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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-917

Filed 3 October 2023

Mitchell County, Nos. 20CRS50278, 21CRS92

STATE OF NORTH CAROLINA

v.

JASON LEE FILMORE

Appeal by defendant from judgment entered 24 May 2022 by Judge Gary M. Gavenus in Mitchell County Superior Court. Heard in the Court of Appeals 20 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Tanisha D. Folks, for the State.

Blackrose Law, by Gina Balamucki, for the defendant-appellant.

TYSON, Judge.

Jason Lee Filmore (“Defendant”) appeals from a judgment entered on a jury’s verdict for possession of methamphetamine and attaining habitual felon status. Our review discloses no error.

I. Background

Spruce Pine Police Officer Michael Burleson (“Officer Burleson”) was on patrol on 31 July 2020. While stopped at a traffic light, Officer Burleson observed Defendant

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wave to him from the front passenger seat of a silver Honda Civic vehicle. He recognized Defendant from attempting to serve him with a warrant earlier that week.

Officer Burleson confirmed Defendant's warrant remained outstanding over the radio. By the time he received confirmation, the traffic light had turned green. Officer Burleson drove straight through the traffic light, but the car Defendant was riding in had turned left. Officer Burleson communicated a description of the vehicle and asked for other law enforcement officers to help him locate the vehicle.

Captain Kasey Cook ("Captain Cook") was driving an unmarked patrol car and located the silver Honda Civic parked in front of a nearby convenience store. He parked across the street to observe the vehicle. Law enforcement officers "wanted to make sure that [Defendant] was [still] in the vehicle before [they] approached[.]" Captain Cook did not observe anyone entering or exiting the vehicle, but he was able to recognize Defendant was sitting in the passenger seat. He observed Defendant through the front windshield as the vehicle departed from the parking lot.

Captain Cook followed the vehicle for a short period of time and alerted other law enforcement officers concerning the direction it was headed. He also confirmed Defendant was still seated in the passenger seat and communicated with the other officers over the radio. When the vehicle pulled into a nearby McDonald's restaurant parking lot, he activated his emergency lights and stopped the vehicle.

Three individuals were seated inside the vehicle. The driver identified himself as Josh Henline ("Henline"), but he failed to produce his driver's license. Henline

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also explained the car was owned by his girlfriend, who was not present. Defendant, who was still seated in the passenger seat, falsely identified himself as “Josh Pittman.” Cynthia Thompson (“Thompson”), Defendant’s girlfriend, was sitting in the rear passenger seat behind Defendant.

Officer Burleson arrived at the scene as Captain Cook was speaking with Henline and Defendant. Captain Cook informed Officer Burleson that Defendant had provided a false name, and then he asked Henline to step outside of the vehicle.

Officer Burleson focused his attention on Defendant, and asked Defendant to exit the vehicle. Defendant was “very hesitant and slow about his movements,” and officers had to “assist[] him out of the vehicle.” Officer Burleson conducted a pat-down search of Defendant while standing directly beside the vehicle. The passenger front door remained open during the duration of the search. Defendant was advised about the outstanding arrest warrant for violating his probation, and he was handcuffed and placed in the back of the patrol vehicle.

While Officer Burleson arrested and searched Defendant, Captain Cook focused on Henline. He conducted a pat-down search and found a syringe inside of Henline’s pocket. Henline admitted a plastic bag of marijuana and another syringe were located inside the vehicle under the driver’s seat. While Captain Cook and Officer Burleson focused on Henline and Defendant, other officers spoke with Thompson.

Officer Burleson and another officer at the scene conducted a more thorough

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search of the vehicle. The front passenger door contained a three-inch pocket on the panel of the door, and the officers discovered a small bag containing a clear, crystallized substance in that pocket. When the front passenger door was closed, this door pocket “was within mere inches” of where Defendant had been seated. The bag containing the crystallized substance was the sole item located in the pocket.

The North Carolina State Crime Lab confirmed the white, crystallized substance was methamphetamine. During the search, officers also found a DeWalt miter saw, a DeWalt jigsaw, and other tools in the vehicle with “identifying markings,” which Defendant admitted belonged to his former employer.

A grand jury indicted Defendant for possession of methamphetamine on 1 March 2021. A trial was held on 24 May 2022. During trial, Officer Burleson and Captain Cook testified for the State. Defendant moved to dismiss for insufficiency of the evidence at the close of the state’s evidence and again at the close of all the evidence. The trial court denied both of Defendant’s motions.

The jury was instructed on actual and constructive possession. The jury unanimously found Defendant guilty of possession of methamphetamine.

The trial then proceeded to the second phase to decide whether Defendant was guilty of attaining habitual felon status. The State presented certified, true copies of Automated Criminal Information System (“ACIS”) printouts as evidence of Defendant’s prior felony convictions. Defendant objected to the admission of the ACIS printouts, arguing the State had failed to produce actual or certified copies of the

judgments for Defendant's prior convictions. The trial court admitted the evidence over Defendant's objection. The jury's verdict found Defendant guilty of attaining habitual felon status.

Defendant was sentenced as a prior record level III offender to an active term of between 33 and 52 months of imprisonment. Defendant entered an oral notice of appeal in open court.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Issues

Defendant argues the trial court: (1) erroneously denied his motion to dismiss for sufficiency of the evidence; (2) committed plain error by instructing the jury on actual possession; and, (3) erroneously admitted evidence of the ACIS report, without original or certified copies of Defendant's prior convictions, to support his attaining habitual felon status.

IV. Motion to Dismiss

Defendant argues the trial court erroneously denied his motion to dismiss for sufficiency of the evidence.

A. Standard of Review

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to

dismiss de novo.” *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (citation omitted). “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) (internal citations and quotation marks omitted).

“When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. McNeil*, 359 N.C. 800, 803, 617 S.E.2d 271, 273 (2005) (citations and internal quotations omitted). “Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.” *Id.* at 804, 617 S.E.2d at 274.

“For purposes of a motion to dismiss, evidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant’s guilt.” *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002) (citation omitted).

“If there is substantial evidence[,] whether direct, circumstantial, or both[,] to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

B. Analysis

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“An accused’s possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use.” *State v. Weems*, 31 N.C. App. 569, 570, 230 S.E.2d 193, 194 (1976) (citation and internal quotation marks omitted).

A person has actual possession of a controlled substance 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. “Constructive possession [of a controlled substance] occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the [controlled] substance.” “[U]nless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.”

State v. Alston, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386 (2008), *aff’d*, 363 N.C. 367, 677 S.E.2d 455 (2009) (citations omitted).

Our courts review the “totality of the circumstances” to determine whether incriminating evidence exists to support constructive possession. *State v. McBride*, 173 N.C. App. 101, 106, 618 S.E.2d 754, 758 (2005). Incriminating circumstances include the defendant’s: “(1) proximity to the contraband, though mere presence is not enough, (2) ownership or control of the place where the contraband was found, (3) opportunity to dispose of the contraband in the place it was found, and (4) suspicious or unusual behavior.” *State v. Garrett*, 246 N.C. App. 651, 655, 783 S.E.2d 780, 784

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(2016) (citations omitted); *State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012). No single factor controls. *Garrett*, 246 N.C. App. at 655, 783 S.E.2d at 784.

“[A]ctual possession may be proven by circumstantial evidence.” *McNeil*, 359 N.C. at 813, 617 S.E.2d at 279. “[E]vidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession[.]” *State v. Robledo*, 193 N.C. App. 521, 527, 668 S.E.2d 91, 96 (2008) (citation and quotation marks omitted). “[I]n addressing a defendant’s proximity to the contraband, this Court considers proximity in terms of space and time.” *State v. Chekanow*, 370 N.C. 488, 497, 809 S.E.2d 546, 553 (2018).

Here, evidence of other incriminating circumstances must be present because the car was not owned by or under Defendant’s exclusive possession or control. *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (explaining “unless the person has exclusive possession of the place where the narcotics are found,” proof of “other incriminating circumstances” must be provided “before constructive possession may be inferred”).

The testimony from Officers Burleson and Captain Cook regarding Defendant’s location and proximity to the drugs cannot be the sole source of support for finding Defendant constructively possessed the narcotics. *See Weems*, 31 N.C. App. at 571, 230 S.E.2d at 194 (“[M]ere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating

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circumstances, to convict for possession.” (citation omitted)).

The remaining evidence, however, provides sufficient evidence to overcome Defendant’s motion to dismiss and to present the issue to the jury. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383.

First, while Defendant did not own the vehicle or exercise exclusive possession over it, the evidence demonstrated Defendant exercised a certain amount of control over the vehicle. *See State v. Miller*, 363 N.C. 96, 100, 678 S.E.2d 592, 595 (2009) (explaining a “defendant’s proximity to the contraband and indicia of the defendant’s control over the place where the contraband is found” are key factors indicating constructive possession”).

The evidence tended to show Defendant felt comfortable in exercising some control over the contents of the vehicle, because he placed tools belonging to his previous employer inside the trunk. That evidence is similar to the evidence presented at trial in *Miller*, where the defendant’s proximity in relation to the drugs found in a bedroom, along with defendant’s “birth certificate and state-issued identification card [being] found on top of the television stand” in the room where the drugs were uncovered, “permit[ted] a reasonable inference that defendant had the intent and capability to exercise control and dominion over cocaine in that room.” *Id.* Overall, the evidence presented at trial supports an inference that Defendant was able to exercise a degree of possession or control over the contents of the vehicle, including the methamphetamine in the front passenger door pocket and the trunk of

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the car. *Id.*

Defendant's demeanor and behavior when Captain Cook and Office Burleson apprehended him also tended to support an inference that Defendant constructively possessed the drugs. In *State v. Butler*, the "defendant appeared 'very nervous' and 'fidgety' when the officers approached the cab and asked him to step out with his bag" and the officer "stated that defendant was 'very slow' to get out of the cab." 356 N.C. 141, 147, 567 S.E.2d 137, 141 (2002). In *Butler*, testimony regarding those "incriminating circumstances tend[ed] to establish defendant's constructive possession of the cocaine." *Id.* Here, Defendant lied to the officers about his identity and was purportedly "very hesitant and slow about his movements," requiring the officers to "assist[] him out of the vehicle." Defendant's behavior provides evidence of incriminating circumstances sufficient to present the factual issue of constructive possession to the jury. *Id.*

Defendant argues Thompson could have reached forward and placed the methamphetamine inside the pocket on the passenger front door while Defendant and Henline were being questioned by law enforcement. Officer Burleson testified the car door remained open while he patted down and arrested Defendant. He also testified Thompson was questioned by a third officer at the scene and was not left unattended in the car. While Defendant argued this factual issue to the jury, Officer Burleson's testimony and Defendant's actions and behaviors provided sufficient evidence for the trial court to present the issue of constructive possession to the jury.

See Locklear, 322 N.C. at 358, 368 S.E.2d at 383. Defendant’s argument is overruled. *Miller*, 363 N.C. at 100, 678 S.E.2d at 595; *Butler*, 356 N.C. at 147, 567 S.E.2d at 141.

V. Jury Instructions on Actual Possession

Defendant argues the trial court committed plain error by instructing the jury on actual possession.

A. Standard of Review

Defendant failed to object to the jury instructions for actual possession. This Court reviews unobjected-to instructional errors for plain error. *State v. Lawrence*, 365 N.C. 506, 512-16, 723 S.E.2d 326, 330-33 (2012) (explaining “[u]npreserved error in criminal cases, on the other hand, is reviewed only for plain error” and “plain error review in North Carolina is normally limited to instructional and evidentiary error” (citations omitted)).

“Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). A reviewing court examines the entire record to determine whether the instructional error had a probable impact on the juror’s finding of guilt. *State v. Tollison*, 190 N.C. App. 552, 560-61, 660 S.E.2d 647, 653 (2008).

B. Analysis

Defendant argues the trial judge erred by instructing the jury on actual possession, as the methamphetamine was not located on Defendant’s body. At trial,

the State expressed its intention to refrain from pursuing a theory of actual possession. Defendant's argument fails, because he has not demonstrated prejudice, "that absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. The jury was instructed on both actual and constructive possession. Sufficient evidence was introduced and existed to support a jury's finding and verdict that Defendant constructively possessed the drugs. Defendant's argument is without merit and overruled.

VI. Sufficiency of the Evidence to Support Habitual Felon Status

Defendant lastly argues the trial court erroneously admitted evidence of the ACIS report, without original or certified copies of Defendant's prior convictions, to support his attaining habitual felon status. We disagree.

Our Supreme Court addressed Defendant's argument in *State v. Waycaster*, 375 N.C. 232, 846 S.E.2d 688 (2020). The Court in *Waycaster* held the "admission of the ACIS printout for the purpose of establishing defendant's habitual felon status was proper" and aligned with the legislative requirements of how a defendant's prior convictions may be established pursuant to N.C. Gen. Stat. § 14-7.4 (2021). *Id.* at 245, 846 S.E.2d at 696. Defendant's argument is dismissed.

VII. Conclusion

The State presented sufficient evidence of other incriminating circumstances to support submission of and a jury's finding Defendant constructively possessed methamphetamine found inside the pocket of the front passenger door where

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Defendant was seated. *See Locklear*, 322 N.C. at 358, 368 S.E.2d at 383; *Miller*, 363 N.C. at 100, 678 S.E.2d at 595; *Butler*, 356 N.C. at 147, 567 S.E.2d at 141.

Defendant failed to show the trial judge plainly erred by instructing the jury on actual possession. *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

The ACIS report constituted sufficient evidence of Defendant's prior convictions. *Waycaster*, 375 N.C. at 245, 846 S.E.2d at 696.

Defendant received a fair trial free from the errors he argued and preserved for appeal. We discern no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge COLLINS and Judge WOOD concur.

Report per Rule 30(e).