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NO. COA09-1204

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v.

MIGUEL JIMINEZ CAPOTE,
MARTIN CRUZ

Hoke County
Nos. 08 CRS 51236, 51237, 51238, 51239, 51240, 51241, 51242, 51243

Appeal by Defendants from judgments entered 1 May 2009 by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 23 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong and Special Deputy Attorney General Joseph E. Herrin, for the State.

Bryan Gates for Defendant Miguel Jiminez Capote; and Jon W. Myers for Defendant Martin Cruz.

McGEE, Judge.

Miguel Jiminez Capote (Capote) and Martin Cruz (Cruz) (collectively Defendants) were convicted of trafficking in marijuana by possession and by transportation, possession with intent to sell or deliver marijuana, and maintaining a dwelling for the keeping or sale of a controlled substance. Defendants were each given consolidated sentences of twenty-five to thirty months in prison for the charges of trafficking in marijuana by transportation, possession with intent to sell or deliver marijuana, and maintaining a dwelling for the keeping or sale of a

controlled substance, to be served consecutively with a sentence of twenty-five to thirty months in prison for trafficking in marijuana by possession.

I. Factual Background

The State presented evidence at trial tending to show that Detective Gallegos of the Fayetteville Police Department identified a suspicious package at a Federal Express (FedEx) facility in Fayetteville on 31 May 2008. After obtaining a search warrant, Detective Gallegos opened and inspected the package, which contained approximately thirty pounds of marijuana. The Hoke County Sheriff's Department (the Sheriff's Department) was contacted to set up a controlled delivery of the package to the delivery address of 210 Little Mexico Drive, Raeford, North Carolina.[1]

Detective Kivett of the Sheriff's Department, dressed as a FedEx delivery driver, arrived at the mobile home located at 210 Little Mexico Drive on 2 June 2008 to deliver the package, and was approached by Cruz. Before approaching Detective Kivett, Cruz had been standing in the doorway of a mobile home identified as 225 Little Mexico Drive. After handing Detective Kivett a slip of paper on which the tracking number of the package was written, Cruz accepted the package. Cruz then turned in the direction of the mobile home at 225 Little Mexico Drive. Detective Burchfield of

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[1] The record is inconsistent regarding the name of the street, sometimes referring to this location as "210 Little Mexico Lane." We refer to it throughout as "210 Little Mexico Drive."

the Sheriff's Department had also observed Capote at the entrance of the mobile home located at 225 Little Mexico Drive.

Captain Pierce, and other members of the Sheriff's Department, later entered an open door of the mobile home at 225 Little Mexico Drive and found Defendants in the living room area. Cruz was lying on a couch near the kitchen wall and Capote was sitting in a chair across the room. Detective Burchfield testified that the law enforcement team did not find anyone else in the mobile home. The FedEx package that Cruz had accepted was found by the Sheriff's Department in a corner behind the couch, wrapped in black plastic bags.

Members of the Sheriff's Department searched both of the mobile homes at 210 and 225 Little Mexico Drive, a Nissan pickup truck (the Nissan truck) parked at 225 Little Mexico Drive, and two cell phones. A drug canine did not alert to the presence of narcotics during the search of 210 Little Mexico Drive. During the search of 225 Little Mexico Drive, no items were found indicating that anyone was living at that mobile home on a long-term basis. Also, the mobile home at 225 Little Mexico Drive did not have water or electricity service. The mobile home did contain miscellaneous furniture, including a couch, a dresser/chest of drawers, a chair, a mattress, sandwich bags, fake social security cards, "drug paraphernalia," and a purported picture of Capote. Hoke County tax records showed that neither Capote nor Cruz owned the real property located at 225 Little Mexico Drive.

A search of the Nissan truck uncovered the following items:

Cruz's wallet, his unofficial North Carolina identification card, a pocket calendar/notebook with Cruz's name on it, a cell phone, and traffic citations issued earlier to both Defendants when they had been driving the Nissan truck. The Nissan truck was registered to Cesar Jimenez Hernandez.

Records for the cell phone found in the Nissan truck, and another cell phone found in Capote's pocket, showed several calls between the two phones and to common telephone numbers. Neither Defendant was the registered subscriber, or owner, of either cell phone. However, a slip of paper in Cruz's wallet referenced one phone's number with the notation "Martin," and the name "on [the other] phone" was "Miguel." Telephone company cell tower site information also showed that both phones were used in the vicinity of Little Mexico Drive on 31 May 2008, the scheduled delivery date for the package containing approximately thirty pounds of marijuana.

The State also offered testimony regarding a 29 May 2008 package received by a FedEx facility in Raeford. That package had been shipped via a third party from Alton, Texas to a "Miguel Lopez" at 211 Little Mexico Drive in Raeford. The package contained dumbbells and approximately three pounds of marijuana. Detective Burchfield searched the mobile home located at 211 Little Mexico Drive and questioned an occupant, but found no evidence of drug activity. However, Detective Burchfield saw the Nissan truck parked in front of the mobile home at 225 Little Mexico Drive, and observed Capote sitting in the passenger seat. A slip of paper

with the tracking number of the 29 May 2008 package was later found inside the Nissan truck on 2 June 2008.

Defendants did not present any evidence at trial.

II. Standard of Review

Defendants argue that the trial court erred in denying their motions to dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all the evidence.

"'This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.'" *State v. Wilkerson*, ___ N.C. App. ___, ___, 675 S.E.2d 678, 680 (2009) (quoting *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008)). "A defendant's motion to dismiss is properly denied when 'there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.'" *State v. Harrington*, 171 N.C. App. 17, 24, 614 S.E.2d 337, 344 (2005) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "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) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "The evidence can be direct or circumstantial, but must give rise to a reasonable inference of guilt in order to withstand the motion to dismiss." *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504 (2003) (citing *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). "When ruling on a motion to dismiss for insufficient evidence, the

trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citing *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995)). "'Any contradictions or discrepancies in the evidence are for resolution by the jury.'" *Harrington*, 171 N.C. App. at 24, 614 S.E.2d at 344 (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). "[A] motion to dismiss should be allowed where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." *Stone*, 323 N.C. at 452, 373 S.E.2d at 433 (citations omitted).

III. Trafficking and Intent to Sell or Deliver

A. Defendant Cruz

Cruz argues that the trial court erred in denying his motion to dismiss for insufficient evidence of this charge because the State failed to present evidence sufficient to show that Cruz "knowingly possessed and transported marijuana." Trafficking in marijuana by possession and by transportation requires the State to prove that the substance was knowingly possessed. *See* N.C. Gen. Stat. § 90-95(h)(1) (2009) ("Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as 'trafficking in marijuana[.]'" Similarly, possession of marijuana with intent to sell or deliver, in

violation of N.C. Gen. Stat. § 90-95(a)(1), has two elements: "'1) knowing possession of the controlled substance and 2) possession with intent to sell or deliver it.'" *State v. Hyatt*, 98 N.C. App. 214, 216, 390 S.E.2d 355, 357 (1990) (citation omitted).

Possession may be actual or constructive. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession." *Baldwin*, 161 N.C. App. at 391, 588 S.E.2d at 504-05 (citing *State v. Butler*, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002)). Constructive possession is determined by the totality of the circumstances. *See State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) ("As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury.").

"The defendant may have the power to control either alone or jointly with others." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citing *State v. Fuqua*, 234 N.C. 168, 170-71, 66 S.E.2d 667, 668 (1951)).

> When narcotics "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." "[W]here possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances."

Harrington, 171 N.C. App. at 24, 614 S.E.2d at 344-45 (internal

citations omitted).

> Incriminating circumstances relevant to constructive possession "include evidence that 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."

State v. Alston, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386 (2008), *aff'd*, 363 N.C. 367, 677 S.E.2d 455 (2009) (citation omitted). In *State v. Turner*, 168 N.C. App. 152, 607 S.E.2d 19 (2005), this Court examined a case in which the defendant was seated next to a wadded-up blanket that concealed drugs, "[h]e appeared agitated, and his hands were 'jumbling' around 'nervously,'" while the drugs appeared to be passed back and forth under the blanket. *Id.* at 156, 607 S.E.2d at 22. Our Court found that North Carolina appellate courts have "held that similar circumstances—involving close proximity to the controlled substance and conduct indicating an awareness of the drugs, such as efforts at concealment or behavior suggesting a fear of discovery—are sufficient to permit a jury to find constructive possession." *Id.*, 607 S.E.2d at 22-23. Additionally, in *Miller*, the North Carolina Supreme Court found "that two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Miller*, 363 N.C. at 100, 678 S.E.2d at 595.

Similarly,

> "[k]nowledge is a mental state and may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had come to his attention, and by circumstantial evidence from which an inference of knowledge might reasonably be drawn."

State v. Nunez, ___ N.C. App. ___, ___, 693 S.E.2d 223, 226 (2010) (quoting *State v. Boone*, 310 N.C. 284, 294-95, 311 S.E.2d 552, 559 (1984)). "'Knowledge may be shown even where the defendant's possession of the illegal substance is merely constructive rather than actual.'" *State v. Lopez*, 176 N.C. App. 538, 541, 626 S.E.2d 736, 739 (2006) (quoting *State v. Crudup*, 157 N.C. App. 657, 662, 580 S.E.2d 21, 26 (2003)).

In the case before us, Cruz accepted a package containing marijuana. The package was later found unopened and concealed in trash bags behind the couch Cruz was lying on at the time members of the Sheriff's Department entered the mobile home. At trial, the State presented the following evidence: (1) Cruz approached Detective Kivett and presented a handwritten slip of paper noting the package's tracking number; (2) Cruz accepted the package, despite its being in another person's name, and returned to the mobile home at 225 Little Mexico Drive; (3) the package was then placed in a corner behind a couch, inside trash bags; and (4) Cruz was found on a couch near the package when members of the Sheriff's Department entered; (5) only one vehicle, which could have served to transport the large quantity of drugs within the package, was present at the mobile home and was shown to have been used jointly by both Defendants; (6) the mobile home was uninhabited and was

occupied by Defendants only at the time the package was discovered; and (7) evidence demonstrated prior ties to the mobile home where the package was located, including cell phone records showing use of Cruz's phone near the vicinity of the mobile home on the same day as the scheduled delivery of the package. Viewing this evidence in a light most favorable to the State, we hold that a jury could reasonably infer: (1) that Cruz was in close proximity to drugs for which he accepted delivery; (2) that Cruz, in conjunction with Capote, the only other occupant in the mobile home, had joint control of the mobile home and the package; and (3) the drugs had been placed in a location, and hidden in a manner, that could have only been accomplished, individually or jointly, by Defendants. *See Miller*, 363 N.C. at 98, 678 S.E.2d at 594 (citing *McCullers*, 341 N.C. at 28-29, 460 S.E.2d at 168). Although circumstantial, this evidence was sufficient to submit these offenses to the jury for its consideration and determination. *See, e.g., Nunez*, ___ N.C. App. at ___, 693 S.E.2d at 226; *Baldwin*, 161 N.C. App. at 391, 588 S.E.2d at 505; *State v. Rosario*, 93 N.C. App. 627, 638, 379 S.E.2d 434, 440 (1989).

Cruz also argues that "reason to know" and "willful blindness" are not recognized standards under North Carolina case law sufficient to establish the element of knowledge in this context. However, Cruz's reliance on these arguments is misplaced given the actions that he took regarding the package. Although Cruz did not have exclusive control of the marijuana or the premises, when taken in a light most favorable to the State, sufficient incriminating

circumstances were shown to provide evidence of knowledge and possession sufficient to survive a motion to dismiss. *See Miller*, 363 N.C. at 98, 678 S.E.2d at 594 (citing *McCullers*, 341 N.C. at 28-29, 460 S.E.2d at 168).

B. Defendant Capote

Capote argues the judgment of the trial court should be reversed because there was insufficient evidence of his constructive possession of the controlled delivery package and the marijuana it contained.

Capote did not have exclusive possession of the premises in this case; therefore, other incriminating circumstances must be presented to prove constructive possession. *Harrington*, 171 N.C. App. at 24, 614 S.E.2d at 344-45. Both the State and Capote cite *Miller* to define "other incriminating circumstances." In *Miller*, our Supreme Court concluded that applicable case law demonstrates that "proximity to the contraband and indicia of the defendant's control over the place where the contraband is found" are "frequently considered" in determining what constitutes an incriminating circumstance in a constructive possession case. *Miller*, 363 N.C. at 100, 678 S.E.2d at 595. The Court concluded that, "[w]hen the evidence showed, among other things, that defendant was found within touching distance of the crack cocaine in question and defendant's identity documents were in the same room," the evidence "was sufficient to support a finding of guilt based upon the theory of constructive possession." *See id.* at 97, 678 S.E.2d at 593.

Capote's argument applies the holding of *Miller* too rigidly in that it fails to recognize that, although the *Miller* factors are "frequently considered," they are not exclusively considered in determining what constitutes an incriminating circumstance in a constructive possession case. *Id.* at 100, 678 S.E.2d at 595. Specifically, Capote argues that the State's evidence showing his association with Cruz, his presence at the mobile home once before the 2 June 2008 delivery, his connection with the Nissan truck parked at the mobile home, and his presence in the same room as the package is insufficient evidence under the *Miller* standard. Capote also argues that the absence of certain evidence weakens the State's case. He points to the State's failure to show that he had knowledge of the package's contents, that he was involved in drug trafficking with Cruz, that he had a tie with the real property, or that any of his possessions or identity documents were found inside the mobile home.

Nevertheless, given the standard of review applicable to this case, the evidence presented by the State is significant. Although Capote may not have been within touching distance of the package and did not have identification documents in the mobile home, like the defendant in *Miller*, Capote was with Cruz in the same room in a mobile home that lacked basic elements of habitability, when the package was discovered. In that room, between the time of the delivery and its discovery by the Sheriff's Department, the package had been hidden in a corner and enclosed in trash bags. Given that no one else was discovered in the mobile home, it is not

unreasonable to conclude that a jury could find that Defendants had joint power to control the package, its contents, and the mobile home in which they were found.

This conclusion is further supported by the fact that only one vehicle - the Nissan truck - which both Defendants were shown to have used, was present at the mobile home. Also, within the Nissan truck was a slip of paper with the tracking number of the 29 May 2008 package that contained approximately three pounds of marijuana. A jury could reasonably view this evidence as yet another element of power and intent to control the package and its contents. Capote was also present at the mobile home, sitting in the same Nissan truck, during Detective Burchfield's visit to 211 Little Mexico Drive on 29 May 2008. Additionally, there was testimony that an apparent photograph of Capote and "drug paraphernalia" were discovered in the mobile home. Although circumstantial, when considered in a light most favorable to the State, this evidence warrants consideration by a jury, and the denial of Capote's motions to dismiss. *See id.* at 98, 678 S.E.2d at 594 (citing *McCullers*, 341 N.C. at 28-29, 460 S.E.2d at 168).

IV. Maintaining a Dwelling for the Keeping and Sale of Controlled Substances

We must determine whether the trial court erred in denying Defendants' motions to dismiss the charge of intentionally maintaining a dwelling to keep and sell controlled substances because the State presented insufficient evidence to support the charge.

To obtain a conviction for knowingly or

> intentionally keeping or maintaining a place for the purpose of keeping or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7) (2007), the State has the burden of proving a defendant: "(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance."

State v. Fuller, ___ N.C. App. ___, ___, 674 S.E.2d 824, 832 (2009) (quoting *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001)); *see also* N.C. Gen. Stat. § 90-108(a)(7) (2009) (making it unlawful for any person "[t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, . . . which is used for the keeping or selling of [a controlled substance]"). We first consider whether the State presented sufficient evidence of the first element: that Defendants kept or maintained the mobile home at 225 Little Mexico Drive within the meaning of N.C. Gen. Stat. § 90-108(a)(7).

> To determine whether a person keeps or maintains a place under N.C. Gen. Stat. § 90-108(a)(7), the court considers the following factors, none of which are dispositive: "ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent." *State v. Baldwin*, 161 N.C. App. 382, 393, 588 S.E.2d 497, 506 (2003). The determination depends on the totality of the circumstances. *Id.* *See also State v. Boyd*, 177 N.C. App. 165, 174, 628 S.E.2d 796, 804 (2006) ("A pivotal factor is whether there is evidence that defendant owned, leased, maintained, or was otherwise responsible for the premises.").

Fuller, ___ N.C. App. at ___, 674 S.E.2d at 832.

In *State v. Bowens*, 140 N.C. App. 217, 535 S.E.2d 870 (2000),

our Court applied these principles to a case in which the defendant

> was seen in and out of the dwelling 8-to-10 times over the course of 2-to-3 days; nobody else was seen entering the premises during this 2-to-3 day period of time; men's clothing was found in one closet in the dwelling; [Officer] Branch testified he believed [d]efendant lived at [the dwelling], although he offered no basis for that opinion and had not checked to see who the dwelling was rented to or who paid the utilities and telephone bills.

Id. at 221–22, 535 S.E.2d at 873. Additionally, "[t]here [was] no evidence [d]efendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling." *Id.* at 222, 535 S.E.2d at 873. This Court has repeatedly found that evidence comparable to that presented in *Bowens* does not constitute substantial evidence of maintaining a dwelling to keep and sell controlled substances. *See, e.g.*, *State v. Carter*, 184 N.C. App. 706, 709–10, 646 S.E.2d 846, 849 (2007) (finding evidence insufficient when the State only showed that defendant was the sole occupant of the residence at the time of the search; and three photographs of defendant, along with personal items, including defendant's North Carolina State Identification Card, social security card, and birth certificate were found in the residence, but "[t]he State presented no evidence indicating that defendant owned the property, bore any expense for renting or maintaining the property, or took any other responsibility for the residence"); *State v. Harris*, 157 N.C. App. 647, 652, 580 S.E.2d 63, 66 (2003) (holding evidence insufficient when the State only showed that the defendant had been seen at the

residence several times over a period of two months, an officer spoke with the defendant there twice during that period, and personal property belonging to the defendant was found in the bedroom).

In the case before us, the State presented the following evidence to establish that Defendants kept or maintained the mobile home at 225 Little Mexico Drive: (1) Defendants received marijuana at the mobile home; (2) some furniture was found in the mobile home, which would allow for some degree of residency, (3) items like "drug paraphernalia," fake social security cards, and sandwich bags were found in the mobile home, and (4) Defendants stayed at the mobile home for a duration of time during which they had exclusive control of the location.

In light of *Bowens* and analogous cases, this evidence is insufficient to support Defendants' conviction for maintaining a dwelling for the purpose of keeping or selling a controlled substance. In fact, components of the State's evidence, like the presence of "drug paraphernalia," speak more to the purpose of the property, an element not challenged by Defendants, rather than any actions taken by Defendants to maintain the mobile home. *See Carter*, 184 N.C. App. at 709, 646 S.E.2d at 849 n.1 (citing *Frazier*, 142 N.C. App. at 366, 542 S.E.2d at 686). A critical deficiency is the State's failure to provide evidence indicating that Defendants owned the real property, bore any expense for renting or maintaining the property, or took any other responsibility for the mobile home. It appears more likely that

Defendants merely occupied the mobile home from time to time. "[O]ccupancy, without more, will not support the element of 'maintaining' a dwelling." *State v. Spencer*, 192 N.C. App. 143, 148, 664 S.E.2d 601, 605 (2008) (citing *State v. Kraus*, 147 N.C. App. 766, 768-69, 557 S.E.2d 144, 147 (2001)).

V. Conclusion

For the reasons set forth above, we reverse each Defendant's conviction on the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. The trial court consolidated the convictions for maintaining a dwelling with the convictions for trafficking in marijuana by transportation and possession with intent to sell or deliver marijuana. Thus, we must remand for resentencing as to the trafficking in marijuana by transportation and possession with intent to sell or deliver marijuana convictions. *See State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999) (remanding for resentencing on remaining conviction because the Court could not "assume that the trial court's consideration of two offenses, as opposed to one, had no affect on the sentence imposed"). However, Defendants have failed to demonstrate any error with respect to their convictions for trafficking in marijuana by possession.

We find no error in 08 CRS 51236 and 08 CRS 51242; we remand for re-sentencing in 08 CRS 51237, 08 CRS 51239, 08 CRS 51240, and 08 CRS 51241; and we reverse in 08 CRS 51238 and 08 CRS 51243.

No error in part, remanded in part, and reversed in part.

Judges GEER and ERVIN concur.

Report per Rule 30(e).