An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-847

Filed: 19 June 2018

Lincoln County, Nos. 15 CRS 51438, 16 CRS 166

STATE OF NORTH CAROLINA

v.

DANIEL WAYNE BURNETTE

Appeal by defendant from judgment entered 19 January 2017 by Judge Jeffrey P. Hunt in Lincoln County Superior Court. Heard in the Court of Appeals 18 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State.

Charlotte Gail Blake, for defendant-appellant.

CALABRIA, Judge.

Defendant Daniel Wayne Burnette appeals from a judgment entered upon his convictions for possession of a firearm by a felon and attaining habitual felon status. We conclude that defendant received a fair trial free from error.

I. Factual and Procedural Background

On 7 April 2015, Detective Adam Hicks ("Detective Hicks") of the Randolph County Sheriff's Office was browsing for-sale advertisements online in search of property crimes. On a site that advertised guns for sale, Detective Hicks saw two Browning 12-gauge shotguns for sale in a post originating from defendant's Facebook site. Using personal information obtained from defendant's Facebook site, Detective Hicks conducted a criminal records search and learned that defendant was previously convicted of a felony offense. Detective Hicks contacted Detective Frank Runyon ("Detective Runyon") of the Lincoln County Sheriff's Office, who asked Detective Hicks to arrange to buy the guns from defendant. After Detective Hicks sent Facebook messages inquiring about the guns and expressing interest in purchasing them, defendant's profile messaged a phone number to call. Detective Hicks called the phone number and arranged a meeting in a parking lot in Lincoln County.

After Detective Hicks arranged the meeting, Detective Runyon went to the location at the agreed-upon time. When Detective Runyon drove past a blue truck fitting the description of defendant's truck, he observed defendant in the driver's seat and a female in the passenger's seat. Detective Runyon parked behind the truck and activated his blue lights, then got out of his vehicle and ordered the occupants out of the truck. On the back seat in the truck cab were two Browning semi-automatic shotguns. The guns were seized and defendant was placed under arrest.

On 9 May 2016, defendant was indicted for possession of a firearm by a felon. The indictment listed "TWO BROWNING SEMI-AUTOMATIC SHOTGUNS" as the firearms under defendant's possession. On 14 March 2016, defendant was also indicted for attaining habitual felon status.

On 13 January 2017, a jury returned verdicts finding defendant guilty of possession of a firearm by a felon, and subsequently guilty of attaining habitual felon status. On 19 January 2017, the trial court sentenced defendant to 127 to 165 months in the custody of the North Carolina Department of Adult Correction. Defendant gave oral notice of appeal in open court.

II. Jury Instructions

Defendant asserts two errors regarding the trial court's jury instructions.

A. Standard of Review

"[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal."

State v. Williams, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Defendant failed to object to the jury instructions at trial, but contends on appeal that the trial court's conflicting instructions amounted to plain error. *See* N.C.R. App. P. 10(a)(4) ("[A]n issue that was not preserved by objection noted at trial . . . 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"). Plain error arises when the error is "something 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) (citation and quotation marks omitted). "Under the plain error rule, [the] defendant must convince [the] Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Constructive Possession

First, defendant contends that the trial court erred in giving conflicting instructions on constructive possession. We disagree.

The trial court instructed the jury on both actual and constructive possession. As to constructive possession, the trial court instructed:

> A person has constructive possession of an article if the person does not have it on the person but is aware of its presence and either alone or together with other[s], has both the power and intent to control its disposition or use.

> A person's awareness of the presence of an article and the person's power to control its disposition or use may be shown by direct evidence, or it may be inferred from the circumstances. If you find beyond a reasonable doubt that an article was found in close, physical proximity to the defendant, that would be a circumstance which, together with other circumstances, you may infer that the defendant was aware of the presence of the article and had the power and intent to control its disposition or use.
>
> However, the defendant's physical proximity to the article in question does not, by itself, permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use. Such an inference may be drawn only from this and other circumstances which you find from the evidence beyond a reasonable doubt.

Defendant does not contend that this instruction was not supported by the evidence introduced at trial or was otherwise in error. Rather, defendant points to the next portion of the jury charge as having been given erroneously:

> Furthermore, if you find beyond a reasonable doubt that an article was found in a certain vehicle, and that the defendant exercised control over said vehicle, whether or not the defendant owned said vehicle, this would be a circumstance from which you may infer that the defendant was aware of the presence of the article and had the power and intent to control its disposition or use.

Defendant contends that "[t]he trial court improperly instructed the jury on the theories that the shotguns were found in close physical proximity to [defendant] and that they were not found in close physical proximity to him." Since defendant did not object to the alternative theory of constructive possession, defendant failed to

preserve this challenge, and we review it for plain error. We note that defendant does not indicate where the trial court instructed the jury regarding his lack of close physical proximity to the shotguns. Moreover, while defendant contends that "the trial court committed reversible error by allowing the jury to convict [him] on a theory unsupported by the evidence[,]" defendant does not point to any portion of the actual instruction that was not supported by the evidence introduced at trial.

Defendant does not contest the fact that evidence was introduced showing that the guns were found in a vehicle and that defendant exercised control over that vehicle. While it is true, as defendant contends, that "[t]he trial court's instruction allowed the jury to infer that [he] had the power and intent to control the shotguns simply because he owned the truck [where the guns were found] and was driving it[,]" defendant makes no argument that it would be improper to convict him for possession of a firearm by a felon based on that theory. *See State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 ("[P]ower to control the automobile where [contraband] was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury" (quoting *State v. Hudson*, 206 N.C. App. 482, 490, 696 S.E.2d 577, 583 (2010))), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). Defendant has not demonstrated that he is entitled to relief on the basis of this contention.

C. Variance from Indictment

Defendant next contends that the trial court improperly instructed the jury that it could convict him if it found that he possessed one or more of the shotguns when the indictment specifically alleged that he possessed two Browning shotguns. Defendant asserts that the variance violated "the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are . . . not charged in the bill of indictment." *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). We disagree.

An "indictment must allege all of the essential elements of the crime sought to be charged." *State v. Westbrooks,* 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996). However, " '[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage[.]' " *Id.* (quoting *State v. Taylor,* 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)).

In *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986), the indictment charged the defendant with kidnapping by "unlawfully *removing [the victim] from one place to another*[.]" *Id.* at 537, 346 S.E.2d at 420 (emphasis in original). However, the jury instruction allowed a conviction for kidnapping if the jury found the defendant "unlawfully *restrained*" the victim. *Id.* (emphasis in original). Our Supreme Court held that it was reversible error to allow the jury to convict the defendant on a theory that was not charged in the indictment. *Id.* at 540, 346 S.E.2d at 422.

By contrast, our appellate courts have recognized that allegations in the indictment that are not included in the jury instructions are mere surplusage if the instructions allow the jury to convict the defendant on a theory that was included in the indictment. In *State v. Lancaster*, 137 N.C. App. 37, 527 S.E.2d 61, *disc. review denied in part and allowed in part*, 352 N.C. 680, 545 S.E.2d 723 (2000), the indictment charged defendant with kidnapping by "confining, restraining, and removing" the victim, while "[t]he jury instruction allowed a conviction upon a showing of either confining, restraining, or removing" the victim. *Id.* at 47, 527 S.E.2d at 68. In rejecting the defendant's contention that the State was required to prove all three theories asserted in the indictment, this Court stated that, "[s]ince an indictment need only allege one statutory theory, an indictment alleging all three theories is sufficient and puts the defendant on notice that the State intends to show that the defendant committed kidnapping in any one of the three theories." *Id.* at 48, 527 S.E.2d at 69. Similarly, in *State v. Shipp*, 155 N.C. App. 294, 573 S.E.2d 721 (2002), this Court found no error where one of the indictments alleged that the defendant sold heroin "*to P.J. Mulhall and M.D. Marlow*," while the trial court instructed the jury that it could convict if it found that "the defendant knowingly sold heroin *to P.J. Mulhall or M.D. Marlow or both*[.]" *Id.* at 299-301, 573 S.E.2d at 724-25 (emphasis in original).

In the present case, the indictment charged a violation of N.C. Gen. Stat. § 14-415.1(a) (2017), which provides, in pertinent part, that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" The element of the offense at issue here is possession of a firearm. Defendant does not contest that the indictment alleged this element of the offense. Moreover, the averment to a second firearm "was not necessary, making it mere surplusage in the indictment." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997); *see also State v. Garris*, 191 N.C. App. 276, 285, 663 S.E.2d 340, 348 (holding that simultaneous possession of two firearms suffices to support only a single conviction for possession of a firearm by a felon), *disc. review denied*, 362 N.C. 684, 670 S.E.2d 907 (2008). Therefore, the trial court did not err in instructing the jury that it could find defendant guilty if he possessed one or more of the shotguns. Defendant has failed to demonstrate that he is entitled to relief on appeal, and we conclude that defendant received a fair trial free from error.

NO ERROR.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).