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NO. COA07-724

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v.

Burke County
Nos. 05 CRS 7268, 7269

WILLIAM SCOTT HALL

Appeal by Defendant from judgments entered 1 November 2006 by Judge James W. Morgan in Superior Court, Burke County. Heard in the Court of Appeals 15 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

C. Gary Triggs, Esq., by C. Gary Triggs, for Defendant.

McGEE, Judge.

A jury found William Scott Hall (Defendant) guilty on 1 August 2006 of one count of possession of a firearm by a convicted felon and one count of having attained habitual felon status. The trial court sentenced Defendant to a term of 107 months to 138 months in prison. Defendant appeals.

The evidence presented at trial tended to show that during July 2005, Robert Franklin Beall (Detective Beall) was employed as a Sergeant Detective with the Burke County Sheriff's Department. Detective Beall testified that he checked pawn ticket receipts at various pawnshops in Burke County each week in an attempt to find

stolen items. Detective Beall visited the Burkemont Pawn Shop (Burkemont Pawn) on 26 July 2005. While examining receipts at Burkemont Pawn, Detective Beall noticed a receipt that indicated Defendant had pawned a Norinco .22 caliber rifle and a speaker box on 8 July 2005 in exchange for a sixty dollar finance loan. The receipt contained Defendant's signature, and it indicated that Defendant was the borrower or obligor on the loan.

Defendant had a prior felony conviction for discharging a firearm into an occupied vehicle and, therefore, Detective Beall decided to contact Defendant regarding the pawn ticket. Detective Beall drove to Defendant's home on 29 July 2005 and observed Defendant in his driveway. Detective Beall testified as follows:

I asked [Defendant] if the gun [Defendant] pawned in the pawnshop -- "could you give me any information about it?" And [Defendant] said it belonged to his brother. Stated that the gun was his brother's, and when his brother died, [Defendant] had received the gun. [Defendant] took the gun to the pawnshop and pawned it. [Defendant] stated he knew he was a convicted felon and wasn't supposed to own any firearms, and asked me what exactly that meant to him.

I told him, I said, "[i]t's really not in my discretion. I have no discretion in the case. I have to report all the findings that I find to the district attorney's office and they will make a determination of where the case goes from there."

Clara Adams (Ms. Adams), Defendant's mother, also testified at trial. Ms. Adams testified that the rifle was previously owned by her other son, Randy Hall (Mr. Hall). Following Mr. Hall's death, Ms. Adams stored his rifle and other personal items in her attic. Ms. Adams decided to pawn the rifle on 8 July 2005, and she asked

Defendant to meet her at Burkemont Pawn, where she was a regular customer. Ms. Adams drove alone to Burkemont Pawn with the rifle in the back seat of her car. When Ms. Adams arrived at Burkemont Pawn, Defendant was already present and was attempting to pawn a speaker box. According to Ms. Adams, she placed the rifle on the counter next to the speaker box, and Defendant never touched the rifle. Ms. Adams explained that Defendant signed the pawn ticket for the items because "when[ever] we go out . . . [to Burkemont Pawn], it's always put in [Defendant]'s name. I didn't even think. I just laid [the rifle] up there with [Defendant]'s things."

Doyle Cook (Mr. Cook) also testified at trial. Mr. Cook testified that he owned Burkemont Pawn, and that Defendant and Ms. Adams had been regular customers in his pawn shop. However, Mr. Cook had no specific recollection of the particular transaction at issue, and he did not remember seeing Defendant carry the rifle into Burkemont Pawn.

The jury found Defendant guilty on 1 August 2006 of possession of a firearm by a convicted felon. Following the jury's verdict, the trial court declared that court would be in recess for a lunch break. The State intended to proceed on the habitual felon phase of Defendant's trial following the lunch recess, but Defendant did not return to court after the recess. The trial court issued an order for Defendant's arrest, and the State proceeded to try Defendant *in absentia* on the habitual felon charge, over the objection of Defendant's counsel. Later that afternoon, the jury found Defendant guilty of having attained habitual felon status.

Defendant appeals both convictions.

I.

Defendant first argues the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a convicted felon due to insufficiency of the State's evidence. To survive a motion to dismiss based on insufficient evidence, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence exists if, considered in the light most favorable to the State, the evidence "gives rise to a reasonable inference of guilt[.]" *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981). However, a defendant's motion to dismiss must be granted "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it[.]" *Powell*, 299 N.C. at 98, 261 S.E.2d at 117.

Under N.C. Gen. Stat. § 14-415.1(a) (2007):

It shall be 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[.] . . . For the purposes of this section, a firearm is . . . any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver[.]

Defendant argues the State failed to establish that the item recovered from Burkemont Pawn met the statutory definition of a

firearm. Defendant specifically notes that the State only introduced a photograph of the purported firearm, rather than the actual rifle, and never introduced any evidence that the rifle was capable of "expel[ling] a projectile by the action of an explosive." N.C.G.S. § 14-415.1(a). We find that Defendant's argument is without merit. The State was not required to introduce the actual rifle into evidence, and was not required to prove that the rifle was operable. See *State v. McCree*, 160 N.C. App. 200, 205, 584 S.E.2d 861, 865 (2003) (holding that "operability of a firearm is not an essential element of the charge of possession of a firearm by a felon, nor is it an affirmative defense"). Further, the jury was entitled to rely on its own acquired knowledge and common sense in finding that a Norinco .22 caliber rifle met the statutory definition of a firearm. See, e.g., *State v. Mitchell*, 336 N.C. 22, 29, 442 S.E.2d 24, 28 (1994) (stating that "[w]hen determining whether an element exists, the jury may rely on its common sense and the knowledge it has acquired through everyday experiences"). We find that the State introduced sufficient evidence that the rifle in question was a firearm for the purposes of N.C.G.S. § 14-415.1(a).

Defendant also contends the State did not demonstrate that he actively or constructively possessed the firearm in question. Defendant argues that Ms. Adams' testimony clearly demonstrates that the rifle belonged to her, and not to Defendant. Defendant further notes that police never saw the rifle in Defendant's hands, and there is no evidence to suggest that Defendant ever touched the

rifle. We disagree with Defendant's contentions. Detective Beall testified at trial that when he spoke with Defendant about the rifle, Defendant admitted that when Mr. Hall died, Defendant "received the gun," and "took the gun to the pawnshop and pawned it." According to Detective Beall, Defendant also stated that as a convicted felon, he knew he was not allowed to possess the rifle, and was concerned about the repercussions of his actions. While there is evidence in the record suggesting that Defendant never had actual possession of the rifle, we find that the State introduced substantial evidence, through Detective Beall's testimony, that Defendant did have actual possession of the Norinco .22 caliber rifle before leaving it at Burkemont Pawn.

Finally, Defendant argues the trial court erred by failing to properly instruct the jury that "constructive possession of . . . contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984). Defendant did not raise an objection to this alleged error at trial and, therefore, we may only review Defendant's argument for plain error. See N.C.R. App. P. 10(b)(2); N.C.R. App. P. 10(c)(4). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). Because we find that the State presented substantial evidence that Defendant *actually* possessed the firearm in question, we likewise find that

there is no probability that an instructional error on the law of *constructive* possession had an impact on the jury's finding of guilt. Defendant's assignments of error are overruled.

II.

Defendant next argues the trial court erred by proceeding with Defendant's habitual felon trial in Defendant's absence. Defendant contends that such error deprived him of his constitutional right to be present at his own trial and to confront witnesses against him.

In *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971), the defendant was present on the first day of his trial, but failed to appear when his trial resumed the following day. The defendant's attorney could offer no explanation for the defendant's absence, and the trial court resumed the trial over the objection of the defendant's attorney. *Id.* at 290-91, 185 S.E.2d at 462. On appeal, our Court noted that in noncapital cases, a defendant may waive his right to be present, and a defendant's "voluntary and unexplained absence from court after his trial begins constitutes a waiver of his right to be present." *Id.* at 291, 185 S.E.2d at 462-63. Our Court then held that because the defendant voluntarily failed to appear after the commencement of his trial, and he did not explain his absence, the defendant had waived his right to be present. *Id.* at 291-92, 185 S.E.2d at 462-63. Our Supreme Court cited *Stockton* approvingly in *State v. Richardson*, 330 N.C. 174, 410 S.E.2d 61 (1991) (finding no constitutional error and affirming the trial court's denial of a continuance where the defendant

failed to appear at trial and did not meet his burden of adequately explaining his absence).

Defendant acknowledges that his argument is not supported by existing precedent, but he asks this Court to reconsider the holding in *Richardson* in light of the United States Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). It is clear that this Court cannot reconsider a decision of the North Carolina Supreme Court, and we therefore decline to address Defendant's argument.

Defendant further asserts that because the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon, the trial court also erred by proceeding with Defendant's trial on the habitual felon charge. Because we find that the trial court did not err by denying Defendant's motion to dismiss on the firearm charge, we find that the trial court did not err by proceeding with Defendant's trial on the habitual felon charge. Defendant's assignment of error is overruled.

III.

Finally, Defendant argues that the trial court erred by failing to grant his motion to dismiss the habitual felon charge at the close of the evidence. N.C. Gen. Stat. § 14-7.1 (2007) provides that "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon."

During the habitual felon phase of Defendant's trial, the

State introduced the following evidence: (1) a certified copy of a judgment reflecting that Defendant pled guilty in Burke County Superior Court on 28 July 1986 to one count of felonious possession of stolen goods, and one count of felonious sale and delivery of cocaine; (2) a judgment reflecting that Defendant pled guilty in Burke County Superior Court on 10 October 1994 to one count of felonious larceny; and (3) a certified copy of a judgment reflecting that Defendant pled guilty in Burke County Superior Court on 7 August 2000 to one count of felonious fleeing to elude arrest with a motor vehicle.

Defendant argues that the trial court should have dismissed the habitual felon charge because "at all relevant times . . . Defendant had serious medical problems and was taking a number of medications." Defendant also notes that two of his prior felony convictions are over twenty years old, and that the record does not reflect whether Defendant had counsel at the time of his prior felony convictions. Defendant's arguments are without merit. N.C.G.S. § 14-7.1 does not require the use of recent felony convictions to prove a defendant's habitual felon status. Further, Defendant's physical health is irrelevant to a determination of whether he has attained habitual felon status. Defendant has not alleged that he suffers from a mental illness, and Defendant presented no such argument to the trial court. Finally, N.C.G.S. § 14-7.1 does not require the State to prove that Defendant was represented by counsel during his prior felony convictions. If Defendant wishes to collaterally challenge his prior convictions on

such grounds, he may bring an appropriate action to do so.

No error.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).