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NO. COA14-575  
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Buncombe County  
Nos. 12 CRS 63574, 13 CRS 195

WILLIAM KEITH DAVIS

Appeal by defendant from judgment entered 29 August 2013 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 22 October 2014.

*Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn J. Thomas, for the State.*

*Brock & Meece, P.A., by C. Scott Holmes, for Defendant.*

ERVIN, Judge.

Defendant William Keith Davis appeals from a judgment sentencing him to a term of 101 to 134 months imprisonment based upon his conviction for possession of a firearm by a felon and having attained habitual felon status. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon on the grounds that there was insufficient evidence of possession and,

in the alternative, that the trial court erred or plainly erred by instructing the jury concerning actual and constructive possession and by failing to instruct the jury concerning the legal effect of non-exclusive constructive possession of an item of property. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be reversed.

I. Factual Background

A. Substantive Facts

On 2 December 2012, Officer Jonathan Ray of the Weaverville Police Department responded to a call relating to the presence of a suspicious person at the residence of James Bass. After arriving at the house, Officer Ray discovered that James Bass' house had been broken into and that a revolver and a .22 automatic rifle had been stolen. Based upon his conversation with James Bass, Officer Ray was able to identify James Bass' grandson, Jonathan Bass, as a suspect in the break-in.

Later that day, Officer Ray and two other officers set up a sting operation or "controlled buy" in the parking lot of the Weaverville Walmart for the purpose of ascertaining whether certain firearms that Jonathan Bass was attempting to sell were the same guns that had been stolen from James Bass. As part of

that operation, Officer Ray was in an unmarked patrol car near the Walmart parking lot while Sergeant Andy Mace of the Weaverville Police Department served as a lookout.

After receiving word from Sergeant Mace that the vehicle carrying Jonathan Bass had arrived in the parking lot, Officer Ray pulled up behind the vehicle in question and activated his blue lights. At that time, Officer Ray could see that the vehicle, which was an older brown Ford truck that was being driven by Defendant, had three occupants. As Officer Ray approached the vehicle, Jonathan Bass exited the passenger side and began to run. While giving chase to Jonathan Bass, Officer Ray observed that he discarded a silver revolver. After Jonathan Bass was caught, subdued, and arrested by Officer Ray and Sergeant Mace, Officer Ray recovered the revolver that Jonathan Bass had discarded during the chase and eventually determined that it was one of the firearms that had been stolen from James Bass.

Once Jonathan Bass had been taken into custody, Sergeant Mace returned to the location at which the truck was parked with the intention of locating the .22 rifle that had been stolen from James Bass. At that time, Defendant was standing outside the driver's side of the truck along with a blond-haired female. Upon obtaining permission from Defendant to search the truck,

Sergeant Mace examined the interior of the vehicle without finding a rifle. After speaking to Jonathan Bass, Sergeant Mace searched the vehicle for a second time with an equal lack of success.

At that point, Sergeant Mace asked Defendant to drive the truck to the police station in order to permit the investigating officers to search the vehicle at that location, which was better lighted than the Walmart parking lot. Although Sergeant Mace searched the truck in the garage, he did not find the missing rifle. On the same night, Sergeant Mace sent another officer to search the area in the Walmart parking lot near the location at which the truck had been parked. However, the officer examining the area in question did not find anything of interest.

On the following day, Sergeant Mace returned to the Walmart store to examine the parking lot surveillance video for the purpose of ascertaining if anything of interest had occurred at the truck while Jonathan Bass was being chased and apprehended given that there had been no law enforcement officers near the truck during that time. After watching the surveillance video, Sergeant Mace went to a grassy median adjacent to the location at which the truck had been parked. When Sergeant Mace moved the thick, decorative grass that covered the median with his

foot, he found the .22 rifle that had been stolen from James Bass.

B. Procedural History

On 6 May 2013, the Buncombe County grand jury returned bills of indictment charging Defendant with possession of a firearm by a felon, possession of a stolen firearm, and having attained habitual felon status. The charges against Defendant came on for trial before the trial court and a jury at the 26 August 2013 criminal session of the Buncombe County Superior Court. At the close of the State's evidence and at the close of all of the evidence, Defendant unsuccessfully moved to dismiss the charges that had been lodged against him for lack of sufficient evidence. On 29 August 2013, the jury returned verdicts finding Defendant guilty of possession of a firearm by a felon and not guilty of possession of a stolen firearm. After the return of the jury's verdict, Defendant entered a plea of guilty to having attained habitual felon status. At the ensuing sentencing hearing, the trial court found that Defendant had accumulated fourteen prior record points and should be sentenced as a Level V offender. Based upon these determinations, the trial court entered a judgment sentencing Defendant to a term of 101 to 134 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

A. Standard of Review

In his initial challenge to the trial court's judgment, Defendant contends that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon based upon insufficiency of the evidence. More specifically, Defendant contends that the State failed to elicit substantial evidence tending to show that Defendant possessed the rifle. Defendant's contention has merit.

In reviewing a challenge to the denial of a defendant's motion to dismiss for insufficiency of the evidence, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most

favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). We will now utilize the applicable standard of review to evaluate the validity of Defendant's challenge to the sufficiency of the evidence to support his conviction for possession of a firearm by a felon.

#### B. Evidentiary Analysis

According to N.C. Gen. Stat. § 14-415.1, "[i]t 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[.]" N.C. Gen. Stat. § 14-415.1(a). Thus, in order to demonstrate the defendant's guilt of possession of a firearm by a felon, the State must establish that "(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). As a result of the fact that Defendant has not challenged the sufficiency of the State's proof to establish that he had a prior felony conviction, the only issue that we must address is the extent, if any, to which the State elicited sufficient evidence to demonstrate that Defendant possessed a firearm.

"Possession of a firearm may be actual or constructive." *State v. Taylor*, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (citing *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998)), *cert. denied*, 366 N.C. 408, 736 S.E.2d 180 (2012). "Actual possession requires that a party have physical or personal custody of the item," while "[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." *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318. "When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764 (citing *State v. Young*, 190 N.C. App. 458, 461, 660 S.E.2d 574, 577 (2008)). "[C]onstructive



possession depends on the totality of circumstances in each case,' so that '[n]o single factor controls.'" *State v. Ferguson*, 204 N.C. App. 451, 460, 694 S.E.2d 470, 477 (2010) (quoting *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986)).

In this case, the record is devoid of any evidence tending to show that Defendant actually possessed the rifle, which was found in the grassy median of the Walmart parking lot rather than on his person or in his physical possession. As a result, the only basis upon which the State could have successfully established that the record contained sufficient evidence that Defendant possessed the .22 rifle stolen from James Bass' residence would have been proof that Defendant constructively possessed the firearm in question. *State v. Mewborn*, 200 N.C. App. 731, 736, 684 S.E.2d 535, 538-39 (2009) (stating that, "[w]here police officers do not find the defendant in actual possession of a weapon, the State may nonetheless sustain a conviction based upon a theory of constructive possession"); *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (stating that, "[b]ecause, in this case, the gun was not found on [the] defendant's person, the State was required to offer evidence that defendant constructively possessed the [gun]"). Moreover, given that Defendant did not have exclusive

control over the grassy median, which was located in a public parking lot, in which the rifle was found, "the State [was also] required to show other incriminating circumstances in order to establish constructive possession." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764.<sup>1</sup>

Although the outcome of a sufficiency of the evidence analysis is ultimately dependent on the specific facts contained in the record developed at the trial of the particular case under consideration, reviewing courts have considered a broad range of "other incriminating circumstances" in determining the sufficiency of the evidence to support a finding of constructive possession when the "defendant exercised nonexclusive control of contraband," with "[t]wo of the most common factors [being] 'the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found.'" *State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012) (citations omitted). In addition, reviewing courts

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<sup>1</sup>In its brief, the State argues that the record contained evidence tending to show that Defendant had exclusive control over the vehicle in support of its contention that Defendant constructively possessed the rifle. However, the relevant inquiry for purposes of determining the presence or absence of exclusive control is whether the defendant had exclusive control "of the location where the firearm [was] found." *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764. Since the rifle was found in a grassy median located in the Walmart parking lot rather than in the vehicle itself, we do not find the State's "exclusive control" argument persuasive.

have found evidence of "a defendant's nervousness or suspicious activity in the presence of law enforcement" officers to be relevant to the "other incriminating circumstances" inquiry. *State v. Hudson*, 206 N.C. App. 482, 490, 696 S.E.2d 577, 583, *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010). Absent additional incriminating circumstances, however, mere physical proximity to the location at which contraband is found does not usually suffice to establish constructive possession. *Ferguson*, 204 N.C. App. at 459-60, 694 S.E.2d at 477.

The evidence presented by the State during the trial of this case tended to show that Jonathan Bass, rather than Defendant, was suspected of stealing the revolver and the .22 rifle from the home of James Bass and was, for that reason, the target of a police operation that took place in the Walmart parking lot.<sup>2</sup> Although Defendant was driving at the time that the investigating officers approached the vehicle, Jonathan Bass, rather than Defendant, jumped out of the vehicle and fled when the presence of the investigating officers became apparent. While being chased and before being subdued, Jonathan Bass discarded the revolver that had been stolen from James Bass. As

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<sup>2</sup>Although the State has argued that Defendant knew that Jonathan Bass had stolen the weapons and was delivering him to the Walmart parking lot so that he could sell the stolen weapons, the record does not contain any evidence tending to establish such knowledge on Defendant's part.

a result of the fact that the vehicle was left unattended by investigating officers during the pursuit and apprehension of Jonathan Bass, the only evidence of the events that transpired in the vicinity of the vehicle during this interval contained in the present record is video footage taken by a surveillance camera covering the Walmart parking lot.

A careful examination of the surveillance video footage shows that Defendant and another person got out of the truck while investigating officers were pursuing and apprehending Jonathan Bass. After he exited the vehicle, Defendant walked back and forth along the driver's side of the truck. The surveillance video indicates that many other people were present in the parking lot during this time, including a shopper who was putting items in the trunk of a white car that was positioned near the driver's side of Defendant's truck. As a result of the fact that the surveillance video footage is grainy and had been shot by a camera situated at some distance from the location at which Defendant's truck was parked, it is difficult to tell what Defendant did during the relevant period of time other than that he walked by the side of the truck, a fact that precludes us from accepting the State's contention. We are unable, based on our review of the surveillance video footage, to conclude that

Defendant was engaged in "suspicious" behavior during the pursuit and apprehension of Jonathan Bass.

After a short period of time, Sergeant Mace returned to the truck and talked to Defendant, who had remained in the vicinity of the truck. According to Sergeant Mace, Defendant was very cooperative, consented to multiple searches of the truck during the time that it remained in the Walmart parking lot, and voluntarily drove to the police station so that an additional search could be conducted under better lighting conditions. Upon failing to find the rifle in the truck, the police returned to the parking lot later that night to search the grassy median near which the truck had been parked. However, the .22 rifle that had been stolen from James Bass was not recovered until the following day.

After reviewing the record, we are unable to accept the State's contention that the record contains sufficient evidence of other incriminating circumstances to support a reasonable inference that Defendant constructively possessed the rifle. Instead, we believe that the evidence, when taken in the light most favorable to the State, "showed nothing more than [that] '[D]efendant had been in an area where he could have committed the crimes charged'" and was, for that reason, insufficient to support Defendant's conviction for possession of a firearm by a

felon. *State v. Barron*, 202 N.C. App. 686, 692, 690 S.E.2d 22, 27 (quoting *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976)), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). As a result, given our determination that the record did not contain sufficient evidence to support a determination that Defendant constructively possessed the .22 rifle in an area that was not subject to his exclusive control, we hold that the trial court erred by denying Defendant's motion to dismiss the charge of possession of a firearm by a felon for insufficiency of the evidence.<sup>3</sup>

### III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by denying Defendant's motion to dismiss the charge of possession of a firearm by a felon for insufficiency of the evidence. As a result, the trial court's judgment should be, and hereby is, reversed.

REVERSED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).

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<sup>3</sup>As a result of our determination that the record did not support Defendant's conviction for possession of a firearm by a felon, we need not address Defendant's remaining challenges to the trial court's judgment.