NO. COA01-1383

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

MARK CHRISTOPHER MASSEY

Mecklenburg County
Nos. 00 CRS 3756
00 CRS 3757
00 CRS 3758
01 CRS 106848

Appeal by defendant from judgment entered 18 May 2001 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

THOMAS, Judge.

Defendant, Mark Massey, was found guilty of possession of cocaine, possession of drug paraphernalia, and second-degree trespass. The trial court consolidated the offenses for judgment and sentenced defendant to 66 to 89 months in prison. Defendant confines his appeal to his conviction for possession of cocaine. For the reasons discussed herein, we find no error.

The State's evidence tended to show the following: On 28 January 2000, Charlotte Mecklenburg Police Officers Dave Scheppegrell and LeBraun Evans saw defendant engage in what

appeared to be a hand to hand drug transaction with an unidentified male. As the officers approached in their marked patrol car, the unidentified male ran through a field separating Benjamin Street from Fairfield Avenue. Defendant, meanwhile, walked toward an apartment at 407 Benjamin Street. He went onto the concrete porch, opened the apartment's screen door, and stood in the doorway. The metal portion of the screen door blocked the officers' view of defendant's body below the waist. However, they could see defendant's "hands moving." Scheppegrell described defendant's actions as follows: "[Y]ou could see him bending over a little bit doing something down below the door where I could see, and he was manipulating something."

Knowing defendant had been banned from the property by the Charlotte Housing Authority, the officers approached him. Evans asked defendant if he was trying to enter the apartment. Defendant replied, "No, I can't." Defendant then admitted to Evans that he had a crack pipe in his jacket. When retrieving the pipe from defendant's pocket, the officers discovered three individually-packaged rocks of what defendant acknowledged to be "flex" or fake crack cocaine. Scattered on the ground "[d]irectly under [defendant's] feet where he was standing," the officers found seven rocks of crack cocaine as well as an open corner piece from a plastic baggie, known in the drug trade as a "corner bag." Defendant told Evans that he had dropped the bag. Scheppegrell testified that corner bags were "usually" used by dealers to hold rocks of crack cocaine for sale. Evans confirmed that he

previously purchased crack cocaine packaged in a corner bag in the course of his police work.

The State introduced a letter from the Charlotte Housing Authority dated 27 August 1997 which noted that defendant was banned from its property. Scheppegrell had also personally informed defendant of the ban "several times" prior to 28 January 2000.

At the conclusion of the State's evidence, defendant moved to dismiss the charge of possession of cocaine with intent to sell or deliver. The trial court denied the motion. Defendant offered no evidence of his own but renewed his motion to dismiss, which was again denied. During his closing argument, defendant conceded his guilt on the trespassing and drug paraphernalia charges.

The trial court charged the jury on possession of cocaine with intent to sell or deliver and, over defendant's objection, the lesser included offense of possession of cocaine. The jury returned a verdict of guilty on the lesser offense of possession of cocaine, as well as second-degree trespass and possession of drug paraphernalia.

By his first assignment of error, defendant argues the trial court erred in denying his motion to dismiss, absent evidence that he possessed the cocaine found on the porch. We disagree.

In reviewing the denial of defendant's motion to dismiss, this Court must determine whether the evidence, when viewed in the light most favorable to the State, is sufficient to allow a reasonable juror to find defendant guilty of the essential elements of the

offense beyond a reasonable doubt. *See State v. Jones*, 147 N.C. App. 527,545, 556 S.E.2d 644, 655 (2001), *disc. rev. denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). The State is entitled to all favorable inferences reasonably drawn from the evidence. *State v. Tucker*, 347 N.C. 235, 243, 490 S.E.2d 559, 563 (1997), *cert. denied*, 523 U.S. 1061, 140 L. Ed. 2d 649 (1998). Although the evidence supporting a finding of the defendant's guilt must be substantial, it need not exclude every reasonable hypothesis of innocence to survive a motion to dismiss. *See State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986).

Possession may be either actual or constructive. *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001). A person has constructive possession of an object if he lacks actual physical possession thereof but retains the power and intent to control its disposition and use. *See State v. Givens*, 95 N.C. App. 72, 78, 381 S.E.2d 869, 872 (1989). Where a defendant is found in close proximity to drugs in an area not within his exclusive control, the State must show "'other incriminating circumstances which would permit an inference of constructive possession.'" *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3 (2001) (quoting *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996)).

We find substantial evidence that defendant possessed the seven rocks of crack cocaine recovered by police. Defendant was observed engaging in what appeared to be a hand to hand drug transaction with another man. When approached by police,

defendant's associate fled and defendant retreated to the porch of a nearby apartment building. While shielding his lower body behind the door, defendant bent over and made movements with his hands as if "manipulating" something. When police arrived on the porch, defendant had a crack pipe and pieces of flex in his jacket pocket. At his feet in plain view were seven loose rocks of crack cocaine and an open "corner bag," an accouterment of the drug trade commonly used to package cocaine. Defendant, who was alone, admitted that he had just dropped the bag. We find sufficient incriminating circumstances, including defendant's evasive movements and his actual possession of a crack pipe and pieces of flex, to permit a reasonable inference that the corner bag dropped by defendant had held the rocks of crack cocaine lying beside it. *Cf. State v. Lane*, 119 N.C. App. 197, 203, 458 S.E.2d 19, 22-23 (1995).

By his second assignment of error, defendant argues the trial court erred in instructing the jury on the offense of possession of cocaine. Having determined the evidence of possession sufficient to survive a motion to dismiss, we further hold that the trial court did not err in instructing the jury on this offense. *See State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000) ("A trial court must give instructions on all lesser-included offenses that are supported by the evidence [.]"), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001).

By his final assignment of error, defendant argues the trial court committed plain error and violated his right to due process

by instructing the jury on the charge of possession of cocaine with intent to sell or deliver, absent any evidence of his intent to sell or deliver the drug. Although defendant was convicted only of the lesser offense of possession of cocaine, he contends that the instruction on the greater offense improperly invited the jury to return a "compromise" verdict rather than an outright acquittal. Mindful of the high standard required to establish plain error, defendant claims that "the trial court's erroneous instruction did have a probable impact on the jury's finding of guilt." We disagree.

Our Supreme Court addressed a similar argument in *State v. Cody,* 225 N.C. 38, 39, 33 S.E.2d 71, 72 (1945). The defendant in *Cody* was charged with assault with a deadly weapon with intent to kill inflicting serious injury, a felony. The trial court instructed the jury on this offense as well as the lesser offense of misdemeanor assault with a deadly weapon. The jury returned a guilty verdict on the misdemeanor. While suggesting that the evidence might not have supported the felony instruction, the Supreme Court rejected defendant's challenge to the jury charge, reasoning as follows:

> There is very slight, if any, evidence of serious injury within the meaning of the statute. Thus, if there was error in the instructions, it rests in the fact that the court submitted the felony charge to the jury. Even so, on this count there was a verdict of not guilty. Hence defendant has not been prejudiced thereby.

Id. at 39, 33 S.E.2d at 72. Here, as in *Cody*, defendant was effectively found not guilty of possession of cocaine with intent

to sell or deliver. We hold there was no prejudice arising from the jury instruction on this offense in that defendant was not convicted of that offense. Defendant's suggestion that the charge somehow invited the jurors to enter an improper compromise verdict is pure speculation. A jury is presumed to follow the instructions of the trial court. *State v. Richardson*, 346 N.C. 520, 538, 488 S.E.2d 148, 158 (1997) (citing *State v. Johnson*, 341 N.C. 104, 115, 459 S.E.2d 246, 252 (1995)), *cert. denied*, 522 U.S. 1056, 239 L. Ed. 2d 652 (1998). Nothing in the record rebuts this presumption.

Accordingly, we hold that defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).