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NO. COA11-264
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v.

Guilford County
No. 10 CRS 071786

JONATHAN DAVID FRIDAY

Appeal by defendant from judgment entered 27 October 2010
by Judge Catherine C. Eagles in Guilford County Superior Court.

Heard in the Court of Appeals 15 September 2011.

Thomas R. Sallenger, for Defendant.

*Roy Cooper, Attorney General, by P. Bly Hall, Assistant
Attorney General, for the State.*

THIGPEN, Judge.

Jonathan David Friday ("Defendant") appeals from a judgment convicting him of possession of cocaine with the intent to sell and deliver. We must determine whether the evidence that Defendant constructively possessed the cocaine was sufficient to overcome Defendant's motion to dismiss for insufficiency of the evidence. We conclude the trial court did not err by denying Defendant's motion to dismiss.

The evidence of record tends to show that residents of Claremont Court Apartments in Greensboro, North Carolina, complained to police that drugs were being sold out of Building 2708, Apartment B, of the apartment complex. On 17 March 2010 at approximately 7:00 p.m., Officer William Coble began conducting surveillance at Claremont Court Apartments, looking specifically for Defendant. Defendant had been prohibited from all Greensboro Housing Authority property, which included Claremont Court Apartments.

As Officer Coble arrived at the apartment complex, a car sped out of the parking lot and ran a stop sign. Officer Coble followed and stopped the car, after which he found a crack pipe and some crack cocaine folded in a piece of paper on the car's console. The driver was arrested.

Officer Coble and Officer Brian Bowman returned to the parking lot of the apartment complex, after which they saw a man walking out of Apartment B of Building 2708. The man threw something to the ground. Officer Coble detained the man, and Officer Bowman retrieved the objects discarded by the man - a crack pipe and a zip-lock bag. Officer Coble called for assistance from Officer Tim Moore.

When Officer Moore arrived at the apartment complex, he saw Defendant peeking around the corner of Building 2704. Defendant took one step out, saw Officer Moore in his police car, and ducked around the corner of Building 2704. Officer Coble intercepted Defendant and placed him under arrest for trespassing. Defendant was searched and police discovered \$739 in cash, with mixed denominations of twenties, tens, and fives. Officer Coble stated:

The thing that struck me, some of the . . . bills were folded together, some of them — they were in every pocket. Some of them were balled up like in a ball, like a wad, a piece of paper. It took . . . quite a little time to sort it all out and count it.

Officer Moore also discovered a white sock in a recessed area on the east side of Building 2704, containing 22.4 grams of crack cocaine in a plastic bag. The recessed area was described as a "hole that [has] been recessed to give . . . the crawl space of the building the opportunity to breathe." The crack cocaine was discovered six to ten feet away from the corner where Officer Moore first saw Defendant. The sock was dry, and leaves had been pushed over the sock to hide it.

Defendant was taken to jail, at which time the police noticed Defendant was only wearing three white socks, one on one foot and two on the other.

On 19 April 2010, Defendant was indicted on the charge of possession of cocaine with the intent to sell and deliver. The case came on for trial on 26 October 2010, and the jury found Defendant guilty of possession of cocaine with the intent to sell and deliver. The trial court entered judgment consistent with the jury's verdict, convicting Defendant of possession of cocaine with the intent to sell and deliver, and sentencing Defendant to six to eight months incarceration. The trial court suspended the sentence and placed Defendant on supervised probation for 36 months, with intensive supervision for a period of six months. From this judgment, Defendant appeals.

I: Motion to Dismiss

In Defendant's sole argument on appeal, he contends the trial court erred by denying Defendant's motion to dismiss the charge of possession with intent to sell and deliver cocaine because there was insufficient evidence that Defendant possessed the cocaine.¹

¹Although Defendant states in the "Issues Presented" portion of his brief that the State presented insufficient evidence that Defendant was the perpetrator of the offense, Defendant's argument challenges the sufficiency of the evidence to support the possession element, not the identity element. This opinion addresses the substantive argument made by Defendant regarding the possession element. See N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

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).

"The elements of possession with intent to sell and deliver are: 1) possession, 2) of a controlled substance, and 3) with intent to sell or deliver, which may be inferred from the amount or packaging." *State v. Peoples*, 167 N.C. App. 63, 67, 604 S.E.2d 321, 324 (2004). The possession element of the offense "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). Defendant specifically contends there was insufficient evidence to support the possession element of his possession with intent to sell and deliver conviction.

"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) (quotation 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).

Since Defendant in this case did not have exclusive possession of the recessed area on the east side of building 2704, the State was required to present sufficient evidence of other incriminating circumstances in order to allow the jury to infer Defendant constructively possessed the crack cocaine found in that area.

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 the present case, evidence of record tends to show that crack cocaine was being sold in, or in the vicinity of, Apartment B in Building 2708; Defendant was first seen behind building 2704, peeking around the corner; when Defendant saw Officer Moore, Defendant sidestepped behind Building 2704 and "walked away quickly"; the crack cocaine was discovered in a recessed area of Building 2704, only six to ten feet from where Officer Moore first saw Defendant; the crack cocaine was found in a white sock, and Defendant was wearing three white socks, one on one foot and two on the other; and Defendant was carrying \$739 in mixed denominations of twenties, tens, and fives. We believe the foregoing incriminating circumstances were sufficient, such that the question of whether Defendant constructively possessed crack cocaine was properly a question for the jury. *See State v. McNeil*, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005) ("Incriminating circumstances, such as evidence placing the accused within close proximity to the controlled substance may support a conclusion that the substance was in the constructive

possession of the accused"). Defendant had a fair trial, free from error.

NO ERROR.

Judges GEER and STROUD concur.

Report per Rule 30(e).