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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-414

No. COA20-408

Filed 3 August 2021

Rutherford County, Nos. 18 CRS 51942; 19 CRS 253

STATE OF NORTH CAROLINA,

v.

LEE ANTHONY BRISBON, Defendant.

Appeal by Defendant from judgments entered 18 July 2019 by Judge James W. Morgan in Rutherford County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kelly A. Moore, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On July 18, 2019, a Rutherford County jury convicted Lee Anthony Brisbon ("Defendant") of possession of a firearm by a felon. Defendant then pled guilty to attaining habitual felon status. On appeal, Defendant alleges there was insufficient evidence to support his conviction for possession of a firearm by a felon; the trial court committed plain error by failing to instruct the jury that incriminating circumstances

were required to find constructive possession and failing to explain the limited relevance of Defendant's prior convictions; and his trial counsel provided ineffective assistance of counsel. After careful review, we affirm the decision of the trial court.

I. Background

¶ 2 Prior to the conviction from which Defendant appeals, he was convicted of five felonies. First, on May 30, 1989, Defendant was convicted of felony larceny by a New Hanover County Superior Court jury. Three years later, Defendant was convicted of felony larceny in New Hanover County on March 21, 1991. Next, on January 20, 1995, Defendant was convicted of felony possession of a Schedule II controlled substance by a New Hanover County Superior Court jury. Defendant was then convicted in Rutherford County of possession of a firearm by a felon on August 17, 2011. Lastly, on November 18, 2016, a Rutherford County Superior Court jury convicted Defendant of possession of a firearm by a felon. On that same day, Defendant was placed on thirty-months supervised felony probation. The standard terms of supervised felony probation are that Defendant shall not possess a firearm and that Defendant shall submit to warrantless searches of Defendant's residence.

¶ 3 While on probation, Defendant lived with his wife, Melissa Suber ("Ms. Suber"), and her son, Ezekiel. Defendant provided the address for the residence he shared with Ms. Suber and Ezekiel to the Division of Adult Correction, and he was known to live there by Lieutenant Christopher Weeks ("Lieutenant Weeks"). The

residence had two bedrooms. Defendant told Probation Officer Robbie Wellman ("PO Wellman") and Lieutenant Weeks that he slept in the first bedroom on the left in the residence, and Ezekiel slept in the second bedroom.

¶ 4 On June 26, 2018, Defendant was alone inside the residence when law enforcement officers and a probation officer (collectively, the "Officers") arrived to search the residence pursuant to Defendant's felony probation terms and conditions.

¶ 5 The Officers recovered three firearms and ammunition from Defendant's residence. The firearms were not in a safe or in a secured or locked location. The first firearm was found inside Defendant's bedroom closet. The second firearm was recovered from underneath a dresser in Defendant's bedroom. The third firearm was found in the attic of the residence. The ammunition for the firearms was in plain view on top of a dresser in Defendant's bedroom.

¶ 6 On March 3, 2019, Defendant was indicted for the offenses of possession of a firearm by a felon and attaining habitual felon status. Defendant's trial occurred in Rutherford County Superior Court on July 17, 2019.

¶ 7 At trial, Lieutenant Weeks testified that Defendant asked if he could take a shower and change his clothes prior to his arrest. When Lieutenant Weeks permitted Defendant to do so, he observed that Defendant changed his clothing in the same bedroom where the two firearms and ammunition were recovered.

¶ 8 At the close of the State's evidence, Defendant made a motion to dismiss the

charge of possession of a firearm by a felon. The trial court denied Defendant's motion. Defendant then presented evidence that the firearms and the ammunition belonged to Ms. Suber and that she received them two to three days prior to the search of their home.

¶ 9 Ms. Suber testified she received the firearm from her father's estate and was temporarily storing them for her sisters. She testified she hid them throughout the house in unsecured and unlocked places. Ms. Suber knew Defendant was a convicted felon, he was on probation, and he was not allowed to have any firearms in his home. Ms. Suber did not provide proof that she was the owner of the firearms recovered.

¶ 10 The dresser in Defendant's bedroom contained male and female items, cologne, and perfume. Pink clothing was found where the firearms were recovered in the bedroom, but one officer testified that he could not assume whether pink clothing items were male or female.

¶ 11 On July 18, 2019, the jury found Defendant guilty of possession of a firearm by a felon. That same day, Defendant pled guilty to attaining the status of a habitual felon. The trial court entered a consolidated judgment and imposed an active sentence of seventy-two months minimum to ninety-nine months maximum imprisonment. On an unspecified date, Defendant filed his *pro se* written notice of appeal.

¶ 12 On September 4, 2020, Defendant filed a petition for writ of certiorari ("PWC")

with this Court because his appeal failed to "designate . . . the [C]ourt to which appeal is taken," and he did not provide certification of service of his notice of appeal on the State. N.C. R. App. P. 4(b). Because Defendant failed to comply with Rule 4 of our rules of appellate procedure, Defendant asks this Court to exercise its discretion and issue a writ of certiorari to permit appellate review. In our discretion, we allow the petition to consider the merits of Defendant's appeal.

II. Discussion

¶ 13 Defendant raises several arguments on appeal. Each will be addressed in turn.

A. Sufficient Evidence for Possession of a Firearm by a Felon

¶ 14 Defendant first contends the trial court erred in denying his motion to dismiss the possession of a firearm by a felon charge because there was insufficient evidence Defendant possessed the firearms. Defendant failed to renew his motion to dismiss at the close of all evidence as required by N.C. R. App. P. 10(a)(3). Accordingly, Defendant's argument is not preserved for appellate review. Defendant requests we invoke Rule 2 to reach the merits of his sufficiency argument. N.C. R. App. P. 2. In our discretion, we invoke Rule 2 to consider the merits of Defendant's argument.

¶ 15 This Court reviews a trial court's ruling regarding a motion to dismiss for insufficient evidence *de novo*. *State v. Mewborn*, 200 N.C. App. 731, 736, 684 S.E.2d 535, 538 (2009).

¶ 16 Possession of a firearm may be actual or constructive. *State v. Harvey*, 281

N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "[A] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Jones*, 369 N.C. 631, 634, 800 S.E.2d 54, 57 (2017) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). Constructive possession of an item is determined by the totality of the circumstances. *See State v. Butler*, 356 N.C. 141, 146-47, 567 S.E.2d 137, 140-41 (2002). A person may have power to control an item either alone or jointly with others. *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). The State must show "other incriminating circumstances" to find constructive possession if the defendant is not in exclusive possession of the location where the contraband is found. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594; *cited in State v. Chekanow*, 370 N.C. 488, 493, 809 S.E.2d 546, 550 (2018).

¶ 17 A defendant's motion to dismiss for insufficiency of the evidence in a criminal case raises the question of whether substantial evidence of each essential element of the offense charged has been presented. *State v. Earnhardt*, 307 N.C. 62, 62, 296 S.E.2d 649, 649 (1982); *cited in State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988). The evidence must be viewed in the light most favorable to the State, giving the State every reasonable inference, which may be drawn therefrom. *Herring*, 322 N.C. at 738, 370 S.E.2d at 367 (citation omitted). If there is substantial direct evidence, circumstantial evidence, or both to support a finding that the offense

charged has been committed and that the defendant committed it, then a motion to dismiss should be denied. *Earnhardt*, 307 N.C. at 62, 296 S.E.2d at 649; *cited in Herring*, 322 N.C. at 738, 370 S.E.2d at 367.

¶ 18 In determining whether there was substantial circumstantial evidence of constructive possession, we consider several factors. *See Chekanow*, 270 N.C. at 496, 809 S.E.2d at 552. "No single factor controls, but ordinarily the questions will be for the jury." *See Mewborn*, 200 N.C. App. at 737-38, 684 S.E.2d at 539; *see also State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262 (2003) (citing *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002) (emphasis omitted)). The first factor to consider is the "[d]efendant's ownership and occupation of the property." *Chekanow*, 270 N.C. at 496, 809 S.E.2d at 552 (citing *Miller*, 363 N.C. at 99-100, 678 S.E.2d at 594-95). Here, Defendant lived at his residence with Ms. Suber and Ezekiel. Defendant provided the address of his residence to the Division of Adult Correction, and Defendant was known to live at that address by Lieutenant Weeks. Further, Defendant told PO Wellman and Lieutenant Weeks that he slept in the first bedroom on the left where two of the firearms and ammunition were recovered.

¶ 19 Secondly, we look to "[D]efendant's proximity to the contraband." *Id.* Defendant was in his residence alone when the firearms and ammunition were recovered by the Officers in his bedroom. The third factor in our consideration is

"indicia of [] [D]efendant's control over the place where the contraband is found." *Id.* Two firearms and ammunition were found in Defendant's bedroom, under his dresser and in his closet. Although Defendant shared the bedroom with Ms. Suber, he was in the residence alone at the time the firearms were recovered. The fourth factor is "[D]efendant's suspicious behavior at or near the time of the contraband's discovery." *Id.* Here, Defendant answered the door, walked outside, and did not invite the Officers into his residence. Although failing to invite Officers into his residence may not rise to the level of "suspicious," no single factor controls in a constructive possession analysis. *See Mewborn*, 200 N.C. App. at 737, 684 S.E.2d at 539; *see also Glasco*, 160 N.C. App. at 157, 585 S.E.2d at 262. We also consider any "other evidence found in [] [D]efendant's possession that links [] [D]efendant to the contraband." *Chekanow*, 270 N.C. at 496, 809 S.E.2d at 552 (citing *Miller*, 363 N.C. at 99-100, 678 S.E.2d at 594-95). In the present appeal, we can infer Defendant had knowledge of the ammunition because the ammunition was found in plain view, on top of Defendant's dresser, and Defendant was in the residence alone. Viewing the evidence in the light most favorable to the State, the totality of the circumstances reveal there was sufficient evidence that Defendant had constructive possession of the firearms recovered from his residence. Accordingly, we find no error.

B. Plain Error

¶ 20 Next, Defendant contends the trial court plainly erred by failing to instruct the

jury that incriminating circumstances were required to find constructive possession and by failing to explain the limited relevance of Defendant's prior convictions. Defendant further contends the trial court plainly erred by admitting evidence of Defendant's prior convictions. We disagree.

1. Failure to Properly Instruct the Jury

¶ 21 Defendant argues the trial court plainly erred by failing to instruct the jury that incriminating circumstances were required to find constructive possession and by failing to explain the limited relevance of Defendant's prior convictions of possession of a firearm by a felon.

¶ 22 This Court reviews instructional defects for plain error when trial counsel did not object to the jury instructions. *See State v. Moseley*, 338 N.C. 1, 55, 449 S.E.2d 412, 445 (1994). To properly preserve an issue for appellate review, Rule 10(a)(1) requires a party to present "a timely request, objection or motion stating the specific grounds for the ruling" to the trial court and "obtain a ruling upon the party's request, objection or motion." N.C. R. App. P. 10(a)(1). Rule 10(a)(4) further provides that

> [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). The defendant has the responsibility to make appropriate

objections at trial. Failure to obtain a ruling from the trial court results in an issue not being preserved for appellate review. *State v. Wiggins*, 185 N.C. App. 376, 385, 648 S.E.2d 865, 872 (2007).

¶ 23 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice . . . after examination of the entire record, the error, 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). The error must be "so fundamental as to amount to a miscarriage of justice." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)). To establish plain error, the defendant has the burden of showing that, absent the fundamental error in the jury instructions or in the admission of evidence, the jury would have reached a different result. *Id.*; *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779-80 (1997). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 333 (internal quotation marks and citations omitted). During the charge conference, the trial court asked trial counsel twice: "any requests regarding the substantive

instructions from the defense?"

¶ 24 The exchange between the trial court and defense counsel regarding the instruction for constructive possession was as follows:

> [Defense Counsel]: "Your Honor, I'm kind of going out on a limb here. I would like in a maybe a – I can't – I honestly can't think of the number right off the bat or right off the top of my head in regards to the issue of constructive possession that can be re-rebutted by substantive evidence. I-I recall having one of that type in my past, but it may not – I may be remembering it wrong. I'll have to – I need to research this tonight and try to bring that to Your Honor's attention tomorrow.
>
> The Court: "That will be fine. You might be referring to what is within 104.41."
>
> [Defense Counsel]: "Oh, you've got it written down. Thank you. One Second, Your Honor. That, that appears to be it. Your Honor. I apologize."
>
> The Court: "Yeah, I will be reading the first paragraph, the second paragraph, the third para – not the notes – but the third paragraph, and the fourth."
>
> [Defense Counsel]: "Yes, sir."
>
> The Court: "Did that – did that take care of your question?"
>
> [Defense Counsel]: "It does, Your honor, Thank you."

¶ 25 Thereafter, the trial court delivered the following instruction in accordance with N.C.P.I. – Crim. 104.41 (2008):

> Possession of an item may be actual or constructive. A person has actual possession of an item if the person has it on their 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 an item if the person does not have it on their 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 item and a person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.
>
> If you find beyond a reasonable doubt that an item was found in close physical proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of the item and had the power and intent to control its disposition or use.
>
> However, the defendant's physical proximity, if any, to the item does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use. Such an inference may be drawn only from this and other circumstances which you find from the evidence beyond a reasonable doubt.
>
> If you find beyond a reasonable doubt that an item was close–excuse me–that an item was found at a certain premises, and the defendant exercised control over these premises, whether or not the defendant owned them, this would be a circumstance from which you may infer that the defendant was aware of the presence of the item.

¶ 26 Defendant did not object to the jury instruction at the conference or offer any amendments to the proposed jury instructions after being given opportunities by the trial court. The State presented substantial evidence of constructive possession of a firearm by a felon. Therefore, we find the trial court did not commit plain error.

¶ 27 Defendant further contends the trial court plainly erred by failing to explain

the limited relevance of Defendant's prior convictions and by admitting evidence of Defendant's prior convictions. This Court reviews instructional defects and the admission of evidence where trial counsel did not object for plain error. *See Moseley*, 338 N.C. at 55, 449 S.E.2d at 445; *see also State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998).

¶ 28 Rule 401 provides that relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (2021). Our Supreme Court has interpreted relevance broadly and has "explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994) (citations omitted); *see also State v. Hedrick*, 289 N.C. 232, 235, 221 S.E.2d 350, 352 (1976). "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on [] [D]efendant; the question [] is one of degree." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

¶ 29 Pursuant to N.C. Gen. Stat. § 14-415.1, it is "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) (2021). A person found in violation of Section 14-415.1(a) is guilty of a Class G felony. N.C. Gen. Stat. § 14-415.1(a).

Thus, a prior conviction is an essential element of the crime charged.

¶ 30 Here, Defendant conceded that, absent an objection, this Court is limited to plain error review. The State needed to admit Defendant's prior convictions to prove that Defendant was a felon, and his possession of a firearm was unlawful. *See State v. Jeffers*, 48 N.C. App. 663, 666, 269 S.E.2d 731, 733-34 (1980). The State also needed to show that the search was permitted while Defendant was on felony probation because Ms. Suber alleged she did not know why the Officers had searched her residence when she could lawfully own and possess a firearm. Because Defendant did not stipulate to his prior convictions, the convictions were properly admitted to prove an element of the crime charged and that the search of the residence was proper.

¶ 31 It is not enough for Defendant to show error; he must also show he was prejudiced by the error. N.C. Gen. Stat. § 15A-1443 (2021). Harmless error warrants no relief on appeal. This Court has held "evidence will be treated as harmless unless [] [D]efendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded." *State v. Harper*, 96 N.C. App. 36, 42, 384 S.E.2d 297, 300 (1989) (internal citation omitted). Defendant makes no such showing of prejudice in this case. Therefore, we find Defendant's arguments to be without merit.

C. Ineffective Assistance of Counsel

¶ 32 Lastly, Defendant contends he received ineffective assistance of counsel by counsel's failure to renew Defendant's motion to dismiss at the close of all the evidence; failure to request a stipulation as to Defendant's prior convictions; and failure to object to the details of Defendant's prior convictions. We disagree.

1. Defendant's Motion to Dismiss

¶ 33 Defendant first contends he received ineffective assistance of counsel by counsel's failure to renew Defendant's motion to dismiss at the close of all the evidence.

¶ 34 "[I]neffective assistance of counsel claims brought on direct review [before this Court] will be decided on the merits when the cold record reveals that no further investigation is required." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (quotation marks and citation omitted).

¶ 35 A defendant has the constitutional right to effective assistance of counsel. *See State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted).

> Judicial review of counsel's performance must be highly deferential so as to avoid the prejudicial effects of hindsight. Because of the difficulties inherent in determining if counsel's conduct was within reasonable standards, a court must indulge a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance.

State v. Fisher, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984)).

In order to establish his counsel was ineffective Defendant must satisfy a two-part test:

> First, [] [D]efendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed [] [D]efendant by the Sixth Amendment. Second, [] [D]efendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive [] [D]efendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (emphasis omitted)). Error by counsel does not warrant reversal unless there is a reasonable probability that, but for the error, there would have been a different result in the proceedings. *Braswell* at 563, 324 S.E.2d at 248. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id*. at 563, 324 S.E.2d at 249.

¶ 36 Here, Defendant was not prejudiced because there was not a reasonable probability of a different outcome at trial. The defense called one witness, Ms. Suber. Ms. Suber testified she received the firearms from her father's estate and hid them around the house two or three days before the search of their home. Lieutenant Weeks testified that Ms. Suber could not prove that the firearms belonged to her. Ms.

Suber testified that there were two dressers in their bedroom, and Defendant had his own dresser, which was not the dresser where the firearm and ammunition were recovered. Ms. Suber also testified that Defendant hung his clothes in the laundry room. According to Lieutenant Weeks, Defendant went into the bedroom on the left and retrieved clothing and other personal items from an armoire inside his bedroom. Thus, any contradiction or discrepancy in the testimony of the witnesses was for the jury to resolve. *See Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653.

¶ 37 Defendant's contention that he was prejudiced because of counsel's failure to renew his motion to dismiss after the close of the evidence would have resulted in a directed verdict or a meritorious issue for review is purely speculative. Defendant has failed to make a sufficient showing that his counsel's performance was deficient and that it prejudiced Defendant enough to call into doubt the outcome and fairness of the trial.

2. Failure to Request a Felon-Status Stipulation and Object to Prior Convictions

¶ 38 Defendant further contends he received ineffective assistance of counsel when counsel failed to request a stipulation as to Defendant's status as a felon and failed to object to the admission of Defendant's prior convictions.

¶ 39 N.C. Gen. Stat. § 14-415.1 provides in part:

> When a person is charged [with possession of a firearm by a felon] . . . [a] judgment of conviction of [] [D]efendant . . .

> to such an offense certified to a superior court of this State from the custodian of records of any state or federal court shall be *prima facie* evidence of the facts so certified.

N.C. Gen. Stat. § 14-415.1 (emphasis added). Absent a tendered stipulation, judgments of prior felony convictions are admissible for the purposes of proving possession of a firearm by a felon. N.C. Gen. Stat. § 14-415.1.

¶ 40 Here, Defendant did not stipulate, and the State was permitted to call a witness to prove an element of the crime charged. It is Defendant's decision whether to stipulate to his prior convictions, not trial counsel's. In this case, the State provided evidence to prove the element of the crime that Defendant had prior convictions through the testimony of a Clerk of the Superior Court.

¶ 41 Defendant's contention that he was prejudiced because of trial counsel's failure to stipulate to his prior felony convictions would have resulted in a not guilty verdict is without merit. Because there was not a reasonable probability of a different outcome at trial, we need not reach the question of whether counsel was deficient. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. Therefore, we find no error.

III. Conclusion

¶ 42 After careful review, we hold Defendant received a fair trial free from error. Further, we find Defendant failed to make a sufficient showing to rise to the level of ineffective assistance of counsel.

NO ERROR.

Judges ZACHARY and JACKSON concur.

Report per Rule 30(e).