An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-139

Filed: 15 January 2019

Catawba County, Nos. 16 CRS 1224, 1464, 1869

STATE OF NORTH CAROLINA

v.

KENNETH WAYNE RYCKELEY, Defendant.

Appeal by Defendant from judgments entered 12 September 2017 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 20 December 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan D. Shaw, for the State.

Paul F. Herzog, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant appeals from judgments entered upon his convictions for carrying a concealed gun, possession of a firearm by a felon, and attaining habitual felon status. On appeal, Defendant contends the trial court erred in denying his motions to dismiss because the State presented insufficient evidence he possessed a firearm. We find no error.

I. Factual and Procedural Background

On 7 March 2016, a Catawba County Grand Jury indicted Defendant for carrying a concealed gun and possession of a firearm by a felon. On 3 April 2017, another Catawba County Grand Jury indicted Defendant for attaining habitual felon status. The court called Defendant's case for trial on 11 September 2017. The State's evidence tended to show the following.

On 15 January 2015, Sergeant Dennis Smith of the Catawba County Sheriff's Office stopped a gold Ford Town & Country minivan for speeding. Defendant drove the minivan and was the sole occupant of the minivan. Sergeant Smith asked Defendant to come to his patrol car. Sergeant Smith also asked Defendant if he had any firearms or drugs in the minivan. Defendant told Sergeant Smith there was a firearm in the minivan. Defendant said to look for the firearm in a compartment in between the passenger's and driver's seats. Sergeant Smith found a .22 caliber Harrington & Richardson revolver where Defendant told him to look.

At the close of the State's evidence, Defendant moved to dismiss the charges of possession of a firearm by a felon and carrying a concealed gun. The trial court denied the motion. Defendant called his wife as a witness. She testified both the minivan and the firearm belonged to her. Defendant rested and renewed his motion to dismiss. The trial court denied his motion. The jury found Defendant guilty of carrying a concealed gun and possession of a firearm by a felon. Defendant

subsequently pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 132 to 171 months imprisonment for the possession of a firearm by a felon conviction and 60 days imprisonment for the carrying a concealed gun conviction. Defendant gave oral notice of appeal.

II. Standard of Review

"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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "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) (citations omitted). In ruling on a motion to dismiss, the trial court must consider the evidence

> in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Mercer, 317 N.C. 87, 96, 343 S.E.2d 885, 891 (1986) (citations omitted). "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) (citation omitted).

III. Analysis

Defendant contends the trial court erred in denying his motions to dismiss. Specifically, Defendant argues the State did not satisfy its burden of presenting substantial evidence he possessed the firearm. We disagree.

The two elements of possession of a firearm by a felon are: (1) Defendant was previously convicted of a felony; and (2) thereafter possessed a firearm. *State v. Mitchell*, 224 N.C. App. 171, 176, 735 S.E.2d 438, 442-43 (2012) (citation omitted). The elements of carrying a concealed weapon are: "(1) [t]he accused must be off his own premises; (2) he must carry a deadly weapon; (3) the weapon must be concealed about his person." *State v. Mather*, 221 N.C. App. 593, 597, 728 S.E.2d 430, 433 (2012).

> Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

Mitchell, 224 N.C. App. at 177, 735 S.E.2d at 443 (citation omitted).

"[T]he courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." *State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011) (quotation marks and citation omitted). "Moreover, power 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." *Mitchell*, 224 N.C. App. at 177, 735 S.E.2d at 443 (alteration and emphasis in original) (quoting *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562).

Sergeant Smith found the gun in the minivan Defendant drove. Defendant had exclusive control over the vehicle at the time of the stop. These facts "give rise to the inference of knowledge and possession sufficient to go to the jury." *Best*, 214 N.C. App. at 47, 713 S.E.2d at 562 (citation omitted). Furthermore, while this fact was not a precondition to the denial of Defendant's motions to dismiss, we further note Defendant had actual knowledge of the gun's presence, as he acknowledged a firearm was in the vehicle and informed Sergeant Smith where he could find it. Defendant's contention on appeal he did not intend to control the gun's disposition is immaterial to the question of whether the trial court erred in denying his motions to dismiss. We conclude the State produced substantial evidence Defendant possessed the firearm. Accordingly, the trial court did not err in denying Defendant's motions.

IV. Conclusion

For the foregoing reasons, we find no error in the judgments.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).