NO. COA11-280
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. Johnston County
No. 08 CRS 51323

LAMONT ANDRE MCKOY

Appeal by defendant from judgment entered 3 September 2010 by Judge Robert F. Floyd, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 22 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Robert D. Croom, for the State.

Peter Wood, for defendant-appellant.

MARTIN, Chief Judge.

On 21 February 2008 at approximately 3:14 a.m., Detective Jeremy Creech of the Johnston County Sheriff's Office stopped a vehicle driven by defendant because the tag light was out and not illuminating the license plate. Detective Creech noticed that defendant's eyes were glassy and there was a strong odor of alcohol coming from inside the vehicle. After checking defendant's license and the vehicle's registration, Detective

Creech approached the vehicle, shined his flashlight inside, and observed a black shotgun lying on the floorboard behind defendant's seat. After securing the firearm, Detective Creech asked defendant to perform two field sobriety tests, which defendant failed. Officer Creech then arrested defendant and transported him to the Johnston County Detention Center. There, defendant told Detective Creech that the reason defendant was driving around that evening was "to get out of his house for a little while" and that he had "put a 12-pack of alcohol inside the vehicle and was just looking for deer to shoot." At the detention facility, defendant's breath alcohol concentration was tested at .12 grams per 210 liters of breath. The State also presented evidence that defendant had been convicted of felony larceny in Wake County in September 1993.

Defendant was tried for the charges of driving while impaired, possession of a firearm by a felon, and having attained habitual felon status. At the close of the State's evidence, defendant made a motion to dismiss the charge of possession of a firearm by a convicted felon. The motion was denied. Defendant did not testify. However, his wife testified that the car defendant was driving and the gun recovered by Detective Creech belonged to her. At the close of his evidence,

defendant made a motion to dismiss all the charges against him. This motion was also denied. On 3 September 2010, a jury found defendant guilty of driving while impaired and possession of a firearm by a felon. Defendant was found not guilty of having attained habitual felon status. Defendant appeals.

I.

Defendant first argues that the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a felon because the State failed to prove every element of the charge. We disagree.

When reviewing a motion to dismiss, the court views "the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). "If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion." *State v. Morga*n, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State*

v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). To establish the crime of possession of a firearm by a felon, the State needs to prove "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007).

In this case, defendant does not contest that he was previously convicted of a felony. Instead, he contends the State failed to present substantial evidence that he possessed the firearm.

Possession of a firearm may be actual or constructive. *State v. Glasco*, 160 N.C. App. 150, 156, 585 S.E.2d 257, 262, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003). "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.* This Court has held

> [t]he driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Thus, where contraband material is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. The inference is rebuttable, and if the

> owner of a vehicle loans it to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference.
>
> . . . [T]he State may overcome a motion for nonsuit by presenting evidence which places the accused within such close juxtaposition to the contraband as to justify the jury in concluding that the contraband was in the accused's possession.

State v. Wolfe, 26 N.C. App. 464, 467, 216 S.E.2d 470, 473 (quoting *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974)), *cert. denied*, 288 N.C. 252, 217 S.E.2d 677 (1975).

In the present case, the fact that defendant was in control of his wife's car was sufficient to give rise to an inference of defendant's knowledge and possession of the firearm found in the vehicle. The evidence showed that defendant was driving the vehicle and was its sole occupant. The shotgun was located on the floor behind defendant's seat within sight of Detective Creech and presumably within defendant's view as well. Moreover, Detective Creech testified that defendant stated he "wanted to get out of his house for a little while" and "was just looking for deer to shoot." Finally, while his wife testified that the gun was hers and she carried it in her vehicle when she delivered newspapers and forgot to remove it on this occasion, at no time did she testify that defendant was

unaware of the gun's presence in the vehicle. We therefore hold the State's evidence was sufficient to survive the motion to dismiss because defendant was in such close juxtaposition to the firearm that a jury could conclude the shotgun was in defendant's possession. Accordingly, this argument is overruled.

II.

Defendant next argues the trial court committed plain error when it did not instruct the jury that it could only consider his prior felony conviction for the limited purpose of proving one of the elements of possession of a firearm by a felon. Defendant neither objected to the instruction given, nor requested a limiting instruction. Therefore, this argument must be analyzed under the plain error standard of review. *State v. Holden*, 346 N.C. 404, 434-35, 488 S.E.2d 514, 530-31 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998). "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *Id.* at 435, 488 S.E.2d at 531.

As discussed above, the State presented sufficient evidence to support the jury's verdict of guilty as to the charge of possession of a firearm by a felon. Therefore "the lack of any instructions to the jury regarding the use of defendant's prior conviction could not have been so prejudicial that it had a probable impact on the jury's verdict." *See Wood*, 185 N.C. App. at 232-33, 647 S.E.2d at 684. Defendant does not contend the State failed to present sufficient evidence to support his other conviction of driving while impaired and so we will not examine whether there was sufficient evidence to support that charge. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401-02, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 183 N.C. App. 389, 392-93, 645 S.E.2d 212, 215 (2007), *rev'd on other grounds*, 362 N.C. 191, 657 S.E.2d 361 (2008). Accordingly, defendant's argument is overruled.

No error.

Judges HUNTER, JR. and THIGPEN concur.

Report per Rule 30(e).