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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1217

Filed: 6 August 2019

Cleveland County, Nos. 17 CRS 50072–73

STATE OF NORTH CAROLINA

v.

JUSTIN MATTHEW SCRUGGS

Appeal by defendant from judgment entered 27 February 2018 by Judge Lisa C. Bell in Cleveland County Superior Court. Heard in the Court of Appeals 9 May 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Bircher, for the State.*

*William D. Spence for defendant.*

DIETZ, Judge.

During evening services at Faith Baptist Church in Cleveland County, church members noticed Defendant Justin Matthew Scruggs with what appeared to be a handgun partially concealed at his waist. Ultimately, some church ushers approached Scruggs, told him they could see his handgun, and asked if he had a concealed carry permit. Scruggs claimed that he did and left, purportedly to get the permit.

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Scruggs did not have a concealed carry permit. He is a convicted felon and not lawfully permitted to possess firearms. Concerned by Scruggs's suspicious behavior, church members contacted law enforcement, who arrested Scruggs. Officers found a box of 9mm ammunition in Scruggs's car but did not find a gun. Recordings of a jail visit between Scruggs and his sister suggested that Scruggs may have hidden the gun on nearby property and instructed his sister to retrieve it later.

A jury convicted Scruggs of possession of a firearm by a felon and carrying a concealed gun without a permit. On appeal, Scruggs argues there was insufficient evidence to support his convictions and that the trial court plainly erred in its jury instructions. We reject both arguments. There was ample evidence from which a reasonable jury could infer all the essential elements of the charged offenses. Likewise, the court properly instructed the jury on the essential elements of those offenses. Accordingly, we find no error in the trial court's judgment.

**Facts and Procedural History**

On 4 January 2017, Defendant Justin Matthew Scruggs went to Faith Baptist Church in Cleveland County during an evening church service. Scruggs had what appeared to be a firearm affixed to his waistband, visible as a bulge underneath his coat. Several church members, including a law enforcement officer, confronted Scruggs, told him that they could see he had a gun, and asked him if he had a permit for it. Scruggs said that he did and then went to his car, purportedly to retrieve the

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permit. Scruggs then got in his car and drove away. Scruggs returned some time later and showed the church members that his holster was now empty. Church members were concerned by Scruggs's behavior and contacted the authorities.

Deputy Jordan Perkins of the Cleveland County Sheriff's office arrived at the church and found Scruggs sitting in his car at the back of the church parking lot. With Scruggs's consent, Deputy Perkins searched Scruggs's car and found a box of 9mm ammunition, print magazines about firearms and firearms accessories, and a cane sword. Perkins placed Scruggs under arrest.

While Scruggs was in jail, his sister visited him. Scruggs instructed his sister to go to First Love Baptist Church, another church near Faith Baptist Church and "make sure it was cleaned up." Security camera footage showed that, after leaving Faith Baptist Church, Scruggs drove to the parking lot of First Love Baptist Church, got out of his car, and later got back in again. After law enforcement listened to the jail recording, they searched the area around First Love Baptist Church but did not find a gun. In another jail discussion, Scruggs urged his sister to sell "my fire—I mean my assets." Scruggs's sister testified that she understood "assets" to mean "firearms."

The State indicted Scruggs for possession of a firearm by a felon and misdemeanor carrying a concealed gun without a permit. The case went to trial. Scruggs moved to dismiss the charges at the close of the State's evidence and again at the close of all evidence. The trial court denied both motions. After deliberations,

the jury convicted Scruggs of both charges. The trial court consolidated the convictions and sentenced Scruggs to 14 to 26 months in prison, suspended for 24 months of probation. Scruggs appealed.

## **Analysis**

### **I. Motions to Dismiss**

Scruggs first argues that the trial court erred by denying his motions to dismiss for insufficiency of the evidence. We reject this argument because there was substantial evidence supporting all elements of the charged offenses.

“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). We examine 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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (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, 265 S.E.2d 164, 169 (1980).

The elements of possession of a firearm by a felon are “(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Wiggins*, 210 N.C. App. 128, 133, 707 S.E.2d 664, 669 (2011). The essential elements of carrying a concealed gun are: “(1) The accused must be off his own premises; (2) he

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must carry a [pistol or gun]; (3) the weapon must be concealed about his person.”  
*State v. Mather*, 221 N.C. App. 593, 597, 728 S.E.2d 430, 433 (2012).

The gist of Scruggs’s argument is that the State’s case relied entirely on speculation and conjecture. Scruggs asserts that the church witnesses merely testified that they briefly saw what looked like a gun handle or the general shape of a gun concealed in Scruggs’s clothes. And, after law enforcement arrived and investigated, officers did not recover a gun, either from Scruggs or from the areas Scruggs purportedly visited after leaving the church grounds. Thus, Scruggs argues, “what the ushers did see could, just as easily, have been a plastic ‘toy’ made, sold, and possessed to look like the real thing.”

This is a classic example of a jury argument; it is not the basis for a meritorious motion to dismiss. To be sure, the State’s evidence required the jury to *infer* that Scruggs possessed a concealed firearm. But that is a reasonable inference. Take, for example, this testimony from a church member describing Scruggs’s possession of the gun on the church property:

Q. Now, the three of you, can you tell the jury about the conversation that the three of you had at that time with the defendant?

A. At that time, Mr. Lovelace asked Mr. Scruggs if he had a permit to carry a gun and he said yes, and—

Q. Who is “he”?

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A. Mr. Scruggs. And he said that he didn't have it on him at the time, that he had it in his car. And during the process of that conversation, *I noticed that the grip of the handgun was sticking out* of the cut in his coat, because his coat was kind of tight on his, on him, he had a button. *And I told him, you know, that his gun was showing and that it should be concealed. And he reached in and concealed the gun.* And—

Q. So you—sorry, go ahead.

A. And then at that point, he decided to go out to the vehicle and get his permit and bring it back.

A jury hearing this evidence reasonably could infer the following: if a person is asked if he has a concealed carry permit for a gun and is then told that the handle of his gun is poking out from his jacket, if that person is not, in fact, carrying a gun, one would expect him to say “you're mistaken, this isn't a gun.” If the person instead says he will go to his car to get the permit for his gun, then he must have a gun.

Similarly, law enforcement found 9mm ammunition in Scruggs's car. Is it possible for one to possess ammunition but not possess a gun? Of course. But the presence of that ammunition further supports the inference that the object poking out of Scruggs's jacket was a gun.

Finally, although law enforcement never recovered a gun, they offered evidence that explained why they didn't recover one: Scruggs's sister visited him in jail after his arrest and Scruggs instructed her to go to property near the church where Scruggs was arrested and “make sure it was cleaned up.” Later, Scruggs told

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his sister to sell “my fire—I mean my assets.” Scruggs’s sister testified that she understood “assets” to mean “firearms.”

Again, are there innocent explanations for Scruggs’s discussions with his sister? Yes. But it is also reasonable to infer from this conversation that Scruggs instructed his sister to retrieve the gun and dispose of it so law enforcement could not find it.

Taken together, all of this circumstantial evidence is more than sufficient to overcome a motion to dismiss. When reviewing a motion to dismiss, this Court must consider the evidence “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). “Once the court decides that 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 [it] beyond a reasonable doubt that the defendant is actually guilty.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

In short, we reject Scruggs’s argument and hold that the State presented substantial evidence of each element of the charged offenses. Accordingly, the trial court properly denied Scruggs’s motion to dismiss.

## II. Jury Instructions

Scruggs also argues that the trial court committed plain error by failing to include in the jury instructions a description of the particular type of handgun that the State referenced in the indictment. We reject this argument because the trial court did not err, and certainly did not commit plain error.

Scruggs concedes that he did not object to the jury instructions at trial and thus we review for plain error. “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.* In other words, the defendant must show that, “absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335. Plain error should be “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 518, 723 S.E.2d at 334.

Scruggs contends that the trial court plainly erred by failing to instruct the jury that Scruggs was indicted for possession of a “9mm silver handgun” by a felon and carrying a concealed “9mm handgun.” This instruction was not required. An “indictment must allege all of the essential elements of the crime sought to be



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charged. Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.” *State v. Westbrook*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citation omitted).

Here, for example, the offense of possession of a firearm by a felon requires proof of possession of a “firearm.” See *State v. Langley*, 173 N.C. App. 194, 198–99, 618 S.E.2d 253, 256–57 (2005). This is why the indictment alleges that Scruggs possessed “a 9mm silver handgun, *which is a firearm.*” (Emphasis added). Similarly, the offense of carrying a concealed gun requires proof of possession of a “gun.” Again, this is why the indictment alleges that Scruggs carried “*a gun*, to wit: a 9mm handgun.” (Emphasis added). The essential elements of the charged offenses were possessing a “firearm” by a felon and carrying a concealed “gun.” The specific type of handgun alleged in the indictment is surplusage. *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997). Thus, the trial court did not err when it instructed the jury on the essential elements and not these additional details from the indictment, without objection from Scruggs. See *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139–40 (2008), *aff’d*, 363 N.C. 251, 675 S.E.2d 333 (2009) (finding the phrase “to wit: a Metallic set of Knuckles” to be surplusage in an indictment for carrying a concealed weapon).

In any event, this alleged omission from the jury instructions cannot rise to the level of plain error. As noted above, plain error should be “applied cautiously and only

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in the exceptional case” where the error calls into question “the fairness, integrity or public reputation of judicial proceedings.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. That is certainly not this case. The indictments properly alleged each element of the charged offenses of possession of a firearm by a felon and carrying a concealed handgun; the State presented substantial evidence that Scruggs committed both of these offenses; the jury instructions accurately stated the law with respect to those offenses; and Scruggs ably presented a defense to those charges.

Simply put, even assuming there was error (and we are not persuaded that there was), it was not the type of error that was so serious as to render this criminal trial fundamentally unfair and, as a result, undermine the integrity of our justice system. *Id.* at 518–19, 723 S.E.2d at 334–35. Accordingly, we find no error and certainly no plain error in the trial court’s jury instructions.

**Conclusion**

For the reasons discussed above, we find no error in the trial court’s judgment.

NO ERROR.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).