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NO. COA11-842
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Edgecombe County
No. 10CRS50734-35

RICKY LEANDER GAMBLE

Appeal by Defendant from judgments entered 10, 12 and 26 January 2011 by Judge Jerry R. Tillet in Edgecombe County Superior Court. Heard in the Court of Appeals 1 December 2011.

No brief filed by the State.

William D. Spence, for Defendant.

BEASLEY, Judge.

Ricky Leander Gamble (Defendant) appeals from judgment entered on his conviction for two counts of possession of cocaine, one count of felony maintaining a dwelling for keeping or one count of selling cocaine, and possession of drug paraphernalia. Defendant asserts the trial court committed reversible error by failing to dismiss the charges and allowing the State's witness to testify that a confidential informant had

purchased cocaine. For the following reasons, we find no prejudicial error.

Defendant was indicted for (1) two counts of possession of cocaine pursuant to N.C. Gen. Stat. § 90-95(A)(1), (2) one count of felony maintaining a dwelling for keeping or selling cocaine pursuant to N.C. Gen. Stat. § 90-108(A)(7), and (3) possession of drug paraphernalia pursuant to N.C. Gen. Stat. § 90-113.22. 10 January 2011, Defendant's trial before an Edgecombe County jury commenced.

Over the course of a month, the Rocky Mount Police Department performed surveillance of the residence located at 318 Madison Street, Rocky Mount, North Carolina. Drug activity was observed on several occasions at the residence.

Corporal T.J. Bunt (Corporal Bunt) of the Rocky Mount Police Department testified that he had a confidential informant purchase crack cocaine from an unnamed person located at 318 Madison Street. On 1 March 2010, Corporal Bunt secured a search warrant for the premises and executed the warrant with other officers of the Rocky Mount Police Department.

While searching the residence, Corporal Bunt located a citation with the name "Ricky Gamble", and another court document addressed to "Khaleel Shaakir", later determined to be an alias for Defendant. During the search, the officers located

a pot in the kitchen that appeared to have cocaine residue in the bottom. Officers observed Defendant exiting the right rear bedroom and detained him. Officers searched the room that Defendant was seen exiting and located a clear plastic bag that contained an off-white substance later determined to be crack cocaine. There were a total of ten people located within the residence.

Following the presentation of evidence, the jury found Defendant guilty of both counts of possession of cocaine, felony maintaining a dwelling for keeping or selling cocaine, and possession of drug paraphernalia. On 11 January 2011, Defendant entered notice of appeal in open court.

Defendant argues the trial court erred by (1) allowing the State's witness to testify that a confidential informant purchased cocaine from the residence at 318 Madison Street, and (2) denying the Defendant's motion to dismiss the charges at the close of the evidence.

First, we address Defendant's contention that the trial court improperly allowed Corporal Bunt to testify that a confidential informant had purchased cocaine from the residence at 318 Madison Street. We disagree.

"Exceptions to the admission of evidence must generally be preserved by an objection by counsel at the time of their admission. When preserved by an objection, a trial court's

decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, ____ N.C. App. ____, ____, 706 S.E.2d 790, 797 (2011).

The relevant portion of the State's direct examination of Corporal Bunt is as follows:

[PROSECUTION]: All right, what other information did you have about narcotics going on at this residence?

CORPORAL BUNT: We had a confidential informant --

[DEFENSE COUNSEL]: Objection, your Honor. Motion to Strike.

THE COURT: Overruled.

CORPORAL BUNT: We had a confidential informant purchase cocaine from this location, crack cocaine.

[PROSECUTION]: And as a result of that confidential informant and the surveillance that you were doing on the residence, were you able to get a search warrant?

CORPORAL BUNT: Yes, ma'am.
. . . .

[PROSECUTION]: Okay. And in getting this search warrant issued, was there one particular person that you were looking for or was it the residence in general?

CORPORAL BUNT: We didn't have a name, but they -- when the confidential informant purchased the cocaine he described the person and we put that --

[DEFENSE COUNSEL]: Objection to what the confidential informant said.

The State ultimately opted not to use the description given by the confidential informant during its presentation of evidence.

Defendant argues that the confidential informants' assertion that he had purchased crack cocaine at the residence at 318 Madison Street was hearsay and therefore inadmissible.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen Stat. § 8C-1 Rule 801(c) (2011). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2011). "It is well established that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986) (citation omitted). "Defendant has the burden of showing error and that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred." *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998). (citations omitted).

Assuming *arguendo* that the admission of Corporal Bunt's statement was hearsay, we conclude that the admission was harmless error. As a further detailed explanation follows, the State's evidence showed that (1) Defendant was found in the

house; (2) Defendant's legal documents were found in both the rear and front rooms of the house; (3) Defendant's documents listed his address as 318 Madison Street; and (4) officers found the crack cocaine and paraphernalia in close proximity to Defendant's personal effects. The State's evidence was more than sufficient to support the conclusion that Defendant was in possession of the cocaine and paraphernalia. Accordingly, Defendant's argument is overruled.

Next, Defendant contends the trial court erred in denying his motion to dismiss the charge of possession of cocaine. Defendant argues that the State failed to offer sufficient evidence that Defendant knowingly possessed cocaine because Defendant did not have physical possession of the cocaine and Defendant was not in exclusive control of the premises. We disagree.

"A motion to dismiss due to insufficiency of the evidence is properly denied if the State has presented substantial evidence of each essential element of the offense charged and that the defendant is the perpetrator." *State v. Fortney*, 201 N.C. App. 662, 667, 687 S.E.2d 518, 522 (2010). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d

138, 141 (1998).

"The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. McNeil*, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004) (internal quotation marks and citations omitted). "[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (internal quotation marks and citations omitted). Instead, "[p]ossession of a controlled substance may be either actual or constructive." *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001).

"A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). "Incriminating circumstances, such as evidence placing the accused within close proximity to the controlled substance, may support a conclusion that the substance was in the constructive possession of the accused." *McNeil*, 165 N.C. App. at 781, 600 S.E.2d at 34 (citations omitted). "Thus, where sufficient incriminating circumstances exist, constructive possession of a

controlled substance may be inferred even where possession of a premises is nonexclusive." *Id.* at 781, 600 S.E.2d at 35. Incriminating circumstances include,

"evidence that 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, 716, 668 S.E.2d 383, 386 (2008) (quoting *State v. Miller*, 191 N.C. App. 124, 127, 661 S.E.2d 770, 773 (2008)).

In the case *sub judice*, Defendant owned items found in proximity to the contraband, and resided in or had some control over the premises. Although ten people were found at the residence, officers observed Defendant exiting the right rear room. Officers searched that room and found legal documents containing Defendant's name and alias, and listing his address as 318 Madison Street. Officers also found cocaine inside a chair and crack pipes concealed in a shoe box and under a couch in the right rear room. Moreover, officers found eviction papers that were addressed to Defendant which listed 318 Madison Street as his residence. Based on the foregoing, the State presented sufficient evidence of incriminating circumstances to

support a finding of constructive possession of the cocaine. Therefore, Defendant's argument is overruled.

Further, Defendant argues that the trial court erred by denying Defendant's motion to dismiss the charge of possession of drug paraphernalia. Defendant contends the State's evidence did not support a finding that Defendant possessed the crack pipes found in the shoe box and under the couch in the right rear room. First, Defendant argues that the State failed to establish constructive possession by Defendant. Because we have already overruled Defendant's argument concerning constructive possession of the cocaine, Defendant's argument regarding constructive possession of drug paraphernalia is overruled.

Additionally, Defendant argues that the State failed to establish that Defendant intended to use the crack pipes in connection with a controlled substance. Pursuant to N.C. Gen. Stat. § 90-113.22(a) (2011), "[i]t is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess." The State must present substantial evidence that Defendant possessed the paraphernalia with the intent to use it in connection with a controlled substance. *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992).

Viewing the evidence in the light most favorable to the State, the evidence tended to show that (1) officers found the crack pipes in the same room that they found the cocaine; (2) Officer Brent Lawton testified that through his training and experience he knew that the glass pipe found in the shoe box was a crack pipe because it was charred, broken at the ends, and was stuffed with a brillo pad; and (3) Officer Lawton also testified that the pipe found in the cigarette box was also charred. Based on the foregoing, the State presented sufficient evidence of Defendant's intent to use the pipes in connection with a controlled substance.

Finally, Defendant argues that the trial court erred by denying his motion to dismiss the charge of maintaining a place for the keeping and selling of controlled substances because the State did not present substantial evidence of "keeping or maintaining." We disagree.

To obtain a conviction for knowingly or intentionally keeping or maintaining a place for the purpose of keeping or selling controlled substances under N.C. Gen. Stat. § 90-108 (a)(7). . . , the State has the burden of proving a 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.

State v. Fuller, 196 N.C. App. 412, 424, 674 S.E.2d 824, 832 (2009). (internal quotation marks omitted). "Factors which may

be taken into consideration in determining whether a person keeps or maintains a dwelling include ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent." *State v. Baldwin*, 161 N.C. App. 382, 393, 588 S.E.2d 497, 506 (2003).

Here, Defendant was located in the home exiting a rear bedroom. Also, officers located several legal documents in the rear right room, as well as the front room, which were addressed to Defendant and listed 318 Madison Street as Defendant's address. These documents included a notice of a return of bill of indictment, a complaint listing Defendant as a named party, and an eviction notice. "Taken together, this evidence shows more than temporary occupancy and points instead to [D]efendant's maintaining the house." *Id.* Therefore, Defendant's final argument is overruled.

No Prejudicial Error.

Judges ERVIN and THIGPEN concur.

Report per Rule 30(e).