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NO. COA05-1557

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

STATE OF NORTH CAROLINA

v.

Wayne County
No. 04 CRS 57689

JOSE MANUEL DIAZ,
Defendant-Appellant.

Appeal by Defendant from judgment entered 11 May 2005 by Judge Jack W. Jenkins in Superior Court, Wayne County. Heard in the Court of Appeals 12 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Stormie D. Forte, for the State.

Appellant Defender Staples Hughes, by Assistant Appellant Defender Matthew D. Wunsche, for the defendant-appellant.

WYNN, Judge.

To maintain a dwelling to use, keep, or sell a controlled substance, a defendant must "bear the expense of; carry on . . . hold or keep [the dwelling] in an existing state or condition."¹ Here, because the evidence fails to show Defendant kept or maintained the dwelling where a controlled substance was found, we reverse the trial court's denial of Defendant's motion to dismiss that charge. However, we do find the evidence to be sufficient to

¹*State v. Kraus*, 147 N.C. App. 766, 768, 557 S.E.2d 144, 147 (2001) (citation omitted).

support Defendant's conviction on the charge of trafficking in cocaine by possession.

On 19 August 2004, agents of the Goldsboro/Wayne County drug squad approached and knocked on the door of a residence in Dudley, North Carolina. When a male opened the door and was asked if the officer could speak to the man in charge, Defendant Jose Manuel Diaz, appeared at the door and stated he was the man in charge. The agents informed Defendant that illegal drugs were suspected at the resident and asked Defendant's consent to search. With Defendant's consent, the agents searched the residence and found powder cocaine and a revocation order containing a name that Defendant admitted he used as an alias.

At a trial before a jury, Defendant testified he had lived at the residence for approximately three months, but he was not the only resident.

At the close of all evidence, the trial court granted Defendant's motion to dismiss a conspiracy charge, but denied Defendant's motion as to the remaining charges. Thereafter, Defendant was convicted of maintaining a dwelling for the use of a controlled substance and trafficking in cocaine by possession. The trial judge sentenced Defendant to 70 to 80 months imprisonment for trafficking cocaine, and to a suspended sentence of 6 to 8 months imprisonment for maintaining a dwelling for the use of a controlled substance.

Defendant appeals to this Court arguing that the trial court erred by (I) failing to dismiss the charge of maintaining a

dwelling for the purpose of using, keeping, or selling a controlled substance and (II) failing to dismiss the charge of felony trafficking in cocaine by possession.

I.

Defendant first argues that the trial court erred in failing to dismiss the charge of maintaining a dwelling for the purpose of keeping, using, or selling a controlled substance in violation of Section 90-108(a)(7) of the North Carolina General Statutes. He contends the State failed to provide substantial evidence Defendant 'kept or maintained' the dwelling where a controlled substance was found. We agree.

"In reviewing the denial of a motion to dismiss, this Court must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime." *State v. Harris*, 157 N.C. App. 647, 651, 580 S.E.2d 63, 66 (2003) (citations omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). "[H]owever, if 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. Grooms*, 353 N.C. 50, 79, 540 S.E.2d 713, 731 (2000) (citation omitted).

Defendant was charged with violating Section 90-108(a)(7) of the 2005 North Carolina General Statutes, which states,

It shall be unlawful for any person to knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of [Article V of the North Carolina Controlled Substances Act] for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

In determining whether a defendant maintained a dwelling, this Court has listed several factors to consider, including: property ownership, occupancy of property, repairs to property, payment of taxes, payment of utility expenses, payment for repairs and payment of rent. *State v. Bowen*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000) (citations omitted). But, where evidence fails to show defendant bore the expense of a dwelling or was otherwise responsible for it, this Court has held the element of maintaining a dwelling unsatisfied. *E.g.*, *State v. Kraus*, 147 N.C. App. 766, 557 S.E.2d 144 (2001) (conviction for maintaining a place for the use of a controlled substance reversed where the State presented no evidence defendant "bore the expense of" or otherwise maintained a motel room, and defendant occupied the room for less than twenty-four hours); *State v. Harris*, 157 N.C. App. 647, 580 S.E.2d 63 (2003) (conviction for maintaining a dwelling for storing a controlled substance reversed where the State's evidence showed officers had on occasion seen the defendant at the residence, but there was no evidence the defendant owned or was responsible for the dwelling).

In the case before us, the relevant facts are analogous to those in *State v. Boyd*, __ N.C. App. __, 628 S.E.2d 796 (2006). In

Boyd, officers observed the defendant in a dwelling over a two month period, but, at trial, the State produced no evidence the defendant was responsible for the dwelling. "While a jury could find [the defendant] lived there, the State offered no evidence that [the defendant] participated in the leasing of the house, the payment of the rent, or the maintenance and upkeep of the premises." *Id.* at __, 628 S.E.2d at 804. This Court held there was insufficient evidence of defendant's responsibility for maintaining the dwelling and reversed the conviction of maintaining a dwelling for keeping a controlled substance.

At the trial of the case before us, Defendant testified that he resided at the residence, but the State presented no evidence that Defendant was responsible for the maintenance or upkeep of the dwelling. As the relevant facts and charge here are analogous to those in *Boyd*, we must reach a similar result. Accordingly, because the State presented no evidence that Defendant maintained, kept, or was responsible for the dwelling, we hold the trial court erred by denying Defendant's motion to dismiss that charge.

II.

Defendant argues second that the trial court erred by failing to dismiss the charge of felony trafficking in cocaine by possession because the State failed to prove either actual or constructive possession.² We disagree.

²We note from the outset Defendant's indictment charges a violation of N.C. Gen. Stat. § 90-95(h) (3) (a), a Class G felony, while the indictment's description of the charge gives notice of charges corresponding to a violation of N.C. Gen. Stat. § 90-95(h) (3) (b), a Class F felony. As the indictment charges the

When ruling on a motion to dismiss, "the trial court's inquiry is limited to a determination of whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. McNeil*, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004) (citations omitted). "Whether the evidence presented is substantial is a question of law for the court." *State v. Siriguanico*, 151 N.C. App. 107, 109, 564 S.E.2d 301, 304 (2002) (citation omitted). "Substantial evidence is defined as the amount of 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Diaz*, 155 N.C. App. 307, 318, 575 S.E.2d 523, 531 (2002) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "If substantial evidence of each element is presented, the motion for dismissal is properly denied." *State v. Jones*, 161 N.C. App. 615, 624, 589 S.E.2d 374, 379 (2003) (citation omitted). "Moreover, if the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion [to dismiss] even though the evidence may also support reasonable inferences of the

defendant in the language of N.C. Gen. Stat. § 90-95(h)(3)(b), a Class F felony, and Defendant was subsequently convicted of violating N.C. Gen. Stat. § 90-95(h)(3) and sentenced as a Class F felon, we read the indictment as sufficient. See *State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 492 (1971) ("If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient An indictment for a statutory offense is sufficient, as a general rule, when it charges the offense in the language of the statute.") (citations omitted).

defendant's innocence." *State v. Butler*, 147 N.C. App. 1, 10, 556 S.E.2d 304, 310 (2001) (citation omitted).

To convict a defendant of possession with intent to sell or deliver the State must prove three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance. *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citations omitted).

Defendant argues the State failed to prove actual possession because no controlled substances were found on Defendant's person. Defendant further argues the State presented insufficient proof of constructive possession because the State failed to prove he had exclusive control over the residence and absent a showing of exclusive control, the State failed to prove other incriminating circumstances.

In determining whether a defendant possessed cocaine, this Court has stated:

[a]n accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.

State v. Leonard, 87 N.C. App. 448, 455, 361 S.E.2d 397, 401 (1987) (citing *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)). ``However, unless 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. McNeil*, 359 N.C. 800, 810, 617 S.E.2d 271, 277 (2005) (citing *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)).

The relevant facts here are analogous to those in *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987). In *Rich*, agents searched a defendant's residence and uncovered cocaine. *Id.* at 382, 361 S.E.2d at 323. But at trial, evidence showed the defendant was in non-exclusive possession of the house. *Id.* Other incriminating circumstances were needed to prove the defendant had constructive possession of the cocaine. *Id.* The State presented evidence the defendant had been seen on the premises the evening before the search and was present at the time agents arrived to execute the search. *Id.* Agents found cocaine in the same room as letters with the defendant's name on them and in the same room and drawer as a woman's casual clothes and undergarments - the defendant being a woman. *Id.* This Court held those facts evidenced other incriminating circumstances, sufficient to allow the jury to infer that the defendant had constructive possession of the cocaine. *Id.* at 382-83, 361 S.E.2d at 323.

Here, Defendant acknowledged living in the residence for three months. Alone, a defendant's residence in a dwelling raises an inference of control over items within that residence. *Leonard*, 87 N.C. App. at 455, 361 S.E.2d at 401. But, Defendant testified without contradiction that at the time of his arrest another man

was living in the residence. Where a defendant's possession is non-exclusive, the State must prove other incriminating circumstances to support a finding of constructive possession. *McNeil*, 359 N.C. at 810, 617 S.E.2d at 277.

In the case before us, as in *Rich*, agents found cocaine and personal articles in the same immediate area. In *Rich*, agents found cocaine in a bedroom with letters containing the defendant's name and in a drawer with clothes. *Rich*, 87 N.C. App. at 382, 361 S.E.2d at 323. Here, agents found cocaine in a desk drawer with a revocation order containing Defendant's alias in a bedroom with clothes. Also as in *Rich*, Defendant was present when agents arrived to search.

In *Rich*, this Court found the evidence supported a finding of other incriminating circumstances. *Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323. As a result, this Court held there was sufficient evidence to support a reasonable inference the defendant was in constructive possession of cocaine. *Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323. Likewise, in this case, we believe the evidence of cocaine found in a bedroom desk drawer along with a revocation order form containing Defendant's alias and clothes support a finding of other incriminating circumstances. Accordingly, we hold the trial court did not error in denying Defendant's motion to dismiss the charge of trafficking in cocaine by possession.

Reversed in part, no error in part.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).