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NO. COA09-1597

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

Buncombe County  
No. 08 CRS 58024

TAMARA DENISE WINGATE,  
Defendant.

Appeal by defendant from judgment entered 16 June 2009 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 24 August 2010.

*Attorney General Roy Cooper, by Associate Attorney General Eryn E. Linkous, for the State*

*Gilda C. Rodriguez for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant Tamara Denise Wingate appeals from her conviction of possession of cocaine. In related arguments, defendant contends that the trial court erred in (1) denying her motion to dismiss the charge for insufficient evidence that she was in possession of the cocaine, and (2) instructing the jury on constructive possession of the contraband where the evidence did not support the instruction. After careful review, we find no error.

#### Facts

The State's evidence tended to establish the following facts at trial: Late in the evening of 2 July 2008, several uniformed

police officers with the Asheville Police Department's Drug Suppression Unit ("DSU") were on routine patrol and decided to go to the In Town Motor Lodge on Tunnel Road, where there are frequent complaints of drug activity. The DSU officers arrived at the In Town Motor Lodge sometime between 10:30 p.m. and 11:00 p.m. After exiting their vehicle, the officers noticed a man "scurry away." The officers approached the man and asked him if he was staying at the hotel. Based on their conversation with the man, the officers decided to investigate Room 42.

Officers Chad Bridges and Dewayne Greene approached the room from one side, while Officer Patton approached from the other in order to block all the exits. As they approached the room, Officers Bridges and Greene noticed that the door to the room was partially open and they looked inside. Officer Bridges saw a woman, identified as Fanetta Bryant, sitting next to the door smoking what appeared to be a "crack pipe." He also saw defendant sitting on the bed. When defendant saw Officer Bridges, she quickly got up and went toward the bathroom. Officer Bridges entered the room and followed defendant into the bathroom, concerned that she might flush contraband down the toilet. By the time Officer Bridges caught up to defendant in the bathroom, she had already flushed the toilet. A third woman, Deshan Bryant, was laying in the bathtub, which was next to the toilet. Although conscious, Deshan Bryant was not "alert" and appeared to be "stoned" and in a "bad stupor." Officer Bridges did not see her make any movements while he was in the bathroom until he ordered

her to get up. Officer Bridges then took defendant and Deshan Bryant out of the bathroom and had them sit on the bed.

Officer Bridges asked defendant what she flushed down the toilet, and defendant told him that she had "flush[ed] her blunt." Officer Bridges then examined the toilet and retrieved "two small off-white-colored rocks" at the bottom of the bowl. Although defendant continued to state that she had flushed her blunt down the toilet, she repeatedly asked the officers what they had found in the toilet. The DSU officers, who were familiar with the odor of marijuana from their training and experience, did not notice the smell of marijuana in the room or find any marijuana in the room. When defendant was asked if she had anything on her person, she gave the officers a Blackberry and over \$1,100.00 in cash.

Defendant was arrested and charged with possession of cocaine. Defendant pled not guilty and the case proceeded to trial. At the close of the State's evidence, defendant moved to dismiss the charge. The trial court denied the motion. Defendant did not present any evidence in her defense. The jury convicted defendant of possession of cocaine and the trial court sentenced defendant to a presumptive-range term of five to six months imprisonment, suspended the sentence and placed defendant on 24 months of supervised probation. Defendant timely appealed to this Court.

I

Defendant assigns error to the trial court's denial of her motion to dismiss the cocaine possession charge for insufficient evidence. The trial court properly denies the defendant's motion

to dismiss "[i]f there is substantial evidence – whether direct, circumstantial, or both – to support a finding that the offense charged has been committed and that the defendant committed it . . . ." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence is that amount of relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Defendant was convicted of possession of a Schedule II controlled substance – cocaine – in violation of N.C. Gen. Stat. § 90-95(a)(3) (2009). Possession of a controlled substance has two 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) (quoting *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977)). Defendant argues that the State failed to present sufficient evidence to establish that she possessed the cocaine found in the toilet bowl.

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)). Thus, "the State may overcome a motion to dismiss . . . by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972) (quoting *State v. Allen*, 279 N.C. 406, 411-12, 183 S.E.2d 680, 684 (1971)).

When a defendant does not have exclusive possession of the location where the drugs are found, "the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). "[C]onstructive possession depends on the totality of circumstances in each case." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

Viewed in the light most favorable to the State, the evidence is sufficient to support a reasonable inference that defendant possessed the cocaine found in the toilet. Although there were two other women in Room 42, and thus defendant did not have exclusive

possession of the premises where the cocaine was found, the State presented evidence of "other incriminating circumstances." When defendant saw the officers looking into the room, she "quickly" got up from the bed and ran to the bathroom. When Officer Bridges caught up to her in the bathroom, defendant was standing over the toilet and had just flushed it. Although defendant maintained that she had flushed her blunt down the toilet, the officers did not detect the odor of marijuana in the motel room and found no marijuana in the room. When the toilet was searched, Officer Bridges found two small rocks of cocaine. Defendant also had over \$1,100 in cash on her person.

This evidence constituted sufficient evidence of other incriminating circumstances to warrant denial of defendant's motion to dismiss the charge of possession of cocaine. See *State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22-23 (2005) ("Our appellate courts have previously 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."); *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001) ("Other incriminating evidence, connecting Defendant with the drugs, includes his 'lunge' into the bathroom and the placing of his hands into the bathroom ceiling, where the drugs were later found."); *State v. Neal*, 109 N.C. App. 684, 688, 428 S.E.2d 287, 290 (1993) (concluding evidence of incriminating circumstances was

sufficient when defendant fled bathroom where cocaine was being flushed as police entered residence); *State v. Alston*, 91 N.C. App. 707, 710-11, 373 S.E.2d 306, 309 (1988) (finding evidence of other incriminating circumstances sufficient when defendant was in close proximity to the cocaine and had large amount of cash on his person). The trial court, therefore, properly denied defendant's motion to dismiss.

Defendant nonetheless contends that, because Deshan Bryant was also in the bathroom, "it is not too far reaching to conclude that she had been in possession of the controlled substance that Officer Bridges found in the toilet." Contrary to defendant's argument, however, this Court has repeatedly held that, "[i]n showing possession, the State is not required to prove that a defendant owned the controlled substance, nor that a defendant was the only person with access to it." *State v. Battle*, 167 N.C. App. 730, 732, 606 S.E.2d 418, 420 (2005); accord *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321323 (1987).

## II

Defendant also contends that the court erred by instructing the jury on "constructive possession based on close proximity" as the evidence at trial did not support this instruction. "[T]he purpose of an instruction to the jury is to clarify issues so that the jury can apply the law to the facts of the case." *State v. Williams*, 136 N.C. App. 218, 222, 523 S.E.2d 428, 432 (1999). In determining if an instruction is proper, the trial court must "consider whether there is any evidence in the record which might

convince a rational trier of fact to convict defendant of the offense." *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862-63 (1985). "A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973).

"It is within the discretion of the trial judge as to how much of a charge to give the jury." *State v. Ayers*, 11 N.C. App. 333, 336, 181 S.E.2d 250, 253 (1971). "The preferred method of instructing the jury is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Solomon*, 117 N.C. App. 701, 706, 453 S.E.2d 201, 205, *disc. review denied*, 340 N.C. 117, 456 S.E.2d 325-26 (1995). Here, the trial court gave the North Carolina pattern jury instruction for constructive possession: N.C.P.I. - Criminal 104.41. The trial court's instructions on this issue provided:

Possession of a substance may be actual or constructive. A person has actual possession of a substance if a person has it on the person, is aware of it[s] presence and has the power and intent to control its disposition or use. A person has constructive possession of a substance if the person does not have it on the person and is aware of its presence and has the power and intent to control its disposition or use. That a person is aware of a substance and has the power and intent to control its disposition or use may be shown by direct evidence or inferred from the circumstances. If you find beyond a reasonable doubt that a substance was found in close proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may find that the



defendant was aware of the presence of a substance and had the power and intent to control its disposition or use. However, the defendant's physical proximity does not, by itself, permit an inference that the defendant was aware of it or had the power and intent to control its disposition or use. Such inference may be drawn only from this and other circumstances which you find from the evidence beyond a reasonable doubt.

The evidence in this case supports the trial court's instructions. As defendant did not have exclusive possession of the motel room in which the cocaine was found, the State was required to present evidence of other incriminating circumstances sufficient to support an inference of constructive possession. See *State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991) ("If the defendant's possession over the premises is nonexclusive, constructive possession may not be inferred without other incriminating circumstances."). As the State's evidence tended to show - in addition to other incriminating circumstance - defendant's close proximity to the cocaine found in the toilet, the trial court properly instructed the jury on constructive possession. See *State v. McNeil*, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004) ("Incriminating circumstances, such as evidence placing the accused within close proximity to the controlled substance, may support a conclusion that the substance was in the constructive possession of the accused."), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005).

No Error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).