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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-495

Filed: 3 July 2018

Davidson County, No. 15 CRS 54724, 16 CRS 165

STATE OF NORTH CAROLINA,

v.

JONATHAN ADRIAN FULLER, Defendant.

Appeal by defendant from judgment entered on or about 13 September 2016 by Judge Ted S. Royster in Superior Court, Davidson County. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.

Guy J. Loranger for defendant-appellant.

STROUD, Judge.

Defendant Jonathan Adrian Fuller (“defendant”) appeals from his conviction of possession of a firearm by a felon. On appeal, defendant contends that the trial court erred when it denied his motion to dismiss the charge of possession of a firearm by a felon because the State failed to present substantial evidence that defendant possessed the gun or substantial independent evidence to establish the

trustworthiness of his statement to the police. Because the State presented substantial evidence of defendant's actual and constructive possession of the gun, and his statement was independently confirmed by the officer's observations and the gun itself, we find no error with the trial court's judgment.

I. Factual Background

The State's evidence showed that on 10 June 2015, three on-duty officers with the Lexington Police Department were riding in an unmarked patrol vehicle. The officers pulled in to a "Sheets" [sic] gas station and backed into a parking space. While parked, they saw a white Hyundai Sonata vehicle pull around to the right side of the gas station. No one got in or out of the vehicle and they did not stop for gas. Then, a male individual walked up to the car and leaned into it on the front passenger side "for a brief period of time." Approximately 30 to 45 seconds later, the car exited the parking lot. The officers could not see any of the occupants in the vehicle -- though it appeared there were three people inside the car -- and decided to follow the car as it exited the parking lot because they found the interaction in the parking lot odd. While following the car, the officers noticed that the vehicle's tag was improperly displayed.

The officers performed a vehicle stop and activated their flashing blue lights. After the car pulled over, all three officers approached. Once at the vehicle, two of the officers recognized defendant as the front seat passenger in the vehicle. On a

previous occasion, one officer had observed defendant be “very loud, very hostile towards the police[.]” But during the stop, defendant was quiet and seemed very nervous -- he was breathing heavily, mumbling, avoiding eye contact, and had shaking hands while trying to provide his identification to the officer. Based on his observations, the officer asked defendant to step out of the vehicle for safety purposes. Defendant got out of the car and let the officer know he had a knife. After defendant was out of the car, the officer saw the barrel of a gun on the front passenger side floorboard. The officer alerted the other officers about the gun, and defendant was immediately placed in handcuffs. The gun was later identified as a Jennings .22 caliber firearm.

The officers arrested defendant and took him to the Lexington Police Department. Defendant waived his *Miranda* rights and then agreed to provide a statement to police. Defendant did not object during trial when the waiver of rights form and defendant’s statement were admitted into evidence by the State. The officer testified that defendant stated:

that a girl had been texting him all day saying that she had something that she wanted to get rid of. So he met with her at the Pickett Food Mart. He was riding with a friend named Ryan.

They picked the girl up, and the girl wanted to trade him the firearm for dope. [Defendant] advised the girl that he did not have any dope but knew somebody that might want the gun.

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Then the -- Ryan, [defendant], and the girl drove to Sheets on South Main Street and met with a person who may be interested in the gun. [Defendant] said he then showed the person the gun.

The person was -- the girl was wanting a hundred dollars for the gun, and [defendant] was going to charge a hundred fifty dollars so that he made some money off of it too.

The male that he met at Sheets said that he did not want the gun because it was a .22 and he wanted a .380.

At that point, they left Sheets and were heading to [defendant's] residence when they were stopped by police.

Defendant's written statement specifically indicated:

and while I was looking at it [the gun] in my hands I saw that it was a .22. The girl wanted \$100 for the gun but I was going to ask Dave for \$150 so that I could make some money. Dave said that he did not want it. I gave the gun back to the girl.

(Emphasis added).

Defendant was offered the option to "work off" his charges by assisting the police in undercover drug purchases. But defendant "did not hold up his end of the deal," so he was eventually charged on 13 August 2015 with the underlying offense of possession of a firearm by a felon.

The matter proceeded to jury trial, and on 13 September 2016, a jury found defendant guilty of possession of a firearm by a felon. Defendant pled guilty to attaining the status of a habitual felon in File No. 16 CRS 165. He was sentenced,

and on 15 September 2016, defendant filed written notice of appeal on a jail “Inmate Request Form.” A hearing was held on 26 October 2016 addressing his notice of appeal. On 27 June 2017, defendant filed a petition for writ of certiorari (“PWC”).

II. Petition for Writ of Certiorari

In his petition, defendant acknowledges his notice of appeal from the trial court’s judgment fails to comply with Rule 4 of the North Carolina Rules of Appellate Procedure. Before we can reach defendant’s arguments, we must first address the deficiencies in his notice of appeal.

Under Rule 4(a), as relevant to this case:

[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal appeal may take appeal by . . . filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order”

N.C. R. App. P. 4(a)(2). The notice of appeal

shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P. 4(b).

Here, defendant filed written notice of appeal *pro se* on a jail “Inmate Request Form.” The request failed to include File No. 16 CRS 165, the habitual felon charge,

and included no reference to the court to which defendant wished to appeal. In addition, the notice was not served on the State, as required by Rule 4(b).

As defendant notes in his petition, failure to comply with Rule 4 is a jurisdictional default. *See, e.g., State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) (“[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal.”). But defendant asks this Court to exercise its discretion under Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure to grant his petition and review the issues raised in his brief.

Under Rule 21(a)(1), “[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. Rules App. P. Rule 21(a)(1). The State acknowledges this Court has discretion to consider the matter by granting defendant’s PWC. Here, as it is evident from defendant’s Inmate Request Form he intended to appeal, we grant defendant’s petition and exercise our discretion under Rule 21 to review the merits of his appeal.

III. Analysis

Defendant argues on appeal that the trial court erred when it denied his motion to dismiss the charge of possession of a firearm by a felon. Defendant contends that the State failed to present substantial evidence that defendant possessed the

gun or substantial independent evidence to establish the trustworthiness of his statement to police.

A. Standard of Review

We review a trial court's ruling on a motion to dismiss *de novo*. *See, e.g. State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) ("When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. This Court reviews the trial court's denial of a motion to dismiss *de novo*." (Citations and quotation marks omitted)).

B. Substantial Evidence of Possession

Defendant contends that the State failed to present substantial evidence that defendant possessed the gun found in the car in which he was a passenger.

Defendant was charged with possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1 (2017), which prohibits "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" This charge requires the State to prove that "(1) defendant was previously convicted of a felony and (2) subsequently possessed a firearm." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347-48 (2012). Here, defendant stipulated to a prior

felony conviction, but argues that the State “failed to present sufficient evidence that [defendant] actually or constructively possessed the gun.”

To meet the required element of possession of a firearm, the State need not prove actual physical possession; proof of nonexclusive constructive possession is sufficient. *See, e.g., Bradshaw, id.* at 93, 718 S.E.2d at 348 (“It is well established that possession may be actual or constructive.”); *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986) (“It is well settled in this jurisdiction that in a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of constructive possession is sufficient and that possession need not always be exclusive.”). “When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. Constructive possession depends on the totality of the circumstances in each case.” *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (citations omitted).

The State presented evidence showing both actual possession of the gun and later constructive possession of the gun. In defendant’s own statement to police, he admitted that he had actual physical possession of the gun, stating “while I was looking at it in my hands” and that he “gave the gun back to the girl[.]”

Defendant argues that the State failed to present substantial independent evidence tending to establish the trustworthiness of his statement to police. Although a defendant's statement may be powerful evidence against him, under the *corpus delicti* rule, the State may not solely rely on a defendant's extrajudicial confession but must also produce substantial independent corroborative evidence that supports the facts underlying the defendant's confession. *See State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013) ("A confession can be powerful evidence against the accused. But we have long held that an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime. When the State relies upon a defendant's extrajudicial confession, we apply the *corpus delicti* rule to guard against the possibility that a defendant will be convicted of a crime that has not been committed." (citations and quotation marks omitted)).

Our Supreme Court explained in *Cox*:

When applying the *corpus delicti* rule, it is fundamental that the corroborative evidence need not in any manner tend to show that the defendant was the guilty party. Instead, the rule requires the State to present evidence tending to show that the crime in question occurred. The rule does not require the State to logically exclude every possibility that defendant did not commit the crime.

Id. at 152, 749 S.E.2d at 275 (citations, quotation marks, and ellipses omitted). And in non-capital cases "we adopted a rule . . . expanding the type of corroboration which may be sufficient to establish the trustworthiness of the confession[.]" *Id.* (citation

and quotation marks omitted). This rule was originally explained in *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985):

We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

Here, two officers testified that while sitting in a parked, unmarked patrol car, they saw a white Hyundai Sonata with three passengers park on the right side of the gas station. The officers saw a man approach the car, lean into the passenger-side window, and briefly speak with someone. After the officers stopped the car and looked inside, one officer saw the barrel of a black handgun -- later identified as a Jennings .22 caliber firearm -- sticking out on the floor of the car at the edge of the front passenger seat where defendant had been seated.

In defendant's written statement to police, he stated that he was hanging out with a male friend named "Bryan"¹ and a woman, and that the woman showed him a gun she wanted to trade. Defendant called someone he knew -- "Dave" -- to see if he wanted the gun and told him to meet at the gas station. Defendant stated that he showed the gun to Dave and that while "looking at it in my hands I saw that it was a

¹ Defendant's statement refers to the friend as Bryan, while officer testimony at trial references "Ryan."

.22.” This statement was corroborated by the officer’s testimony about what they observed in the gas station parking lot and additional evidence, including exhibits that identified the gun recovered during the stop as a Jennings .22 caliber firearm. These additional facts, as in *Cox*,

are not “insignificant facts” or facts “unrelated to the commission of the crime.” Rather, these facts strongly corroborate *essential* facts and circumstances embraced in defendant’s confession. They link defendant temporally and spatially to the firearm. Thus, the circumstances preceding defendant’s confession -- circumstances that were observed by law enforcement officers -- establish the trustworthiness of the confession.

Cox, 367 N.C. at 153, 749 S.E.2d at 276 (citations, quotation marks, and brackets omitted). The independent evidence showed that defendant had the opportunity to possess the gun and substantial independent evidence bolstered the trustworthiness of defendant’s statement.

The State’s evidence also showed defendant had constructive possession of the gun -- the gun was retrieved from the front passenger seat floorboard, and defendant had been sitting in the front passenger seat when the car was stopped. Defendant argues that the State “failed to present sufficient evidence of ‘incriminating circumstances’ from which his constructive possession of the gun could be inferred.”

We disagree. Our Supreme Court explained in *Bradshaw*:

[T]o have the charges submitted to a jury, the State must have introduced evidence of other incriminating circumstances sufficient to support a reasonable inference

that defendant constructively possessed the contraband found in the room. This inquiry is necessarily fact specific; each case will turn on the specific facts presented, and no two cases will be exactly alike.

This Court has considered a broad range of other incriminating circumstances to determine whether an inference of constructive possession was appropriate when a defendant exercised nonexclusive control of contraband. Two of the most common factors are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found.

Bradshaw, 366 N.C. at 94, 728 S.E.2d at 348 (citations, quotation marks, and brackets omitted). Here, the State offered substantial evidence of other incriminating circumstances, including: defendant's close proximity to the firearm; defendant's suspicious, nervous behavior when the car was stopped by police; the suspicious behavior of the person in the car in the gas station parking lot; and the officer's testimony regarding his own personal observations which was consistent with defendant's own statement regarding the events. All of this evidence, when viewed in the light most favorable to the State, supports a reasonable inference that defendant constructively possessed the firearm. We hold that the State presented sufficient evidence that defendant possessed the firearm while a convicted felon.

IV. Conclusion

We find no error with the trial court's judgment.

NO ERROR.

Judges HUNTER and TYSON concur.

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Report per Rule 30(e).