NO. COA11-154
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 09 CRS 78669
09 CRS 24529

YUAKIN DYWAN TUCKER

Appeal by defendant from judgment entered 17 August 2010 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 1 September 2011.

Roy Cooper, Attorney General, by Daniel S. Hirschman, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Emily H. Davis, Assistant Appellate Defender, for defendant.

THIGPEN, Judge.

Yuakin Dywan Tucker ("Defendant") was convicted of possession of cocaine and trafficking by possessing twenty-eight grams or more of cocaine. On appeal, we must decide whether the State presented sufficient evidence that Defendant constructively possessed cocaine and whether the admission of evidence that his companion, Carl Blackmon ("Blackmon"), also

possessed illegal substances was plain error. We conclude Defendant had a fair trial, free from error.

The evidence of record tends to show that on the afternoon of 6 May 2009, Detective Justin Blanks, Detective E.A. Goodykoontz, and Corporal John Marsh, conducted surveillance at the Studio 6 hotel in Greensboro, North Carolina. Detective Blanks saw a blue Ford Taurus enter the hotel parking lot and subsequently exit the lot less than two minutes later. Detective Blanks believed the vehicle's short stay at the hotel indicated a drug transaction may have occurred. Detective Goodykoontz and Corporal Marsh stopped the Taurus, and after obtaining consent to search the vehicle, discovered 0.4 grams of crack cocaine and a crack pipe. The driver of the vehicle spoke with the policemen about where he had purchased the crack cocaine. Thereafter, the police renewed their surveillance and focused on Building 16 of the Studio 6 hotel, looking specifically for two males.

Within minutes, the police saw two men, who were later identified as Blackmon and Defendant. Blackmon and Defendant exited Building 16, walked to separate vehicles, and drove away. The police followed Blackmon and stopped him, after which Blackmon was transferred to the Studio 6 hotel, where he showed

the officers the room he had left, room 1612. The police searched Blackmon and found marijuana and 0.3 grams of powder cocaine.

The police also followed Defendant into a nearby apartment complex, where Defendant parked his car. Sergeant J.E. Armstrong parked next to Defendant, turned on his blue lights, and approached Defendant. Sergeant Armstrong noticed a "very strong" odor of marijuana and asked Defendant if he had marijuana on his person. Defendant said yes, voluntarily giving Sergeant Armstrong a marijuana blunt from his pocket. Detective Blanks then arrived at the apartment complex and searched Defendant, finding a room key for room 1612 at the Studio 6 hotel and $1,555.00 in denominational breakdowns of fives, tens, and twenties.

After Defendant was searched, Detective Blanks testified that a "female . . . emerged from the apartment complex[,]" and "[D]efendant . . . spoke to her and asked her to call somebody and have them respond to the room." In response, Detective Blanks contacted Sergeant Koonce, who obtained a key for room 1612 from the front desk of the Studio 6 hotel and secured the room. Detective Blanks was concerned that "whoever the [female] was that [Defendant] asked to respond to the room may try to

arrive and attempt to destroy any evidence that may be present." Detective Blanks then informed Defendant the police were going to obtain a search warrant for room 1612, and Defendant would be transported back to the room. Defendant "immediately broke into a deep sweat[.]" Defendant "went from a very calm, cool, collected state . . . to very nervous." Defendant was "visibly tense."

Sergeant Armstrong transported Defendant back to the Studio 6 hotel, and Detective Blanks obtained a search warrant for room 1612. Blackmon and several other officers were already gathered in the room. While waiting on Detective Blanks to return with the warrant, Defendant was "nervous[,]" "fidgety[,]" and "tense[.]" Detective Blanks announced over the police radio he had just left the magistrate's office with the search warrant and was returning to the Studio 6 hotel, after which Defendant stood up, started walking towards the bed and nightstand, and stated, "I'm going to end all this[;] all I got is scales and some bags[;] let me get it and give it to you[;] let's go to jail." Officers instructed Defendant to sit back down, and Defendant complied.

Detective Blanks arrived with the search warrant, and the officers conducted a search of room 1612 with the assistance of

a K-9 unit. The K-9 unit alerted to the area near the nightstand. Police discovered scales and a box of sandwich bags in the nightstand drawer and 64.7 grams of crack cocaine in a plastic bag in a black Nike shoe underneath the nightstand. Police also found a bag with white powder, which was ultimately not subjected to a chemical analysis because the weight of the 64.7 grams of crack cocaine in addition to the white powder totaled less than 200 grams.

Defendant was arrested on 6 May 2009. On 20 July 2009, Defendant was indicted on charges of trafficking by possession of 28 to 200 grams of cocaine and possession with intent to sell and deliver cocaine. The case came on for trial on 27 July 2010 in Guilford County Superior Court, and on 3 August 2010, the jury found Defendant guilty of trafficking by possession of 28 to 200 grams of cocaine and of possession of cocaine. Defendant pled guilty to having attained the status of an habitual felon. The trial court consolidated the offenses, entered a judgment consistent with the jury's verdict, and sentenced Defendant to 110 to 141 months incarceration. From this judgment, Defendant appeals.

I: Motion to Dismiss

In Defendant's first argument on appeal, he contends the trial court erred by denying his motion to dismiss the charges of trafficking by possession of 28 to 200 grams of cocaine and possession of cocaine for insufficiency of the evidence. We disagree.

When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines "whether the State presented substantial evidence in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (quotation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quotation omitted). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *Id.* (quotation omitted). Additionally, a "substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight," which remains a matter for the jury. *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (quotation omitted). Thus,

"[i]f 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." *Id.* (quotation omitted).

"For a conviction of felonious possession of cocaine, the State is required to prove that the defendant knowingly possessed cocaine." *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991) (citing N.C. Gen. Stat. § 90-95(d)(2)). "To prove the offense of trafficking in cocaine by possession the State must show: (1) knowing possession of cocaine and (2) that the amount possessed was 28 grams or more." *Id.* (citing N.C. Gen. Stat. § 90-95(h)(3)). "The 'knowingly possessed' element of the offense of trafficking by possession may be established by showing that: (1) defendant had actual possession; (2) defendant had constructive possession; or (3) defendant acted in concert with another to commit the crime." *State v. Alston*, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386 (2008), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009) (citation omitted). Defendant specifically contends there was insufficient evidence to support the possession element of his possession and trafficking of cocaine offenses.

"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." *Id.* (quotation omitted). "The defendant may have the power to control either alone or jointly with others." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Id.* (citation omitted).

In the present case, since Defendant did not have exclusive possession of the hotel room, the State was required to present sufficient evidence of incriminating circumstances in order to allow the jury to infer Defendant constructively possessed the crack cocaine found in the hotel room.

> Incriminating circumstances relevant to constructive possession include [but are not limited to] evidence that [the] defendant: (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6)

possessed a large amount of cash.

Alston at 716, 668 S.E.2d at 386. "Evidence of conduct by the defendant indicating knowledge of the controlled substance or fear of discovery is also sufficient to permit a jury to find constructive possession." *Id.* (citation omitted). "Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case[;] [n]o single factor controls, but ordinarily *the questions will be for the jury*." *Id.* at 716, 668 S.E.2d at 386-87 (quotation omitted) (Emphasis in original).

In this case, the police saw Defendant leaving Building 16 of the Studio 6 hotel; Defendant possessed a room key for room 1612, in which the cocaine was found; Defendant had in his possession $1,555 in small bills; upon Defendant's discovery that the police were interested in room 1612, Defendant told an unidentified female to "call somebody and have them respond" to room 1612; Defendant became extremely nervous when told room 1612 would be searched; Defendant admitted there were scales and plastic bags in room 1612; Defendant also knew where the scales and plastic bags were located in room 1612. We believe the foregoing incriminating circumstances were sufficient, such that the question of whether Defendant constructively possessed

cocaine was properly a question for the jury. *See, e.g., State v. Brown*, 310 N.C. 563, 569-70, 313 S.E.2d 585, 588-89 (1984) (finding sufficient other incriminating circumstances when cocaine and other drug packaging paraphernalia were found on a table beside which the defendant was standing when the officers entered the apartment, the defendant had been observed at the apartment multiple times, possessed a key to the apartment, and had over $1,700 in cash in his pockets). We conclude the trial court did not err by denying Defendant's motion to dismiss for insufficiency of the evidence.

II: Plain Error

In Defendant's second and final argument on appeal, he contends the trial court committed plain error by admitting evidence pertaining to the illegal drugs found on Carl Blackmon. Assuming *arguendo* the admission of this evidence was error, we conclude any error was not plain, because it did not prejudice Defendant's trial.

Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure governs this Court's review of matters employing the plain error standard: "In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial

action questioned is specifically and distinctly contended to amount to plain error."[1]

Plain error analysis applies to evidentiary matters and jury instructions. *State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007), *cert. denied*, 552 U.S. 1319, 170 L. Ed. 2d 760, 128 S. Ct. 1888 (2008). "The plain error rule is critical in the context of admitting physical evidence or testimony without an objection because the trial court is not expected to second-guess a party's trial strategy[;] [t]he possibility always exists that a party intentionally declines to object for some strategic reason." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, __ U.S. __, 175 L. Ed. 2d 362, 130 S. Ct. 510 (2009) (citation omitted). To show plain error, the "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. Allen*, 360 N.C. 297, 310, 626 S.E.2d 271, 282, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116, 127 S. Ct. 164 (2006) (quotation omitted). Defendant bears the burden of showing that an error

[1]Defendant did not object at trial to the admission of the evidence pertaining to the illegal drugs found on Carl Blackmon. Therefore, plain error review is appropriate.

arose to the level of plain error. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Defendant argues the admission of the testimony of SBI Special Agent Lindley pertaining to the chemical analysis and identification of powder cocaine found on Blackmon was plain error. Defendant argues there was "less than overwhelming" evidence of Defendant's guilt, and Agent Lindley's testimony "tipped the scales with the jury" to convict Defendant. We find this argument unconvincing. Defendant used the evidence that Blackmon possessed illegal drugs to his advantage. At trial, Defendant implied that because drugs were found in Blackmon's shoe, the drugs found in the hotel room stowed away in a shoe must necessarily have also been Blackmon's. On cross-examination, Defendant asked the following questions:

> Q: What contraband did the Greensboro Police find on Mr. Blackmon?
>
> A: Marijuana and cocaine.
>
> Q: And where was it found?
>
> A: In his shoe.
>
> Q: In his shoe?
>
> A: Yes, sir.
>
> Q: Did you find any cocaine in [Defendant's] shoe?

> A: No sir, not - not on his person, the shoes that were on his person, no.

Based on the foregoing, and assuming without deciding the admission of evidence pertaining to illegal drugs found on Blackmon was erroneously admitted, we do not believe Defendant has met his burden of proving that absent the admission of the evidence, the jury probably would have reached a different result. We conclude the admission of the evidence was not plain error. Defendant had a fair trial, free from error.

NO ERROR.

Judges GEER and STROUD concur.

Report per Rule 30(e).