An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-1344

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

STATE OF NORTH CAROLINA

v.

KENNETH DILVERN ROGERS

Cabarrus County
No. 06 CRS 51826-27
06 CRS 6847

Appeal by Defendant from judgment entered 25 April 2008 by Judge Carl R. Fox in Cabarrus County Superior Court. Heard in the Court of Appeals 22 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Teresa Townsend, for the State.

Andresen & Arronte, PLLC, by Julian M. Arronte, for Defendant.

BEASLEY, Judge.

Kenneth Dilvern Rogers (Defendant) appeals from his convictions of felony possession of cocaine with intent to sell and deliver, intentionally maintaining a dwelling for keeping controlled substances, and habitual felon status. We find no error.

On 27 April 2006, the Concord Police Department executed a search warrant at 191 Crowell Drive in Concord, North Carolina.

The search warrant was issued following a "controlled buy" that took place seventy-two hours prior to the execution of the search warrant, under the supervision of Officer Brian Kelly (Kelly) of the Concord Police Department. During the "controlled buy", a confidential source of information (CSI) was given money and sent to 191 Crowell Drive with directions to purchase cocaine. The CSI was provided with a digital recorder and two marked twenty dollar bills. Kelly followed the CSI until he turned onto Crowell Drive, but did not see the transaction. After three minutes, the CSI returned to Kelly with two twenty dollar rocks of crack cocaine and none of the marked money. After listening to the digital recording to corroborate the CSI's story, Kelly obtained a search warrant for 191 Crowell Drive.

During the execution of the search warrant, officers discovered that 191 Crowell Drive had four bedrooms, three of which were occupied by Defendant, Defendant's son named Kenneth Rogers, Jr. (Jr.), and a woman named Mary Posey. The fourth was used as an exercise room. In Defendant's bedroom, officers found the following items: a life insurance policy addressed to Defendant at 191 Crowell Drive, $350 in cash, one rock of crack cocaine in a dresser measuring 0.1 gram, personal letters addressed to Defendant at 191 Crowell Drive, Defendant's social security card, a razor blade and cut marks on Defendant's dresser with cocaine residue in and around the cut marks, and Defendant's driver's license. In the garage to the house, officers found two

pill bottles containing cocaine residue. Officers also searched Jr. and found $1,747 in cash, including the two twenty dollar bills that had been provided to the CSI during the "controlled buy".

In April 2008, a jury returned a verdict finding Defendant guilty of felony possession of cocaine with intent to sell and deliver, intentionally maintaining a dwelling for keeping controlled substances, and habitual felon status. Defendant was sentenced to a minimum of 115 months to a maximum term of 147 months in the custody of North Carolina Department of Corrections. From this judgment, Defendant appeals.

MOTION TO DISMISS AND MOTION FOR DIRECTED VERDICT

Defendant argues that the trial court erred when it denied Defendant's motions to dismiss and for directed verdict on the charge of maintaining a dwelling for keeping controlled substances. Defendant argues that there was insufficient evidence that he maintained a dwelling for the purpose of selling controlled substances. We disagree.

The standard of appellate review, or the "test of sufficiency of the evidence in a criminal action is the same whether the motion raising that issue is one for dismissal, directed verdict or judgment of nonsuit." *State v. Locklear*, 304 N.C. 534, 537, 284 S.E.2d 500, 502 (1981). The test is whether, "'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.'" *Id.* at 537-38, 284 S.E.2d at 502 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). The State must have "offered substantial evidence of each required element of the offense charged." *State v. Goblet,* 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Crawford,* 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

"When reviewing claims of sufficiency of the evidence, an appellate court must . . . view[] all the evidence in the light most favorable to the State and resolv[e] all contradictions and discrepancies in the State's favor." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007). Therefore, "[a] case should be submitted to a jury if there is any evidence tending to prove the fact in issue or reasonably leading to the jury's conclusion 'as a fairly logical and legitimate deduction.'" *Id.* at 402-03, 646 S.E.2d at 528.

Defendant argues that the State failed to present any evidence that he kept or maintained the house at 191 Crowell Drive. Under N.C. Gen. Stat. § 90-108(a)(7) (2007), it is unlawful for any person, "[t]o knowingly keep or maintain any . . . dwelling house . . . or any place whatever, which is resorted to by persons using controlled substances . . . or which is used for the keeping or selling of the same. . . ." In determining whether an individual is keeping or maintaining under G.S. § 90-

108(a)(7), this Court looks to several factors, "none of which are [sic] dispositive" individually. *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000). Some of the factors include "'ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent.'" *State v. Cowan*, ___ N.C. App. ___, 669 S.E.2d 811, 817 (2008). Occupancy, in and of itself, will not support a finding of keeping or maintaining. "However, evidence of residency, standing alone, is sufficient to support the element of maintaining." *State v. Spencer,* ___ N.C. App. ___, 664 S.E.2d 601, 605 (2008). Furthermore, the "determination of whether . . . a building, is used for keeping or selling controlled substances will depend on the *totality of the circumstances*." *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994).

Although Kelly testified that he did not check tax records to determine who owned the property, the State presented convincing evidence that Defendant kept or maintained a house at 191 Crowell Drive. An entry in the police department's record management system listed Defendant's residence as 191 Crowell Drive. This information is entered into the system "[a]ny time [the police department] deal[s] with somebody" or the last time the police department "pick[ed] Defendant up." Among other things, upon execution of the search warrant, police officers found Defendant in his bedroom, laying on his bed before they

placed him into custody. Personal letters addressed to Defendant at 191 Crowell Drive, a life insurance policy statement listing Defendant's address as 191 Crowell Street, cocaine and materials related to the use of cocaine, Defendant's social security card and driver's license were all found either in Defendant's room or in other living quarters at 191 Crowell Drive.

In *State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987), this Court concluded that because the "defendant resided in the house, that she was cooking dinner, and that she possessed cocaine and materials related to the use and sale of cocaine, [it was] sufficient to allow conviction under G.S. 90-108(a)(7) for maintaining a dwelling used for keeping or selling of controlled substances." *Id.* at 384, 361 S.E.2d at 324. In *State v. Baldwin*, 161 N.C. App. 382, 588 S.E.2d 497 (2003), this Court also concluded that although "occupancy was the only factor shown by the evidence in this case, the defendant received mail at the address, . . . his driver's license showed the address as his home address, and his car was registered at the address." *Id.* at 393, 588 S.E.2d at 506. Based on the totality of circumstances in this case, we conclude that, as a matter of law, there was substantial evidence that Defendant kept or maintained the dwelling at 191 Crowell Drive.

The trial court properly denied Defendant's motion to dismiss and motion for directed verdict on the charge of maintaining a dwelling for purposes of keeping or selling a

controlled substance. This assignment of error is overruled.

RULE 404(b) EVIDENCE

Defendant argues that the trial court erred in admitting Rule 404(b) evidence of prior drug sales by Defendant where the evidence did not constitute proper character evidence, was not similar to the facts on which Defendant was charged, and where the prejudicial nature of the evidence outweighed any probative value. We disagree.

The standard of review of a trial court's ruling to admit evidence under Rule 404(b) is for an abuse of discretion. *See State v. Theer*, 181 N.C. App. 349, 359, 639 S.E.2d 655, 662 (2007). "This Court will find an abuse of discretion only where a trial court's ruling 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* at 360, 639 S.E.2d at 662-63 (quoting *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005)).

Under Rule 404(b) of the North Carolina Rules of Evidence:

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404 (2007). First, the trial court must "make the determination that the evidence is of the type and offered for a proper purpose under the rule." *State v. Bynum,*

111 N.C. App. 845, 848, 433 S.E.2d 778, 780 (1993). The trial court must ascertain whether the evidence is relevant, or having "'any tendency to make a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' N.C.G.S. § 8C-1, Rule 401 (1986)." *Id.* Lastly, the trial court must "balance the probative value of the extrinsic conduct evidence against its prejudicial effect." *Id.* at 848-49, 433 S.E.2d at 780.

The State sought to present evidence of prior drug sales allegedly made by Defendant in 2003, 2004, and 2006 to undercover detectives. The trial court conducted a voir dire hearing prior to ruling on the admission of all 404(b) evidence. The trial court properly admitted the evidence of prior acts under Rule 404(b).

By limiting the purposes for which the jury could consider the evidence, the trial court ensured that the probative value would not be outweighed by its prejudicial effect. Also, the trial court appropriately determined that the evidence was relevant when it concluded that:

> 1. The evidence of the prior sale of cocaine is relevant. . . . This 404(b) evidence is *relevant to the intent of the defendant* to sell and deliver cocaine on this occasion and whether or not the cocaine found in the residence was the *result of his maintaining the residence for "keeping" controlled substances* . . . .

(emphasis added).

Defendant argues that the 404(b) evidence of his prior drug offenses lacked sufficient similarity to the offenses for which Defendant was being tried and that as a result of this erroneous admission, he was prejudiced. Defendant asserts that the only similarity between his "prior acts and the facts on which he was charged is the presence of cocaine." Defendant also argues that the trial court's conclusion of law number two was not supported by the facts. We disagree.

"[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). Accordingly, the trial court made the following conclusions of law, admitting the 404(b) evidence, in pertinent part:

> 2. The evidence of the sale by the Defendant on October 2, 2003 and the evidence of the sale by the Defendant on April 27, 2006 are *sufficiently similar in nature* because: (1) on both occasions the Defendant told the officer to drive around the block, (2) the Defendant went back into the residence and (3) upon the return of the officer the Defendant exited the residence and produced cocaine. The Defendant's conduct gave rise to an inference that the Defendant was keeping cocaine in the residence, rather than on his person on both occasions. The cocaine found on April 27, 2006 was also found in the Defendant's residence.
>
> 3. Although the temporal proximity of this case involves a span of two years and six

> months, the "keeping" or controlled substances, as referred to in the crime of potentially maintaining a dwelling for the "keeping" of controlled substances, has been held to "occur over a period of time." Therefore, the period of two years and six months is *sufficiently short to establish a temporal proximity* between the two offenses.

(emphasis added).

The trial court's conclusion of law number two was sufficiently supported by its findings of fact. The findings of fact showed that: i) on 2 October 2003, an undercover officer went to Defendant's residence to purchase a controlled substance, ii) Defendant told the officer to drive around the block while he entered his residence, iii) upon return from the residence, Defendant gave the undercover officer a rock of crack cocaine and iv) on 27 April 2006, cocaine was found inside the residence at 191 Crowell Drive while Defendant was present.

Upon a thorough review of the record, we conclude that the trial court, weighed the probative and prejudicial value of the evidence and properly admitted the 404(b) evidence. This assignment of error is overruled.

For the foregoing reasons, we conclude that the Defendant had a fair trial, free from prejudicial error.

No error.

Judges MCGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).