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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-336

Filed 5 March 2024

Pitt County, Nos. 20 CRS 55228, 22 CRS 1007

STATE OF NORTH CAROLINA

v.

MONTE LOVETTE HUDSON, Defendant.

Appeal by defendant from judgment entered 12 July 2022 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 4 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary L. Maloney, for the State.

Blackrose Law, by Gina Balamucki, for the defendant-appellant.

STADING, Judge.

Monte Hudson (“defendant”) appeals from judgment after a jury found him guilty of possession of a firearm by a felon. For the reasons below, we hold no error.

I. Background

On 12 September 2020, Greenville Police Officer Johnson saw a Ford Mercury run a stop sign. Officer Johnson pulled behind the Mercury, checked its registration, and discovered that the owner had a suspended driver’s license. When Officer

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Johnson activated his blue lights, the “car kind of circled the parking lot a little bit going into the parking lot[.]” Two occupants were inside the car: the driver, and defendant—who was the front-seat passenger. Officer Johnson observed that the driver had red, glassy eyes, and he saw an open container of alcohol in the front area of the car. Officer Johnson called for an additional officer to assist him with the stop. Once Officer Lopez arrived in response to the request, Officer Johnson asked that the driver step out of the car, but he refused. After noticing the driver reaching toward the gear shift, Officer Johnson was afraid he was “attempting to drive off” and removed him from the car. A search of the driver’s person led to the discovery of a small amount of marijuana.

Meanwhile, Officer Lopez asked defendant to step out of the car. As he was exiting the car, defendant repeatedly told Officer Lopez he had just showered and worked all day. Officer Lopez smelled an odor of alcohol coming from defendant. As defendant and the driver stood at the front of the car with Officer Johnson, Officer Lopez searched the car and discovered a nine-millimeter handgun on the floorboard under the front passenger seat. Officer Lopez described the position of the handgun with the “handgrip [] pointed toward the seatbelt and the barrel [] pointed toward the back left passenger seat of the vehicle.” Officer Lopez also noted that the gun was sitting at an angle on “the small hump . . . underneath the passenger seat.” He explained, “if you put a gun underneath a seat and you drive around, that gun’s going

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to slide around.” Further, he stated when “the driver turned into that parking lot” he “believe[d] that that gun would have slid out.” Upon learning defendant was a convicted felon, the officers arrested him for possession of a firearm by a felon.

The case was first tried on 9 September 2021 but resulted in a mistrial because the jury was deadlocked. The case was re-tried on 11 July 2022. Just before a break during jury selection, the trial court told the jury: “Now, you’ve heard what the case is about. You’ve heard what the charge is and you know what the defendant did, so you know something about the case. But you don’t know . . . anywhere near what you’re going to know when you hear the evidence.” (ellipses in transcript). At the close of the State’s evidence, defendant moved to dismiss the case and argued that the State did not present sufficient evidence to show defendant was in actual or constructive possession of the gun. The State countered that defendant’s proximity to the gun, the gun’s positioning and placement under the front passenger seat, and defendant’s statements supported constructive possession. The trial court denied the motion, and defendant did not present evidence. The trial court subsequently instructed the jury on actual and constructive possession. Ultimately, the jury found defendant guilty of possession of a firearm by a felon.

II. Jurisdiction

This Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2023).

III. Analysis

Defendant raises three issues on appeal: (1) whether the trial court erred by denying his motion to dismiss for insufficient evidence; (2) whether the trial court committed plain error by instructing the jury on a theory of actual possession; and (3) whether the trial court made an improper statement insinuating defendant's guilt.

A. Motion to Dismiss

Defendant first argues the trial court erred by denying his motion to dismiss, alleging that the State did not present sufficient evidence showing defendant had actual or constructive possession of the firearm found under the front passenger seat. At the close of the State's evidence, defense counsel moved to dismiss the charge of possession of a firearm by a felon, and the trial court denied the motion. Thus, defendant "preserved all issues related to the sufficiency of the evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020); N.C. R. App. P. 10 (a)(3).

When considering a motion to dismiss for insufficient evidence, the trial court determines "whether there is 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) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

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State v. Hoyle, 373 N.C. 454, 458, 838 S.E.2d 435, 439 (2020) (citation omitted). Evaluating the sufficiency of the evidence supporting a criminal conviction requires that the evidence be considered “in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.” *Golder*, 374 N.C. at 250, 839 S.E.2d at 790 (citing *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826). “[I]f the record developed at trial contains ‘substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Id.* (internal quotation marks and citations omitted). Our Court reviews the denial of a motion to dismiss *de novo*. *State v. Guin*, 282 N.C. App. 160, 175, 870 S.E.2d 285, 296 (2020) (citation omitted).

“In order to obtain a conviction for possession of a firearm by a felon, the State must establish that (1) the defendant has been convicted of or pled guilty to a felony and (2) the defendant, subsequent to the conviction or [plea of] guilty, possessed a firearm.” *State v. Taylor*, 203 N.C. App. 448, 458–59, 691 S.E.2d 755, 764 (2010) (citations omitted); N.C. Gen. Stat. § 14-415.1 (2023). As for the second element, possession may be actual or constructive. *State v. Chevallier*, 264 N.C. App. 204, 215, 824 S.E.2d 440, 449 (2019) (citation omitted). “Actual possession requires that the defendant have physical or personal custody of the firearm.” *Taylor*, 203 N.C. App.

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at 459, 691 S.E.2d at 764. “Constructive possession exists when the defendant, ‘while not having actual possession, . . . has the intent and capability to maintain control and dominion over’ the firearm.” *Chevallier*, 264 N.C. App. at 215, 824 S.E.2d at 449 (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). Unless the accused has exclusive possession of the place where the contraband is located, the State must show “other incriminating circumstances before constructive possession may be inferred.” *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Here, defendant was a passenger in the car driven by someone else and did not have exclusive possession of the car. Thus, the issue is whether the evidence disclosed other incriminating circumstances sufficient for the jury to find that defendant had constructive possession of the gun found in the car.

Defendant contends that this Court’s decision in *State v. Sharpe* undermines the trial court’s denial of his motion to dismiss. 289 N.C. App. 84, 887 S.E.2d 116 (2023). In that case, the defendant was not in exclusive possession of the car but was one of four occupants and was sitting in the front passenger seat. *Id.* at 85, 90, 887 S.E.2d at 118, 121. A search of the car revealed “a box of bullets in the middle of the floorboard, in between the front — front driver and front passenger, in the middle . . . and [] a rifle in the back seat.” *Id.* at 86, 887 S.E.2d at 118. The rifle “was at an angle, not longways, [] facing the driver and the passenger, [] between the driver and the passenger, facing up towards the back passenger, not laying flat on the seat.”

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Id. And so, this Court noted “there were four adults in the [car]—with two in the rear seat, including a passenger in the seat behind Defendant where the rifle was found” and “the evidence, taken in the light most favorable to the State, shows the only evidence linking Defendant to the rifle was his presence and awareness of the firearm in the car.” *Id.* at 91, 887 S.E.2d at 121. Therefore, this Court determined that the evidence was insufficient to show the defendant was in constructive possession of the rifle. *Id.* at 91, 887 S.E.2d at 121-22.

Here, by comparison, the evidence showed that Officer Johnson initiated a traffic stop on a car containing two occupants. Defendant was the front seat passenger. After defendant stepped out of the car at Officer Lopez’s request, a nine-millimeter handgun was found under the front passenger seat where defendant was sitting. The gun’s handgrip was “pointed toward the seatbelt” and the barrel “pointed toward the back left passenger seat of the vehicle.” Further incriminating circumstances showed that the gun was positioned on a “small hump” on the floorboard and did not slide to lower location during the car’s travel—including when the driver pulled into and circled a parking lot. Considering the evidence in a light most favorable to the State, giving the State every reasonable inference which may be drawn therefrom, we conclude that the evidence was sufficient to go to the jury on the issue of defendant’s constructive possession of the gun found in the car. *Golder*, 374 N.C. at 250, 839 S.E.2d at 790.

B. Jury Instructions

Defendant next argues that because the State did not proceed on a theory of actual possession, the trial court's instruction on actual and constructive possession was prejudicial. Since defendant did not object to the jury instructions, he failed to preserve the issue for appellate review. N.C. R. App. P. 10(a)(4). Even so, we can review this unpreserved issue for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict." *Id.* at 518, 723 S.E.2d at 334. A trial court may commit an error when it instructs the jury on actual and constructive possession where the evidence supports only one theory of possession. *See State v. McMillan*, 272 N.C. App. 378, 389, 846 S.E.2d 575, 582–83 (2020). "Where there is highly conflicting evidence in a case, an error in the jury instructions may tilt the scales and cause the jury to convict a defendant." *State v. Hooper*, 279 N.C. App. 451, 456, 864 S.E.2d 376, 379 (2021) (citation omitted). A defendant has the burden of demonstrating "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial of which the appeal arises." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331.

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The trial court instructed the jury on both actual and constructive possession. Defendant contends that the evidence on both theories of possession was so weak that the jury's guilty verdict was most likely due to confusion caused by the erroneous instruction. In *State v. Perry*, the trial court instructed the jury on actual and constructive possession, although the State specifically told the jury not to consider actual possession. 222 N.C. App. 813, 820, 731 S.E.2d 714, 719 (2012). Our Court determined this statement likely affected the jury's consideration of the element of possession because it left the jury only to consider constructive possession, which was not supported by the evidence. *Id.* The Court held the trial court's failure to provide clarity to the jury constituted plain error because it might have changed the outcome of the case. *Id.* That said, *Perry* holds that this Court will only find plain error if instructions "had a probable impact on the jury's finding of guilt." *Id.* This case differs from *Perry* in that sufficient evidence supports defendant's constructive possession of the gun. Thus, defendant cannot demonstrate the trial court's instruction on possession had a probable impact on the jury's finding of guilt. For the foregoing reasons, defendant failed to meet his burden of showing plain error.

C. The Trial Court's Statements

Lastly, defendant contends the trial court made an inappropriate, prejudicial statement to the jury, implying defendant was guilty when stating, "you know what the defendant did[.]" The full admonishment provides the necessary context:

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Now, you've heard what the case is about. You've heard what the charge is and you know what the defendant did, so you know something about the case. But you don't know [] anywhere near what you're going to know when you hear the evidence. So do not begin deliberating about this case. Don't discuss it among yourselves, with each other, and don't let anyone discuss it with you in your presence. Keep an open mind, okay.

Defendant claims that the trial court's statement violated N.C. Gen. Stat. § 15A-1222 (2023), which prohibits a trial court from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury." "In determining whether the remark was improper, a totality of the circumstances test is utilized under which the defendant has the burden of showing prejudice." *State v. Williamson*, 272 N.C. App. 204, 217, 845 S.E.2d 876, 886 (2020) (internal quotation marks and citation omitted). "A defendant is not entitled to a new trial if the statement, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial." *State v. Williamson*, 272 N.C. App. 204, 217-18, 845 S.E.2d 876, 886 (2020). Unless the remarks "might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *State v. Brunson*, 187 N.C. App. 472, 479, 653 S.E.2d 552, 556 (2007) (citations omitted).

Given the context of the statement, the trial court appeared to summarize the timeline of the proceedings by referencing background information about the case and warning the jury about prematurely drawing conclusions. After making the

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statement now challenged by defendant, the trial court cautioned the jurors that “you don’t know . . . anywhere near what you’re going to know when you hear the evidence” and to “not begin deliberating about this case,” and to “keep an open mind.” When read in context, the trial court’s statement cannot be construed as an expression as to the merits of the case, or intimation of contempt for defendant. *State v. Holden*, 346 N.C. 404, 423–24, 488 S.E.2d 514, 524 (1997). Thus, defendant cannot meet his burden of showing prejudice under a totality of the circumstances test. *State v. Williamson*, 272 N.C. App. at 217, 845 S.E.2d at 886.

IV. Conclusion

We hold the trial court did not err in denying defendant’s motion to dismiss or instructing the jury on both actual and constructive possession. Furthermore, Furthermore, the trial court’s statement did not constitute a prejudicial remark expressing its opinion on the merits of the case when considered in the context of the court’s total instructions.

NO ERROR.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).