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NO. COA05-380

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Wake County
No. 04 CRS 44314

DONTRAIL MARKISE GILMORE,
Defendant

Appeal by defendant from a judgment entered 5 August 2004 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 16 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi, II, for the State.

Sue Genrich Berry for defendant.

BRYANT, Judge.

Dontrail Markise Gilmore (defendant), appeals a judgment dated 5 August 2004, entered consistent with a jury verdict finding him guilty of possession of a firearm by a convicted felon.

Factual Summary

On 26 May 2004, Raleigh Police Detective W.N. Vaughn was on duty looking to serve defendant with an arrest warrant. Detective Vaughn had information that defendant was staying at the home of his girlfriend Akea Kearny, and had been using her vehicle.

Detective Vaughn saw defendant exit Ms. Kearny's home and approach the vehicle in question. Five to ten seconds after

defendant approached the vehicle, the vehicle drove off. Detective Vaughn followed the vehicle for approximately one-half mile before it was parked in a Howard Johnson's parking lot.

Detective Vaughn pulled in behind the vehicle and turned on his strobe and blue lights. Defendant exited the vehicle and followed Vaughn's commands to get on the ground. Vaughn detained defendant until other officers arrived. Officer DiSimone and his recruit took defendant into custody, handcuffed him, and searched him.

Detective Vaughn was convinced defendant was the man for whom he had a warrant even though defendant refused to give his name and then gave a false name. Vaughn asked Officer P.J. Kelly to search the vehicle in question. Officer Kelly found a fully loaded nine-millimeter semi-automatic handgun under the driver's seat. Defendant was the operator and only occupant of the vehicle during the time in question.

Defendant was transported to the West Raleigh Substation where he was advised of his *Miranda* rights. Defendant said he did not own the firearm and that it did not belong to Ms. Kearny either. Defendant stated that the vehicle belonged to Ms. Akea Kearny.

At trial, Detective Vaughn testified that he verified the gun was not stolen. He also testified that defendant's girlfriend, Ms. Kearny, never contacted the police to state that the gun was hers, to recover the gun, or for any other reason. Officer Kelly testified that he found the fully loaded handgun under the driver's

seat and that he unloaded the gun and removed the magazine before turning it over to Detective Vaughn.

After all the State's witnesses had testified, counsel for defendant stipulated that defendant had previously been convicted of a felony by stating, "Your Honor, at this time we will stipulate that Mr. Gilmore does have a felony, had one prior to May 26th of 2004." Judge Manning asked if the conviction was in Wake County and defense counsel answered in the affirmative. The State announced it would accept the stipulation. Without objection from defense counsel, the State announced, "I have what I have marked State's exhibit number [four], . . . which is a certified copy of the defendant's conviction of a Class G felony common law robbery." The State continued, "He was convicted in Wake County, North Carolina of common law robbery, trial June 14, 2002. The felony was committed on or about February 18 of 2002." Judge Manning informed the jury that the parties had stipulated to the prior felony conviction and that they were to accept that fact as true for purposes of this case.

Defendant then called his only witness, Ms. Kearny. Ms. Kearny stated the gun belonged to her, and was given to her by her grandfather because she was afraid of "it being like shooting in my neighborhood." Ms. Kearny testified the vehicle in question belonged to her as well. On cross-examination, Ms. Kearny stated the gun was ordinarily kept in her house, however, on 26 May 2004 the gun was in the vehicle because her two-year-old niece was visiting. Ms. Kearny admitted driving the vehicle in question with

the gun under the seat, then changed her testimony and denied that fact, then admitted it again. Ms. Kearny also admitted not contacting the police after defendant's arrest to inform them the gun belonged to her grandfather. Ms. Kearny did not have a permit for the firearm. She then testified that she never discussed the case at hand with defendant even though she visited him eight times in jail. However, she then changed her testimony and admitted discussing the case with defendant.

On appeal, defendant raises four issues¹: (I) whether the trial court committed plain error by allowing the prosecutor to announce the nature of defendant's prior felony conviction and by allowing the introduction of the certification of the conviction after defendant had stipulated to the conviction; (II) whether the trial court committed plain error by instructing the jury that possession of the firearm could be actual or constructive because no evidence of actual possession was presented; (III) whether trial counsel provided ineffective assistance of counsel by failing to object to certain evidence and jury instructions; and (IV) whether the trial court erred by failing to grant defendant's motion to dismiss for insufficiency of evidence. For the following reasons, we find no error.

I

¹We note defendant abandoned his issue involving his motion to suppress the firearm based on *Thornton v. United States*, 541 U.S. 615, 158 L. Ed. 2d 905 (2004).

Defendant first argues it was plain error to allow the State to announce the nature of defendant's prior felony conviction and to admit a certification of the conviction because defendant stipulated to the prior felony conviction. Since defendant failed to object to the admission of such evidence of the prior conviction, this issue must be analyzed under the plain error rule. *State v. Walker*, 316 N.C. 33, 37, 340 S.E.2d 80, 82 (1986).

The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. . . . [T]he appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection.^[2] This is so in part at least because the defendant could have prevented any error by making a timely objection.

Id. at 39, 340 S.E.2d at 83 (internal citations omitted).

Defendant argues the trial court was obligated to follow *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed. 2d 574 (1997). In *Old Chief*, the Supreme Court held the United States District Court abused its discretion under Rule 403 of the Federal Rules of Evidence by rejecting defendant's offer to stipulate to a prior conviction and admitting the full record of a prior judgment. *Id.* at 191, 136 L. Ed. 2d at 595. The Court reasoned that the name or

² To demonstrate prejudicial error, defendants must only show there is a reasonable possibility that a different result would have been reached if the error in question had not been committed. N.C. Gen. Stat. § 15A-1443(a) (2003).

nature of the prior offense, assault causing serious bodily injury, raised the risk of a verdict tainted by improper considerations when the current charge was assault with a deadly weapon because the offenses were substantially similar and the only purpose of the evidence was to establish the prior conviction. *Id.* at 185, 136 L. Ed. 2d at 591.

This Court analyzed *Old Chief* in *State v. Jackson*, 139 N.C. App. 721, 535 S.E.2d 48 (2000), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (2001) (finding the inoperability of a firearm is not an affirmative defense to a charge of possession of a firearm by a convicted felon). The *Jackson* Court acknowledged the United States Supreme Court's emphasis on the prejudice that ensues when a defendant is being tried for possession of a firearm and a prior assault conviction involving a firearm is introduced. However, the *Jackson* Court held that we are not bound by *Old Chief*:

[W]e note that our statute prohibiting possession of a firearm by a convicted felon specifically provides as follows:

When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section.

G.S. § 14-415.1(b). No similar provision may be found in the statute at issue in *Old Chief*. See 18 U.S.C. § 992.

139 N.C. App. at 732, 535 S.E.2d at 55.

Therefore, pursuant to *Jackson*, defendant's reliance on *Old Chief* is misplaced for several reasons. First, the facts of the present case are distinguishable from those in *Old Chief*. There, the United States Supreme Court stated the prior offense, assault causing serious bodily injury, was substantially similar to the offense in question, assault with a deadly weapon. *Old Chief*, 519 U.S. at 185, 136 L. Ed. 2d at 591. In the present case, the prior felony conviction was for common law robbery and the charge in question is possession of a firearm by a convicted felon. Defendant's argument that the charges are substantially similar because they both involve prospective violence is without merit because many charges involve prospective violence. To adopt such reasoning would be imprudent as wholly unrelated charges could be found to be substantially similar. Further, there was no evidence presented that defendant used a firearm during the commission of the prior crime.

Second, North Carolina courts are not bound by the decision in *Old Chief*. *State v. Faison*, 128 N.C. App. 745, 747, 497 S.E.2d 111, 112 (1998); see also, *State v. Lamb*, 84 N.C. App. 569, 580, 353 S.E.2d 857, 863 (1987) (a non-constitutional decision of the United States Supreme Court cannot bind or restrict how courts in this State interpret and apply North Carolina evidence law).

Third, North Carolina General Statute § 14-415.1, prohibiting possession of a firearm by convicted felons, clearly allows records of prior convictions to be used to prove the offense of possession of a firearm by a convicted felon. N.C. Gen. Stat. § 14-415.1(b)

(2003). Therefore, it cannot be said that the trial court committed plain error in allowing the State to introduce evidence regarding defendant's prior felony conviction. This assignment of error is overruled.

II

Defendant next argues the trial court committed plain error by instructing the jury that possession of a firearm could be actual or constructive because no evidence of actual possession was presented. The jury was instructed, in pertinent part, "Possession . . . may be actual or constructive." The trial court's instructions then defined both actual and constructive possession.

Defendant cites *State v. Carter* for the proposition that a trial court's instructions on possible theories of conviction must be supported by the evidence. *State v. Carter*, 122 N.C. App. 332, 339, 470 S.E.2d 74, 79 (1996). Defendant posits that there was no evidence of actual possession in this case and that the instruction violated North Carolina General Statute § 15A-1232, which reads, "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved" N.C. Gen. Stat. § 15-1232 (2003). Defendant claims that instructing the jury on actual possession amounted to the trial judge expressing an opinion of defendant's guilt.

Since defendant failed to object to the jury instructions, this assignment of error must be analyzed under the plain error standard of review. *State v. Holden*, 346 N.C. 404, 434-35, 488 S.E.2d 514, 530-31 (1997). Plain error with respect to jury

instructions requires the error be "so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *Id.* at 435, 488 S.E.2d at 531.

In *State v. Lyons*, the defendant similarly argued his right to be convicted by a unanimous jury was violated by a disjunctive jury instruction. *State v. Lyons*, 330 N.C. 298, 301-02, 412 S.E.2d 308, 311 (1991). In response, the North Carolina Supreme Court held, "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." *Id.* at 303, 412 S.E.2d at 312.

The present case is similar to *Lyons* because here the jury was disjunctively instructed that possession of the firearm could be actual or constructive. Therefore, the trial court did not commit plain error in instructing the jury that possession could be actual or constructive. This assignment of error is overruled.

III

Defendant next argues trial counsel was ineffective for (1) failing to object to the admission of any evidence of the prior conviction other than the stipulation, and/or (2) failing to object to the trial court's jury instruction that possession of the firearm could be actual or constructive. To prevail on his ineffective assistance of counsel claim defendant must show that his counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561-62, 324

S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). Defendant must satisfy the following two-prong test:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Braswell at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

Defendant first contends counsel was ineffective for failing to object to evidence other than the stipulation concerning defendant's prior felony conviction. As stated above, the trial court did not err in allowing the admission of evidence concerning defendant's prior felony conviction. Any argument that defense counsel made a serious error that deprived defendant of a fair trial when (1) the current and prior offenses were not substantially similar and (2) N.C. Gen. Stat. § 14-415.1(b) authorizes the admission of such evidence, is unavailing.

Defendant also contends counsel was ineffective for failing to object to the jury instructions that possession of the firearm could be actual or constructive. As stated above, *Lyons* established that a disjunctive jury instruction allowing the jury to consider alternative acts that will establish an element of the offense does not constitute error. *Lyons*, 330 N.C. at 303, 412

S.E.2d at 312. Therefore, failure to object to such an instruction falls well short of ineffective assistance of counsel. Since both of defendant's contentions of ineffective assistance of counsel are without merit this assignment of error is overruled.

IV

Defendant's final argument is that the trial court committed plain error by denying defendant's motion to dismiss for insufficiency of the evidence. The standard of review for a motion to dismiss in a criminal trial is, "'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. If so, the motion is properly denied.'" *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). In order for the jury to render a guilty verdict on the charge of possession of a firearm by a felon, the jury must find, (1) the defendant had previously been convicted of a felony and (2) that he had a firearm in his possession, custody, or control. N.C. Gen. Stat. § 14-415.1 (2003).

Defendant admits he is a convicted felon for purposes of N.C. Gen. Stat. § 14-415.1. Therefore, the issue is whether defendant had a firearm in his possession, custody, or control. Possession may be actual or constructive. *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 885 (1984). "Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over'" the

item. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)).

In *State v. Wolfe*, this Court held:

"The driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Thus, where contraband material is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. The inference is rebuttable, and if the owner of a vehicle loans it to an accused without telling him what is contained in the vehicle, the accused may offer evidence to that effect and thereby rebut the inference.

. . . [T]he State may overcome a motion for nonsuit by presenting evidence which places the accused within such close juxtaposition to the contraband as to justify the jury in concluding that the contraband was in the accused's possession."

State v. Wolfe, 26 N.C. App. 464, 467, 216 S.E.2d 470, 473 (1975) (quoting *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974)).

In the present case, the fact that defendant borrowed the vehicle from Ms. Kearny was sufficient to give rise to an inference of defendant's knowledge and possession of the firearm found in the vehicle. Ms. Kearny's testimony that defendant was not aware of the firearm's presence within the vehicle was sufficient to rebut that inference. However, the State's evidence that defendant was operating the vehicle and was its sole occupant when the firearm was discovered is sufficient to survive the motion to dismiss because defendant was in such close juxtaposition to the firearm

that a jury could conclude the handgun was in his possession. This assignment of error is overruled.

No error.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).