NO. COA11-1464
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 07 CRS 231922, 231923,
08 CRS 14351

EARL DAVIS, JR.

Appeal by defendant from judgment entered 30 July 2009 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliot Walker, for defendant.

BRYANT, Judge.

Where the State presented substantial evidence that the cocaine found on the ground had been in defendant's possession and where there was substantial evidence that defendant was guilty of the charge of possession of cocaine with intent to sell or deliver, the admission of Detective McCarty's testimony did not amount to plain error.

On 3 March 2008, defendant Earl Davis, Jr., was indicted in Mecklenburg County Superior Court on charges of possession with intent to sell or deliver a controlled substance, resisting a public officer, and attaining habitual felon status.

On 28 July 2009, a jury trial commenced in Mecklenburg County Superior Court. The evidence tended to show that on 12 June 2007, Charlotte-Mecklenburg Police Department Officers Matthew Montgomery and Brent Koeck, were off-duty, working for the Sandhurst Apartment Complex near West Boulevard in Southwest Charlotte. The officers were in uniform and in a marked police car. Officer Koeck received information from a confidential informant who provided the license plate number and description of a small, black, two-door car with heavy rear-end damage in the area of West Boulevard and Remount Road; and stated that the vehicle driver, a black male named Earl, had "crack" cocaine on his person.

Within an hour, at approximately 8:55 p.m., the officers observed a vehicle on West Boulevard matching the informant's description. Officer Montgomery ran the vehicle license plate number through a law-enforcement database and found the vehicle was registered to Earl Davis, Jr. The officers initiated a traffic stop.

Officer Montgomery approached the stopped vehicle and asked the driver to step out and produce his driver's license. The name on the license was Earl Davis, defendant. Officer Montgomery testified that while he chatted, defendant "was stammering, really couldn't complete his sentences, [and was] very nervous, very nervous." When Officer Montgomery informed defendant that he had probable cause to search his person and his vehicle, defendant ran but was apprehended approximately twenty feet from his vehicle. After regaining control of defendant, Officer Montgomery noticed that defendant's pocket was completely turned out where it had not been prior to defendant attempting to run.

Officer Montgomery conducted a search of defendant's person and found $411.00 in cash but no drugs. Officer Koeck and a member of the police canine unit trained in alerting to the presence of drugs searched the vehicle and found no drugs. Officer Montgomery then reviewed the VHS tape from the in-car video camera and saw that defendant made a throwing motion with his right arm, but could not actually see what, if anything, defendant had thrown. Searching the ground close to and to the right of the area where defendant was apprehended, Officer Montgomery found "a large baggie of crack cocaine. . . . [K]ind

of a larger baggie which contained the individually wrapped cocaine." It was in plain view, lying on the grass, out in the open. The large baggie contained 10.89 grams of cocaine in 16 individually wrapped rocks when first counted.

At trial, Charlotte-Mecklenburg Police Department Officer Darren Neely testified that he arrested defendant on 26 October 2007, just over three months after defendant's 12 July 2007 arrest. Officer Neely testified that he received a tip from a confidential informant that "Earl" was in possession of crack cocaine and gave a description of his vehicle and location. Officer Neely, along with his partner Charlotte-Mecklenburg Police Department Officer James McCarty, identified and stopped a vehicle matching the description. Defendant was driving. Officer Neely informed defendant that he had received information that drugs were in the vehicle. Defendant was asked to exit the vehicle, but as Officer Neely began to search the vehicle, defendant took off on foot. Both officers chased defendant and apprehended him. Officer McCarty testified that, while running, he saw defendant toss a small baggie on the ground, which was recovered immediately. Officer McCarty testified that the baggie contained several rocks of crack

cocaine. He later had the contents of the baggie tested and testified that it was crack cocaine.

The jury found defendant guilty of possession with intent to sell or deliver cocaine and resisting, obstructing, or delaying a public officer. Defendant stipulated to having attained habitual felon status. The trial court entered judgment in accordance with the jury verdicts and defendant's stipulation. The judgments were consolidated, and defendant was sentenced to an active term of 105 to 135 months. Defendant appeals.

On appeal, defendant raises the following three issues: (I) did the trial court err in denying defendant's motion to dismiss the charge of possession of cocaine with intent to sell or deliver; (II) did the trial court commit plain error by allowing a layman to testify that the substance discovered was "crack" cocaine; and (III) did the trial court commit plain error by allowing a detective to testify that he had the substance tested and that it was crack cocaine.

I

Defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of cocaine with

intent to sell or deliver. Defendant contends that the State failed to present substantial evidence that the cocaine found on the ground was ever in defendant's possession. We disagree.

"We review a trial court's denial of a motion to dismiss criminal charges de novo, to determine whether 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. Fraley*, 202 N.C. App. 457, 462, 688 S.E.2d 778, 783 (2010) (citation and quotations omitted). "'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Ferguson*, 204 N.C. App. 451, 458, 694 S.E.2d 470, 476 (2010) (quoting *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004)). "The court must consider the evidence in the light most favorable to the State, the State should receive the benefit of every reasonable inference that can be drawn from the evidence, and all inconsistencies should be resolved in the State's favor." *State v. Hargrave*, 198 N.C. App. 579, 588, 680 S.E.2d 254, 261 (2009) (citation omitted).

Under North Carolina General Statutes, section 90-95(a), "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance . . . ." N.C. Gen. Stat. § 90-95(a)(1) (2011).[1] "To obtain a conviction for possession of [cocaine] with the intent to sell or deliver, 'the State is required to prove two elements: (1) defendant's possession of the drug and (2) defendant's intention to "sell or deliver" the drug.'" *Ferguson*, 204 N.C. App. at 549, 694 S.E.2d at 476-77 (quoting *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985)). Defendant challenges only the contention that he possessed cocaine.

Possession may be actual or constructive. *Id.* at 459, 694 S.E.2d at 477 (citation omitted). "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." *Id.* at 459, 694 S.E.2d at 477 (citation omitted).

> Constructive possession exists when the defendant, although not in actual possession of the contraband, has the intent and capability to exercise control over it. *State v. Spencer*, 281 N.C. 121, 129, 187

[1] Cocaine is a Schedule II controlled substance. N.C. Gen. Stat. § 90-90(1)(d) (2011).

> S.E.2d 779, 784 (1972). When the defendant is not in exclusive control of the premises where the drugs are found, the State must prove other incriminating circumstances to get the benefit of an inference of constructive possession. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987).

Hargrave, 198 N.C. App. at 588, 680 S.E.2d at 261 (holding incriminating circumstances, such as, close proximity to the contraband in question, owning other items of property found near the contraband, acting nervous in the presence of law enforcement, and possessing a large amount of cash, sufficient to submit the issue of possession to a jury and deny defendant's motion to dismiss when an officer found cocaine next to the driver's door of a vehicle after approaching two men in cars parked beside each other in an otherwise empty parking garage); *see also State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976) ("[E]vidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession."); *see also State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (holding that trial court did not err in denying the defendant's motion to dismiss where the defendant had constructive possession of cocaine in light of

information provided by and through a confidential informant used to set up a drug deal between defendant and undercover police), *aff'd*, 331 N.C. 113, 413 S.E.2d 798 (1992); *compare State v. Acolatse*, 158 N.C. App. 485, 581 S.E.2d 807 (2003) (holding that the evidence supported only a reasonable suspicion of possession of cocaine where law enforcement arrived to serve a tax warrant, defendant ran, officers lost sight of defendant for ten seconds, and subsequently found cocaine along the defendant's escape route).

Here, the officers received information from a confidential informant describing the location, vehicle, and name of a person with crack cocaine on his person. The officers observed a vehicle matching the informant's description and conducted a vehicle stop. When stopped defendant "was stammering, really couldn't complete his sentences, [and was] very nervous, very nervous." When informed that the officers had probable cause to search, defendant ran approximately twenty feet before being apprehended.

> After we had control we stood [defendant] up and I noticed that his right pants pocket was now pulled out all the way as if you grab for all your change and pull it out and leave the pocket lining protruding from inside your pants.

Officer Montgomery conducted a search of defendant and found

$411.00 in cash but no drugs. A search of defendant's vehicle also yielded no drugs. Officer Montgomery then viewed a video of the 12 July 2007 traffic stop recorded from his police cruiser.[2] Officer Montgomery testified that on the video he observed defendant "toss or throw out his right arm" when he started to run.

> A. I walked out a little bit further from kind of where I thought if he's right-handed where he'd be kind of tossing. Maybe another -- maybe another ten feet or so.
>
> . . .
>
> That's when I found a large baggie of crack cocaine. . . . [K]ind of a larger baggie which contained the individually wrapped cocaine.
>
> . . .
>
> Q. Just to be clear, you never saw the defendant -- you never saw anything leave his hand.
>
> A. Correct.
>
> Q. Can you explain for the jury what the -- what the scene was like out there? About how many people, what was the foot traffic like in that general area?
>
> A. I noticed through the situation there was kind of a house to the right on up the street, just a little from us, and

[2] The video recorded from the officer's police cruiser was played for the jury.

> I just noticed some people sitting on the porch watching. I remember maybe kind of behind us, you know, one or two people walking by. And then down the street was -- we tend to draw some onlookers.

Though defendant was not in exclusive control of the premises on which the contraband was found, taken in the light most favorable to the State, the record provides substantial evidence of incriminating circumstances sufficient to support submission of the issue of constructive possession to the jury: a confidential informant provided information regarding the location, vehicle, and individual in question that was later corroborated by police; defendant's nervous demeanor when stopped; defendant made a throwing motion while running from police which was caught on the video camera in the police car; after being subdued and having $411.00 in cash on his person, defendant had an out-turned pocket; and, in the general area where defendant was observed making a tossing motion, a large baggie of containing crack cocaine was found. Therefore, the trial court did not err in failing to dismiss the charge of possession with the intent to sell or deliver cocaine. Accordingly, this argument is overruled.

II & *III*

Next, defendant argues that the trial court committed plain error by allowing Detective James McCarty to testify that he observed defendant throw crack cocaine when chased by police on 26 October 2007 and that the substance was tested and found to be crack cocaine. Defendant notes that he was tried on charges stemming from events occurring 12 July 2007. Defendant contends that Det. McCarty's testimony was inadmissible, prejudicial, and warrants a new trial. We disagree.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2012).

> [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."

State v. Phillips, 365 N.C. 103, 129, 711 S.E.2d 122, 142 (2011) (citation omitted).

Det. McCarty's testimony was admitted as testimony of a prior bad act pursuant to our Rules of Evidence, Rule 404(b). Detective McCarty testified that on 26 October 2007, he was working as a warrant officer for the Charlotte-Mecklenburg Police Department when his partner Officer Darren Neely received a phone call informing him that defendant was carrying drugs in his vehicle. [T. Vol. 2, 151]. Det. McCarty observed defendant sitting in a car at a stop sign and shortly thereafter conducted a traffic stop.

> After Officer Neely asked him to step back to my location because I was at the rear of the vehicle, and Officer Neely was at the driver side of the vehicle and he was looking inside the vehicle. As he was looking at something [defendant] began to run.
>
> . . .
>
> As [defendant] ran, he refused to stop and continued to run. As he did he threw a small plastic baggie down to the ground, at which time I stopped and recovered the plastic bag.

The prosecution engaged Det. McCarty in the following exchange:

> Q. At some point did you take the baggie out of your pocket that you recovered during the

> chase?
>
> A. Yes, I did.
>
> . . .
>
> Q. What did you find when you took a look at that item?
>
> A. There were several rocks of crack cocaine. I believe it was fourteen individually wrapped rocks found in a plastic baggie.
>
> . . .
>
> Q. Did you have it tested to see whether it was crack cocaine?
>
> A. Yes, I did.
>
> Q. And was it crack cocaine?
>
> A. Yes, sir.

Defendant asserts that the testimony was inadmissible, prejudicial, and therefore requires that he be granted a new trial. But, even assuming without deciding that the admission of Det. McCarty's testimony was error, it was not prejudicial error. There was sufficient evidence of defendant's guilt on the charge of possession with intent to sell or deliver cocaine on 12 June 2007, such that the admission of Det. McCarty's testimony did not amount to plain error. A confidential informant reported that a black male named "Earl" had crack cocaine on his person, that he was driving a small, black, two-

door car with heavy damage to the rear end in the area of West Boulevard. A car and driver matching the informant's description was stopped on West Boulevard. Defendant Earl Davis attempted to run when he was informed that the officers had probable cause to search his vehicle and his person. The substance recovered on the ground in plain sight near where defendant made a throwing motion caught on camera and shown to the jury was lab tested and determined to be crack cocaine. This evidence is sufficient to support the jury verdict of possession with intent to sell or deliver cocaine. Accordingly, we overrule defendant's arguments.

No prejudicial error.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Report per Rule 30(e).