

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-338
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 12CRS006413
12CRS054266
BRANDON DEMORCOS STREATER,
Defendant.

Appeal by defendant from judgment entered on or about 2 October 2012 by Judge Lindsay R. Davis Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Janelle Varley, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment entered upon his conviction for possession of a firearm by a felon and attaining habitual felon status. We find no error.

The State's evidence at trial establishes the following factual background. Kendra Shuford, defendant's former girlfriend, has an eighteen-month-old son with defendant

Defendant, who lived in Thomasville, was visiting his son at Ms. Shuford's home on Salem Pointe Lane in Winston-Salem on 30 April 2012. Defendant and Ms. Shuford got into an argument that evening, and Ms. Shuford told defendant that she would take him home in the morning, as defendant did not have his own transportation.

The next morning, Ms. Shuford left defendant home alone while she took her children to school and took her mother to a doctor's appointment. When she returned around 10:30 a.m., Ms. Shuford discovered that defendant had gone through her belongings and discovered men's clothing. Ms. Shuford admitted that the clothing belonged to another man. Defendant yelled and cursed at her and spit in her face. He also pulled out Ms. Shuford's hair, pushed her to the ground, and pulled a gun out of his pocket. He waived the gun around and said "[c]all your boyfriend up now, call him up now." He then pointed the gun at Ms. Shuford and pulled the trigger. She heard it click, and he spun the revolver around. Defendant then took Ms. Shuford's keys and cell phone, went outside, and sat in her car.

After about thirty minutes, Ms. Shuford went to the car and told defendant she would take him home. As a ruse to get her phone back, Ms. Shuford told defendant she needed to call her

mother. Instead, she dialed 9-1-1 and told the operator that her ex-boyfriend was at her house with a gun. Defendant went back into the house and into the bathroom. When he came out, he said, "[t]hey won't find this gun." He then got into Ms. Shuford's car and drove off. While she was still on the phone, Ms. Shuford saw a police officer stop defendant. Ms. Shuford met with Officer Rivera and told him what happened. Ms. Shuford described the gun as "an old gun, looked like something out of a country-western movie, and it was gold, kind of like a peachy color."

Officer Rivera, one of the responding officers, testified that he was approximately one mile away when he received the call regarding defendant and stopped defendant approximately one minute later on Salem Pointe Lane. He stated that the call came in around 3:45 to 4:00 p.m. He did not see any other vehicles on Salem Pointe Lane except Ms. Shuford's white Kia. When Officer Rivera approached the vehicle, he noticed that all of the windows were down, that no one else was in the car, and that defendant was driving. The officers did not find any weapons on defendant's person or in the vehicle. When asked if he had a gun, defendant responded "no" and stated that Ms. Shuford had guns.

Officer Canup also responded, and he found a fully-loaded gun in a grassy field located approximately 20 to 30 feet from the passenger side of the vehicle. Officer Rivera, however, testified that the gun was 10 to 15 feet away from the car. Officer Rivera described the gun as a "silver revolver with a yellow-gold-colored handle[.]" The gun was not covered with any dirt or leaves, it did not have grass growing through it, and it did not appear to be in a weathered condition. The officers did not find any fingerprints on the gun; nor did they find gunshot residue on defendant's hands.

Defendant was indicted for assault by pointing a gun, unauthorized use of a motor vehicle, driving while license revoked, possession of a firearm by a felon, and attaining habitual felon status. Following the State's evidence, the trial court dismissed the charge of driving while license revoked. A jury found defendant not guilty of assault by pointing a gun and unauthorized use of a motor vehicle. The jury, however, found defendant guilty of possession of a firearm by a felon, and defendant subsequently entered a plea of guilty to attaining habitual felon status. The trial court sentenced defendant to a term of 77 to 105 months imprisonment. Defendant timely entered notice of appeal.

Defendant argues that the trial court erred in instructing the jury on constructive possession of a firearm. As defendant failed to object to the instruction at trial, he did not preserve any such error, and this Court's review is limited to whether the trial court's instruction amounted to plain error. See N.C.R. App. P. 10(a)(4). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L.Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

"A trial court must instruct the jury on the law arising on the evidence." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 28, *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L.Ed. 2d 1153 (1974).

"Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *Barron*, 202 N.C. App. at 694, 690 S.E.2d at 29.

"Actual possession requires that a party have physical or personal custody of the item." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). "When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession." *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504-05 (2003). "[W]here 'the defendant did not have exclusive control of the location where contraband is found, constructive possession of the contraband materials may not be inferred without other incriminating circumstances.'" *State v. Perry*, ___ N.C. App. ___, ___, 731 S.E.2d 714, 718 (2012) (quoting *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003)), *disc. review denied*, ___ N.C. ___, 736 S.E.2d 188 (2013). At trial, the court instructed the jury on both actual and constructive possession. Defendant contends that the evidence does not support an instruction on

constructive possession because defendant did not have exclusive control of the field in which the gun was found and the State presented insufficient evidence of incriminating circumstances.

We are not persuaded. While the evidence supports an instruction on actual possession, it also supports an instruction on constructive possession. The evidence shows that defendant stated "[t]hey won't find this gun" before getting into Ms. Shuford's car and leaving. The police arrived minutes later, and found the gun 10 to 30 feet from the vehicle. The gun did not have any dirt or leaves on it, and it was not weathered. Defendant was the only person in Ms. Shuford's car, all of the windows were down, and it was the only vehicle on the street. Additionally, the gun found in the field roughly matched the description Ms. Shuford gave to Officer Rivera. We find the foregoing evidence sufficient to constitute other incriminating circumstances such that an instruction on constructive possession was supported by the evidence.

Defendant also points out some of the contradictions and discrepancies in the evidence, and appears to argue that they too undercut the validity of an instruction on constructive possession. For instance, no one saw defendant throw the gun, and there were recent break-ins in the area. Additionally, the

gun found in the field was fully loaded, but Ms. Shuford testified that defendant pulled the trigger and heard a click. Again, we are not persuaded. Any contradictions or discrepancies in the evidence were for the jury to resolve. Accordingly, we find no plain error in the trial court's instruction to the jury on constructive possession.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).