An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-764

Filed: 7 August 2018

Johnston County, No. 15CRS002222

STATE OF NORTH CAROLINA

v.

SHELTON PAUL FERGUSON, Defendant.

Appeal by defendant from judgment entered 17 November 2016 by Judge Michael E. Beale in Johnston County Superior Court. Heard in the Court of Appeals 6 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Richard A. Graham, for the State.

Gilda C. Rodriguez for defendant-appellant.

BERGER, Judge.

On November 17, 2016, Shelton Paul Ferguson ("Defendant") was convicted of possession of a firearm by a felon. Defendant moved to dismiss the charge at trial alleging the State failed to offer sufficient evidence of constructive possession to support the charge. The trial court denied Defendant's motion. Because the State offered sufficient evidence that Defendant had constructively possessed a firearm as

a convicted felon, we find no error.

Factual and Procedural Background

On the evening of September 25, 2015, Deputy D. Edward Jaggers ("Deputy Jaggers") of the Harnett County Sheriff's Department initiated a stop on a vehicle with only one functioning headlight. Defendant was a passenger in the rear of the vehicle that was being driven by Perry Council ("Council"). Dominic Wright ("Wright") was seated in the front of the vehicle with Council.

When Deputy Jaggers first approached the vehicle, he noticed a handgun on the center console of the vehicle between Council and Wright. Wright immediately informed Deputy Jaggers that the handgun was his and that he legally possessed it. Wright also gave Deputy Jaggers consent for the deputy to secure it. Council indicated that he had neither a driver's license nor any other form of identification. Deputy Jaggers then asked Council to exit the vehicle, which Council did. Once Council was out of the vehicle, Deputy Jaggers secured the handgun. Upon further investigation, Deputy Jaggers discovered Council had an outstanding warrant and, therefore, placed him under arrest.

Additional law enforcement officers arrived to assist Deputy Jaggers. Deputy Jaggers noticed strong odors of alcohol and marijuana while he was speaking with Council. Unsure if the odors were coming only from Council or from the other men in the vehicle, the officers asked Wright and Defendant to exit the vehicle so that it

could be searched. During their search of the vehicle, officers found a second handgun under the front passenger seat, on the rear floorboard of the vehicle where Defendant had been sitting. During his testimony at trial, Deputy Jaggers twice stressed the location of the firearm as "more towards the back part of the seat." Though the firearm was not hidden, it was "under the seat enough that you couldn't look—standing outside the car looking in, you wouldn't be able to see it. But just as soon as you look under the seat, you would see it." Officers then investigated the serial number on that handgun and discovered that it had been stolen. It was at that time that all three men were arrested.

On November 2, 2015, Defendant was indicted for possession of a stolen firearm, carrying a concealed weapon, possession of a firearm by a convicted felon, and having attained habitual felon status. Prior to trial, the State dismissed the charge of carrying a concealed weapon. At trial, Defendant moved to dismiss the charges of possession of a stolen firearm and possession of a firearm by a felon. The trial court dismissed the charge of possession of a stolen firearm, but declined to dismiss the charge of possession of a firearm by a felon. On November 17, 2016, Defendant was convicted of possession of a firearm by a felon and pleaded guilty to having attained habitual felon status. Defendant was sentenced to sixty-six to ninety-two months in prison. Defendant timely appealed the denial of his motion to dismiss.

Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

Analysis

Defendant argues the trial court erred in denying his motion to dismiss because the State did not offer sufficient evidence that he had actual or constructive possession of the firearm. We disagree.

In North Carolina, "[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." N.C. Gen. Stat. § 14-415.1 (2017). Our Supreme Court has explained what is necessary to prove possession:

> In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the [contraband]. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the [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, 270-71 (2001) (*purgandum*[1]).

"Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) (*purgandum*), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002). Cases finding sufficient proof of constructive

[1] Our shortening of the latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

possession frequently, but not always, include one of the following: (1) evidence the defendant had a "specific or unique connection to the place where the [items] were found"; (2) evidence the defendant "behaved suspiciously, made incriminating statements . . . ., or failed to cooperate with law enforcement"; (3) indicia of the defendant's control over the place where the contraband was found; or (4) other incriminating evidence in addition to the fact that the items were located near the defendant. *State v. Ferguson*, 204 N.C. App. 451, 460-64, 694 S.E.2d 470, 477-80 (2010) (citations omitted) (discussing several cases in which evidence of different "incriminating circumstances" had or had not established constructive possession).

Here, the evidence tended to show that the firearm was principally in close proximity to Defendant. Deputy Jaggers testified twice that the location of the firearm was more toward the back-seat of the vehicle where Defendant was sitting. He also testified that the firearm was so close to Defendant's position in the back-seat of the vehicle that it was only slightly hidden from view by the front seat. Additionally, Wright, the other occupant within reach of the firearm in question, had a legally owned handgun on the console of the vehicle when Deputy Jaggers approached. Wright readily admitted the handgun on the console was his, and he allowed Deputy Jaggers to secure it. Wright testified that he was unaware of the firearm underneath his seat, and that his girlfriend, the owner of the vehicle, neither owned a firearm nor stored one in the vehicle.

Considering this evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor, there were sufficient incriminating circumstances whereby the jury could find Defendant constructively possessed the firearm. The State introduced evidence that tended to show that the firearm was in close proximity to Defendant. Furthermore, it tended to show that Wright, who shared this proximity and claimed not to know about the firearm beneath his seat, legally possessed and quickly surrendered his own firearm to law enforcement. This was substantial evidence from which the jury could infer Defendant's intent and capability to maintain control and dominion over the firearm. Therefore, the trial court did not err in denying Defendant's motion to dismiss and allowing the jury to weigh the evidence and come to a verdict.

Conclusion

The State introduced substantial evidence of each essential element of the felony of possession of a firearm by a felon. Furthermore, with its evidence of the incriminating circumstances tending to show constructive possession, the State introduced substantial evidence that Defendant, a convicted felon, possessed the firearm. Therefore, the trial court did not err in denying Defendant's motion to dismiss. Defendant received a fair trial free from error.

NO ERROR.

Judge MURPHY concurs.

Judge BRYANT concurs in result only.

Report per Rule 30(e).