NO. COA21-286 **ELEVEN-A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Harnett**
	)	
WILLIAM MCDOUGALD	**)**	

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BRIEF FOR THE STATE

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BRIEF FOR THE STATE

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ISSUES PRESENTED

I. WHETHER THE TRIAL COURT ERRED BY REJECTING DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

II. WHETHER THE TRIAL COURT ERRED BY CONCLUDING THAT DEFENDANT'S SENTENCE DID NOT VIOLATE THE CONSTITUTIONAL PROHIBITION ON A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR JUVENILES.

III. WHETHER THE TRIAL COURT ERRED BY CONCLUDING DEFENDANT'S SENTENCE WAS NOT DISPROPORTIONATE.

STATEMENT OF THE CASE

On 10 April 2001, William McDougald ("Defendant") was indicted by a Harnett County grand jury for first-degree burglary, second-degree kidnapping, and assault on a female. (R p. 96) A grand jury returned a superseding indictment on 14 May 2001 charging Defendant with the same offenses and an additional indictment for attaining violent habitual felon status. (R pp. 52, 97) The matter came on for trial at the 1 October 2001 Criminal Session of Superior Court, Harnett County, before the Honorable Wiley F. Bowen, Judge presiding. (Trial T p. 1)[1] Because the violent habitual felon indictment had not previously been served on Defendant, the trial was bifurcated. (Trial T p. 6) A jury found Defendant guilty of second-degree kidnapping, misdemeanor breaking and entering, and assault on a female. (R p. 111) The violent habitual felon charge subsequently came on for trial on 14 November 2001 after the trial court denied Defendant's motion to dismiss the charge. (VHF T p. 1; R pp. 112–16) A jury found Defendant guilty of attaining violent habitual felon status. (VHF T p. 20) The trial court sentenced Defendant to life imprisonment without parole. (R p. 53)

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[1] The transcripts are referred to as "(Trial T p. __)" for the 1 October 2001 trial on the substantive offenses; "(VHF T p. __)" for the 14 November 2001 trial on violent habitual felon status; and "(MAR T p. ___)" for the 8 May 2019 evidentiary hearing on the motion for appropriate relief.

Defendant appealed, arguing the trial court erred by denying his motion to dismiss the second-degree kidnapping charge. (R p. 118) While his appeal was pending, Defendant filed in the trial court a pro se motion to arrest judgment on the violent habitual felon conviction, arguing it was improper to base the indictment on a predicate violent felony committed while Defendant was a juvenile, which was denied. (R pp. 55–58) This Court issued an opinion on 20 May 2008 finding no error, and our Supreme Court denied certiorari. State v. McDougald, No. COA07-993, 2008 WL 2097534 (N.C. Ct. App. May 20, 2008) (unpublished), cert. denied, 362 N.C. 686 (2008). Defendant filed a federal petition for writ of habeas corpus, in which he repeated his insufficiency of the evidence claim made on direct appeal and later raised a number of other issues in response to the respondent's motion for summary judgment. McDougald v. Keller, No. 5:09-HC-2134-D, 2011 WL 677272 (E.D.N.C. Feb. 15, 2011) (unpublished). The federal district court granted the motion for summary judgment and dismissed the petition for writ of habeas corpus. Id.

Defendant filed a motion for appropriate relief in the trial court on 26 June 2017, alleging various Eighth Amendment violations in his sentence, and an amendment to the motion on 22 May 2018 adding an ineffective assistance

of counsel claim.[2] (R pp. 4, 64) The State filed a response on 20 January 2019, and Defendant filed a reply on 2 August 2019. (R pp. 142, 301) An evidentiary hearing on the ineffective assistance of counsel claim was held on 9 August 2019 before the Honorable C. Winston Gilchrist. (MAR T p. 1) The trial court entered an order on 26 November 2019 denying the motion for appropriate relief. (R p. 345)

Defendant filed in this Court a petition for writ of certiorari seeking review of the trial court's order denying the motion for appropriate relief on 20 November 2020, to which the State responded on 14 December 2020. This Court entered an order on 6 January 2021 allowing the petition "for purposes of reviewing the 'Order on Defendant's Motion for Appropriate Relief' entered 26 November 2019 by Judge C. Winston Gilchrist." (R p. 353) Defendant filed the record on appeal on 24 May 2021 and an appellant brief on 23 June 2021. (See Docket Sheet in No. COA21-286) On 22 July 2021, *amici curiae* filed a motion for leave to file an amicus brief, which this Court allowed. (Id.)

[2] Defendant also made, but subsequently abandoned, an ineffective assistance of appellate counsel claim. (R p. 78; MAR T p. 66)

STATEMENT OF THE FACTS

A. Defendant's Convictions

This Court described the facts underlying Defendant's substantive offenses as follows:

> On 2 February 2001, at approximately 8:30 p.m., seventeen year old Patrice Ann Howes ("Howes") was babysitting for her cousin when two of her male friends from school, Jason Criswell ("Criswell") and Chris Griffith ("Griffith"), arrived. Howes had a crush on Criswell.
>
> Criswell, Griffith, and Howes watched a birthday video on the porch. Criswell and Griffith eventually left, but returned at approximately 11:30 p.m. with Griffith's brother, Eddie, and defendant, who was over thirty years old. The four males were at Howes' house for only a short time and all but Criswell stayed outside because Howes' dog was barking at their dogs. Howes was introduced to defendant, whom she had seen around the neighborhood, but did not know. Howes informed the males that it was getting late and asked them to leave. They then left.
>
> Next, Howes used the restroom and went to the laundry room to do some laundry. While Howes was doing her laundry, there was a knock on the back door, located in the laundry room. Howes could not determine who was at the back door, so she opened it, and found defendant there. Defendant tried to talk to Howes about Criswell, telling her that Criswell was a "jerk" and "no good." He also told her that she was better off with him, and that she was a beautiful girl who could "get anybody."
>
> When Howes asked defendant to leave, he did not. Howes and defendant each had a hand on the back door, and when Howes attempted to push defendant back, he stepped into the house and continued to try to talk to Howes. At this point, Howes began cursing at defendant, as she was

> angered by the fact that he had come into the house. Defendant slapped Howes in the face, closed the back door, closed the laundry room door, picked Howes up, placed her on top of the washer, turned the lights out, and choked her. Howes was afraid that defendant was going to rape her, and "just sat there and cried ." [sic]
>
> Defendant continued to slap Howes and choke her because she still was crying. At some point he tried to hug Howes, and turned the light back on, saying, "now you can identify me to the police." He tried to turn the light off again, but Howes fought with him to keep it on. When her dog started to bark, indicating that her cousin was home, defendant opened the laundry room door, then fled through the back door.

McDougald, 2008 WL 2097534, at *1.

Based on this incident, Defendant was charged with first-degree burglary, second-degree kidnapping, assault on a female, and attaining violent habitual felon status. The violent habitual felon charge alleged the following predicate felonies: (1) second-degree kidnapping, which Defendant committed on 16 May 1984 and of which he was convicted on 16 May 1984, and (2) second-degree sexual offense, which Defendant committed on 3 November 1987 and of

which he was convicted of on 1 February 1988. (R p. 52)[3] Defendant rejected a plea offer from the State requiring a term of imprisonment of approximately thirteen and one-half years. (Trial T p. 4) Defendant was found guilty of second-degree kidnapping, misdemeanor breaking and entering, assault on a female, and attaining violent habitual felon status and was sentenced to life imprisonment without the possibility of parole.

B. Motion for Appropriate Relief

Over sixteen years after he was convicted and nine years after his appeal was decided, Defendant filed a motion for appropriate relief (MAR). (R p. 4) In the motion, Defendant argued the sentence of life imprisonment violated the Eighth Amendment "in three ways:"

> 1. He received a sentence of life without parole that could not have been imposed but for juvenile, nonhomicide conduct, contrary to Graham[v. Florida, 560 U.S. 48 (2010)]; and
>
> 2. He was sentenced to mandatory life without parole as a result of juvenile conduct without a finding that he was beyond rehabilitation, contrary to Miller[v. Alabama, 567

[3] As the trial court below noted, Defendant was sixteen years old when he committed second-degree kidnapping in 1984, and he served approximately three years in custody as a committed youthful offender. When he was released from custody, Defendant was nineteen years old; less than three months after his release, Defendant committed second-degree sexual offense, as well as armed robbery and common law robbery. Defendant served approximately thirteen years in custody for these offenses and was released at the age of thirty-three. Less than thirty days after his release, Defendant committed second-degree kidnapping against Ms. Howes. (R p. 349)

> U.S. 460 (2012)] and Montgomery[v. Louisiana, 577 U.S. 190 (2016)]; and
>
> 3. His sentence is disproportionate, contrary to Solem v. Helm, 463 U.S. 277 (1983).

(R p. 12) In an amendment adding a claim that he received ineffective assistance of trial counsel during plea negotiations, Defendant argued "[b]efore his conviction, he turned down a more favorable plea deal because of his attorney's unreasonable failure to advise him that there was a mandatory punishment of life without parole for violent habitual felon status." (R p. 64)

At the evidentiary hearing on the ineffective assistance of counsel claim, Defendant presented testimony from his trial counsel, Mark Key.[4] Trial counsel testified he was appointed to represent Defendant in February 2001 and had several meetings with Defendant on 6 February 2001, 14 April 2001, and 25 April 2001. (MAR T pp. 12–13) At the April meeting, Defendant rejected a plea offer from the State to first-degree burglary and second-degree kidnapping for a sentence of approximately thirteen and one-half years. (MAR T pp. 13–14) Trial counsel learned that Defendant had been indicted for

[4] Defendant also presented testimony from Michael G. Howell, an attorney who practices criminal law at the Wake County Public Defender's Office. Mr. Howell, who had not published any relevant research and did not possess a board-certified specialization, testified that in his opinion, based on the record he reviewed, trial counsel performed deficiently. Defendant did not testify.

attaining violent habitual felon status in May 2001, when "[t]hey placed [the indictment] in [his] courthouse mailbox." (MAR T p. 23) Trial counsel testified that his timesheet did not reflect that he sent Defendant correspondence about the indictment but admitted he did not always include all of his work on the timesheet, that his file on the case has since been destroyed, and that he had no "recollection as to whether I sent him a letter or not." (MAR T pp. 15, 26–27) After Defendant was indicted for attaining violent habitual felon status, he attended court with trial counsel on 18 May 2001 and 25 June 2001 where the violent habitual felon charge was addressed. (R p. 346) Trial counsel nevertheless testified that "his recollection" is that he told Defendant about the mandatory sentence for violent habitual felon status the morning of trial on 1 October 2001. (MAR T p. 27) However, as the trial court ultimately found, "[e]ighteen years [had] passed since the events at issue[,]" so trial counsel "did not have a perfect or complete recollection of all his statements to his client." (R p. 348)

In an order in which it made numerous findings of fact and conclusions of law, the trial court concluded (1) Defendant failed to establish ineffective assistance of counsel; (2) "Defendant's sentence did not violate the constitutional prohibits against mandatory sentences of life without parole for

juveniles"; and (3) "[a]s applied to Defendant, a sentence of life without parole is not grossly disproportionate to the conduct punished." (R pp. 350–51)

STANDARD OF REVIEW

This Court reviews a trial court's order denying a motion for appropriate relief "to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." State v. Hyman, 371 N.C. 363, 382 (2018) (cleaned up). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." Id. Unchallenged findings of fact are considered supported by competent evidence and are thus binding on appeal. Id. The trial court's conclusions of law are reviewed *de novo*. Id.

ARGUMENT

Defendant argues on appeal the trial court erred (1) "in concluding that the trial attorney acted reasonably and without prejudice", (2) in concluding that Defendant's sentence did not violate the constitutional prohibition on a mandatory sentence of life imprisonment without parole for a juvenile, and (3) "in concluding that [Defendant's] sentence is not disproportionate." (Def's Br pp. 15, 29, 34) *Amici curiae* similarly argue that Defendant's sentence "contradicts constitutional prohibitions on mandatory juvenile life without

parole sentencing." (*Amici* Br p. 8) Each argument is meritless, and the trial court's order should be affirmed.

I. THE TRIAL COURT DID NOT ERR BY REJECTING DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Criminal defendants "have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012). Accordingly, defendants are "entitled to the effective assistance of competent counsel" during plea negotiations. Id. A defendant claiming she received ineffective assistance of counsel must establish (1) counsel's performance was constitutionally deficient and (2) the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Hill v. Lockhart, 474 U.S. 52, 58 (1985). If it is easier to dispose of an ineffective assistance of counsel claim "on the ground of lack of sufficient prejudice, [this Court] need not determine whether counsel's performance was deficient." State v. Phillips, 365 N.C. 103, 122 (2011) (cleaned up).

A. The trial court did not err by finding there was no deficient performance by counsel.

To show that counsel's performance was constitutionally deficient, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." Strickland, 466 U.S. at 687. That is, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. The United States Supreme Court has stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . 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[.]

Id. at 689 (emphasis added).

In the present case, the trial court made numerous findings of fact relevant to counsel's performance. (R pp. 345–349, FOF #1–#27) Because Defendant does not challenge them, Findings of Fact #1–#23 are presumed to be supported by competent evidence and are thus binding on appeal. See Hyman, 371 N.C. at 382. The findings of fact challenged by Defendant on appeal are as follows:

> 24. Defendant was informed well before October 1, 2001 that he faced a violent habitual felon enhancement.
>
> 25. The Defendant was informed that he was subject to a sentence of life without parole. The credible evidence does not establish that Defendant was not informed by Mr. Key well in advance of the first day of his trial, October 1, 2001,

> that he faced a mandatory sentence of life imprisonment without parole as a violent habitual felon.
>
> 26. As late as October 1, 2001, the day Defendant's trial on the underlying substantive charges began, Defendant knew that he faced a sentence of life without parole, but still declined to accept a plea bargain for a lesser sentence. Defendant instead made the choice to proceed to trial.
>
> 27. The credible evidence does not establish that Defendant lacked a full and informed understanding well in advance of October 1, 2001, of the impact of the violent habitual felon charge, of its potential consequences and of the consequences of rejecting the plea arrangement which had been offered by the State. The credible evidence does not establish that the defense counsel failed to fully, timely and competently advise Defendant on these issues. The credible evidence does not establish that defense counsel's representation was objectively unreasonable in any way.

(R pp. 348–49, FOF #24–#27) (emphasis in original).

Defendant's argument that the trial court "abused its discretion" by finding in Finding of Fact #24 that he "was informed well before October 1, 2001 that he faced a violent habitual felon enhancement" fails. The evidence, and the trial court's other (binding) findings, establish that Defendant was present in court multiple times when the violent habitual felon charge had been addressed before 1 October 2001. On 18 May 2001, four days after Defendant was indicted for attaining violent habitual felon status, Defendant was present when the court entered a scheduling order that explicitly referenced the charge. (R p. 346, FOF #5; R p. 234) A little over a month later,

on 25 June 2001, Defendant again returned to court and was present when his substantive charges were joined for trial with his violent habitual felon charge without any objection. (R p. 110; R p. 346, FOF #6, #9) Indeed, Defendant himself admitted he was in court in June, and, in a later motion to dismiss the violent habitual felon indictment, Defendant's counsel stated that Defendant was in court on 25 June 2001. (R p. 346, FOF #7–#8) Moreover, on the morning of trial on 1 October 2021, Defendant, referring to his trial counsel, stated that "on several occasions he brought – he told me that the DA brought up felony, habitual felony charges on me." (Trial T p. 5) This finding of fact is therefore supported by competent evidence. See Hyman, 371 N.C. at 382 ("The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.").

Defendant also erroneously argues the trial court abused its discretion by finding in Finding of Fact #26 that "he knew on the morning of trial 'that he faced a sentence of life without parole.'" (Def's Br p. 16) Defendant's own statements on 1 October 2001 demonstrate he understood that he faced a mandatory sentence of life without parole if he proceeded to trial and was convicted of attaining violent habitual felon status. Defendant stated to the trial court that he was "facing [his] life with no parole in prison." (Trial T p. 4) His trial counsel also confirmed to the trial court that morning that he had

talked to Defendant about the punishment for attaining violent habitual felon status. (Trial T p. 5) Defendant did not challenge trial counsel's statement that he explained the required punishment to Defendant—in fact, when the trial court asked Defendant about his own statement regarding life imprisonment, Defendant said "that['s] what he told me." (Trial T p. 4) Furthermore, when the court found that Defendant "understood the nature and object of the proceedings against him" and was "competent in his own situation in reference to the proceeding[,]" and asked if he had any questions, Defendant responded "[n]o, sir" and that he was ready to proceed to trial. (Trial T p. 6) Finding of Fact #26 is supported by competent evidence.

Lastly, Defendant erroneously argues that "Findings of fact # 25 and # 27 are [ ] an abuse of discretion in disregarding evidence that [Defendant] was not informed about the risk of a mandatory life without parole sentence if he went to trial." (Def's Br pp. 16–17) Although trial counsel testified at the evidentiary hearing there was no indication on the timesheet that he sent Defendant correspondence about the violent habitual felon charge and that his timesheet did not reflect any meetings solely with Defendant about the charge, this testimony was qualified. Trial counsel admitted that he did not have his full file from the case:

> I don't have his file. So when you guys first contacted me, his file had been destroyed because, since it was 2001, every six years or so, I purge my office of files where the cases have been disposed of, and so I don't have any evidence of whether I sent him a letter or didn't sent [sic] him a letter. I just don't know because I don't have his file. . . . So I don't really have any recollection as to whether I sent him a letter or not.

(MAR T p. 15) Trial counsel also admitted that his timesheet did not always reflect all the work he did on a case, and, as the trial court found, counsel "did not have a perfect or complete recollection of all his statements to his client" due to the passage of eighteen years. (MAR T p. 26; R p. 348) Additionally, trial counsel's timesheet did reflect that he was in court with Defendant in May and June 2001 when the violent habitual felon status charge was discussed. (R p. 92) In light of all of this, the trial court did not abuse its discretion in finding that the credible evidence did not establish that Defendant had not been informed of the consequences of a violent habitual felon conviction.

The trial court's findings of fact support its conclusion of law that Defendant failed to meet his burden of proving that his trial counsel's performance fell below an objective standard of reasonableness. (R pp. 350–51, COL #7) Although the violent habitual felon indictment had not been officially served on Defendant until 1 October 2001, Defendant was aware of the charge months before trial began that morning. (R pp. 345–48, FOF #4–#11, #19, #24) Defendant was similarly aware of and understood that a

mandatory sentence of life imprisonment without parole would be imposed if he were convicted of second-degree kidnapping and attaining violent habitual felon status, as demonstrated by his own statements on 1 October 2001, trial counsel's statement that he had explained the sentence to Defendant, and the lack of any indication that Defendant was confused about or did not understand the sentence. (R pp. 347–48, FOF #14, #25–#27; Trial T pp. 4–6) It was Defendant's burden to establish that counsel performed deficiently through a failure to reasonably explain the sentence for attaining violent habitual felon status; however, Defendant failed to do so. Notably, Defendant never testified at the evidentiary hearing that he did not understand the consequences of a conviction for attaining violent habitual felon status. He instead relies upon trial counsel's timesheet and "recollection" at the evidentiary hearing that counsel informed Defendant of the mandatory sentence on the morning of trial. This is insufficient to establish deficient performance because, as discussed above, trial counsel's file had been destroyed and he "did not have a perfect or complete recollection of all his statements to his client" due to the passage of eighteen years. (R p. 348, FOF #21, #23); see N.C.G.S. § 15A-1420(c)(5) ("[T]he moving party has the burden of proving by a preponderance of the evidence every fact essential to support the" MAR).

Even assuming *arguendo* Defendant was aware of the violent habitual felon charge before 1 October 2001 but did not learn of its mandatory punishment until that morning, Defendant still cannot show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The sentence to be imposed upon a conviction of attaining violent habitual felon status is not a complicated or time-consuming concept to explain. The statute means what it says:

> A person who is convicted of a violent felony and of being a violent habitual felon must, upon conviction (except where the death penalty is imposed), be sentenced to life imprisonment without parole. Life imprisonment without parole means that the person will spend the remainder of the person's natural life in prison. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation.

N.C.G.S. § 14-7.12 (emphasis added). There is no gray area in the statute as to what life imprisonment without parole means or possibility that the trial court may impose a different sentence. And the record demonstrates Defendant fully understood the sentence he faced if convicted of this status crime. (Trial T p. 4) Therefore, even if the mandatory punishment had been explained to him that morning, it was done in time for Defendant to make a knowing decision about whether to accept the plea agreement or proceed to

trial. The trial court did not err in concluding that Defendant failed to establish that counsel's performance was objectively unreasonable.

B. The trial court did not err by finding there was no resulting prejudice.

"To establish Strickland prejudice a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Lafler, 566 U.S. at 163 (cleaned up). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." Id. Where the defendant claims that ineffective assistance of counsel led to the rejection of a plea offer, she

> must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 164.

1. Defendant did not present any evidence which supported a finding of prejudice.

An MAR "must be supported by affidavit or other documentary evidence if based" on facts not ascertainable from the records or transcripts of the case.

N.C.G.S. § 15A-1420(b)(1) (2019). "If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." Id. at (c)(5). This Court has held that the "Rules of Evidence apply to post-conviction proceedings." State v. Howard, 247 N.C. App. 193, 211 (2016). Accordingly, a defendant may not rely on affidavits in lieu of presenting competent evidence at an evidentiary hearing to prove facts essential to support her MAR. Id. ("Resolution of those claims necessarily required the trial court to make credibility determinations, which could not be done unless the evidence and witnesses were actually before the court." (emphasis in original)); cf. State v. Salinas, 366 N.C. 119, 125–26 (2012).

Defendant argued in his MAR that had his trial counsel "told him that there was a risk of being convicted as a violent habitual felon if he turned down the plea," "he would have pled guilty and accepted a minimum sentence of approximately thirteen years." (R pp. 77) With his MAR, Defendant submitted an affidavit in which he stated:

> 9. Before the day that my trial began in October 2001, Mr. Key did not tell me that I could avoid being convicted as a violent habitual felon by pleading guilty and agreeing to serve a minimum sentence of approximately thirteen years. If Mr. Key had told me that, I would have pleaded guilty and accepted a minimum sentence of approximately thirteen years.

> 10. On the morning that my trial began in October 2001, Mr. Key did not tell me that I could avoid being convicted as a violent habitual felon by pleading guilty and agreeing to serve a minimum sentence of approximately thirteen years. If Mr. Key had told me that, then I would have pled guilty and accepted a minimum sentence of approximately thirteen years.

(R pp. 94–95) Defendant did not testify at the evidentiary hearing.

The trial court did not err by concluding that Defendant failed to establish prejudice from any alleged deficient performance. To establish prejudice, Defendant was required to show that but for the ineffective advice of trial counsel, there is a reasonable probability he would have accepted the guilty plea. Lafler, 566 U.S. at 174. However, Defendant did not present any competent evidence at the evidentiary hearing to support such a finding. While he stated in his affidavit that he would have accepted the guilty plea, an affidavit is not competent evidence which can establish prejudice. See Howard, 247 N.C. App. at 211. Furthermore, trial counsel's testimony at the evidentiary hearing, given approximately eighteen years later, that he thought Defendant "may have changed his mind if he truly understood the impact of [sic] violent habitual felon indictment" is insufficient to establish a reasonable probability that Defendant would have accepted the guilty plea. (MAR T p. 32) (emphasis added) Because the trial court had no evidence before it which

established prejudice under Strickland, it did not err in denying Defendant's ineffective assistance of counsel claim.

2. The trial court did not err in its finding of no prejudice.

The trial court did not err by making the following conclusions that Defendant failed to establish prejudice:

> 34. The credible evidence does not demonstrate a reasonable probability that but for any errors or insufficiency in the frequency, timing, content or methods of communication used by attorney Key with Defendant that the outcome of the case would have been any different or that Defendant would have accepted a plea to a sentence of less than life without parole.
>
> . . .
>
> 8. In addition, and in the alternative, the Defendant has failed to establish that there is a reasonable probability that but for any unprofessional error committed by Mr. Key the result of the proceeding would have been different.
>
> 9. There is no reasonable probability that Defendant would have accepted the plea offer made by the State but for any unprofessional error by attorney Key.

(R pp. 350–51)

The evidence and the trial court's findings of fact establish that at the time Defendant rejected the plea agreement and decided to proceed to trial, he was aware of the violent habitual felon charge and understood its mandatory punishment upon conviction—regardless of whether that punishment had

been explained to him well in advance of 1 October 2001 or that morning. Defendant stated to the trial court that morning he was "already facing my life with no parole in prison[,]" and trial counsel confirmed to the court he had discussed "what the punishment is for the habitual felon, violent felon." (Trial T pp. 4–5) After the trial court allowed Defendant's request to represent himself, the trial court directly asked Defendant "Do you want to ask me any questions?" Defendant replied, "No, sir[,]" and stated he was ready to proceed to trial. (Trial T p. 6) If Defendant had not understood the punishment he faced upon conviction for attaining violent habitual felon status, he could have asked the trial court questions or for more time to understand the punishment[5]; however, he did neither.

Defendant also understood that he had an alternative to proceeding to trial and risking a mandatory sentence of life imprisonment without parole—accepting the State's plea agreement to first-degree burglary and second-degree kidnapping for a term of imprisonment of approximately thirteen and one-half years. (R p. 345, FOF #3) And Defendant was aware this alternative was available to him on 1 October 2001, stating that trial counsel told him that

[5] While the trial court took Defendant's later comments during jury selection to be a "motion to continue[,]" those comments were about Defendant not being "able to get in touch with [his] witnesses[.]" (Trial T p. 7)

morning "[i]f you don't go to trial, you can take the plea bargain for 13 years and a half." (Trial T p. 4)

With these two options before him—proceed to trial and risk a mandatory sentence of life imprisonment without parole or accept a plea agreement to a sentence of thirteen and one-half years—Defendant ultimately decided to proceed to trial. (Trial T p. 4) Given he had full knowledge and understanding of both options when he made this decision, Defendant has not shown a reasonable probability that he would have accepted the plea agreement in lieu of proceeding to trial if he had learned of the mandatory punishment for a violent habitual felon conviction any earlier or with any different "frequency, timing, content or methods of communication used by" trial counsel. (R p. 350) While Defendant makes a *post hoc* assertion in an affidavit made over sixteen years after his decision that he would have accepted the plea agreement, there is no contemporaneous evidence to support this assertion. See Lee v. United States, 198 L. Ed. 2d 476, 487 (2017) ("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."). To the contrary, the record, including Defendant's own statements, demonstrates that Defendant understood his options but

wanted to proceed to trial. Defendant failed to meet his burden of establishing prejudice, and the trial court did not err by denying the ineffective assistance of counsel claim.

II. THE TRIAL COURT DID NOT ERR IN REJECTING DEFENDANT'S CLAIM THAT HIS SENTENCE VIOLATED CONSTITUTIONAL PROHIBITIONS AGAINST A MANDATORY SENTENCE OF LIFE WITHOUT PAROLE FOR JUVENILES.

In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court held that the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed violated the Eighth Amendment's prohibition against cruel and unusual punishment. Id. at 578. The Court identified three general differences between adults and offense under the age of eighteen: (1) juveniles have "a lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions"; (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) "the character of a juvenile is not as well formed as that of an adult" and "[t]he personality traits of juveniles are more transitory, less fixed." Id. at 569–70 (cleaned up). Accordingly, the penological justifications for the death penalty, the most serious punishment, applied with less force to

juveniles than adults, warranting a categorical ban on a sentence of death for those who were juveniles when they committed their crimes. Id. at 571, 578.

Several years later, in Graham v. Florida, 560 U.S. 48 (2010), the Supreme Court held that sentencing a juvenile offender to life imprisonment without parole for a non-homicidal offense categorically violated the Eighth Amendment. The Supreme Court relied on Roper's reasoning that "because juveniles have lessened culpability they are less deserving of the most severe punishments" and further noted that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Id. at 68–69. Therefore, when compared to an adult murderer, a juvenile offender who had not murdered had "twice diminished moral culpability." Id. at 69. The Eighth Amendment thus requires the State to "afford some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 75.

The Supreme Court then held in Miller v. Alabama, 567 U.S. 460 (2012), that mandatory life imprisonment without the possibility of parole for juvenile offenders who have murdered also violates the Eight Amendment. Id. at 470. Again recognizing that "[c]hildren are constitutionally different from adults for purposes of sentencing[,]" the Court concluded individualized sentencing was required and that a trial court "must have the opportunity to consider

mitigating circumstances before imposing the harshest possible penalty for juveniles." Id. at 470–71, 489. A trial court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. While the Supreme Court held that the imposition of life imprisonment without the possibility of parole should be "uncommon" on juveniles who murder, it did not prohibit a trial court's ability to impose the penalty in such cases. Id. at 479. Thus, the Roper, Graham, and Miller line of cases make clear: the Constitution forbids a sentence of death or a mandatory sentence of life imprisonment without parole for a crime that was committed by an offender under the age of eighteen.

Here, Defendant was not sentenced to death or life imprisonment without parole as a juvenile; rather, he was sentenced to life imprisonment without parole as an adult who was convicted of second-degree kidnapping enhanced by Defendant's status as a violent habitual felon. Under North Carolina law, "[a] person who has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon." N.C.G.S. § 14-7.7(a) (2019). A "violent felony" includes all Class A through Class E felonies. Id. at (b). The penalty for a conviction "of a violent felony and of being

a violent felon" is life imprisonment without the possibility of parole. N.C.G.S. § 14-7.12.

It is well established that recidivist statutes, such as habitual felon statutes, do not punish the previous offenses. The purpose of these statutes is to deter repeat offenders, and they are justified by "the propensities [such an offender] has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." Rummel v. Estelle, 445 U.S. 263, 284 (1980). Therefore, the sentence imposed as a habitual criminal under a recidivist statute is not an "additional penalty for the earlier crimes" but rather a "stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." Gryger v. Burke, 334 U.S. 728, 732 (1948); cf. Nicholas v. United States, 511 U.S. 738, 747 (1994) (repeated-offender laws penalize "only the last offense committed by the defendant"); United States v. Rodriguez, 553 U.S. 377, 386 (2008) ("When a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction.").

While it appears that neither this Court nor our Supreme Court have addressed the question of whether a mandatory sentence of life without parole imposed by a recidivist statute violates the Eighth Amendment when it includes a predicate offense committed as juvenile, other courts have. For

example, in United States v. Hoffman, 710 F.3d 1228 (11th Cir. 2013), the defendant was charged with various narcotics offenses related to a methamphetamine trafficking conspiracy. Id. at 1230. The government sought enhanced punishment under 21 U.S.C. § 841(b)(1)(A)(viii), which provided at the time that "if a person with 'two or more prior convictions for a felony drug offense' [was] convicted for possessing with intent to distribute 50 or more grams of methamphetamine (or conspiring to do so, see 21 U.S.C. § 846), he 'shall be sentenced to a mandatory term of life imprisonment.' " Id. at 1232. The defendant had previously committed two such felonies "when he was a 17-year-old juvenile." Id. at 1230. The defendant was ultimately convicted, and the district court sentenced him to concurrent terms of life imprisonment and 262 months' imprisonment. Id. at 1231.

On appeal, relying upon Roper and Miller, the defendant argued "his mandatory life sentence . . . constitute[d] cruel and unusual punishment under the Eighth Amendment because the basis for the statutory enhancement was two prior convictions for offenses [he] committed when he was 17 years old." Hoffman, 710 F.3d at 1231. The Eleventh Circuit found Roper inapposite "for several reasons" because it concerned a sentence of death and "did not involve sentence enhancement for an adult offender":

> Roper does not deal specifically—or even tangentially—with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. Roper does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.

Id. at 1232 (cleaned up).

The Eleventh Circuit similarly did not find Miller supportive of the defendant's Eighth Amendment argument:

> . . . Miller is inapposite because it involved a juvenile offender facing punishment for a crime committed when he was a juvenile, and thus it focused on the reasons why it would be cruel and unusual for a juvenile to face a mandatory life sentence. Nothing in Miller suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence as an adult, after committing a further crime as an adult.

Id. at 1233 (cleaned up). The court, in a plain error review, concluded the defendant failed to meet "his burden of showing on-point precedent holding that the Eighth Amendment prohibits using juvenile felony drug convictions to enhance to life imprisonment an adult defendant's sentence for a crime he committed as an adult." Id.

Other federal courts have reached similar conclusions when addressing the interplay between the Eighth Amendment and sentences enhanced by recidivist statutes. See, e.g., United States v. Hunter, 735 F.3d 172, 174–76

(4th Cir. 2013) (rejecting argument that ACCA sentencing enhancement based on convictions the defendant committed when he was a juvenile violated the Eighth Amendment because the "proportionality concerns expressed in Miller regarding youthful offenders are not implicated here" as the defendant "is not being punished for a crime he committed as a juvenile, because sentence enhancements do not themselves constitute punishment for the prior criminal convictions that trigger them"); United States v. Orona, 724 F.3d 1297, 1307–08 (10th Cir. 2013) ("Unlike the defendants in Roper and Graham, [the defendant] is being punished for his adult conduct. . . . [These cases] involve sentences imposed directly for crimes committed while the defendants were young. In the case before us, an adult defendant faced an enhanced sentence for a crime he committed as an adult.").

Furthermore, a number of state courts have rejected the argument that Roper, Graham, and Miller prohibit mandatory life sentences for recidivist enhancements that include a predicate offense committed by a defendant as a juvenile. See, e.g., McDuffey v. State, 286 So. 3d 364 (Fla. 1st DCA 2019) (noting that "numerous federal and state courts have rejected the claim that using prior juvenile offenses, to qualify adult offenders for mandatory life sentences under recidivist sentencing statutes, violate Graham or Miller" and rejecting such a claim); Wilson v. State, 521 S.W.3d 123, 127–28 (Ark. 2017)

("In receiving a life sentence as a defendant convicted of a Class Y felony involving violence and who had previously been convicted as an adult of two felonies involving violence, [the defendant] was not being sentenced a second time for past crimes that he committed as a juvenile but instead was being punished for his conduct as an adult."); Commonwealth v. Lawson, 90 A.3d 1 (Pa. Super. Ct. 2014) (rejecting similar argument).

Here, the trial court did not err when it made the following conclusion consistent with the weight of authorities from other jurisdictions who have rejected the Eighth Amendment argument raised by Defendant:

> Defendant's sentence of life without parole was not imposed for conduct committed before Defendant was eighteen years of age in violation of Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 132 S. Ct. 2455 (2012), or Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Defendant's sentence did not violate the constitutional prohibitions against mandatory sentences of life without parole for juveniles. Defendant's sentence is therefore not unconstitutional as applied to the Defendant.

(R p. 350)

Nevertheless, Defendant argues his mandatory sentence of life imprisonment violates the Eighth Amendment because it could not have been imposed "without alleging juvenile conduct" and "Graham held that juvenile conduct other than murder cannot be punished with life without parole." (Def's Br p. 31) *Amici curiae* similarly argue that Defendant's "sentence contradicts

constitutional prohibitions on mandatory juvenile life without parole sentencing." (*Amici* Br p. 8) At the outset, this argument reads Graham and Miller far beyond their holdings. These cases prohibit a mandatory punishment of life imprisonment without parole for an offense that was committed by a juvenile. See Graham, 560 U.S. at 75; Miller, 567 U.S. at 489. Here, no one was sentenced to life imprisonment without parole for an offense committed as a juvenile—Defendant received this sentence for second-degree kidnapping, enhanced by violent habitual felon status, which he committed as a thirty-three-year-old man. Graham and Miller are simply inapplicable.

Defendant's "but for" argument also misses the mark because Defendant was not punished, even in part, for juvenile conduct when he was sentenced as a violent habitual felon which contained a predicate felony he committed as a juvenile. The heightened sentence of life imprisonment without parole was solely a "stiffened penalty" imposed on Defendant for his offense of second-degree kidnapping because it was a repetitive offense. See Gryger, 334 U.S. at 732. The United States Supreme Court, and our own appellate courts, have made clear that when a higher sentence is imposed under a recidivist statute, "none" of the punishment "is for the prior convictions." Rodriguez, 553 U.S. at 386; cf. State v. Vardiman, 146 N.C. App. 381, 383 (2001), appeal dismissed, 559 S.E.2d 794, cert. denied, 537 U.S. 833 (2002) (rejecting double jeopardy

challenge to sentence imposed under recidivist statute because these statutes "increase the severity of the punishment for the crime being prosecuted; they do not punish a previous crime a second time"). Because Defendant was not punished for any juvenile conduct when he received a heightened sentence for second-degree kidnapping as a violent habitual felon, the concerns for juveniles present in the Graham and Miller line of cases are not present here. Defendant cannot claim any "distinctive immaturity" or "vulnerability to outside influences" when he committed a second-degree kidnapping as a thirty-three-year-old adult and cannot point to a "potential for change" when he was given the chance to rehabilitate after his previous offenses but "elected to continue a course of illegal conduct" in adulthood. See Orona, 724 F.3d at 1308; (Def's Br p. 31) Accordingly, Defendant's sentence did not violate the Eighth Amendment, and the trial court did not err in rejecting this claim.

III. THE TRIAL COURT DID NOT ERR IN REJECTING DEFENDANT'S CLAIM THAT HIS SENTENCE WAS GROSSLY DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense." Graham v.

Florida, 560 U.S. 48, 59 (2010) (cleaned up). However, "the United States Supreme Court [has] held that outside of the capital [punishment] context, there is no general proportionality principle inherent in the prohibition against cruel and unusual punishment." State v. Green, 348 N.C. 588, 609 (1998) (citing Harmelin v. Michigan, 501 U.S. 957 (1991)). "[T]he prohibition against cruel and unusual punishment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id. (cleaned up).

In Rummel v. Estelle, 445 U.S. 263 (1980), the United States Supreme Court held it was not "cruel and unusual punishment" to sentence a defendant to life imprisonment under a recidivist statute after a triggering conviction for obtaining $120.75 by false pretenses and two previous convictions for fraudulent use of a credit card to obtain $80.00 worth of goods or services and passing a forged check in the amount of $28.36. The Court explained:

> one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id. at 274. Similarly, in Ewing v. California, 538 U.S. 11 (2010), the Supreme Court upheld a sentence of 25 years to life under a "three-strikes" law after the

defendant was convicted felony grand theft of personal property in excess of $400 for stealing golf clubs while on parole. Id. at 17–19. The Court noted that the Eighth Amendment does not prohibit states from making a "deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." Id. at 24–25.

In State v. Mason, 126 N.C. App. 318 (1997), cert. denied, 354 N.C. 72 (2001), the defendant was sentenced to life imprisonment without parole as a violent habitual felon and argued on appeal that the violent habitual felon statute facially violates the Eighth Amendment. Id. at 321. This Court explained that our Supreme Court rejected a similar argument against the habitual felon statute and "determined that the General Assembly 'acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided.'" Id. (quoting State v. Todd, 313 N.C. 110, 118 (1985)). This Court found "the Supreme Court's reasoning in Todd equally applies to the violent habitual felon statute" and rejected the defendant's argument that statute violates the Eighth Amendment. Id.

In this case, the trial court did not err in rejecting Defendant's argument that his sentence of life imprisonment without parole "is grossly disproportionate to the crime of second-degree kidnapping with violent habitual felon status." (R pp. 19; R p. 350, COL #3–#4). As this Court determined in Mason, the mandatory sentence of life imprisonment without parole that is required upon a conviction "of a violent felony and of being a violent habitual felon" does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Mason, 126 N.C. App. at 318; In re Civil Penalty, 324 N.C. 373, 384 (1989). Furthermore, as to Defendant, he was convicted of second-degree kidnapping after he, a thirty-three-year-old man, entered a seventeen-year-old's house and "picked [her] up, placed her on top of the washer, turned the lights out, and choked her." McDougald, 2008 WL 2097534, at *1. The seventeen-year-old, afraid that Defendant was going to rape her, "just sat there and cried[,]" while Defendant continued to slap and choke her until someone interrupted Defendant's conduct. Id. Defendant committed this offense in the context of a repeated criminal history. In the short time Defendant was at liberty since committing his first felony, he committed not just numerous felonies, but numerous violent felonies. In light of Defendant's repeated criminal behavior and the State's public-safety interest, this "is not the rare case in which a threshold comparison of the crime

committed and the sentence imposed leads to an inference of gross disproportionality." See Ewing, 538 U.S. at 30. The trial court did not err by rejecting Defendant's claim.

CONCLUSION

For the reasons stated herein, the State respectfully requests that this Court affirm the trial court's order denying the motion for appropriate relief.

Electronically submitted this the 24th day of November, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)

Undersigned counsel certifies that the State's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Word, the program used to prepare the brief.

Electronically submitted this the 24th day of November, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD and other attorneys listed below as follows

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William O'Neal
McDOUGALD, Petitioner,
v.
Alvin W. KELLER, Sec'y,
North Carolina Department
of Correction, Respondent.

No. 5:09–HC–2134–D.
|
Feb. 15, 2011.

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ORDER

JAMES C. DEVER III, District Judge.

***1** William O'Neal McDougald ("McDougald" or "petitioner"), a state inmate, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 [D.E. 1]. On August 2, 2010, respondent answered the petition [D.E. 5] and filed a motion for summary judgment [D.E. 6]. Pursuant to *Roseboro v. Garrison,* 528 F.2d 309, 310 (4th Cir.1975) (per curiam), the court notified McDougald about the motion for summary judgment, the consequences of failing to respond, and the response deadline [D.E. 8]. On August 16, 2010, respondent moved to supplement the summary judgment motion with additional exhibits [D.E. 9]. On August 23 and September 7, 2010, McDougald filed five responses to the summary judgment motion [D.E. 10–14] and the affidavit of Teresa Spears [D.E. 15]. As explained below, respondent's motion for summary judgment [D.E. 6] is granted.

I.

The North Carolina Court of Appeals summarized the facts of this case as follows:

> On 2 February 2001, at approximately 8:30 p.m., seventeen year old Patrice Ann Howes ("Howes") was babysitting for her cousin when two of her male friends from school, Jason Criswell ("Criswell") and Chris Griffith ("Griffith"), arrived. Howes had a crush on Criswell.
>
> Criswell, Griffith, and Howes watched a birthday video on the porch. Criswell and Griffith eventually left, but returned at approximately 11:30 p.m. with Griffith's brother, Eddie, and defendant, who was over thirty years old. The four males were at Howes' house for only a short time and all but Criswell stayed outside because Howes' dog was barking at their dogs. Howes was introduced to defendant, whom she had seen around the neighborhood, but did not know. Howes informed the males that it was getting late and asked them to leave. They then left.

Next, Howes used the restroom and went to the laundry room to do some laundry. While Howes was doing her laundry, there was a knock on the back door, located in the laundry room. Howes could not determine who was at the back door, so she opened it, and found defendant there. Defendant tried to talk to Howes about Criswell, telling her that Criswell was a "jerk" and "no good." He also told her that she was better off with him, and that she was a beautiful girl who could "get anybody."

When Howes asked defendant to leave, he did not. Howes and defendant each had a hand on the back door, and when Howes attempted to push defendant back, he stepped into the house and continued to try to talk to Howes. At this point, Howes began cursing at defendant, as she was angered by the fact that he had come into the house. Defendant slapped Howes in the face, closed the back door, closed the laundry room door, picked Howes up, placed her on top of the washer, turned the lights out, and choked her. Howes was afraid that defendant was going to rape her, and "just sat there and cried ."

Defendant continued to slap Howes and choke her because she still was crying. At some point he tried to hug Howes, and turned the light back on, saying, "now you can identify me to the police." He tried to turn the light off again, but Howes fought with him to keep it on. When her dog started to bark, indicating that her cousin was home, defendant opened the laundry room door, then fled through the back door.

***2** *State v. McDoueald,* No. COA07–993, 2008 WL 2097534, at *1 (N.C . Ct.App. May 20, 2008) (unpublished), *review denied,* 362 N.C. 686, 671 S.E.2d 328 (2008).

On October 2, 2001, a jury convicted McDougald of breaking and entering, second degree kidnapping, and assault on a female. Mem. Supp. Mot. Summ. J., Ex. 1 at 21 (jury verdict). On November 14, 2001, McDougald was convicted of being a violent habitual felon, and the state court sentenced McDougald to life imprisonment without parole. *Id.* at 26 (11/16/01 state court order). McDougald appealed, challenging whether the state's evidence supported all the required elements of the charge of second degree kidnapping. Mem. Supp. Mot. Summ. J., Ex. 2 (petitioner's brief on appeal). On May 20, 2008, the North Carolina Court of Appeals found no error. On December 11, 2008, the North Carolina Supreme Court denied review. On October 13, 2009, McDougald filed his section 2254 petition, raising the same claim he raised on direct appeal. Pet. ¶ 12.

II.

Summary judgment is appropriate when, after reviewing the record taken as a whole, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party may not rest on the allegations or denials in its pleading, *Anderson,* 477 U.S. at 248–49,

but "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (emphasis removed) (quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. *Anderson,* 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. *Scott v. Harris,* 550 U.S. 372, 378 (2007).

A federal court cannot grant habeas relief in cases where a state court considered a claim on its merits unless (1) the state-court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or (2) the state-court decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. *See* 28 U.S.C. § 2254(d). A state-court decision is "contrary to" Supreme Court precedent if it either arrives at "a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite" to the Supreme Court. *Williams v. Taylor,* 529 U.S. 362, 405 (2000). A state-court decision "involves an unreasonable application" of Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *See id.* at 407; *Renico v. Lett,* 130 S.Ct. 1855, 1862 (2010).

> ***3** [Section 2254(d)] does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision is an objectively reasonable one, nor does it require a federal habeas court to offer an independent opinion as to whether it believes, based upon its own reading of the controlling Supreme Court precedents, that the [petitioner's] constitutional rights were violated during the state court proceedings.

Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir.2000) (en banc). Moreover, a state court's factual determination is presumed correct, unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Sharpe v. Bell,* 593 F.3d 372, 378 (4th Cir.2010).

McDougald claims that the state failed to present sufficient evidence to establish one element of the crime of second degree kidnapping: whether McDougald "kidnapped Patricia Howes for the purpose of terrorizing her." *See* Pet. ¶¶ 9(g)(6), 12 (pound one). McDougald first raised this argument on direct appeal. *See McDougald,* 2008 WL 2097534, at *1. The North Carolina Court of Appeals reviewed the record and found "there was substantial evidence from which a jury could conclude that defendant kidnapped Howes for the purpose of terrorizing her." *Id.* at *2–3.

Generally, the standard of review for a claim of insufficient evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *See, e.g., Wright v. West,* 505 U.S. 277, 295–97 (1992); *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). However, under the

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the appropriate inquiry is "whether a state court determination that the evidence was sufficient to support a conviction was an 'objectively reasonable' application of [the standard enunciated in] *Jackson.*" *Williams v. Ozmint,* 494 F.3d 478, 489 (4th Cir.2007) (alteration in original) (quotation omitted).

Here, there is overwhelming evidence in the record to demonstrate that McDougald intended to terrorize Howes. From his prior interaction with Howes earlier that evening, McDougald knew that Howes was in the home alone. He came to the back door of the house. When she told him to leave, he entered the house. When Howes cursed at him and asked him to leave, McDougald "slapped her, closed the doors, turned out the lights, placed her on the washing machine and proceeded to choke her." *McDougald,* 2008 WL 2097534, at *2. Howes cried hysterically during the assault. McDougald left by the back door only upon realizing that Howes' cousin was returning home. In sum, the court concludes that the North Carolina Court of Appeals' application of *Jackson* was objectively reasonable. Accordingly, this claim fails.

To the extent that McDougald attempts to challenge other aspects of his arrest or conviction in his filings in opposition to the motion for summary judgment,[1] McDougald did not present these claims in his petition, and does not indicate whether he has ever presented them in state court. A state-prisoner habeas petitioner is required to "present the state courts with the same claim he urges upon the federal courts." *Picard v. Connor,* 404 U.S. 270, 276 (1971); *see* 28 U.S.C. § 2254(b)(1)(A). A habeas petitioner has not exhausted state-court review so long as he maintains "the right under the law of the State to raise, [in state court] by any available procedure, the question presented." 28 U.S .C. § 2254(c). This exhaustion requirement compels a habeas petitioner to "invok[e] one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999). Under North Carolina's appellate process, "one complete round" includes direct appeal to the North Carolina Court of Appeals and the opportunity to petition to the North Carolina Supreme Court for discretionary review, or filing a state post-conviction proceeding and petitioning the North Carolina Court of Appeals for a writ of certiorari. *See* N.C. Gen.Stat. §§ 7A–31, 15A–1422. The State may waive the exhaustion requirement, but such a waiver must be express. *See* 28 U.S.C. § 2254(b)(3).

1 Specifically, McDougald asserts: (1) challenges to evidentiary rulings by the trial court, D.E. 10–1 at 2 (petitioner's affidavit), D.E. 14 (document titled "motion to vacate dismiss judgment and/or sentence"); (2) a claim of actual innocence, D.E. 10–1 at 2–5, D.E. 14, D.E. 15 (Spears Aff.); (3) a claim of malicious prosecution, D.E. 10–1 at 4–5; (4) a challenge to the predicate felony convictions used to secure his conviction as a violent habitual felon, D.E. 11 at 2 (document titled "motion to arrest of judgment violent habitual felon"); (5) ineffective assistance of appellate counsel, D.E. 12 (document titled "motion to grant retrial"); (6) ineffective assistance of trial counsel, D.E. 13 (document titled "motion to vacate/dismiss ineffective counsel"); and (6) a challenge to the composition of the jury under *Batson v. Kentucky,* 476 U.S. 79 (1986), D.E. 14 at 7.

***4** "The exhaustion requirement applies as much to the development of facts material to a petitioner's claims as it does to the legal principles underlying those claims." *Winston v. Kelly,* 592 F.3d 535, 549 (4th Cir.2010).

Failure to exhaust does not, however, "prohibit a district court from considering evidence not presented to the state courts. Supplemental evidence that does not fundamentally alter the legal claim already considered by the state courts can properly be considered by a district court." *Id.* (alteration and quotations omitted). "The question of when new evidence 'fundamentally alters' an otherwise exhausted claim 'is necessarily case and fact specific.' " *Id.* (quoting *Morris v.. Dretke,* 413 F.3d 484, 491 (5th Cir.2005)).

The court concludes that any additional claims raised by McDougald should be dismissed without prejudice in order to allow McDougald to pursue them in state court. In doing so, the court expresses no view on their merit. The court also expresses no view on whether McDougald has procedurally defaulted any claim under North Carolina law.

III.

In sum, the court GRANTS respondent's motion for summary judgment [D.E. 6] and motion to supplement the record [D.E. 9], and DISMISSES McDougald's application for a writ of habeas corpus [D.E. 1]. The court also DENIES a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Miller–El v. Cockrell,* 537 U.S. 322, 336–38 (2003); *Rose v. Lee,* 252 F.3d 676, 684 (4th Cir.2001). The Clerk of Court shall close this case.

SO ORDERED.

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190 N.C.App. 675
Unpublished Disposition
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Court of Appeals of North Carolina.

STATE of North Carolina
v.
William O'Neill McDOUGALD.

No. COA07–993.
|
May 20, 2008.

***1** Appeal by defendant from judgments entered 14 November 2001 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 4 March 2008.

Attorneys and Law Firms

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

Opinion

JACKSON, Judge.

William O'Neill McDougald ("defendant") appeals the trial court's denial of his motion to dismiss the charge of second-degree kidnapping. For the following reasons, we hold no error.

On 2 February 2001, at approximately 8:30 p.m., seventeen year old Patrice Ann Howes ("Howes") was babysitting for her cousin when two of her male friends from school, Jason Criswell ("Criswell") and Chris Griffith ("Griffith"), arrived. Howes had a crush on Criswell.

Criswell, Griffith, and Howes watched a birthday video on the porch. Criswell and Griffith eventually left, but returned at approximately 11:30 p.m. with Griffith's brother, Eddie, and defendant, who was over thirty years old. The four males were at Howes' house for only a short time and all but Criswell stayed outside because Howes' dog was barking at their dogs. Howes was introduced to defendant, whom she had seen around the neighborhood, but did not know. Howes informed the males that it was getting late and asked them to leave. They then left.

Next, Howes used the restroom and went to the laundry room to do some laundry. While Howes was doing her laundry, there was a knock on the back door, located in the laundry room. Howes could not determine who was at the back door, so she opened it, and found defendant there. Defendant tried to talk to Howes about Criswell, telling her that Criswell was a "jerk" and "no good." He also told her that she was better off with him, and that she was a beautiful girl who could "get anybody."

When Howes asked defendant to leave, he did not. Howes and defendant each had a hand on the back door, and when Howes attempted to push defendant back, he stepped into the house and continued to try to talk to Howes. At this

point, Howes began cursing at defendant, as she was angered by the fact that he had come into the house. Defendant slapped Howes in the face, closed the back door, closed the laundry room door, picked Howes up, placed her on top of the washer, turned the lights out, and choked her. Howes was afraid that defendant was going to rape her, and "just sat there and cried ."

Defendant continued to slap Howes and choke her because she still was crying. At some point he tried to hug Howes, and turned the light back on, saying, "now you can identify me to the police." He tried to turn the light off again, but Howes fought with him to keep it on. When her dog started to bark, indicating that her cousin was home, defendant opened the laundry room door, then fled through the back door.

Defendant argues that his motion to dismiss the charge of second-degree kidnapping should have been granted, because the State failed to prove that he had the intent to terrorize Howes. We disagree.

***2** When ruling on a defendant's motion to dismiss a charge, the trial court must determine whether there is substantial evidence "(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell,* 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "Substantial evidence" is such evidence as a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists. *State v. McKinnon,* 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Powell, 299 N.C. at 98, 261 S.E.2d at 117 (citing *State v. Thomas,* 296 N.C. 236, 250 S.E.2d 204 (1978); *State v. McKinney,* 288 N.C.113, 215 S.E.2d 578 (1975)). On appeal to this Court, we review the motion to dismiss *de novo. State v. Marsh,* —— N.C.App. ——, ——, 652 S.E.2d 744, 748 (2007) (citing *Hatcher v. Harrah's N.C. Casino Co., LLC,* 169 N.C.App. 151, 155, 610 S.E.2d 210, 212 (2005)).

" 'Intent is a condition of the mind ordinarily susceptible of proof only by circumstantial evidence.' " *State v. Claypoole,* 118 N.C.App. 714, 717, 457 S.E.2d 322, 324 (1995) (quoting *State v. Pigott,* 331 N.C. 199, 211, 415 S.E.2d 555, 562 (1992)). "Intent to terrorize means more than an intent to put another in fear. It means an intent to '[put] that person in some high degree of fear, a state of intense fright or apprehension.' " *Id.* (quoting *State v. Surrett,* 109 N.C.App. 344, 349, 427 S.E.2d 124, 127 (1993)).

In the case *sub judice,* the State presented evidence that Howes was only seventeen years old, while defendant was over thirty years old at the time of the incident. Howes barely knew defendant. Defendant knew that she was home without adult supervision and he came to the back door late at night. He discussed Howes'

involvement with Criswell and attempted to make himself look better by comparison. When Howes tried to push defendant away, he came into the house. When she cursed at him and asked him to leave, he slapped her, closed the doors, turned out the lights, placed her on the washing machine and proceeded to choke her. Howes was afraid that defendant would rape her. Defendant did not leave until Howes' cousin arrived at home. During the assault, Howes was crying hysterically and was unable to stop. After her cousin's arrival, Howes still was "pretty much hysterical;" her cousin "couldn't make sense of what she was saying." Howes "pulled her knees up, and she had her face and hands buried in her lap; and she was just crying, babbling, not making a whole lot of sense."

***3** When police responded to the 911 call, they found Howes "teary-eyed, crying, upset, red[-]face[d], [and] nervous." Howes and her uncle accompanied police officers as they searched the neighborhood for defendant. When he was located and brought to the police car for identification purposes, Howes again became hysterical and squirmed to get away from him and to put distance between the two of them. When her statement was taken, Howes still was "extremely upset, physically shaken to the point where she would just sit there. She couldn't hold still. She was still visually [sic] shaken."

Taken in the light most favorable to the State, there was substantial evidence from which a jury could conclude that defendant kidnapped Howes for the purpose of terrorizing her. Therefore, the trial court properly denied defendant's motion to dismiss the charge of second-degree kidnapping.

No error.

Judges WYNN and BRYANT concur.
Report per Rule 30(e).

All Citations

190 N.C.App. 675, 661 S.E.2d 789 (Table), 2008 WL 2097534

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