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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-890

Filed: 6 June 2017

Mecklenburg County, No. 15 CRS 214459

STATE OF NORTH CAROLINA

v.

DONALD STEVEN DOREST, Defendant.

Appeal by defendant from judgment entered 18 April 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2017.

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

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell and Law Intern Miles Lindley, J.D., on the brief, for defendant-appellant.

ELMORE, Judge.

Donald Steven Dorest (defendant) was convicted of possessing cocaine and attaining habitual felon status. On appeal, defendant argues that the prosecution's use of his pre-arrest and post-arrest silence in its case-in-chief violated his constitutionally protected privilege against self-incrimination. We agree with

defendant that it was improper for the prosecution to use defendant's post-arrest silence as substantive evidence of his guilt. Assuming the same conclusion regarding defendant's pre-arrest silence, defendant has nevertheless failed to show that the admission of the challenged testimony amounts to plain error.

I. Background

On 23 April 2015, Officers Bodenstein and Aquino of the Charlotte-Mecklenburg Police Department responded to a residential alarm call in a high drug crime area. Upon their arrival, the officers observed two individuals in a purple van parked across the street from the residence. Officer Bodenstein initially suspected that they might have something to do with the alarm call but the homeowner advised the officers that the alarm was false. On their way back to their patrol cars, the officers decided to make contact with the two occupants in the van.

As the officers approached, defendant exited the van from the driver's seat and, with his back toward the officers, "began to move items around the front seat area." Officer Bodenstein could not see what defendant had in front of him: "I didn't know if he had a weapon that was under the vehicle or he was trying to conceal something from me as I was approaching." At Officer Bodenstein's request, defendant accompanied him to the back of the van.

Defendant explained that he was looking for a lost key when the officers first approached. Officer Bodenstein asked defendant if he had any weapons in his

possession. Defendant informed the officer that he had a box cutter in his back pocket, which he produced and placed on the hood of the patrol car. Officer Bodenstein then asked defendant if he had “anything illegal” in his possession. Defendant replied that he had a crack pipe in his left pocket, which the officer found during a search of defendant’s person. Officer Aquino located a second crack pipe on the front-seat passenger, Crystal Robinson.

After the two crack pipes were discovered, Officer Bodenstein instructed defendant and Robinson to have a seat on the curb. He asked them if there was any crack cocaine inside the van. Defendant admitted that there was crack underneath the driver’s seat, where he had been sitting. At that point, Officer Bodenstein advised defendant that he was under arrest and proceeded to search the van. He found a small, white crack rock underneath the driver’s seat and a charred spoon containing white residue in the center console.

Defendant was charged with possession of cocaine and attaining habitual felon status. At trial, the prosecutor asked Officer Bodenstein whether defendant had denied that the cocaine was his either before or after his arrest:

Q. And when he told you that he had cocaine in his van and he told [sic] where it was and you found it, did he ever tell you that it wasn’t his?

A. No, he did not.

Q. And when you told him that he was being arrested for possession of cocaine, did he ever tell you that it wasn’t his?

A. No, he did not.

Defendant did not object to the officer's testimony and did not testify at trial.

During deliberations, the jury submitted three notes to the trial court. In the first, the jury asked for the definitions of "possession" and "reasonable doubt." In the second, it informed the court of a nine-three deadlock. And in the third, it sought clarification on the definition of constructive possession. The trial court exercised its discretion and repeated its instructions for reasonable doubt and possession.

Ultimately, the jury found defendant guilty of felonious possession of cocaine. He pleaded guilty to attaining habitual felon status and was sentenced to a term of forty to sixty months of imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues that the trial court erred in allowing Officer Bodenstein to testify that defendant never denied that the cocaine in the van was his own. Defendant asserts that the State improperly used his silence as substantive evidence of his guilt in violation of his rights under the Fifth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. Although defendant raised no objection to the testimony at trial, he contends that its admission amounts to plain error.

“Unpreserved error in criminal cases . . . is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C. R. App. P. 10(a)(4); *State v. Black*, 308 N.C. 736, 739–41, 303 S.E.2d 804, 805–07 (1983)). Plain error arises when the error is “‘so basic, so prejudicial, so lacking in its elements that justice cannot have been done.’” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d. 513 (1982)).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (alterations, citations, and quotation marks omitted).

A criminal defendant has a privilege against self-incrimination under the United States Constitution and the North Carolina Constitution. The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed. 2d 653, 658 (1964), provides in relevant part: “No person . . . shall be compelled

in any criminal case to be a witness against himself” U.S. Const. amend. V. Our state’s constitutional provision, Article I, Section 23, provides in relevant part: “In all criminal prosecutions, every person charged with crime has the right to . . . not be compelled to give self-incriminating evidence” N.C. Const. art. I, § 23.

The privilege includes a right to remain silent under both the Fifth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution. *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (citing *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840 (2001)); *see also Miranda v. Arizona*, 384 U.S. 436, 460, 86 S. Ct. 1602, 1620, 16 L. Ed. 2d 694, 715 (1966) (“[T]he privilege is fulfilled only when the person is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will.’ ” (quoting *Malloy*, 378 U.S. at 8, 84 S. Ct. at 1493, 12 L. Ed. 2d at 659)).

A defendant’s post-arrest silence may not be used as substantive evidence of his or her own guilt. *Ward*, 354 N.C. at 266, 555 S.E.2d at 273 (“A defendant’s decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant’s exercise of his right to silence is unconstitutional.” (citing *Mitchell*, 353 N.C. at 326, 543 S.E.2d at 840)); *see also State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894 (“[A] defendant’s decision to remain silent following her arrest cannot be used as substantive evidence of her guilt of the crime charged.” (citing *Ward*, 354 N.C. at 266, 555 S.E.2d at 273)), *appeal*

dismissed and disc. review denied, 362 N.C. 683, 670 S.E.2d 566–67 (2008). It was improper, under the United States Constitution and the North Carolina Constitution, for the prosecutor to elicit testimony from Officer Bodenstein regarding defendant’s post-arrest silence. The officer’s single affirmation that, upon arrest, defendant never denied the crack cocaine belonged to him, implied to the jury that the crack was in fact defendant’s own and that he was guilty of the crime charged.

Still, defendant and the State primarily disagree over Officer Bodenstein’s testimony regarding defendant’s pre-arrest silence. Our Court has considered whether the State may use a defendant’s pre-arrest silence as substantive evidence of the defendant’s guilt. In *Boston*, two of the State’s witnesses testified that the defendant refused to speak with police about an arson investigation. *Boston*, 191 N.C. App. at 646–47, 663 S.E.2d at 893. After her conviction, the defendant argued that the “introduction of this testimony violated her right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, Section 23 of the North Carolina Constitution.” *Id.* at 647, 663 S.E.2d at 893. Deciding an issue of first impression, this Court held that the defendant’s pre-arrest silence was constitutionally protected:

Contrary to the State’s assertion, it is clear that a defendant’s Fifth Amendment right against self-incrimination, unlike a defendant’s Fifth Amendment right to counsel, does not attach solely upon custodial interrogation. Therefore, we hold that a proper invocation of the privilege against self-incrimination is protected from

prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest.

Id. at 651, 663 S.E.2d at 896 (citations omitted). The Court's analysis, however, focused primarily—if not entirely—on the Fifth Amendment right against self-incrimination under the United States Constitution.

Relying on *Boston*, this Court reached the same result in *State v. Mendoza*, 206 N.C. App. 391, 698 S.E.2d 170 (2010). While investigating a one-car accident, an officer observed two bags of cocaine in the back seat of the defendant's vehicle, along with \$2,950.00 in cash inside a bag which the defendant had tried to remove as the tow truck arrived. *Id.* at 392–93, 698 S.E.2d at 172–73. At trial, the officer testified that when he saw the cocaine and informed the defendant that he was under arrest, the defendant “didn't say anything.”¹ *Id.* at 396, 698 S.E.2d at 174. He also testified that the defendant had no explanation for carrying such a large amount of cash. *Id.* at 397, 698 S.E.2d at 174–75. The defendant argued on appeal that “the admission of this testimony violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution.” *Id.* at 394, 698 S.E.2d at 173. This Court held that the officer's “commentary on defendant's pre-arrest silence falls squarely under *Boston*” and was

¹ Although this portion of his testimony seems to reference the defendant's post-arrest silence, the Court characterized it as pre-arrest silence. *Mendoza*, 206 N.C. App. at 396–97, 698 S.E.2d at 174–75.

not admissible as substantive evidence of the defendant's guilt. *Id.* at 397–98, 698 S.E.2d at 175–76. Apart from its reliance on *Boston*, however, the Court again did not explicitly address whether the testimony offended the defendant's rights under Article I, Section 23 of the North Carolina Constitution.

Defendant and the State both acknowledge that since *Boston* and *Mendoza* were decided, the Supreme Court of the United States announced that where a defendant does not expressly invoke the right to remain silent before his arrest, the prosecution's use of the defendant's pre-arrest silence as substantive evidence of guilt does not violate the Fifth Amendment. *Salinas v. Texas*, 570 U.S. ___, 133 S. Ct. 2174, 2177–78, 186 L. Ed. 2d 376, 382 (2013). Our research has revealed no appellate decision in North Carolina that addresses or even cites to *Salinas*. Defendant maintains, however, that the substantive use of his pre-arrest silence is still prohibited under Article I, Section 23 North Carolina Constitution, as interpreted by *Boston* and *Mendoza*.

Assuming *arguendo* that defendant's analysis is accurate, the admission of the challenged testimony concerning defendant's pre-arrest and post-arrest silence still does not rise to the level of plain error. The State prosecuted defendant on a theory of constructive possession. Constructive possession exists when the defendant, while not having actual possession of the contraband, "has 'the intent and capability to maintain control and dominion over' it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d

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592, 594 (2009) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). “The defendant may have the power to control either alone or jointly with others.” *Id.* (citing *State v. Fuqua*, 234 N.C. 168, 170–71, 66 S.E.2d 667, 668 (1951)). To establish constructive possession, the State is not required to prove that a defendant has “exclusive control” of the area where the contraband is found. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). “Proof of nonexclusive, constructive possession is sufficient.” *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (citing *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). But unless the defendant “ ‘has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.’ ” *Id.* at 552, 556 S.E.2d at 271 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)).

In this case, defendant admitted that he had a crack pipe in his pants pocket, which was confirmed by a search of his person. Defendant also admitted that there was crack cocaine underneath the driver’s seat of the van, which was confirmed by a search of the vehicle. Defendant had been sitting in the driver’s seat and was seen “moving things around” in that area when the officers first approached. The circumstances certainly support an inference that defendant had, either alone or with Robinson, the power and intent to control the disposition or use of the crack cocaine. The notes from the jury reveal only that it sought clarification on the definition of

constructive possession—in particular, whether defendant must have intended to control disposition or use, or alternatively, whether defendant must have intended to use the crack cocaine. The jury returned a guilty verdict after the trial court repeated its initial instructions, which defendant does not challenge. Based on the foregoing, we cannot conclude that Officer Bodenstein’s testimony regarding defendant’s silence had a probable impact on the jury’s finding that defendant was guilty.

III. Conclusion

The State improperly relied on defendant’s post-arrest silence as substantive evidence of defendant’s guilt. But assuming that defendant’s pre-arrest silence was also protected under Article 1, Section 23 of the North Carolina Constitution—notwithstanding *Salinas*—defendant has failed to show that the admission of both statements regarding defendant’s silence amounts to plain error.

NO PLAIN ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).