An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA11-583
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 09 CRS 230059

MARCO ANTONIO RIVERA-OCANA

Appeal by defendant from judgment entered 8 November 2010 by Judge Eric Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

Winifred H. Dillon, attorney for defendant.

ELMORE, Judge.

Marco Antonio Rivera-Ocana (defendant) appeals from a jury conviction entered 8 November 2010 for trafficking in cocaine by possession. After careful consideration, we find no error.

On 21 June 2009, Officers Jeffrey Zederbaum and Robert Havens of the Charlotte-Mecklenburg Police Department were patrolling the parking lot of Compare Foods located off North

Tryon Street in Charlotte. The officers observed a blue Chevrolet Suburban and a silver Honda sedan parked side by side. The Suburban was registered to an individual named Esperanza Guzman. Defendant was in the driver's seat of the Suburban, and Lanardo Hernandez Sanchez was in the passenger's seat of the Suburban. The officers approached the vehicle, and asked defendant and Sanchez to exit. Defendant then granted consent for the officers to search the vehicle. The officers found a Kellogg's Frosted Flakes cereal box on the passenger side floorboard. The cereal box contained a roll of black electrical tape and two bricks of cocaine. Defendant and Sanchez were then arrested.

On 29 June 2009, defendant was indicted for 1) trafficking in 400 grams or more of cocaine by possession and 2) trafficking in 400 grams or more of cocaine by transportation. Prior to trial, one of the bricks was chemically analyzed by Ann Charlesworth of the Charlotte-Mecklenburg Police Department Crime Laboratory. Charlesworth found that the brick contained 498.36 grams of cocaine. On 18 December 2009, the State gave notice to defendant of its intent to introduce Charlesworth's report at trial. On 3 November 2010, a trial was held. At trial, Officer Zederbaum testified to the results of

Charlesworth's analysis, but Charlesworth did not testify. Next, the State offered into evidence Charlesworth's report. Defendant did not object to the report being admitted into evidence. At the close of the State's evidence, defendant made a motion to dismiss all charges. The trial court granted defendant's motion to dismiss the charge of trafficking in cocaine by transportation, but denied the motion to dismiss the charge of trafficking in cocaine by possession. At the close of all evidence, defendant renewed his motion to dismiss the charge of trafficking in cocaine by possession. The trial court again denied this motion.

On 8 November 2010, the jury convicted defendant of trafficking in cocaine by possession. The trial court then imposed a sentence of 175-219 months imprisonment. Defendant now appeals.

Defendant first argues that the trial court erred in denying his motion to dismiss the charge of trafficking in cocaine by possession. Specifically, defendant argues that the State failed to present sufficient evidence that defendant actually or constructively possessed the cocaine. We disagree.

> In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime[.] Substantial

> evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion....A case should be submitted to a jury if there is any evidence tending to prove the fact in issue[.]

State v. Everette, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007) (quotations and citations omitted) (alterations removed). "A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quotations and citations omitted). When a defendant is not in exclusive possession of the place where contraband is found, "the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Id.* "[T]wo factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Id.* at 100, 678 S.E.2d at 595.

Here, the officers found a Kellogg's Frosted Flakes cereal box containing two bricks of cocaine on the passenger side floorboard of the Suburban. Defendant was seated in the driver's seat of that same vehicle. Therefore, defendant was in close proximity to the cocaine at the time it was discovered. Furthermore, the fact that defendant was seated behind the wheel of the vehicle indicates that defendant had the ability to

control the place where the contraband was found. We conclude that these facts were sufficient for the case to be submitted to the jury. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

Defendant next argues that the trial court committed plain error in admitting the results of the chemical analysis conducted by Charlesworth. Specifically, defendant argues that admission of the report violated his constitutional right to confront witnesses, because he was not provided with an opportunity to cross-examine Charlesworth. We disagree.

According to N.C. Gen. Stat. § 90-95, a report from the Charlotte-Mecklenburg Police Department Crime Laboratory is admissible without further authentication and without the testimony of the analyst if:

> (1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
>
> (2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g) (2009).

Here, the State filed a "Notice of Intent to Introduce Evidence at Trial" of Charlesworth's report on 18 December 2009. Defendant did not object to the admission of the report at that time, or at trial. The trial was held on 3 November 2010, approximately eleven months after the State provided written notice to defendant. Therefore, we conclude that the trial court did not err in admitting the results of the chemical analysis conducted by Charlesworth.

No error.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).