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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1050

Filed: 15 May 2018

Carteret County, Nos. 16 CRS 52297-98, 1485

STATE OF NORTH CAROLINA

v.

JOSEPH STEVEN JIMENEZ

Appeal by defendant from judgments entered 11 January 2017 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for the State.

Meghan Adelle Jones for defendant-appellant.

TYSON, Judge.

Joseph Steven Jimenez ("Defendant") appeals from judgments entered upon his convictions for possession of a firearm by a convicted felon, possession with intent to manufacture, sell, or deliver a Schedule II controlled substance, and having attained habitual felon status. We find no plain error.

I. Background

On 26 May 2016, Morehead City Police Sergeant Jeremy Miller received a phone call from Michael Beck. Beck advised Sergeant Miller that Allison Barber was driving his black Ford Ranger truck around the area of 20th Street in Morehead City and Defendant was a passenger inside the vehicle. Beck further informed Sergeant Miller that heroin and methamphetamine could be found inside the truck, his truck's registration was expired, and Barber did not have a driver's license. Beck owned the truck and knew Barber, because they had been in a prior relationship and had produced children together.

Sergeant Miller called Carteret County Sheriff's Detective Scott Moots and relayed the information he had received from Beck. Detective Moots observed a truck matching the description given to him by Sergeant Miller and performed a traffic stop on the basis of an expired registration.

Barber was driving the truck, and Detective Moots asked her to exit the vehicle. As she exited the vehicle, Detective Moots observed "track marks" on her arms, which he believed to be an indication of intravenous drug use. He asked Barber if anything illegal was present inside the truck. Barber responded that there was a piece of Suboxone, as well as a syringe.

Sergeant Miller, as well as Carteret County Sheriff's Sergeant James Pittman, arrived on the scene to assist Detective Moots. Sergeant Miller called Beck and obtained his consent to search Beck's truck. As Sergeant Pittman approached the

truck's bed, he noticed a "Bosch bag" and observed a set of digital scales sticking out of a side pocket of the bag. Sergeant Pittman opened the bag, and found a razor, shaving cream, a Suboxone strip, and a bag full of .22 caliber bullets.

Defendant admitted that the bag belonged to him and that he did not have a prescription for Suboxone. Sergeant Miller then began searching the truck's cab and found a black bag containing ten small bags of heroin in the open center console.

Morehead City Police Sergeant James Gaskill was the fourth officer to arrive upon the scene. Sergeant Gaskill searched the front passenger seat of the truck and found a small briefcase containing drug paraphernalia. After Sergeant Pittman discovered the bullets in the Bosch bag, the officers searched the truck more closely. Sergeant Gaskill found a .22 caliber semiautomatic pistol underneath the passenger seat. Defendant admitted "all the stuff was his." Defendant then spoke with Barber, told her he would "take care of it," and turned around and stated "[a]ll this stuff is mine. Please don't arrest [Barber]."

On 11 July 2016, Defendant was indicted for possession of a firearm by a convicted felon and possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. He was subsequently indicted for having achieved habitual felon status. On 11 January 2017, Defendant was convicted by a jury on all counts. The trial court sentenced Defendant to consecutive terms of 146 to 188 and 128 to 166 months of imprisonment. Defendant gave written notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court from a final judgment entered by the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issue

Defendant's sole argument on appeal is that the trial court committed plain error by instructing the jury on the theory of actual possession when that theory was not supported by the evidence.

IV. Analysis

To preserve an issue for review on appeal, a defendant "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).

However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). Defendant failed to object to the trial court's instruction on actual possession and he did not preserve any alleged error. This Court's review is limited to whether the trial court's instruction to the jury on actual possession constituted plain error. *Id.*

Our Supreme Court has stated:

> 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 affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (citations and quotation marks omitted).

Defendant was convicted of both possession of a firearm by a convicted felon and possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. The essential elements of possession of a firearm by a felon are that "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007); *see also* N.C. Gen. Stat. § 14-415.1 (2017).

"The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and[,] (3) there must be intent to sell or distribute the controlled substance." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175 (2005) (citations omitted).

Possession of contraband may be either actual or constructive. *State v. Sawyers*, __ N.C. App __, __, 808 S.E.2d 148, 153 (2017). "Actual possession requires that a party have physical or personal custody of the item." *State v. Squirewell*, __ N.C. App. __, __, 808 S.E.2d 312, 317 (2017) (citation and internal quotation marks omitted). "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397 (1996) (citation omitted).

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). If Defendant does not possess exclusive control of the area where contraband is found, "the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (citation and internal quotation marks omitted).

Defendant correctly asserts no evidence tended to show he was in actual possession of either the firearm or the narcotics seized from Beck's truck. Also none of the contraband was found upon his person. *See State v. Robinson*, __ N.C. App. __, __, 805 S.E.2d 309, 319 (2017) (finding no evidence of actual possession where firearms were not found on the defendant but in the master bedroom of the home).

The heroin was found inside a bag within the truck's center console next to Defendant and the firearm was found underneath his seat. Beck, the owner of the truck, testified none of the contraband, or the bags it was found inside, belonged to him.

Barber testified the contraband and the bags belonged to Defendant. She testified Defendant would bag the heroin in pieces of paper, put them inside baggies, and take them to customers. She further testified that she would ride with him when he sold heroin. Most importantly, after law enforcement officers discovered the contraband drugs and weapon inside the truck, Defendant admitted to them that "all this stuff is mine." In the absence of an objection, Defendant has failed to show that it is "'probable, not just possible, that absent the instructional error the jury would have returned a different verdict.'" *Id.* (quoting *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016)).

Considering this evidence and presuming error without objection thereto, Defendant has failed to "demonstrate that a fundamental error occurred at trial . . . [to] . . . establish prejudice—that . . . the error had a probable impact on the jury's finding that the defendant was guilty. [B]ecause plain error is to be applied cautiously and only in the exceptional case, the error . . . [must] be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant's arguments are overruled.

V. Conclusion

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no plain error. *It is so ordered.*

NO PLAIN ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).