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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-486

Filed 7 May 2024

Pitt County, No. 18 CRS 54622

STATE OF NORTH CAROLINA

v.

WILLIAM FREDERICK KUERS, Defendant.

Appeal by defendant from judgment entered 22 March 2022 by Judge Marvin K. Blount in Pitt County Superior Court. Heard in the Court of Appeals 20 March 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.

Kimberly P. Hoppin for defendant-appellant.

DILLON, Chief Judge.

Defendant William Frederick Kuers appeals his conviction for possession of a firearm by a felon.

I. Background

On the evening of 7 July 2018, Defendant had an altercation with a tow truck driver at an apartment complex where Defendant lived. Police arrived on the scene

and mediated the dispute. Police were also informed that the caller noted a gun was mentioned during the altercation prior to police arrival. Officers learned that Defendant was a convicted felon, obtained consent to search Defendant's apartment for firearms, and found a gun in the basement. Defendant was subsequently arrested for possession of a firearm by a convicted felon.

II. Analysis

Defendant presents multiple arguments on appeal, which we address in turn.

A. Jury Instruction Regarding Defendant's Failure to Testify

Defendant argues the trial court erred in failing to instruct the jury regarding the effect of Defendant's election not to testify at trial.

"A nontestifying defendant . . . has the right *upon request* to have the trial court instruct the jury that his failure to testify may not be held against him." *State v. Randolph*, 312 N.C. 198, 206, 321 S.E.2d 864, 869 (1984) (emphasis added). *See also Carter v. Kentucky*, 450 U.S. 228, 305 (1981) ("[W]e hold that a state trial judge has the constitutional obligation, *upon proper request*, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify.").

Here, the trial court did not give any instruction that the jury must not give evidentiary weight to Defendant's decision not to testify. *See Randolph*, 312 N.C. at 206, 321 S.E.2d at 869 (noting that Section 8-54 of our General Statutes "provide[s] that the failure of a defendant to testify creates no presumption against him"); N.C. Gen. Stat. § 8-54 (2023).

STATE V. KUERS

Opinion of the Court

For the reasoning below, we conclude that the trial court's omission did not constitute reversible error.

During the trial, when Defendant was making his decision not to testify, the trial court stated that it would instruct the jury of its duty *not* to give any evidentiary weight to Defendant's decision not to testify. However, the trial court did not give that instruction during its charge to the jury. And after the trial court gave the jury charge, the court asked if there was anything it needed to know with respect to the charge, to which Defendant's counsel stated, "No, sir."

Defendant contends that his argument concerning the trial court's omission of the instruction is preserved for our review. We disagree since his counsel failed to request that the instruction be given during the charge conference and otherwise did not object when the trial court informed counsel at the charge conference of the instructions it intended to give, instructions which omitted any reference to Defendant's decision not to testify, as explained below.

Our Supreme Court has held that "a request for an instruction *at the charge conference* is sufficient [] to warrant [an appellate court's] full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial court's attention at the end of the instructions." *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) (emphasis added). Our Supreme Court has reiterated that holding on a number of occasions. *See, e.g., State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018); *State v. Maske*,

358 N.C. 40, 53, 591 S.E.2d 521, 530 (2004); *State v. Hood*, 332 N.C. 611, 617, 422 S.E.2d 679, 682 (1992). *See also State v. Pakulski*, 319 N.C. 562, 574–75, 356 S.E.2d 319, 327 (1987).

The present case is distinguishable. Unlike the cases cited above, here Defendant’s counsel made no request that the instruction be given during the charge conference after being informed by the trial court of the instructions it intended to give, which did not include any instruction regarding Defendant’s decision not to testify. And when asked during the charge conference if there were any additional requested instructions, Defendant’s attorney stated, “No, sir.”

In its 2018 *Lee* decision, our Supreme Court explained that an omission of an instruction that the trial court at the charge conference had indicated that it would give was fully reviewable because the trial court’s subsequent omission of the instruction from the jury charge occurred “without prior notice to the parties[.]” *Lee*, 370 N.C. at 673, 811 S.E.2d at 565.

It is true in the present case that the trial court had stated during the trial—prior to the charge conference—its intent to give the instruction regarding Defendant’s decision not to testify. However, Defendant’s counsel was put on notice *during the charge conference* by the trial court that it would be giving instructions which omitted any instruction concerning Defendant’s decision not to testify. And during the charge conference Defendant’s counsel never made any request that the instruction be included nor lodged any objection when the trial court essentially

STATE V. KUERS

Opinion of the Court

indicated that it would not be giving the instruction.

Our Supreme Court has expressly held that a defendant who fails to request an instruction or to object to its omission at the charge conference and after the charge is given, waives appellate review of that omission:

Counsel . . . did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

State v. White, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998).

Therefore, Defendant has waived any argument on appeal concerning the omission of the instruction. *See, e.g., State v. McNeil*, 350 N.C. 657, 696, 518 S.E.2d 586, 510 (1999) (holding that a defendant waives challenging the omission of an instruction which he did not request at the charge conference).

Defendant has asked that we review the trial court's omission for plain error.

See State v. Collington, 375 N.C. 401, 407, 847 S.E.2d 691, 696 (2020).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that any error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up).

Assuming *arguendo* the trial court erred by failing to give the instruction, we cannot say the omission of a jury instruction concerning Defendant's failure to testify

had a probable impact on the jury's verdict in this case, given the evidence presented by the State of Defendant's guilt. Therefore, we conclude there was no plain error.

B. Motion to Dismiss for Insufficient Evidence

Defendant also contends the trial court should have granted his motion to dismiss the charge of possession of a firearm by a felon due to insufficient evidence. We disagree.

When reviewing the denial of a motion to dismiss for insufficiency of the evidence, our Court "need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator, with 'substantial evidence' consisting of that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Elder*, 383 N.C. 578, 586, 881 S.E.2d 227, 234 (2022) (cleaned up). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016).

"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 guilty [plea], possessed a firearm." *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 764 (2010) (citation omitted); N.C. Gen. Stat. § 14-415.1(a) (2023). Defendant does not contest his felon status; the only question here is whether Defendant possessed a firearm after his

1992 felony convictions.

Here, the State relied on a theory of constructive possession to prove that Defendant possessed a firearm on the night in question.

A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it. . . . Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession.

State v. Miller, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (cleaned up).

When viewed in the light most favorable to the State and giving the State every reasonable inference drawn from the evidence, *see State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985), we hold that Defendant constructively possessed the firearm. The evidence presented at trial tends to show that Defendant was the only person living in the apartment's basement where the firearm was found and only his belongings were kept in the basement. Further, during Defendant's altercation with the tow truck driver, Defendant told one of the women living upstairs in his apartment, "Go get my gun," thus implying he possessed a gun. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

C. Motion to Fire Defense Counsel

Finally, Defendant contests the trial court's denial of his motion to fire his defense counsel during trial. Defendant sought to fire his appointed counsel because counsel did not cross-examine two witnesses (the women living on the upper levels of

the apartment) in the aggressive manner in which Defendant wanted them to be cross-examined. Counsel informed the court of his reasoning, explaining that he “wasn’t going to argue with witnesses,” “didn’t see any value in being abusive [to] the two lay witnesses,” and “got them to say what [he] thought [he] could get them to say that would be helpful to [Defendant’s] case.”

On appeal, “[w]e review the denial of a defendant’s request for the appointment of substitute counsel for an abuse of discretion.” *State v. Strickland*, 283 N.C. App. 295, 302, 872 S.E.2d 594, 601 (2022). “An abuse of discretion occurs when the trial court’s decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (cleaned up).

The right to appointed counsel does not “include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney’s services.” *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976). “A disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel, and tactical decisions, such as . . . how to conduct cross-examinations . . . are ultimately the province of the lawyer.” *Strickland*, 283 N.C. App. at 302–03, 872 S.E.2d at 601–02 (cleaned up). “[W]hen counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client’s wishes must control[.]” *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991). However, “[o]ur caselaw further establishes that conclusory allegations of impasse are not enough. Nor is the existence of a

STATE V. KUERS

Opinion of the Court

personality conflict or a belief that defense counsel does not have the defendant's best interest at heart." *Strickland*, 283 N.C. App. at 303, 872 S.E.2d at 602 (cleaned up).

In this case, while there was a disagreement between Defendant and his appointed counsel about cross-examination tactics, it is not evident there was an absolute impasse. The court inquired into the disagreement, and counsel explained that he refused to further cross-examine the witnesses due to ethical considerations regarding the treatment of witnesses. Thus, we conclude that the trial court did not abuse its discretion in denying Defendant's motion to fire his appointed counsel.

III. Conclusion

We conclude Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges COLLINS and GORE concur.

Report per Rule 30(e).