

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-523
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v.

Caswell County
No. 12CRS050284

AUSTIN PATRICK WIGFALL, III,
Defendant.

Appeal by defendant from judgment entered on 28 December 2012 by Judge W. Osmond Smith III in Superior Court, Caswell County. Heard in the Court of Appeals 5 November 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Deborah M. Greene, for the State.

Ryan McKaig for defendant-appellant.

STROUD, Judge.

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

At trial, Deputy Cole Edwards testified for the State. On 21 April 2012, Deputy Edwards was dispatched to the Pelham Community Center after a report that shots had been fired and a victim had been shot. As Deputy Edwards was making his way

around the outside of the building, Vashon Canty approached him. Ms. Canty looked like she had been in a "scuffle." While he was talking to Ms. Canty, Deputy Edwards noticed a head pop up in a sport utility vehicle ("SUV") behind her. Deputy Edwards questioned Ms. Canty about the SUV and the individual in the backseat. She responded that her boyfriend was in the backseat of the SUV, which she drove to the community center. The individual in the backseat was later identified as defendant. Deputy Edwards asked if defendant had been in a fight, and she said that he had, but was fine. Deputy Edwards then asked Ms. Canty to open the vehicle so he could determine if defendant needed medical attention.

After defendant opened the door, Deputy Edwards noticed that defendant "was laying across the back seat with his head down on his arm, and the gun was laying up underneath his arm." Defendant looked as if he had been in a scuffle. Deputy Edwards testified that there was some clothing on the floorboard, but nothing else on the backseat. Deputy Edwards secured the firearm, escorted defendant from the vehicle, and noticed that he had a holster to the weapon on his waistband. When Deputy Edwards asked defendant about the gun, defendant responded that "the gun was not his, but he had it for safety, protection[.]"

The defense called Ms. Canty and defendant as witnesses. Ms. Canty testified that on 21 April 2012, she got into a fight with another woman at the community center. Defendant tried to break up the fight, but several men jumped on him and attacked him. Ms. Canty got up, saw the men fighting with defendant, and heard shots being fired from multiple directions. When the shots rang out, people began to scatter, and Ms. Canty walked around the side of the building. She saw a friend drop a gun on the ground, and she picked it up and put it in the back of her SUV. Ms. Canty testified that defendant neither had a gun nor was wearing a holster that night.

Defendant confirmed that he got into a fight while trying to break up a fight involving Ms. Canty. After the fight, a security guard helped him to Ms. Canty's SUV, and he laid down across the back seat. Defendant testified that he did not know there was a gun in the vehicle. He could not feel it because the car was dark and the seat was covered with clothing and other items. Defendant also denied wearing a holster that night.

Following the trial, the jury found defendant guilty of possession of a firearm by a felon, and the trial court imposed

a sentence of 12 to 24 months imprisonment. Defendant timely entered notice of appeal.

On appeal, defendant challenges the trial court's instruction to the jury on actual possession of the firearm. "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.

A person has actual possession of an item where it is "on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.'" *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 805 (2006) (quoting *State v. Reid*, 151 N.C.

App. 420, 428-29, 566 S.E.2d 186, 192 (2002)). Constructive possession, on the other hand, exists when defendant does not have actual possession, but has "the power and intent to control its disposition or use[.]" *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation and quotation marks omitted). At trial, the court instructed the jury on both actual and constructive possession. In doing so, the trial court overruled defendant's objection to the instruction on actual possession.

Defendant contends that the evidence does not support an instruction on actual possession because the gun was not found on his person, he was unaware of its presence, and he did not own the vehicle in which it was found. We are not persuaded. Deputy Edwards testified that defendant was laying directly on top of the gun and that defendant stated he "had it for safety, protection." This evidence was sufficient to support a jury instruction on actual possession. While the testimony of Ms. Canty and defendant may have contradicted Deputy Edwards' testimony, any such contradictions or discrepancies in the evidence were for the jury to resolve. We therefore conclude that the trial court did not err in instructing the jury on actual possession.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).