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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-576

No. COA20-513

Filed 19 October 2021

Forsyth County, No. 17 CRS 59311

STATE OF NORTH CAROLINA

v.

CRISTIEN FARRIOR, Defendant.

Appeal by defendant from judgment entered 23 January 2020 by Judge Lora Christine Cabbage in Superior Court, Forsyth County. Heard in the Court of Appeals 21 June 2021.

Attorney General Joshua H. Stein, by Criminal Bureau Chief Leslie Cooley Dismukes, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant-appellant.

STROUD, Chief Judge.

¶ 1

Cristien Fariior (“Defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of felony possession of cocaine. Because the State presented insufficient evidence of constructive possession, the trial court erred in denying Defendant’s motion to dismiss and we vacate the judgment.

I. Background

¶ 2

Detective P.A. Davenport testified that in October of 2017, the Winston-Salem Police Department received a “Crime Stopper’s tip” referencing “drug activity being conducted” at a residence on East 17th Street. Early in October¹, Detective Davenport arranged for a confidential informant to conduct a “controlled purchase” of narcotics at the East 17th Street residence. While surveilling the East 17th Street residence from his parked car, Detective Davenport observed Defendant walk out of the house, meet with the confidential informant on the front porch, and engage in “a hand-to-hand transaction.” A few minutes later, Detective Davenport met with the confidential informant and retrieved “a small, off-white, flaky, rock-like substance.”

¶ 3

Days later, the confidential informant engaged in another controlled purchase at the East 17th Street residence, where Detective Davenport observed Defendant, who was standing on the front porch, engage in “another hand-to-hand transaction[.]” Shortly after the exchange, Detective Davenport met with the informant and retrieved “a small, off-white, rock-like substance that was in a plastic Baggie.” Detective Davenport acquired a search warrant for Defendant’s person² and the East 17th Street residence.

¹ Detective Davenport could not recall the date of either controlled purchase.

² Before executing the warrant, Detective Davenport discovered that Defendant lived on Rose Street.

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¶ 4

At approximately 10:00 a.m. on 6 October 2017, Detective Davenport and other detectives in the Special Division Unit arrived at the East 17th Street residence to execute the search warrant. Detective Davenport observed Defendant standing on the front porch with a male and a female; the female indicated that the residence belonged to her. Detective J. Rivera detained Defendant on the porch and searched his person. Detective Rivera found \$539 in the fold of Defendant's baseball hat.

¶ 5

When officers entered the East 17th Street residence, it was unoccupied. Detective S.T. Dickerson testified that in the living room, he found a Jansport backpack containing "a small bag of off-white rock-like substance, which [he] suspected to be crack cocaine." Although there were other items in the backpack, Detective Dickerson testified that there was "not anything that [he] was able to identify ownership" of. In the laundry room, in a laundry basket filled with "a mixture" of male and female dirty clothes, Detective A. E. Kimmel found "a folded up \$5 bill that had a white powdered substance contained inside" and a clear plastic bag containing "a white rock substance." Detective Kimel testified that the plastic bag "had the white rock substance inside, which was consistent with what [he had] seen over the years with people buying and selling narcotics," and "[i]t was packaged identically to what [he had] seen on the street when [he had] personally bought narcotics undercover[.]" The contents of the bags were later identified as approximately 1.61 grams and .02 grams of cocaine.

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¶ 6 In addition to finding the narcotics, officers also discovered torn plastic baggies around the East 17th Street residence. On the dresser in the upstairs bedroom, Detective Davenport found some “tear offs,” which he described as “the edge of a plastic Baggie used to put narcotics and keep them for sale.” Detective Davenport further testified that there was a pair of “large sized male shoes” in the bedroom that “appeared [like] they might fit Mr. Farrior.” On top of the breaker box in the kitchen, Detective Dickerson found “a knot from a plastic [b]aggie” and “a used piece of plastic [b]aggie.” In the trash can, Detective Parker found several “[b]aggies with the corners missing.” In the living room closet, Detective Kimel found two \$1 bills containing a “white powder residue.” Detective Dickerson testified that he “recognize[d]” the baggies he discovered in the bedroom and the kitchen as “packaging material for narcotics.”

¶ 7 Defendant was indicted for possession with intent to sell and deliver cocaine in violation of North Carolina General Statute § 90-95, based upon the narcotics found in the laundry basket and the backpack found in the East 17th Street residence. Defendant made a motion to dismiss the charge at the close of the State’s evidence and renewed the motion at the close of all the evidence. The trial court denied the motion. The jury found Defendant guilty of the lesser-included offense of felony possession of cocaine. Defendant was sentenced to 6 to 17 months imprisonment, suspended for 18 months of supervised probation. Defendant appeals.

II. Analysis

¶ 8

Defendant argues the trial court erred by denying his motion to dismiss, denying his right to an impartial tribunal, and instructing the jury on actual possession, a theory not supported by the evidence. The State’s brief “acknowledges that Defendant is entitled to a new trial” on his impartial tribunal argument because “[t]he trial court’s comments to the jury pool improperly included religious and racial references which likely eroded the neutrality of the court.”³ Although the State notes that it “does not concede that it failed to prove constructive possession or that the trial court’s jury instructions were improper[.]” the State’s brief does not substantively address Defendant’s arguments on these issues at all. Instead, the State argues “[i]t is unnecessary for this Court to reach these arguments . . . because the State agrees that a new trial is warranted” based upon the trial court’s comments during jury selection. We hold, however, that the trial court erred in denying Defendant’s motion to dismiss because the State presented insufficient evidence of constructive possession. Because we vacate the trial court’s judgment on that basis, we need not address Defendant’s additional arguments.

A. Constructive Possession

³ We need not address the trial court’s comments during jury selection here as we have determined Defendant’s motion to dismiss should have been granted. But in *State v. Campbell*, COA20-646, filed concurrently with this opinion, this Court granted a new trial based upon similar comments by the same judge during jury selection.

¶ 9 Defendant argues the trial court erred in denying his motion to dismiss because “the State entirely failed to prove constructive possession of the cocaine found inside the dirty laundry and unidentified backpack inside the house that did not belong to [Defendant] and where there were two other people present.” (Capitalization altered.)

This Court reviews the trial court’s ruling with respect to a motion to dismiss for insufficient evidence on a *de novo* basis. The question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendant’s being the perpetrator of such offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. The evidence can be circumstantial or direct, or both. However, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. In considering such motions, the trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. If, however, the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator . . . the motion to dismiss must be allowed.

State v. English, 241 N.C. App. 98, 104, 772 S.E.2d 740, 744–45 (2015) (citations, quotation marks, and brackets omitted).

¶ 10 Defendant was convicted of possession of cocaine in violation of North Carolina

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General Statute § 90-95. N.C. Gen. Stat. § 90-95(a)(3) (2019). “To convict a defendant of possessing a controlled substance, the State must prove beyond a reasonable doubt that defendant knowingly possessed the substance.” *State v. Crudup*, 157 N.C. App. 657, 662, 580 S.E.2d 21, 25 (2003) (citations omitted). Possession of a controlled substance may be actual or constructive. *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 348 (2012). “A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing.” *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citation omitted). “[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. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation omitted).

In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession, a review of this Court’s cases reveals that we have considered the following factors: (1) the defendant’s ownership and occupation of the property . . . ; (2) the defendant’s proximity to the contraband; (3) indicia of the defendant’s control over the place where the contraband is found; (4) the defendant’s suspicious behavior at or near the time of the contraband’s discovery; and (5) other evidence found in the defendant’s possession that links the defendant to the contraband. No one factor controls, and courts must consider the totality of the circumstances.

State v. Chekanow, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018) (citations omitted).

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¶ 11 Here, the State’s evidence showed that Defendant did not have ownership or exclusive control of the East 17th Street residence, as officers were aware prior to executing the search warrant that Defendant lived at a different address. In fact, there was no evidence that Defendant had ever resided in or stayed overnight at the East 17th Street residence. Moreover, when officers arrived at the East 17th Street residence on 6 October, the woman standing on the front porch with Defendant informed officers that she owned the property. Therefore, to survive a motion to dismiss, “the State must have introduced evidence of other incriminating circumstances sufficient to support a reasonable inference that [D]efendant constructively possessed the contraband found in the” East 17th Street residence. *Bradshaw*, 366 N.C. at 94, 728 S.E.2d at 348. “This inquiry is necessarily fact specific; each case will turn on the specific facts presented, and no two cases will be exactly alike.” *Id.* (citation and quotation marks omitted).

¶ 12 The State’s evidence showed Defendant was standing on the front porch with two individuals when officers arrived at the East 17th Street residence to execute the search warrant. There was no evidence that Defendant possessed a key to the residence, received mail at the residence, or had even been inside the residence beyond the one occasion where he was observed exiting the front door. *See State v. Graham*, 90 N.C. App. 564, 568, 369 S.E.2d 615, 618 (1988) (finding inference of constructive possession when cocaine was found next to a letter addressed to the

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defendant in a bedroom where the defendant occasionally stayed); *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (considering the defendant's possession of a house key as an indicator of the defendant's control over the house). At the time the officers discovered the two plastic bags containing cocaine inside the East 17th Street residence, Defendant was detained on the front porch. *See State v. Kraus*, 147 N.C. App. 766, 770, 557 S.E.2d 144, 148 (2001) ("Evidence placing the accused within close proximity to the contraband may support a jury's conclusion that the contraband was in the accused's possession, thereby justifying the denial of a motion to dismiss." (citation omitted)). The cocaine was not located in plain view; one plastic bag was in a laundry basket containing "a mixture" of male and female clothes, and the other bag was found in a backpack. *See State v. Givens*, 95 N.C. App. 72, 78, 381 S.E.2d 869, 872 (1989) (considering that the "[d]efendant was arrested in the same room where police found cocaine in plain view" as an incriminating circumstance). There was no evidence regarding who owned or used the clothing in the laundry basket. Additionally, there was no evidence that Defendant failed to cooperate with the officers or acted suspiciously when he was searched on the front porch. *See State v. Ferguson*, 204 N.C. App. 451, 460, 694 S.E.2d 470, 477–78 (2010) ("[M]any constructive possession cases involve evidence that the defendant behaved suspiciously, made incriminating statements admitting involvement with drugs, or failed to cooperate with law enforcement officers.").

¶ 13 Viewing the evidence in the light most favorable to the State, the evidence was not sufficient to show Defendant’s constructive possession of the cocaine found in the laundry basket and the backpack found in the East 17th Street residence. Although the State presented evidence that \$539 in cash was found in Defendant’s hat, Defendant had been observed around the East 17th Street residence on a couple of occasions, and plastic baggies were found inside the East 17th Street residence, such evidence was “sufficient only to raise a suspicion or conjecture as to . . . the commission of the offense[.]” *English*, 241 N.C. App. at 104, 772 S.E.2d at 745. At best, the evidence tends to show that *someone* possessed narcotics at the East 17th Street residence, but it was not Defendant’s residence and there is no evidence connecting Defendant to the items found in the residence. Viewed in the light most favorable to the State, there was insufficient evidence of other incriminating circumstances to support an inference of constructive possession. *Id.* Accordingly, the trial court erred in denying Defendant’s motion to dismiss.

III. Conclusion

¶ 14 The State failed to present sufficient evidence of incriminating circumstances to support a finding of constructive possession. We therefore vacate Defendant’s judgment for possession of cocaine.

VACATED.

Judges COLLINS and WOOD concur.

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Report per Rule 30(e).