

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1667

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

Pitt County
No. 08 CRS 60526

KEDRON DEVON LYONS

Appeal by defendant from judgment entered 16 June 2009 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 23 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.

Kimberly P. Hoppin for defendant-appellant.

BRYANT, Judge.

Defendant Kedron Devon Lyons (defendant) appeals from a judgment entered consistent with a jury verdict finding him guilty of possession of a firearm by a felon. For the reasons stated below, we find no error.

The State's evidence tended to show that Jermaine Robinson (Robinson) was the property manager of a boarding house at 120 Manhattan Avenue in Greenville. When Robinson arrived at the boarding house on the morning of 14 October 2008, he saw a man sitting on the porch with a tenant. The man, later identified as defendant, was wearing a brown hoodie, blue jeans and a black du-

rag. Defendant asked Robinson about renting a room. Robinson asked defendant if he had a job and defendant replied, "No." Robinson explained that the policy was that a tenant "must have a job or some type of pool-able income." Defendant became agitated, approached Robinson, and started using profanity. Robinson moved toward the back of the house and called 911. Defendant left the area.

Upon returning a couple of minutes later, defendant approached Robinson, who was still on the phone with a 911 dispatcher. Robinson "could see the bulge through the shirt with his hand on the gun." Robinson saw "the handle" of a gun. Defendant stated that there was "going to be a dead man on the street." As Robinson moved toward the back door of the house, defendant got on a bike and rode through the street past the house.

Officer Charles W. Salter of the Greenville Police Department responded to the 911 call. Robinson told the officer that "defendant was walking toward him in a threatening manner with a hand on the bulge in the waistband of his pants as if it was a gun." Robinson further informed Officer Salter that defendant was wearing a "black du-rag, a brown hoodie, and blue jeans" and that defendant rode off on a bicycle. Several officers, including a canine unit, searched the neighborhood. Around the corner, police found a bicycle in front of a residence at 109 Paris.

While driving past 111 Paris, a couple of houses behind 120 Manhattan Avenue, Officer Salter saw a man matching the suspect's description standing next to a tree. Officer Salter parked around

the corner and exited his patrol car. The suspect was gone by the time Officer Salter rounded the corner; however, the officer "saw a brown jacket or hoodie [] laying next to the tree." Officer Salter waited for an officer to bring the K-9 to smell the hoodie. After the dog obtained the scent, the officer moved the hoodie and found a handgun underneath. Officer Salter secured the weapon and collected the hoodie.

Officer Salter subsequently found defendant in the backyard of a residence located next to where the officer found the sweatshirt and gun and directly behind 120 Manhattan Avenue. Defendant was lying in the cargo area of a red sport utility vehicle parked at the residence. Defendant was "sweaty" and said he was "just trying to rest." Robinson, who was looking through the back fence of 120 Manhattan at the time the police pulled defendant out of the vehicle, yelled, "That's him!"

Officer Salter transported defendant in the back seat of his patrol car to the police station. Defendant "talked almost non-stop, [] and one of the first things he said was that he ran because he had a gun and it wasn't his." Defendant also told Officer Salter that "next time he wouldn't run he would shoot it out."

At trial, the State introduced evidence that defendant had a prior felony. Kathy Watson, an assistant clerk of court, testified that defendant had pled guilty to the felony of possession with intent to sell and deliver cocaine on May 25, 2007. Defendant did not present any evidence.

A jury found defendant guilty of possession of a firearm by a felon. The trial court sentenced defendant to 15 to 18 months imprisonment. Defendant appeals.

Defendant contends the trial court erred by failing to dismiss the charge of possession of a firearm by a convicted felon for insufficiency of the evidence. Defendant acknowledges counsel did not move to dismiss the charge at trial and asserts counsel's failure to do so amounts to ineffective assistance of counsel. Defendant asks this Court to review the issue "to ensure that an innocent person is not serving a prison sentence because of the ineffective assistance of trial counsel in failing to preserve this issue for review."

Our appellate rules state, "if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C. R. App. P. 10(b)(3) (2009). Pursuant to N.C.R. App. P. 2, however, we will hear the merits of defendant's contention despite the rule violation, as defendant alleges he received ineffective assistance of counsel based on counsel's failure to move for a dismissal of the charge. *See State v. Gayton-Barbosa*, ___ N.C. App. ___, 676 S.E.2d 586, 593 (2009) (where defendant did not move to dismiss this charge at the close of all of the evidence this Court invoked Rule 2 "because defendant also argues ineffective assistance of counsel based on counsel's failure to make the proper motion to dismiss.").

The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citation omitted). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998) (citation omitted).

"[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (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); see also N.C. Gen. Stat. § 14-415.1(a) (2009). In his brief, defendant asserts the State did not prove that he possessed a gun because Robinson told Officer Salter he saw "a bulge" and not a gun, as Robinson testified at trial. Defendant argues Robinson's contradictory statements are insufficient evidence that he possessed a gun and, therefore, the charge should have been dismissed. However, upon a motion to dismiss, "[t]he trial court must [] resolve any contradictions in the evidence in the State's

favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (internal citations omitted), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). Further, "[a]ny contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted).

Here, Robinson testified that defendant "came up on me with his hand and I could see the bulge through the shirt with his hand on the gun." Robinson further testified that he could see "the handle" of the gun. When asked on cross-examination whether Robinson "thought it was a gun?" Robinson answered, "No, no, sir. I didn't think it was, it was." Upon further questioning by defense counsel, Robinson stated, "I saw the gun." In the light most favorable to the State, a reasonable mind could conclude from the evidence that defendant possessed a firearm.

No error.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).