

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-272

Filed: 5 May 2020

Alamance County, No. 17 CRS 50194

STATE OF NORTH CAROLINA

v.

MICHAEL TYRONE GREEN, JR.

Appeal by defendant from judgment entered 29 August 2018 by Judge Andrew T. Heath in Superior Court, Alamance County. Heard in the Court of Appeals 13 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Jane Atmatzidis, for the State.

Dylan J.C. Buffum for defendant-appellant.

STROUD, Judge.

Defendant argues that the trial court committed plain error by giving a jury instruction on constructive possession of a firearm when there was insufficient evidence to support the instruction. Because the State presented evidence supporting both actual and constructive possession of the firearm, we find no error by the trial court.

I. Background

At trial, the State's evidence tended to show that a 9mm handgun was stolen from a pickup truck sometime between 9 January 2017 and 12 January 2017. On 12 January 2017, three individuals riding together in a vehicle on I-85 saw Defendant, who was a passenger in a Honda Civic, point a handgun at their vehicle. They followed the Honda Civic and called 911 to report the incident. The Mebane Police Department received the report, including the license plate number and description of the vehicle and occupants. Officers saw a Honda Civic fitting the description in Mebane and saw a passenger wearing a black sweatshirt and a black hat. Officers followed the vehicle to initiate a traffic stop. The officers lost sight of the vehicle for approximately one minute before stopping the vehicle.

At the time of the stop, only the driver was in the vehicle. Officers searched the vehicle for weapons and found the hat Defendant had been wearing earlier and an ID card with his name on it. A nearby officer observed Defendant reach into his hoodie or pants pocket before turning a corner at a fast pace and then lost sight of him briefly. The officer regained sight of Defendant, and when he approached Defendant, he told the officer he was being chased by a man with a gun. Lieutenant Adam Cole of the Mebane Police Department found a black semi-automatic pistol on the patio of an apartment located a short distance from where Defendant was talking to the other

officers.¹ The officer who observed Defendant reach into his pocket described the patio² where the firearm was found:

And to your right there's four patios; it's kind of a lifted -- they're -- they're not flat with the ground; they're lifted up maybe four (4) feet off the ground and they have a rail -- they all have railings over them as well.

But, you can see -- you can see over the little ledge underneath the railing, kind of the flat concrete patio area there. And that's where I initially seen him walk by going into that common area that I found him in.

Q. And do you recall where that weapon was recovered?

A. Just right over -- over the railing maybe a foot in on the patio on the ground.

Q. So on one of those patios to which you just testified to?

A. Yes, sir.

Q. And so are they somewhat open air; they're not completely locked ---

A. Oh, absolutely.

Q. -----off; correct?

A. Completely open air, yes, sir.

The officers reported there were no other people besides Defendant and the officers in the nearby vicinity.

¹ During the trial, Lt. Cole described the distance as "here to the other side of the courtroom." He was then asked if it was "a fairly short distance," and he responded, "Yes, sir."

² Defendant refers to the location the firearm was found as a balcony.

Defendant had a prior felony conviction and was charged with possession of a firearm by a felon, possession of a stolen firearm, and resisting a public officer. At trial, the State dismissed the charge of resisting an officer at the close of evidence. During the charge conference, the trial court asked both parties' counsel about the actual and constructive possession instructions. Defendant's counsel had some objections to the actual possession instruction based on jurisdictional concerns, but she made no objections to the constructive possession instruction. The jury found Defendant not guilty of possession of a stolen firearm and guilty of possession of a firearm by a felon. The verdict sheet did not state whether the conviction was based upon constructive or actual possession. Defendant was sentenced accordingly. Defendant appealed, but his appeal was not timely as addressed below.

II. Petition for Writ of Certiorari

The Rules of Appellate Procedure provide that in criminal appeals, a party may appeal by either

- (1) giving oral notice of appeal at trial, or
- (2) 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 or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order.

N.C. R. App. P. 4(a). Defendant acknowledges that "counsel for [Defendant] appeared in court the day after judgment was entered to enter oral notice of appeal, which this

Court has at times held to be untimely.” Defendant’s appeal was untimely, but, in our discretion, we grant Defendant’s petition for writ of certiorari to review the merits of his appeal.

III. Standard of Review

Because defendant failed to object to the jury instructions in this case, this assignment of error must be analyzed under the plain error standard of review. Plain error with respect to jury instructions requires the error be “so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected.” Further, “[i]n deciding whether a defect in the jury instruction constitutes ‘plain error,’ the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.”

State v. Wood, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684 (2007) (citations omitted).

“A prerequisite to our engaging in a ‘plain error’ analysis is the determination that the instruction complained of constitutes ‘error’ at all.” *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986). “According to well-established North Carolina law, ‘it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence.’” *State v. Malachi*, 371 N.C. 719, 731, 821 S.E.2d 407, 416 (2018) (quoting *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970)).

IV. Constructive Possession Jury Instruction

Defendant's only argument on appeal is "the trial court committed plain error when it instructed the jury on constructive possession."³

"It 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(a) (2017).

There are two elements to possession of a firearm by a felon: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm."

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.

State v. Mitchell, 224 N.C. App. 171, 176-77, 735 S.E.2d 438, 442-43 (2012) (citation omitted) (quoting *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998)).

"When, as here, the defendant did not have exclusive control of the location where contraband is found, 'constructive possession of the contraband materials may not be inferred without other incriminating circumstances.'" *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (quoting *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)). The State has the burden to show incriminating circumstances. See *State v. Alston*, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386

³ The jury was instructed on actual and constructive theories of possession of the firearm. Defendant does not challenge the actual possession instruction on appeal.

STATE V. GREEN

Opinion of the Court

(2008), *aff'd*, 363 N.C. 367, 677 S.E.2d 455 (2009). “This Court has previously emphasized that 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. Smith*, 192 N.C. App. 690, 695, 666 S.E.2d 191, 194 (2008) (quoting *State v. Glasco*, 160 N.C. App. 150, 156-67, 585 S.E.2d 257, 262 (2003)). “Possession . . . exists only upon a showing of some independent and incriminating circumstance, beyond mere association or presence, linking the person(s) to the item[.]” *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citing *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989)) *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003).

Defendant does not contest he was previously convicted of a felony. The only element at issue is whether he possessed a firearm. Defendant argues “the State’s evidence was nothing ‘more than a mere association or presence linking’ [Defendant] to the gun found in the courtyard.” Defendant argues the following factors support his position:

There was no evidence that the gun found on the balcony was the same gun seen in the Civic on the highway. There was no evidence to indicate that the gun had recently been left on the balcony. Nobody saw [Defendant] carrying or discarding an object. The State offered no fingerprints or DNA to link [Defendant] to the gun in the balcony.

Defendant cites to several unpublished cases of this Court in support of his argument. Citation to unpublished cases is disfavored and we do not find these cases to have

“precedential value to a material issue in the case and that there is no published opinion that would serve as well[.]” N.C. R. App. P. 30(e)(3). We disregard Defendant’s arguments that rely on unpublished opinions of this Court. *See id.*

Defendant compares this case to *State v. Acolatse*, 158 N.C. App. 485, 490, 581 S.E.2d 807 (2003). In *Acolaste*, the defendant parked his car behind a vehicle under police surveillance. *Id.* at 486, 581 S.E.2d at 808. The defendant was driving with a revoked license and was approached by detectives. *Id.* The defendant fled, and, during a foot pursuit, one detective saw him make a throwing motion towards some bushes. *Id.* at 487, 581 S.E.2d at 809. Nothing was found in the bushes, but after a K9 officer’s dog alerted to narcotics, the officers found five bags of cocaine on the roof of a detached garage. *Id.* No one saw the defendant throw the bags onto the roof. *Id.* The State argued “the evidence placing the defendant in close juxtaposition to the cocaine, the money (\$830.00) found on defendant’s person in denominations consistent with the sale of controlled substances and the defendant’s throwing motion are sufficient incriminating circumstances from which one can infer constructive possession.” *Id.* at 489, 581 S.E.2d at 810. This Court disagreed and held “that the State has failed to present any incriminating circumstances from which one can infer constructive possession.” *Id.* at 490, 581 S.E.2d at 811.

Defendant contrasts his case with *State v. Mewborn*, 200 N.C. App. 731, 684 S.E.2d 535 (2009). In *Mewborn*, this Court found sufficient evidence to support a charge of possession of a firearm by a felon where

the evidence tended to show that Defendant ran through an open field in a high traffic area. Defendant appeared to have something heavy in his back pocket and appeared to make throwing motions from that pocket. The grass in the field was wet. When the officers found the weapon, it was dry, clean, and had no leaves or other debris on it.

Id. at 737, 684 S.E.2d at 539.

This case is distinguishable from *Acolaste*. Here, police had received a report about a man matching Defendant's description with a gun.⁴ Shortly after receiving the report, police located the vehicle and identified someone matching Defendant's description in the vehicle. Police initiated a traffic stop and while Defendant was not in the vehicle, they found Defendant's ID there, and they found Defendant nearby. While Defendant did not have exclusive control of the ground-level patio where the firearm was found, the State identified these incriminating circumstances to support an instruction on constructive possession:

Defendant was seen moving at a fast pace, appeared to put his hands in his hoodie or pants pocket, and had just gone past the area where the gun was subsequently recovered. More importantly, here, Defendant had to pass directly through the area where the gun was found to get to the

⁴ Defendant argues, "the fact that a witness testified he saw [Defendant] with a gun on the highway outside Hillsborough, is evidence that he had actual possession at that time, and is not evidence that he had constructive possession at a later time when a gun was found on the balcony." We agree but do find this to be a relevant incriminating circumstance.

area where he was questioned by Officer Roney.

Viewing the evidence in the light most favorable to the State, police received a report about a man who matched Defendant's description waving a gun on the highway and found Defendant's ID in a Honda Civic with the same license plate number as the vehicle identified by an eyewitness. After stopping the vehicle, officers saw Defendant nearby walking towards an apartment complex and observed him reaching into his pocket. The officer approaching Defendant saw him walk by the patio where the gun was found. Based on the specific facts of this case, we conclude that the State established sufficient incriminating circumstances to support an instruction on constructive possession. *See State v. Thorpe*, 326 N.C. 451, 455, 390 S.E.2d 311, 313-14 (1990) ("As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence.' Circumstantial evidence is evidence that is applied indirectly 'by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred.' The principle that circumstantial evidence may support proof of facts through inference or deduction is the same principle underlying constructive possession" (citations omitted)). In the alternative, even if the trial court erred by giving the constructive possession instruction, because of the evidence supporting actual possession of the firearm, Defendant failed to prove that absent the error, the jury probably would have

STATE V. GREEN

Opinion of the Court

reached a different verdict. *See State v. Wood*, 185 N.C. App. at 232, 647 S.E.2d at 684. Defendant's argument is overruled.

V. Conclusion

Defendant received a fair trial free from prejudicial error, and we find no error by the trial court.

NO ERROR.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).