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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-313

Filed: 2 January 2018

Gaston County, Nos. 12 CRS 55132-33

STATE OF NORTH CAROLINA

v.

MICHAEL CHAMEL THOMAS

Appeal by defendant by petition for writ of certiorari from judgment entered 7 May 2015 by Judge Eric L. Levinson in Gaston County Superior Court. Heard in the Court of Appeals 2 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Roberta A. Ouellette, for the State.

Morgan & Carter PLLC, by Michelle FormyDuval Lynch, for defendant-appellant.

CALABRIA, Judge.

Michael Chamel Thomas ("defendant") appeals by petition for writ of certiorari from the trial court's judgment entered upon jury verdicts finding him guilty of sale of cocaine; delivery of cocaine; and possession with intent to sell or deliver cocaine. After careful review, we conclude that defendant received a fair trial, free from error. However, because the trial court erroneously sentenced defendant for both sale and

delivery arising from a single transfer of cocaine, we remand to the trial court for resentencing in 12 CRS 55132.

I. Background

On 13 April 2011, the Gastonia Police Department conducted a controlled buy of cocaine through a confidential informant, Kashif Gumbs ("Gumbs"). Officers gave Gumbs $450 and instructed him to purchase one-half ounce of cocaine from an individual whom Gumbs knew as "Red." Once Gumbs arrived at Red's apartment, the men went into the kitchen, where Red used scales to weigh out 14 grams of cocaine. After verifying its authenticity, Gumbs paid Red for the cocaine. While Red was counting the money, defendant walked downstairs and entered the kitchen. Gumbs asked Red the price for an ounce of cocaine. After Red responded that an ounce would cost $800, defendant said, "if you keep fuc*ing with me I'll give it to you for $750." A few minutes later, Gumbs left Red's apartment to meet the officers and provide them with evidence from the transaction.

Based on the 13 April 2011 controlled buy, on 15 April 2013, defendant was indicted for one count each of (1) sale of cocaine (12 CRS 55132); (2) delivery of cocaine (12 CRS 55132); (3) possession with intent to sell or deliver cocaine (12 CRS 55133);

and (4) possession of cocaine (12 CRS 55133).[1] On 16 February 2015, defendant was indicted for attaining habitual felon status (15 CRS 1303).

A jury trial commenced in Gaston County Criminal Superior Court on 20 April 2015. When defendant moved to dismiss all charges following the State's presentation of evidence, he requested the trial court to "pay particular attention to the evidence in 12 CRS 55132, the two counts of sell and deliver" related to the 13 April 2011 controlled buy. After dismissing the simple possession charge in 12 CRS 55133, the trial court denied defendant's motion as to the remaining charges. Defendant did not present evidence but renewed his motion to dismiss at the close of all evidence, which the trial court denied.

On 22 April 2015, the jury returned verdicts finding defendant guilty of the remaining charges in 12 CRS 55132-33. Defendant subsequently pleaded guilty to attaining habitual felon status in 15 CRS 1303. After consolidating the offenses for judgment, the trial court sentenced defendant to serve 80-105 months in the custody of the North Carolina Division of Adult Correction.

II. Writ of Certiorari

[1] Defendant was also indicted on 15 April 2013 for one count each of (1) trafficking in cocaine by possession (12 CRS 55137); (2) trafficking in cocaine by sale (12 CRS 55137); and (3) trafficking in cocaine by delivery (12 CRS 55139). These offenses are based on separate transactions from those in the instant case and are not related to defendant's appeal. Accordingly, we will not address these offenses further.

Defendant failed to timely appeal to this Court. *See* N.C.R. App. P. 4(a)(1)-(2) (providing, *inter alia*, that a criminal defendant "may take appeal by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment"). However, on 26 July 2016, defendant filed a petition for writ of certiorari requesting this Court's review of the judgment entered in 12 CRS 55132-33. On 11 August 2016, we granted defendant's petition for writ of certiorari. *See* N.C.R. App. P. 21(a)(1) (providing, *inter alia*, that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action"). Accordingly, we have jurisdiction over defendant's appeal.

III. Analysis

A. Denial of Defendant's Motion to Dismiss

On appeal, defendant first argues that the trial court erred by denying his motion to dismiss the charges of sale, delivery, and possession with intent to sell or deliver cocaine. We disagree.

1. Standard of Review

In reviewing a criminal defendant's motion to dismiss, the question for the trial 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 defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "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). "[T]he 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).

"The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

> If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

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

2. N.C. Gen. Stat. § 90-95(a)(1) Offenses

N.C. Gen. Stat. § 90-95(a)(1) (2015) makes it unlawful "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance" such as cocaine. *See* § 90-90(1)(d) (providing that cocaine is a Schedule II controlled substance). For purposes of the North Carolina Controlled Substances Act, "[a] sale is a transfer of property for a specified price payable in money[,]" *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990) (original emphasis omitted), whereas "delivery" means "the actual[,] constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." N.C. Gen. Stat. § 90-87(7).

To prove the offense of possession with intent to sell or deliver, the State must show that (1) the defendant possessed a substance; (2) the substance was a controlled substance; and (3) the defendant intended to sell or deliver the controlled substance. *See State v. Fletcher*, 92 N.C. App. 50, 55, 373 S.E.2d 681, 685 (1988). "An accused has possession of a controlled substance within the meaning of [N.C. Gen. Stat. §] 90-95(a)(1) when he has both the power and the intent to control its disposition or use." *Id.* at 56, 373 S.E.2d at 685 (citation and quotation marks omitted). "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 fact that a person is present in a room where drugs are located, nothing else appearing, does

not mean that person has constructive possession of the drugs. If possession of the premises is non-exclusive, there must be evidence of other incriminating circumstances to support constructive possession." *Id.* (citations 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." *Id.*

In the instant case, the State's theory was that defendant acted in concert with Red to commit these offenses. "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). To secure a conviction based on an "acting in concert" theory of liability, "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 quotation marks omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

"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; *see also James*, 81 N.C. App. at 97, 344 S.E.2d at 81. Nevertheless, in *State v. Lewis*, 162 N.C. App. 277, 590 S.E.2d 318 (2004), we held that the jury could reasonably infer that the defendant acted in concert with "Jennette" to possess and sell crack cocaine, where the evidence showed that:

> Defendant was sitting in the truck beside Jennette when Jennette spoke with the officers about their desire to purchase crack cocaine. Defendant brought over collateral . . . and waited with the officers while Jennette took the officers' money to purchase the drugs. Defendant told the officers that he and Jennette had watched the officers' unsuccessful attempts to buy drugs and had decided to follow them. Defendant also knew where Jennette was getting the crack cocaine and smoked some of it with Jennette following the sale. At no time while defendant was engaged in these acts did he appear confused about what was going on or why he was present. In fact, defendant even told the officers that he had "tried to stay out of this drug game" but no longer gave "a f--k about it."

Lewis, 162 N.C. App. at 282, 590 S.E.2d at 322.

On appeal, defendant argues that there was insufficient evidence to send the charges to the jury because he was not in the room when Gumbs purchased the cocaine from Red, and his statement "if you keep fuc*ing with me I'll give it to you for $750" merely "created a suspicion" of a common plan or scheme. We disagree.

Although defendant was not *actually* present when Gumbs purchased the cocaine, he entered the kitchen immediately thereafter, while Red was still counting

money from the sale. Accordingly, defendant was "close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime." *Mann*, 355 N.C. at 306, 560 S.E.2d at 784. Defendant's use of the present-tense verb phrase "if you keep fuc*ing with me" suggests that he played an active, ongoing role in the 13 April 2011 transaction, and that he and Red shared a "common plan or purpose" of selling cocaine. *Joyner*, 297 N.C. at 356, 255 S.E.2d at 395. Indeed, Gumbs testified that he inferred defendant's statement to mean "if I keep coming around, I keep buying, and I keep spending money with him, he'll give it to me for that price."

Furthermore, while it is undisputed that defendant was not in exclusive possession of the apartment where the transaction occurred, there were sufficient "other incriminating circumstances" to support an inference of constructive possession. When defendant entered the kitchen, Red was counting money, and the men were discussing prices for a much larger future purchase. In the presence of cocaine, scales, and cash, defendant offered to sell Gumbs an ounce of cocaine for $750, suggesting that he had "both the power and the intent to control its disposition or use." *Fletcher*, 92 N.C. App. at 56, 373 S.E.2d at 685. "At no time while defendant was engaged in these acts did he appear confused about what was going on or why he was present." *Lewis*, 162 N.C. App. at 282, 590 S.E.2d at 322.

Taken in the light most favorable to the State, this evidence supports a reasonable inference of defendant's guilt. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

Therefore, the trial court appropriately determined that it was "for the jury to decide whether the facts, taken singly or in combination, satisf[ied] it beyond a reasonable doubt that . . . defendant [wa]s actually guilty." *Id.* (original emphasis omitted). Accordingly, we overrule defendant's challenge to the denial of his motion to dismiss the charges of sale, delivery, and possession with intent to sell or deliver cocaine.

B. Multiple Punishments for Sale and Delivery of Cocaine

Defendant next argues that the trial court erroneously sentenced him for both sale and delivery arising from a single transfer of cocaine. We agree.

In *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990), our Supreme Court considered this very issue and concluded that N.C. Gen. Stat. § 90-95(a)(1) "creates three offenses: (1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance." 327 N.C. at 381, 395 S.E.2d at 126. The Court reasoned that by phrasing the statute

> to make it unlawful "to manufacture, *sell or deliver*, or possess with intent to manufacture, sell or deliver, a controlled substance" (emphasis added), the legislature, *solely for the purposes of this statutory subsection*, has made each single transaction involving transfer of a controlled substance one criminal offense, which is committed by either or both of two acts – sale or delivery.

Id. at 382, 395 S.E.2d at 126-27. Therefore, "a defendant may not . . . be convicted under [N.C. Gen. Stat.] § 90-95(a)(1) of both the sale *and* the delivery of a controlled

substance arising from a single transfer." *Id.* at 382, 395 S.E.2d at 127; *accord State v. Fleig*, 232 N.C. App. 647, 754 S.E.2d 461 (2014); *State v. Rogers*, 186 N.C. App. 676, 652 S.E.2d 276 (2007).

Here, it is undisputed that defendant's convictions for sale and delivery of cocaine in 12 CRS 55132 arose from the same controlled buy conducted on 13 April 2011. The State concedes—and we agree—that defendant was improperly sentenced for both offenses. The trial court consolidated into one judgment the three offenses arising from the 13 April 2011 transfer and sentenced defendant as a habitual felon. As a result, "we are unable to determine what weight, if any, the trial court gave each of the separate convictions for sale and for delivery in calculating the sentence[] imposed upon the defendant. This case must thus be remanded for resentencing." *Moore*, 327 N.C. at 383, 395 S.E.2d at 127-28. On remand, the judgment should be amended to reflect that defendant was convicted in 12 CRS 55132 of a single count of the "sale or delivery" of a Schedule II controlled substance. *Id.* at 383, 395 S.E.2d at 128.

IV. Conclusion

We hold that the trial court did not err by denying defendant's motion to dismiss, because there was substantial evidence to support the charges and the State's acting in concert theory of liability. However, since the court erroneously

sentenced defendant for both sale and delivery arising from a single transfer of cocaine, we remand to the trial court for resentencing in 12 CRS 55132.

NO ERROR IN PART; REMANDED FOR RESENTENCING IN PART.

Chief Judge McGEE and Judge DILLON concur.

Report per Rule 30(e).