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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-563

Filed: 16 April 2019

Johnston County, Nos. 16 CRS 51969-70

STATE OF NORTH CAROLINA

v.

JONATHAN TRAVIS BEST

Appeal by defendant from judgment entered 11 January 2018 by Judge Imelda J. Pate in Johnston County Superior Court. Heard in the Court of Appeals 8 April 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Allison Angell, for the State.*

*Winifred H. Dillon for defendant-appellant.*

ARROWOOD, Judge.

Jonathan Travis Best (“defendant”) appeals from a judgment entered upon his convictions for felony possession of cocaine and possession of drug paraphernalia. Defendant argues the trial court committed plain error in its instructions to the jury on the law of constructive possession. After careful review, we find no plain error.

I. Background

On the night of 31 March 2016, Officer C.J. Eason of the Selma Police Department was sitting in his marked patrol car when he saw a white Ford hatchback automobile roll through a stop sign. Officer Eason pulled out and began following the car and observed the license plate was only partially illuminated. He decided to stop the car due to the traffic and equipment violations. He turned on his blue lights and siren, but the car did not immediately pull over. Officer Eason testified the car reduced speed, and he saw two people with their hands moving around inside the vehicle. The car continued traveling for two blocks before finally stopping.

Officer Eason exited his patrol car and approached the driver's side of the vehicle. At the same time, another officer exited his own patrol car and also approached the vehicle. Both officers looked inside the car to make sure there were no weapons or other safety issues. Officer Eason testified the driver was looking straight and down, and he could not see his face. The passenger was looking down and to the side, away from Officer Eason. Officer Eason asked the driver for his license and advised him of the reason for the stop. The other officer told Officer Eason that he saw an open container, and they asked the occupants to exit the vehicle. The passenger stepped out freely, and as he did, a digital scale fell off of his lap. The driver did not move. Officer Eason again asked the driver to step out of the car but got no response. Officer Eason then reached in, unbuckled the driver's seatbelt, and

pulled him out of the car. Both the driver and the passenger were secured in handcuffs, and the driver was identified as defendant.

Officer Eason began searching the car and found a glass cylindrical pipe which was burnt on one end and had Brillo. Officer Eason testified he believed the pipe was used to smoke crack cocaine. He also found a green leafy material scattered about the floorboard, which he believed to be marijuana, and small, hard, rock-like pieces under the driver's seat. Officer Eason then found smoked marijuana cigarettes in the car's center console. The other officer assisting in the search found, hidden in the ceiling of the passenger side of the vehicle, a baggie containing a small, rock-like substance similar to the items which had been found under the driver's seat. The small, rock-like items later tested positive for crack cocaine.

Defendant was convicted of felony possession of cocaine and possession of drug paraphernalia. The trial court consolidated the convictions for judgment and sentenced defendant to a term of 6 to 17 months of imprisonment. Defendant gave notice of appeal in open court.

## II. Discussion

Defendant's sole argument on appeal is that the trial court's instructions to the jury on constructive possession constituted plain error. We disagree.

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) (2019). 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). Here, defendant neither requested any specific instruction on constructive possession, nor did he object to the trial court’s instructions as given. Therefore, he did not preserve any such error, and this Court’s review is limited to whether the trial court’s instruction on constructive possession constituted plain error. *See 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).

In the instant case, the trial court instructed the jury as follows:

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The defendant has been charged with possessing cocaine, a controlled substance. For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed cocaine. Cocaine is a controlled substance. A person possesses a controlled substance when the person is aware of its presence and has both the power and intent to control the disposition or use of that substance.

Possession of a substance may be either actual or constructive. A person has actual possession of a substance if the person has it on the person, is aware of its presence, and has both the power and intent to control its disposition or use. A person has constructive possession of a substance if the person does not have it on the person but is aware of its presence and has both the power and intent to control its disposition or use. A person's awareness of the presence of the substance and the person's power and intent 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 a substance was found at a certain place, such as in a vehicle, and that the defendant exercised control over that place whether or not the defendant owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use.

Defendant argues that he was driving the car, but that his possession of the car was not exclusive. Thus, he contends that before the jury could find exclusive possession, other incriminating factors had to be present. Defendant asserts that the trial court failed to instruct the jury that they could not infer awareness and power and intent to control, unless there were other incriminating circumstances linking him to the contraband.

Even assuming *arguendo* that the trial court's omission was error, we conclude that defendant has failed to demonstrate plain error. 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 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). But where defendant does not have 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) (citations omitted). Our Supreme Court has stated:

Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry. In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession, a review of this Court's cases reveals that we have considered the following factors: (1) the defendant's ownership and occupation of the property . . .; (2) the defendant's proximity to the contraband; (3) indicia of the

defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

*State v. Chekanow*, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018) (citations omitted).

Here, the State presented substantial evidence that defendant possessed the cocaine and drug paraphernalia found inside the vehicle. First, Officer Eason testified at length regarding defendant's suspicious behavior prior to discovery of the contraband. After Officer Eason activated his blue lights, defendant, who was driving the vehicle, refused to immediately pull over. Then, while Officer Eason was following defendant's vehicle, he testified that he "could see movement inside the vehicle which made me nervous." After defendant finally stopped the vehicle and Officer Eason approached him, defendant refused to look at him, instead looking straightforward or away from the officer. When Officer Eason asked defendant and the passenger to exit the vehicle, the passenger did so freely, but defendant did not move, and Officer Eason had to use force to remove him from the vehicle. Second, defendant was found in close proximity to the contraband. The glass cylindrical pipe and crack cocaine for which he was charged with possessing was found underneath the driver's seat. Accordingly, based on this evidence, we conclude defendant has failed to demonstrate that the trial court's omission of the instruction undermined the fundamental fairness of the trial.

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NO ERROR.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).