An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-734

No. COA22-165

Filed 1 November 2022

Brunswick County, Nos. 19 CRS 50630, 19 CRS 681

STATE OF NORTH CAROLINA

v.

JOEY LAVON WILLIAMS, Defendant.

Appeal by Defendant from judgment entered 29 July 2021 by Judge Henry L. Stevens, IV, in Brunswick County Superior Court. Heard in the Court of Appeals 6 September 2022.

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

Anne Bleyman, for Defendant-Appellant.

DILLON, Judge.

¶ 1 Defendant Joey Lavon Williams appeals from judgment entered upon a jury's verdict convicting him of felony possession of a firearm. We conclude Defendant received a fair trial.

I. Background

¶ 2 Defendant was convicted of felony possession of a firearm based on evidence

that during a traffic stop a law enforcement officer discovered a weapon in a car occupied by Defendant and two others. The evidence at trial included the officer's testimony and the video from the officer's body camera. Defendant appeals his conviction.

II. Analysis

¶ 3 Defendant raises two arguments on appeal, which we address in turn.

A. Motion to Dismiss

¶ 4 Defendant first contends the trial court erred by denying his motion to dismiss for insufficiency of evidence. We disagree.

¶ 5 To survive a motion to dismiss, there must be substantial evidence of each essential element of the crime and that the defendant is the perpetrator. *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015). Evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference from the evidence. *Id.* Whether the State presented substantial evidence of each essential element is a question of law, which we review *de novo*. *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016).

¶ 6 In this case, Defendant was charged by indictment with possession of a firearm by a felon in violation of Section 14-415.1 of our General Statutes, which makes it ". . . 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).

¶ 7 Defendant does not challenge his status as a convicted felon. Therefore, the only element we consider on appeal is possession.

¶ 8 Possession of a firearm may be actual or constructive. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Here, the State proceeded solely under the theory of constructive possession. "[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) (citation omitted). Constructive possession of contraband is determined by the totality of the circumstances. *State v. Butler*, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002). A person may have power to control either alone or jointly with others. *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009).

¶ 9 We conclude that the evidence was sufficient to show that Defendant was in possession of the firearm that was found in the vehicle. When viewed in the light most favorable to the State, this evidence tended to show as follows:

¶ 10 On 9 February 2019, a law enforcement officer stopped a vehicle he observed traveling ten (10) miles over the speed limit and without a license plate tag light. The vehicle was registered to an unknown individual.

¶ 11 As the officer approached the vehicle, he observed three individuals inside, including Defendant. A woman ("Ms. Daniels") was seated in the driver's seat.

Defendant was sitting in the front passenger's seat. The front sitting area of the vehicle consisted of two separate seats, with space in the middle, as opposed to a bench-type seat. There was one passenger ("Mr. Reaves") seated in the backseat, sitting directly behind the driver Ms. Daniels (and diagonally from Defendant).

¶ 12 The officer approached the driver's side of the vehicle. As he stood outside the rear passenger door (adjacent to Mr. Reaves), he noticed the silver barrel of a firearm tucked between Mr. Reaves' legs in the backseat. The officer ordered Mr. Reaves to put his hands up. The officer observed Defendant reach for the gun. The officer ordered Defendant multiple times to "stop reaching" for the gun. Mr. Reaves did not attempt to block Defendant's attempt to reach the firearm, which was within Defendant's proximity and ability to control. The officer's view of the gun and Defendant's reach was obscured during much of this portion of the encounter.

¶ 13 Ms. Daniels exited the front passenger seat. Mr. Reaves exited the back seat. Defendant was the last to exit the vehicle. After Mr. Reaves exited the vehicle, the gun was discovered between the driver's front seat and the front console between the front seats. As Mr. Reaves exited the vehicle, he exclaimed, "it [the firearm] wasn't on me, it was on him [the Defendant]."

¶ 14 Based on this evidence, a reasonable juror could infer that Defendant possessed the requisite "control and dominion" to constructively possess the firearm. *Jones*, 369 N.C. at 634, 800 S.E.2d at 57. First, the statement by Mr. Reaves that the

gun had been on Defendant is some evidence Defendant constructively possessed the gun at some point. Although Mr. Reaves' statement may have been inadmissible hearsay, counsel for Defendant failed to object to its introduction at trial. Our Supreme Court has held "that evidence admitted without objection is properly considered by the court in determining the sufficiency of the evidence and by the jury in determining the issue, even though the evidence is incompetent and should have been excluded had objection been made." *Reeves v. Hill*, 272 N.C. 352, 361, 158 S.E.2d 529, 536 (1968) (citation omitted).

¶ 15 In addition to Mr. Reaves' statement, it could be inferred from the evidence the gun was within Defendant's reach and control, based on evidence that Defendant reached for the gun on a number of occasions, the gun was within his reach, Mr. Reaves did not block Defendant's access to the gun, Mr. Reaves' hands were away from the gun, and the gun changed location from between Mr. Reaves' legs to the front seat while Defendant remained in the vehicle. The jury certainly could have reached an opposite finding; however, we conclude the evidence was sufficient to allow the jury to make the call. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988); *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462-63 (2000). And the jury did make its call, finding that Defendant was in constructive possession of the firearm.

B. Eighth Amendment

¶ 16 Defendant further argues that the Habitual Felon Act violates the Eighth Amendment prohibition against cruel and unusual punishment (made applicable to the States through the Fourteenth Amendment). However, Defendant failed to properly preserve this issue for appeal.

¶ 17 Rule 14(b)(2) of our Rules of Appellate Procedure requires that a constitutional issue must have been "timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not)" as a prerequisite to appellate review in this Court. This is true even when a sentencing issue is intertwined with a constitutional issue. *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018). Because Defendant failed to argue to the sentencing court that the sentence imposed violates the Eighth Amendment, he may not raise that argument on appeal. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010).

NO ERROR.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).