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NO. COA14-607
NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 13 CRS 82953, 24624

JAMES HERBIN

Appeal by defendant from judgment entered 25 February 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 15 December 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

Farber Law Firm, P.L.L.C., by Sarah Jessica Farber, for defendant-appellant.

STEELMAN, Judge.

Where the State presented substantial evidence to support the element of possession of cocaine under either the theory of actual possession or the theory of constructive possession, the trial court did not err in denying defendant's motion to dismiss.

I. Factual and Procedural Background

On 25 June 2013, Detective Brad Jeter of the Greensboro Police Department stopped the motor vehicle of James Herbin (defendant) after defendant failed to stop for a red light and Detective Jeter had determined his license was suspended. Defendant was the only person in the vehicle. Detective Jeter asked defendant if he had anything illegal in the car, and defendant replied, "Go ahead and search if you want to search."

When defendant got out of his car, Detective Jeter conducted a pat-down search of defendant for weapons. Detective Jeter felt defendant "clinch his body up" when he patted his waist area, but defendant did not have any weapons. Detective Jeter told defendant to sit down, but defendant stood up and acted in a nervous manner while Detective Jeter waited for another officer. When the other officer arrived, defendant turned his back to Detective Jeter. Defendant reached into his waistband and pulled out a white tissue, which he dropped on the ground as he turned back around to face Detective Jeter.

Defendant tried to step on the tissue when Detective Jeter asked him what it was. Detective Jeter then handcuffed defendant and had him sit on the curb. When Detective Jeter picked up the tissue, he saw it contained a plastic bag holding a substance that subsequent testing revealed to be crack cocaine.

Defendant was indicted for the felony of possession with intent to sell or deliver cocaine and for having achieved habitual felon status. A jury found defendant guilty of the lesser offense of felony possession of cocaine. Defendant pled guilty to having attained habitual felon status. The trial court sentenced defendant to an active sentence of 32 to 51 months imprisonment

Defendant appeals.

II. Denial of Defendant's Motion to Dismiss

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss. We disagree.

A. Standard of Review

"When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation omitted), *cert. denied sub nom Garcia v. North Carolina*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "In reviewing challenges to the sufficiency of evidence, [the appellate court] must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Scott*,

356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation omitted). "The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991).

B. Analysis

"Felony possession of a controlled substance has two essential 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, *aff'd*, 314 N.C. 401, 333 S.E.2d 701 (1985). The possession element is satisfied if the State presents sufficient evidence of either actual or constructive possession. *State v. Baublitz*, 172 N.C. App. 801, 809-10, 616 S.E.2d 615, 621 (2005) (citation omitted).

Actual possession may be proven by either direct or circumstantial evidence. *State v. McNeil*, 359 N.C. 800, 813, 617 S.E.2d 271, 279 (2005). "[T]he State may overcome a motion to dismiss or motion for judgment as of nonsuit 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. Reddick*, 55 N.C. App. 646, 648, 286 S.E.2d 654, 656 (citation

omitted), *disc. review denied*, 305 N.C. 398, 290 S.E.2d 268 (1982).

"Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics." *McNeil*, 359 N.C. at 809, 617 S.E.2d at 277 (quotation marks and citation omitted). "Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. Sinclair*, 191 N.C. App. 485, 492, 663 S.E.2d 866, 872 (2008) (citation omitted). "[C]lose 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. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22-23 (2005).

In this case, the evidence presented by the State was sufficient to withstand defendant's motion to dismiss based on either actual or constructive possession, and the trial court properly instructed the jury on both actual and constructive possession.

Detective Jeter stopped defendant's car and noticed defendant was alone in the car. After Detective Jeter conducted

a pat-down frisk for weapons, defendant began to act in a nervous manner. Detective Jeter then saw defendant reach into his waistband and drop a tissue on the ground. When Detective Jeter noticed the tissue, defendant attempted to step on it. Detective Jeter picked up the tissue after he secured defendant, and found a plastic bag that contained cocaine. Although Detective Jeter did not find the cocaine on defendant's person, the circumstantial evidence was sufficient to show he had actual possession of the substance. Moreover, the totality of the evidence, including defendant's proximity to the cocaine at the time of its discovery and his behavior during his encounter with Detective Jeter, also supported a theory of constructive possession.

Accordingly, we find no error.

NO ERROR.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).