NO. COA05-1600

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 04 CRS 65175
WILLIAM DONNELL HILL 05 CRS 1448

Appeal by defendant from judgment entered 20 July 2005 by Judge Steve A. Balog in Forsyth County Superior Court. Heard in the Court of Appeals 13 November 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Lynne Rupp, for defendant-appellant.

LEVINSON, Judge.

A jury found defendant guilty of possession of a firearm by a convicted felon, whereupon he admitted his habitual felon status and was sentenced to an active prison term of 107-138 months. Defendant gave timely notice of appeal in open court.

The State's evidence tended to show that Winston-Salem Police Officers T. L. McMasters, William Patterson and Matthew Gfeller responded to a reported disturbance at 730 Ferrell Court in the Rolling Hills housing community on the evening of 21 December 2004. Because McMasters was on patrol in the area, he arrived at the

scene in less than a minute and saw defendant sitting alone in the driver's seat of a white van parked in front of apartment building 730. He stopped his patrol car in front of the van with his blue lights flashing. Defendant got out of the van and began walking away from it toward the apartment building. McMasters "immediately exited [his] vehicle just to try to catch up with him" and engaged defendant a few feet from the van's driver's side door. As Patterson and Gfeller arrived at the scene, McMasters asked defendant to take his hands out of his pockets. When he twice refused to comply, McMasters informed him that he was under arrest for delaying his investigation. Defendant ignored McMasters' command to place his hands behind his back and pulled away from Patterson's attempt to grab his arm. When McMasters took defendant by the shoulder, he "attempted to jerk away" and struggled with him until falling into an air-conditioning unit beside the building. The officers subdued defendant by spraying his face with an irritant and placed him in handcuffs. A search of the van revealed a loaded .357 magnum handgun "between the driver's seat and the passenger seat on the floor of the car." The gun was covered by a shoebox lid and was pointing toward the building with "the butt of the weapon toward the driver." No shoebox was found. A license tag check revealed that the van was registered to defendant's mother.

Defendant told McMasters that "someone tossed the gun in the car" but was unable to provide the person's name, description or any other details to support his account. The windows to the van were closed. McMasters did not see anyone other than defendant in

the van and did not observe anyone else in the general vicinity other than "maybe two or three girls."

Defendant stipulated to a prior felony conviction for purposes of the charge of possession of a handgun by a felon. He adduced testimony from two expert witnesses that the three latent fingerprints found on the gun did not belong to him. However, defendant's first expert noted that the gun's wooden handle was "not a very good surface for leaving fingerprints" and that the grip area was "almost an impossible surface to get a print off of[.]" His second expert concurred that the wooden handle had a patterned surface making it "extremely difficult" to leave fingerprints "if you could even do it at all." Neither expert could offer an opinion on whether defendant had touched the gun.

On appeal, defendant claims the trial court erred in denying his motion to dismiss the charge at the conclusion of the evidence, absent proof that he possessed the handgun found inside the van. He notes that no witness observed him in physical possession of the gun. Moreover, he argues the State failed to show constructive possession, either by proof of his "exclusive control over his mother's van" or by "other incriminating circumstances" linking him to the gun.

In reviewing the denial of defendant's motion to dismiss, our task is to determine whether the evidence at trial was sufficient to allow a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt. *See State v. Vick*, 341 N.C. 569, 583, 461 S.E.2d 655, 663 (1995). We

"consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001) (citing *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995)). Moreover, "'all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.'" *State v. Redd*, 144 N.C. App. 248, 256, 549 S.E.2d 875, 881 (2001) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). We do not consider defendant's evidence unless it aids the State's case or "'it explains or clarifies evidence offered by the State or is not inconsistent with the State's evidence.'" *State v. Taylor*, 337 N.C. 597, 604-05, 447 S.E.2d 360, 365 (1994) (quoting *State v. Lane*, 328 N.C. 598, 606, 403 S.E.2d 267, 272 (1991)).

The elements of possession of a firearm by a convicted felon are (1) the purchase, ownership, possession, custody, care, or control of (2) any firearm (3) by "any person who has been convicted of a felony[.]" N.C. Gen. Stat. § 14-415.1(a) (2005). Here, defendant challenges only the evidence of his possession of the gun found in the van.

Possession of an object can be actual or constructive. A person has constructive possession of an object if he does not have it on his person, but is aware of its presence and has both the power and intent to control its disposition. *See State v. Williams*, 136 N.C. App. 218, 222, 523 S.E.2d 428, 431-32 (1999).

"Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the [contraband]." *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3, *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001).

Constructive possession can be established "from evidence which tends to show that a defendant was the custodian of the vehicle where the contr[aband] was found." *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). We have emphasized that this inference of constructive possession is not dependent on the defendant's ownership of the vehicle, as follows:

> [T]his Court has consistently held that the 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 found in a vehicle under the control of an accused, even though the accused is the borrower of the 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. This inference is rebuttable and if the accused offers evidence rebutting the inference, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Tisdale, 153 N.C. App. 294, 298, 569 S.E.2d 680, 682 (2002) (internal quotations and citations omitted); *accord State v. Nettles*, 170 N.C. App. 100, 103-04, 612 S.E.2d 172, 175, *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005).

We hold the evidence sufficient to support the jury's finding that defendant was in constructive possession of the handgun.

Officer McMasters testified without objection that he knew defendant had driven the van to the apartment building and did not live there. Moreover, defendant was alone in the van and was sitting in the driver's seat. Although defendant's mother was the van's registered owner, the evidence tended to show he had exclusive custody of the vehicle at the time the gun was found. Additional circumstances supporting an inference of constructive possession included the gun's location on the floor of the van in close proximity to where defendant was seated, its rather makeshift concealment beneath a shoe box top, defendant's immediate movement away from the gun and van in response to McMasters' arrival, and his subsequent attempts to elude apprehension. *See State v. Lane*, 163 N.C. App. 495, 501-02, 594 S.E.2d 107, 111-12 (2004); *State v. Boyd*, 154 N.C. App. 302, 307-08, 572 S.E.2d 192, 196-97 (2002). This assignment of error is overruled.

Defendant next avers the trial court erred by instructing the jury on flight. While conceding that he resisted arrest, he argues the State adduced no evidence that he left the scene of a crime in order to avoid apprehension or to dispose of inculpatory evidence.

In order to support an instruction on flight, the record must contain "'some evidence . . . reasonably supporting the theory that defendant fled after commission of the crime charged.'" *State v. Thompson*, 328 N.C. 477, 489-90, 402 S.E.2d 386, 392 (1991) (quoting *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990)). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be

some evidence that defendant took steps to avoid apprehension." *Thompson*, 328 N.C. at 490, 402 S.E.2d at 392.

We again find no error by the trial court. The evidence showed that defendant reacted to the police's arrival by exiting the van and walking toward the apartment building, thereby leaving the locus of his unlawful possession of the gun. As noted by the State, the fact that defendant "left the scene calmly rather than running does not eliminate the issue of flight." *State v. Carswell*, 40 N.C. App. 752, 755, 253 S.E.2d 635, 638 (1979). Moreover, although defendant initially stopped for McMasters, he "was still trying to make his way towards the 730 building of Ferrell Court" as McMasters addressed him, jerking away and struggling with him in an apparent attempt to elude capture. Officer Patterson described defendant as "walking away" from McMasters and testified that defendant "resisted by jerking away and trying to run or get away from the area" when Patterson attempted to arrest him. (Emphasis added). This evidence was sufficient "to support an inference that defendant was attempting to escape apprehension." *State v. Evans*, 149 N.C. App. 767, 777, 562 S.E.2d 102, 108 (2002) (citing *State v. Beck*, 346 N.C. 750, 758, 487 S.E.2d 751, 757 (1997)). Even assuming the instruction was not warranted where the evidence showed only an unsuccessful attempt at flight, "defendant argues only that the trial court erred in its jury instructions and never addresses the effect of the error on the jury's verdict. Therefore, we find defendant has failed to show he was prejudiced by the error." *State v.*

Hutchinson, 139 N.C. App. 132, 139, 532 S.E.2d 569, 574 (2000); N.C. Gen. Stat. § 15A-1443(a) (2005).

The record on appeal includes additional assignments of error which are not addressed in defendant's brief to this Court. Pursuant to N.C.R. App. 28(b)(6), we consider them abandoned.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).