NO. COA08-163

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v. Robeson County
Nos. 05 CRS 56491
05 CRS 56494
05 CRS 56495

JOHNNY RAY CUMMINGS,
Defendant.

Appeal by defendant from judgments entered 31 August 2007 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 21 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Somerby, for the State.

Haral E. Carlin for defendant-appellant.

GEER, Judge.

Defendant Johnny Ray Cummings appeals his convictions for possession with intent to sell or deliver ("PWISD") cocaine, trafficking in cocaine by possession, conspiracy to possess cocaine, and possession of drug paraphernalia. Defendant argues the trial court erred in admitting recordings of his telephone conversations from jail. We hold that defendant's statements constitute admissions of a party opponent and, therefore, were properly admitted. In turn, those statements, together with additional evidence presented by the State, provide sufficient

evidence to support the trial court's denial of defendant's motion to dismiss. Accordingly, we find no error.

Facts

The State's evidence tended to show the following facts at trial. Based on complaints about possible drug deals taking place at 921 Sunrise Road in Pembroke, North Carolina, the Robeson County Sheriff's Department began a criminal investigation. As part of the investigation, deputies began surveillance of the residence and set up a controlled purchase with a confidential informant. On 26 September 2005 and again on 27 September 2005, Officer Richie Adams gave a confidential informant $40.00 to purchase crack cocaine at 921 Sunrise Road. The serial numbers of the bills used in the controlled purchase were recorded. Based on the two controlled purchases of cocaine at the 921 Sunrise Road residence, deputies obtained a warrant to search the house.

Deputies executed the search warrant later on 27 September 2005. As they pulled up to the house, they saw defendant standing near a storage shed in the back yard, roughly 30 to 40 yards from the house. The only other person on the premises was Brandon Furr. Deputy Shawn Clark approached defendant and conducted a "pat-down" for weapons, finding a clear plastic bag containing marijuana. When defendant was searched more thoroughly after his arrest, deputies found on his person the $80.00 of "buy money" used in the controlled purchases.

When the deputies entered the house, they found a small amount of marijuana in a planter in the living room. Upon searching the master bedroom, they discovered two bags of what appeared to be cocaine in the pocket of a coat in the closet. A forensic chemist for the SBI later determined that one bag contained 55.8 grams of crack cocaine and the other bag contained 97.7 grams of powder cocaine.

At trial, David Dial testified that he rented the house located at 921 Sunrise Road. According to Dial, he agreed with defendant and Mickey Ray Locklear to let them live in and sell drugs out of his house in exchange for them paying his bills and supplying him with crack cocaine. Defendant moved into Dial's house and, from 18 to 27 September 2005, was selling drugs "most of the time." While living in the house, defendant slept in the master bedroom, and he was the only person allowed to go into that room. The coat found in the closet of the master bedroom containing the two bags of cocaine belonged to Dial, but he did not know who had put the drugs in the coat pocket. According to Dial, defendant was the only one in the house selling drugs.

While defendant was in jail following his arrest, Officer Adams accessed the Paytel Communications System, a system that allows law enforcement officers to monitor jail inmates' telephone conversations at the jail. As the transcript in this case reveals, at the beginning of each call, an operator would announce that "this call may be recorded at any time." Officer Adams was able to recognize defendant's voice, identified the taped calls

from defendant's cell, and had the tapes transcribed and recorded onto compact discs.

During three taped calls from his cell, defendant made the following statements:

> Inmate: . . . . I [sic] fixin' to have to do prison time for this shit.
>
> . . . .
>
> Inmate: And they caught me with all that shit too boy.
>
> . . . .
>
> Inmate: They got me with a 160 grams of cocaine last night[.]
>
> . . . .
>
> Inmate: . . . . I told them it was mine, but I didn't write no statement saying it was mine though. I, I shouldn't have been messing with that stuff. Ain't nobody's fault but mine.
>
> . . . .
>
> Inmate: . . . . [S]omebody was calling them [the police] and complaining about me selling dope everyday. . . . They caught me with over a hunnerd [sic] and some grams[.]
>
> . . . .
>
> Inmate: . . . . Baby look[,] all my clothes is at that house. What is [sic] somebody steals them?
>
> . . . .
>
> Inmate: They done rushed my house four times since I been home, that time they got somethin' though.
>
> . . . .
>
> Inmate: Well see they took my money from me too last night and all that stuff and I just had that was 'bout $8000 worth of stuff they

> took from me and they took like $1700 off of me, but they gave that to the tax man though.

Defendant was indicted for PWISD, trafficking in cocaine by possession, conspiracy to possess cocaine, and possession of drug paraphernalia. The jury convicted defendant of all four charges. The trial court sentenced defendant to four consecutive terms of (1) 11 to 14 months for the PWISD conviction; (2) 35 to 42 months for the trafficking charge; (3) eight to 10 months for the conspiracy conviction; and (4) 120 days for the drug paraphernalia charge. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court erred in admitting the recordings and transcripts of his phone conversations made from jail. At trial, the State argued that the statements were admissible under Rule 804(b)(3) of the Rules of Evidence as statements against penal interest. Defendant contends, however, that the court failed to conduct the requisite test under Rule 804(b)(3) to determine the "trustworthiness" of the statements. *See, e.g., State v. Dewberry*, 166 N.C. App. 177, 181, 600 S.E.2d 866, 869 (2004) ("Admission of evidence under the provision of Rule 804(b)(3) concerning criminal liability requires satisfying a two prong test: 1) the statement must be against the declarant's penal interest, and 2) the trial judge must find that corroborating circumstances insure the trustworthiness of the statement.").

We need not address defendant's argument because, in any event, defendant's statements constitute admissions of a party opponent under Rule 801(d). Although the State offered defendant's

telephone conversations as statements against penal interest, their admission may be upheld on appeal if the evidence was admissible on some other basis. *See State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382-83 (1991) (holding, despite trial court's admitting evidence on improper basis, error "cannot prejudice defendant" under N.C. Gen. Stat. § 15A-1443(a), as evidence was admissible on other grounds), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992).

Rule 801(d) provides: "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity . . . ." N.C.R. Evid. 801(d)(A). "'An admission is a statement of pertinent facts which, in light of other evidence, is incriminating.'" *State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (quoting *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986)).

In this case, defendant does not dispute either that he made the statements on the recording or that they were incriminating. Paytel recorded defendant saying that he had been "caught" with nearly 160 grams of cocaine; that the police "got [him] with a 160 grams of cocaine last night"; that the cocaine belonged to him; "that was 'bout $8000 worth of stuff they took from me"; and that he was "fixin' to have to do prison time for this shit." A jury could reasonably have believed that defendant was admitting in these statements that the drugs found on the premises belonged to him and that he possessed the drugs in order to sell them.

As such, the statements were properly admitted under N.C.R. Evid. 801(d)(A). *See State v. Al-Bayyinah*, 359 N.C. 741, 748, 616 S.E.2d 500, 507 (2005) (holding, in armed robbery and felony murder case, defendant's statements to police — that he did not know how he could be expected to make a living after being released from prison and that he wanted to go back to prison — "when considered in light of other evidence, constitute an admission by a party-opponent and were thus admissible against [defendant]"), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528, 126 S. Ct. 1784 (2006); *State v. White*, 131 N.C. App. 734, 742-43, 509 S.E.2d 462, 468 (1998) (holding that witness could testify pursuant to N.C.R. Evid. 801(d) that defendant told him "he had to sell drugs in order to 'stay afloat'" and that he overheard defendant say over the telephone that "'he was going to have to cap someone'" if his employer continued to garnish his wages). This assignment of error is, therefore, overruled.

II

Defendant next challenges the trial court's denial of his motion to dismiss the PWISD and trafficking by possession charges. A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to

dismiss, this Court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal, but rather are for the jury to resolve. *Id.*

"The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (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); N.C. Gen. Stat. § 90-95(a)(1) (2007). For the offense of trafficking cocaine by possession, the State is required to prove that the defendant "possesse[d] 28 grams or more of cocaine . . . ." N.C. Gen. Stat. § 90-95(h)(3). On appeal, defendant contends with respect to each charge that the State presented insufficient evidence of possession.

Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). In contrast, constructive possession exists when the defendant, "'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *State v. Matias*, 354 N.C. 549,

552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). When a defendant does not have exclusive possession of the location where the drugs are found, the State is required to show "'other incriminating circumstances'" in order to establish constructive possession. *Id.*, 556 S.E.2d at 271 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)).

In this case, the State proceeded on the theory of constructive possession and thus was required to prove the existence of other incriminating circumstances. The evidence in this case indicated that the cocaine was found in the master bedroom that was used solely by defendant and contained his clothes. According to Dial, defendant was the only person allowed to go into the room while defendant was living there, and "everybody knew not to go in that bedroom." In addition, Dial testified that defendant was selling drugs "most of the time" and was the only person doing so from the house. When the police arrested defendant, he was carrying roughly $1,700.00 in cash, including the $80.00 of "buy money" used in the controlled purchases. Finally, defendant made statements in his tape-recorded telephone calls that a jury could reasonably construe as being admissions that the cocaine belonged to him.

This evidence was sufficient to require denial of defendants' motion to dismiss. *See, e.g., State v. Miller*, ___ N.C. App. ___, ___, 661 S.E.2d 770, 773 (2008) (holding that evidence of "other incriminating circumstances" existed when defendant "(1) owned

other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash" (internal citations omitted)); *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22-23 (2005) (holding evidence of constructive possession sufficient when evidence included defendant's "close proximity to the controlled substance and conduct indicating an awareness of the drugs"); *State v. Morgan*, 111 N.C. App. 662, 665-66, 432 S.E.2d 877, 879-80 (1993) (concluding evidence of incriminating circumstances sufficient when police found $2,600.00 in cash in back bedroom (including marked bills from controlled buy) and over 100 grams of crack cocaine in adjoining bathroom, defendant had key to apartment, and defendant was only person to use back bedroom).

Defendant's arguments otherwise would require that we view the evidence in the light most favorable to him — contrary to the standard of review for a motion to dismiss. When the evidence is viewed in the light most favorable to the State, there is sufficient evidence of incriminating circumstances to permit the jury to reasonably infer defendant's possession of the cocaine found on the premises. The trial court, therefore, properly denied defendant's motion to dismiss.

III

Defendant next argues that the trial court erred in its instructions to the jury on the PWISD and trafficking by possession charges "by failing to instruct the jury that where actual possession of the premises is non-exclusive, constructive possession of contraband may not be inferred without other incriminating circumstances . . . ." Because defendant failed to object to the instructions at trial, he argues plain error on appeal. Plain error is "'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . .'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)). "Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Defendant takes issue with the following portion of the trial court's instructions on constructive possession, which were identical as to both the PWISD and trafficking by possession charges:

> If you find beyond a reasonable doubt that a substance was found in a certain premises and that the defendant exercised control over those premises, whether or not he owned them, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use.

Although defendant acknowledges the trial court's instructions were based on the pattern jury instruction for constructive possession, N.C.P.I.–Crim. 104.41, defendant contends the court was required to also instruct the jury that constructive possession may not be inferred without "other incriminating circumstances."

The jury instructions given in this case on constructive possession are identical to the jury instructions given in *State v. Solomon*, 117 N.C. App. 701, 453 S.E.2d 201, *disc. review denied*, 340 N.C. 117, 456 S.E.2d 325 (1995), where this Court held: "The instructions given in this case regarding constructive possession of a controlled substance accurately stated the law and clearly placed the burden on the State to prove beyond a reasonable doubt that defendant possessed the cocaine. Accordingly, we find that the challenged instructions did not amount to plain error." *Id.* at 706-07, 453 S.E.2d at 205. We are bound by *Solomon* and, therefore, hold that the trial court did not commit plain error in its instructions on constructive possession.

IV

In his final argument on appeal, defendant asserts the trial court should have instructed the jury on simple possession of cocaine, a lesser-included offense of PWISD cocaine. A defendant is entitled to an instruction on a lesser-included offense if "'the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847, 93 S. Ct.

1993, 1995 (1973)). Phrased differently, "the court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged in the indictment when the State's 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." *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972).

In arguing that the evidence supported submission of the charge of simple possession, defendant points to Dial's trial testimony that he saw defendant with small amounts of cocaine. No evidence was presented, however, that defendant possessed any of the drugs — in whatever amount — for personal use. Dial testified that the agreement he had with defendant was that defendant would pay Dial's bills and supply him with cocaine in exchange for his allowing defendant to sell drugs out of the house. Dial further testified that during the short time defendant was living in the house, defendant was selling drugs most of the time. Defendant points to no evidence on appeal that conflicts with the State's evidence establishing the elements of PWISD cocaine. The trial court, therefore, did not err in refusing to instruct the jury on the lesser included offense of simple possession.

No Error.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).