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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-27

Filed: 5 September 2017

New Hanover County, Nos. 15CRS4541, 2585, 52868–69

STATE OF NORTH CAROLINA

v.

DEANDRE BLU TILGHMAN

Appeal by defendant from judgments entered 2 August 2016 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 9 August 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.*

DIETZ, Judge.

Defendant Deandre Blu Tilghman challenges his conviction on multiple charges stemming from two home break-ins. As explained below, we hold that the State presented sufficient circumstantial evidence—including witness testimony, surveillance video, and tracking data from Tilghman’s ankle bracelet—to permit the

charges to be sent to the jury. We likewise hold that the trial court did not commit plain error by failing to instruct on the difference between actual and constructive possession and by admitting testimony by a detective that included statements by a cooperating witness. Finally, we dismiss Tilghman's ineffective assistance of counsel claim without prejudice because, under our Supreme Court's recent decision in *State v. Todd*, \_\_ N.C. \_\_, \_\_, 799 S.E.2d 834, 838 (2017), that claim is not suited for review on direct appeal.

### **Facts and Procedural History**

On 24 March 2015, Janet Davidson returned to her home and noticed that a window had been broken and several items were missing from her home, including a PlayStation 4, a backpack, a Kindle Fire, some jewelry, and cash. On 30 March 2015, Shane Sykes returned to his home and found his gun and ammunition were missing.

Sergeant Stephanie Boucher with the Wilmington Police Department investigated Ms. Davidson's break-in. On 31 March 2015, Sergeant Boucher received an alert that some jewelry matching Ms. Davidson's description might have been pawned. Boucher and Ms. Davidson met at the pawn shop and Ms. Davidson identified the jewelry. The pawn shop provided a ticket showing that Javon Bullock pawned the items.

The next day, an employee of the pawn shop notified Sergeant Boucher that Bullock had returned and was trying to pawn a Kindle Fire and another tablet.

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Sergeant Boucher and Detective Wilbert Hatcher went to the pawn shop to confront Bullock.

Bullock ultimately admitted to law enforcement that he tried to pawn stolen items given to him by his cousin, Defendant Deandre Tilghman. Officers obtained a search warrant for Bullock's house, where Tilghman also lived. During the search, officers located a backpack in the backyard that contained the stolen PlayStation 4 and the stolen gun and ammunition.

The pawn shop provided law enforcement with surveillance video from the day Bullock sold the stolen jewelry. The video showed Bullock accompanied by Tilghman, who wore the backpack later found with the stolen items in it.

Tilghman was on probation at the time of these crimes and wore an ankle monitor as a condition of his probation. Tracking data from the ankle monitor showed that Tilghman was within 30 meters of the scene of the crimes when they occurred.

The State indicted Tilghman on two counts of breaking and entering, two counts of larceny, and one count of possession of a firearm by a felon. At trial, Bullock testified against Tilghman as part of a plea agreement. He identified Tilghman as the man wearing the backpack in the surveillance video and testified that Tilghman instructed him to sell the stolen items at the pawn shop. Bullock also testified that he was at school when the break-ins occurred. A witness from the firm that

manufactured Tilghman's ankle bracelet testified that it was functioning properly when it recorded Tilghman's location at or near the scene of the crimes.

The jury found Tilghman guilty on all counts. The trial court sentenced Tilghman to consecutive prison sentences of 8-19 months for each breaking and entering and larceny charge, and 14-16 months for possession of a firearm by a felon. Tilghman timely appealed.

### **Analysis**

Tilghman asserts four separate arguments on appeal. We address each argument in turn below.

#### **I. Motion to Dismiss All Charges**

Tilghman first argues that the State failed to present sufficient evidence to support any of the charges and thus the trial court should have granted his motion to dismiss. "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). "Upon defendant's motion for dismissal, 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. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "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, 265 S.E.2d 164, 169 (1980).

We first address Tilghman’s arguments with respect to the breaking and entering and larceny charges, and then address the possession of a firearm by a felon charge.

### **A. Breaking and Entering and Larceny**

The essential elements of felonious breaking or entering are “(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein.” *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986); *see also* N.C. Gen. Stat. § 14-54(a). The essential elements of larceny are that defendant “(1) took the property of another; (2) carried it away; (3) without the owner’s consent, and (4) with the intent to deprive the owner of the property permanently.” *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983).

The State presented substantial evidence of all of these essential elements. Javon Bullock, the State’s cooperating witness, testified that Tilghman asked him to sell the stolen goods and that, at the pawn shop, Tilghman handed him a backpack containing the stolen jewelry. Video surveillance from the pawn shop corroborated Bullock’s story and showed Tilghman with the backpack. Law enforcement later found the backpack outside the home where Tilghman was staying with Bullock and his family. That backpack contained the stolen PlayStation and the stolen gun and

ammunition. Tracking data from Tilghman's ankle monitor placed him within 30 meters of the crime scenes at the time the crimes likely occurred.

To be sure, all of this evidence is circumstantial. But “[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). Here, the jury reasonably could infer from Tilghman's presence near the scene of the crimes, his possession of the stolen goods shortly after the crimes occurred, and his attempts to get his cousin to sell those stolen items, that Tilghman committed the crimes. If “a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.” *Id.* at 452, 373 S.E.2d at 434. Accordingly, the trial court properly denied Tilghman's motion to dismiss the breaking and entering and larceny charges.

### **B. Possession of a Firearm by a Felon**

The essential elements of possession of a firearm by a felon are 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 (2007). Tilghman contends that there was insufficient evidence of the possession element.

As Tilghman concedes, the State can prove possession by establishing that he “was aware of the gun’s presence and had both the power and intent to control its disposition or use.” This is often referred to as “constructive” possession. *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). When the illegally possessed item is found in an area not exclusively under the control of the defendant, the State also must show “other incriminating circumstances” that the defendant committed the crime. *Id.*

Under this standard, the State presented sufficient evidence to send this charge to the jury. Witness testimony and surveillance video established that Tilghman had a backpack which he used to provide stolen items to Bullock so that Bullock could sell the items to a pawn shop. When police searched the home where Tilghman was staying, they discovered the backpack with the gun inside. Moreover, tracking data from Tilghman’s ankle bracelet established that he was at or near the crime scene when the gun was stolen. From this evidence, a reasonable jury could conclude that Tilghman constructively possessed the gun. Accordingly, the trial court properly denied Tilghman’s motion to dismiss.

## **II. Jury Instructions**

Tilghman next argues that the trial court erred by failing to instruct the jury on the difference between actual and constructive possession. Tilghman acknowledges that he did not request this instruction or object to the instruction

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actually given, and thus his argument is reviewed for plain error. N.C. R. App. P. 10(a)(2), (4).

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* “Plain error is to be applied cautiously and only in the exceptional case,” such as when the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.*

Tilghman correctly asserts that the State presented no evidence that Tilghman actually possessed the gun and thus the jury must have concluded that Tilghman constructively possessed it. But, as discussed above, the State presented substantial evidence from which the jury could conclude that Tilghman constructively possessed the gun. Accordingly, Tilghman cannot satisfy the plain error standard in this case because, even if the trial court had given the requested instruction, the jury still would have heard the same evidence and still would have been instructed on the theory for which they convicted Tilghman. Thus, Tilghman has failed to show that, but for the alleged error by the trial court, the jury probably would have reached a different result. *Id.*

### **III. Detective Hatcher's Testimony**

Tilghman next argues that the trial court committed plain error by permitting Detective Hatcher to testify that Bullock told him Tilghman had a gun. Tilghman concedes that he did not object to Detective Hatcher's testimony at trial and that we must therefore review this argument under the plain error standard described above.

During his direct examination, Detective Hatcher testified as follows:

A. . . . I remember [Bullock] making -- referring to the weapon being in his room because he was worried that his father would look -- Deandre [Tilghman] had asked him to keep the gun in his room because he was worried -- his room would not be searched.

Q. So Mr. Bullock told you that Deandre had spoken to him about having a weapon?

A. (Nods head affirmatively.)

Tilghman argues that Bullock's conversation with Detective Hatcher was inadmissible hearsay and that the jury probably would have acquitted Tilghman of possession of a firearm by a felon if Detective Hatcher had not given this testimony.

We reject this argument because, even setting aside this testimony, the State presented ample evidence that Tilghman constructively possessed the gun. As explained above, Bullock's testimony and the surveillance video established that Tilghman controlled the contents of the backpack and used that backpack to give stolen goods to Bullock so he could sell the contents at a pawn shop. Moreover, tracking data placed Tilghman at the scene of the crime when the gun was stolen.

Thus, although the jury *might* have reached a different result had it not heard Detective Hatcher's testimony, Tilghman has not shown that the jury *probably* would have reached a different result. Thus, he cannot satisfy the plain error standard. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

#### **IV. Ineffective Assistance of Counsel**

Finally, Tilghman argues that he was denied his Sixth Amendment right to effective assistance of counsel. He contends that his counsel should have stipulated to his prior felony convictions and then objected to any trial testimony concerning his criminal history.

Ordinarily, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). Recently, in *State v. Todd*, our Supreme Court dismissed an appeal in which a defendant claimed his counsel was ineffective for failing to make a meritorious motion to dismiss for insufficiency of the evidence, outside the presence of the jury. \_\_ N.C. \_\_, \_\_, 799 S.E.2d 834, 838 (2017). It is difficult to imagine any conceivable strategic reason for declining to assert a meritorious, dispositive motion, particularly outside the jury's presence. Nevertheless, our Supreme Court held that whether defense counsel "made a particular strategic decision remains a question of fact, and is not something which can be hypothesized" by an appellate court on direct appeal. *Id.* Likewise, here, the

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State asserts that Tilghman's counsel may have had a strategic reason for not stipulating to the prior felony convictions. Accordingly, under *Todd*, we must dismiss Tilghman's ineffective assistance of counsel claim without prejudice to pursue it through a motion for appropriate relief in the trial court.

**Conclusion**

For the reasons stated above, we dismiss Tilghman's ineffective assistance of counsel claim without prejudice and find no error or no plain error with respect to the trial court's judgments.

DISMISSED IN PART; NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges ELMORE and ARROWOOD concur.

Report per Rule 30(e).