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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-478

No. COA20-627

Filed 7 September 2021

Duplin County, No. 18 CRS 50621-22

STATE OF NORTH CAROLINA,

v.

ROBERT LEVITICUS MCKOY, Defendant.

Appeal by Defendant from judgment entered 3 October 2019 by Judge William W. Bland in Duplin County Superior Court. Heard in the Court of Appeals 28 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Stroud, for the State.

Edgerton Law Practice, by Jarvis John Edgerton, IV, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Robert McKoy (“Defendant”) appeals his conviction for possession of a firearm by a felon. On appeal, Defendant argues the trial court erred in denying his motion to dismiss due to a lack of sufficient evidence. We disagree.

I. Factual and Procedural Background

¶ 2 On March 7, 2018, Lieutenant Chris Smith (“Smith”) of the Duplin County

Sheriff's Office observed Defendant driving a blue Nissan Rogue in Wallace, North Carolina. Smith testified he radioed Detective Mitchell Henderson ("Henderson") and asked Henderson to perform a traffic stop of Defendant's vehicle because Smith knew Defendant's license was revoked.¹ Henderson was parked in a church parking lot in a patrol car when Smith radioed him. When Henderson observed a blue Nissan Rogue matching the description given by Smith pass by, Henderson followed the vehicle in his patrol car. Henderson activated his emergency lights to conduct a traffic stop and the driver of the Nissan Rogue pulled over to a complete stop.

¶ 3 As Henderson exited his vehicle to approach the passenger side of the Nissan Rogue, the driver of the vehicle "sped away." Henderson returned to his vehicle to pursue the Nissan Rogue. Detective Kevin Crissey ("Crissey") joined the pursuit in a separate vehicle. Henderson testified the Nissan Rogue sped through red stop lights, departed its lane of travel, and reached speeds in excess of 100 miles per hour.

¶ 4 While in pursuit, Henderson and Crissey had to make a turn to stay behind the vehicle. Henderson was unable to make the turn so Crissey's patrol car became the lead pursuit vehicle. In an effort to stop the driver, Crissey struck the Nissan

¹ Smith knew Defendant's license was revoked from an ongoing narcotics investigation, in which an informant purchased narcotics from Defendant. Law enforcement previously "ran his information and . . . already knew his license was suspended [sic]."

Smith first testifies Defendant's license was revoked but later testifies that Defendant's license was suspended. It appears from the record on appeal that Defendant was operating a motor vehicle while his license was revoked.

Rogue with his vehicle causing its driver to lose control and “spin out into a field” where the driver began to head back toward the road. Crissey then used his vehicle to pin the Nissan Rogue against a telephone pole.

¶ 5 Henderson testified he observed Defendant on the passenger side of the Nissan Rogue after it was stopped. Law enforcement had to “break the passenger window [in order to] remove him from the vehicle” because Defendant would not unlock the doors. Once Defendant was removed from the vehicle, law enforcement officers searched the Nissan Rogue and found a firearm in the glovebox. Law enforcement did not lift fingerprints from the firearm.

¶ 6 LaTonya Murphy (“Murphy”), Defendant’s girlfriend rented the Nissan Rogue. At trial, Murphy testified she legally purchased a firearm² “a couple of years prior” to 2018. She further testified that the Nissan Rogue was the rental vehicle provided by her insurance company for her to drive while her personal vehicle was being repaired; that she had returned home with the rental car to meet a co-worker with whom she carpooled to work; and, in a rush to avoid being late to work, had locked her firearm in the glovebox of the rental car and had given its key to her son to place on the counter inside her home. Defendant was not at Murphy’s house when she left for work with her co-worker. Murphy did not give Defendant permission to possess her

² Murphy’s testimony revealed she did not know the make, model, or how much ammunition her firearm held in the magazine.

firearm or discuss the firearm in the glovebox with him.

¶ 7

Defendant was indicted for felony fleeing to elude arrest, carrying a concealed weapon, possession of a firearm by a felon, and attaining habitual felon status on July 23, 2018. On September 20, 2019, Defendant's trial began. At the close of State's evidence, Defendant moved to dismiss all charges for insufficient evidence and thereafter, renewed his motion to dismiss at the close of all evidence. The trial court denied both motions. On October 3, 2019, Defendant was convicted of all charges. Defendant gave timely notice of appeal in open court.

II. Discussion

¶ 8

In Defendant's sole argument on appeal, he contends the trial court erred in denying his motion to dismiss for insufficient evidence. We disagree.

¶ 9

We review the 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) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Bailey*, 233 N.C. App. 688, 691, 757

S.E.2d 491, 493 (2014) (quoting *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000)). “Substantial evidence is 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) (citations omitted).

¶ 10 “In making its determination, 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.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995). Where the defendant’s evidence “explains or makes clear the evidence of the State,” it must also be considered. *State v. Bruton*, 264 N.C. 488, 199, 142 S.E.2d 169, 176 (1965). If the evidence is sufficient only to raise a suspicion or conjecture as to the commission of the offense, a motion to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) (citations omitted); *State v. Allen*, 79 N.C. App. 280, 282, 339 S.E.2d 76, 77 (1986) (citations omitted); *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). “These controlling principles of law are more easily stated than applied to the evidence in a particular case.” *Allen*, 79 N.C. App. at 282, 339 S.E.2d at 77 (citing *Cutler*, 271 N.C. at 383, 156 S.E.2d at 682). Applying these principles, we reach the conclusion that

the evidence presented raises more than a mere suspicion or conjecture that Defendant constructively possessed the firearm located in the Nissan Rogue.

¶ 11 In the present appeal, Defendant was indicted for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1(a), in which 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) (2020). 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, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) 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 (2007). Here, “Defendant does not challenge his status as a convicted felon; therefore, the only element” we consider on appeal is possession. *See Bailey*, 233 N.C. App. at 691, 757 S.E.2d at 493.

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.

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State v. Taylor, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (internal citations omitted); *see also State v. Billinger*, 213 N.C. App. 249, 253-54, 714 S.E.2d 201, 205 (2011). Here, the State proceeded on a theory of constructive possession because Defendant alleged he did not have actual possession of the firearm.

¶ 12 “The requirements of power and intent necessarily imply that a defendant must be aware of the [item’s] presence . . . if he is to be convicted of possessing it.” *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E.2d 61, 62 (1973). Where “there is no link between the defendant and the firearm besides mere presence,” evidence of constructive possession is insufficient. *Bailey*, 233 N.C. App. at 692, 757 S.E.2d at 493.

[A]n inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Best, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011) (citations omitted) (emphasis added); *see also State v. Mitchell*, 224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (2012) (citation omitted); *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984) (citation omitted); *State v. Kennedy*, ___ N.C. App. ___, 2021-NCCOA-140, ¶

11 (citation omitted).

¶ 13 Defendant correctly notes that “the [C]ourt must consider the defendant’s evidence which explains or clarifies that offered by the State,” and “the defendant’s evidence which rebuts the inference of guilt when it is not inconsistent with the State’s evidence.” *State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 262-63 (1983) (citations omitted). In the present appeal, Defendant’s evidence can “be characterized as a clarification of the State’s testimonial . . . evidence . . . [because] it in no way contradicted the prosecution’s case.” *Id.* at 535, 308 S.E.2d at 263. Defendant’s evidence consisted of Murphy’s testimony that (1) she was the owner of a lawfully purchased firearm prior to renting the car driven by Defendant; (2) she placed the firearm in the glovebox of the rental vehicle; and (3) Defendant was not at home when she did so.

¶ 14 Relying on *State v. Allen*, 79 N.C. App. 280, 339 S.E.2d 76, *aff’d per curiam*, 317 N.C. 329, 344 S.E.2d 789 (1986), Defendant argues that “[t]aken together the facts are simply too tenuous to establish the element of knowledge sufficiently to take the case to the jury.” 79 N.C. App. at 283-84, 339 S.E.2d at 78. In *Allen*, the defendant was in a retail store at the same time as two men who stole VCRs. 79 N.C. App. at 281, 339 S.E.2d at 77. There was no evidence the defendant was with the other men in the store. *Id.* at 282, 339 S.E.2d at 77. An off-duty police officer saw the defendant at a car wash approximately one hour later and noticed the two men were also at the

carwash at the same time. *Id.* One of the two men approached the defendant; the defendant agreed to give the two a ride from the carwash and allowed them to put the VCRs in the trunk of his vehicle. *Id.* at 282-83, 339 SE.2d at 78. The defendant was subsequently convicted of possession of stolen property. This Court reversed the conviction, stating: “Granted, these facts give rise to a suspicion that defendant possessed the requisite knowledge; however, these facts just as reasonably lead to an inference that defendant had no knowledge that he was transporting stolen property. Conjecture, not reasonable inference of guilt, is raised.” *Id.* at 282-83, 339 S.E.2d at 78. This Court concluded that “[the] evidence [was] not sufficient to conclude that defendant had reasonable grounds to believe the property was stolen. Taken together [the] facts [were] simply too tenuous to establish the element of knowledge sufficiently to take the case to the jury.” *Id.* at 283-84, 339 S.E.2d at 78.

¶ 15 However, *Allen* is factually distinguishable from the present appeal. Here, the State’s evidence demonstrated Defendant drove a rental car that had been rented in Murphy’s name. Defendant, like the driver of a borrowed car, had the power to control the contents of the vehicle. *See Best*, 214 N.C. App. at 47, 713 S.E.2d at 562. Further, Henderson testified he observed Defendant “reaching towards the passenger side of the vehicle” while Defendant was fleeing in the Nissan Rogue. *See State v. Butler*, 356 N.C. 141, 148, 567 S.E.2d 137, 141 (2002) (holding the defendant’s attempt to urgently depart the bus terminal and the fact that the defendant was “the

only person who had been in a position to place the [contraband] in that location” as being “sufficient indicia of defendant’s constructive possession to warrant submission of the . . . charges to the jury”). Defendant was found on the passenger side of the vehicle, and the doors were locked. Thus, the State was entitled to an inference of constructive possession as Defendant was the custodian of the vehicle where the firearm was found, was observed to be reaching toward the passenger side of the vehicle while fleeing, and was apprehended from the passenger seat of the vehicle. *See Best*, 214 N.C. App. at 47, 713 S.E.2d at 562; *see also Dow*, 70 N.C. App. at 85, 318 S.E.2d at 562. Taking the evidence and the inferences to be drawn therefrom in the light most favorable to the State, a reasonable jury could have found Defendant had knowledge of the firearm in the glovebox and thus, constructively possessed it. *See Mitchell*, 224 N.C. App. at, 177-78, 735 S.E.2d at 443-44; *see also State v. Rogers*, 32 N.C. App. 274, 277, 231 S.E.2d 919, 921 (1977) (“Where the driver is in control of the car . . . and the controlled substance is found in the car . . . such evidence is sufficient to withstand a motion to dismiss.” (citation omitted)).

¶ 16 While Defendant argues Murphy’s testimony could support an inference that he was unaware of the firearm located in the glovebox of the Nissan Rogue, “these additional facts [of Murphy’s purchase and placement of the firearm] make the State’s evidence no less sufficient to send to the jury.” *Butler*, 356 N.C. at 148, 567 S.E.2d at 141. Accordingly, we find no error in the trial court’s ruling.

III. Conclusion

¶ 17

The State presented evidence Defendant was (1) the custodian of the vehicle in which the firearm was found, (2) in a position to place the firearm in the glovebox toward which he was observed reaching, and (3) apprehended from the passenger seat. Therefore, the State presented evidence giving rise to an inference of knowledge and possession sufficient to go to the jury. *See Best*, 241 N.C. App. at 47, 713 S.E.2d at 562. Accordingly, we find no error.

NO ERROR.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).