IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-53

Filed: 1 October 2019

Lincoln County, Nos. 16CRS054511, 54501

STATE OF NORTH CAROLINA,

v.

JOHN WHITLEY CRAFT, Defendant.

Appeal by Defendant from judgments entered 11 July 2018 by Judge William R. Bell in Lincoln County Superior Court. Heard in the Court of Appeals 6 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander H. Ward, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant-Appellant.

COLLINS, Judge.

Defendant John Whitley Craft appeals from judgments entered upon jury verdicts of guilty of possession of methamphetamine and trafficking in methamphetamine. On appeal, Defendant contends that the trial court erred by denying his motion to dismiss for insufficient evidence of possession and by

committing reversible evidentiary errors. Defendant also claims that he is entitled to a new trial because he was denied effective assistance of counsel. We find no error by the trial court and conclude that Defendant was not denied effective assistance of counsel.

I. Procedural History

Defendant was arrested for possession of methamphetamine on 23 December 2016. In June 2017, a Lincoln County grand jury indicted Defendant on charges of possession of methamphetamine and trafficking in methamphetamine. A jury found Defendant guilty of both charges on 11 July 2018. Judgment was entered upon the jury verdicts, sentencing Defendant to 70 to 92 months' imprisonment and assessing a $50,000 fine. Defendant gave oral notice of appeal in open court.

II. Factual Background

The State's evidence at trial tended to show the following: Deputy Adam Georgia of the Lincoln County Sheriff's Office was dispatched to a residence on 23 December 2016 to investigate possible drug activity. When Georgia arrived at the residence, Defendant was sitting in the front passenger side of a car parked in the front yard. The doors of the four-door sedan were open, and a female was in the back seat on the driver's side. Georgia approached the car and asked the occupants if they knew whether any drugs were in the car; they both replied no. When Georgia asked them why they were there, Defendant replied that he was not sure. Georgia observed

that Defendant was "very visibly nervous, shaking pretty hard, [and] avoiding eye contact."

Another man exited the house and identified himself as Brandon Schronce, the driver of the car. After Schronce consented to a search of the car, Georgia asked Defendant to get out and wait in front of the car. Deputy Lail of the Lincoln County Sheriff's Office arrived on the scene and asked the female to exit the car. Georgia searched Defendant's person and did not find any contraband. While Georgia was searching the car, he learned that there were outstanding warrants for Schronce's arrest. While being handcuffed, Schronce told Georgia that Defendant had "dope with him."

Georgia then searched the front passenger side of the car and found a plastic baggie of methamphetamine "down between the seat and the passenger-side door, not on the floor, sort of wedged in between where [Defendant's] right arm would have been resting at the time he occupied the vehicle." The plastic baggie was at "the very base of where the door closes . . . at the frame of the door . . . wedged in between the seat." The baggie contained over 34 grams of methamphetamine. Because Defendant tried to avoid being handcuffed by moving his hands apart and turning his body toward Georgia, Georgia tased him in order to place him in custody.

III. Issues

On appeal, Defendant argues that (1) the trial court erred by denying Defendant's motion to dismiss for insufficient evidence of constructive possession; (2) the trial court erred when it overruled Defendant's objection to Georgia's lay opinion testimony; (3) Defendant was denied effective assistance of counsel when his trial attorney failed to object to or request a limiting instruction regarding Georgia's testimony that Schronce told Georgia that Defendant had "dope with him"; and (4) cumulative evidentiary error by the trial court denied Defendant a fair trial.

IV. Discussion

A. Denial of Motion to Dismiss

Defendant first contends that the trial court erred by denying his motion to dismiss for insufficient evidence of possession of methamphetamine.

This Court reviews a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Denial of a motion to dismiss is proper if there is substantial evidence of each essential element of the offense and that the defendant was the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (internal quotation marks and citation omitted). "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). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every

hypothesis of innocence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (internal quotation marks and citation omitted). When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Id.* at 378-79, 526 S.E.2d at 455.

Possession of contraband may be actual or constructive. *State v. Malachi*, 371 N.C. 719, 730, 821 S.E.2d 407, 416 (2018) (internal quotation marks and citation omitted).[1] "A defendant constructively possesses contraband when he or she does not have actual possession of the contraband but has the intent and capability to maintain control and dominion over it." *State v. Chekanow*, 370 N.C. 488, 493, 809 S.E.2d 546, 550 (2018) (internal quotation marks and citations omitted). A reviewing court considers the totality of the circumstances in determining whether there was sufficient evidence of a defendant's constructive possession of contraband. *See State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). If a defendant does not have exclusive possession of the place where the contraband is found, the State must show "other incriminating circumstances sufficient for the jury to find [the] defendant ha[s] constructive possession." *Id.*

This Court has considered a variety of incriminating circumstances when analyzing the sufficiency of evidence of constructive possession, including: (1) defendant's close physical proximity to the contraband, *see id.* at 100, 678 S.E.2d

[1] In this case, the State proceeded on a theory that Defendant constructively possessed the methamphetamine.

at 595 (contraband found within defendant's reach); *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (defendant was the sole occupant of the side of the vehicle where drugs were found and was the only passenger to exit from that side); (2) defendant's recent proximity to the contraband, *see State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002) (defendant constructively possessed drugs discovered under the driver's seat of a taxicab ten minutes after defendant had exited the taxicab, and the taxicab driver had transported another customer); (3) defendant's nervous behavior at or near the time of the contraband's discovery, *see id.*; and (4) defendant's opportunity to place the contraband where it was discovered, *see State v. Matias*, 354 N.C 549, 552, 556 S.E.2d 269, 271 (2001) (defendant, a passenger in a car, constructively possessed cocaine found between the seat pads where he had been sitting, and defendant was "the only person in the car who could have shoved the package" into the crease of the seat).

In this case, when Georgia initially approached the car and asked Defendant why he was there, Defendant stated that he did not know. Defendant was "very visibly nervous, shaking pretty hard, [and] avoiding eye contact" with Georgia. When Georgia searched the car, he found the baggie of methamphetamine wedged between the front passenger door and the seat in which Defendant had been sitting just moments before, within Defendant's reach. Defendant was the sole occupant of the side of the car where drugs were found, and Defendant was the only passenger to exit

from that side of the car. Considering the totality of the circumstances, the evidence of these incriminating circumstances was sufficient to support a conclusion that Defendant had the intent and capability to maintain control and dominion over the methamphetamine. *Chekanow*, 370 N.C. at 493, 809 S.E.2d at 550.

Defendant argues that this case is similar to *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976), wherein this Court held that the defendant's mere presence in the vehicle containing contraband was not enough to prove constructive possession. However, this case is distinguishable from *Weems* and is more analogous to *Carr*.

In *Carr*, a police officer pulled over a vehicle to investigate criminal activity. *Carr*, 122 N.C. App. at 371, 470 S.E.2d at 72. All three occupants of the vehicle exited, and the defendant was the only occupant to exit from the passenger side. *Id.* The officer searched the vehicle and discovered pill bottles containing cocaine on the floor of the front passenger side, between the front passenger seat and the center armrest. *Id.* As "the State provided substantial evidence the pill bottles containing cocaine were found in the area of the car occupied solely by the defendant[,]" the defendant gave the officer a fictitious name, and the defendant had conversed earlier that evening with a known drug user, this Court concluded there were "sufficient incriminating circumstances to allow the reasonable inference that defendant had the intent and capability to exercise control and dominion over the drugs." *Id.* at 373, 470 S.E.2d at 73.

As in *Carr*, Defendant was not merely present in the vehicle where the methamphetamine was found; there were sufficient other incriminating circumstances to permit an inference of constructive possession. Accordingly, the trial court did not err by denying Defendant's motion to dismiss.

B. Deputy's Lay Opinion Testimony

Defendant next argues that the trial court erred or plainly erred when it overruled Defendant's objection to Georgia's response, "I would imagine so[,]" when the prosecutor asked, "So if you were sitting in that seat with your arms to your sides, would you possibly have felt that?" Defendant makes two specific arguments on appeal: (1) the testimony was inadmissible because it was not based on Georgia's personal knowledge but was speculative and not helpful to the jury; and (2) the prosecutor asked a leading question that suggested Georgia's answer.

The State argues that Defendant did not properly preserve his objection for review because (1) Defendant did not specify the grounds for the objection, and (2) testimony of a similar character was twice previously admitted without objection.

With respect to Defendant's first argument based on the speculative nature of the testimony, we conclude that even though Defendant did not state specific grounds for the objection at trial, the grounds were apparent from the context. *See* N.C. R. App. P. 10 (a)(1). Moreover, the previously admitted testimony to which the State refers—that the drugs were found "where [Defendant's] right arm would have been

resting at the time he occupied the vehicle"—was different in character from the opinion testimony on which Defendant based his objection. *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). Defendant has thus preserved this issue for our review, and we review the trial court's evidentiary ruling for an abuse of discretion. *See State v. Little*, 191 N.C. App. 655, 663, 664 S.E.2d 432, 438 (2008).

If a witness does not testify as an expert, the witness's testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2018). "Although a lay witness is usually restricted to facts within his knowledge, if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion." *State v. Lindley*, 286 N.C. 255, 257-58, 210 S.E.2d 207, 209 (1974) (internal quotation marks and citation omitted) (noting that a lay witness may testify as to whether a person was under the influence of drugs or other intoxicants). Moreover, Rule 701 allows evidence that can be characterized as a "shorthand statement of fact"—an "instantaneous conclusion[] of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *State v. Braxton*,

352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000) (internal quotation marks and citation omitted) (finding no error in the trial court's admission of an officer's lay opinion testimony that "the victim's screaming sounded like somebody fearing for his life"; defendant "looked guilty" when he "immediately raised his hands" in response to the officer's approach; and defendant "appeared calm, relaxed, and without remorse").

In this case, Georgia testified that he found the baggie of methamphetamine "down between the seat and the passenger-side door, not on the floor, sort of wedged between where [Defendant's] right arm would have been resting at the time he occupied the vehicle." Georgia's affirmative response to the question, "So if you were sitting in that seat with your arms to your sides, would you possibly have felt that?" was a shorthand statement of fact, which was based on his perception of a person's position in the car relative to the location of the drugs, and helped the jury understand Defendant's proximity to and ability to control the contraband. *See* N.C. Gen. Stat. § 8C-1, Rule 701. Because Georgia's testimony was not an inadmissible lay opinion, the trial court did not err by overruling Defendant's objection.

With respect to Defendant's second argument based on the leading nature of the prosecutor's question, we conclude that the grounds for Defendant's objection were not apparent from the context, and thus Defendant failed to preserve this issue for review. *See* N.C. R. App. P. 10 (a)(1). However, because Defendant specifically and distinctly contended plain error on appeal, *see* N.C. R. App. P. 10(a)(4), we review

this issue to determine whether there was error, and if so, whether "absent the error, the jury probably would have reached a different result[,]" *see State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

"Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." N.C. Gen. Stat. § 8C-1, Rule 611(c) (2018). A leading question is one "which suggests the desired response and may frequently be answered by a simple yes or no." *State v. Riddick*, 315 N.C. 749, 755, 340 S.E.2d 55, 59 (1986) (internal quotation marks and citations omitted). "However, simply because a question may be answered yes or no does not make it leading, unless it also suggests the proper response." *State v. Britt*, 291 N.C. 528, 539, 231 S.E.2d 644, 652 (1977).

During the direct examination of Georgia, the following exchange took place:

> State: So if you were sitting in that seat with your arms to your sides, would you possibly have felt that?"
>
> Georgia: I would imagine so.

Although the question was answerable with a yes or no, it did not suggest the answer desired. Thus, it was not a leading question and the trial court did not err, much less plainly err, by allowing the testimony. Defendant's argument is without merit.

C. Ineffective Assistance of Counsel

Defendant argues that he was denied effective assistance of counsel and is thus entitled to a new trial because his trial counsel failed to object to or request a limiting instruction regarding Georgia's testimony that Schronce told Georgia that Defendant had "dope with him." Defendant contends that Schronce's statement, while admissible for a non-hearsay purpose, was not admissible for its truth and furthermore, if admitted for its truth, Defendant's rights under the Confrontation Clause to confront and cross-examine the witnesses against him would be violated.

Claims of ineffective assistance of counsel generally should be considered through motions for appropriate relief. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, we may decide the merits of this claim because the trial transcript reveals that no further investigation is required. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)) ("[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required.").

When a defendant challenges a conviction on the basis of ineffective assistance of counsel, he must show that (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment[,]" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish such errors, a defendant must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance. *State v. McNeill*, 371 N.C. 198, 219, 813 S.E.2d 797, 812-13 (2018) (applying *Strickland*). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* (internal quotation marks and citation omitted). If a reviewing court determines at the outset that the defendant has failed to establish prejudice, then the court "need not determine whether counsel's performance was actually deficient[,]" in order to reject the claim of ineffective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

At trial, the State presented the following evidence of Defendant's possession of methamphetamine: (1) the baggie of methamphetamine was found within Defendant's reach and immediately adjacent to the seat Defendant had occupied moments before it was discovered; (2) Defendant was the only individual sitting on the right side of the vehicle, which was the only place in the vehicle that drugs were found; (3) Defendant was "very visibly nervous, shaking pretty hard, [and] avoiding eye contact" with law enforcement; (4) when asked why he was there, Defendant stated that he did not know; and (5) when Georgia tried to handcuff Defendant, Defendant attempted to spread his arms out further and turned his body toward Georgia. In light of this evidence of Defendant's constructive possession of the methamphetamine, there is not a reasonable probability that, but for counsel's failure

to object to or request a limiting instruction regarding Schronce's statement, there would have been a different result in the proceedings. *See State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985) (finding no prejudicial error where "the state offered abundant evidence of defendant's guilt" of possession of heroin). Because we conclude that Defendant has failed to establish the prejudice necessary to demonstrate ineffective assistance of counsel, we need not determine whether the defense counsel committed a serious error that fell below the wide range of reasonable professional assistance. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

D. Cumulative Error

Defendant finally argues that there was a cumulative effect of two evidentiary errors by the trial court, which deprived him of a fair trial—namely, the admission of Georgia's lay opinion testimony and the admission of Georgia's testimony containing Schronce's out-of-court statement. A new trial is required when, "[a]lthough none of the trial court's errors, when considered in isolation, were necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors created sufficient prejudice to deny [the] defendant a fair trial." *State v. Canady*, 355 N.C. 242, 246, 559 S.E.2d 762, 764 (2002). Because we conclude that the trial court did not commit any single evidentiary err, we must conclude that Defendant was not prejudiced by cumulative error.

V. Conclusion

For the reasons stated above, we conclude that the trial court did not err by denying Defendant's motion to dismiss, the trial court did not commit reversible evidentiary errors, and Defendant was not denied effective assistance of counsel.

NO ERROR.

Chief Judge McGEE and Judge BERGER concur.

Report per Rule 30(e).