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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-54

Filed 15 October 2024

Union County, No. 20CRS051461

STATE OF NORTH CAROLINA

v.

VALTER JOSUE ESTRADA, Defendant.

Appeal by Defendant from judgment entered 4 May 2023 by Judge Taylor Browne in Union County Superior Court. Heard in the Court of Appeals 24 September 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.*

*Jackie Willingham for Defendant.*

GRIFFIN, Judge.

Defendant appeals from a judgment entered after a jury found him guilty of second-degree rape. Defendant contends he received ineffective assistance of counsel because of a *Harbison* error. We disagree and hold Defendant received a trial free from error.

**I. Factual and Procedural Background**

This case arises from the sexual assault of a female, Jessica<sup>1</sup>, after a party at Defendant's house. The evidence tended to show the following:

Defendant is the first cousin of Jessica's father. Defendant and Jessica's relationship was much like that of an uncle and niece. On 3 November 2019, Jessica and her parents attended a housewarming party at Defendant's residence. The attendees were casually drinking. Jessica had four to five glasses of wine. Defendant consumed beer throughout the evening.

As the night wore on, Jessica laid down and fell asleep on Defendant's couch. A couple hours later, Defendant's wife woke Jessica and had her move to Defendant's son's room. There, she was awoken three different times. On each occasion, she was being physically touched but fell back asleep because of her inebriation. During the last instance, she awoke to someone raping her while pressing their full body weight against her in the bed.

At 5:00 a.m., Jessica woke up with multiple articles of clothing removed from her body and placed on the floor beside the bed. She also found Defendant's phone lying on the bed. She remembered what happened and called her mother to pick her up. They immediately went to the hospital where a nurse ordered a rape kit and called the police. Officers went to Defendant's residence where both Defendant and his wife gave statements. Defendant also submitted a DNA sample which matched

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<sup>1</sup> We use a pseudonym to protect the adult victim's identity.

the DNA recovered from Jessica by the rape kit.

On 1 May 2023, Defendant was indicted for second-degree forcible rape. During his opening statement, Defendant’s trial counsel stated, “they will not have proven from any witness or any testimony whether she was physically helpless, whether he knew she was physically helpless or should have known that she was physically helpless and whether he had the intent to commit any act on her in the first place.” He did not make any statement about whether Defendant and Jessica engaged in sexual intercourse. During closing, trial counsel stated, “Now, in the element of this particular rape it’s required that [] Defendant know or should have known that the alleged victim was unable to act or unable to consent.” Trial counsel did not mention whether Defendant and Jessica engaged in sexual intercourse.

Following closing arguments, the jury returned a verdict finding Defendant guilty of second-degree forcible rape. Defendant timely appealed.

## **II. Analysis**

Defendant argues he received ineffective assistance of counsel because his trial counsel “admitted the sexual intercourse[,]” an element of second-degree forcible rape. We disagree.

We review a defendant’s claim of ineffective assistance of counsel, including allegations of unauthorized concessions of a defendant’s guilt, de novo. *State v. Foreman*, 270 N.C. App. 784, 788–89, 842 S.E.2d 184, 187–88 (2020).

A defendant claiming ineffective assistance of counsel “must show that

counsel's performance was deficient" and this deficiency resulted in prejudice against the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, a per se showing of prejudice exists 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, 507–08 (1985). While generally a *Harbison* claim is based upon an explicit admission of the defendant's guilt, "an implied admission of guilt can, in fact, constitute *Harbison* error." *State v. McAllister*, 375 N.C. 455, 475, 847 S.E.2d 711, 723 (2020). Being so, "a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence." *Id.* at 476, 847 S.E.2d at 724.

Here, to obtain a conviction for second-degree forcible rape, the State needed to prove beyond a reasonable doubt that: (1) Defendant engaged in vaginal intercourse with Jessica; (2) against her will by force; (3) while she was mentally incapacitated or physically helpless; and (4) Defendant knew or should reasonably have known Jessica was mentally incapacitated or physically helpless. *See* N.C. Gen. Stat. § 14-27.22 (2019). Contrary to Defendant's argument, trial counsel did not explicitly admit Defendant's guilt to second-degree forcible rape or any element thereof. Moreover, after a thorough review of the record, we cannot conclude trial counsel implicitly conceded Defendant's guilt to any element of second-degree forcible rape either. In fact, trial counsel explicitly argued Defendant's innocence during both opening and closing statements.

Trial counsel's only statement which could be construed to concede the element

of sexual intercourse was, without concurrently stating intercourse did not occur, that “in the element of this particular rape it’s required that [] Defendant know or should have known that the alleged victim was unable to act or unable to consent.” However, in context, the record suggests this to be a reference to the elements constituting the crime charged, not a factual or legal concession that intercourse did or did not occur. Additionally, Defendant contests trial counsel’s frequent references to Defendant’s intoxication the night of the rape. Defendant contends this was an erroneous attempt by trial counsel to assert an unavailable defense. However, the record shows that trial counsel utilized both the fact of Jessica’s and Defendant’s intoxication in a variety of ways. For one, trial counsel emphasized the party’s intoxication to impeach the veracity of Jessica’s testimony. Trial counsel also utilized intoxication to call into question whether Defendant knew or should have had reason to know Jessica was helpless. Thus, Defendant’s contention is without merit. *Cf. McAllister*, 375 N.C. at 475, 847 S.E.2d at 723 (“In cases where—as here—defense counsel’s statements to the jury cannot logically be interpreted as anything other than implied concession of guilt to a charged offense[.]”).

Accordingly, Defendant fails to show his trial counsel committed a *Harbison* error constituting ineffective assistance of counsel.

### **III. Conclusion**

We hold Defendant received effective assistance of counsel and affirm the trial court’s judgment.

STATE V. ESTRADA

*Opinion of the Court*

NO ERROR.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).