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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-572

Filed: 21 November 2017

Cumberland County, Nos. 15 CRS 3790, 53324

STATE OF NORTH CAROLINA

v.

ERIC LORENZO WOMBLE, JR.

Appeal by Defendant from judgment entered 14 September 2016 by Judge Gale M. Adams in Superior Court, Cumberland County. Heard in the Court of Appeals 26 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher Spiller, for the State.

Winifred H. Dillon for Defendant-Appellant.

McGEE, Chief Judge.

Eric Lorenzo Womble, Jr. (“Defendant”) appeals from judgment entered upon his convictions for possession of a firearm by a felon, possession of a weapon of mass death and destruction, and attaining habitual felon status. For the reasons discussed below, we dismiss Defendant’s appeal.

I. Background

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Defendant pleaded guilty to felony possession of cocaine and was placed on thirty-six months' supervised probation on 13 August 2012. Defendant's probation officer, Officer Jared Britt ("Officer Britt"), met with Defendant at the Cumberland County courthouse on or about 18 March 2015. Defendant's case file included a signed copy of the regular conditions of his probation, including that Defendant was prohibited from possessing a firearm. Officer Britt told Defendant he would be visiting Defendant's residence to conduct a home inspection. Approximately one hour after the meeting, Officer Britt went to the apartment Defendant shared with a roommate. When Officer Britt entered Defendant's room, he observed what appeared to be the end of a firearm situated between the bed and a dresser. When Officer Britt asked Defendant what the object was, Defendant replied "[O]h, that's a shotgun." Officer Britt walked with Defendant into the living room, where Defendant was handcuffed and taken into custody.

Defendant was indicted for possession of a firearm by a convicted felon, possession of a weapon of mass death and destruction, and attaining habitual felon status on 9 November 2015. A jury found Defendant guilty of the underlying felonies on 14 September 2016, and Defendant subsequently pleaded guilty to attaining habitual felon status. The trial court consolidated the charges for judgment and sentenced Defendant to 120 to 156 months' imprisonment. Defendant appeals.

II. Analysis

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Defendant contends the trial court erred in denying his motion to dismiss the charges for possession of a firearm by a convicted felon and possession of a weapon of mass death and destruction because the State's evidence was insufficient to establish that Defendant had constructive possession of the firearm. In response, the State contends Defendant failed to preserve this argument for appellate review. We agree with the State and therefore dismiss Defendant's appeal.

Preservation of Argument

To preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). N.C.R. App. P. 10(a)(3) further provides that

[i]n a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of [the] State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether

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defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C.R. App. P. 10(a)(3).

A general motion to dismiss for insufficiency of the evidence is sufficient to preserve for appellate review an argument that individual elements of an offense lacked evidentiary support. *See State v. Glisson*, ___ N.C. App. ___, ___, 796 S.E.2d 124, 127 (2017) (“[A] general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court.”). However, where a defendant’s motion to dismiss is based on the sufficiency of the evidence only as to *specific elements* of an offense, rather than a general challenge to the sufficiency of the evidence to support each element of each crime(s) charged, the defendant is bound to those arguments asserted at trial. *See State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 530-32 (2017).

In *Walker*, this Court noted that “[a] general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review.” *Id.* at ___, 798 S.E.2d at 531. However, a “specific reference to one element of the offense remove[s]

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the other elements of the offense from the trial court's consideration, and therefore from this Court's consideration[.]” *Id.* at ___, 798 S.E.2d at 531 (discussing *State v. Chapman*, ___ N.C. App. ___, 781 S.E.2d 320 (2016)). This Court contrasted cases where a defendant presented specific arguments as to some charges but also asserted a general motion to dismiss the charges, thereby preserving insufficient evidence arguments as to all charges and all elements thereof. *Walker*, ___ at ___, 798 S.E.2d at 531 (citing *Glisson*, ___ N.C. App. at ___, 796 S.E.2d at 127; *State v. Pender*, ___ N.C. App. ___, ___, 776 S.E.2d 352, 360 (2015); *State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007)). We concluded that

[b]ecause defense counsel argued before the trial court the sufficiency of the evidence only as to specific elements of the charges and did not refer to a general challenge regarding the sufficiency of the evidence to support each element of each charge, . . . [the d]efendant failed to preserve the issues of the sufficiency of the evidence as to the other elements of the charged offenses on appeal.

Walker, ___ at ___, 798 S.E.2d at 532.

The present case is indistinguishable from *Walker*. Defendant's motion to dismiss the charge of possession of a firearm by a felon addressed specific elements of that offense, and did not include a general challenge to the sufficiency of the evidence as to all elements. Defense counsel stated:

we would contend that the State has not met [its] burden of proving that [Defendant] is, in fact, a convicted felon. That the only evidence that was heard was from the probation officer saying that [Defendant] was on probation.

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Uh, but, we never heard anything from anybody from the Clerk's office providing a certified judgment that they had a copy of. Um, there was no, uh, fingerprint analysis that would show that the person sitting here today is the same person that was ever convicted of any felony. Um, the only thing produced was a document that doesn't show that that person is, in fact, [Defendant].

Um, further, with regard to the second part of that charge, that the defendant possessed a firearm. [Defendant] would contend the State has not met [its] burden with regard to that as all [the evidence] we've had is whatever the object in that box is, uh, produced here today. There is nothing — as we heard, there was never any testing on that to prove that that is, in fact, a viable weapon. That, in order for it to be a firearm, it must be able to expel a projectile by action of an explosive. Um, we don't know that that will expel anything. . . . Without that, it's not a firearm; therefore, [Defendant] cannot be in possession of [a firearm]. . . . There's — without any type of testing, without it being able to be proven as being a firearm, it's not a — I would contend it's not a firearm and the State hasn't met [its] burden of proving that.

Turning to the charge of possession of a weapon of mass death and destruction, defense counsel continued:

[E]ssentially the same thing with that. Without . . . the State proving that it is, in fact, a firearm, we don't have a weapon of mass destruction as we don't know whether that's capable of expelling anything, whether that's a real gun, a toy gun, what that is. Um, it's a piece of metal that's held together by duct tape. Uh, so, [Defendant] would contend the State hasn't met [its] burden.

At the conclusion of all the evidence, defense counsel stated: "I would renew [Defendant's] motions for a directed verdict that the State has not met [its] burden.

Um, and I would rely on — I don't want to be redundant, so I would rely on the same arguments I made earlier today.”

The record thus shows that Defendant's motion to dismiss was based on his contention that the State failed to show the specific elements that (1) Defendant was a convicted felon, and (2) the object found in Defendant's residence was in fact a firearm or a weapon of mass death and destruction.¹ Defendant did not challenge the sufficiency of the evidence generally as to all elements of the offenses charged. Defendant's sole argument on appeal is that the State failed to demonstrate that Defendant had either actual or constructive possession of the shotgun discovered in his bedroom. Because Defendant did not raise this argument before the trial court, he failed to preserve that issue for this Court's review.

III. Conclusion

Because Defendant's sole argument on appeal was not preserved at trial, Defendant presents no issue for our consideration. Accordingly, we dismiss the appeal.

DISMISSED.

Judges STROUD and DILLON concur.

Report per Rule 30(e).

¹ On appeal, Defendant concedes that the object found in his bedroom was a weapon of mass death and destruction as defined in N.C. Gen. Stat. § 14-288.8(c)(3).