NO. COA06-61

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

STATE OF NORTH CAROLINA

v. Davidson County
No. 03 CRS 61738

MARTIN LUTHER ELLER

Appeal by defendant from judgment entered 5 April 2005 by Judge W. David Lee in Davidson County Superior Court. Heard in the Court of Appeals 21 September 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.*

*Eric A. Bach for defendant-appellant.*

STEELMAN, Judge.

Martin Luther Eller (defendant) appeals from a judgment entered following a jury verdict finding him guilty of intentionally maintaining a dwelling used for the purpose of unlawfully keeping and selling controlled substances, possession with the intent to sell or deliver cocaine, and possession of drug paraphernalia. Defendant received consecutive sentences of twelve to fifteen months for the offense of possession with the intent to sell or deliver cocaine and seven to nine months for the possession of drug paraphernalia and maintaining a dwelling charges. We find no error.

In early November 2003, Detective Beth Clodfelter, a vice and narcotics detective for the Lexington Police Department, Detective Kenneth Causey, a vice and narcotics detective for the Davidson County Sheriff's Department, and a confidential informant planned and successfully conducted three buys of crack cocaine at defendant's residence in Lexington, North Carolina.

On 26 November 2003, Detective Causey assembled an entry team to execute a search warrant at defendant's house. Upon entry of the house, the police discovered two men inside--an unidentified man and Luther Eller, defendant's nephew. Defendant was not present when the police initiated the search but arrived during the course of the search. The police discovered the following items during their search of the house: two plastic bags containing 9.3 grams of crack cocaine, which was found behind a clock in the living room of the house, several video cameras, a handgun, a shotgun, and a rent receipt bearing defendant's name. The video cameras served as a surveillance system for the inhabitants of the house. The cameras were "actually set up on the outside of the residence, [one at] the front door coming in from the driveway and, also, [one] on the side of the driveway." Detective Causey testifed that "each one of them had a separate small monitor . . . in the living room close to the television set[.]" The monitors were activated and working when Detective Causey entered the house. Detective Causey also testified that the rent receipt, dated 25 September 2003, contained the following information: "[It] says, 'received from Martin Eller,' [and] has a quantity of $400.00. It

[also says] for rent at [defendant's address] from September 1 to September 30th, 2003[.]"

Approximately fifteen minutes after the policemen began the search of the house, defendant "drove down the road[,]" then "turned around and came back to the residence." Detective Causey "asked him if he lived in the residence," and defendant said, "no he didn't." Then, Detective Causey "showed him the rent receipt[,]" after which defendant admitted, "yes, [it's] my house, I rent the house."

At the close of the State's evidence, defendant moved to dismiss all of the charges against him. The trial court denied the motions. Defendant did not testify and presented no evidence at trial.

I: Motion to Dismiss

Defendant first argues that the trial court erred in denying defendant's motion to dismiss the charge of possession with the intent to sell or deliver cocaine for insufficiency of evidence. We disagree.

We note that defendant's assignment of error pertaining to the denial of his motion to dismiss encompassed both the possession charge and the maintaining a dwelling charge. Since defendant fails to argue as to the maintaining a dwelling charge in his brief, this assignment of error is deemed abandoned. N.C. R. App. P. 28(b)(6) (2006); *see also State v. McNeill*, 360 N.C. 231, 241, 624 S.E.2d 329, 336 (2006).

"In considering a motion to dismiss, the trial court is concerned only with sufficiency of the evidence to carry the case to the jury and not its weight." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 891 (1986)). The only issue for the trial court is whether there is substantial evidence of each essential element of the charged offense and of the defendant being the perpetrator. *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925. "Such evidence may be direct, circumstantial, or both." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (citing *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998)). The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence. *State v. Jaynes*, 342 N.C. 249, 274, 464 S.E.2d 448, 463 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

In the instant case, defendant contends that the State failed to present substantial evidence of his possession of the cocaine. Possession of a controlled substance may be either actual or constructive. *State v. Morgan*, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879 (1993) (citing *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)). "Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both 'the power and intent to control its disposition or use,' . . . even though he does not have actual possession." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)

(quoting *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714). "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." *Id.* (quoting *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714). "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." *Id.* (emphasis added) (citing *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)). This Court has held that the State may show a defendant had constructive possession by producing evidence that a defendant "maintained the premises as a residence, or had some apparent proprietary interest in the premises or the controlled substance.'" *State v. Hamilton*, 145 N.C. App. 152, 156, 549 S.E.2d 233, 235 (2001).

At trial, the State did not show that defendant had exclusive possession of the house. The evidence tends to show that two other people were present when the police searched the home, one of whom lived there. However, Detective Causey observed defendant at or near the house on two separate occasions, at which times defendant personally escorted the State's informant into the house to complete the purchase of crack cocaine. Further, Detective Causey's search of the house produced a rent receipt bearing defendant's name, and defendant admitted to Detective Causey, "yes, [it's] my house, I rent the house." The evidence submitted by the

State amounts to more than a strong suspicion that defendant maintained the house as a residence. This, coupled with defendant's apparent participation in the controlled buys, his initial denial of his residency, and other evidence found in the house, including the quantity of crack cocaine, a shotgun and a handgun located in defendant's bedroom, and a surveillance system installed in defendant's house, is sufficient to establish "other incriminating circumstances," so that constructive possession may be inferred, even though defendant did not have exclusive possession of the house when the controlled substance was discovered. *Davis*, 325 N.C. at 697, 386 S.E.2d at 190.

When all the evidence is examined in a light most favorable to the State, we conclude that the State submitted substantial evidence of incriminating circumstances sufficient to submit the charge of possession with the intent to sell or deliver cocaine to the jury based upon constructive possession. This argument is without merit.

II: Jury Instructions

Defendant next argues that the trial court committed plain error by failing to properly instruct the jury with regard to constructive possession of a controlled substance where possession of the premises is nonexclusive. Specifically, defendant argues that the trial court erred by not instructing the jury as to the requirement of scienter. We disagree.

"Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the

substance must be *knowingly* possessed." *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (emphasis added) (quoting *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977)). An accused "has possession of the contraband material . . . when he has both the power and intent to control its disposition or use." *Id.* (quoting *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714). "The requirements of power and intent necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it." *Weldon*, 314 N.C. at 403, 333 S.E.2d at 702-03 (quoting *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E.2d 61, 62 (1973), *disc. rev. denied*, 284 N.C. 618, 202 S.E.2d 274 (1974)). "When such materials are found on the premises under the control of the 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." *Weldon*, 314 N.C. at 403, 333 S.E.2d at 703 (quoting *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714).

To preserve a question regarding jury instructions for appellate review, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2) (2006).

In the instant case, defendant did not object to the instructions as given or request a special instruction. In fact, when the trial court asked counsel for defendant, "[w]hat says the defendant to those instructions[,]" defense counsel responded, "[w]e are satisfied with those instructions." Defendant, therefore, "is entitled to relief only if the court's failure to give such an instruction *sua sponte* constitutes plain error." *State v. Shine*, __ N.C. App. __, __, 619 S.E.2d 895, 899 (2005) (citing N.C. R. App. P. 10(c)(4) (2004)). "Plain error occurs where, 'after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" *Id.* (quoting *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal citations omitted)). "Defendant must show not only that the instruction was error, but that the instruction probably impacted the jury's finding defendant guilty." *State v. Martinez*, 150 N.C. App. 364, 372, 562 S.E.2d 914, 918-19 (2002) (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

The State presented sufficient evidence to allow a jury to decide whether defendant had the intent and capability to exercise control and dominion over the cocaine based on constructive possession. We do not believe that the jury was likely to have reached a different verdict had the instructions been as defendant now asserts they should have been. Defendant has failed to show that the instruction constituted plain error.

Defendant fails to argue his remaining assignments of error in his brief, and they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

For the forgoing reasons, we find no error.

No error.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).