

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-883

No. COA22-502

Filed 20 December 2022

Wayne County, Nos. 19 CRS 51961, 2408

STATE OF NORTH CAROLINA

v.

BRANDON L. GRIFFIN

Appeal by defendant from judgment entered 25 August 2021 by Judge Clint D. Rowe in Wayne County Superior Court. Heard in the Court of Appeals 1 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary L. Maloney, for the State.

Caryn Strickland for defendant.

DIETZ, Judge.

¶ 1 Defendant Brandon Griffin appeals his conviction for possession of a firearm by a convicted felon. Griffin challenges the sufficiency of the evidence with respect to the possession element and also asserts two unpreserved instructional and evidentiary challenges.

¶ 2 As explained below, there was substantial evidence of constructive possession,

and thus, the trial court properly denied the motion to dismiss for insufficient evidence. With respect to his unpreserved instructional and evidentiary challenges, Griffin cannot meet the high bar to show plain error. We therefore find no error in part, and no plain error in part, in the trial court's judgment.

Facts and Procedural History

¶ 3 In 2019, two probation officers arrived at Defendant Brandon Griffin's home for a routine probation visit. Griffin lived in the home with his wife. As a standard condition of his probation, Griffin was not permitted to possess a firearm.

¶ 4 The probation officers, Officer Pia and Officer Castillo, testified at trial about the events that occurred during their visit. According to the officers' testimony, Griffin answered the door in a robe, allowed the officers to enter, and explained to the officers that he and his wife would need to put clothes on. The officers agreed and followed Griffin to his bedroom, where his wife was sitting on the bed. Once Griffin entered the bedroom, Officer Castillo saw Griffin grabbing items off a nightstand next to the bed and attempting to conceal the items in the front of his robe. Griffin later explained that the nightstand was on "his side of the bed."

¶ 5 In response to Griffin's suspicious behavior, Officer Castillo grabbed Griffin by the arm and led him to the kitchen. Officer Pia remained with Griffin's wife as she got dressed. Once she was clothed, Griffin's wife brought out a pair of black gym shorts for Griffin to wear. As Griffin was putting on the shorts, a bag of marijuana

and a bag of pills fell out of Griffin's robe and onto the kitchen floor.

¶ 6 The officers then asked Griffin whether there was anything else in the home that would be illegal for Griffin to have. Griffin replied that there was a rifle in the bedroom closet. The officers then called for backup so that they could safely perform a larger search of the residence and retrieve the rifle from the bedroom.

¶ 7 Once backup arrived, Officer Pia returned to the master bedroom and found a .22 caliber Mossberg rifle in the closet. In addition to the rifle, the officers also found .22 caliber ammunition in the nightstand from which Griffin previously had grabbed and attempted to conceal a number of items, and which he explained was the nightstand on "his side of the bed." During their search, the officers also recovered drug paraphernalia, a bag that contained a white powdery substance, two large machetes, a butcher knife, shotgun shells, a digital scale, and various other items.

¶ 8 At trial, the State asked Officer Pia if she served in a supervisory capacity, and she replied that she was not a supervisor but that she did have a "specialty in supervising gang related cases." The State asked Officer Pia to explain her specific job duties in both general probationary cases and gang related cases, and she explained that in gang related cases there are "additional conditions" for probationers. Officer Pia then described those additional conditions but did not state that Griffin's case was a gang-related probation case.

¶ 9 The jury found Griffin guilty of being a felon in possession of a firearm and

Griffin later pleaded guilty to attaining habitual felon status. The trial court sentenced Griffin to 90 to 120 months in prison. Griffin timely appealed.

Analysis

I. Denial of defendant’s motion to dismiss

¶ 10 Griffin first argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon. Griffin contends that there was insufficient evidence of either actual or constructive possession of the firearm.

¶ 11 This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Harding*, 258 N.C. App. 306, 318, 813 S.E.2d 254, 263 (2018). “In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court’s review is to determine whether there is substantial evidence of each element of the charged offense.” *State v. Hardison*, 243 N.C. App. 723, 726, 779 S.E.2d 505, 507 (2015). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* “The evidence must be considered in the light most favorable to the State as the State is entitled to every reasonable inference that might be drawn therefrom.” *Id.*

¶ 12 The offense of possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1 has two essential elements: “(1) the defendant has been convicted of a felony; and (2) the defendant subsequently possessed a firearm.” *State v. Grady*, 274 N.C. App. 429, 438, 852 S.E.2d 631, 638 (2020). Griffin challenges the sufficiency of the

evidence of the second element, concerning possession.

¶ 13 Possession of a firearm for purposes of this offense may be actual or constructive. *State v. Battle*, 253 N.C. App. 141, 144, 799 S.E.2d 434, 437 (2017). “A person has actual possession of a firearm if 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.” *Id.*

¶ 14 Constructive possession exists when the defendant does not have physical possession of the firearm but has the “intent and capability to maintain control and dominion over the firearm.” *Id.* When the defendant does not have exclusive control of the area where the firearm is located, “the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009).

¶ 15 “Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.” *State v. Guy*, 262 N.C. App. 313, 322, 822 S.E.2d 66, 74 (2018). Factors that can support a finding of constructive possession include “evidence the defendant had a specific or unique connection” to the place where the firearm was located and “indicia of the defendant’s control over the place where” the firearm was located. *Id.* at 322, 822 S.E.2d at 74–75.

¶ 16 Here, the evidence, viewed in the light most favorable to the State, showed the

following: Griffin acted suspiciously from the outset of his interaction with the probation officers. In response to a question about whether there was “anything else in the residence that was cause for concern for officers or that he knew would be illegal for him to have,” Griffin told the officers that there was a rifle in the bedroom closet. Officers recovered a .22 caliber rifle from the closet. During their initial interaction with Griffin in the bedroom, Griffin attempted to conceal a number of items on a nightstand that he identified as being on “his side of the bed.” Officers later recovered ammunition matching the caliber of the recovered firearm from that nightstand.

¶ 17 This evidence, viewed in its totality, is substantial evidence from which the jury could infer Griffin’s constructive possession of the recovered firearm. *Id.* at 322, 822 S.E.2d at 74. We therefore find no error in the trial court’s denial of the motion to dismiss.

II. Challenge to jury instructions

¶ 18 Griffin next argues that the trial court erred in instructing the jury on both actual and constructive possession because there was no evidence that could have supported a conviction based on actual possession. Griffin objected to a portion of the trial court’s instruction on constructive possession, but he did not challenge the instruction concerning actual possession at trial, or otherwise assert the argument

he now raises on appeal. We therefore review this argument for plain error.

¶ 19 “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 affects “the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 518, 723 S.E.2d at 334.

¶ 20 Griffin cannot satisfy the plain error standard here. First, even if we assume the instruction on actual possession was erroneous, Griffin has not shown that, but for the inclusion of the instruction, the jury probably would have reached a different verdict. Griffin points to various portions of the probation officers’ testimony and contends that the officers “could not agree on, or even recall, many material details about the alleged offense” and that there were various credibility issues with the officers’ testimony. But Griffin does not explain how, but for the erroneous instruction, the jury probably would have addressed these purported credibility issues differently.

¶ 21 More importantly, the trial court's instructions, set out below, were a concise, correct statement of the law with respect to both actual possession and constructive possession:

Possession of an article may be actual or constructive. A person has actual possession of an article if the person has it on their person, is aware of its presence, and either alone, or together with others, has both the power and the intent to control its disposition or use. A person has constructive possession of an article if the person does not have it on his person, but is aware of the presence, and has either alone, or together with others, both the power and intent to control its disposition or use. A person's awareness of the presence of the article, and the person's power and intent to control its disposition or use may be shown by direct or may be inferred from the circumstances.

¶ 22 The State presented no evidence that Griffin had physical possession of the firearm at any point in the encounter and emphasized during closing argument that the State did not contend that Griffin had actual possession of the firearm:

The judge is going to tell you that possession of something is either actual, which is you got it on your person, it's in your pocket, *which is not what we had here, I mean we just didn't, it's in his closet*; or it's constructive, and he's going to give you the legal definition of constructive possession.

(Emphasis added). The State then argued to the jury at length about all the various evidence that the State contended was proof beyond a reasonable doubt that Griffin had constructive possession of the firearm.

¶ 23 Simply put, given the particular circumstances present at this trial, the alleged

error is simply not the sort of fundamental error that is so extraordinary that it calls into question the “fairness, integrity or public reputation” of this criminal proceeding or raises questions about whether Griffin received a fundamentally fair trial. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. We therefore hold that Griffin has not met the high bar to show plain error with respect to the instruction on actual possession.

III. Admission of gang affiliation

¶ 24 Finally, Griffin argues that the trial court erred by admitting evidence of his gang affiliation. Griffin acknowledges that he failed to preserve this issue at trial and we therefore review it for plain error under the standard described above.

¶ 25 “Evidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt.” *State v. Privette*, 218 N.C. App. 459, 480, 721 S.E.2d 299, 314 (2012). The State does not contend that gang affiliation was relevant to the firearm possession charge in this case.

¶ 26 Still, we are not convinced that the admission of this evidence was error. First, the State did not present direct evidence that Griffin was affiliated with a gang. Instead, one of the probation officers who testified at trial, in describing her responsibilities as a probation officer, explained that she had a “specialty in supervising gang related cases.” Thus, at most, the jury might have inferred from this testimony that Griffin had some gang affiliation, although no witness actually

testified that this was so.

¶ 27 Griffin also points to testimony that the officers seized a “black and gold” bandana from Griffin’s home among many other items. Griffin argues that these are the colors of a gang known as the “Latin Kings.” But, as the State points out, there was no testimony about the Latin Kings at trial, nor was there any testimony linking the colors black and gold, which are a common color combination, with gang activity.

¶ 28 In any event, even if we assumed the admission of this evidence was a fundamental error, Griffin again fails to show that, but for these passing references at trial, the jury probably would have reached a different verdict or that the admission of this testimony was so fundamentally wrong that it seriously affected the integrity and public reputation of this criminal proceeding. *Lawrence*, 365 N.C. at 516–17, 723 S.E.2d at 333. We therefore find no plain error in the admission of this evidence.

Conclusion

¶ 29 We find no error in part, and no plain error in part, in the trial court’s judgment.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges DILLON and INMAN concur.

Report per Rule 30(e).