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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-243

Filed 21 November 2023

Nash County, Nos. 21 CRS 51448, 801

STATE OF NORTH CAROLINA

v.

ANTONIO MAURICE WILKINS

Appeal by Defendant from judgment entered 7 December 2021 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 17 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan D. Jones, for the State.

Stephen Donald Fuller, for Defendant.

WOOD, Judge.

Defendant appeals his conviction for possession of a firearm by a convicted felon, arguing the trial court erred in admitting hearsay testimony and in its instructions to the jury. After careful review, we hold Defendant received a fair trial, free from error.

I. Factual and Procedural History

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In the early afternoon of 24 May 2021, Officer Phillip Cinal (“Officer Cinal”) of the Rocky Mount Police Department responded to a dispatch regarding a person with a weapon at North Pine Street. In less than a minute, Officer Cinal arrived at North Pine Street and observed a vehicle on the left-hand side of the street. There, three people, including Defendant, appeared to be arguing while standing in the middle of the roadway. Officer Cinal stopped his vehicle approximately twenty feet away and observed Defendant take a step back, draw his pistol from the front of his waistband, and fire one round into the air. Officer Cinal angled his vehicle for protection and gave verbal commands to Defendant, who then fled north on foot through an open field. Although Officer Cinal’s bodycam was on, it did not capture what he observed because the dashboard blocked its view.

Officer Cinal observed Defendant as he fled from the open field onto Star Street and then ran west to the corner of North Vyne Street. Officer Cinal testified that he observed a pistol in Defendant’s right hand the entire time. Officer Cinal commanded Defendant to drop the gun numerous times, but he did not comply. Officer Cinal lost sight of Defendant once he turned north onto North Vyne Street.

Officer Cinal pursued Defendant on foot and regained sight of him as he lunged into a bush. As Officer Cinal again commanded Defendant to drop the gun, Defendant exited the bush and fled north on North Vyne Street. He finally stopped and became cooperative, permitting Officer Cinal to arrest him without further incident.

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Officer Cinal placed Defendant in handcuffs, walked him back to his vehicle, and secured him in the vehicle. At this time, Officer Cinal and Defendant were positioned approximately at the corner of North Vyne Street, allowing Officer Cinal to see the bush into which Defendant had lunged and from which he had emerged. Other officers had arrived at the scene by the time Officer Cinal secured Defendant in his vehicle, allowing him to look around the bush briefly, but he did not see the pistol.

At trial, Officer Cinal testified, “Once other officers showed up on-scene, we did a reverse search of that area and located the pistol.” Officer Cinal testified he searched the area located slightly to the side of where the pistol was actually found. As for where exactly he was when the pistol was located, he testified: “I can’t remember exactly. I remember I was not right next to that officer [who found the pistol], though.” At the time that the officer located the pistol, Officer Cinal was giving an update to the shift lieutenant. Officer Cinal could not remember whether he or another officer retrieved the pistol out of the bush. However, he offered testimony regarding a picture depicting the pistol on the ground where it was located, stating, “Nothing had been moved at that point. The pistol was not removed. That is how it laid as it was found inside of the bushes[.]” After the pistol was retrieved from the bush, Officer Cinal “seized the gun and packaged it for evidence and submitted it into evidence.”

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On 12 July 2021, a grand jury indicted Defendant for: 1) discharging a firearm in city limits; 2) resisting a public officer; and 3) possession of a firearm by a convicted felon. Defendant's jury trial was held 5-6 December 2021.

During the jury instruction charge conference, the trial court announced the pattern jury instructions it would give, specifically including: "[N.C.P.I. Crim.] 254A.11, possession of a firearm by a felon. Within that instruction will be included [N.C.P.I. Crim.] 104.41, actual constructive possession. The first and third paragraphs of that instruction will be given." The first and third paragraphs of N.C.P.I. Crim. 104.41 read as follows:

Possession of a(n) [substance] [article] may be either actual or constructive. A person has actual possession of a(n) [substance] [article] if the person has it on the person, is aware of its presence, and (either alone or together with others), has both the power and intent to control its disposition or use.

...

NOTE WELL: Use the following paragraph to charge on constructive possession of a substance or article found in close physical proximity to the defendant.

[If you find beyond a reasonable doubt that a(n) [substance] [article] 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 [substance] [article] and had the power and intent to control its disposition or use. However, the defendant's physical proximity, if any, to the [substance] [article] does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its

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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.]

N.C.P.I. Crim. 104.41. (Emphasis in original).

However, the trial court ultimately instructed the jury on the first and *fourth* paragraphs of N.C.P.I. Crim. 104.41. The trial court read the first paragraph as follows: “Possession of an article may be either actual or constructive. A person has actual possession of an article if the person has it on the person, is aware of its presence, and has both the power and intent to control its disposition or use.” N.C.P.I. Crim. 104.41. Then, instead of reading the third paragraph regarding an item discovered in “close physical proximity” to a defendant, the trial court read the fourth paragraph, regarding an item discovered “not in close physical proximity” to a defendant, as follows:

If you find beyond a reasonable doubt that an article was found at a certain place and that the Defendant exercised control over that place, whether or not the Defendant owned it, this would be a circumstance from which you may infer that the Defendant was aware of the presence of the article and had the power and intent to control its disposition or use.

On 7 December 2021, the jury found Defendant guilty of resisting a public officer and possession of a firearm by a felon. The jury found Defendant not guilty of discharging a firearm in city limits.

Defendant gave oral notice of appeal. All other relevant facts are provided as necessary in our analysis.

II. Analysis

On appeal, Defendant argues the trial court erred by: 1) admitting hearsay testimony by Officer Cinal regarding the discovery of the pistol; and 2) deviating from the “agreed-upon” jury instructions. We address these issues in turn.

A. Officer Cinal’s Testimony Regarding the Discovery of the Pistol

Defendant argues the trial court prejudicially erred by allowing Officer Cinal to give purportedly hearsay testimony, not based on personal knowledge, that the pistol was first discovered in the bushes into which Defendant had lunged and that officers had not yet touched or moved the pistol prior to Officer Cinal seeing where Defendant left it on the ground. We disagree.

Because Defendant did not object to the testimony at trial, the issue may be reviewed only for plain error. N.C. R. App. P. 10(a)(4). “Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Defendant contends the trial court allowed Officer Cinal to give inadmissible hearsay testimony. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted,” and hearsay is inadmissible without an applicable exception. N.C. R. Evid. 801, 802. A witness may not testify to a matter unless evidence is introduced

sufficient to support a finding that he has personal knowledge of the matter. N.C. R. Evid. 602.

Here, Officer Cinal testified that after arresting Defendant and while walking him back to his vehicle, he could see the bush into which Defendant had lunged. His line of sight therefore allowed him to be certain no one else had disturbed the bushes or picked up or moved the pistol from the ground. Officer Cinal also testified he looked for the pistol in or around the bushes but did not initially find it. The other responding officers were the ones who located the pistol in the bushes where Defendant hid. Officer Cinal further testified that he could not remember exactly where he was when the pistol was located, but “he was not right next to that officer,” and that at or around the time the pistol was discovered, he was giving an update to the shift lieutenant. While it is true that Officer Cinal may not have had direct, personal knowledge of the discovery of the pistol at the moment it occurred, it does not necessarily follow that he learned of its discovery only through inadmissible hearsay. Ultimately, Officer Cinal was the one who seized the pistol, packaged it for evidence, and submitted it to evidence, demonstrating he was present in the direct vicinity and immediately after the discovery of the pistol. Officer Cinal was able to see Defendant: (1) holding a pistol when he first arrived at North Pine Street; (2) fleeing with a pistol in his hand during the pursuit; and (3) lunging into a bush with a pistol in his hand. Moreover, Officer Cinal could see the bush the entire time as he arrested and walked Defendant to his vehicle. Therefore, Officer Cinal’s testimony

was not inadmissible hearsay because he had personal knowledge of the events about which he testified, and he did not repeat an out of court statement. We also note Officer Cinal never actually testified that his knowledge of the location of the pistol or details of its discovery was based upon statements made by another person. Because Officer Cinal's testimony did not contain inadmissible hearsay, we hold the trial court did not plainly err in admitting it.

B. The Trial Court's Swapping of Jury Instructions

Defendant argues the trial court prejudicially erred in instructing the jury on the first and fourth paragraphs of N.C.P.I. Crim. 104.41, rather than on the first and third paragraphs of the pattern jury instructions.

The first paragraph of N.C.P.I. Crim. 104.41 simply states possession may be actual or constructive, and it defines actual possession. N.C.P.I. Crim. 104.41. The fourth paragraph pertains to an item found *not* in close physical proximity to a defendant. The third paragraph pertains to an item found in close physical proximity to a defendant.

Generally, an alleged error not objected to at trial is preserved only for plain error review. N.C. R. App. P. 10(a)(4). Defendant, relying on a statement made by our Supreme Court in *State v. Allen*, argues a *de novo* standard of review applies because the issue of a jury instruction given in error is preserved if "the trial court agreed to give specific, *requested* instructions but then either omitted the instruction

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entirely or gave one which differed from the requested instruction.” 339 N.C. 545, 554, 453 S.E.2d 150, 155 (1995) (emphasis added).

“This Court reviews jury instructions contextually and in [their] entirety. The [instructions] will be held to be sufficient if [they] present[] the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.” *State v. Blizzard*, 169 N.C. App. 285, 296–97, 610 S.E.2d 245, 253 (2005). It is the duty of the party appealing the jury instructions to demonstrate a likelihood of prejudice. *Id.* at 297, 610 S.E.2d at 253. Specifically regarding actual possession versus constructive possession, our Supreme Court has stated:

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. 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. According to well-established North Carolina law, it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence.

State v. Malachi, 371 N.C. 719, 730–31, 821 S.E.2d 407, 416 (2018) (citations, quotation marks, and brackets omitted).

Here, the trial court asked if the parties wanted to make any corrections to the copies of the jury instructions charge they received the day before, and neither party objected to the instructions as presented. The trial court then stated it would instruct on the first and third paragraphs of N.C.P.I. Crim. 104.41, and again, the parties did not object. Even after the trial court charged the jury, the parties did not object. The

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Record does not indicate Defendant specifically requested the third paragraph as opposed to the fourth paragraph of N.C.P.I. Crim. 104.41. Because the trial court did not fail to give an instruction that a party specifically requested and because Defendant did not object to the instruction given, the issue is not preserved. Therefore, we review for plain error. N.C. R. App. P. 10(a)(4). Accordingly, Defendant must show error and that, absent the error, the jury probably would have reached a different result. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

A careful review of the Record evidence supports the trial court's jury instructions. There was sufficient evidence for the jury to convict Defendant of possession of a firearm by a felon by actual or constructive possession regardless of which constructive possession instruction the trial court gave.

There was sufficient evidence to convict Defendant of actual possession because Officer Cinal testified he saw Defendant holding a pistol when he first arrived and throughout his pursuit of him until Defendant lunged into the bush. Officer Cinal further testified he had his service weapon drawn out of concern for his safety, lending credence to the fact that he saw Defendant holding a pistol. Defendant argues the jury's acquittal on the charge of discharging a firearm in city limits necessarily means the jury discredited Officer Cinal's testimony that he saw Defendant holding a gun. However, Officer Cinal testified that it is possible to confuse the sound of a gunshot and a firecracker. The jury could have believed Officer Cinal's testimony that he saw Defendant holding a pistol, which is likely the strongest

evidence regarding the felon in possession charge, but simultaneously not have determined his guilt beyond a reasonable doubt regarding discharging the pistol.

There was also sufficient evidence to convict Defendant based on constructive possession. As for an item found in close physical proximity to a defendant, the above evidence coupled with Officer Cinal's testimony that he observed Defendant leap into the bush where the pistol was ultimately found would be sufficient to convict Defendant under that theory. As for an item not found in close physical proximity, the jury could have interpreted that instruction to mean the bush was no longer in close physical proximity to Defendant by the time he was arrested and walked to Officer Cinal's vehicle but that Defendant "exercised control" over the bush and surrounding ground during the time he hid in it and was attempting to discard or hide the pistol. N.C.P.I. Crim. 104.41.

Because the jury could have convicted Defendant of possession under either theory of possession, actual or constructive, regardless of which jury instruction on constructive possession the trial court gave, the trial court did not plainly err in its instructions to the jury. *Malachi*, 371 N.C. at 730–31, 821 S.E.2d at 416; *Blizzard*, 169 N.C. App. at 296–97, 610 S.E.2d at 253.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err in admitting Officer Cinal's testimony about the pistol's discovery or in instructing the jury. Thus, we hold Defendant received a fair trial free from prejudicial error.

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NO ERROR.

Judges ZACHARY and STADING concur.

Report per Rule 30(e).