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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-643

Filed 2 April 2024

Rutherford County, No. 20CRS52371

STATE OF NORTH CAROLINA

v.

CHERYL MARIE THOMPSON, Defendant.

Appeal by defendant from judgment entered 9 August 2022 by Judge Bradley B. Letts in Rutherford County Superior Court. Heard in the Court of Appeals 6 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew W. Bream, for the State.

Gilda C. Rodriguez, for defendant-appellant.

FLOOD, Judge.

Cheryl Thompson (“Defendant”) appeals from the trial court’s judgment entered upon a jury verdict of possession of a firearm by a felon. Defendant argues on appeal the trial court: (A) erred in denying her Motion to Dismiss because the State presented insufficient evidence that Defendant possessed the seized firearm;

(B) plainly erred in instructing the jury to consider two videos for substantive purposes; and (C) plainly erred in allowing the admission of evidence regarding Defendant's prior convictions. Defendant alternatively contends, (D) her trial counsel provided ineffective assistance of counsel ("IAC"). After careful consideration, we conclude the State presented sufficient evidence such that the trial court's denial of Defendant's Motion to Dismiss was proper, and Defendant failed to establish that she was prejudiced by the trial court's jury instructions or by the admission of additional past convictions. We further conclude Defendant did not receive ineffective assistance of counsel. We therefore hold the trial court neither erred nor plainly erred.

I. Factual and Procedural Background

On 8 September 2020, deputies with the Rutherford County Sheriff's Office went to a Mooresboro home to perform a welfare check of the children of Mr. Smith.¹ While on their way to the address, the deputies were advised that Defendant was present at the home and had an outstanding warrant for a probation violation out of South Carolina.

When the deputies arrived at the residence, they knocked on the door and were greeted by Defendant. Defendant, once prompted, assured the deputies that Mr. Smith's children were not in the house and were staying elsewhere. The deputies

¹ A pseudonym is used to protect the identity of the parent to the minor children in keeping with N.C.R. App. P. 42.

STATE V. THOMPSON

Opinion of the Court

asked to come inside to assess the situation for themselves, and Defendant allowed them in. While looking around the home, one of the deputies noticed a rack on the wall of the bedroom that displayed two rifles.

After confirming that the children were not inside the home, the deputies asked to check a camper parked in the yard, to see if the children were inside. Prior to leading the deputies outside, Defendant searched for her shoes in the home, beginning in the bedroom where the firearms were displayed. During her conversation with the deputies, Defendant confirmed that she owned the property. Defendant led the deputies to the camper to show them the children were not there.

The deputies then arrested Defendant, believing she was a felon in possession of a firearm; reentered the home; and seized one of the rifles from the bedroom, which was loaded and appeared to the deputies to be fully functional. After being arrested, Defendant was asked about the firearms; she initially told the deputies that the rifles were hers, but then immediately claimed she misspoke and stated they belonged to Mr. Smith. The deputies placed Defendant in the patrol car, after which Mr. Smith arrived at the scene. Mr. Smith, upon arrival, claimed the rifles belonged to him. Mr. Smith later testified that he leased the land from Defendant, and that he lived in the camper.

On 25 June 2021, Defendant was indicted by a Rutherford County Grand Jury for possession of a firearm by a felon. On 8 August 2022, Defendant was tried at the Criminal Session of Rutherford County Superior Court. At trial, the Clerk of Superior

STATE V. THOMPSON

Opinion of the Court

Court of Rutherford County testified that Defendant had been previously convicted on four counts of possession of stolen goods, the consolidated judgment of which was also published to the jury. Also during trial, the State presented Exhibit 1, which was comprised of two body camera videos from the deputies during their time in Defendant's home. In moving to publish the videos, the State twice used the word "illustrative" to describe how the videos should be used.

At the close of the State's evidence, Defendant brought forward a Motion to Dismiss. The trial court ultimately denied Defendant's Motion to Dismiss regarding her possession of the seized firearm. The trial court thereafter issued jury instructions, and in doing so provided that the videos were to be regarded as substantive evidence.

On 9 August 2022, the jury found Defendant guilty of possessing a firearm by felon. That same day, the trial court entered a Judgment Suspending Sentence Order, where it sentenced Defendant to thirteen to twenty-five months' imprisonment, which was suspended for a sentence of twenty-four months of supervised probation. Defendant gave timely notice of appeal.

II. Jurisdiction

Appeal to this Court lies of right from the final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

Defendant presents the following arguments on appeal: the trial court (A) erred in denying her Motion to Dismiss because the State presented insufficient evidence that Defendant possessed the seized firearm; (B) plainly erred in instructing the jury to consider two videos for substantive purposes; and (C) plainly erred in allowing the admission of evidence regarding Defendant's prior convictions. Defendant alternatively contends, (D) her trial counsel provided IAC. We address each argument in turn.

A. Motion to Dismiss

Defendant argues the trial court erred in denying Defendant's Motion to Dismiss because the State's reliance on Defendant's initial statement to the deputies that the firearm was hers was insufficient evidence of her constructive possession of the seized firearm. We disagree.

A trial court's denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018). "Under a *de novo* review, the court considers the matter anew and substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

In our review of a trial court's denial of a defendant's motion to dismiss, we consider whether the State presented to the trial court "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 and internal

quotation marks omitted). Where the State has met its evidentiary burden of substantial evidence, it is not error for the trial court to deny a defendant's motion to dismiss. *See State v. Smith*, 300 N.C. 71, 81, 265 S.E.2d 164, 171 (1980) (concluding the trial court did not err in denying the defendant's motion to dismiss where the State presented "substantial evidence of each essential element of the crime of attempted robbery" and that the defendant was the perpetrator). "Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citation omitted). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must 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." *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020) (citation and internal quotations omitted).

For a defendant to properly be found guilty of possession of a firearm by a felon, that defendant must have, (1) been "previously convicted of a felony[,] and (2) thereafter possessed a firearm." *State v. Dawkins*, 196 N.C. App. 719, 725, 675 S.E.2d 402, 406 (2009). The second prong, possession of a firearm, may be actual or constructive. *See State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "A defendant constructively possesses contraband when he or she does not have actual possession of the contraband but he has 'the intent and capability to maintain control and dominion over' it." *Chekanow*, 370 N.C. at 493, 809 S.E.2d at 550 (citation

omitted). “A finding of constructive possession requires a totality of the circumstances analysis.” *Id.* at 493, 809 S.E.2d at 550.

Here, for Defendant to have been properly found guilty of felony possession of a firearm, the State must have proved Defendant was a felon who had constructive possession of a firearm. *See id.* at 493, 809 S.E.2d at 550. The evidence shows Defendant was on the premises when the deputies came to the house to perform a welfare check on Mr. Smith’s children, and Defendant opened the door for the deputies and allowed them entry into the home. After doing so, Defendant stated that she was the owner of the property and began searching for her shoes in the home so she could take the deputies to the camper, specifically looking in the room where the firearms were on display. After placing Defendant under arrest, the deputies asked who the owner of the seized firearm was, to which she stated “[i]t’s my firearm, my gun.” Although Defendant immediately changed her response, her initial reaction was to claim ownership. Drawing all inferences in favor of the State, this evidence is sufficient such that a rational juror may accept the conclusion Defendant had constructive possession over the seized firearm. *See Chekanow*, 370 N.C. at 493, 809 S.E.2d at 550.

As the State presented evidence that a reasonable mind might accept as adequate to support a finding that Defendant had constructive possession of a firearm, the State met its evidentiary burden of substantial evidence. *See Cox*, 303 N.C. at 87, 277 S.E.2d at 384. We therefore conclude, upon our *de novo* review, the

trial court properly denied Defendant's motion to dismiss for insufficient evidence of her constructive possession of the seized firearm. *See Smith*, 300 N.C. at 81, 265 S.E.2d at 171; *see Winkler*, 368 N.C. at 574, 780 S.E.2d at 826; *see Chekanow*, 370 N.C. at 492, 809 S.E.2d at 550. The trial court did not err.

B. Jury Instructions

Defendant contends the trial court plainly erred in instructing the jury to consider the two body camera videos in evidence for substantive purposes, when the videos had been introduced by the State for illustrative purposes. We disagree.

This challenge comes after Defendant made no objection at trial to the jury instructions, and as Plaintiff specifically and distinctly alleges plain error on appeal, we review her argument for plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . 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."). Plain error is a fundamental error that had a probable impact on the jury's verdict. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "Under a plain error analysis, [a] defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). "The necessary examination is whether there was a 'probable impact' on the verdict, not a *possible* one." *State v. Carter*, 366 N.C. 496, 500, 739 S.E.2d 548, 551 (2013) (citation omitted).

Rule 901(a) of the North Carolina Rules of Evidence states that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C.R. Evid. 901(a). Evidence is sufficient to support such a finding where it is used “to illustrate the testimony of a witness so as to make it more intelligible to the court and the jury.” *State v. See*, 301 N.C. 388, 391, 271 S.E.2d 282, 284 (1980). Alternatively, to introduce a video as substantive evidence, the proponent of the evidence must demonstrate “that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission[.]” *State v. Snead*, 368 N.C. 811, 814, 783 S.E.2d 733, 736 (2016).

In *Snead*, the State introduced a surveillance video the State purported to depict a theft being committed by the defendant. 368 N.C. at 812, 783 S.E.2d at 735. Our Supreme Court concluded that the video was properly admitted as substantive evidence because the State produced sufficient evidence to show that the video was produced by a reliable process, and that, as corroborated by testimony of a witness with first-hand knowledge, the video accurately depicted the events in question. *Id.* at 812, 783 S.E.2d at 735.

Here, the State, for illustrative purposes to assist in illustrating the deputies’ testimony, introduced into evidence two body camera videos from the deputies. Prior

to showing each video, for authentication purposes, the State asked each deputy about the recordings. The State specifically asked each deputy if their cameras were operational while they were in Defendant's home, and if the videos accurately portrayed the events as they occurred in real time. Each deputy responded in the affirmative to these questions. As such, like in *Snead*, the State properly laid a foundation for the admissibility of the surveillance videos. *See Snead*, 368 N.C. at 812, 783 S.E.2d at 735. The trial court, therefore, did not err in instructing the jury of the videos' substantive purpose. *See id* at 812, 783 S.E.2d at 735.

Furthermore, Defendant fails to establish that, had these jury instructions not been given, the jury would probably have reached a different result. In *State v. Moore*, this Court concluded that a video had been improperly introduced into evidence as it was not authenticated; we further concluded, however, that the defendant "failed to meet his burden of showing that there is a reasonable probability that the jury would have failed to convict defendant absent the video evidence." 254 N.C. App 544, 567, 803 S.E.2d 196, 211 (2017).

Here, as explained above, the relevant evidence was properly introduced, and Defendant has therefore failed to demonstrate that, absent the alleged error in the trial court's instructions, the outcome of the proceeding would have been different. Thus, we conclude the trial court committed no error and certainly no plain error. *See id.* at 567, 803 S.E.2d at 211; *see also Jones*, 355 N.C. at 125, 558 S.E.2d at 103.

C. Admission of Defendant's Prior Convictions

Defendant contends the trial court's use of a consolidated judgment of Defendant's prior convictions constituted plain error because the convictions were not relevant evidence and unfairly prejudiced Defendant. We disagree.

As with the issue of jury instruction, Defendant's challenge comes after she made no objection at trial to the admission of Defendant's prior convictions. Defendant specifically and distinctly alleges plain error, however, and we therefore review this issue for plain error. *See* N.C.R. App. P. 10(a)(4).

As set forth above, "under a plain error analysis, [a] defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *Jones*, 355 N.C. at 125, 558 S.E.2d at 103. "The necessary examination is whether there was a '*probable* impact' on the verdict, not a *possible* one." *Carter*, 366 N.C. at 500, 739 S.E.2d at 551 (citation omitted). In the present case, the State had the burden of proving that Defendant was previously convicted of a felony. *See State v. Wood*, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684 (2007).

Rule 401 defines relevant evidence as "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.R. Evid. 401. This rule is limited by Rule 403, which provides that "relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C.R. Evid. 403. Relevant evidence may take the form of "certified

STATE V. THOMPSON

Opinion of the Court

judgments to prove the existence of a prior felony[.]” and such evidence is properly admissible. *State v. Fortney*, 201 N.C. App. 662, 665, 687 S.E.2d 518, 521 (2010).

In *Fortney*, the defendant argued that admission of his prior rape conviction should not have been admitted as evidence to support his charge of drug possession. *Id.* at 663, 687 S.E.2d at 520. This Court disagreed with the defendant’s contention and provided that N.C. Gen. Stat. § 14-415.1(b), the same statute at issue in the case at bar, “expressly allows for the admission of certified judgments to prove the existence of a prior felony” and, therefore, the admission was properly admitted. *Id.* at 665, 687 S.E.2d at 521. Further, this Court concluded the defendant was not prejudiced by the admission of prior convictions because “defendant’s prior conviction for rape is not substantially similar to the offenses for which he was tried[.]” *Id.* at 667, 687 S.E.2d at 522.

Here, to meet its burden, the State introduced Defendant’s past conviction of possession of stolen goods from 13 November 2013. This conviction was part of a consolidated judgment that included three other possession of stolen goods convictions. Through the testimony of the Clerk of Superior Court and the publication of the consolidated judgment, the State included evidence of the three additional past convictions. As in *Fortney*, per statute, this evidence was admissible to prove the existence of a prior felony. *See Fortney*, 201 N.C. App. at 665, 687 S.E.2d at 521; N.C. Gen. Stat. § 14.415.1(b) (“When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in

the courts of any state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section.”). As such, Defendant has failed to demonstrate that evidence of her past convictions is inadmissible, and the trial court did not err.

Further, as Defendant failed to demonstrate the evidence was improperly admitted, she failed to show that the alleged error had a probable impact on the jury’s finding of guilt. *See Jones*, 355 N.C. at 125, 558 S.E.2d at 103; *see Carter*, 366 N.C. at 500, 739 S.E.2d at 551. We therefore conclude the trial court committed no error and certainly no plain error.

D. Ineffective Assistance of Counsel

Defendant contends that her case was prejudiced by IAC. More specifically, Defendant contends, per *Strickland v. Washington*, that trial counsel’s failure to request a stipulation as to Defendant’s status as a felon, failure to file a pre-trial motion *in limine* to exclude evidence of Defendant’s prior convictions, and failure to request a redaction of the judgment published to the jury prejudiced Defendant. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We disagree.

Under *Strickland*, a defendant must satisfy a two-part test to show IAC: “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.” 466 U.S. at 687,

104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *see also State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (“In order to meet this burden [the] defendant must satisfy a two part test.”). To demonstrate prejudice, a defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. “[T]here is no reason for a court deciding an ineffective assistance of counsel claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. “IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citation omitted).

In the present case, Defendant contends that she was unfairly prejudiced by the blatant admission of three additional prior convictions. Defendant, however, has failed to provide any support for this contention, and therefore has failed to meet the required standard for proving an IAC claim. *See State v. Lotharp*, 148 N.C. App. 435, 445, 559 S.E.2d 807, 812 (2002) (“Defendant has failed to show that the admission of the irrelevant felonies unfairly prejudiced the outcome such that a different result would have been reached by the jury had the evidence not been admitted.”). Even without the admission of the additional convictions—or without redacting the

judgment presented to the jury—Defendant was still a convicted felon, and there is no evidence that introduction of these other convictions had a probable impact on the jury’s decision.

Additionally, even if trial counsel had requested to stipulate to Defendant’s status as a felon, the State was under no obligation to accept the stipulation. *See Fortney*, 201 N.C. App. at 666, 687 S.E.2d at 552. “[T]he prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that the criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.” *Old Chief v. United States*, 519 U.S. 172, 186–87, 117 S. Ct. 644, 653, 136 L. Ed. 2d 574, 591–92 (1997). Defendant contends her trial counsel’s failure to stipulate Defendant’s status as a felon rendered IAC. As the State is under no obligation to accept such stipulation, however, Defendant has failed to establish that trial counsel was ineffective. *See State v. Little*, 191 N.C. App. 655, 661, 664 S.E.2d 432, 436–37 (2008).

Defendant has failed to prove how she was prejudiced by the admission of additional prior convictions. Had Defendant’s trial counsel requested a stipulation, filed a pre-trial motion to exclude such evidence, or requested a redaction of the judgment published to the jury, the result of the proceeding would have been the same.

Thus, the cold Record on appeal reveals Defendant was not prejudiced and did not receive IAC, and we dismiss this claim. *See Fair*, 354 N.C. at 166, 557 S.E.2d at

524; *see also Fortney*, 201 N.C. App. at 666, 687 S.E.2d at 522; *Lotharp*, 148 N.C. App. at 445, 559 S.E.2d at 812; *Little*, 191 N.C. App. at 661, 664 S.E.2d at 436–37.

IV. Conclusion

The State presented sufficient evidence such that the trial court’s denial of Defendant’s Motion to Dismiss was proper, and Defendant failed to establish she was prejudiced by the trial court’s jury instructions regarding the admission of deputies’ body camera videos for substance or by the admission of additional prior convictions. As such, we hold the trial court neither erred nor plainly erred. We further conclude Defendant did not receive IAC and dismiss this claim.

NO ERROR in part, NO PLAIN ERROR in part, and DISMISSED in part.

Judge STROUD and Judge CARPENTER concur.

Report per Rule 30(e).