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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-823

Filed 6 August 2024

Cleveland County, No. 21CRS54361

STATE OF NORTH CAROLINA

v.

LINDA STIDHAM, Defendant.

Appeal by defendant from judgment entered 18 August 2022 by Judge William Anderson Long Jr. in Superior Court, Cleveland County. Heard in the Court of Appeals 30 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State.

MK Mann Law, by Mikayla Mann, for defendant-appellant.

STROUD, Judge.

Defendant appeals a judgment convicting her of possession of methamphetamine. Because the record is not sufficient for us to consider Defendant's argument of ineffective assistance of counsel, we dismiss this issue without prejudice. We also conclude there was no plain error in the jury instructions.

I. Background

The State's evidence tended to show that in November of 2021, Defendant was driving, and she was stopped by a police officer on suspicion of driving with a suspended license. The officer asked for permission to search her vehicle, she consented, and the officer found a bag of methamphetamine between the passenger side seat and the console. Defendant was arrested and indicted for possession of methamphetamine. Defendant testified on her own behalf that on the day she was arrested, she had given "a lot of . . . friends rides," but the methamphetamine was not hers nor did she know it was in her vehicle. A jury found Defendant guilty, and Defendant appeals.

II. Ineffective Assistance of Counsel

Defendant first contends she "received *per se* ineffective assistance of counsel where her trial attorney conceded guilt and the record does not show that her consent was knowing and voluntary." After the charge conference, Defendant's attorney informed the Court that "[a]s part of my closing, I am going to concede certain criminal offenses. I would appreciate it if you would put on the record a *Harbison* inquiry."

A "*Harbison* inquiry" regards the principle enunciated in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), in which the N.C. Supreme Court held that "a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel."

State v. Givens, 246 N.C. App. 121, 126, 783 S.E.2d 42, 46 (2016) (citation omitted).

[O]ur Supreme Court has held that *per se* ineffective assistance of counsel exists in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent. *Harbison* applies when defense counsel concedes defendant's guilt to either the charged offense or a lesser included offense. However, *Harbison* does not apply where defense counsel has conceded an element of a crime charged, while still maintaining the Defendant's innocence.

State v. Foreman, 270 N.C. App. 784, 788-89, 842 S.E.2d 184, 187-88 (2020) (citations and quotation marks omitted). Defendant contends "there is no lesser included offense to possession of methamphetamine . . . [thus], it is clear, given his request for a *Harbison* inquiry, that trial counsel admitted guilt in a situation where there is no lesser included offense." In other words, the "certain criminal offenses" could only be the possession of methamphetamine.

The State contends we cannot review this issue as "the record on appeal does not contain a verbatim transcript of closing arguments or a narrative summary of those arguments." We agree with the State. Defendant's failure to have the alleged concessions made during closing arguments recorded prevents this Court from reviewing what they were and therefore whether the trial court's inquiry sufficiently demonstrated Defendant's knowing and voluntary acquiescence to any concessions her counsel may have made. While the State also contends a motion for appropriate relief at the trial level is "unnecessary[.]" and thus this Court should dismiss with prejudice, it makes no argument as to *why* this Court should dismiss the issue with prejudice and not allow such a motion, as we have done in other cases. *See, e.g., State*

v. Satterthwaite, 234 N.C. App. 440, 440, 759 S.E.2d 369, 370 (2014) (“Where the cold record does not demonstrate whether defendant received ineffective assistance of counsel, this argument is dismissed without prejudice.”). We therefore dismiss this issue without prejudice.

III. Jury Instructions

Defendant’s only other argument is “the trial court plainly erred by instructing the jury on the theory of actual possession where that theory was not supported by evidence.” (Capitalization altered.) Although the State does not explicitly concede error, its argument focuses on *State v. Robinson*, where according to the State,

the trial court instructed the jury on constructive and actual possession when the evidence only supported constructive possession. 255 N.C. App. 397, 409-12, 805 S.E.2d 309, 318-319 (2017). Under plain error review, this Court determined that the defendant failed to show the erroneous instruction had a probable impact on the jury’s finding of guilt.

In *Robinson*, the defendant “argue[d] that the trial court erred by instructing the jury on both actual and constructive possession, on the grounds that there was no evidence to support an instruction on actual possession.” 255 N.C. App. 397, 409, 805 S.E.2d 309, 318 (2017). Just as in this case, the defendant did not object to the jury instructions:

Because defendant did not object to the instruction as given at trial, we consider whether this instruction constitutes plain error. The plain error standard requires a defendant to demonstrate that a fundamental error occurred at trial. To show that an 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. For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict.

Id. at 409-10, 805 S.E.2d at 318 (citations and quotation marks omitted). *Robinson*

then explains:

To prove that a defendant possessed contraband materials, the State must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of the materials. A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. Constructive possession exists when the defendant, while not having actual possession, has the intent and capability to maintain control and dominion over the narcotics.

Id. at 411, 805 S.E.2d at 318-19 (citations, quotation marks, and ellipses). *Robinson*

further notes

that there was substantial evidence that defendant constructively possessed the items seized during the search, and defendant has not contested the sufficiency of the evidence of constructive possession. *We agree with defendant that there was no evidence that defendant was in actual possession of either the firearms or the narcotics seized from the house.* These items were found in the master bedroom of the home, rather than on defendant’s person. *We conclude, however, that defendant has failed to show that it is probable, not just possible, that absent the instructional error the jury would have returned a different verdict. The primary factual issue for the jury to resolve was whether to find defendant guilty based upon the State’s evidence or to believe defendant’s explanations for the presence of firearms and cocaine in the house.* Simply put,

the question for the jury was whether to believe that defendant's sister-in-law planted the drugs and that his wife's brother was storing weapons in defendant's house. *We conclude without difficulty that the distinction between actual and constructive possession did not play a significant role in the jury's decision.*

Id. at 411-12, 805 S.E.2d at 319 (emphasis added) (citation and quotation marks omitted).

Here, the drugs were found in Defendant's car between the passenger seat and the center console, not on her person, so Defendant did not have actual possession though the evidence did support constructive possession. *See id.* at 411, 805 S.E.2d at 319; *see also State v. Best*, 214 N.C. App. 39, 46-47, 713 S.E.2d 556, 562 (2011) (“[P]ower to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and [constructive] possession sufficient to go to the jury.”).

In car cases, not only is ownership sufficient, but an inference of constructive possession can also arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

Best, 214 N.C. App. at 46-47, 713 S.E.2d at 562 (citations, quotation marks, and

brackets omitted).

As in *Robinson*, “[t]he primary factual issue for the jury to resolve was whether to find defendant guilty based upon the State’s evidence or to believe defendant’s explanations for the presence of [methamphetamine.]” 255 N.C. App. at 412, 805 S.E.2d at 319. Defendant tries to distinguish her case from *Robinson* by noting she had admitted to using methamphetamine in the past, so the jury could have applied the “actual possession” instruction to when she admittedly had possessed drugs by using them in the past. But considering the entirety of the jury instructions, we deem it unlikely the jury would have believed it was to consider Defendant’s possession of methamphetamine she admitted using in the past *instead* of the bag found in Defendant’s car, as she was charged in this case. As in *Robinson*, Defendant here “has failed to show that it is *probable, not just possible*, that absent the instructional error the jury would have returned a different verdict. . . . We conclude without difficulty that the distinction between actual and constructive possession did not play a significant role in the jury’s decision.” *Id.* (emphasis added). This argument is overruled.

IV. Conclusion

As we are unable to review Defendant’s contention regarding ineffective assistance of counsel, we dismiss this argument. Further, we conclude there was no plain error in the trial court’s jury instructions.

DISMISSED AND NO PLAIN ERROR.

STATE V. STIDHAM

Opinion of the Court

Judges COLLINS and WOOD concur.

Report per Rule 30(e).