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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-437

Filed: 18 December 2018

Wake County, No. 17 JB 431

IN THE MATTER OF: B.W.

Appeal by juvenile from adjudication and disposition entered 7 November 2017 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 1 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Vanessa N. Totten, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for juvenile-appellant.

MURPHY, Judge.

Where the State alleges a juvenile constructively possessed contraband, it must show the juvenile had the intent and capability to maintain control and dominion over that contraband. Where the State fails to do so, a trial court errs in denying a juvenile's motion to dismiss the possession charge for insufficient evidence. Here, the State did not put forth adequate evidence the Juvenile, B.W., constructively possessed marijuana. Consequently, the trial court erred in denying her motion to dismiss at the conclusion of the evidence.

BACKGROUND

This appeal arises out of an adjudication and disposition order entered against B.W. for resisting, delaying, and obstructing a public officer (“RPO”) and possession of a schedule VI controlled substance (“possession”). On 11 October 2017, B.W. was found not responsible for the RPO charge. On 7 November 2017, B.W. was tried at an adjudication hearing in Wake County District Court on the possession charge. The court entered an order finding B.W. delinquent on the possession charge *and* also for RPO.

B.W. was charged for possession stemming from an incident where police were called to her father’s house on 6 July 2017. Around 1:40 p.m., Apex Police Officer Brandon Pope (“Pope”) received a call to respond to a residence where a juvenile was allegedly using drugs and alcohol. Pope arrived at the scene at the same time as Apex Police Officer Markworth (“Markworth”) and proceeded to knock on the front door of the house. Receiving no response, Pope returned to his cruiser, where he sat until he saw a female walk from the yard into the house. When Pope knocked on the door a second time, B.W.—not the female he had previously observed entering the house—answered. Pope detected the odor of marijuana and observed that B.W.’s eyes appeared red and glassy, but she stated that she had not been using marijuana.

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While he was standing at the door, Pope heard “commotion” inside the house, including “running, door shutting, [and] slamming.” Around this time, the female Pope had seen in the yard, Patricia¹, came out to the front steps of the house with B.W. Pope called B.W.’s father, the owner of the house, who indicated that he was on his way home.

Around that time, Patricia told Markworth “there was a male inside the house.” Consequently, Pope and Markworth executed “a protective sweep of the house to make sure nobody was still in there.” The officers’ search proceeded from the first floor of the house up to the second and eventually the third floor. On the third floor, there was a finished room—which Pope described as a “bonus room”—and unfinished attic space, or “void,” accessible by doors located on both sides of the bonus room. The third floor room, which Pope believed “looked like a female’s room[,]” housed a bed, a couch, and a closet. In the attic or void space, there was another mattress laying directly on the floor without a box spring. Upon entering the attic space attached to the third floor room, Pope noticed “a bag of marijuana sitting right there in plain view.”

Once B.W.’s father arrived home, Pope received his signed consent to search the house and returned inside with Officer Markworth to seize the bag of marijuana. During this second search, Pope seized the marijuana from the third floor as well as

¹ A pseudonym is used to protect the identity of the minor.

a cell phone he had found in a backpack that was also inside the attic. Inside the backpack, Pope “also [found] some men’s clothing . . . men’s underwear in there.” In addition to what he seized from the attic, Pope seized a digital scale from the drawer of a “dresser of makeup, dresser or stand . . . type of table” inside the bonus room.

On 11 October 2017, B.W. appeared before the Wake County District Court for a hearing on an RPO petition “with an offense date of March 14th [2017.]” At the close of the evidence, B.W. was found not responsible for the RPO offense and the court set a date of 7 November 2017 to hear the possession charge. At the hearing on the possession charge, the only person who testified was Pope. When the State rested at the conclusion of Pope’s testimony, B.W. moved to dismiss the possession charge for insufficient evidence. The trial court denied B.W.’s motion and found her responsible for both possession and RPO. B.W. filed a timely notice of appeal.

ANALYSIS

B.W. raises three arguments on appeal: first, that the trial court erred in denying her motion to suppress the marijuana seized from her father’s house; second, that the trial court erred in denying her motion to dismiss the possession offense; and third, that the record contains a clerical error regarding the RPO offense. We hold the trial court erred in denying B.W.’s motion to dismiss and reverse its decision, so we need not reach her argument regarding the protective sweep. Additionally, B.W.’s

record contains a clerical error. Consequently, we vacate the judgment finding B.W. delinquent for RPO.

A. B.W.'s Motion to Dismiss

At her adjudicatory hearing, B.W. moved to dismiss at the close of the State's evidence, arguing the State did not present sufficient evidence from which a reasonable mind could infer B.W. possessed the marijuana found at her father's house. She renews that argument on appeal, contending the State failed to put forward evidence from which a reasonable mind might conclude B.W. possessed marijuana. After careful review, we agree and reverse the trial court's denial of B.W.'s motion to dismiss.

“Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [the juvenile's] being the perpetrator of such offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.” *In re: S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (internal quotations and citations omitted). “Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.” *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016).

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Here, B.W. was charged with possession of a schedule VI substance, marijuana, under N.C.G.S. § 90-95(a)(3) (2017). One may be guilty of simple possession where she actually or constructively possesses marijuana. *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 348 (2012). Therefore, we must determine whether the State put forth substantial evidence that B.W. was in possession, either actual or constructive, of the marijuana found at her father's house. *Id.*

The State does not argue now, and did not argue below, that B.W. was in actual possession of marijuana, but that she constructively possessed the schedule VI substance. "A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (internal citation and quotation marks omitted). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances" from which a reasonable mind could infer constructive possession. *Id.*; *State v. Chekanow*, 370 N.C. 488, 493, 809 S.E.2d 546, 550 (2017). Here, there is nothing in the record indicating B.W. had exclusive control over the attic space where the marijuana was found, so we review the incriminating circumstances surrounding the incident. Our review of incriminating circumstances is not an exact formula, but most commonly considers (1) one's proximity to the contraband, (2) indicia of that individual's control

over the place where contraband is found, and (3) “other incriminating circumstances linking [the individual] to the contraband.” *Bradshaw*, 366 N.C. at 94-95, 728 S.E.2d at 348-49 (internal quotations omitted).

First, an individual’s proximity to contraband is generally considered an incriminating circumstance where that person is found within reach of, or at least in the same room as, the contraband. *Miller*, 363 N.C. at 100, 678 S.E.2d at 595 (reviewing cases and finding ample incriminating circumstances to avoid dismissal where defendant was in the same room as cocaine, his birth certificate, and state ID). Here, there is no evidence B.W. was present in the area where the marijuana was found. Although B.W. was present at the house, there is no evidence that she was on the third floor or in the attic space. Likewise, none of B.W.’s possessions were found in the attic space. Instead, within the immediate proximity of the contraband, police found a backpack that stored men’s clothing and a cell phone belonging neither to B.W. nor Patricia. Therefore, there is not sufficient evidence to conclude B.W. was in the proximity of the marijuana for the purposes of constructive possession.

Second, the record does not show B.W. had control over the attic space where police found marijuana. The house was owned by B.W.’s father and, at the time of the incident, both B.W. and Patricia were present in the home. Additionally, there was no evidence presented that B.W. maintained a bedroom on the third floor of the house or had control over the attic space where the marijuana was found. The only

evidence indicating B.W. had control over the attic space is Pope's testimony that the room attached to the attic "looked like a female's bedroom." However, Pope also testified that the homeowner "very well may have two daughters" besides B.W. who lived with him at the time. The evidence is silent as to who actually lived in the house with B.W., or may have been staying there at the time of this incident.² Therefore, we cannot conclude B.W. had control over the marijuana or the space in which it was found.

Third, there are insufficient other incriminating circumstances to prove constructive possession. Pope's testimony that he detected the odor of marijuana and observed that B.W.'s eyes appeared red and glassy when she answered the door is a potentially incriminating circumstance. However, we have previously held that the State fails to prove constructive possession of a malt beverage by a person less than twenty-one years of age where a police officer "noticed defendant had 'red, glassy eyes,' and . . . detected an odor of alcohol." *State v. Hensley*, 190 N.C. App. 600, 606, 661 S.E.2d 18, 22 (2008). In so holding, we reasoned neither of "these facts demonstrate . . . that defendant 'had in his possession a malt beverage,'" and that "consumption and possession are two different matters." *Id.* The same is true here. B.W. denied that she had consumed marijuana when Pope questioned her, and we

² To this point, there was a mattress in the attic space. Had the state presented this evidence to show a male guest had been staying in the attic space and constructively possessed the marijuana in question, the argument as to indicia of control and proximity would have been considerably stronger.

cannot say red, glassy eyes or marijuana odor, in the absence of evidence regarding proximity and control over the marijuana, is sufficient to prove constructive possession.

Given the record before us, we cannot determine how the marijuana ended up in the attic, how long it had been there before police seized it, who placed it there, or who controlled that space. The inferential leaps necessary for a reasonable mind to infer that B.W. possessed the marijuana found in the attic space of her father's home next to a bag of men's clothes are simply too great. A determination to the contrary would be based on conjecture and speculation rather than the substantial evidence presented at the adjudicatory hearing. Therefore, the trial court erred in denying B.W.'s Motion to Dismiss for insufficiency of the evidence.

B. Clerical Error Regarding the RPO Offense

In addition to her argument regarding the Motion to Dismiss, B.W. contends the trial court erred by stating B.W. was found responsible for the RPO offense in its adjudication and disposition orders. We agree. The trial court made a clerical error when it stated B.W. had been found responsible for RPO, a charge for which she was deemed not responsible at the 11 October 2017 hearing. Indeed, both the prosecutor and defense attorney from B.W.'s trial stipulated she was found not responsible for the RPO offense. Typically we remand clerical errors for the trial court to correct, but because we reverse the trial court's decision regarding the motion to dismiss, and

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in the interest of judicial efficiency, we instead vacate the trial court's judgment finding B.W. delinquent for RPO.

CONCLUSION

The State failed to present sufficient evidence from which a reasonable mind could infer B.W. was in constructive possession of the marijuana found in her father's attic. Accordingly, the trial court erred in denying B.W.'s motion to dismiss the possession charge at the conclusion of the State's evidence. Furthermore, the trial court made a clerical error in finding B.W. delinquent on an RPO offense for which she was actually found not responsible.

REVERSED IN PART; VACATED IN PART.

Judges HUNTER, JR. and DAVIS concur.

Report per Rule 30(e).