IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1003

Filed: 3 November 2020

Haywood County, No. 17 CRS 52010-13, 17 CRS 809

STATE OF NORTH CAROLINA

v.

JAMES NICHOLAS DOTSON

Appeal by defendant from judgment entered 10 August 2018 by Judge J. Thomas Davis in Haywood County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.

BRYANT, Judge.

Where the evidence, when taken in the light most favorable to the State, was sufficient to show defendant possessed a firearm as a felon and maintained a dwelling used to keep controlled substances, the trial court did not err in denying defendant's motion to dismiss.

On 2 October 2017, defendant James Nicholas Dotson was indicted on the following charges: possession of a firearm by a felon; possession with intent to

manufacture, sell, and deliver a controlled substance; maintaining a dwelling for keeping controlled substances; two counts of possession of a controlled substance on jail premises; misdemeanor possession of drug paraphernalia; and attaining the status of an habitual felon. On 6 August 2018, this case was tried before the Honorable J. Thomas Davis, Judge presiding.

The State's evidence at trial tended to show that on 14 June 2017, defendant was arrested by members of the Haywood County Sheriff's Office ("HCSO") following a lawful search of his residence, located in Haywood County, North Carolina. Officer James Allen Rathbone, Jr. ("Rathbone"), defendant's parole officer, had arrived at the residence to conduct a home visit as a condition of defendant's probation. When Rathbone arrived, he encountered a dog who was tied to the front porch and blocked the entrance. Rathbone waited outside until someone greeted him at the front door. Eventually, defendant came outside, retrieved the dog, and placed the dog inside a cage in the living room. Defendant then allowed Rathbone to enter the house.

Upon entering the residence, Rathbone observed a man unconscious on the couch. The man was also accompanied by a female. Rathbone called the HCSO for assistance, and when officers arrived, they searched the house. The search resulted in the recovery of drugs, money, drug paraphernalia, an AR-15 semi-automatic assault rifle, and ammunition for the assault rifle.

In the living room, officers found a pouch containing cards in the name of several individuals, and drug paraphernalia. In the master bedroom, Rathbone discovered a set of keys hanging on the wall, a syringe containing a liquid substance on the floor, a box of little cotton balls (commonly used as filters for the needles), and male clothing inside the closet. Also discovered inside a vent in the master bedroom were Ziploc style baggies with a yellow "smiley face" stamp on them. Sitting on top of the dresser was a wooden, black box with the letter "J" on it. The box had $114 in one-dollar bills inside along with two digital scale weights—one ten-gram weight and one twenty-gram weight—and a X-Acto knife with residue on the blade. Underneath a dresser in the room was an opioid overdose kit and a set of digital scales with residue on it. Also, inside the box was a business card with residue on it. Located on a bedside table was a Guns and Ammo magazine, with a picture of an AR-15 rifle on the cover. A wallet containing a driver's license that belonged to defendant was also found in another dresser, next to the table.

As the officers went toward the second bedroom to search, defendant became very agitated and came down the hallway cursing. Defendant was restrained and taken to another area of the house. The second bedroom had a special lock installed on the door. Using one of the keys found in the master bedroom, officers determined the key fit that lock and searched the room. Inside, officers found female clothing and a sectional couch; one portion of the couch was turned sideways and contained a

storage area under the cushions. In the storage area, was a rifle bag containing an AR-15 semi-automatic rifle with a loaded magazine and an additional magazine and a large size pair of men's gloves. The following items were also found in the room: 40-caliber handgun ammunition, two lockboxes, more syringes; six unopened packages of insulin-style needles, and another set of digital scales. The two lockboxes were seized and, pursuant to a search warrant specific to the boxes, were opened using keys from the ring that was found in the master bedroom. Inside the boxes, officers discovered a smoking pipe and a Ziploc-style baggie with powder residue.

Defendant was arrested and taken into custody. During his strip search at the Haywood County Detention Center, drugs were recovered from defendant's person. The baggies—the two found in the vent in master bedroom (State's Exhibit 26), and the baggies found on defendant's person (State's Exhibit 35)—were submitted for laboratory analysis. The substance in State's Exhibit 26 was fentanyl. The substances contained in State's Exhibit 35 were heroin and a combination of heroin and fentanyl.

At trial, defendant's motion to dismiss the charges at the conclusion of the State's case was denied. Defendant did not testify or offer any evidence. Defendant was found guilty and sentenced for possession of a firearm by felon; possession with intent to manufacture, sell, and deliver a Schedule II controlled substance;

maintaining a dwelling for the keeping of controlled substances; possession of heroin on jail premises; and possession of drug paraphernalia. Defendant appeals.

On appeal, defendant argues only two issues: whether the trial court erred by denying his motion to dismiss I) the charge of possession of a firearm by a felon, and II) the charge of keeping or maintaining a dwelling for controlled substance.

Our standard of review for a trial court's denial of a motion to dismiss is *de novo*. *State v. Woodard*, 210 N.C. App. 725, 730, 709 S.E.2d 430, 434 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

In deciding whether to grant a defendant's motion to dismiss, the trial court must consider "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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted). "Substantial evidence is [] relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Lambert*, 341 N.C. 36, 42, 460 S.E.2d 123, 127 (1995) (citation and quotation marks omitted). "When considering a motion to dismiss, the evidence presented must be considered in the light most

favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *Id*.

> 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. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only permit a reasonable inference of the defendant's guilt of the crime charged in order for that charge to be properly submitted to the jury. Once the court determines that a reasonable inference of the defendant's guilt may be drawn from the circumstances, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. Taylor, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994) (internal citations and quotation marks omitted).

We address each argument.

I

Defendant first argues the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon. Defendant does not challenge his status as a convicted felon—only the sufficiency of the evidence regarding his possession of the rifle found in the second bedroom of his home. *See State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007) ("[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) [defendant] thereafter possessed a firearm.").

In North Carolina, possession of a firearm may be established by actual or constructive possession. *State v. Glasco*, 160 N.C. App. 150, 156, 585 S.E.2d 257, 262 (2003). "Actual possession requires that a party have physical or personal custody of the item." *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003).

> In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. . . . Constructive possession depends on the totality of the circumstances in each case.

State v. Taylor, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (citations omitted). "[U]nless the person has exclusive possession of the place where the [evidence is] found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001).

> The requirements of power and intent necessarily imply that a defendant must be aware of the presence of [a firearm] if he is to be convicted of possessing it. [T]here must be more than mere association or presence linking the person to the item in order to establish constructive possession.

State v. McNeil, 209 N.C. App. 654, 663, 707 S.E.2d 674, 681 (2011) (alterations in original) (citations omitted).

> [T]his Court [has] considered a broad range of other incriminating circumstances to determine whether an inference of constructive possession was appropriate when a defendant exercised nonexclusive control of [the firearm].

> Two of the most common factors are the defendant's proximity to the [firearm] and indicia of the defendant's control over the place where the [firearm] is found.

State v. Bradshaw, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012) (first and second alterations in original) (citation and quotation marks omitted). "No one factor controls, and courts must consider the totality of the circumstances." *State v. Chekanow*, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018).

In the instant case, the State introduced substantial evidence indicating that defendant lived at and maintained the residence where the rifle was found. When Rathbone arrived at the residence and encountered a barking dog on the front porch, it was defendant who restrained and caged the dog so Rathbone could enter the residence. During the search of the master bedroom, officers found items of clothing which appeared to belong to a male occupant—presumably defendant. Defendant's wallet containing his driver's license was found on the bedside table, and a black box was found in the room with the letter "J"—the first letter of defendant's first name––on the front.

There were also significant links to the rifle in the second bedroom based on the items found the master bedroom. The set of keys in the master bedroom, which were keys that fit the lock's mechanism on the second bedroom—where the rifle was located—were found in the master bedroom. Those same keys also opened the lockboxes found inside the second bedroom. There were digital scales found in both

the master bedroom and the second bedroom. The rifle seized from the second bedroom was the same type of firearm featured on the magazine cover in the master bedroom.

Defendant directs this Court's attention to *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987), while arguing that the female clothing and personal identification cards of individuals other than defendant proves that defendant had nonexclusive control over the second bedroom. However, we find the circumstances in *McLaurin* to be distinguishable. In *McLaurin*, the officers searched through a residence and found contraband scattered throughout. *Id.* at 144–45, 357 S.E.2d at 637. The residence itself was linked to at least three people: the defendant and two adult males seen leaving the residence shortly before the search. *Id.* at 145, 357 S.E.2d at 637. The defendant gave the address of the residence as her own, and officers found an identification card bearing her name. *Id.* Our North Carolina Supreme Court held that the "defendant's control over the premises in which the [contraband was] found was nonexclusive, and because there was no evidence of other incriminating circumstances linking her to those items, her control was insufficiently substantial to support a conclusion of her possession of the seized [contraband]." *Id.* at 147, 357 S.E.2d at 638.

By contrast, in this case, while there was evidence that defendant might not have had exclusive possession of the entire premises, sufficient incriminating

circumstances exist to link defendant to the firearm in that room. The restricted access to the second bedroom by the usage of a lock installed on the door, the necessity of a separate key—found in a bedroom linked to defendant—to unlock the door, the large-sized gloves found inside the bag of the rifle, and defendant's increased state of agitation as the officers searched the room suggest that defendant was aware of its presence and had the power and intent to control the firearm. *Taylor*, 203 N.C. App. at 459, 691 S.E.2d at 764.

Such evidence, when taken in the light most favorable to the State, provides a sufficient link between defendant and the firearm to allow the jury to consider that defendant constructively possessed the firearm. Accordingly, the trial court properly denied defendant's motion to dismiss.

II

Defendant also argues the trial court erred by denying his motion to dismiss the charge of maintaining a dwelling for keeping or selling a controlled substance. Defendant contends the State failed to produce substantial evidence that he used a residence unlawfully to keep controlled substances. We disagree.

> To obtain a conviction for knowingly and intentionally maintaining a place used for keeping and/or selling controlled substances under N.C. Gen. Stat. § 90–108(a)(7), the State has the burden of proving the defendant: (1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance.

> . . . .
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> Whether a person "keep[s] or maintain[s]" a place, within the meaning of N.C. Gen. Stat. § 90–108(a)(7), requires consideration of several factors, none of which are dispositive. Those factors include: occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses.
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> . . . .
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> The determination of whether a building or other place is used for keeping or selling a controlled substance will depend on the totality of the circumstances. Factors to be considered in determining whether a particular place is used to "keep or sell" controlled substances include: a large amount of cash being found in the place; a defendant admitting to selling controlled substances; and the place containing numerous amounts of drug paraphernalia.

State v. Frazier, 142 N.C. App. 361, 365–66, 542 S.E.2d 682, 686 (2001) (citations and quotation marks omitted).

Here, the charging indictment in 17 CRS 52011 alleged that defendant did

> knowingly and intentionally keep and maintain a dwelling . . . which was used for unlawfully keeping and selling controlled substances, to wit: methamphetamine, heroin and/or fentanyl.

The State's evidence established that defendant had occupied the residence to satisfy the "keep or maintain" element under N.C.G.S. § 90–108(a)(7). Rathbone testified that defendant indicated that the residence was his current living arrangement while he was on probation. According to Rathbone, defendant gave a "sufficient description" of the house so Rathbone could locate him. Defendant had a

dog on the property—a dog which he kept inside when he was not at home—and his personal belonging were found inside the house. Taken together, this evidence supports that defendant was keeping and/or maintaining the house.

The record also demonstrates that controlled substances were found. Two Ziploc-style baggies recovered from the vent in the master bedroom contained a substance which tested positive for fentanyl. Further, the baggies found on defendant's person upon arrest also tested positive for heroin and fentanyl. Drug paraphernalia found in defendant's residence consisted of at least two digital scales and weights—much of which had drug residue on or near those items. Significant amounts of drug paraphernalia were seized inside the house, which included, *inter alia*, a spoon with burnt residue on it, needles, a razor blade, and an opioid overdose kit. These facts, together with the circumstances supporting defendant's convictions on possession with intent to manufacture, sell and distribute a Schedule II controlled substance and possession of drug paraphernalia, are clearly sufficient to overcome defendant's motion to suppress and sustain a conviction under N.C.G.S. § 90-108(a)(7). The trial court's ruling on defendant's motion to suppress is affirmed.

NO ERROR.

Judge ARROWOOD concurs.

Judge ZACHARY concurs in the result only.

Report per Rule 30(e).