NO. COA08-296

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 06 CRS 232914

TARHEEN KYNYARDO SIMPSON

Appeal by defendant from judgment entered 2 August 2007 by Judge Steve A. Ballog in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Thomas Henry, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from a judgment and commitment sentencing him to imprisonment for a minimum term of 35 months and a maximum term of 42 months entered after a jury found him guilty of possession of 28 grams or more but less than 200 grams of cocaine.

On 12 July 2007, Officer Eric Ryerson, of the Charlotte-Mecklenburg Police Department, was on patrol and observed a vehicle traveling approximately 52 miles per hour in a 35 mile per hour zone. Officer Ryerson conducted a traffic stop and discovered that defendant, the only person in the car, was driving with a revoked or suspended licence. Officer Ryerson asked defendant to exit the

vehicle and after speaking briefly with him asked defendant for consent to search his person and his vehicle. Defendant consented. Officer Ryerson found in defendant's left front pants pocket a small, clear plastic bag containing 5.5 grams of marijuana.

Shortly thereafter, Officer Ryerson was joined by another member of the Charlotte-Mecklenburg Police Department, Officer K.C. Dowell. Defendant sat with Officer Ryerson in his patrol car while Officer Dowell conducted a search of defendant's vehicle. In the trunk of defendant's vehicle, Officer Ryerson found a black scale and a Nextel cell phone box inside of which were small, clear plastic bags along with 71.1 grams of powder cocaine and 38.6 grams of crack cocaine.

Defendant was arrested and subsequently indicted for trafficking in drugs in violation of N.C. Gen. Stat. § 90-95(h), by "unlawfully, willfully, and feloniously possessing 28 grams or more but less than 200 grams of cocaine, which is included in Schedule II of the North Carolina Controlled Substances Act." At trial, the State introduced the scale, the phone box, the plastic bags, and the cocaine into evidence. Defendant did not present any evidence.

A jury found defendant guilty of possession of 28 grams of cocaine or more but less than 200 grams of cocaine. The trial court entered judgment and sentenced defendant to an active term of 35 to 42 months in the North Carolina Department of Correction along with a fine of $50,000. Defendant appeals.

On appeal, defendant raises two issues: (I) whether the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence, and (II) whether the trial court committed plain error by admitting evidence that Officer Ryerson found marijuana in defendant's pocket.

I

Defendant first argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence. Specifically, defendant argues that the State presented insufficient evidence that defendant knowingly possessed cocaine. We disagree.

In ruling on a motion to dismiss, the trial court's standard is "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005).

> In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Weakley, 176 N.C. App. 642, 651, 627 S.E.2d 315, 321 (2006).

"The crime of trafficking [contraband] has two elements: (1) knowing possession (either actual or constructive) of (2) a

specified amount of [contraband]." *State v. Lopez*, 176 N.C. App. 538, 541, 626 S.E.2d 736, 739 (2006). "Knowledge may be shown even where the defendant's possession of the illegal substance is merely constructive rather than actual." *Id.*

> [W]here contraband material is found in a vehicle under the control of an accused, even though the accused is the borrower of the vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which *may* be sufficient to carry the case to the jury. This inference is rebuttable and if the accused offers evidence rebutting the inference, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Tisdale, 153 N.C. App. 294, 298, 569 S.E.2d 680, 682 (2002).

Here, the State presented evidence that a Charlotte-Mecklenburg Police Officer pulled defendant over for speeding; defendant was alone in the car; and defendant consented to a search of his person and the vehicle. In the trunk of defendant's car, officers found a scale and a Nextel cell phone box that contained small, clear plastic bags, 71.1 grams of powder cocaine, and 38.6 grams of crack cocaine. Defendant offered no evidence at trial.

Absent rebuttal evidence, we hold there was an inference of knowledge and possession sufficient to carry the matter to the jury. Accordingly, defendant's assignment of error is overruled.

II

Defendant next argues the trial court committed plain error by admitting evidence that Officer Ryerson found marijuana in defendant's pocket. Defendant argues the evidence of marijuana

presented before the jury was not relevant and its probative value substantially outweighed by the danger of unfair prejudice.

Our Supreme Court has stated that "[p]lain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007) (citation omitted).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case 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, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 470, 648 S.E.2d at 807 (original emphasis and original brackets).

In *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990), a police officer pulled over the defendant after he observed the defendant's car weaving on the road. *Id.* at 545, 391 S.E.2d at 173. After the defendant pulled over, the officer observed the defendant throw something red into the back seat. *Id.* When the officer approached, he believed the defendant to be inebriated, ordered him out of the car, and placed him under arrest. *Id.* In a search incident to that arrest, the officer found "a plastic bag with a green vegetable matter inside of it in [the] defendant's

pocket, and that in [the officer's] opinion the bag contained marijuana." *Id.* The officer proceeded to search the vehicle. *Id.* On the back seat, the officer found only one red item, a Marlboro cigarette package which contained "a small square piece of aluminum foil, which he thought to be a blotter acid hit of LSD." *Id.* The defendant was tried separately and acquitted of the charge of misdemeanor possession of marijuana. *Id.* at 544, 391 S.E.2d at 172.

The issue before our Supreme Court was whether "[the] defendant's acquittal on a charge of misdemeanor possession of marijuana preclude[d] the State from introducing, in a subsequent prosecution for felonious possession of lysergic acid diethylamide (LSD), evidence that defendant possessed marijuana at the time of his arrest on both charges." *Id.* The Court upheld the admission of evidence regarding the defendant's possession of marijuana reasoning that "[s]uch evidence is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts." *Id.* at 547, 391 S.E.2d at 174 (citation and quotations omitted).

Here, defendant was charged with "unlawfully, willfully, and feloniously possessing 28 grams or more but less than 200 grams of cocaine" in violation of N.C. Gen. Stat. § 90-95(h) because 71.1 grams of powder cocaine and 38.6 grams of crack cocaine were found in defendant's trunk. The State offered evidence of defendant's possession of marijuana in describing the sequence of events that led to defendant's arrest. We hold this evidence admissible as it

"forms part of the history of the event or serves to enhance the natural development of the facts." *Agee*, 326 N.C. at 547, 391 S.E.2d at 174 (citation and quotations omitted). Accordingly, we overrule defendant's assignment of error.

No error.

Judges JACKSON and ARROWOOD concur.

Report per Rule 30(e).