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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1190

Filed: 16 October 2018

Duplin County, No. 16 CRS 51619, 16 CRS 840

STATE OF NORTH CAROLINA

v.

RODNEY WAYNE ROBINSON, Defendant.

Appeal by Defendant from judgment entered 24 March 2017 by Judge Joshua W. Willey, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 15 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Phyllis A. Turner, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Leslie C. Rawls, for defendant-appellant.

MURPHY, Judge.

Defendant, Rodney Wayne Robinson, was stopped by two officers with the Beulaville Police Department for a traffic violation. In the course of this traffic stop, the officers recovered a weapon lying on the ground outside of Defendant's vehicle.

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Defendant was subsequently charged with possession of a firearm by a convicted felon and moved to dismiss the charge at trial on the ground that the State failed to offer sufficient evidence that Defendant had actual or constructive possession of the firearm. On appeal, Defendant contends that the trial court erred in denying his motion to dismiss and that the judgment entered against him pursuant to a plea of guilty to attaining habitual felon status must be vacated as an ancillary conviction that rests on this felony. He further contends that he would be entitled to resentencing on the misdemeanors to which he also pled guilty that were consolidated for sentencing.

Possession of a firearm may be either actual or constructive. When the firearm is not found on a defendant's person and he or she does not have exclusive possession of the place where the firearm was found, the State must show the existence of other incriminating circumstances sufficient to support a reasonable inference that a defendant constructively possessed the firearm. When viewed in the light most favorable to the State, the State's showing that the firearm was found in proximity to Defendant immediately after he had the exclusive opportunity to dispose of items in the area, and after the prior absence of such an object, is sufficient to submit the issue to the jury. Accordingly, we hold that Defendant received a fair trial, free from error.

BACKGROUND

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On the night of 10 August 2016, Officer Jonathan Morris (“Officer Morris”) was on patrol in his capacity as reserve patrol officer with the Beulaville Police Department. Officer Matthew Byrd (“Officer Byrd”), a reserve patrol officer trainee with the Beulaville Police Department, accompanied Officer Morris. Officers Morris and Byrd were stopped at an intersection in Beulaville when they noticed Defendant’s vehicle make a left turn at the intersection while the stoplight was red. The officers subsequently activated the patrol car’s blue lights and siren to effectuate a traffic stop. Defendant pulled into the parking lot of a gas station and stopped alongside a landscaped area at the edge of the parking lot. Defendant’s vehicle was parked so that the driver’s side of the vehicle was parallel to the curb bordering the landscaped area. The ground of the landscaped area was covered in “reddish mulch.”

As Officers Morris and Byrd were pulling behind Defendant’s vehicle, Officer Morris noticed Defendant’s left arm extend out of the driver’s window and throw a blue can onto the mulch in the landscaped area. Officer Morris parked behind Defendant’s vehicle and made a driver’s side approach to speak with Defendant, and Officer Byrd remained in the car to have dispatch run Defendant’s license plate. While approaching, Officer Morris noted that the area was lit from the gas station’s exterior lights and the headlamps of the patrol car. He then observed the can that was thrown out of the vehicle lying on the mulch and identified it as a beer can. At

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this time, the beer can was the only object that Officer Morris observed lying on the mulch.

Officer Morris approached and began speaking with Defendant at the driver's side door. Officer Morris detected an odor of alcohol coming from Defendant and determined that a field sobriety test was necessary. At this point, Officer Byrd had exited the patrol vehicle and was on the passenger side of the car. While leading Defendant to the area between Defendant's vehicle and the patrol car to administer the field sobriety test, Officer Morris stumbled on the curb running parallel to Defendant's vehicle. Officer Morris testified that, while stumbling, he had to turn his attention away from Defendant to ensure that he would not fall.

Officer Byrd walked over to the driver's side of the vehicle while Officer Morris was administering the field sobriety test to search for the can that had been thrown by Defendant. When he turned the corner at the back of the vehicle on the driver's side, Officer Byrd noticed a dark object that he identified upon closer examination as a revolver secured in a black holster. He testified that the firearm was lying on top of the red mulch, a few feet past where the driver's door would have extended. He further noted that he was able to see the firearm right away, as "it was a dark spot on the background of red mulch." Officer Byrd then found the beer can in front of the vehicle.

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A deputy from the Duplin County Sheriff's Office, who arrived while Officer Morris was conducting the field sobriety test, conducted a *Terry* frisk on Defendant after the firearm was found. No weapons were found during the frisk, and Defendant, when asked about the firearm, told Officer Morris "that he couldn't have a firearm because he was a convicted felon." Officer Morris examined the area where the gun was found and testified, "with the gun being black in color and on that red mulch, it would have stuck out like a sore thumb – pardon the phrase, but that would have been something I would've observed . . . when I did my initial approach."

A jury convicted Defendant of possession of a firearm by a felon, and Defendant pled guilty to attainment of habitual felon status and the related misdemeanors. The trial court consolidated the convictions and sentenced Defendant to an active sentence in the presumptive range of 88 to 118 months.

ANALYSIS

Defendant argues that the trial court erred in denying his motion to dismiss the possession of a firearm by a felon charge. Specifically, Defendant contends that the State failed to present sufficient evidence to establish that Defendant constructively possessed the firearm found near his car. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial

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evidence (1) of 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, 526 S.E.2d 451, 455, cert. denied, 531 U.S. 890, 121 S. Ct. 213 (2000) (internal quotation marks omitted). “Substantial evidence 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, 265 S.E.2d 164, 169 (1980). “When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the record evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor.” *State v. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009).

Defendant was charged under N.C.G.S § 14-415.1, which makes it “unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm” N.C.G.S. § 14-415.1(a) (2017). The State must, therefore, only prove two elements under N.C.G.S § 14-415.1: “(1) [the] 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 (2007). Defendant does not challenge either that he was previously convicted of a felony or that the object found was a firearm. The only issue on appeal is whether the State presented sufficient evidence that Defendant possessed the firearm.

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“Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use.” *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (citing *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998), *superseded in part on other grounds by statute*. When the defendant does not have exclusive possession of the area in which the contraband is found, “the State must show other incriminating circumstances before constructive possession may be inferred.” *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (quotation marks omitted). Constructive possession is determined based on the totality of the circumstances and is fact specific. *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001); *see also State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012).

Here, the firearm was not found in Defendant’s physical or personal custody, but rather on the ground outside of his vehicle. The Defendant also did not exercise *exclusive* possession of the landscaped area of the parking lot where the firearm was found. Accordingly, actual possession is inapplicable, and the State was required to show additional incriminating circumstances to establish constructive possession of the firearm. We hold that Defendant’s proximity to the firearm and his exclusive

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opportunity to place items in the area between the time of Officer Morris's observations and Officer Byrd's discovery of the firearm are such incriminating circumstances. The State's evidence tended to show that the firearm was not present in the landscaped area when Officer Morris first began speaking with Defendant during the traffic stop. Officer Morris testified that, as he approached the driver's side of Defendant's vehicle, the mulched area beside the vehicle was lit by the gas station's exterior lights and the headlamps of the patrol vehicle. At this point in the traffic stop, Officer Morris stated that the only object lying on the mulch was the beer can that he observed Defendant initially throw out of the vehicle. When Officer Morris saw where Officer Byrd recovered the firearm, he noted that he was in that area during his initial approach and that a black firearm lying on the red mulch "would have been something that [he] would've observed...when [he] did [his] initial approach."

The State introduced evidence that the firearm was then found in proximity to Defendant's driver side door and within a short period of time after Defendant exited his vehicle. After Defendant exited his vehicle for the field sobriety test, Officer Byrd walked to the driver's side to search for the beer can that Defendant had thrown out of the vehicle. He testified that, as soon as he turned the rear corner of the vehicle, he observed a dark object lying on the red mulch a few feet past where the driver's door would have extended. Officer Byrd's testimony was that the object was

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“relatively easy” to see and that he noticed it immediately, as “it was a dark spot on the background of red mulch.”

The State also introduced evidence that the circumstances presented Defendant with an unobserved opportunity to place the gun the on the mulch during the traffic stop. After his initial approach and discussion with Defendant, Officer Morris instructed Defendant to walk to the rear of the vehicle for a field sobriety test. While the two were walking to the rear of the vehicle, Officer Morris stumbled on the curb and his attention diverted from Defendant. Officer Byrd remained on the passenger side of the vehicle during this interaction. During this time, Officer Morris testified that no other person from the public was in the area of the parking lot where the traffic stop was occurring.

Viewing this evidence in the light most favorable to the State, *see Worley*, 198 N.C. App. at 333, 679 S.E.2d at 861, a reasonable juror could find that the absence of the firearm before Defendant exited his vehicle and its presence near the vehicle shortly after Defendant’s exit indicated that Defendant possessed the firearm and disposed of it in the mulch while Officer Morris was distracted.

Defendant argues that the facts here are similar to those in *State v. Pierce*, 216 N.C. App. 377, 718 S.E.2d 648 (2011), where we held that the State failed to show sufficient evidence that the defendant possessed a firearm found outside of the vehicle he was driving. We find the case before us to be factually distinguishable from *Pierce*.

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See State v. Miller, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (“Our cases addressing constructive possession have tended to turn on the specific facts presented.”). In *Pierce*, an officer was in the midst of a car chase with the defendant’s vehicle when he observed packages of marijuana being thrown out of the vehicle. *Pierce*, 216 N.C. App. at 379, 718 S.E.2d at 650. The vehicle eventually stopped, and the officer found the defendant in the vehicle along with two other occupants. *Id.* Other responding officers searched the area where the marijuana packages were thrown out several hours after the chase and found a firearm that was later traced to an occupant of the vehicle the defendant was driving. *Id.* at 385-86, 718 S.E.2d at 654. We held that, even when taken in the light most favorable to the State, there was no “evidence of [the defendant’s] control of the firearm sufficient to show constructive possession.” *Id.* at 386, 718 S.E.2d at 654.

Despite Defendant’s arguments, the context in which the alleged disposal of the firearm occurred here distinguishes this case from *Pierce*. In *Pierce*, the officer was not in the area where the firearm was found prior to the car chase. Thus, there was no evidence that the gun was not there *before* Pierce’s vehicle passed the area or that no one else had the opportunity to dispose of the firearm in that area. The evidence only tended to show that there was a gun found on the ground several hours later. Here, Officer Morris testified that he did not observe any objects in the mulch where the firearm was found during his initial approach, yet Officer Byrd observed

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the firearm in the area shortly after Defendant exited the vehicle. Unlike *Pierce*, there was also evidence that during this timeframe between the initial approach and the firearm being discovered, there were no other members of the public in the area during the timeframe between the initial approach and the firearm being discovered.

“Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The jurors must decide whether the evidence satisfies them beyond a reasonable doubt that the defendant is guilty.” *State v. Tirado*, 358 N.C. 551, 582, 599 S.E.2d 515, 536 (2004) (internal citation, quotation marks, and alteration omitted). Taking the evidence in the light most favorable to the State and affording it every reasonable inference, the evidence was sufficient for a reasonable juror to find that Defendant possessed the firearm in violation of N.C.G.S. § 14-415.1. The trial court properly denied Defendant’s motion to dismiss.

CONCLUSION

After a thorough review, we hold that the evidence presented, taken in the light most favorable to the State, was sufficient to support the charge of possession of a firearm by a felon. Accordingly, Defendant received a fair trial, free from error.

NO ERROR.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).