threats. I've got shot and everything.

THE COURT: Yes. So did [defense counsel] have permission to admit to the jury that on this date, February 23, 2020, that you were in possession of a firearm?

DEFENDANT: Yes, sir.

. . . .

THE COURT: . . . . I find that it is the defendant's wish that [defense counsel] take the approach in this case. . . . I find as fact that [Defendant], having the benefit of experienced and skilled counsel . . . gave permission to [defense counsel] to make, if you want to call it a concession, or to admit that [Defendant] was in possession of a firearm on the date alleged, that being February 23, 2020, in order to raise the defense of justification based upon imminent threat of death or serious bodily injury. So I find that as a fact and conclude as a matter of law that that was done proper.

On 2 November 2021, the jury returned verdicts finding Defendant guilty of possession of a firearm by a felon, carrying a concealed gun, and resisting a public officer. Defendant was later found guilty of obtaining habitual felon status. The trial

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<sup>1</sup> Opening statements took place off the record and were not included in the record on appeal.

court imposed a consolidated sentence of 92 to 123 months' imprisonment on all charges. Defendant gave notice of appeal in open court.

## **II. Discussion**

Defendant's sole argument on appeal is that he received ineffective assistance of counsel because defense counsel conceded Defendant's guilt without Defendant's prior informed consent. Specifically, Defendant argues that, during opening statements, defense counsel conceded Defendant's possession of a firearm, and that the trial court's post-concession inquiry was insufficient to determine whether Defendant knowingly and voluntarily consented to the concession.

Every criminal defendant has a constitutional right to effective assistance of counsel through the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. *See generally Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for constitutionally effective assistance of counsel under the Sixth Amendment); *see also State v. Braswell*, 312 N.C. 553, 561-63, 324 S.E.2d 241, 247-48 (1985) (incorporating the *Strickland* standard as the standard for effective assistance of counsel under the North Carolina Constitution). "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 (citations omitted). However, "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and

so apparent that the issue of prejudice need not be addressed.” *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985). Thus, a defendant suffers “a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant’s guilt to the jury without his prior consent.” *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020) (citation omitted).

“[A]n 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[,]” but such a colloquy is not the sole measure of consent. *Id.* at 477, 847 S.E.2d at 724 (citation omitted). Additionally, although the best practice is to ascertain whether a defendant consents to an admission of guilt prior to the admission, a post-admission inquiry may be sufficient to determine whether the defendant had given his consent. *See id.* at 477, 847 S.E.2d at 725 (remanding for an evidentiary hearing to determine “whether defendant knowingly consented in advance to his attorney’s admission of guilt”); *State v. Johnson*, 161 N.C. App. 68, 77-78, 587 S.E.2d 445, 451 (2003) (finding no error where trial court conducted post-concession inquiry); *State v. Bryant*, 281 N.C. App. 116, 125-26, 867 S.E.2d 580, 586-87 (2021) (same).

Here, defense counsel gave notice of his intent to offer justification as a defense over four months before the trial. Before jury selection, the trial court discussed with defense counsel the justification defense and the potential need for a *Harbison* inquiry. During opening statements that were not captured on the record, defense

counsel apparently conceded that Defendant had possessed a firearm. After opening statements, the trial court inquired whether Defendant had consented to the concession, and Defendant answered in the affirmative. These facts, taken together, show that Defendant understood and consented to his counsel's concession. Accordingly, defense counsel's performance was not per se ineffective under *Harbison*.

Defendant, relying on *McAllister*, argues that the matter should be remanded for an evidentiary hearing due to the absence of record evidence that Defendant gave knowing and voluntary consent to concede that he had been in possession of a firearm.

In *McAllister*, defendant's counsel impliedly conceded defendant's guilt of a charged offense during closing argument. 375 N.C. at 474, 847 S.E.2d at 723. However, the record contained no indication whether defendant had consented to the concession. *Id.* at 477, 847 S.E.2d at 724. Our Supreme Court remanded the matter for an evidentiary hearing "for the sole purpose of determining whether defendant knowingly consented in advance to his attorney's admission of guilt[.]" noting that "the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to presume defendant's lack of consent." *Id.* at 477, 847 S.E.2d at 725 (quotation marks and citations omitted).

Here, unlike *McAllister*, the record contains a colloquy between the trial court and Defendant specifically for the purpose of determining whether Defendant consented to defense counsel's concession. Additionally, that colloquy, along with

evidence of defense counsel's notice of intent to pursue the defense of justification filed four months before trial, is sufficient to determine that Defendant "knowingly consented in advance to his attorney's admission of guilt[.]" *Id.* Thus, further factual findings are unnecessary.

### **III. Conclusion**

Because the record shows that Defendant consented to defense counsel's concession, no error occurred during the proceedings leading to the trial court's judgments, and no further proceedings are necessary.

NO ERROR.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).