

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-200

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v.

Alamance County  
No. 06 CRS 55350

RONNIE BERNARD GRAVES

Appeal by defendant from judgment entered 31 July 2007 by Judge Henry W. Hight in Alamance County Superior Court. Heard in the Court of Appeals 15 June 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant.*

MARTIN, Chief Judge.

On 31 July 2007, defendant was found guilty by a jury of possessing a firearm after having been convicted of a felony. Thereafter, defendant entered into a plea agreement with the State. Pursuant to the plea agreement, nine pending charges would be dismissed, and defendant would plead guilty to eleven other pending charges. The eleven charges were to be consolidated, along with the conviction for possessing a firearm by a convicted felon, into one judgment. Defendant was sentenced as a Level IV, Class C habitual felon to 133 to 169 months imprisonment. Defendant did not give notice of appeal. However, on 2 April 2008, petitioner

filed a petition for writ of certiorari seeking a belated appeal. On 23 April 2008, we issued a writ of certiorari for the purpose of reviewing the judgment.

The State's evidence tended to show that in early 2006, the Alamance County Sheriff's Department conducted Operation Night Hawk to address an issue with stolen property in the county. The purpose of the operation was to determine the identity of the thieves and locate stolen property or illegal drugs.

Chief Deputy Morris McPherson ("McPherson") was assigned as an undercover agent as part of the operation. On 14 March 2006, at approximately 11:05 a.m., McPherson received a call on his cell phone from a confidential informant. The confidential informant said defendant wanted to talk to McPherson. McPherson and defendant spoke about an AK-47 rifle that defendant wanted to sell. Defendant told McPherson that he wanted \$125.00 for the rifle, that he was trying to raise money because his wife was in jail and he was trying to make enough money to get her out on bond. McPherson told defendant that he wanted to see the rifle first, but could not come over to defendant's location at that time. McPherson told defendant that if he could meet him by 6 o'clock, they could discuss the purchase of the weapon further. Defendant wanted to know if he could get \$80.00 from the informant, and get the remaining \$45.00 later from McPherson. McPherson spoke with the informant, who then gave defendant the \$80.00. At approximately 1:30 p.m., McPherson went to the location to meet defendant. Defendant arrived at approximately 3:09 p.m. McPherson and

defendant had a conversation about the rifle, and defendant showed the rifle to McPherson. McPherson paid defendant an additional \$45.00, making a total of \$125.00 paid defendant for the gun.

On 22 June 2006, defendant was arrested and questioned by Corporal J.T. Walker and Captain Tim Britt of the Alamance County Sheriff's Department. During questioning, defendant stated that "a white kid named Dustin asked him to sell [the AK-47] for him for a hundred dollars." Defendant further stated that "he sold the gun and he got \$80 and gave, gave the money to Dustin and Dustin gave him back 20 for selling it."

Defendant first argues that the trial court erred in instructing the jury on constructive possession, as that instruction was not supported by the evidence.

On appeal, this Court reviews jury instructions

contextually and in its entirety. The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . ." The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury."

*State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (quoting *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002)).

"Possession of a weapon may be either actual or constructive."

*State v. Barksdale*, 181 N.C. App. 302, 305, 638 S.E.2d 579, 582 (2007). "Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted).

In this case, the trial court instructed the jury as follows:

The defendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

First, that the defendant was convicted of a felony in Alamance County Superior Court.

And second, that thereafter the defendant possessed a firearm.

So I charge that if you find from the evidence beyond a reasonable doubt that the defendant was convicted of a felony in Alamance County Superior Court and that the defendant thereafter possessed a firearm, it would be your duty to return a verdict of guilty.

However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

During deliberations, the jury submitted the following written inquiry to the trial court:

1. Please clarify how and when Mr. Graves allegedly possessed [sic] the firearm.
2. Please redefine possession [sic] of a firearm according to NC law.

In response to the first question, the trial court proposed telling the jury that they asked a question of fact that was for them alone to determine. As for the second question, the trial court proposed telling the jury that possession of a firearm may be either actual or constructive. Defendant objected.

Thereafter, the trial court re-instructed the jury as follows:

The defendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

First, that the defendant was convicted of a felony in Alamance County Superior Court.

Second, and second, that thereafter the defendant possessed a firearm. Possession of a firearm may be either actual or constructive. A person has actual possession of a firearm if he holds it in his hands, is aware of its presence and either by himself or together with others has both the power and intent to control its disposition or use.

A person has constructive possession of a firearm if he does not have it on his person, but is aware of its presence and has either by himself or together with others both the power and intent to control its disposition or use.

A person's awareness of the presence of the firearm and his power and intent to control its disposition or use may be shown by direct evidence, or may be inferred from the circumstances.

And so I charge that if you find from the evidence beyond a reasonable doubt that the defendant was convicted of a felony in Alamance County Superior Court and that the defendant thereafter possessed a firearm, it would be your duty to return a verdict of guilt.

However, if you do not so find or if you have a reasonable doubt as to one or more of these

things, it would be your duty to return a verdict of not guilty.

Here, defendant objected to the trial court's instruction because he did not like it, not because it was an incorrect statement of the law. Moreover, we conclude that the State's evidence was sufficient to show that defendant exercised actual and constructive possession of the firearm. Accordingly, we find no error in the trial court's jury instruction.

Defendant next argues that the trial court erred when it ordered him to pay \$989.00 in restitution. Defendant contends the State introduced no evidence and made no arguments in support of the restitution request. The State concedes that there was insufficient evidence to support the restitution award and we agree.

Our statutes authorize the trial court to order restitution to a victim or victim's family for "any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(c) (2007). However, "[a] trial court's award of restitution must be supported by competent evidence in the record." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399, *disc. rev. improvidently allowed*, 347 N.C. 391, 493 S.E.2d 56 (1997) (citation omitted). Accordingly, the order of restitution is vacated and the case remanded to the trial court for a new sentencing hearing on the issue of restitution.

Finally, defendant contends the case should be remanded because the Judgment and Commitment erroneously indicates that

defendant pleaded guilty to delivery of cocaine in case number 06 CRS 054977. The State concedes that the case should be remanded to the trial court to correct the clerical error in the written judgment.

"[A] court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein." *State v. Davis*, 123 N.C. App. 240, 242-243, 472 S.E.2d 392, 393 (1996) (citation omitted).

In this case, defendant pleaded guilty to only possession with the intent to sell or deliver cocaine and to the sale of cocaine in 06 CRS 054977. It appears the inclusion of the delivery of the cocaine charge in 06 CRS 054977 in the Judgment and Commitment was simply a clerical error. Therefore, we remand the case to the trial court for correction of the clerical error in the judgment.

No error in part; restitution order vacated and remanded for resentencing on the issue of restitution; remanded for correction of judgment.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).