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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-477

Filed: 15 December 2015

Wake County, Nos. 13 CRS 205847-48

STATE OF NORTH CAROLINA

v.

KELVIN VALENCIA, Defendant.

Appeal by defendant from judgment entered 31 January 2014 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 22 October 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Erin O. Scott, for the State.*

*Anne Bleyman for defendant-appellant.*

DIETZ, Judge.

On 10 March 2013, a Highway Patrol trooper spotted a car traveling 86 miles per hour in a 45 mile per hour zone. When the trooper activated his lights and attempted to stop the car, it sped away. A car chase ensued and the fleeing car ultimately struck another vehicle, spun out, and slid off the road. The trooper pulled his patrol car up and illuminated the driver's side area of the car with his headlights. The trooper witnessed three men flee from the passenger side of the car. He also saw a fourth man sitting in the driver's seat. That fourth man had a darker colored shirt

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than the other three. He escaped out the driver's side door soon after and ran in the direction of the other three men. The trooper testified that he pursued the men and caught the one who escaped from the driver's side door. That man was Defendant Kelvin Valencia. The other three suspects were not caught. Law enforcement also searched the stopped car (which they later learned had been stolen) and discovered a sawed-off shotgun wedged between the center console and the passenger seat.

The jury convicted Valencia of felony eluding arrest, possession of a stolen motor vehicle, possession of a weapon of mass destruction, and possession of a firearm by a felon. On appeal, Valencia contends that there was insufficient evidence that he was the driver of the fleeing car and insufficient evidence that he possessed the sawed-off shotgun.

We reject Valencia's arguments. With respect to the felony eluding arrest charge, the arresting officer testified that he saw Valencia in the driver's seat of the car immediately after it came to a stop, watched him flee using the driver's side door, and later apprehended him as he fled the scene. This is sufficient evidence to send the felony eluding arrest charge to the jury. With respect to possession of the sawed-off shotgun, police found the firearm wedged in between the center console and the passenger seat with the handle facing upwards, readily visible and accessible to Valencia, the driver. Valencia's role as driver of the vehicle, the location of the shotgun in the center console within easy reach of driver, and Valencia's actions in

lingering inside the car longer than the passengers before attempting to flee, all provide sufficient incriminating circumstances for a jury to conclude that Valencia constructively possessed the shotgun. Accordingly, we find no error in the trial court's judgment.

### **Facts and Procedural History**

On 8 March 2013, a woman returned from shopping at a mall in Raleigh to discover that her blue 2003 Honda Accord had been stolen. She immediately reported the theft to police.

Two days later, a Highway Patrol trooper saw a blue 2003 Honda Accord travelling 86 miles per hour in a 45 mile per hour zone and activated his blue lights to initiate a traffic stop. The car sped up and turned onto a nearby road. While the trooper pursued the fleeing car, the car lost control, struck another vehicle, and came to an abrupt halt.

The trooper pulled his patrol car up to the immobilized Honda Accord and pointed his headlights at the driver. Three men then fled on foot from the passenger side of the car. Shortly after, the driver fled from the driver's side door. The trooper observed the driver wearing a darker colored shirt than the three passenger side occupants and also saw that he lagged behind them as he fled. The trooper briefly looked inside the wrecked vehicle after the occupants fled and then proceeded to chase the fleeing suspects. Thereafter, the trooper caught Defendant Kelvin Valencia, who

had on the dark colored shirt and trailed behind the other fleeing suspects. The other men eluded police.

Meanwhile, a Raleigh police officer arrived at the scene and ran the license plate on the wrecked car. He learned that it was the blue Honda Accord stolen two days earlier. The officer examined the stolen car and discovered a sawed-off shotgun wedged in between the center console and the passenger seat, readily accessible to the driver. Law enforcement also matched a fingerprint found inside the stolen car to Valencia's fingerprints.

On 21 May 2013, the State indicted Valencia on charges of felony eluding arrest, possession of a stolen motor vehicle, possession of a weapon of mass destruction (the sawed-off shotgun), and possession of a firearm by a felon. Valencia moved to dismiss the felony eluding arrest and weapon possession charges. The trial court denied the motion. The jury then convicted Valencia on all charges. He timely appealed.

### **Analysis**

Valencia challenges the trial court's denial of his motion to dismiss. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefits of all reasonable inferences which may be drawn from the evidence. *State v. Kemmerlin*, 356 N.C. 446, 470, 573 S.E.2d 870, 888 (2002). The test of sufficiency of the evidence in a criminal case is whether

the trial court finds that there is substantial evidence of each essential element of the offense charged. *State v. Robbins*, 309 N.C. 771, 774, 309 S.E.2d 188, 190 (1983). “Substantial evidence is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

**I. Felony Eluding Arrest Conviction**

Valencia first argues that there was insufficient evidence to support the charge of felony eluding arrest. Section 20-141.5 of the General Statutes provides that “[i]t shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties . . . .” N.C. Gen. Stat. § 20-141.5(a). On its face, the statute applies only to the operator (i.e., driver) of a fleeing vehicle. Here, Valencia argues that the State had insufficient evidence that he was the driver of the car, and therefore the trial court should have dismissed this charge. We disagree.

The Highway Patrol trooper who caught Valencia testified unequivocally that he saw the person sitting in the driver’s seat of the car. The trooper testified that he deliberately positioned his vehicle in front of the driver’s side door of the fleeing vehicle so that his headlights were shining directly on the driver. The trooper saw

the driver escape through the driver's side door and pursued him. When the trooper caught the fleeing suspect, he discovered it was Valencia.

This testimony is sufficient to create a reasonable inference that Valencia was driving the stolen car as it fled from the police. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Valencia points to other, contradictory facts in the record, but resolving those contradictions is a job for the jury. *Id.* at 99, 261 S.E.2d at 118. The trooper's testimony, viewed in the light most favorable to the State, was sufficient to support his conviction and therefore the trial court properly sent the case to the jury.

## **II. Weapon Possession Convictions**

Valencia next argues that there was insufficient evidence to prove Valencia constructively possessed the sawed-off shotgun found inside the stolen car. Again, we disagree.

Both possession of a weapon of mass destruction and possession of a firearm by a felon require, as an essential element, proof of possession. The State may prove this element by showing either actual or constructive possession. A defendant constructively possesses an object when he has "the intent and capability to maintain control and dominion over it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). "The defendant may have the power to control either alone or jointly with others." *Id.* "Unless a defendant has exclusive possession of the place where the

contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession.” *Id.*

Here, Valencia argues that he was “not the only person in the car” and therefore the State needed to show “other incriminating circumstances” that tie Valencia to the shotgun. Valencia contends that “being in a car where a gun is found is not sufficient other incriminating circumstances.”

The flaw in Valencia’s argument is that he was not merely an occupant of the car; as explained above, the jury concluded that he was the driver. This Court has repeatedly acknowledged that the driver of a vehicle is different from a passenger because the driver has greater power to control objects within the vehicle. *See State v. Mitchell*, 224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (2012); *State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 561 (2011). Moreover, the location of the shotgun provides an additional incriminating circumstance. The shotgun was stuffed in between the center console and the passenger seat of the vehicle, with the handle facing up, readily accessible to the driver. The location of the shotgun, so close to the driver’s seat and plainly visible, is further evidence of Valencia’s constructive possession of the weapon. *See State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001). Finally, Valencia stayed inside the vehicle longer than the passengers before fleeing from the police. This suggests Valencia had a greater degree of control over the vehicle and its contents. *Id.* These factors, taken together, provide sufficient

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“other incriminating circumstances” to permit the trial court to send the issue of constructive possession to the jury.

**Conclusion**

We find no error in the trial court’s judgment.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).