NO. COA02-366

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Davidson County
No.01 CRS 50009

CHARLIE WILLIS, III,
Defendant.

Appeal by defendant from judgment entered 3 October 2001 by Judge Robert P. Johnston in the Superior Court in Davidson County. Heard in the Court of Appeals 30 October 2002

Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for the State.

Hall & Hall, by Douglas L. Hall, for defendant-appellant.

HUDSON, Judge.

Defendant appeals the judgment entered upon conviction by a jury of possession of a firearm by a felon. Before the State presented any evidence to the jury, defendant stipulated that he had previously been convicted of a felony.

The State's evidence showed that at approximately 5:30 p.m. on 1 January 2001, State Highway Patrol Trooper Jerry Baity saw a blue Jeep Cherokee traveling north on Interstate Highway 85 in Davidson

County. Trooper Baity estimated the Jeep's speed to be ninety miles per hour in a seventy mile per hour speed zone. Using a K-55 stationary moving radar device, Trooper Baity confirmed that the Jeep was traveling eighty-nine miles per hour. Trooper Baity then stopped the Jeep for speeding and learned that defendant was its only occupant. Trooper Baity approached the Jeep and asked defendant to produce his license and vehicle registration. Defendant handed Trooper Baity his license and a copy of a vehicle rental contract.

Trooper Baity noticed a strong odor of marijuana emanating from the vehicle, and also saw that defendant's eyes were red and watery. Trooper Baity asked defendant if he had any marijuana in the vehicle, and defendant replied that he had smoked marijuana approximately thirty minutes earlier. Trooper Baity returned to his vehicle and called for assistance.

Soon, Trooper Glenn Smith arrived at the scene. The Troopers had defendant get out of the vehicle, placed him in handcuffs, and informed him that they were going to search the vehicle, to which defendant said, "Go ahead." Trooper Baity placed defendant in his patrol car while two other Troopers searched the Jeep.

Trooper Smith found a loaded .380 caliber handgun in a holster in the unlocked glove box of defendant's vehicle. Trooper Smith unloaded the handgun and placed it back in the holster. Trooper Smith then ran a check on the serial number on the handgun, and learned that the handgun was not stolen. Trooper Smith then turned the handgun over to Trooper Baity.

Cheryl Albrecht, the location manager and custodian of records for Triangle Rent-A-Car, identified a copy of defendant's rental contract for the Jeep Cherokee from 28 December 2000 until 4 January 2001, and described it as a business record Triangle kept in the normal course of their business. The prosecutor introduced the record, defendant did not object, and the trial court received the contract into evidence as State's Exhibit 2.

Ms. Albrecht also testified about the policies and procedures followed by Triangle to prepare a vehicle for the next renter and to ensure that no personal belongings remain in the vehicle. According to Ms. Albrecht, Triangle personnel check all compartments of a vehicle, including the glove box, after its return and before another customer rents the vehicle. If they find personal belongings inside a vehicle, they bring the items into the office and tag them "with which vehicle they come out of," and contact the previous renter. Whenever they find a weapon inside a vehicle, Ms. Albrecht notifies the Greensboro Police Department.

Triangle also keeps a daily inspection and reconciliation sheet showing the various things done to a vehicle before it is rented. Triangle's policy is to note on this sheet any personal belongings that were found in the vehicle during cleaning. Ms. Albrecht identified State's Exhibit 3 as a copy of Triangle's vehicle inspection and daily reconciliation log from 28 December 2000. This exhibit showed an entry for the Jeep that defendant rented 28 December 2000, and showed no entries noting that any personal belongings were found in the vehicle when it was cleaned

before defendant rented it on that date. Hearing no objection from defendant, the trial court received State's Exhibit 3 into evidence.

Ms. Albrecht also testified to, and the trial court received into evidence, State's Exhibits 4 and 5, respectively, a copy of a rental return form from a previous rental of the same vehicle by defendant, and the rental contract from the previous rental. Defendant did not object to either exhibit.

Defendant brings forth four assignments of error. In his first arguments, defendant contends that the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence and that the trial court erred in denying defendant's motion for Judgment Notwithstanding the Verdict.

In ruling on a defendant's motion to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652. Our Courts have repeatedly noted that "[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 . . . ." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citations omitted). "If all the evidence, taken together and viewed in the light most favorable to the State, amounts to substantial evidence of each and every element of the offense and of defendant's being the perpetrator of such offense, a motion to dismiss is properly denied." *State v. Mercer*, 317 N.C. 87, 98, 343 S.E.2d 885, 892 (citations omitted).

Here, defendant was charged with possession of a handgun by a felon in violation of G.S. § 14-415.1. Pursuant to G.S. § 14-415.1(a), it is unlawful for "any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches . . . ." N.C. Gen. Stat. § 14-415.1(a) (1999). Defendant stipulated to having been previously convicted of a felony. Thus, defendant's sole contention is that the evidence was insufficient for the jury to find that defendant had possession of the firearm.

Possession may either be actual or constructive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). "A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *Id.*

In *Alston*, this Court found insufficient evidence to support an inference of constructive possession of a firearm when the evidence showed that the gun was found laying on the console

between the driver and the defendant, the driver and the defendant had equal access to the gun, and the gun was purchased and owned by the driver. *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 319. Here, the evidence showed: that defendant rented a Jeep Cherokee from Triangle Rent-A-Car on 28 December 2000; that before defendant took possession of the vehicle, Triangle conducted its standard cleaning and inspection procedure, which included checking all vehicle compartments; that no firearm had been found in the car during that inspection; that when Trooper Baity stopped the Jeep, defendant was its sole occupant; and that Troopers found a loaded .380 caliber handgun in the glove box of the Jeep. We conclude that this evidence was sufficient to support an inference that defendant constructively possessed the firearm, and that the court did not err by refusing to dismiss the charge of possession of a firearm by a felon.

Defendant next argues that the trial court erred in admitting into evidence the defendant's rental contract and other documents from Triangle (State's Exhibits 2, 3, 4, and 5). Defendant contends that the State did not lay the proper foundation for the admission of these documents. Because defendant failed to object or otherwise preserve this argument for review, this assignment of error is overruled.

North Carolina Rule of Appellate Procedure 10(b)(1) provides, in pertinent part, that:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the

> ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C. R. App. P. 10(b)(1).

In *State v. Canady*, our Supreme Court noted that:

> The purpose of the rule [Rule 10(b)(1)] is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal. If we did not have this rule, a party could allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work.

State v. Canady, 330 N.C. 398, 401-02, 410 S.E.2d 875, 878 (1991) (citations omitted).

Here, defendant objected to two questions asked of Ms. Albrecht on the grounds of relevance. However, defendant neither objected to the admission of any of the State's exhibits, nor did he move to strike any of these exhibits after their admission. Because defendant failed to properly preserve this assignment of error for review, we decline to address it on the merits.

Finally, defendant argues that the trial court erred in refusing to instruct the jury on the offense of carrying a concealed weapon as a lesser included offense of possession of a firearm by a felon.

To be a lesser included offense, "all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *State v. Westbrooks*, 345 N.C. 43, 55, 478 S.E.2d 483, 491 (1996). The offense of carrying a concealed weapon is defined as follows: "It shall be unlawful for

any person willfully and intentionally to carry concealed about his person any pistol or gun . . . .” N.C. Gen. Stat. § 14-269(a1) (1999). Carrying a concealed weapon has as an essential element that the weapon be “concealed,” whereas possession of a firearm by a felon does not. Therefore, since the “greater” crime does not contain all of the essential elements of the “lesser” crime, we hold that carrying a concealed weapon is not a lesser included offense of possession of a firearm by a felon.

No error.

Judges McGEE and BIGGS concur.

Report per Rule 30(e).