NO. COA01-192

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Scotland County
98 CRS 866, 867, 868, 1110, 1114

RITA FAYE QUICK

Appeal by defendant from judgment entered 25 August 2000 by Judge D. Jack Hooks, Jr. in Scotland County Superior Court. Heard in the Court of Appeals 9 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jarvis John Edgerton, IV., for defendant.

BIGGS, Judge.

Rita Faye Quick (defendant) appeals her convictions of trafficking in marijuana. For the reasons discussed herein, we affirm in part; and remand for a new trial.

The evidence tended to show the following: On 5 January 1998, defendant's boyfriend, George Durand, and Preston William Mabe, defendant's brother-in-law, traveled to Tucson, Arizona to purchase marijuana. While the men were away, defendant approached Ronnie Douglas and his girlfriend, Peggy Sue Stutts, about renovating and renting a small cinder block building on Douglas' property, in

close proximity to his house. Defendant explained that she needed the building by 16 January 1998, and offered to pay Douglas $200 per week rent. On 16 January 1998, defendant arrived at the building and paid Ronnie Douglas $200 for rent, while Durand and Mabe unloaded defendant's van and stocked the building with what was later determined to be marijuana. Defendant, accompanied by Mabe, Durand, and Myra Martin (defendant's sister) took "one of the balls" of marijuana home with them.

On 24 January 1998, law enforcement officers, responding to information from a confidential source that defendant was storing marijuana at the building, went to the building and asked to search. Douglas signed a written consent to search form, allowing the search of his vehicle, his trailer, and the cinder block building in question. He did not have keys to the building so law enforcement picked the lock to gain entry. Inside the building, the investigating officers found nineteen bales of marijuana wrapped in plastic.

On 27 April 1998, the grand jury returned indictments charging defendant with, among other charges, trafficking in marijuana by manufacture, trafficking in marijuana by possession, and trafficking in marijuana by transport. Each indictment alleged that the offense occurred on or about 16 January 1998, and further alleged that the amount of marijuana involved was more than 50, but less than 2000 pounds. These cases were tried together on 25 August 2000; a jury found defendant guilty on all charges. From this conviction, defendant appeals.

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At the outset, we note that, while defendant sets forth eleven assignments of error for appellate review, those that were not addressed in her brief are deemed abandoned, pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure.

I.

In defendant's first two assignments of error, she contends that the trial court erred in its denial of her motion to dismiss for insufficiency of evidence. She argues that there was insufficient evidence of the amount of marijuana manufactured, possessed, and transported on the date alleged in the indictment, 16 January 1998. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense." *State v. Lynch,* 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis,* 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies in the evidence are for resolution by the jury." *State v. Brown,* 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

N.C. Gen. Stat. § 90-95(h)(1) (1999) sets forth the statutory offense of trafficking marijuana, in pertinent part, as follows:

> (1) Any person who . . . manufactures, . . . transports, or possesses in excess of 10 pounds [] of marijuana shall be guilty of a felony . . . and if the quantity of such substance involved:
>
> . . . .
>
> b. Is 50 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon. . . .

Thus, weight is one of the essential elements of trafficking under N.C.G.S. § 90-95(h). The State "must either offer evidence of its actual, measured weight or demonstrate that the quantity of marijuana itself is so large as to permit a reasonable inference that its weight satisfied this element." *State v. Mitchell*, 336 N.C. 22, 28, 442 S.E.2d 24, 27 (1994). "The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct." *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993) (citations omitted).

In the instant case, the evidence presented by the State tended to show the following: Defendant arranged to have Preston Mabe and others go to Arizona to pick up a large quantity of marijuana on 5 January 1998; store receipts indicated that on 10 January 1998, defendant purchased supplies from Lowes for renovating a building she was leasing for $200 a week; on 16 January 1998, defendant and her boyfriend picked up the marijuana in defendant's van and drove to the building rented by the defendant; the marijuana was in light square blocks, with wrapping

around it; after unloading the "packages" from defendant's vehicle, Preston Mabe had to wash grease from his hands from the packages; defendant kept the keys to the building at her residence, from 16 January to 24 January 1998, when they were seized by law enforcement; Ronnie Douglas, the owner of the building, did not have access to the building within those times; that Officer Murphy was familiar with the method used for packaging marijuana; on 24 January 1998, the "bales [of marijuana] were in different sizes . . . [,] wrapped in clear plastic . . . [and they] had some kind of oily-type substance on the outside of the wrapping" which came from defendant's vehicle; and the actual weight of the marijuana seized was 224 pounds.

Defendant argues that the State failed to prove that the amount of marijuana deposited in the building on 16 May 1998, was the same amount seized on 24 January 1998, or that the marijuana was left undisturbed for eight full days and thus, her motion to dismiss should have been allowed. We disagree.

We are unpersuaded by defendant's argument since "'[n]either . . . statute nor [case law] requires that the evidence be direct; rather, the evidence must be substantial.'" *State v. Salters*, 137 N.C. App. 553, 557, 528 S.E.2d 386, 390, (quoting *State v. Sluka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 203 (1992)), *disc. review denied*, 352 N.C. 361, 544 S.E.2d 556 (2000). It is well settled that jurors may rely on circumstantial evidence to the same degree as they rely on direct evidence. *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984). The law makes no distinction between the weight

to be given to either direct or circumstantial evidence. *Id.* Instead, "the law requires only that the jury shall be fully satisfied of the truth of the charge." *Id.* at 29, 310 S.E.2d at 603 (quoting *State v. Adams*, 138 N.C. 688, 695, 50 S.E. 765, 767 (1905)); *State v. Sluka*, 107 N.C. App. at 204, 419 S.E.2d at 203.

Viewing the evidence in the light most favorable to the State, a reasonable inference from the State's evidence is that the marijuana placed in the building on 16 January 1998 is the same marijuana that was seized on 24 January 1998, with the exception of the bale that was removed by defendant and her colleagues. Thus, the jury could conclude that the defendant did possess and transport in excess of the 50 pounds of marijuana required on the date set forth in the indictment. However, we decline to address the charge of trafficking in marijuana by manufacture, in that we conclude, for the reasons discussed below, that defendant's conviction on that charge must be vacated. Accordingly, this assignment as it pertains to the charges of trafficking by possession and transport is overruled.

II.

Defendant next contends that the trial court erred by failing to instruct the jury on the lesser included offenses of manufacture, possession, and transport of marijuana. We hold that it was reversible error for the court to decline to submit instructions to the jury on the lesser included offense of trafficking by manufacture; however, the court properly declined to instruct on lesser included offenses of trafficking by transport

and by possession.

The trial court must instruct the jury regarding a lesser included offense when "the evidence would permit a jury rationally to find [the accused] guilty of the lesser offense and acquit him of the greater." *State v. Williams,* 343 N.C. 345, 363, 471 S.E.2d 379, 389, *cert. denied*, 343 N.C. 345, 471 S.E.2d 379 (1996). However, when all the "evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime," the trial court is not required to submit a lesser included offense to the jury. *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972).

First, the defendant argues, and the State concedes, that the trial court should have instructed the jury on the lesser included offense of trafficking by manufacture, a charge that requires the manufacture of more than ten pounds, but less than fifty pounds, of marijuana. The evidence established that defendant and others took one of the nineteen bales to her home, opened it, weighed it, and repackaged it. Because the entire nineteen bales weighed 224 pounds, a reasonable inference is that the one bale was less than the 50 pounds necessary to convict on the indicted offense. We hold that the evidence would reasonably permit a jury to convict defendant of trafficking in marijuana by manufacture of the smaller amount. Accordingly, we vacate defendant's conviction of trafficking by manufacture and remand for a new trial on that offense.

However, with respect to the defendant's convictions of

trafficking in marijuana by possession, and trafficking in marijuana by transport, we find no error in the trial court's refusal to submit instructions on the lesser included offenses.

To convict a defendant of trafficking in marijuana by possession requires the State to prove either "actual or constructive" possession. *See State v. Harvey*, 281 N.C. at 12, 187 S.E.2d at 714. When a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance, constructive possession occurs. *State v. Givens*, 95 N.C. App. 72, 381 S.E.2d 869 (1989).

In the case *sub judice,* we hold that there is sufficient evidence to submit the charge of trafficking in marijuana by possession to the jury, in that there was substantial evidence from which the jury could find that defendant exercised dominion and control over the marijuana found in the building.

To convict a defendant of trafficking in marijuana by transport, the State is required to show "substantial movement." *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991). Determining whether there has been "substantial movement" involves "a consideration of all the circumstances surrounding the movement", *Id.*, including its purpose and the characteristics of the areas involved. In this case, Ronnie Douglas testified that defendant owned and drove the van that carried the marijuana to the building. We find that there is sufficient evidence to submit the charge of trafficking marijuana by transportation to the jury, because there is evidence of substantial movement by defendant of

all of the marijuana seized.

Accordingly, we overrule this assignment as to trafficking in marijuana by possession, and trafficking in marijuana by transport. Further, we vacate the conviction of trafficking in marijuana by manufacture and grant a new trial.

IV.

Lastly, defendant argues that she is entitled to a new trial on the grounds that the trial court erred by denying her motion to suppress evidence obtained via a warrantless third party consent search, and further, by allowing the evidence to be introduced at trial. We disagree.

"Our review of a denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct." *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993).

In the present case, the trial court made the following pertinent findings of fact:

> 13. Mr. Douglas identified himself as the owner of the premises. . . .
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> . . . .
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> 16. At 3:56 [p.m.] on 24 January 1998, Mr. Douglas signed a written consent to search form which authorized officers to search the [residence] and all buildings and property.
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> 17. Mr. Douglas was asked for a key to the storage building at which time he stated that he did not have one. No further inquiry was made.

> . . . .
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> 19. Chief Deputy Murphy was contacted by radio and informed that the property owner had consented to the search. He was told to return to the premises.

We hold that these findings are supported by the evidence and thus, are binding on appeal. *State v. Barnett*, 307 N.C. 608, 300 S.E.2d 340 (1983); *State v. Garner,* 340 N.C. 573, 459 S.E.2d 718 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996).

Defendant, however, maintains that the following conclusions of law are not supported by the evidence, and further are erroneous as a matter of law:

> 5. It was reasonable for officers to assume that Mr. Douglas had the authority to consent to the search of the building.
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> 6. The only evidence apparent to [the] officers that Mr. Douglas had the authority to consent to the search of the building.
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> 7. The members of the Scotland County Sheriff's Department were under no duty to make further inquiry concerning control of the storage building.

Our Supreme Court has held that "the Constitution and related laws only protect [against] *unreasonable* searches and seizures." *State v. Moore,* 316 N.C. 328, 333, 341 S.E.2d 733, 737 (1986). "A search is not unreasonable if lawful consent to search is given." *Garner,* 340 N.C. at 592, 459 S.E.2d at 728. A third party may give permission to search if he possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Barnett* 307 N.C. at 615-16, 300 S.E.2d at 344 (quoting *United States v. Matlock*, 415 U.S. 164, 171, 39 L. Ed. 2d

242, 250 (1974)).

The reasonableness of a search is determined under the circumstances as they appeared to the officers. *Id.* N.C. Gen. Stat. § 15A-222(3) (1999) provides that the consent needed to justify a search and seizure may be given "'[b]y a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises.'" *State v. McDowell,* 329 N.C. 363, 375, 407 S.E.2d 200, 207 (1991) (quoting *State v. Moore*, 316 N.C. 328, 333-34, 341 S.E.2d 733, 737 (1986)).

In the case *sub judice,* the evidence shows that the officers searched based upon the consent of someone who reasonably appeared, under the circumstances, entitled to give consent. We hold that the trial court's conclusions are legally correct and, thus, are binding on appeal. Accordingly, this assignment of error is overruled.

Affirmed in part; vacated in part, new trial.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).