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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-553

Filed: 4 February 2020

Gaston County, No. 17CRS063353

THE STATE OF NORTH CAROLINA,

v.

FREDRICK OTIS WATSON, JR, Defendant.

Appeal by Defendant from judgment entered 24 October 2018 by Judge Forrest D. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 7 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kyu-Eun (Dana) Lee, for the State-Appellee.

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

Defendant Fredrick Otis Watson, Jr., appeals from judgment entered upon a jury verdict of guilty of possession of a firearm by a felon. Defendant argues that the trial court erred by failing to dismiss the charge for insufficient evidence. We discern no error.

I. Procedural History

On 13 November 2017, Defendant was indicted for possession of a firearm by felon, in violation of N.C. Gen. Stat. § 14-415.1, and possession with intent to sell and deliver cocaine, in violation of N.C. Gen. Stat. § 90-95(A)(1). Defendant was tried before a jury upon his plea of not guilty during the 23 October 2018 Criminal Session of Gaston County Superior Court. During pre-trial motions, Defendant stipulated in open court that, at the time of the offense, he had been convicted of a felony that was committed in violation of the laws of North Carolina. Defendant subsequently reduced this stipulation to writing.

On 24 October 2018, the jury returned a verdict finding Defendant not guilty of possession with intent to sell and deliver cocaine, but guilty of the Class G felony of possession of a firearm by a felon. The trial court entered judgment upon the jury's verdict, sentencing Defendant to 13 to 25 months' imprisonment. Defendant gave written notice of appeal on 30 October 2018.

II. Factual Background

The evidence at trial tended to show the following: On the afternoon of 26 October 2017, Chief Probation Officer Crystal Goldberg, Probation Officers King Stratford and Jennifer Nolan, and Officers Richard Penley and James Burgess, went to 523 Holly Street, Dallas, North Carolina to search Defendant, who was on probation. Defendant was not home, but Defendant's sister told the officers that he

was at Jagers Park, also in Dallas, North Carolina. The officers located Defendant at Jagers Park through his electronic monitoring system. When the officers arrived at the park, Defendant was sitting in the back seat on the passenger's side of a silver car. There were no other occupants in the back of the car. There were two other occupants in the front of the car: Ky'Dasia Holmes, the driver and owner of the car, and Tritavius Downing, who was in the front passenger seat. When the officers approached the car, they saw a gun on the floorboard of the back driver's side of the car, about an arm's length away from the Defendant. The gun was loaded. A pack of cigarettes was discovered on the floorboard of the front passenger side of the vehicle. Inside the pack was a baggy with a white, powdery, rock-like substance inside it. Through testing, the substance was determined to be cocaine. Some money was found in the trunk, which Defendant stated was his. At the time of the encounter, none of the occupants of the car claimed ownership of the gun or the cocaine.

On 27 October 2017, the day after the offense, Defendant made a phone call from the jail during which he told the party on the other end of the line several times that she should not argue with Holmes because Holmes was "taking the charge" for him.

On 28 October 2017, Defendant spoke with Holmes on the phone and said to her, "if you just admit to the gun charge they will drop the rest of it and put you on probation."

In another phone call made on 3 November 2017, Defendant told Holmes, “if you just take the gun charge, you will be straight, because the gun’s not stolen.”

Holmes testified on Defendant’s behalf. She testified that the gun found in the car was hers, and that she had put it behind her seat when the police cars showed up. Holmes indicated that she was aware that Defendant was a convicted felon who could not be around guns and testified that Defendant did not know that she had a gun in the car. Holmes stated that she told Burgess that the gun was hers, but that Burgess responded, “No, don’t try that,” then looked at the Defendant and said, “I am going to make sure you rot in jail.”

Holmes initially denied that Defendant told her that if she admitted to the gun charge, the police would drop everything else and put her on probation. However, after a portion of the recorded conversation was played in court, Holmes acknowledged that she had this conversation and testified that she had forgotten about the conversation.

At the close of all evidence, Defendant moved to dismiss the charge for insufficient evidence. The trial court denied the motion.

III. Discussion

Defendant argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon.

To survive a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of (1) each essential element of the charged offense and (2) the defendant's being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). The trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455. We review a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

N.C. Gen. Stat. 14-415.1(a) provides, "It shall be unlawful for any person who has been convicted of a felony to . . . possess, or have in his custody, care, or control any firearm" N.C. Gen. Stat. 14-415.1(a) (2018). To obtain a conviction for possession of a firearm by a felon, the State must present sufficient evidence that: "(1) the defendant has been convicted of or has pled guilty to a felony, and (2) the defendant subsequent to the conviction or guilty plea possessed a firearm." *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 764 (2010).

Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has

both the power and intent to control its disposition or use. 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.

Id. at 459, 691 S.E.2d at 764 (internal citations omitted). Other incriminating circumstances considered by this Court have included: (1) a defendant's proximity to the item in question; (2) indicia of control over the place where the item is found; and (3) "other incriminating circumstances linking [the defendant] to the item." *State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012).

A. Possession of the Firearm

In this case, the State offered evidence showing that Defendant was the only occupant in the back seat of the vehicle and was within arm's reach of the firearm that was on the floorboard of the driver's side in the back seat. Additionally, the day after the offense, Defendant made a phone call during which he told the other party several times that she should not argue with Holmes because Holmes was "taking the charge" for him. The following day, Defendant told Holmes over the phone, "if you just admit to the gun charge they will drop the rest of it and put you on probation." At trial, Holmes initially denied having such a conversation, but later acknowledged that she had this conversation after she was played a portion of the recorded phone call. In a third phone call, Defendant told Holmes, "if you just take the gun charge,

you will be straight, because the gun's not stolen." These statements indicate that Defendant knew about the gun, in that he knew it was not stolen, and was trying to convince Holmes to take the blame for possessing the gun so he wouldn't be charged.

Defendant argues that the evidence was insufficient because it merely shows that Defendant was a passenger in the vehicle in which the gun was found. *See State v. Bailey*, 233 N.C. App. 688, 691, 757 S.E.2d 491, 493 (2014) ("the mere fact that defendant was in the car where the firearm was found does not, by itself, establish constructive possession"). However, unlike in *Bailey*, the evidence in this case shows more than mere presence; it shows that Defendant was the only individual in the back seat where the gun was located, was within arm's length of the gun, and was trying to persuade Holmes to take the charge for him. This was sufficient evidence from which the jury could conclude that Defendant was "aware of [the gun's] presence and [had] both the power and intent to control its disposition or use." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764.

B. Status as a Convicted Felon

Defendant also argues the State failed to present sufficient evidence that Defendant was a convicted felon at the time he possessed the firearm. Defendant specifically argues that his written stipulation "stating only that he had previously been convicted of a felony" was insufficient to show that he "had been convicted of a felony prior to October 26 (or October 17), 2017. The stipulation did not contain the

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date of [D]efendant's felony guilty plea or conviction." Defendant's argument borders on frivolous.

During pre-trial motions on 23 October 2018, the following colloquy took place between the trial court, defense counsel (Mr. Lutz), and the prosecutor (Mr. Meulemans):

MR. LUTZ: . . . The very last thing I had is we wanted to stipulate to his conviction as a felony [sic].

THE COURT: What was the felony?

MR. MEULEMANS: Possession of stolen firearm.

THE COURT: Okay. So you are offering to stipulate that he was a convicted felon *at the time*?

MR. LUTZ: Yes, your Honor.

THE COURT: So that will not be brought before the jury?

MR. LUTZ: Yes, your Honor.

THE COURT: It is an [O]ld [C]hief motion.

MR. LUTZ: Yes, your Honor.

THE COURT: Does the State agree to that?

. . . .

MR. MEULEMANS: Yes, your Honor.

THE COURT: All right. The State is accepting that offer as stipulated. I would like for you to write out what your stipulation is because I will need to instruct the jury on that. Craft that out for me for jury instructions.

(emphasis added).

The written stipulation, dated 24 October 2018 and signed by Defendant and the prosecutor, states: "The Defendant stipulates that he has previously been

convicted of a felony that was committed in violation of the laws of North Carolina.” This written stipulation was read to the jury verbatim at the end of State’s evidence as well as at the jury charge.

Defendant’s stipulation was sufficient evidence that Defendant was a convicted felon *at the time* he was charged with possession of a firearm in this case. *See State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961) (“No proof of stipulated or admitted facts, or of matters necessarily implied thereby, is necessary, the stipulations being substituted for proof and dispensing with evidence”) (citation omitted).

As the State presented sufficient evidence that Defendant possessed a firearm and that Defendant was a convicted felon at the time he was found in possession of a firearm, the trial court did not err by denying Defendant’s motion to dismiss the charge of possession of a firearm by a felon.

IV. Conclusion

Because the State presented sufficient evidence of possession of a firearm by a felon, the trial court did not err by denying Defendant’s motion to dismiss the charge.

NO ERROR.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).