

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-224

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Buncombe County
Nos. 03 CRS 61347
03 CRS 61350

RAY LEE POWELL, JR.

Appeal by defendant from judgment entered 13 July 2004 by Judge James L. Baker, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 19 October 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Christine M. Ryan, for the State.

Gary C. Rhodes for defendant-appellant.

JOHN, Judge.

Ray Lee Powell, Jr. ("defendant"), appeals the trial court's 13 July 2004 judgment entered upon his conviction by a jury of the offenses of possession of a firearm by felon and possession of a weapon of mass death and destruction. For the reasons discussed herein, we hold that defendant received a trial free of prejudicial error.

The State's evidence presented at trial tends to show the following: On 3 September 2003, Asheville Police Department Officer Dwight Arrowood ("Arrowood") was dispatched to the Asheville Housing Authority ("the Authority") to investigate a

dispute between defendant and Alfred Logan ("Logan"), two Authority employees. Arrowood was informed the two men had engaged in an altercation the previous day, and that other employees of the Authority were "worried about a showdown that was to occur" the morning of 3 September 2003. Arrowood initially spoke to Logan, who confirmed there had been "a small confrontation the day before" between the pair. Although Logan stated that "everything was okay," he nonetheless expressed "concern[] for his safety . . . because . . . he was in fear that [defendant] had brought a gun with him."

Arrowood located defendant in a nearby office. Defendant informed Arrowood that he too was concerned for his safety because he "had heard [Logan] had killed three people." Arrowood again approached Logan, inquiring whether "he had any weapons." Logan replied he had no weapons "on him," but that he did have a weapon in his automobile.

After confiscating a loaded pistol from Logan's vehicle, Arrowood "checked warrants" on both Logan and defendant. Learning there was an outstanding warrant for defendant's arrest, Arrowood arrested and searched defendant. Discovering a .20 gauge shotgun shell in the pocket of defendant's pants, Arrowood asked defendant "where the gun was at." Defendant initially responded that he "didn't want to get anyone into trouble and would rather not say." However, upon repeated inquiry by Arrowood, defendant indicated that "it was in the vehicle that he rode in that morning, Mr. Ricky Jackson's vehicle[.]"

Arrowood located Ricky Jackson ("Jackson") at a nearby apartment complex. Jackson accompanied Arrowood to his automobile and gave the officer permission to search it. While doing so, Arrowood noticed a black tote bag on the floorboard adjacent to the passenger seat. Protruding from the tote bag was an object wrapped in a white towel. Opening the tote bag and unwrapping the towel, Arrowood discovered a .20 gauge Harrington and Richardson sawed-off shotgun. Jackson informed Arrowood that neither the tote bag nor the weapon were his and that the tote bag belonged to defendant.

Defendant was subsequently arrested and indicted on charges of possession of a weapon of mass death and destruction and possession of a firearm by felon. The trial court denied defendant's pretrial motion to suppress his statement to Arrowood, and the case proceeded to trial the week of 12 July 2004. Following conclusion of the State's evidence as well as at the close of all the evidence, defendant moved for dismissal of each of the charges. Defendant's motions were denied and, on 13 July 2004, the jury found defendant guilty of both offenses. After determining defendant had three prior record points and prior felony record II, the trial court consolidated the cases for judgment and imposed an active sentence of nineteen to twenty-three months imprisonment. Defendant appeals.

The issues on appeal are whether the trial court erred by: (I) denying defendant's motion to suppress; (II) failing to dismiss the indictment charging defendant with possession of a weapon of

mass death and destruction; (III) denying defendant's motions to dismiss both charges; and (IV) failing to arrest judgment upon one of defendant's convictions.

Defendant first argues the trial court erred by denying his motion to suppress his statement revealing the location of the sawed-off shotgun, asserting it was obtained in violation of his constitutional rights. We do not agree.

"*Miranda* warnings protect a defendant from coercive custodial interrogation by informing the defendant of his or her rights." *State v. Al-Bayyinah*, 359 N.C. 741, 749, 616 S.E.2d 500, 507 (2005) (citations omitted). Although law enforcement officials are generally required to issue *Miranda* warnings prior to custodial questioning, the United States Supreme Court recognized a "public safety" exception to *Miranda* in *New York v. Quarles*, 467 U.S. 649, 81 L. Ed. 2d 550 (1984), concluding that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657, 81 L. Ed. 2d at 558.

The defendant in *Quarles* was apprehended in a supermarket shortly after a rape. While frisking the defendant, the arresting law enforcement officer discovered an empty shoulder holster. The officer handcuffed the defendant and asked where the weapon was located. In response, the defendant nodded in the direction of several empty cartons and said, "the gun is over there." *Id.* at 652, 81 L. Ed. 2d at 554. On appeal, the United States Supreme

Court observed

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

Id. at 657, 81 L. Ed. 2d at 557-58. After determining Quarles' statement was made in response to "questions necessary to secure [law enforcement officials'] own safety or the safety of the public and [not] questions designed solely to elicit testimonial evidence from [the] suspect[,]" *id.* at 659, 81 L. Ed. 2d at 559, the Supreme Court held the custodial statement was admissible at trial, even though elicited prior to *Miranda* warnings.

In the case *sub judice*, Arrowood testified that after finding the shotgun shell, he believed "there was another gun that we had not found, that someone had not been truthful, [and] that there may be another firearm in the close proximity." Although agreeing "[t]he subjective motive of the officer does not affect the [application of the public safety] exception[,]" *State v. Brooks*, 337 N.C. 132, 143, 446 S.E.2d 579, 587 (1994) (citations omitted), we nonetheless conclude the instant record supports the trial court's determination that "[j]ust as in the case of *New York vs. Quarles*, it w[as] appropriate for the officer, in light of the Public Safety, to make a determination of the location of th[e] weapon."

For example, the record reflects that, after responding to a call regarding an impending "showdown" between defendant and Logan, Arrowood confiscated a weapon possessed by Logan and learned defendant had also brought a gun with him to work. Arrowood thereafter was informed defendant was subject to an outstanding warrant for his arrest and placed defendant into custody. In a search incident to defendant's arrest, Arrowood discovered a "live" .20 gauge shotgun shell in the pocket of defendant's pants. Under these circumstances, we conclude there was no reason for Arrowood to delay asking defendant about the location of the weapon. As in *Quarles*, so long as the weapon was concealed somewhere nearby, it posed a danger to Arrowood, Logan, and the general public.

In short, we conclude the trial court did not err by admitting into evidence defendant's statement regarding the location of the weapon. Accordingly, defendant's first argument fails.

Defendant next assigns error to the trial court's denial of his motion to dismiss the possession of a weapon of mass death and destruction indictment, insisting it was fatally defective and failed to charge the offense properly. Defendant's argument is unavailing.

Initially, we note defendant interposed no objection to the sufficiency of the indictment prior to or during trial. However, "the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division."

State v. Sturdivant, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citing N.C. Gen. Stat. §§ 15A-1441, -1442(2)(b), -1446(d)(1) and (4)); see also *State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416 (noting that a challenge to the sufficiency of an indictment may be made for the first time on appeal), *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998). Accordingly, we address the merits of defendant's argument.

"The purpose of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare a defense." *State v. Bullock*, 154 N.C. App. 234, 244, 574 S.E.2d 17, 23 (2002), *disc. review denied*, 357 N.C. 64, 579 S.E.2d 396, *cert. denied*, 540 U.S. 928, 157 L. Ed. 2d 231 (2003) (citation omitted). "When an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment." *Id.* (citations omitted).

In the case *sub judice*, defendant was charged with violation of N.C. Gen. Stat. § 14-288.8, prohibiting the possession of weapons of mass death and destruction, including "any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches[.]" N.C.G.S. § 14-288.8(a), (c)(3) (2003). The indictment alleges defendant "did possess a weapon of mass death and destruction, a Harrington and Richardson 20 gauge sawed-off shotgun." According to defendant, this language was insufficient to charge him with a violation of the statute because "merely describing a 'sawed off shotgun' as the prohibited weapon

of mass death or destruction propounds a fatal variance." Defendant's contention misses the mark.

"[T]he test for whether there is a fatal variance in the indictment is whether the act or omission [alleged] is clearly set forth so that a person of common understanding may know what is intended." *State v. Blackwell*, 163 N.C. App. 12, 20, 592 S.E.2d 701, 707, *cert. denied*, 358 N.C. 378, 597 S.E.2d 768 (2004) (citations and quotation marks omitted) (alteration in original). Defendant herein has failed to demonstrate how the description of the weapon in the indictment failed to inform him of the charges against him or prevented him from preparing his defense. Reviewing the language used in the indictment, any person of common understanding would have comprehended that defendant was charged with possession of the weapon found in Jackson's vehicle. *See id.* ("[A]ny person of common understanding would have understood that he was charged with possessing the sawed-off shotgun that he used to shoot the victim on the night alleged" where indictment charged violation of N.C.G.S. § 14-288.8(a) by possession of a "Stevens 12 gauge single-shot shotgun."). We therefore conclude the trial court did not err by failing to dismiss the indictment charging defendant with possession of a weapon of mass death and destruction.

In next assigning error to the trial court's failure to dismiss both charges, defendant asserts the State failed to produce sufficient evidence to demonstrate he possessed the weapon at issue. We conclude to the contrary.

"In ruling on a motion to dismiss based on the insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged and that defendant was the perpetrator." *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993) (citation omitted). "Whether the evidence presented is substantial is a question of law for the court." *State v. Siriguanico*, 151 N.C. App. 107, 109, 564 S.E.2d 301, 304 (2002) (citation omitted). The motion to dismiss must be denied if the evidence, viewed in the light most favorable to the State, would allow a jury to reasonably infer that the defendant is guilty. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002).

"Possession of a firearm may . . . be actual or constructive." *State v. Boyd*, 154 N.C. App. 302, 307, 572 S.E.2d 192, 196 (2002) (citing *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998)). While a defendant is in actual possession of an item when he has "physical or personal custody" of it, the defendant has "constructive possession" of an item where "the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318 (citations omitted). "As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citations omitted). However, "[w]hen . . . the defendant did not have exclusive control

of the location where contraband [wa]s found, 'constructive possession of the contraband materials may not be inferred without other incriminating circumstances.'" *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (quoting *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)).

As detailed above, the sawed-off shotgun allegedly possessed by defendant was found in Jackson's vehicle rather than on the person of defendant. Notwithstanding, we conclude that other "incriminating circumstances" in this case are sufficient to sustain the inference of constructive possession of the weapon by defendant. See *id.*

The record reflects Arrowood searched Jackson's automobile only after learning from defendant that his weapon "was in the vehicle that he rode in that morning, Mr. Ricky Jackson's vehicle[.]" Arrowood discovered the weapon in a black tote bag located on the floorboard beneath the seat defendant had occupied while traveling with Jackson to the Authority. At trial, Arrowood testified that upon his locating the weapon, Jackson stated "it was not his" and that the black tote bag was "the tote bag or lunch pail that [defendant] had brought with him that morning." Jackson testified the black tote bag found in his vehicle was not his, and that he told Arrowood the weapon was "Ray Powell's" and he "didn't know nothing about it." Although it appears defendant had not been in Jackson's automobile for approximately one hour and that the vehicle was located approximately one quarter of a mile from defendant's workplace, we nevertheless conclude that, when viewed

in the light most favorable to the State, the evidence of defendant's constructive possession of the weapon was sufficient to withstand the motions to dismiss. See *State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) ("In "borderline" or close cases, our courts have consistently expressed a preference for submitting issues to the jury") (citations omitted), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992). The trial court therefore did not err by denying defendant's motions to dismiss.

Lastly, defendant maintains the trial court erred by failing to arrest judgment upon one of the convictions returned by the jury, maintaining defendant should not have been sentenced on both charges. We conclude otherwise.

Our Supreme Court has previously stated that the

protections against double jeopardy provide that a person may not be unfairly subjected to multiple trials for the same offense. Nor may a defendant be punished twice for the same statutory offense. A person's right to be free from double jeopardy is violated not only when he is tried and convicted twice for the same offense but also when one is charged and convicted for two offenses, one of which is a lesser included offense of the other.

State v. Murray, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984) (citations omitted), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). "Where . . . a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not." *State v. Etheridge*, 319 N.C. 34,

50, 352 S.E.2d 673, 683 (1987) (citations omitted). "That the offenses were consolidated for judgment [as in the case *sub judice*] does not put to rest double jeopardy issues, because the separate convictions may still give rise to adverse collateral consequences." *Id.* (citing *Ball v. United States*, 470 U.S. 856, 84 L. Ed. 2d 740 (1985); *State v. Summrell*, 282 N.C. 157, 192 S.E.2d 569 (1972)); see also *State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989) (per curiam).

Defendant was charged and convicted of possession of a firearm by felon in violation of N.C. Gen. Stat. § 14-415.1(a) (2003) as well as possession of a weapon of mass death and destruction in violation of N.C.G.S. § 14-288.8(a). Presuming without deciding that possession of a weapon of mass death and destruction is a lesser-included element of possession of a firearm by a felon, we note that the State in its appellate brief maintains defendant may be punished for both crimes because the General Assembly intended both offenses to be separately punished. We believe the State is correct.

In *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), our Supreme Court held that "even if the elements of . . . two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended." *Id.* at 455, 340 S.E.2d at 709. Thus, "[w]here a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a

trial court *in a single trial* may impose cumulative punishments under the statutes." *Murray*, 310 N.C. at 547, 313 S.E.2d at 528 (emphasis in original); accord *Missouri v. Hunter*, 459 U.S. 359, 368-69, 74 L. Ed. 2d 535, 544 (1983); *Gardner*, 315 N.C. at 453, 340 S.E.2d at 708. "The traditional means of determining the intent of the legislature where the concern is only one of multiple punishments for two convictions in the same trial include the examination of the subject, language, and history of the statutes." *Gardner*, 315 N.C. at 461, 340 S.E.2d at 712.

Turning then to the statutes at issue, we find the prohibition against possession of a weapon of mass death and destruction located in N.C.G.S. § 14-288.8, which was included in a series of 1969 enactments seeking to "revise and clarify the law relating to riots and civil disorders." 1969 N.C. Sess. Laws c. 869, s. 1. N.C.G.S. § 14-415.1, on the other hand, was enacted in 1971 in an effort to "prohibit[] the possession of firearms, weapons and narcotics by felons[,] " 1971 N.C. Sess. Laws c. 954, s. 1., and to "protect[] . . . the people from violence." *State v. Tanner*, 39 N.C. App. 668, 670, 251 S.E.2d 705, 706, *disc. review denied*, 297 N.C. 303, 254 S.E.2d 924 (1979). Moreover, the latter statute is situated within Article 54A of Chapter 14, entitled "The Felony Firearms Act," while N.C.G.S. § 14-288.8 is contained in Article 36A of Chapter 14, entitled "Riots and Civil Disorders." Thus, the statutes appear in separate articles of the general statutes and are unrelated in short title, distinctions found notable by the Court in *Gardner*. 315 N.C. at 462, 340 S.E.2d at 713 ("Even the

placement of . . . two crimes in the General Statutes may be some indication that the legislature intended that they be separate and distinct.").

In addition, the statutes prescribe differing levels of punishment, with N.C.G.S. § 14-288.8(d) providing that any person who unlawfully possesses a weapon of mass death and destruction is guilty of a Class F felony, while N.C.G.S. § 14-415.1(a) provides that any felon who unlawfully possesses a weapon of mass death and destruction is guilty of a Class G felony. Finally, N.C.G.S. § 14-415.1(c) specifically states that "[t]he indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section."

In light of the foregoing, we do not believe the General Assembly intended the crime of possession of a firearm by felon to subsume the crime of possession of a weapon of mass death and destruction. The trial court therefore did not err by failing to arrest judgment upon one of defendant's convictions, and defendant's final argument fails.

In sum, we hold defendant received a trial free of prejudicial error.

No error.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).