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NO. COA11-1411
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 10 CRS 50697

DENNIS EDWARD PIGFORD

Appeal by Defendant from judgment entered 31 May 2011 by
Judge Gregory A. Weeks in Cumberland County Superior Court.
Heard in the Court of Appeals 21 May 2012.

*Attorney General Roy Cooper, by Assistant Attorney General
Stanley G. Abrams, for the State.*

Guy J. Loranger for Defendant-appellant.

HUNTER, JR., ROBERT N., Judge.

Dennis Edward Pigford ("Defendant") appeals from a judgment entered upon a jury verdict convicting him of one count of trafficking in marijuana by possession. We find no error.

I. Factual & Procedural Background

The State's evidence at trial tended to show the following. The Cumberland County Bureau of Narcotics ("CCBN") began investigating Universal Cuts and Style Barbershop ("Universal

Cuts") in August 2009 after receiving information that marijuana was being sold on the premises. Defendant was the owner and licensed barber at Universal Cuts and operated the business pursuant to a lease agreement.

Over the course of the next five months, CCBN orchestrated a series of transactions through which a CCBN informant purchased marijuana and cocaine "from multiple black male subjects" at Universal Cuts. On 15 January 2010, a (second) CCBN confidential informant reported that he could purchase 20 pounds of marijuana for \$18,000.00 from an individual at Universal Cuts later identified as Defendant's nephew, Justin Mainor. That day, CCBN Agent Roger Moore obtained an anticipatory search warrant to conduct a "buy-bust" operation, whereby CCBN would execute the warrant and make arrests upon consummation of the marijuana sale transaction. CCBN recruited Deputy Rickey Caldwell of the Cumberland County Sheriff's Office to work as an undercover agent with the confidential informant in carrying out the operation. The plan was for Deputy Caldwell, equipped with a recording device and accompanied by the confidential informant, to enter Universal Cuts and signal Agent Moore once he had seen the marijuana. Agent Moore would then alert the special response team ("SRT") to enter Universal

Cuts and execute the search warrant.

Later that day, Deputy Caldwell and the confidential informant arrived at Universal Cuts with \$18,000.00 in cash. They first walked behind the building, where Deputy Caldwell observed several individuals, none of whom he recognized, before making their way through the building's front entrance where customers would go to receive their haircuts. Deputy Caldwell and the confidential informant waited approximately two to five minutes in the front waiting area before Mainor appeared and instructed them to enter a room in the back of the barbershop.

Once in the back room, the confidential informant and Mainor exchanged small talk while a fourth individual, Jerome Pigford, stood nearby. At some point, Defendant's brother, Glendale Pigford, entered the room to discuss the terms of the transaction—20 pounds of marijuana at \$900.00 per pound—with Deputy Caldwell and the confidential informant. Glendale Pigford then exited the room, and Defendant entered "to reiterate the deal that was about to take place." Deputy Caldwell and the confidential informant told Defendant that they intended to purchase 20 pounds of marijuana, although the price for the marijuana was not discussed at that time. Defendant remarked that he had never seen Deputy Caldwell or the

confidential informant before, "and he wanted to make sure [they] were legit buyers." Defendant then left the room.

A short while later, Glendale Pigford returned to the back room with two bricks of marijuana wrapped in Saran wrap. He cut the bricks open, so that Deputy Caldwell and the confidential informant could smell the product, before placing each brick on a digital scale in the room. The scale revealed that each brick weighed approximately five pounds. Glendale Pigford exited the room and returned with two additional bricks of marijuana, which he presented and weighed in the same manner. Deputy Caldwell gave the code signal, and then announced that he needed to go to his vehicle to retrieve the \$18,000.00.

Deputy Caldwell exited Universal Cuts through the front door and made his way to his unmarked police vehicle behind the building. He removed the \$18,000.00 cash from the vehicle and returned to Universal Cuts, entering through the building's main entrance in the front. Deputy Caldwell testified that all parties involved in the transaction, including Defendant, remained in the back area of the business during this time. At or about the time Deputy Caldwell reentered the building, SRT entered Universal Cuts to execute the search warrant and released "distractionary devices." Confusion followed, and

Deputy Caldwell dove on top of the money, which he had placed in a Wal-Mart shopping bag, as people fled out the back of the building. Police ultimately arrested four individuals in connection with the raid, including Defendant, who was apprehended on foot some 150 to 200 yards from the crime scene.

On 17 May 2010, Defendant was indicted on the following charges: trafficking in more than 10 but less than 50 pounds of marijuana by possession, by sale, and by delivery (10 CRS 50697); conspiracy to traffic in marijuana (10 CRS 50702); possession with intent to manufacture, sell or deliver marijuana, sale of marijuana, and delivery of marijuana (10 CRS 52587); felonious maintaining a place to keep controlled substances (10 CRS 52588); possession with intent to manufacture, sell or deliver marijuana, sale of marijuana, and delivery of marijuana (10 CRS 52589); felonious maintaining a place to keep controlled substances (10 CRS 52590); felonious maintaining a place to keep controlled substances (10 CRS 53418); and trafficking in cocaine by sale, delivery, and possession (10 CRS 53419). All charges against Defendant were joined for trial, and the matter came on before the Honorable Gregory A. Weeks in Cumberland County Superior Court on 23 May 2011. The State informed the trial court at the outset that it

had dismissed the trafficking in marijuana by sale count in 10 CRS 50697, but would move forward with the trafficking in marijuana by possession and by delivery counts in that case, as well as the remaining cases against Defendant. Defendant entered a plea of not guilty to all charges.

The State's evidence at trial established the factual account as set forth above. The trial court denied Defendant's motion for a directed verdict based upon insufficiency of the evidence at the close of the State's evidence. Defendant did not put on any evidence.

On 31 May 2011, the jury convicted Defendant on the count of trafficking in marijuana by possession in 10 CRS 50697, acquitted Defendant on the three counts in 10 CRS 53419, and announced that it had failed to reach unanimous verdicts on all remaining charges, prompting the trial court to declare a mistrial with respect to those charges. Defendant stipulated to habitual felon status and to a prior record level of VI for sentencing purposes. The trial court sentenced Defendant to a term of 140 months to 177 months' imprisonment and ordered Defendant to pay a statutorily mandated fine of \$5,000.00. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011), as Defendant appeals from a final judgment of the superior court as a matter of right.

III. Analysis

Defendant's sole contention on appeal is that the trial court erred in denying his motion to set aside the jury's verdict finding him guilty of trafficking in marijuana by possession. Defendant argues the State failed to present substantial evidence of an essential element of the crime, namely, that he had possession of the marijuana in question.

"The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss, i.e., whether there is substantial evidence of each essential element of the crime." *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000); *see also State v. Long*, 20 N.C. App. 91, 94, 200 S.E.2d 825, 827 (1973) ("In a criminal case the motion for a directed verdict of not guilty, like the motion for judgment of nonsuit, challenges the sufficiency of the evidence to take the case to the jury[.]"). "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).

"The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion."

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

At the outset, we note the State's argument that Defendant failed to preserve this issue for appellate review because "defendant moved to dismiss the case for insufficiency of the evidence at the end of the State's evidence, but failed to renew his motion at the close of all the evidence." This argument is without merit, as Defendant was required to renew his motion to dismiss only if he presented evidence at trial. See N.C. R. App. P. 10(a)(3) (providing that a defendant waives his motion to dismiss at the close of the State's evidence where "that motion is denied *and the defendant then introduces evidence*" (emphasis added)). Defendant did not present any evidence in

the instant case and, therefore, Defendant did not waive his challenge to the sufficiency of the evidence at the close of the State's evidence. We accordingly proceed to the merits of Defendant's contention that the State's evidence was insufficient to withstand his motion to set aside the verdict.

"The class H felony of trafficking in marijuana by possession requires the State to prove (1) that defendant knowingly possessed the marijuana, and (2) that the marijuana weighed more than 10 pounds, but less than 50 pounds." *State v. Nunez*, 204 N.C. App. 164, 167, 693 S.E.2d 223, 226 (2010). "The 'knowing possession' element of the offense of trafficking by possession may be established by a showing that (1) the defendant had actual possession, (2) the defendant had constructive possession, or (3) the defendant acted in concert with another to commit the crime." *State v. Reid*, 151 N.C. App. 420, 428, 566 S.E.2d 186, 192 (2002). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *Id.* at 428-29, 566 S.E.2d at 192. In contrast, a person has constructive possession where, "'while not having actual possession, . . . [he] has the intent and capability to maintain

control and dominion over' the [substance in question]." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (citation omitted) (first alteration in original). "Where such [drugs] are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Where the defendant does not have exclusive possession of the place where the drugs are found, however, "the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). Circumstances indicative of constructive possession

"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) (citation omitted). "[C]onstructive possession depends on the totality of circumstances in each case. No single factor

controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). Additionally, under the doctrine of acting in concert, the State is not required to prove actual or constructive possession if it can establish that the defendant was "present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

Viewing the evidence in the light most favorable to the State, as we are required to do, we conclude the evidence was sufficient to submit the case to the jury under the theory of constructive possession. It is undisputed that Defendant owned and operated a barbershop on the premises where police recovered the 19.8 pounds of marijuana that served as the basis for his possession conviction. While Defendant did not own the building in which he conducted his business, the evidence indicated that he was leasing the premises and, additionally, police recovered two envelopes addressed to Defendant at that location. Moreover, testimony at trial revealed that Defendant was not only on the premises at the time of the buy-bust operation, but

that he also participated in the transaction to ensure that Deputy Caldwell and the confidential informant "were legit buyers." A jury could reasonably conclude from these facts, demonstrating Defendant's control over the premises where the drugs were found and Defendant's participation in the transaction that led to his arrest, that Defendant exercised constructive possession over the marijuana in question.

We note Defendant's contention that his flight from the scene when SRT executed the warrant "could reasonably be viewed as a natural reaction to a loud noise and subsequent confusion and not evasion." While this may indeed be a reasonable view of Defendant's actions, we are required under our standard of review to draw all inferences *in the light most favorable to the State*. See *Hill*, 365 N.C. at 275, 715 S.E.2d at 843. When viewed in the appropriate light, Defendant's flight could reasonably be construed as indicative of his "guilty conscience." See *State v. Bagley*, 183 N.C. App. 514, 521, 644 S.E.2d 615, 620 (2007) ("[E]vidence of flight is admissible if offered for the purpose of showing defendant's guilty conscience as circumstantial evidence of guilt of the crime for which he is being tried.").

In sum, we conclude the evidence was sufficient to submit the case to the jury on the theory of constructive possession, and, therefore, we need not reach the issue of whether the evidence was sufficient to support submission to the jury under an "acting in concert" theory. Accordingly, we hold the trial court did not err in denying Defendant's motion to set aside the verdict, and Defendant's argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no error in the trial court's ruling.

No error.

Judges MARTIN and ELMORE concur.

Report per Rule 30(e).