IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-97

Filed: 17 December 2019

Mecklenburg County, No. 17 CRS 203765

STATE OF NORTH CAROLINA

v.

GIAN CARLOS BALICO-VILLALOBOS

Appeal by defendant from judgment entered 24 August 2018 by Judge Athena F. Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lisa Bradley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

DIETZ, Judge.

During a traffic stop, law enforcement found a large amount of marijuana in a backpack beneath the passenger seat of a car. Defendant Gian Carlos Balico-Villalobos was sitting in that passenger seat at the time of the stop and admitted that

the backpack belonged to him. He was charged and convicted of felony possession of marijuana.

On appeal, Defendant argues that the trial court erred by failing to instruct on the lesser-included offense of misdemeanor possession. We reject this argument. The marijuana in the backpack was far more than the threshold for felony possession and there was no evidence from which the jury could have determined that any portion of the marijuana was not in Defendant's possession. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

On 29 January 2017, law enforcement stopped a car with a broken headlight. When officers approached the car, a woman was in the driver's seat, Defendant Gian Carlos Balico-Villalobos was in the front passenger seat, and the driver's two-year-old son was in the backseat. One of the officers noticed a strong odor of marijuana coming from the car and asked the driver if he could search her vehicle. She consented to the search.

While searching the car, the officers found a backpack and a shoe box beneath the front passenger seat where Defendant was sitting. Inside the backpack was a digital scale, as well as a vacuum-sealed freezer bag and a Mason jar each containing a substance resembling marijuana. The shoebox contained five empty Mason jars. At that point, the officers arrested Defendant.

An officer took Defendant to the back of his patrol car, read him his Miranda rights, and asked him who the backpack belonged to. Defendant told the officer that the backpack was his.

Defendant's case went to trial on charges of felony possession of marijuana and possession with intent to sell or deliver marijuana. A crime lab technician testified that the substance recovered from Defendant's backpack tested positive for Delta-9-THC, the active ingredient in marijuana. The total weight of the substance seized was 371.90 grams, or approximately thirteen ounces.

The jury could not reach a unanimous verdict on the charge for possession with intent to sell or deliver but found Defendant guilty of the felony possession charge. The trial court imposed a sentence of 5 to 15 months in prison suspended for 18 months of supervised probation. Defendant appealed.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his request for a jury instruction on misdemeanor possession of marijuana, a lesser-included offense of felony marijuana possession. We review the trial court's decision not to instruct on this lesser charge *de novo*. *State v. Matsoake*, 243 N.C. App. 651, 657, 777 S.E.2d 810, 814 (2015).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to

acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). When deciding whether the evidence justifies an instruction on the lesser-included offense, courts must consider the evidence in the light most favorable to the defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988).

Defendant contends that, while he admitted to owning the backpack, he did not admit to owning all 371.90 grams of marijuana inside it. The marijuana was in two separate containers: a freezer bag with a large amount and a mason jar with a much smaller amount. Thus, he argues, the evidence supported an instruction on misdemeanor possession because the jury rationally could have found that only a portion of the marijuana in the backpack belonged to him, while the rest belonged to the driver.

We reject this argument. A defendant is not entitled to an instruction on the lesser-included offense where the State fully satisfies its burden of proving each element of the greater offense and "there is no evidence to negate those elements other than defendant's denial that he committed the offense." *State v. Smith,* 351 N.C. 251, 267–68, 524 S.E.2d 28, 40 (2000).

On the felony possession charge, the State had the burden of proving Defendant knowingly possessed marijuana in an amount exceeding one and one-half ounces. N.C. Gen. Stat. § 90-95(d)(4); *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). The State could satisfy the possession element by showing

actual or constructive possession. A defendant constructively possesses a drug if he has the "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). Where the defendant does not have exclusive possession of the place where the drugs are found, the State can show constructive possession through evidence of other incriminating circumstances indicating possession. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

At trial, the State's evidence showed that police searched a car and discovered a backpack at the foot of the front passenger seat containing thirteen ounces of marijuana, far more than the threshold amount for felony possession. Although Defendant did not have exclusive possession of the car, he was sitting in the front passenger seat during the traffic stop and admitted to police that the backpack underneath his seat belonged to him. Taken together, this evidence readily is sufficient to show either actual or constructive possession. *Id.*

Moreover, there was no evidence that the driver of the car, or anyone else, possessed some portion of the marijuana in the backpack. Thus, Defendant's argument fails because the State presented evidence of all the essential elements of felony possession of marijuana and there was no evidence negating those elements. *Smith*, 351 N.C. at 267–68, 524 S.E.2d at 40. Therefore, we hold that the trial court did not err in declining Defendant's request for a jury instruction on the lesser-included offense of misdemeanor possession.

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).