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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-130

Filed 17 December 2024

Rowan County, No. 21-CRS-53404

STATE OF NORTH CAROLINA

v.

ALLEN DOUGLAS FORD

Appeal by defendant from judgment entered 23 February 2022 by Judge Mike Adkins in Superior Court, Rowan County. Heard in the Court of Appeals 6 November 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Nathan D. Childs, for the State.*

*MK Mann Law, by Mikayla Mann, for defendant.*

ARROWOOD, Judge.

Allen Douglas Ford (“defendant”) appeals from judgment entered 23 February 2022 upon his conviction of possession of a firearm by a felon. On appeal, defendant argues: (1) the trial court committed plain error by allowing evidence that defendant was engaged in sex acts with a minor, (2) defendant received ineffective assistance of counsel, and (3) the evidence was insufficient to support a conviction of

possession of a firearm by a felon. For the following reasons, we find no error and affirm the conviction.

I. Background

On 8 November 2021, defendant was indicted on the charge of possession of a firearm by a convicted felon. The matter came on for trial on 20 February 2023; at the outset of trial, the deputy clerk testified that defendant was previously convicted of felony possession of cocaine. Additional evidence at trial tended to show the following:

On 30 August 2021, Detective<sup>1</sup> Arthur Reid (“Detective Reid”) and Officer Norman Hill (“Officer Hill”) were separately on patrol and both responded to a suspicious vehicle call at approximately 11:20 p.m. The dispatch directed them to 2865 North Cannon Boulevard in Kannapolis, which had once been a Walmart but was being used for truck parking at the time of the incident. When Detective Reid arrived at the location, he approached the suspicious vehicle, which was parked in the truck parking lot with no other vehicles nearby, in a marked patrol SUV with LED headlights on. Detective Reid also testified that when he arrived at the parking lot, defendant’s vehicle and the caller’s vehicle were the only two cars present at the time. Detective Reid had not turned on his police lights or sirens when approaching

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<sup>1</sup> Reid was a patrol officer with the Kannapolis Police Department at the time and was later promoted to the position of detective. Because the transcript refers to him as Detective Reid, we do the same throughout the opinion.

the vehicle.

As he approached the vehicle, Detective Reid observed defendant exit the back seat of the vehicle and enter the driver's seat. Then, the vehicle's headlights came on and Detective Reid saw the vehicle slowly start to move forward. No other individuals were observed near the vehicle at the time. At that point, Detective Reid stopped the vehicle and approached the driver's side. Detective Reid testified that defendant was sweating, nervous, and appeared to be in a hurry to leave. Reid also saw a young female in the back seat of the car "pulling up her pants from her lower leg area." He questioned defendant about what they were doing in the area and defendant stated that they were "just two friends hanging out"

Due to the nature of the call, Detective Reid informed defendant that he had to run his information. At this point, Officer Hill arrived at the scene and also approached the driver's side of the vehicle. After running defendant's information, Detective Reid removed the female from the vehicle and obtained her information. Officer Hill called Detective Reid back to the side of the vehicle where Officer Hill had found a revolver lying about five to six feet away from the vehicle, where he also found fresh leftover trash from Sonic outside the vehicle where the gun was located. Detective Reid testified that the revolver was clean with no grass clippings or dirt on it, "like it had just been thrown or placed there."

After Detective Reid and Officer Hill found the revolver, they detained defendant temporarily and secured the revolver while they completed their

investigation. During their investigation of the vehicle and the surrounding area, Detective Reid and Officer Hill found an open container of beer inside the vehicle on the driver's side floorboard, marijuana, and food and drinks from a nearby gas station. The trash located with the gun matched the trash found in the vehicle. They learned that defendant's license had been suspended and called the female's father because she was underage. During their investigation of the area, the officers also noticed that the windows for the driver's seat and the rear passenger seat were open.

Upon discovery of the firearm, Detective Reid and Officer Hill decided to detain defendant. Officer Hill testified that the gun was found amongst fresh trash that was not weathered, torn, stepped on, or windblown, "the typical stuff that you would see that's been laying out in the parking lot for awhile." Detective Reid further testified that although the Kannapolis Police Department "swab[bed] every firearm that is seized[,] they did not request DNA testing or collect finger prints from the firearm, because in "situations where a person is charged with possession or constructively possesses an item, we don't typically send that off if we have reasonable belief that it belongs to that suspect."

During their testimony, both Detective Reid and Officer Hill made several statements about the female passenger. Neither the State nor defendant's counsel objected to any testimony given about the female being underage or the fact that the female was in the middle of pulling her pants up when Detective Reid approached the vehicle.

At the close of State’s evidence, and again at the close of all the evidence, defendant’s trial counsel moved to dismiss the charge for possession of a firearm by a felon, arguing there was insufficient evidence to establish exclusive constructive possession. The trial court denied these motions. After deliberation, the jury found defendant guilty of possession of a firearm by a felon. Defendant gave oral notice of appeal on 23 February 2023.

## II. Discussion

On appeal, defendant argues: (1) the trial court committed plain error in allowing evidence that defendant was engaged in sex acts with a minor; (2) defendant received ineffective assistance of counsel; and (3) the evidence was insufficient to support a conviction for possession of a firearm by a felon. We address each argument in turn.

### A. Evidence of Sexual Acts with a Minor

First, defendant argues that the trial court committed plain error by *sua sponte* failing to strike testimony from Detective Reid and Officer Hill about defendant engaging in sexual activity with a minor. Specifically, defendant contests several pieces of testimony from both Detective Reid and Officer Hill that relate to the female passenger in the vehicle on the date of the incident including Detective Reid’s statements that the female was “under age[,]” and was found “pulling her pants from her lower leg area.” We disagree.

#### 1. Standard of Review

Because defendant did not preserve the appeal by objecting at trial to the admission of testimony that defendant engaged in sexual activity with a minor, we review the trial court's action for plain error. Under this standard of review, the defendant "has the burden of showing: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Jones*, 358 N.C. 330, 346 (2004). Fundamental error is an error that is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660 (1983) (cleaned up). To show that an error is fundamental, defendant must show that he was prejudiced such that "absent the erroneous admission of the challenged evidence, the jury probably would not have reached its guilty verdict." *State v. Cunningham*, 188 N.C. App. 832, 835 (2008). Additionally, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Crane*, 269 N.C. App. 341, 343 (2020) (cleaned up).

2. Relevancy and Admissibility Under Rules 401, 402, and 404(b)

Defendant first argues that Detective Reid and Officer Hill's testimony about defendant engaging in sexual conduct with a minor should not have been admitted because it was irrelevant, as defendant was not charged with any crimes related to his actions with the underage girl that night. Defendant further argues that the testimony was inadmissible under Rule 404(b) of the North Carolina Rules of

Evidence because the testimony was not admitted under a proper 404(b) purpose. We disagree.

Pursuant to Rule 402 of the North Carolina Rules of Evidence, “[e]vidence which is not relevant is not admissible.” N.C.G.S. § 8C-1, Rule 402 (2023). Relevant evidence is 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.G.S. § 8C-1, Rule 401 (2023). Furthermore, this Court has previously held that “chain of circumstances” evidence is probative and relevant in establishing the context of the crime charged. *See State v. Agee*, 93 N.C. App. 346, 362 (1989).

Finally, under Rule 404(b) of the North Carolina Rules of Evidence,

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2023). Our Supreme Court has consistently held that Rule 404(b) is a rule of inclusion of relevant evidence “subject to but *one* exception requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Agee*, 326 N.C. 542, 550 (1990) (quoting *State v. Coffey*, 326 N.C. 268, 278–79 (1990)).

Here, the trial court did not err in admitting testimony related to defendant engaging in sexual acts with the minor for several reasons. First, on cross-examination, defendant's counsel elicited testimony from Detective Reid about the female passenger's age when he asked Detective Reid to explain why he thought the open container of alcohol belonged to defendant and not the female passenger. Detective Reid appropriately responded saying, "the female cannot purchase alcohol based on her age." Because this testimony was invited by defendant and elicited a response from Detective Reid related to the minor's age, he waived his right to object to the relevancy of this evidence.

Furthermore, defendant challenges Detective Reid's testimony that the female was "under age", was "pulling her pants from her lower leg area", and Detective Reid's opinion that he "thought she was a victim" in this circumstance. Defendant argues this testimony did not serve a proper purpose under Rule 404(b) and thus, the trial court should have excluded this evidence *sua sponte*. However, this testimony was properly admitted under Rule 404(b) by describing the "chain of circumstances" of the charge for possession of a firearm by a felon. Detective Reid's testimony was relevant to establish the context in which the firearm was found near the vehicle and for determining ownership of the firearm. Accordingly, the testimony was offered for a proper 404(b) purpose and was relevant to the crime charged.

3. Rule 403 Appeal

Defendant further argues that the trial court committed plain error in violation



of Rule 403 by allowing Detective Reid and Officer Hill to testify about defendant engaging in sexual conduct with a minor because this testimony was unfairly prejudicial. Rule 403 of the North Carolina Rules of Evidence states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C.G.S. § 8C-1, Rule 403 (2023). Defendant once again concedes that he did not object to admission of these statements at trial and argues that the admission of these statements is plain error.

“[W]ithout any objection to the evidence this Court is limited to plain error review.” *State v. Cunningham*, 188 N.C. App. 832, 837 (2008). However, “[t]he balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error ‘to issues which fall within the realm of the trial court’s discretion.’” *Id.* (quoting *State v. Steen*, 352 N.C. 227, 256 (2000)). Accordingly, because defendant did not object at trial, his argument is not preserved.

B. Ineffective Assistance of Counsel

Next, defendant contends that his trial counsel provided ineffective assistance by failing to object to Detective Reid’s and Officer Hill’s testimony that defendant was with the underage female on the night of the incident. We find defendant has not met the test to show ineffective assistance of counsel.

“The Sixth Amendment to the Constitution guarantees criminal defendants the right to counsel, which courts have recognized necessarily includes the right to effective assistance or representation by counsel.” *State v. Lane*, 271 N.C. App. 307,

311 (2020). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set out a two-prong test for proving ineffective assistance of counsel, which was later adopted by our Supreme Court in *State v. Braswell*, 312 N.C. 553, 562 (1985). This test requires the defendant to show the following:

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 the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687.

"Generally, claims for ineffective assistance of counsel should be considered through a motion for appropriate relief filed in the trial court and not on direct appeal." *State v. Mills*, 205 N.C. App. 577, 586 (2010) (citing *State v. Stroud*, 147 N.C. App. 549, 553 (2001)). If a defendant raises ineffective assistance of counsel on direct appeal,

[i]n order to determine whether a defendant is in a position to adequately raise an ineffective assistance of counsel claim, . . . this Court is limited to reviewing this assignment of error only on the record before us, without the benefit of "information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor[.]" that could be provided in a full evidentiary hearing on a motion for appropriate relief.

*State v. Stroud*, 147 N.C. App. 549, 554–55 (2001) (quoting *State v. Buckner*, 351 N.C. 401, 412 (2000)). “[S]hould the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [motion for appropriate relief] proceeding.” *State v. Fair*, 354 N.C. 131, 167 (2001).

However, even on direct appeal, an ineffective assistance of counsel claim may be decided based on the cold record if the cold record “establish[es] both that the professional assistance defendant received was unreasonable and that the trial court would have had a different outcome in the absence of such assistance.” *Id.* (cleaned up). Ineffective assistance of counsel “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.” *Id.* at 166.

Finally, we note that this Court has consistently held that the plain error standard for unpreserved evidentiary issues is different from the prejudice requirement for ineffective assistance of counsel claims.

Prejudice under plain error requires that the trial court’s error have had a probable impact on the jury’s finding of guilt . . . . In contrast, prejudice under the ineffective assistance of counsel test requires a showing of reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

*Lane*, 271 N.C. App. at 313 (internal quotations omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 693. While the reasonable probability standard requires a showing that “[t]he likelihood of a different result must be substantial, not just conceivable[.]” it requires less to be shown than under the plain error standard. *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Here, defendant argues for the first time on appeal that he received ineffective assistance by defense counsel’s failure to object to Detective Reid and Officer Hill’s testimony about the underage female because this testimony was “clearly inadmissible”. Defendant argues that had his counsel objected to this testimony, it would have been determined inadmissible and would not have reached the jury.

Defendant makes no showing that his counsel’s actions before the trial court were in error to the extent that they were not acting “as the counsel” guaranteed by the Sixth Amendment. As discussed above, the testimony about the female passenger in defendant’s vehicle was admissible to explain the circumstances and the context in which the firearm was discovered by Detective Reid and Officer Hill. The testimony of the female’s age was relevant because defendant’s actions regarding the female were contemporaneous and intertwined with the discovery of the firearm. Furthermore, the testimony was relevant in describing Detective Reid’s process for determining possession of the firearm. In stating that they “didn’t believe she was a threat[.]” and “actually thought she was a victim[.]” Detective Reid effectively ruled

her out of possessing the firearm.

Second, even if defense counsel's failure to object to this testimony was in error, which we have determined it was not, defendant has failed to meet his burden that there was a substantial likelihood of a different outcome occurring had defense counsel objected to the testimony. Independent of Detective Reid's testimony about the female passenger, his testimony, along with Officer Hill's testimony, provided substantial evidence of defendant's guilt. This includes testimony about the condition of the firearm and how it did not seem weathered or affected by the elements in any way and the fact that the trash found with the firearm matched the trash found in defendant's vehicle. Because this testimony was admissible and would not have been excluded had defendant's counsel objected, there is not a substantial likelihood that any objection would have affected the outcome of the trial. Accordingly, we find that defendant did not meet the requirements for showing ineffective assistance of counsel.

C. Sufficient Evidence

As an alternative to the first two issues on appeal, defendant asks this Court to vacate the conviction arguing there was insufficient evidence to support a finding of constructive possession. Specifically, he challenges the trial court's denial of his motions to dismiss the charge that was presented during trial. We disagree.

Our "Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62 (2007). "Upon defendant's motion for dismissal,

the question for the Court is whether there is substantial evidence (1) each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98 (1980)). Substantial evidence exists if there "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79 (1980) (citations omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192 (1995).

To sustain a conviction of possession of a firearm by a felon, the State must show beyond a reasonable doubt that: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Best*, 214 N.C. App. 39, 45 (2011) (cleaned up). "Possession of a firearm may . . . be actual or constructive." *State v. Young*, 190 N.C. App. 458, 460 (2008) (cleaned up). "Constructive possession of an item exists when a person does not have the item in physical custody, but nonetheless has the power and intent to control its disposition." *Id.* (cleaned up).

Mere proximity to an item is insufficient evidence of constructive possession. See *State v. Bailey*, 233 N.C. App. 688, 692 (2014). However, proximity can be sufficient when combined with other incriminating factors. See *Best*, 214 N.C. App.

at 46–47. These factors are:

(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 (2018).

Here, the State provided uncontroverted evidence that defendant had been previously convicted of a felony. Specifically, the State presented evidence in the form of testimony from Sarah Thurmond, the deputy clerk of the Rowan County Superior Clerk of Court that defendant had been previously convicted of felony possession of cocaine.

Additionally, the State offered several pieces of evidence through the testimony of Detective Reid and Officer Hill to establish several incriminating factors that show defendant constructively possessed the firearm. First, the firearm was found “five to six feet . . . from the driver’s side rear quarter panel of the vehicle,” which satisfies the first *Chekanow* factor of the firearm being found in close proximity to defendant. Second, Detective Reid testified that he saw defendant exit the rear seat of the vehicle on the driver’s side, near where the firearm was found, before he approached the vehicle and found the firearm. Defendant’s presence in the area where the firearm was found indicates he had the opportunity to place the firearm there when he exited the back seat of the vehicle. Third, when Detective Reid was speaking with

defendant, he was sweating and appeared to be “really nervous and in a hurry to leave the area.” This behavior, coupled with the fact that this interaction occurred immediately prior to the firearm being discovered, indicates suspicious behavior on the part of defendant. Finally, Officer Hill testified to finding trash around the firearm that matched trash in defendant’s vehicle because the wrappers he found were both wrappers from Sonic, a fast-food chain. Furthermore, he testified that the trash looked “fresh” and recently thrown away. The trash from Sonic links defendant to the trash found around the firearm, further supporting a finding of constructive possession.

Accordingly, because it is undisputed that defendant had been convicted of a felony prior to the incident, and there is sufficient evidence supporting a finding of constructive possession of the firearm, the trial court did not err in denying defendant’s motion to dismiss the charge.

### III. Conclusion

For the foregoing reasons, we find defendant had a fair trial free from prejudicial error.

NO ERROR.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).