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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-125

No. COA20-449

Filed 6 April 2021

Mecklenburg County, No. 17 CRS 228157

STATE OF NORTH CAROLINA

v.

REGINALD MALKER, Defendant.

Appeal by Defendant from judgment entered 1 November 2019 by Judge Louis A. Trosch in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.

John J. Korzen for Defendant.

JACKSON, Judge.

¶ 1

Reginald Malaker (“Defendant”) argues that the trial court erred in allowing the charge of possession of a firearm by a felon to go before the jury when the State failed to present sufficient evidence that Defendant possessed a firearm. In the alternative, Defendant argues that the jury instructions given on flight and actual possession were not supported by the evidence and were prejudicial. We disagree and hold that

Defendant has failed to demonstrate any error in the proceedings below.

I. Facts and Procedural History

¶ 2

On 26 July 2017, the Charlotte Mecklenburg Police Department (“CMPD”) organized to execute outstanding arrest warrants for Cameron McVay (“Mr. McVay”), who was subject to electronic monitoring. Two CMPD officers, Officers Caleb Skipper (“Skipper”) and Brian Wiggins (“Wiggins”), were called to assist with the arrest. Both officers met up with other CMPD officers to familiarize themselves with Mr. McVay’s appearance and develop a plan. After the briefing, CMPD officers arrived at 1816 Maribel Avenue, where Mr. McVay’s location was currently pinging, in “multiple marked vehicles, so it was clear that the police were coming down the road.” Officers Skipper and Wiggins, who were riding in the same patrol car, traveled in line between several other patrol cars.

¶ 3

Before reaching the front of the home officers believed Mr. McVay occupied, Officers Skipper and Wiggins heard another officer over the radio indicate that individuals were running toward the back of the home. Officer Skipper immediately exited the patrol car and ran toward the back of the home to “get a visual on the backyards.” When Officer Skipper reached the back of the home, he saw two individuals grab their waistbands and pull firearms while Defendant fled through a wooded area. Officer Skipper yelled to the individuals who had pulled the firearms and indicated to other officers over the radio that several guns had been thrown.

Officer Skipper then ran through the wooded area after Defendant, who he believed matched the description given for Mr. McVay. Officer Wiggins followed. Both officers called to Defendant to stop, but Defendant refused the officers' demands and continued through the woods.

¶ 4 Both officers indicated that Defendant was fixated on keeping his right hand on his waistband during the chase. The chase continued until Officer Skipper was able to corner Defendant at a fence. Officer Skipper yelled for Defendant to put his hands up and Defendant, with his back turned, raised only his left hand—motioning toward his waistband with the other hand. Officer Wiggins arrived shortly after to assist with detaining Defendant. As Officer Wiggins attempted to restrain Defendant, Defendant resisted and continued to show interest in the right side of his waistband, refusing to show his right hand. Because Officer Wiggins was struggling to detain Defendant, Officer Skipper assisted and both officers were able to bring Defendant to the ground and detain him.

¶ 5 After handcuffing Defendant and turning him off his stomach to perform a search of his person, the officers located a firearm and cellphone under Defendant's right side, near the waistband. Officer Wiggins used a glove to collect the firearm, which was resting on top of "poison ivy, and sticks, and mud." Officer Wiggins testified that the firearm was in "good shape" and free of dirt, water spots, scratches, and blemishes. After Defendant was detained and CMPD officers had cleared the

home, CMPD officers also recovered the two additional firearms that Officer Skipper witnessed being tossed prior to chasing Defendant.

¶ 6

After the arrest, Defendant was charged with resisting a public officer and possession of a firearm by a felon. On 25 June 2018, a grand jury indicted Defendant for possession of a firearm by a felon. On 5 April 2019, Defendant filed motions to suppress the evidence obtained by CMPD. The motions were later denied when they were heard on 8 July 2019 in Mecklenburg County Superior Court before the Honorable Jeffrey K. Carpenter.

¶ 7

The case was later tried on 29 October 2019 in Mecklenburg County Superior Court before the Honorable Louis A. Trosch. At the beginning of the trial, the State dismissed the resisting a public officer charge and proceeded with the possession of a firearm by a felon charge. As to the felon element of the charge, the parties stipulated to Defendant's prior felony conviction. As to the possession element, Defendant disputed that he possessed the firearm that was located by Officers Skipper and Wiggins. At the close of the State's evidence, Defendant moved to dismiss the felon in possession of a firearm charge for insufficiency of the evidence. The court denied Defendant's motion. After Defendant rested, he renewed his motion; the court denied that motion as well.

¶ 8

In the charge conference, Defendant objected to an instruction on flight, arguing that Defendant was not a suspect, had not committed a crime, and had the

right to flee an encounter with police. The trial court overruled the objection. Defendant also objected to an instruction allowing the jury to consider whether Defendant had actual possession of the firearm, on the ground that there was insufficient evidence of actual possession. The trial court also overruled this objection.

¶ 9 On 1 November 2019, the jury returned a guilty verdict, and the trial court entered a judgment sentencing Defendant to a term of 12 to 24 months, suspending the sentence, and placing Defendant on supervised probation for 24 months. Defendant gave notice of appeal in open court.

II. Analysis

A. Standard of Review

¶ 10 A defendant's motion to dismiss should be denied if "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is defined as "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).

In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State. Moreover, circumstantial evidence may withstand a motion to dismiss and support a

conviction even when the evidence does not rule out every hypothesis of innocence.

State v. Kemmerlin, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (internal marks and citations omitted). Indeed, “[t]he trial court[,] in considering such motions[,] is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight.” *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *Id.* We review a trial court’s denial of a motion to dismiss *de novo*. *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010).

1. Possession of a Firearm by a Felon

¶ 11 Pursuant to N.C. Gen. Stat. § 14-415.1, “[i]t 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) (2019). “Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007).

¶ 12 Here, Defendant does not deny that he had previously been convicted of a felony. Instead, Defendant challenges the possession element—arguing that the trial court erred in denying Defendant’s motion to dismiss, because the State failed to

present sufficient evidence that Defendant possessed the firearm recovered by CMPD officers.

Because Defendant concedes that he committed a prior felony, satisfying the first element of the offense, we only address the possession element as it relates to the sufficiency of evidence claims presented to the court.

¶ 13 “It is well established that possession may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item.” *State v. Malachi*, 371 N.C. 719, 730, 821 S.E.2d 407, 416 (2018) (internal marks and citations omitted). However,

[i]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the [contraband].

Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the [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, 270-71 (2001) (internal marks and citations omitted).

¶ 14 Taken in the light most favorable to the State and drawing all reasonable inferences in favor of the State, the evidence showed that Officers Skipper and Wiggins were called to assist with the execution of outstanding warrants for Mr. McVay. Prior to assisting with the arrest, CMPD officers were briefed on Mr. McVay's appearance and were under the impression that he could be armed. Upon arriving on the scene, Officers Skipper and Wiggins were notified that individuals were running behind the home that officers believed Mr. McVay currently occupied. Officer Skipper ran to the back of the home where he witnessed two individuals throw firearms and Defendant take off through the woods. Officer Skipper, who mistook Defendant as Mr. McVay, gave chase to Defendant, with Officer Wiggins following closely behind. Both officers yelled for Defendant to stop and show his hands. Defendant refused to follow the officers' commands, running with his right hand at his waistband.

¶ 15 Officers Skipper and Wiggins were eventually able to corner Defendant at a fence. The officers continued to command Defendant, who had his back toward them, to raise both hands. Defendant, however, continued to only raise his left hand while motioning toward his waistband with the right hand. As Officer Wiggins attempted to restrain Defendant, Defendant resisted and continued to show interest in the right side of his waistband. Because Officer Wiggins was struggling to detain Defendant, Officer Skipper assisted and both officers were able to bring Defendant to the ground

and detain him.

¶ 16 After handcuffing Defendant and turning him off his stomach to perform a search of his person, the officers located a firearm and cellphone directly under Defendant's right side, near the waistband. The firearm was located on top of poison ivy and was free of scratches or blemishes.

¶ 17 Considering this evidence in the light most favorable to the State, reasonable jurors could have found as a fact that Defendant actually or constructively possessed the firearm recovered by CMPD. Perhaps the strongest evidence introduced against Defendant was that he refused to remove his right hand from his waistline—prompting officers to force him to the ground—and officers found the firearm directly beneath Defendant on the right side near his waistline, where he had previously refused to move his hand. Moreover, the firearm was free of dirt or debris and was unscratched and lying on top of poison ivy, sticks, and mud, even after the officers tussled with Defendant—creating a reasonable inference that the firearm was not previously on the ground before the officers forcibly put Defendant on the ground. Accordingly, we conclude that there was sufficient evidence to raise a jury question regarding Defendant's possession of the firearm.

B. Jury Instructions

1. Actual Possession Instruction

¶ 18 Defendant also argues that the trial court erred in charging the jury on actual

possession over his objection that insufficient evidence was presented to support the instruction.

The trial court must fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence. However, it is error for the trial court to charge on matters which materially affect the issues when they are not supported by the evidence. In determining whether the trial evidence adduced was sufficient to instruct on a particular theory of criminal liability, we review the evidence and any reasonable inference from that evidence in the light most favorable to the State.

State v. Chevallier, 264 N.C. App. 204, 214, 824 S.E.2d 440, 449 (2019) (internal marks and citations omitted).

¶ 19 The State, relying on our Supreme Court’s decision in *State v. McNeil*, 359 N.C. 800, 617 S.E.2d 271 (2005), argues that there was enough circumstantial evidence to give rise to actual possession in this case. We agree.

¶ 20 In *McNeil*, our Supreme Court explained:

actual and constructive possession often so shade into one another that it is difficult to say where one ends and the other begins. This ambiguity is likely attributable to the fact that both actual and constructive possession will support a finding of “possession” within the meaning of our statutes, making it unnecessary to distinguish between the two in many instances. Nonetheless, it is important analytically to appreciate that actual possession may be proven by circumstantial evidence[.]

McNeil, 359 N.C. at 813, 617 S.E.2d at 279 (2005) (internal marks and citations

omitted).

¶ 21 Here, in reviewing the evidence in the light most favorable to the State, we conclude that it was sufficient to support an instruction on the theory of actual possession. Body camera footage shows that the firearm was located directly beneath Defendant near his waistband, on the right side. Prior to being forcibly placed on the ground, Defendant's right hand continued to remain near his waistband. Officers Skipper and Wiggins, who had previously chased Defendant, testified that Defendant was fixated on his right side and that he refused to raise his right hand when prompted to do so. Additionally, while other firearms were seen being tossed in the backyard, the firearm located beneath Defendant was not one of the two firearms later recovered. Thus, despite the firearm not being found on Defendant's person, its pristine condition and placement directly beneath Defendant near his waistband supports the trial court's instruction on the theory of actual possession of the firearm.

2. Flight Instruction

¶ 22 Lastly, Defendant argues that the flight instruction provided to the jury was not supported by the evidence and was prejudicial. More specifically, Defendant argues that the flight instruction was erroneous because Defendant did not flee after the commission of a crime. We disagree.

¶ 23 The trial court instructed the jury, in pertinent part, that:

Evidence of flight may be considered by you together with

all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt.

¶ 24 “[O]ur courts have long held that a trial court may not instruct a jury on [a] defendant’s flight unless there is some evidence in the record reasonably supporting the theory that [the] defendant fled *after* commission of the crime charged.” *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (internal marks and citations omitted) (emphasis added). In making this determination, “the relevant inquiry concerns whether there is evidence that [the] defendant left the scene . . . *and* took steps to avoid apprehension.” *Id.* at 165, 388 S.E.2d at 434 (emphasis added).

¶ 25 Here, the testimony from Officers Skipper and Wiggins and body camera footage from the arrest show that Defendant ran through the woods while uniformed police officers requested that Defendant stop and put his hands up. Defendant continued to run, consistently holding his right hand near his waistband. Officers Skipper and Wiggins testified that from their experience and training, Defendant’s actions were consistent with someone who was armed. Once Defendant was cornered at the fence, he again refused to raise his right arm when officers asked him to put his hands up. In reviewing the evidence adduced in the light most favorable to the State, we conclude the trial court properly instructed the jury as to Defendant’s flight.

¶ 26 Accordingly, we reject Defendant’s contention that he was prejudiced by the instruction. The trial court instruction correctly informed the jury that proof of flight

alone was not sufficient to establish guilt, but, instead, must be considered altogether with all the facts and circumstances. Moreover, the trial court in no way suggested that there was evidence to support the State's contention of flight. "Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention that the defendant fled. Consequently, it was not error for the prosecutor to argue flight to the jury." *State v. Lloyd*, 354 N.C. 76, 120-121, 552 S.E.2d 596, 627 (2001) (internal marks and citations omitted)

III. Conclusion

¶ 27 For the reasons stated above, we hold that there was substantial evidence that Defendant possessed the firearm in question. Thus, the trial court properly denied Defendant's motion to dismiss the charge of felon in possession of a firearm. We further hold that the trial court correctly instructed the jury on actual possession and flight. Accordingly, Defendant has failed to demonstrate any error occurred during his trial.

NO ERROR.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).