

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-164

Filed 17 September 2024

Beaufort County, Nos. 22CRS279630, 22CRS000687

STATE OF NORTH CAROLINA

v.

JERMAINE KENDALL WARREN

Appeal by Defendant from judgment entered 2 August 2023 by Judge William D. Wolfe in Beaufort County Superior Court. Heard in the Court of Appeals 30 August 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Charles G. White, for the State-Appellee.*

*Richard Croutharmel for Defendant-Appellant.*

PER CURIAM.

Defendant Jermaine K. Warren appeals from the trial court's judgment entered upon a jury's guilty verdict of possession of a firearm by a felon. Defendant argues that the trial court plainly erred in its jury instruction on constructive possession. We find no error, much less plain error.

## **I. Background**

Defendant was pulled over by a police officer employed by the City of Washington, North Carolina on 27 August 2022. The officer smelled a strong odor of marijuana coming from the car and detained Defendant, who was the car's sole occupant. The officer searched the car and found a handgun inside the glove box and a small piece of marijuana in the trunk.

Defendant was charged with possession of a firearm by a felon and possession of marijuana. He was also indicted for having attained habitual felon status. The case went to trial, and the trial court dismissed the charge of possession of marijuana. The jury found Defendant guilty of possession of a firearm by a felon and of having attained habitual felon status. Defendant was sentenced to 132 to 171 months' imprisonment. Defendant gave proper notice of appeal in open court.

## **II. Discussion**

Defendant argues that the trial court plainly erred in its jury instruction on constructive possession.

Under the plain error rule, "errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

For error to constitute plain error, a defendant must 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks, brackets, and citations omitted).

North Carolina Pattern Jury Instruction—Criminal 104.41

Actual-Constructive Possession provides, in pertinent part:

Possession of a(n) [substance] [article] may be either actual or constructive. A person has actual possession of a(n) [substance] [article] if the person has it on the person, is aware of its presence, and (either alone or together with others), has both the power and intent to control its disposition or use.

A person has constructive possession of a(n) [substance] [article] if the person does not have it on the person but is aware of its presence, and has (either alone or together with others), both the power and intent to control its disposition or use. A person's awareness of the presence of the [substance] [article] and the person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.[]

....

*NOTE WELL: Use the following paragraph to charge on constructive possession of a substance or article on premises or in a place, e.g., a vehicle, not in close physical proximity to the defendant.*

[If you find beyond a reasonable doubt that a(n) [substance] [article] was found [in] [on] [at] certain [premises] [place] and that the defendant exercised control over [those premises] [that place] whether or not the

defendant owned [them] [it], this would be a circumstance from which you may infer that the defendant was aware of the presence of the [substance] [article] and had the power and intent to control its disposition or use.]

N.C.P.I.–CRIM. 104.41 (Emphasis in original).

The trial court instructed the jury, in relevant part, as follows:

Possession of an article may be either actual or constructive. A person has actual possession of an article if the person has it on their person, is aware of its presence, and either alone or together with others, has both the power and intent to control its disposition or use.

A person has constructive possession of an article if the person does not have it on the person but is aware of its presence, and has either alone or together with others, both the power and intent to control its disposition or use.

A person's awareness of the presence of the article and the person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.

If you find beyond a reasonable doubt that an article was found in a certain vehicle and that the defendant exercised control over that vehicle whether or not the defendant owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the article and had the power and intent to control its disposition or use.

Defendant contends that the final paragraph erroneously “allowed the jury to convict [Defendant] based solely on the fact that [he] drove a car with a gun in it, regardless of whether he knew the gun was present.”

As a general matter, the North Carolina Pattern Jury Instructions are “[t]he preferred method of instructing the jury[.]” *State v. Solomon*, 117 N.C. App. 701, 706,

453 S.E.2d 201, 205 (1995) (citation omitted). Furthermore, jury instructions that model N.C.P.I.–CRIM. 104.41 accurately state the law of constructive possession and “clearly place[] the burden on the State to prove beyond a reasonable doubt that defendant possessed the [article].” *Id.*

The trial court’s jury instruction here accurately adapted N.C.P.I.–CRIM. 104.41 to the facts of this case and accurately stated the law of constructive possession. Accordingly, the trial court did not err, much less plainly err, in its jury instruction on constructive possession.

NO ERROR.

Panel Consisting of:

Judges COLLINS, FLOOD, and THOMPSON.

Report per Rule 30(e).