IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-698

Filed: 15 December 2020

Forsyth County, Nos. 18 CRS 50965-67, 586-87

STATE OF NORTH CAROLINA

v.

RASHON LENARD PEAY and JASHON BERNARD PEAY

Appeal by defendants from judgments entered 11 January 2019 by Judge Thomas H. Lock in Forsyth County Superior Court. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorneys General Christine Wright and J. Aldean Webster, III, for the State.

Joseph P. Lattimore for defendant-appellant Rashon Lenard Peay.

Richard Croutharmel for defendant-appellant Jashon Bernard Peay.

ZACHARY, Judge.

Defendants Rashon Lenard Peay and Jashon Bernard Peay appeal judgments entered upon jury verdicts, following the trial court's denial of their motions to suppress evidence obtained by law enforcement officers following a traffic stop. On appeal, Defendants argue that the denial of their motions to suppress was plain error.

Defendant Rashon also argues that the trial court erred by denying his motion to dismiss the charge of possession with intent to sell or deliver cocaine, and by instructing the jury on the doctrine of constructive possession. After careful review, we affirm the denial of Defendants' motions to suppress, and we conclude that Defendants received a trial free from reversible error.

Background

On 2 February 2018, between 9:00 and 10:00 p.m., Officers M.J. LaValley and B.A. Ferguson of the Winston-Salem Police Department were "working as a two-man unit . . . checking [their] hot spots"[1] in an unmarked police vehicle in Forsyth County, North Carolina. While on patrol, the officers saw someone walking toward an occupied Lincoln Navigator parked at a gas station. The officers parked across the street "to see what kind of interaction it would be." They observed a man approach "the driver's side of the [Lincoln] Navigator and beg[i]n interacting with the driver[.]" The man "reached inside [the Lincoln Navigator,] . . . there was an exchange, and then they parted ways." The man and the Lincoln Navigator immediately left the premises. Based on their training and experience, the officers believed that they had

[1] Officer Ferguson explained that a "hot spot" is an "area[ ] that has been identified by either a Crime Stopper, or a captain or members of the public that [Winston-Salem Police officers] need to focus on in [their] . . . general area that [they] patrol."

observed a hand-to-hand drug transaction between the individual and the driver of the Lincoln Navigator.[2]

When the Lincoln Navigator exited the gas station parking lot, the officers followed. After approximately half a mile, the officers observed the Lincoln Navigator "fail to stop at a duly erected stop sign[.]" "Based on what the officers believed to be a hand-to-hand drug transaction and the observed traffic violation," they initiated a traffic stop of the Lincoln Navigator in the parking lot of Williamson Court, an apartment complex in Winston-Salem.

Officer Ferguson approached the vehicle, and recognized the driver, Defendant Rashon, and the passenger, Defendant Jashon, from previous encounters. He obtained Defendants' identifications and returned to the patrol vehicle, where he ran a preliminary check of Defendants' records while Officer LaValley spoke with Defendants at the driver's side door of the Lincoln Navigator. Almost immediately after he returned to the patrol vehicle, Officer Ferguson "decided to contact the K-9 officer to investigate the narcotic transaction further[,]" based on the observed hand-to-hand transaction and Officer Ferguson's knowledge of Defendants' "criminal history from previous narcotics and child abuse investigations[,]" which he confirmed upon running Defendants' criminal histories as part of the preliminary check.

[2] Officer LaValley explained that a "hand-to-hand drug transaction" is "an exchange of items between two individuals where . . . one person walks up, and you see them reach over, hand something to somebody and then that person hands them something in return. . . . [I]t's quick."

Defendant Jashon had previously been investigated for possession with intent to sell or deliver marijuana and cocaine, child abuse, and robbery; Defendant Rashon had previously been investigated for "firearm crimes, robbery, and murder."

After completing his preliminary check, Officer Ferguson "handed the investigation over to Officer LaValley." Officer LaValley checked each Defendant's "driver's license status, license plate and vehicle information, outstanding warrants, and . . . previous criminal history." K-9 Officer A.R. Bielsten arrived on the scene as Officer LaValley "completed and printed a citation for [Defendant Rashon] for failing to stop at a stop sign." Officer LaValley exited the patrol vehicle with the citation in hand and approached K-9 Officer Bielsten, who advised Officer LaValley to "have the driver exit the vehicle so that he could explain the citation to him," and to "have the passenger exit" so that K-9 Officer Bielsten could conduct a K-9 sniff of the vehicle.

While Officer LaValley explained the citation to Defendant Rashon, Officer Ferguson frisked Defendant Jashon for weapons. Officer Ferguson believed that Defendant Jashon "could be armed and dangerous[,]" because of Defendant Jashon's history and "the suspected hand-to-hand drug transaction"; Officer Ferguson knew "from [his] training and experience that drugs and firearms go hand-in-hand" and that "narcotics dealers . . . typically carry weapons." During the frisk, Officer Ferguson noticed what "felt like several crack rocks" in Defendant Jashon's pocket. Defendant Jashon "manipulate[d] his pocket" and exposed a "tear[-]off" bag that

Officer Ferguson recognized as being associated with narcotics sales. Officer Ferguson recovered the bag and found $53 in cash on Defendant Jashon.

Officer Ferguson gave Officer LaValley a "nonverbal signal to detain" Defendant Rashon, "based on finding illegal narcotics in [Defendant Jashon's] pocket and earlier observing the hand-to-hand transaction." Defendant Rashon tried to flee, and was arrested for "resisting, delaying, or obstructing a public officer." Officer LaValley searched Defendant Rashon incident to his arrest, and discovered three items in his pants pocket: "a digital scale, suspected crack cocaine, and $562 in cash." After arresting Defendant Jashon as well, officers searched the Lincoln Navigator and found "a glass marijuana pipe in the driver's side door that contained burned marijuana" and "a small bag of unburned marijuana near the center dashboard."

On 7 May 2018, a Forsyth County grand jury returned true bills of indictment, formally charging both Defendants with possession of cocaine with intent to sell or deliver, possession of drug paraphernalia, possession of marijuana up to one half an ounce, and attaining the status of an habitual felon. Defendant Rashon was additionally indicted for resisting a public officer.

On 9 October 2018, the State moved to join Defendants for trial. On 1 November 2018, Defendant Rashon filed a motion to "suppress all evidence against him beyond the initial stop." That same day, Defendant Jashon filed a motion to suppress "all evidence seized as a result of the stop, seizure and detention of

Defendant [Jashon] and search of [his] person and car on February 8, 2018." Defendant Jashon also filed a motion *in limine* on 5 November 2018, seeking an order prohibiting "the State and its witnesses from referring, in any manner whatsoever to initial observations of the Defendant [Jashon] being characterized as a 'hand to hand' drug deal or any variation thereof" at trial.

On 5 November 2018, Defendants' motions came on for hearing before the Honorable Thomas H. Lock in Forsyth County Superior Court. On 6 November 2018, the trial court denied Defendants' motions to suppress, and granted Defendant Jashon's motion *in limine*. On 18 December 2018, the trial court entered a written order reflecting its denial of Defendants' motions to suppress.

On the second day of jury selection, Defendants failed to return to court after a lunch break. Each of Defendants' trial counsel moved for a mistrial. The trial court issued orders for Defendants' arrest, denied both motions for a mistrial, found that Defendants voluntarily failed to appear, and ordered that Defendants would be tried *in absentia*, over the objections of Defendants' counsel.

On 9 November 2018, the jury returned its verdicts, finding Defendants guilty of all charges. The trial court then arraigned Defendants on the habitual felon charges and conducted the habitual felon phase of the trial in their absence, again over defense counsels' objections. That same day, the jury returned its verdicts,

finding Defendants guilty of having attained the status of habitual felon. The trial court then continued judgment until Defendants were apprehended.

On 11 January 2019, Defendants appeared for sentencing. The trial court consolidated each Defendant's convictions and sentenced each Defendant to 84–113 months in the custody of the North Carolina Division of Adult Correction. Defendant Rashon received credit for 53 days' time served, and Defendant Jashon received credit for 38 days' time served. Defendants gave oral notice of appeal in open court.

Discussion

Defendants both argue that the trial court erred by denying their motions to suppress. Defendant Rashon also argues that the trial court erred by (1) denying his motion to dismiss the charge of possession of cocaine with the intent to sell or deliver, and (2) instructing the jury on the doctrine of constructive possession. We address each issue in turn below.

I. Motions to Suppress

We first address Defendants' assertions that the trial court erred by denying their pretrial motions to suppress evidence recovered by law enforcement officers following the traffic stop. We disagree.

A. Standard of Review

"A pre-trial motion to suppress evidence is insufficient to preserve for appeal the question of the admissibility of the challenged evidence, if [the d]efendant fails to

object to the admission of that evidence at the time it is offered at trial." *State v. Fuller*, 257 N.C. App. 181, 183–84, 809 S.E.2d 157, 160 (2017) (citation omitted).

Where a defendant moved to suppress evidence, both sides "fully litigated the suppression issue at the trial court stage," *State v. Miller*, 371 N.C. 266, 272, 814 S.E.2d 81, 85 (2018), and the defendant failed to object to the introduction of the evidence at trial, we apply plain error review when the defendant "specifically and distinctly" asserts such error. N.C.R. App. P. 10(a)(4) ("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.").

Defendants acknowledge that they failed to object when the State proffered and elicited testimony at trial about the items recovered by law enforcement officers following the traffic stop. Accordingly, Defendants waived appellate review of their Fourth Amendment claims regarding that evidence. *See State v. Holley*, 267 N.C. App. 333, 336, 833 S.E.2d 63, 68 (2019) ("Generally, when a defendant fails to object to the admission of evidence at trial, he . . . completely waives appellate review of his . . . Fourth Amendment claims regarding that evidence."). However, because Defendants "specifically and distinctly" assert that the trial court committed plain error by denying their motions to suppress, we review their claims for plain error.

To establish plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity, or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted). "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *Id.*

"The first step under plain error review is . . . to determine whether any error occurred at all." *State v. Oxendine*, 246 N.C. App. 502, 510, 783 S.E.2d 286, 292, *disc. review denied*, 368 N.C. 921, 787 S.E.2d 24 (2016). When reviewing the denial of a motion to suppress, this Court must

> [d]etermine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if the evidence is conflicting. Conclusions of law, however, are fully reviewable on appeal and must be legally correct, reflecting a correct application of applicable legal principles to the facts found.

State v. Johnson, 371 N.C. 870, 873, 821 S.E.2d 822, 825 (2018) (citations and internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 205 L. Ed. 2d 41 (2019).

Unchallenged findings of fact are deemed "supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

B. Defendant Rashon's Motion to Suppress

Defendant Rashon first argues that the trial court committed plain error by "admitting the physical evidence recovered from [him] where the officers prolonged a traffic stop for a stop sign violation for 20 minutes without reasonable suspicion of criminal activity."

The Fourth Amendment to the United States Constitution and Article I, section 20 of the North Carolina Constitution prohibit law enforcement officers from conducting unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation and internal quotation marks omitted).

Traffic stops are reviewed under the analysis set forth in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), and its progeny. *Id.* "[A] traffic stop is permitted if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Id.* (citation and internal quotation marks omitted). Reasonable suspicion "is satisfied by some

minimal level of objective justification." *Id.* (citations and internal quotation marks omitted). An investigatory stop must "be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21–22, 20 L. Ed. 2d at 906). "A court must consider the totality of the circumstances—the whole picture[—]in determining whether a reasonable suspicion to make an investigatory stop exists." *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

"A considerable body of case law has established what 'specific and articulable facts' give rise to 'rational inferences' supporting a determination of reasonable suspicion when considered in 'the totality of the circumstances' with other such facts." *State v. Campola*, 258 N.C. App. 292, 301, 812 S.E.2d 681, 689 (2018) (citation omitted). These facts may include:

> (1) a person's history of criminal arrests; (2) a driver's questionable travel plans; (3) a person's evasive action after noticing a police officer; (4) an officer's recognition of an individual as one previously involved in illegal activity; (5) a person's unusual nervousness; (6) registration of the vehicle to a third party; and (7) presence in an area known for criminal activity.

Id. at 301–02, 812 S.E.2d at 689 (citations omitted).

The Supreme Court of the United States has determined that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose before that mission was completed." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017) (citing *Rodriguez v. United States*, 575 U.S. 348, 191 L. Ed. 2d 492 (2015)). "The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop," such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citations and internal quotation marks omitted). Additionally, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely[,] . . . includ[ing] conducting criminal history checks[.]" *Id.* at 258, 805 S.E.2d at 673–74 (quoting *Rodriguez*, 575 U.S. at 356, 191 L. Ed. 2d at 500). However, "[s]afety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped . . . are not permitted if they extend the duration of the stop." *Id.* at 258, 805 S.E.2d at 674 (citing *Rodriguez*, 575 U.S. at 356–57, 191 L. Ed. 2d at 500).

Defendant Rashon argues that the trial court committed plain error by denying his motion to suppress evidence obtained as result of the traffic stop because: (1) "[t]he

officers extended the duration of the traffic stop beyond what was tolerable to address the stop sign infraction"; (2) "[t]he officers lacked the reasonable suspicion of criminal activity to prolong the traffic stop"; and (3) "[a]dmission of the physical evidence was plain error, where the State could not have proved the charges without it."

As Defendant Rashon fails to challenge any findings of fact, the trial court's findings are deemed supported by competent evidence and are binding on his appeal. *See Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Defendant Rashon challenges the following conclusions of law, which we review de novo:

> 3. The officers did not unlawfully extend the traffic stop because Officer LaValley and Officer Ferguson were still within the mission of the stop due to the number of databases searched and the length of time necessary to complete a traffic citation.
>
> 4. However, even if the traffic stop was extended, it was a reasonable extension based on the totality of the circumstances, which included a reasonable and articulable suspicion from observing a suspected hand-to-hand drug transaction.

In challenging conclusion of law 3, Defendant Rashon maintains that "[t]he officers extended the duration of the traffic stop beyond what was tolerable to address the stop sign infraction" because the officers "blend[ed] . . . traffic duties and [the] investigation of an unrelated criminal matter." *See Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (noting that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless

reasonable suspicion of another crime arose before that mission was completed" (citations omitted)); *Campola*, 258 N.C. App. at 292, 812 S.E.2d at 683 ("When a police officer initiates a traffic stop and, in the course of accomplishing the mission of the stop, develops reasonable suspicion that the driver or passenger is engaged in illegal drug activity, the officer may prolong the stop to investigate that suspicion without violating the passenger's Fourth Amendment rights.").

In challenging conclusion of law 4, Defendant Rashon argues that "[t]he officers lacked the reasonable suspicion of criminal activity to prolong the traffic stop." In support of his argument, Defendant Rashon maintains that the gas station parking lot was not "known for drug activity"; that Officers LaValley and Ferguson "did not identify the car, or the individual who approached it, as being involved in prior drug activity"; and that Officer LaValley "could not provide great detail" about the alleged hand-to-hand drug transaction.

Again, "[r]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Styles*, 362 N.C. at 414, 665 S.E.2d at 439. It "is satisfied by some minimal level of objective justification." *Id.* (citation and internal quotation marks omitted). Moreover, the following findings—unchallenged by Defendant Rashon, and thus binding as to him on appeal—amply support conclusions of law 3 and 4:

> 1. Officer M. J. LaValley has been with the Winston-Salem Police Department ("WSPD") for approximately six years

and assigned to the Street Crimes Unit since 2016. As part of his training, Officer LaValley has attended Basic Law Enforcement Training ("BLET"), Police Law Institute ("PLI"), Detecting Deception, Narcotic Investigation Techniques, and Drug Enforcement for Patrol Officers. Part of his training included identifying illegal drugs and drug paraphernalia including crack cocaine, cocaine, and marijuana. Officer LaValley has personally investigated or substantially assisted in approximately six hundred drug investigations, resulting in approximately three hundred arrests. Officer LaValley has personally observed twenty hand-to-hand drug transactions, including ones that have led to the seizure of illegal drugs.

2. Officer B. A. Ferguson has been with WSPD for approximately seven years and assigned to the Street Crimes Unit since 2013. As part of his training, Officer Ferguson has attended BLET, PLI, Interview and Interrogation, Detecting Deception, and Roadside Interdiction training. Part of his training included identifying illegal drugs, such as crack cocaine, cocaine, and marijuana, through sight or touch. Officer Ferguson has personally investigated or substantially assisted in approximately one thousand drug investigations, resulting in approximately seven hundred arrests. Officer Ferguson has personally observed approximately thirty hand-to-hand drug transactions, including ones that have led to the seizure of illegal drugs.

3. On February 2, 2018, WSPD Officers LaValley and Ferguson were patrolling in an unmarked vehicle in the area of Silas Creek Parkway and Lockland Avenue in Forsyth County, North Carolina.

4. While on patrol, both officers noticed a Lincoln Navigator parked in front of the Citgo gas station on Lockland Avenue.

5. Officers parked across the street from the Lincoln Navigator, approximately 100 feet away in a parking lot located off Silas Creek Parkway.

6. The parking lot of the Citgo was well lit, and the officers had a clear view of the Lincoln Navigator.

7. As the officers were watching the Lincoln Navigator, a black male approached the driver's side door and remained there for approximately two minutes or less.

8. *The officers observed what appeared to be a hand-to-hand transaction between the male and the driver of the Lincoln Navigator. Subsequently, both the male and the Lincoln Navigator immediately left the area.*

9. The officers did not observe anyone enter or exit the Lincoln Navigator.

10. *Based on their training and experience, the officers believed they witnessed a hand-to-hand drug transaction*.

11. The officers followed the Lincoln Navigator and observed the vehicle fail to stop at a duly erected stop sign at the intersection of Miller Street and Oak Grove Road.

12. *Based on what the officers believed to be a hand-to-hand drug transaction and the observed traffic violation, officers stopped the Lincoln Navigator* at Williamson Court, an apartment complex in Winston-Salem.

13. After the Lincoln Navigator stopped, Officer Ferguson approached the passenger side and made contact with the driver, Rashon Peay, and passenger, Jashon Peay. Officer Ferguson collected both of the defendants' identifications.

14. *Officer Ferguson immediately recognized the defendants and knew defendants' criminal history from previous narcotics and child abuse investigations*.

15. Officer Ferguson returned to the patrol vehicle upon collecting the defendants' identification and immediately called for a K-9 Officer.

16. Officer Ferguson called for a K-9 Officer based on the suspected hand-to-hand drug transaction and the defendants' prior criminal history.

17. Officer Ferguson also conducted a preliminary check of the defendants using the local police database, PISTOL, while Officer LaValley stood by the driver's side door of the Lincoln Navigator.

18. *Upon running a preliminary check, Officer Ferguson learned that the defendants had previously been investigated for violent crimes. Specifically, the passenger* [*Defendant Jashon*] *was previously investigated for Possession with Intent to Sell and Deliver Marijuana, Possession with Intent to Sell and Deliver Cocaine, child abuse, and robbery. Officer Ferguson learned that the driver* [*Defendant Rashon*] *was previously investigated for firearm crimes*, *robbery, and murder.*

19. After completing a preliminary check, Officer Ferguson handed the investigation over to Officer LaValley.

20. As part of his routine investigation, Officer LaValley checks driver's license status, license plate and vehicle information, outstanding warrants, and views previous criminal history. Officer LaValley routinely runs information checks on the driver and occupants of a vehicle. Officer LaValley also explains the citation and asks if the person has any questions.

21. *Officer LaValley also viewed the defendants' previous criminal history*, which he later discussed with Officer Ferguson while he was continuing to run routine checks.

> 22. After he finished checking multiple databases, Officer LaValley completed and printed a citation for the driver for failing to stop at a stop sign.
>
> 23. Based on Officer LaValley's AXON body camera, approximately twenty-minutes passed between the time the Lincoln Navigator stopped to the time K-9 Officer[ ] A.R. Bielsten arrived.
>
> 24. *K-9 Officer Bielsten arrived before Officer LaValley served the driver with the citation*.
>
> 25. After K-9 Officer Bielsten arrived, Officer LaValley had the driver exit the vehicle so he could explain the citation to him. Officer Ferguson also had the passenger exit the vehicle.

(Emphases added).

As noted above, "[t]he reasonable duration of a traffic stop . . . includes more than just the time needed to write a ticket." *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (citations omitted). Here, Officers LaValley and Ferguson were "engaged in conduct within the scope of [their] mission" for the entirety of the stop. *Campola*, 258 N.C. App. at 300, 812 S.E.2d at 687–88. Indeed, a careful review of the transcript reveals that the officers were either running preliminary checks or drafting the citation until K-9 Officer Bielsten arrived on the scene. Notably, Officer LaValley requested the participation of a K-9 unit "prior to the completion of the citation[,]" and had not yet "completed that mission of the stop before the K-9 arrived"; rather, Officer LaValley "was still working on the citation, and . . . had just printed it" when K-9 Officer Bielsten arrived on the scene.

"Because these searches were within the scope of [their] mission, no delay could occur until they were completed, and the uncontradicted evidence demonstrates that the database searches began" immediately after Officer Ferguson's return to his patrol vehicle with Defendants' identification, and continued as K-9 Officer Bielsten arrived and Officer LaValley asked Defendant Rashon to step out of the vehicle so that he could explain the citation. *Id.* at 300, 812 S.E.2d at 688. Thus, the unchallenged and binding findings support conclusion of law 3.

Moreover, these unchallenged findings of fact also support conclusion of law 4, in that they address "specific and articulable facts" that "g[a]ve rise to rational inferences supporting a determination of reasonable suspicion[.]" *Id.* at 301, 812 S.E.2d at 689 (citation and internal quotation marks omitted). These unchallenged findings of fact demonstrate that Officers LaValley and Ferguson were "apprised of each fact prior to . . . the completion of [their] mission in initiating the traffic stop." *Id.* at 302, 812 S.E.2d at 689. Thus, Officers LaValley and Ferguson "could rely on all of these facts, in their totality, in arriving at a reasonable suspicion that criminal activity beyond a traffic violation was afoot." *Id.* at 302–03, 812 S.E.2d at 689.

Accordingly, the trial court did not err in denying Defendant Rashon's motion to suppress. Because we conclude that the trial court did not err, we need not review for plain error.

C. Defendant Jashon's Motion to Suppress

On appeal, Defendant Jashon maintains that the trial court committed plain error by denying his pretrial motion to suppress all evidence seized as result of the traffic stop and subsequent searches of his car and person, because such evidence was obtained "in violation of his federal and state constitutional rights to be free from unreasonable seizures and searches."

In support of his plain error argument, Defendant Jashon specifically challenges the trial court's finding of fact 12 and conclusions of law 3–10. Finding of fact 12 reads, in its entirety:

> 12. Based on what the officers believed to be a hand-to-hand drug transaction and the observed traffic violation, officers stopped the Lincoln Navigator at Williamson Court, an apartment complex in Winston-Salem.

Conclusions of law 3–10 read, in their entirety:

> 3. The officers did not unlawfully extend the traffic stop because Officer LaValley and Officer Ferguson were still within the mission of the stop due to the number of databases searched and the length of time necessary to complete a traffic citation.
>
> 4. However, even if the traffic stop was extended, it was a reasonable extension based on the totality of the circumstances, which included a reasonable and articulable suspicion from observing a suspected hand-to-hand drug transaction.
>
> 5. Officers had the right to ask both the driver and passenger to exit the Lincoln Navigator.
>
> 6. Officer Ferguson had the right to frisk the passenger for weapons for the purpose of officer safety based on the

> officer's knowledge of the defendants' criminal histories, which included crimes of violence, and Officer Ferguson's knowledge that drugs and guns often go "hand-in-hand."
>
> 7. Officer Ferguson had the right to remove the object from [Jashon's] pocket based on Officer Ferguson's reasonable belief that the item was cocaine.
>
> 8. Officer LaValley had a reasonable and articulable suspicion to detain [Rashon] and handcuff him based on the suspected drug activity and his knowledge of [Rashon's] criminal history.
>
> 9. Officer LaValley had probable cause to arrest and later search [Rashon] incident to arrest based on [Rashon] resisting, delaying, or obstructing a public officer by tensing his body and attempting to flee by running.
>
> 10. The officers had probable cause to search the Lincoln Navigator based on the suspected hand-to-hand drug transaction, locating cocaine on the passenger [Jashon], and locating suspected crack cocaine, a digital scale, and $562 in cash on the driver [Rashon].

Defendant Jashon argues that finding of fact 12 was erroneous in that Officers LaValley and Ferguson stopped Defendants "based *solely* on the traffic violation" and not because of the perceived hand-to-hand drug transaction. He contends that the officers' "perception of a hand-to-hand drug transaction, standing alone, was insufficient to stop and investigate . . . for illegal drug activity." However, Defendant Jashon fails to challenge findings of fact 6 through 11, quoted in full in our analysis of Defendant Rashon's motion above. These unchallenged findings of fact—which are binding on Defendant Jashon's appeal, *see Biber*, 365 N.C. at 168, 712 S.E.2d at 878—

detail the circumstances of the lawful traffic stop and the officers' observations, from which they formed their belief that Defendants engaged in a hand-to-hand drug transaction at a gas station. Finding of fact 12 is thus supported by competent evidence, and is similarly binding on appeal.

As for the trial court's conclusions of law, Defendant Jashon challenges conclusions of law 3 and 5 on the grounds that Officers LaValley and Ferguson did not have the right to remove Defendants from their vehicle, and that by doing so, the officers unlawfully extended the traffic stop. He further challenges conclusion of law 4 on the grounds that the "perceived hand-to-hand drug transaction coupled with a minor traffic violation does not give rise to reasonable suspicion to further investigate possible illegal drug activity"; and consequently challenges conclusions of law 6–10 on the grounds that he was unlawfully removed from the vehicle, and all evidence that was subsequently gathered was then rendered the "fruit of a poisonous tree and therefore inadmissible[.]"

However, we conclude that Defendant Jashon's challenges to conclusions of law 3 and 4 lack merit for the same reasons that the trial court did not err in denying Defendant Rashon's motion to suppress. Conclusions of law 3 and 4, in turn, establish that the officers were "engaged in conduct within the scope of [their] mission" for the entirety of the traffic stop. *Campola*, 258 N.C. App. at 300, 812 S.E.2d at 687–88. Furthermore, in addition to being supported by the same legal principles that support

conclusions of law 3 and 4, conclusion of law 5 was not erroneous as to Defendant Jashon in that law enforcement officers are lawfully permitted "to order passengers from a vehicle in order to conduct a search of the driver's car, despite the complete absence of probable cause or reasonable suspicion concerning the passengers." *Id.* at 305, 812 S.E.2d at 691 (quoting *State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d 280, 283 (2000)). Finally, as to conclusions of law 6–10, Defendant Jashon's sole argument on appeal was that "[o]nce it is established that [Defendant] Jashon's removal from the car was unlawful, any evidence gathered after that is the fruit of a poisonous tree and therefore inadmissible as evidence against Jashon." As Defendant Jashon's removal from the car was not unlawful, this argument fails. Accordingly, we hold that the trial court did not err in denying Defendant Jashon's motion to suppress.

II. Motion to Dismiss

Defendant Rashon next argues that the trial court erred by "denying [his] motion to dismiss the charge of possession of cocaine with the intent to sell or deliver because there was insufficient evidence that [he] acted in concert with [Defendant Jashon] to possess the cocaine that was concealed in Jashon's pocket." We disagree.

A. Standard of Review

Upon a criminal defendant's motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense

charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). "Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Fisher*, 228 N.C. App. 463, 471, 745 S.E.2d 894, 900 (citation omitted), *disc. review denied*, 367 N.C. 274, 752 S.E.2d 470 (2013). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "When presented with circumstantial evidence, the [trial] court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances. If so, it is the jury's duty to determine if the defendant is actually guilty." *State v. Noble*, 226 N.C. App. 531, 535, 741 S.E.2d 473, 478 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 251, 749 S.E.2d 853 (2013).

We review a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Analysis

Defendant Rashon argues that "because there was insufficient evidence that [he] acted in concert with [Defendant Jashon] to possess the cocaine that was concealed in Jashon's pocket[,]" the trial court erred by denying his motion to dismiss the charge of possession of cocaine with the intent to sell or deliver.

To prove the charge of possession with intent to sell or deliver, "the State must present substantial evidence of (1) [the] defendant's possession of the controlled substance, and (2) his intent to sell or distribute it, as well as the actual sale or distribution of the controlled substance." *State v. Lewis*, 162 N.C. App. 277, 281, 590 S.E.2d 318, 322 (2004) (citation and internal quotation marks omitted). An individual has possession of a controlled substance for the purposes of N.C. Gen. Stat. § 90-95(a)(1) (2019) "when he has both the power and the intent to control its disposition or use." *State v. Fletcher*, 92 N.C. App. 50, 56, 373 S.E.2d 681, 685 (1988) (citation and internal quotation marks omitted).

Possession may be actual or constructive. *See State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). "The doctrine of constructive possession applies when a person without *actual* physical possession of a controlled substance has the *intent and capability* to maintain control and dominion over it." *State v. James*, 81

N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). "The defendant may have the power to control either alone or jointly with others." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009).

Constructive possession is typically a question for the jury; it is a fact-specific inquiry, based upon the totality of the circumstances. *See id.* "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Id.* Our case law provides examples of "other incriminating circumstances" that may be relevant to the issue of constructive possession, including evidence that the defendant:

> (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.

State v. Alston, 193 N.C. App. 712, 715–16, 668 S.E.2d 383, 386 (2008) (citation omitted), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009). "Evidence of conduct by the defendant indicating knowledge of the controlled substance or fear of discovery is also sufficient to permit a jury to find constructive possession." *Id.* at 716, 668 S.E.2d at 386.

In the present case, the State indicted Defendants for, *inter alia*, possession with intent to sell or deliver cocaine, which was discovered in Defendant Jashon's pocket. The State conceded that, regarding Defendant Rashon's charge of possession with intent to sell or deliver cocaine, it was limited to an acting in concert theory.

"To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). In order to obtain a conviction based on the theory of acting in concert, "the State must show that [the] defendant was present at the scene of the crime and that he acted together with another individual who does the acts necessary to constitute the crime pursuant to a common plan to commit the offense." *State v. Cotton*, 102 N.C. App. 93, 97, 401 S.E.2d 376, 379, *appeal dismissed and disc. review denied*, 329 N.C. 501, 407 S.E.2d 543 (1991). "For purposes of the [acting in concert] doctrine, a person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime." *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (citation and internal quotation marks omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

"[T]he State need not prove that the defendant committed any act which constitutes an element of the crime with which he is charged." *State v. Cox*, 303 N.C. 75, 86, 277 S.E.2d 376, 383 (1981). "Thus, the burden of proof which the State must

meet to obtain a conviction under the principle of acting in concert is less than its burden to prove that a defendant actually committed every element of the offense charged." *Id.*

"An acting in concert theory is not generally applied to possession offenses, as it tends to confuse the issues." *Cotton*, 102 N.C. App. at 97–98, 401 S.E.2d at 379–80. However, we have upheld possession convictions under an acting in concert theory, given appropriate facts. *See Lewis*, 162 N.C. App. at 282, 590 S.E.2d at 322–23 (holding that "there was sufficient evidence offered to allow a jury to reasonably infer that [the] defendant acted in concert" with another to possess and sell crack cocaine where the evidence showed that the defendant: sat "in the truck beside [his co-conspirator] Jennette when Jennette spoke with [undercover] officers about their desire to purchase crack cocaine"; "brought over collateral . . . and waited with the officers while Jennette took the officers' money to purchase the drugs"; "told the officers that he and Jennette had watched the officers' unsuccessful attempts to buy drugs and had decided to follow them"; "knew where Jennette was getting the crack cocaine and smoked some of it with Jennette following the sale"; and "did [not] appear confused about what was going on or why he was present" while the defendant was engaged in these acts—rather, the defendant "told the officers that he had 'tried to stay out of this drug game' but no longer" cared); *see also State v. Thomas*, 257 N.C. App. 389, 808 S.E.2d 622, 2018 WL 256734, at *3–4 (2018) (unpublished).

Here, Defendants were charged with possession of cocaine with intent to sell or deliver. These charges stemmed from the cocaine discovered in Defendant Jashon's pocket, along with the "digital scale, suspected crack cocaine, and $562 in cash" found in Defendant Rashon's pocket.

Under section 90-95(a)(1), "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" It is well established that "there are two essential elements of this charge: possession and intent." *State v. Turner*, 237 N.C. App. 388, 392, 765 S.E.2d 77, 81 (2014), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015). Section 90-95(a)(1) "only requires the jury to find one element of intent: an intent to sell, deliver or manufacture." *Id.* at 392, 765 S.E.2d at 81–82.

In the present case, it is undisputed that Defendant Rashon was not in exclusive possession of the cocaine. Nonetheless, the State presented substantial evidence of other incriminating circumstances sufficient to support a finding that Defendant Rashon had constructive possession of the contraband in Defendant Jashon's pocket, and that Defendants were acting together pursuant to a common plan or purpose of selling cocaine.

Officers LaValley and Ferguson observed what they reasonably believed, based on their training and experience, to be a hand-to-hand drug transaction. The hand-to-hand transaction occurred "between the male and *the driver* of the Lincoln

Navigator." (Emphasis added). Indeed, when the officers initiated a traffic stop, Defendant Rashon was driving.

At trial, Officer Ferguson testified that he frisked Defendant Jashon for weapons because he knew "from [his] training and experience that drugs and firearms go hand-in-hand" and that "narcotics dealers . . . typically carry weapons." During the frisk, Officer Ferguson noticed something in Defendant Jashon's pocket. Officer Ferguson asked Defendant Jashon what he was feeling; Defendant Jashon indicated that he was feeling "money" and "his zipper." Defendant Jashon reached for his pocket, but Officer Ferguson handcuffed him in order to complete the frisk.

Officer Ferguson felt what he believed, based on his training and experience, to be "several crack rocks" in Defendant Jashon's pocket. Defendant Jashon "manipulate[d]" his pocket and exposed a "tear[-]off" bag that Officer Ferguson recognized as being associated with narcotics sales. The bag contained an amount of cocaine that Officer Ferguson knew was not "consistent with [personal] use[,]" in that "it was more than an average user would . . . use." He estimated the value of the cocaine recovered from Defendant Jashon's pocket as "[a]pproximately $500." Officer Ferguson "did not locate any user paraphernalia" on Defendant Jashon, but he found $53 in cash on Defendant Jashon in "three 1s, one 10 and two 20s."

Officer LaValley searched Defendant Rashon once he was under arrest. The search revealed three items in Defendant Rashon's pocket: (1) $562 in cash, made up

of 15 $20 bills, 8 $10 bills, 26 $5 bills, and 52 $1 bills; (2) a digital scale; and (3) 4.72 grams of a "white, small, rocky substance" that Officer LaValley testified was "consistent with crack cocaine" and that "later field-tested . . . positive for the presence of cocaine."

Officer LaValley believed that he had "seized narcotics" because "[i]t was consistent with its look and feel, as well as it field-tested positive for the presence of cocaine." He also noted that the possession of $562 in cash "was indicative that [Defendant Rashon] was engaged in selling narcotics[,]" and explained that "digital scales are used . . . to weigh out narcotics."

In sum, the State presented evidence of a perceived hand-to-hand drug transaction between the driver (Defendant Rashon) and an unknown individual at a gas station. The State's evidence also showed that Defendant Jashon possessed crack cocaine worth about $500, more than would be consistent with personal use, and $53 in cash; at the same time, while together, Defendant Rashon possessed $562 in cash, a digital scale, and a rock-like substance that was consistent with crack cocaine and that returned a positive result for the presence of cocaine when field-tested.

Accordingly, the State presented ample evidence of other incriminating circumstances "sufficient . . . to allow a jury to reasonably infer that [D]efendant[s] acted in concert[.]" *Lewis*, 162 N.C. App. at 282, 590 S.E.2d at 323. Thus, the trial

court did not err by denying Defendant Rashon's motion to dismiss the charge of possession of cocaine with intent to sell or deliver.

III. Jury Instructions

Lastly, Defendant Rashon argues that the trial court erred by instructing the jury on constructive possession for his charge of possession with intent to sell or deliver cocaine because "the evidence did not support that theory of guilt for the cocaine concealed in Jashon's pocket."

In support of this argument, Defendant Rashon maintains that the State conceded that it was limited to an acting-in-concert theory on this charge, and that such instruction was "reversible error where the evidence of acting in concert was weak." He submits that because the jury "rendered a general verdict[,] . . . [t]here is no way to determine what theory of guilt was selected." Alternatively, Defendant Rashon argues that "[e]ven if the evidence of acting in concert was sufficient, this was error where the evidence showed that the cocaine at issue was hidden in [Defendant Jashon]'s pocket."

A. Standard of Review

This Court reviews a challenge to a trial court's decision regarding jury instructions de novo, and we review "the jury instructions in their entirety when determining if there was error." *State v. Wirt*, 263 N.C. App. 370, 376, 822 S.E.2d 668, 673 (2018).

> The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Id. (citation omitted).

B. Analysis

"Our courts have instructed juries on both constructive possession and acting in concert in possession cases." *State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003).

As explained above, both Defendants' charges for possession with intent to sell or deliver cocaine arose from the contraband discovered in Defendants' pockets. Accordingly, as to Defendant Rashon, the State sought to prove that Defendant Rashon—although lacking actual possession—had the intent and capability to maintain control and dominion over the cocaine in Defendant Jashon's pocket.

The trial court's instructions to the jury on constructive possession combined a portion of our Supreme Court's decision in *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982), with the pattern jury instructions for, *inter alia*, possession of a controlled substance, possession with intent to sell or deliver, acting in concert, and actual and constructive possession.

> Each defendant has been charged with possessing cocaine with the intent to sell or deliver it. For you to find

the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:

First, that the defendant knowingly possessed cocaine. Cocaine is a controlled substance. A person possesses cocaine when the person is aware of its presence and has both the power and intent to control the disposition or use of that substance.

Possession of a substance may be either actual or constructive. A person has actual possession of a substance if the person has it on the person, is aware of its presence, and, either alone or together with others, has both the power and intent to control its disposition or use.

A person has constructive possession of a substance if the person does not have it on the person, but is aware of its presence and has, either alone or together with others, but the power and intent to control its disposition or use. A person's awareness of the presence of a substance and the person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.

If you find beyond a reasonable doubt that a substance was found in close, physical proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use; however, the defendant's physical proximity, if any, to the substance does [not] by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use.

Such an inference may be drawn only from this and other circumstances which you find from the evidence beyond a reasonable doubt.

> And second, that the defendant intended to sell or deliver the cocaine. Intent is seldom, if ever, provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.
>
> For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit possession with the intent to sell or deliver cocaine, each of them, if actually or constructively present, is guilty of the crime. This principle of law is known as "acting in concert."
>
> At [sic] defendant is not guilty of a crime merely because the defendant is present at the scene even though the defendant may silently approve of a crime or secretly intend to assist in its commission. To be guilty, the defendant must aid or actively encourage the person committing the crime, or in some way communicate to another person the defendant's intention to assist in its commission; however, when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.
>
> So if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting either by himself or acting together with another person, knowingly possessed cocaine and intended to sell or deliver it, it would be your duty to return a verdict of guilty of possession of cocaine with the intent to sell or deliver it.

The State presented substantial evidence that Defendants were acting in concert to sell cocaine. As to Defendant Rashon, the facts and the State's theory of the case here could only support a guilty verdict on the charge of possession with intent to sell or deliver cocaine based upon constructive possession, because "the

cocaine at issue was hidden in [Defendant Jashon's] pocket." To establish constructive possession, the State presented substantial evidence of "other incriminating circumstances[,]" *Alston*, 193 N.C. App. at 715, 668 S.E.2d at 386 (citation omitted), from which a reasonable juror could find that Defendant Rashon had the intent and capability to maintain control and dominion over the cocaine that he and Defendant Jashon intended to sell.

Again, at trial, the State presented evidence that: while officers watched, the driver of a Lincoln Navigator (Defendant Rashon) and an unknown individual appeared to have conducted a hand-to-hand drug transaction at a gas station; Defendant Rashon was the driver of the Lincoln Navigator; Defendant Jashon, the passenger, possessed approximately $500 worth of narcotics, more than would be consistent with personal use; and Defendant Rashon possessed $562 in cash, a digital scale, and a rock-like substance consistent with crack cocaine that, when field-tested, returned a positive result for the presence of cocaine. With this evidence, the State presented sufficient "other incriminating circumstances" for the jury to infer that Defendant Rashon had constructive possession of the cocaine, in that he: "owned other items found in proximity to the contraband"; "had some control of . . . where the contraband was found"; and "possessed a large amount of cash." *Id.* at 715–16, 668 S.E.2d at 386 (citations omitted).

Accordingly, we hold that the trial court did not err in instructing the jury on the doctrine of constructive possession.

Conclusion

For the reasons stated herein, we affirm the order denying Defendants' motions to suppress, and we conclude that Defendants received a fair trial, free from prejudicial error.

AFFIRMED IN PART; NO ERROR IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

Report per Rule 30(e).