IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1194

Filed: 19 September 2017

Stanly County, Nos. 15 CRS 50129, 50132

STATE OF NORTH CAROLINA

v.

CAMERON DURAND CLARK

Appeal by defendant from judgments entered 25 February 2016 by Judge Anna M. Wagoner in Stanly County Superior Court. Heard in the Court of Appeals 6 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.

Kimberly P. Hoppin for defendant.

BRYANT, Judge.

Where the trial court did not err in admitting testimony regarding a cell phone software application used to track a stolen phone or in denying defendant's motion to dismiss, we find no error. Defendant's ineffective assistance of counsel claim is overruled.

On 21 January 2015, Kody Crisco arranged to meet Tre Peoples at a Cook Out restaurant to purchase marijuana. Crisco and his friend, Austin Eudy, had already

arrived at Cook Out when a gold Honda pulled up with three people inside. Peoples was sitting in the backseat and "one man with dreads [was] in the passenger seat and a lady [was] driving."

When Crisco approached the Honda, Peoples grabbed him and pointed a gun demanding all of his money. Peoples took Crisco's wallet, which contained three twenty-dollar bills, and then passed Crisco off to defendant Cameron Clark, the "man with dreads." Defendant held Crisco while Peoples went to Crisco's car and demanded that Eudy surrender everything. Eudy managed to escape from Peoples, but Crisco was not released by Defendant until Peoples returned to the Honda.

Crisco watched the Honda pull out of Cook Out and signal to turn right on Leonard Avenue. Once Crisco realized his iPhone had also been taken, he used his friend's phone to access the "Find My iPhone" tracking application, which indicated that Crisco's phone was traveling down Leonard Avenue. After the tracking application indicated that the phone had stopped traveling at a certain point on Leonard Avenue, Crisco dialed 911. Once the officer arrived, Crisco described the car and people involved in the robbery, and also showed the officer the tracking application's results.

Another officer responded to the scene and headed down Leonard Avenue in search of the gold Honda. He spotted the Honda at a home which was later revealed to be the residence of Natasha Harris, the female driver of the Honda during the

robbery. The officer pointed his headlights at the Honda and saw defendant get out of the front passenger side of the car, jump over the front hood, and take off running. However, defendant was intercepted and arrested by law enforcement as he came running around the corner of Harris's house. Peoples and Harris were also arrested at that time.

Upon searching defendant incident to his arrest, officers found a $20 bill in his jacket. On the ground in front of the Honda, officers found two grams of marijuana, a bag containing four additional grams of marijuana, and another $20 bill. Crisco's debit card, his wallet, and his iPhone 6 were found on Peoples. A search inside the Honda revealed another bag containing eleven grams of marijuana.

After Crisco and Eudy described the suspects, law enforcement conducted a "show-up identification" by transporting each victim separately, by car, to the backyard of Harris's house and shining high beam headlights on defendant, Peoples, and Harris. Both victims identified Peoples and Harris as the robbers.

On 9 February 2015, defendant was indicted by the Stanly County grand jury for one count of possession of marijuana, one count of robbery with a dangerous weapon, and one count of assault with a deadly weapon. Defendant's cases were called for jury trial during the 22 February 2016 session of Criminal Superior Court of Stanly County before the Honorable Anna Mills Wagoner, Judge presiding. The jury found defendant guilty of all charges. The trial court consolidated the charges

and sentenced defendant to a presumptive term of sixty-six to ninety-two months. Defendant appeals.

On appeal, defendant contends that (I) the trial court erred in denying his motion *in limine* and allowing testimony concerning the "Find My iPhone" application; (II) the trial court erred in denying his motion to dismiss the charges where the evidence presented was insufficient and; (III) he was denied effective assistance of counsel guaranteed by both the United States and North Carolina Constitutions.

I

Defendant first argues the trial court erred in denying defendant's motion in limine and allowing testimony concerning the "Find My iPhone" application. Specifically, defendant contends that the admission of the testimony violated Rule 901 because the State failed to lay a proper foundation authenticating the application referenced in the testimony.[1] We disagree.

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination will not be reversed absent a showing of an abuse of the trial court's discretion." *Warren v. Gen. Motors*

[1] Defendant in his motion before the trial court, and later in his brief to this Court, "raises" the issue that his constitutional rights under the U.S. and N.C. Constitutions were violated, but brings forth no constitutional argument. Therefore, we consider them abandoned.

Corp., 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (citing *Nunnery v. Baucom*, 135 N.C. App. 556, 566, 521 S.E.2d 479, 486 (1999)).

Pursuant to Rule 901 of the North Carolina Rules of Evidence, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2015). In regard to layperson testimony, Rule 602 of the North Carolina Rules of Evidence states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may . . . consist of the testimony of the witness himself." *Id.* § 8C-1, Rule 602. "[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." *State v. Wright,* 151 N.C. App. 493, 495, 566 S.E.2d 151, 153 (2002) (alteration in original) (citations omitted).

Defendant contends the admissibility of the iPhone app evidence is contingent upon "testimony establishing the reliability and trustworthiness of the process by which the data is generated." Defendant relies on *State v. Jackson,* 229 N.C. App. 644, 748 S.E.2d 50 (2013), and *State v. Cook,* 218 N.C. App. 245, 721 S.E.2d 741 (2012), to support his contention. In *Jackson,* the data obtained from the tracking device worn by the defendant was deemed admissible because the police officer

established the data's authenticity and trustworthiness through testifying about his experience and training in the field of electronic monitoring. 218 N.C. App. at 649–50, 748 S.E.2d at 55. This Court reasoned that the lay testimony of the police officer (who observed the data) was admissible under Rule 602 because the officer's testimony was "rationally based on his perception of the tracking data, not [his] personal knowledge as to defendant's actual location" and, therefore, was "helpful" to understanding the defendant's whereabouts. *Id.* at 652, 748 S.E.2d at 56.

In *Cook,* the defendant challenged the authentication of a surveillance videotape as deficient, but did not otherwise suggest that the videotape was inaccurate or otherwise flawed. 218 N.C. App. at 251–52, 721 S.E.2d at 746–47. When a witness testified that the camera was a "live streaming recording device" and that the "footage presented in court was the same as that . . . made from the server," the video footage in question was deemed to be properly admitted by the trial court. *Id.* at 252–53, 721 S.E.2d 741, 747 (2012).

In contrast to *Jackson* and *Cook*, here, the State did not attempt to introduce the physical tracking data itself into evidence. Here, the trial court held a hearing on defendant's motion *in limine*, and denied the motion, presumably determining no authentication was necessary to admit testimony of what was seen by a witness on a cell phone application. Thereafter, the State's witnesses testified at trial as to what they saw when they looked at Eudy's iPhone tracking application: i.e., Crisco said he

saw his phone traveling down Leonard Avenue where it eventually came to a stop. The officer who looked at Eudy's phone said he saw a "blue dot that was lighting up in between [two cross streets] on Leonard Avenue." Similar to the testimony given by the witness in *Jackson*, the witnesses here testified about the "Find My iPhone" application in order to describe their personal perceptions after observing the tracking data. Accordingly, the trial court did not err in admitting the testimony concerning the application because it was helpful in understanding the chain of events that led the officers to defendant's location. Defendant's argument is overruled.

II

Next, defendant alleges that the trial court erred by denying his motion to dismiss for insufficient evidence. We disagree.

In reviewing a motion to dismiss based on insufficient evidence, this Court reviews whether there is substantial evidence to establish every element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt,* 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1989). "Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists." *State v. McKinnon,* 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them

beyond a reasonable doubt of defendant's guilt." *State v. Jones,* 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981) (citation omitted).

Defendant argues the State failed to prove (A) assault with a deadly weapon under the theory that was presented to the jury, and (B) possession of marijuana.

A. Assault with a Deadly Weapon

Defendant argues that since no evidence was presented at trial that he directly struck either victim, and because the trial court failed to instruct the jury on the theories of aiding and abetting and acting in concert specifically as to the crime of assault with a deadly weapon and the lesser included offense of simple assault, there was insufficient evidence for the jury to find that defendant committed the crime and, therefore, the trial court erred in denying defendant's motion to dismiss. We disagree.

With regard to defendant's jury instruction argument, the trial court instructed the jury on acting in concert right before giving the three substantive charges. Defendant made no objection to the acting in concert instruction as given, and does not request plain error review on appeal. Because "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . ." N.C. R. App. P. 10(a)(2) (2017), and because defendant has failed to argue the instruction as given amounts to plain error, *see State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829,

834 (2010) ("[B]ecause [d]efendant did not specifically and distinctly allege plain error as required by [our appellate rules], [d]efendant is not entitled to plain error review of this issue." (citation omitted)), we need not address this aspect of defendant's arugment; but we do so briefly.

In the instant case, defendant only objected to the aiding and abetting instruction during the charge conference. However, evidence of defendant's participation under either theory—aiding and abetting or acting in concert—is sufficient. At trial, the jury heard evidence that defendant "h[eld] a victim while the armed robbery continue[d] and the assault and attempted robbery of another victim is aiding the person in the commission of [assault with a deadly weapon]." The victim, Crisco, testified that defendant held him to the Honda while Peoples got out of the car and approached Eudy, the second victim. While Crisco was being held by defendant, Peoples robbed Eudy by pointing a gun at him and taking property from him, then hit Eudy in the face with the gun before Eudy was able to escape. Therefore, viewed in the light most favorable to the State, there was sufficient evidence that defendant committed the crime of assault with a deadly weapon under the theories of aiding and abetting and/or acting in concert. Defendant's argument is overruled.

B. Possession of Marijuana

Defendant argues there was insufficient evidence to infer that he constructively possessed any of the marijuana found. We disagree.

To convict a defendant of possession of marijuana, the State must prove (1) that the defendant knowingly possessed a controlled substance and (2) that the substance was marijuana. *See State v. Harris,* 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007). Possession of a controlled substance may be actual or constructive. *State v. Harvey,* 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "A person has actual possession when [he] has 'both the power and the intent to control . . . disposition or use.' " *State v. McLaurin,* 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (alteration in original) (citation omitted) (quoting *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974)). "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Wilder,* 124 N.C. App. 136, 139–40, 476 S.E.2d 394, 397 (1996) (citing *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989)).

"[T]o establish constructive possession, the State need not prove *exclusive* control; it is sufficient to prove nonexclusive control plus other incriminating circumstances." *State v. Dulin*, ___ N.C. App. ___, ___, 786 S.E.2d 803, 808 (2016) (citation omitted).

> Incriminating circumstances relevant to constructive possession include evidence that defendant: (1) owned

> other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.

State v. Alston, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386 (2008) (quoting *State v. Miller*, 191 N.C. App. 124, 127, 661 S.E.2d 770, 773 (2008)). Whether the State presented sufficient evidence to prove constructive possession depends on "the totality of the circumstances in each case." *Dulin*, ___ N.C. App. at ___, 786 S.E.2d at 807 (citation omitted).

Here, the State presented sufficient evidence that defendant constructively possessed marijuana as it presented significant evidence of "incriminating circumstances" that defendant possessed marijuana. In addition to participating in a robbery under the guise of a drug exchange, when a police vehicle arrived minutes after the robbery occurred, defendant immediately jumped out of the Honda, jumped over the front of it, and ran away. Four grams of marijuana were found in front of the Honda where defendant had passed. Approximately fifteen additional grams of marijuana were found inside and outside the vehicle in which defendant and two others had used to commit the robbery. Therefore, the totality of the circumstances was sufficient to show the existence of other incriminating circumstances, such that a reasonable jury could conclude that defendant had the power and intent to control,

and therefore, constructively possess, the controlled substance of marijuana. Defendant's argument is overruled.

III

Lastly, defendant argues that his trial counsel's publication of Detective Springer's written statement of Crisco's first-hand account of the robbery, which included a reference to the victims' show-up identification of defendant, opened the door for the State to present evidence of the show-up identification after the trial court had granted a motion to suppress such evidence, and, as a result, this error amounted to ineffective assistance of counsel. We disagree.

A defendant's constitutional right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amend. VI and XIV; N.C. Const., Article 1, §§ 19 and 23; *State v. Baker,* 109 N.C. App. 643, 644, 428 S.E.2d 476, 477 (1993). To vacate a conviction based on ineffective assistance of counsel, a defendant must satisfy a two-pronged test:

> 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 prejudices 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 v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

In the instant case, a show-up identification took place on the night of the robbery. Defendant's trial counsel filed a motion to suppress and was successful in having the trial court deny the admission of any evidence of the show-up identification.

Then, at trial, defendant's counsel introduced defendant's Exhibit No. 7, a statement written by Detective Springer, for the purpose of impeaching Crisco, who had changed his version of events as told to the officer on the night of the robbery. The statement also referenced the previously suppressed show-up identification. As a result, the State was allowed to admit the suppressed show-up identification because "the defense had opened the door to let in the drive by identification the court suppressed earlier." Defendant argues on appeal that counsel's failure to redact any reference to the show-up identification from Exhibit No. 7 was prejudicial error.

In order to succeed on an ineffective assistance of counsel claim, defendant must show that counsel's deficient performance prejudiced his defense. *See Braswell,* 312 N.C. at 564–65, 324 S.E.2d at 249. In the instant case, defendant cannot show how trial counsel's error prejudiced his defense so as to deprive him of a fair trial. Even absent the error, the jury heard strong, positive, in-court identification testimony from the victims and from law enforcement officers. Crisco testified that he looked into defendant's eyes for "a minute and a half or so." Crisco also testified he was "[o]ne-hundred percent" certain that defendant was the perpetrator, stating

"[y]ou don't really forget something whenever your life is in danger like that." Officers testified defendant fit the description the victims provided. Defendant was found approximately twelve minutes later in a vehicle that matched the victims' description, sitting in the front passenger seat of the car, along with the other two people, all as described by the victims. Items the victims had reported stolen were also found immediately. Therefore, defendant cannot show defense counsel's error in "opening the door" to allow evidence of the show-up identification was so serious as to deny defendant a fair trial. Defendant's ineffective assistance of counsel argument is overruled.

In conclusion, where the trial court did not err in admitting testimony which was helpful in understanding the chain of events, we find no error. Where the evidence showed that defendant committed an assault under the theory of aiding and abetting, and that defendant constructively possessed marijuana, the trial court did not err in denying defendant's motion to dismiss those charges. Lastly, where defense counsel "opened the door" to evidence after the trial court granted a motion to suppress the same evidence, such conduct nevertheless did not amount to ineffective assistance of counsel where there is no reasonable possibility that absent counsel's error, the jury would have reached a different result.

NO ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).