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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-92

Filed: 17 November 2020

Mecklenburg County, No. 18CRS018332

STATE OF NORTH CAROLINA

v.

TYRONE GEORGE HUNTLEY

Appeal by Defendant from judgment entered 22 August 2019 by Judge Athena F. Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Mary S. Crawley, for the State.*

*William D. Spence for Defendant-Appellant.*

COLLINS, Judge.

Defendant Tyrone George Huntley 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 denying his motion to dismiss the charge of possession of a firearm by

a felon because the State failed to offer sufficient evidence that he constructively possessed the firearm. We discern no error.

### **I. Procedural History**

Defendant was arrested and subsequently indicted for possession of a firearm by a felon. Prior to trial, the parties stipulated that Defendant “was previously convicted of a felony in the Mecklenburg County Superior Court of North Carolina which made it illegal for the [D]efendant to possess a firearm on or about February 9th, 2018.” At trial, Officer Sabrina Stinson, Detective Christopher Skelly, Special Operations K-9 Officer Gregory Tucker, and DNA Analyst Captain Catherine Howley – all from the Charlotte Mecklenburg Police Department – testified for the State. At the close of the State’s evidence, Defendant moved to dismiss for insufficient evidence. The trial court denied the motion. Defendant did not present any evidence and renewed his motion to dismiss. The trial court again denied Defendant’s motion.

Defendant was found guilty of possession of a firearm by a felon. The trial court sentenced Defendant to 17 to 30 months’ imprisonment, suspended the sentence, and placed Defendant on supervised probation for 24 months. Following sentencing, Defendant gave oral notice of appeal in open court.

### **II. Factual Background**

The facts at trial tended to show the following: At about 11:27 A.M. on 9 February 2018, Officer Stinson responded to a 911 call for assault with a deadly

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weapon in the area of South Tryon Street and Pressley Road, in Charlotte, North Carolina. Approximately four minutes later, Officer Stinson located the caller at the scene and spoke with her in person. The caller told Officer Stinson that someone had pointed a “little grey gun” at her and gave a description of the assailant. Officer Stinson drove down Pressley Road for approximately one minute where she located Defendant, who matched the caller’s description.

Officer Stinson pulled her car over to the side of the road and attempted to speak with Defendant, but he refused to stop. Defendant walked behind a building and into a wooded area between two parking lots that contained a patch of grass, a small ditch, and a line of trees. When Defendant walked into the wooded area, Officer Stinson saw Defendant “digging into his jacket pocket.” Defendant then exited the wooded area and Officer Stinson followed him and “continued to ask him to stop.” Defendant finally stopped when additional officers arrived and detained him. The officers conducted a protective frisk for weapons, but no weapon was found on Defendant’s person.

Officer Stinson returned to the wooded area. Shortly thereafter, a K-9 unit arrived to search the area. The K-9 is trained to “track human scent when human scent is mixed with crushed vegetation,” to “locate articles that have human scent displayed on them, if somebody was holding them or had them in a pocket,” and to alert to the freshest human scent at the time in a specific area. The K-9 searched the

wooded area, became fixated on an object in the woods, and showed alert behaviors. Within three to five minutes, the K-9 located a firearm “in the vines or on the ground” of the wooded area. The area was “saturated with a lot of trash,” but the firearm was the only object that the K-9 alerted to. The area was “muddy and wet,” but the firearm was not dirty. Officer Stinson testified that the firearm was found “in that area” where she observed Defendant digging in his jacket pocket. Officer Stinson further acknowledged that on that day, there was no other foot traffic or any other people walking around.

Officer Payne secured the firearm, took photographs, and placed it in a box to submit to property control. Captain Howley testified that male DNA was present on the firearm, but the DNA profiles collected “were not suitable for comparison for various reasons.” As a result, the sample was not compared to the DNA profile of Defendant.

### **III. Discussion**

Defendant contends that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon because the State failed to offer sufficient evidence that he constructively possessed the firearm. We disagree.

We review the trial court’s denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “In ruling on a motion to dismiss, the trial court need determine only whether there is

substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quotation marks and citation omitted). Substantial evidence is “that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.” *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citation omitted). The trial court “must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549-50 (quotation marks and citation omitted).

The trial court is “concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight.” *Id.* at 492, 809 S.E.2d at 550 (quotation marks and citation omitted). Thus, the test for sufficiency of the evidence to withstand a motion to dismiss “is the same whether the evidence is direct or circumstantial or both.” *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation omitted). Circumstantial evidence may withstand a motion to dismiss even when the evidence does not rule out every hypothesis of innocence. *Id.* If the evidence presented by the State is circumstantial, the trial court must consider whether “a reasonable inference of defendant’s guilt may be drawn from the circumstances.” *Id.* Once the court decides that a reasonable inference may be drawn from the circumstances, then “it is for the jury to decide whether the facts satisfy the

jury beyond a reasonable doubt that the defendant is actually guilty.” *Checkanow*, 370 N.C. at 492, 809 S.E.2d at 550 (quotation marks, brackets, and citations omitted). The trial court must grant the motion to dismiss when the evidence is sufficient only to “raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator[.]” *Id.* (quotation marks and citation omitted).

Under N.C. Gen. Stat § 14-415.1(a) (2019), it is unlawful for any person who has been convicted of a felony to purchase, own, or possess a firearm. To convict a defendant of possession of a firearm by a felon, the State must present sufficient evidence that (1) the defendant was previously convicted of a felony and (2) thereafter possessed a firearm. *State v. Chevallier*, 264 N.C. App. 204, 214, 824 S.E.2d 440, 449 (2019) (citation omitted).

Possession can be actual or constructive. *State v. Boyd*, 154 N.C. App. 302, 307, 572 S.E.2d 192, 196 (2002). Actual possession requires that an individual has physical or personal custody of the item. *Chevallier*, 264 N.C. App. at 215, 824 S.E.2d at 449. Constructive possession of an item exists when an individual does not have actual possession of the item, but rather “has the power and intent to control its disposition.” *State v. Young*, 190 N.C. App. 458, 460, 660 S.E.2d 574, 576 (2008) (quotation marks and citation omitted). Constructive possession depends on the

totality of the circumstances in each case. *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010).

Where the defendant does not have exclusive control over the area in which the firearm is found, the State must show other incriminating circumstances before constructive possession may be inferred. *State v. Mewborn*, 200 N.C. App. 731, 736, 684 S.E.2d 535, 539 (2009). Incriminating circumstances relevant to establish constructive possession include evidence that the defendant “was the only person who could have placed the contraband in the position where it was found” or was “near contraband in plain view. . . .” *State v. Alston*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386 (2008) (citation omitted). A defendant’s nervousness or suspicious activity in the presence of law enforcement is another incriminating circumstance. *State v. Hudson*, 206 N.C. App. 482, 490, 696 S.E.2d 577, 583 (2010). No single factor controls, and ordinarily the question will be for the jury. *Alston*, 193 N.C. App. at 716, 668 S.E.2d at 387.

In *Mewborn*, sufficient incriminating circumstances existed to infer defendant possessed a firearm where the defendant fled from police, and the police later found a gun, absent any moisture, leaves, or debris, on a wet path the defendant had taken. 200 N.C. App. at 733, 684 S.E.2d at 536-37. In *State v. Sinclair*, 191 N.C. App. 485, 663 S.E.2d 866 (2008), sufficient incriminating circumstances existed to infer defendant possessed contraband where “[d]efendant fled upon learning that [the

officer] wanted to search him; [d]efendant kept his hands in front of him during the chase; the bag was found on the precise route [d]efendant took while being chased by the officers; the bag was found on top of the grass that was bent during the chase; and the bag was ‘clean and undisturbed.’” *Id.* at 492-93, 663 S.E.2d at 872.

Here, the State provided the following incriminating circumstantial evidence of Defendant’s possession of the firearm: When Defendant walked away from Officer Stinson, he cut around to the back of a building, through a parking lot, and into a wooded area. Officer Stinson then “could see [Defendant] digging into his jacket pocket” before exiting out the left side. Defendant walked out of the woods and continued walking until he was apprehended by additional officers.

Officers secured the wooded area until a K-9 unit arrived within approximately six minutes. The K-9 is trained to alert to fresh human scent and, within a few minutes, the K-9 alerted to a firearm that was located in the area where Officer Stinson observed Defendant digging in his pocket. Although the area was filled with trash, the firearm was the only object the K-9 alerted on. The firearm was lying “in the vines or on the ground” of the wooded area. Although the wooded area was “muddy and wet,” the firearm did not appear to be dirty. During this time, there was no other foot traffic or people walking around.

These circumstances support a reasonable inference that the firearm found in the wooded area shortly after Defendant was apprehended came from Defendant.



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Viewing the evidence in the light most favorable to the State, the trial court properly denied Defendant's motion and submitted the issue to the jury. *See Mewborn*, 200 N.C. App. at 733, 684 S.E.2d at 536-37; *Sinclair*, 191 N.C. App. at 492-93, 663 S.E.2d at 872.

**IV. Conclusion**

The State offered sufficient evidence that Defendant constructively possessed a firearm. The trial court did not err by denying Defendant's motion to dismiss.

NO ERROR.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).