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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-24

Filed: 3 October 2017

Cabarrus County, No. 15 CRS 50858, 15 CRS 50860

STATE OF NORTH CAROLINA

v.

CLAUDIA K. ISOM, Defendant.

Appeal by Defendant from judgment entered 10 June 2016 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 21 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Phyllis A. Turner, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Claudia K. Isom (“Defendant”) appeals from a 10 June 2016 judgment entered after a jury convicted her of manufacturing marijuana, maintaining a dwelling place for the purpose of using marijuana, felony possession of marijuana, and possession of drug paraphernalia. Defendant argues the trial court erred by failing to dismiss the charges against Defendant due to insufficient evidence of constructive possession.

Defendant also argues she had ineffective assistance of counsel. We find no error and dismiss Defendant's claim of ineffective assistance of counsel without prejudice to refile the claim in a Motion for Appropriate Relief.

I. Procedural and Factual Background

On 13 April 2015, a grand jury indicted Defendant on one count of manufacturing marijuana, one count of maintaining a dwelling for the purpose of using marijuana, one count of felony possession of marijuana, and one count of possession of drug paraphernalia. On 8 June 2016, the trial court called Defendant's case for trial. Prior to jury selection, both parties stipulated the chain of custody of all evidence had been properly maintained. The State then sought a motion *in limine* to exclude any reference of co-defendant Shannon Isom's trial or any result of that trial. Defense counsel disagreed and stated the testimony at the prior trial may become an issue in the current trial, "especially if the defendant believes that the testimony in the prior trial is inconsistent with the testimony in this trial." Therefore, Defendant "could impeach witnesses based upon the prior statements made at an earlier time." The trial court told defense counsel "if you believe that becomes an issue, if you would bring that to my attention outside of the presence of the jury and we can address it at that time."

The State then added:

Looking at the defense witness list, they have Corbin Walker listed who I believe was the attorney who

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represented the co-defendant at that trial. I have not received nor do I see any transcripts from the other trial or anything like that. Contend that the only way that you could impeach someone with their testimony from a prior trial is if you actually have a transcript. . . . I don't see how he would even remotely be able to testify to anything relevant in this trial.

Defense Counsel disagreed. The trial court again stated it would address the issue outside the jury's presence if the situation occurred during trial.

Defense counsel next noted Defendant was asked several questions which she offered no response. Here, defense counsel contended Defendant's exercise of her right to remain silent is protected and not admissible at trial. Therefore, there should "be no reference to her remaining silent in the evidence portion of the case."

The State responded:

[T]he evidence will show, Detective Roth was directly asking this defendant questions and of the series of questions that he asked her, directly asked her, she answered most of them. Some of them she answered nonverbally, other questions she answered verbally. I think only about two questions she didn't really have much of a response to. . . . So given all that and given that there is no unequivocal assertion of a right to remain silent, we ask the Court to deny that motion.

The trial court stated it would be "difficult" to rule without hearing the testimony.

The trial court then delayed its ruling until there was a *voir dire* of the witness.¹

¹ The trial court ultimately decided the answers Defendant responded to can "come before the jury." The trial court also allowed Detective Roth to describe Defendant's "non-verbal" answers for the jury. For example, Defendant shook her head back and forth without speaking. However, the trial court excluded the questions to which Defendant remained silent.

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The State first called Detective Tim Roth (“Roth”), a vice and narcotics detective for the City of Kannapolis. On 7 November 2014, Roth spoke to an individual who told him a person living at 1504 Forest Glen Lane was receiving marijuana from California through the mail. Roth and Detective Beach rode to that residence and noted the license plate number of a car parked in the driveway. Roth left the residence and learned the car was registered to Shannon Isom (“Isom”) and Defendant.

After running a criminal history on both Defendant and Isom, Roth returned to the residence to investigate. At this point, Roth was “handling just a general complaint.” Roth parked in the driveway next to Defendant’s residence. As Roth approached the house, he noticed the garage door was up about 24 inches, and he could “smell a distinct odor of burnt marijuana.” The odor came from inside the garage. Roth then walked up to the street corner and radioed his supervisor, Sergeant Yurco. Sergeant Yurco joined Roth, and together they approached Defendant’s front door. Roth knocked on the door. The door had glass panels with curtains, and a man inside pushed a curtain aside and asked who was there. Roth later learned this man was Isom. Roth told Isom, “police department,” and showed his badge. Roth then asked to speak with Isom, who said, “give me a minute.” Isom then exited the house from a rear door and walked around to the front of the house.

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Roth identified himself and Sergeant Yurco, and explained he received a complaint about Isom receiving marijuana in the mail. Roth also confronted Isom about the marijuana smell coming from the garage, and asked him how much marijuana was there. Isom responded there wasn't a lot. Roth asked if they could go into the garage and "retrieve it." Isom assented, and Roth asked him if he was smoking the marijuana. Isom said yes. Isom gave Roth a pipe with some burnt marijuana in it, as well as a set of digital scales, a pack of rolling papers, and several plastic bags. One of the bags contained a small amount of marijuana. Roth then told Isom he believed there was marijuana inside the home, and Isom gave Roth and Sergeant Yurco permission to go inside.

Roth smelled fresh marijuana when he entered the home. Roth and Sergeant Yurco followed Isom to the kitchen where they proceeded to sit at the kitchen table. Isom signed a preprinted police department consent form which granted Roth and Sergeant Yurco permission to search Isom's house. While Roth talked to Isom, Sergeant Yurco called Detective Beach ("Beach") and Detective Page ("Page") to come and offer assistance.

Sergeant Yurco instructed Beach and Page to search the house while Roth continued to talk with Isom. Roth asked Isom if there was anything else illegal in the house. Isom showed Roth three jars and two plastic bags of marijuana that were

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between a wall and the dryer. At that point, Beach and Page directed Roth to the front bedroom where there were three marijuana plants growing in the closet:

Inside the closet they had a portable plastic greenhouse that you can buy like at Wal-Mart or Lowe's. It has like the zipper, the plastic. That was in the closet and then these three plants were there. They had fans to help keep it cool and they also had a special light that runs on a ballast, a big ballast. And it runs – runs a light into the closet at the base of the greenhouse.

Roth also found a tin box that contained shears, marijuana leaves, fertilizer, and measuring spoons.

Defendant arrived at Isom's house approximately twenty minutes after Beach and Page arrived. At this time, Roth was reviewing Isom's voluntary statement and Beach and Page were searching the house. Defendant entered the house and stood against the wall near the back door. Roth explained to Defendant what was happening and also the events which prompted him to investigate the Isom home initially. Roth then told Defendant her husband granted permission for the home search, and they found the jars of marijuana as well as the marijuana plants. Roth also told Defendant no one, including Isom, was under arrest at that time. Defendant did not object to Isom's consent to search.

Roth asked Defendant about her involvement with the marijuana, and she "just responded by lowering her head and shaking it, dropping her chin." Roth then asked Defendant if she knew smoking and growing marijuana was illegal, and she

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replied “Yes.” At that point, Roth and the other officers collected all the marijuana, carried it out to the car, and left. No one was arrested at that time. It was “sometime later” that Roth took out arrest warrants for Defendant and Isom.²

At the close of the State’s evidence Defendant moved to dismiss each of the charges. Defendant contended as to each of the charges the State failed to prove Defendant was aware of any of the illegal activities that were occurring in Defendant’s home. Rather, the evidence showed Defendant arrived at the residence sometime after the police arrived and searched the house. Additionally, there was no evidence Defendant lived in the house at that time. The State responded by contending there is substantial evidence, taken in the light most favorable to the State, Defendant not only had constructive possession of all the marijuana in the house, but also knew marijuana was being grown in the bedroom. The court denied Defendant’s motion to dismiss.

The trial court then discussed with Defendant her right to not testify. Defendant took the stand. Defendant lived at 1504 Forest Glen Drive in Kannapolis with Isom since 2008. Defendant has worked at Cabarrus Eye Center for approximately ten years. Cabarrus Eye Center performs random drug screens. Defendant has been the subject of these drug screens, and they have all been negative. Defendant was not aware her husband possessed or smoked marijuana

² The record does not contain a copy of Defendant’s arrest warrant.

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until the day she came home and found the police there. Defendant smoked marijuana as a teenager, but found out “it was not for me.”

Defendant had “absolutely” no idea her husband was growing marijuana in the bedroom. The bedroom with the marijuana plants was a spare room used for storage, and the door always stayed shut. If Defendant saw any pruning shears or fertilizer in her home, she would assume it was Isom’s since he liked to garden. Defendant had never seen the jars of marijuana in her home. Defendant’s home does not contain strange smells, and Roth’s testimony about the smell of marijuana “concerned” her. When Defendant first learned from Roth her husband smoked marijuana and was growing marijuana, she stated, “I was shocked. I was disbelief. I was angry. I was hurt. I couldn’t believe that this was happening. I was angry.” Defendant never planted marijuana seeds, watered a marijuana plant or otherwise cultivated marijuana. Defendant also never knowingly possessed drug paraphernalia.

On cross, Defendant stated she did not respond to Roth’s question regarding Defendant’s involvement with marijuana. Also, when Roth asked Defendant if she was “just turning a blind eye” to her husband’s marijuana, Defendant did not answer Roth. However, Defendant did tell Roth she knew smoking and growing marijuana in North Carolina was illegal. Defendant was also paying the majority of the household bills at the time the marijuana was discovered.

Defense rested and the State did not offer rebuttal evidence.

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The trial court excused the jury. Defense counsel moved to dismiss the charges. As to the charge of manufacturing marijuana, counsel for Defendant contended there was insufficient evidence to support that offense. Defense counsel asserted it was not enough for Defendant to have known the operation was occurring in her household, but Defendant must have done something in furtherance of the cultivation of marijuana. Counsel for Defendant next contended there was insufficient evidence to support the charge of possession of marijuana, since possession requires more than knowledge of marijuana. Rather, defense counsel argued the evidence tends to show Isom was hiding the marijuana from his wife. Defense counsel also made the same argument as to the charge of possession of drug paraphernalia and contended there was insufficient evidence Defendant possessed the paraphernalia or used it in any way. Finally, defense counsel argued the evidence is insufficient to show Defendant's dwelling was maintained in order for Defendant to keep a controlled substance.

In response, the State contended the trial court should deny Defendant's motion to dismiss since "[c]onstructive possession covers pretty much everything and aid and abet covers anything that constructive possession does not." Additionally, "[e]ven though [Defendant] didn't necessarily partake of all of the elements involved with manufacturing marijuana, she certainly aided and abetted in doing it and that's something for a jury to decide exactly what her knowledge is and what she did." The

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only new evidence defense put on was Defendant's denial she had anything to do with the marijuana.

The court denied Defendant's motion to dismiss. Defendant's counsel then stated, "[t]he defendant is not charged with aiding and abetting and I've heard that term now twice. And I would need to know whether or not the charge is going to be amended to aid and abet before I make this jury argument." The State responded it was asking for the aid and abet instruction since it is a theory, "and as a theory it does not need to be indicted or charged in any particular way." Additionally, the evidence tended to show Defendant "facilitated her husband" growing the marijuana since Defendant paid the bills, allowed Isom to grow the marijuana, and provided upkeep to the house. In its discretion, the trial court granted Defendant's motion to exclude the aiding and abetting instruction.

Defense counsel next asked the trial court to include the jury instruction for misdemeanor possession of marijuana. The trial court agreed.

After deliberations, the jury returned verdicts of guilty of manufacturing marijuana, maintaining a dwelling place for the purpose of using marijuana, felony possession of marijuana, and misdemeanor possession of drug paraphernalia. Defense counsel moved for judgment notwithstanding the verdict on the basis the verdicts are not supported by the evidence. The trial court denied Defendant's motion.

Defense counsel next stipulated Defendant was a prior record level one for felony and misdemeanor sentencing. The trial court consolidated all the offenses into the manufacture marijuana charge which is a Class I felony. The trial court sentenced Defendant to a “minimum of 6 and a maximum of 17 months in the North Carolina Department of Adult Corrections.” Defendant’s sentence was suspended and the trial court placed Defendant on supervised probation for 24 months. The trial court gave Defendant a one-day credit for the time she served. Defendant timely appealed.

II. Standard of Review

The standard of review on a motion to dismiss for insufficient evidence is whether the State has offered substantial evidence of each required element of the offense charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). Whether substantial evidence exists “is a question of law for the court.” *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). “Substantial evidence’ is that amount that ‘a reasonable mind might accept as adequate to support a conclusion.’” *State v. Stevenson*, 328 N.C. 542, 545, 402 S.E.2d 396, 398 (1991) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). The evidence must be evaluated “in the light most favorable to the State” and “[t]he defendant’s evidence is not to be considered unless it is favorable to the State.” *Williams* at 178, 571 S.E.2d at 620-21 (2002).

III. Analysis

Defendant contends the trial court erred in failing to grant Defendant's motions to dismiss the charges since the evidence at trial showed Defendant did not have exclusive control of the property. We disagree.

"A defendant constructively possesses contraband when he or she has 'the intent and capability to maintain control and dominion over' it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). "The defendant may have the power to control either alone or jointly with others." *Id.* at 99, 678 S.E.2d at 594. If a defendant does not have exclusive control over the property where the contraband is found, the State must show "other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Id.* at 99, 678 S.E.2d at 594. This Court looks to the specific facts of each case in determining constructive possession. *Id.* at 99, 678 S.E.2d at 594. This Court has held incriminating circumstances relevant to constructive possession include:

[E]vidence 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.*

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Miller, 191 N.C. App. 124, 127, 661 S.E.2d 770, 773 (2008)) (internal citations omitted).

This Court looks at the “totality of the circumstances” of each case in determining whether the State presented sufficient evidence of incriminating circumstances to warrant constructive possession. *Alston* at 716, 668 S.E.2d at 387. “No single factor controls, but ordinarily *the questions will be for the jury.*” *Id.* at 716, 668 S.E.2d at 387 (quoting *State v. McBride*, 173 N.C. App. 101, 106, 618 S.E.2d 754, 758 (2005) (citations and internal quotations omitted)).

In *State v. Spenser*, the North Carolina Supreme Court held the close proximity of the defendant to the marijuana was sufficient for a jury to conclude it was in defendant’s possession. 281 N.C. 121, 130, 187 S.E.2d 779, 784 (1972). In *Spenser*, defendant lived in a combination residence and store in rural North Carolina. *Id.* at 123, 187 S.E.2d at 780. A pig pen was located approximately twenty-five yards behind defendant’s home. *Id.* at 123, 187 S.E.2d at 780. Officers located marijuana seeds in defendant’s bedroom, and also a box containing in excess of eighty-two grams of marijuana leaves in a shed within the pig pen. *Id.* at 123, 187 S.E.2d at 780. The fact defendant had been seen in and around the pig pen behind his residence, coupled with the fact defendant possessed marijuana seeds in his bedroom, led the North Carolina Supreme Court to conclude there was “a reasonable inference that defendant exercised custody, control, and domination over the pig shed and its

contents.” *Id.* at 129-130, 187 S.E.2d at 784.

Viewing the evidence in the light most favorable to the State and giving it the benefit of all inferences raised, we conclude the State presented sufficient evidence of incriminating circumstances for the jury to infer Defendant constructively possessed the marijuana found in her home. The uncontroverted evidence shows Defendant lived with Isom at 1504 Forest Glen Drive in Kannapolis since 2008. Additionally, when Roth first arrived at the residence, he confirmed the car in the driveway was registered to both Isom and Defendant. Defendant was also paying the majority of the household bills and expenses at the time Roth discovered the marijuana. As a resident of the Isom household, Defendant had access to and control over the areas where Isom kept the marijuana plants and the drug paraphernalia. The State also presented evidence tending to show the smell of fresh marijuana was apparent upon entering the home. Even though Defendant did not have exclusive possession of the premises, these incriminating circumstances permit a reasonable inference that Defendant had the intent and capability to exercise control and dominion over the marijuana in the house.

Defendant also contends she must be granted a new trial because she was not afforded effective assistance of counsel. Specifically, Defendant argues her attorney failed to object to the State’s crime lab report, erred in stipulating to the chain of custody, and should not have allowed her to testify and prove elements of the charges

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against her. Generally, ineffective assistance of counsel claims “should be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). We dismiss Defendant’s assignment of error without prejudice and conclude Defendant is free to assert this claim during a later MAR proceeding with a more complete factual record.

NO ERROR.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).