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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-873

Filed 21 May 2024

Surry County, No. 21 CRS 052074

STATE OF NORTH CAROLINA

v.

BRENT HERBERT PICA, Defendant.

Appeal by Defendant from judgment entered 28 March 2023 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 30 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Eric R. Hunt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for Defendant.

GRIFFIN, Judge.

Defendant Brent Herbet Pica appeals from the trial court's judgment entered after the jury returned a verdict finding him guilty of possession of a firearm by a felon. Defendant argues the trial court erred by denying Defendant's motion to dismiss and entering judgment against him because the State failed to establish that

Defendant had actual or constructive possession of a firearm. We hold the trial court did not err by denying Defendant's motion to dismiss.

I. Factual and Procedural Background

In 2021, Defendant and his girlfriend lived across the street from her uncle, B. Bowman. Bowman frequently allowed them to drive his vehicle and gave it to them in early September. Bowman failed to transfer title to Defendant following the gift. On 24 September 2021, Defendant and his girlfriend went to an internet sweepstakes location. At 1:00 p.m., they left the location with a neighbor in the backseat. Detective Richardson of the Surry County Sheriff's Office followed Defendant and, after observing Defendant's vehicle traveling below the speed limit and veering into the left lane, initiated a traffic stop. A K-9 unit responded to the traffic stop while Detective Richardson ran the occupants' identifications for validation. The K-9 unit alerted to the presence of narcotics. There was an empty syringe in the backseat beside the neighbor. Detective Richardson searched the vehicle and located a handgun in the empty space of the plastic unit housing the vehicle's gearshift. The handgun had a bullet in the chamber. Detective Richardson arrested Defendant.

On 14 April 2022, Defendant was indicted for possession of a firearm by a felon. On 27 March 2023, the matter came on for trial in Surry County Superior Court. Defendant stipulated to his prior felony conviction. Following Detective Richardson's testimony, Defendant moved to dismiss the charge for insufficient evidence. The trial court denied his motion. On 28 March 2023, the jury returned a verdict finding

Defendant guilty of possession of a firearm by a felon. Defendant entered a notice of appeal in open court.

II. Analysis

Defendant argues the trial court erred by denying his motion to dismiss and entering judgment against him because the State failed to prove Defendant's actual or constructive possession of the firearm.

We review the trial court's decision to deny a motion to dismiss for insufficient evidence de novo. *State v. Bradsher*, 382 N.C. 656, 658, 879 S.E.2d 567, 569 (2022); *see also State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Lamp*, 383 N.C. 562, 569, 884 S.E.2d 623, 627 (2022) (citations and internal marks omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citations and internal marks omitted). On review, "[t]he evidence is to 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; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *Id.* (citation and internal marks omitted). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence."

State v. Thomas, 350 N.C. 315, 343, 514 S.E.2d 486, 503 (1990) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

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 has pled guilty to a felony and (2) the defendant, subsequent to the conviction or guilty plea, possessed a firearm.” *State v. Sharpe*, 289 N.C. App. 84, 87–88, 887 S.E.2d 116, 119 (2023) (citation and internal marks omitted). “It is well established that possession may be actual or constructive.” *State v. Malachi*, 371 N.C. 719, 730, 821 S.E.2d 407, 416 (2018) (quoting *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 348 (2012)). “Actual possession requires that a party have physical or personal custody of the item.” *State v. Chevallier*, 264 N.C. App. 204, 215, 824 S.E.2d 440, 449 (2019) (citation and internal marks omitted). In contrast to actual possession, “[a] defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it.” *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348 (citation and internal marks omitted). “An inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found.” *State v. Tisdale*, 153 N.C. App. 294, 297–98, 569 S.E.2d 680, 682 (2002) (citation and internal marks omitted). However, “this inference is rebuttable and if the accused offers evidence rebutting the inference, the State must show other incriminating circumstances before constructive possession may be inferred.” *Id.* at 298, 569 S.E.2d at 682 (citation and internal

marks omitted). To determine whether other incriminating circumstances support a finding of constructive possession, we consider:

(1) the defendant's ownership and occupation of the property []; (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

State v. Chekanow, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018) (citation and internal marks omitted). While no one factor controls, we must consider the totality of the circumstances. *Id.* at 496, 809 S.E.2d at 552. “[O]wnership of the [vehicle in] which the contraband is found is strong evidence of control, and thus, should be considered as a weighty factor in the analysis. *Id.* at 497, 809 S.E.2d at 552-53 (citations and internal marks omitted).

Here, because Defendant stipulated to his prior felony conviction, the State's only burden was to show Defendant possessed the firearm found in his vehicle. Defendant contends he did not have exclusive control of the vehicle where the firearm was found. The State's evidence showed that Bowman had given him the vehicle as a gift and Defendant drove it frequently prior to the traffic stop. *See Tisdale*, 153 N.C. App. at 298, 569 S.E.2d at 682 (explaining North Carolina courts have “consistently held that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car” (cleaned up)). Regardless, the State

introduced substantial evidence of other incriminating circumstances to show Defendant had constructive possession of the firearm.

The State showed that Defendant, as the driver, was in close proximity to the firearm and could easily access and control the empty space where it was found by lifting the plastic housing with a few fingers. The State also presented evidence that Defendant's slow speed and inability to maintain his lane could be attributed to nervousness. The Defendant's nervousness about being followed by a marked law enforcement vehicle could also be counted as a suspicious circumstance considering he was not intoxicated and did not have any other contraband in his possession.

Viewed in the light most favorable to the State, the evidence of Defendant's frequent use of the vehicle, his proximity to and control of the area where the firearm was located, and his nervousness at the traffic stop, constitute sufficient incriminating circumstances to support a finding of constructive possession. Accordingly, the trial court did not err by denying Defendant's motion to dismiss.

III. Conclusion

We hold the trial court did not err by denying Defendant's motion to dismiss and entering judgment against him.

NO ERROR.

Chief Judge DILLON and Judge STADING concur.

Report per Rule 30(e).