An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1215

Filed: 7 August 2018

Union County, No. 12 CRS 53800

STATE OF NORTH CAROLINA

v.

MARVIN LOUIS MILLER, JR.

Appeal by defendant from judgment entered 28 April 2017 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepción, for the State.

Leslie Rawls for defendant.

ELMORE, Judge.

Defendant Marvin Louis Miller, Jr., appeals from judgment entered on his conviction of knowingly keeping or maintaining a dwelling used for keeping and selling cocaine. On appeal, defendant argues the trial court erred by denying his motion to dismiss for insufficiency of the evidence. Because we conclude that the

State failed to present sufficient evidence to sustain a conviction for this charge, we reverse the judgment of the trial court.

The evidence at trial tended to show that as of 2012, a woman named Lenita Craig had been working as a confidential informant for the Union County Sheriff's Office (UCSO) for approximately two years. In her role as an informant, Craig was paid to make undercover drug buys.

Upon receiving a complaint that defendant was selling drugs from his home, Detective Mark Thomas of the UCSO contacted Craig and arranged for her to buy drugs from defendant on the afternoon of 7 June 2012. Prior to the drug buy, law enforcement officers provided Craig with a vehicle, recording device, and $48.00 in cash. Detective Thomas then followed Craig to defendant's home and parked close enough to listen in on the device and wait.

In defendant's living room, Craig gave defendant the $48.00 for the drugs, and defendant went outside to retrieve the drugs near an old school bus by his home. When he returned, defendant laid several small white rocks on his living room table. Craig then gathered the rocks and left defendant's home. A subsequent chemical analysis revealed that the rocks contained 0.22 grams of cocaine base.

On 8 October 2012, defendant was indicted on one count each of possession with intent to sell and deliver cocaine, sale of cocaine, and maintaining a place to keep controlled substances. At the conclusion of the State's evidence, defendant

moved to dismiss the charge of maintaining a place to keep controlled substances because the evidence established only a single sale, "and the law required more to support this count." The trial court denied the motion, which was renewed and again denied. Defendant entered timely notice of appeal.

Discussion

In his sole argument on appeal, defendant contends the trial court erred by denying his motion to dismiss. He argues that the isolated incident of being present in his home while selling drugs was insufficient to warrant a charge to the jury of keeping or maintaining a dwelling used for keeping and selling cocaine. We agree.

"This Court reviews the 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). When reviewing a challenge to the denial of a motion to dismiss based on insufficient evidence, the relevant inquiry is "whether the State presented 'substantial evidence' in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005). " 'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citation omitted). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by the evidence." *Id.* (citation omitted).

To survive a motion to dismiss in the present case, the State must have presented substantial evidence that defendant (1) knowingly (2) kept or maintained (3) a dwelling (4) which is used for the keeping or selling (5) of controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2017); *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). On appeal, defendant challenges only whether the State introduced sufficient evidence that his dwelling was "kept" for the use of keeping or selling cocaine. As explained by our Supreme Court in *State v. Mitchell*, the word " '[k]eep' . . . denotes not just possession, but possession that occurs over a duration of time." 336 N.C. at 32, 442 S.E.2d at 30. Defendant relies primarily on this Court's decision in *State v. Dickerson*, 152 N.C. App. 714, 568 S.E.2d 281 (2002), to support his argument that the State's evidence of a single sale was insufficient to withstand his motion to dismiss.

In *Dickerson*, the defendant sold crack cocaine to a police informant from the passenger seat of the defendant's vehicle while an unknown individual occupied his driver's seat. *Id.* at 715, 568 S.E.2d at 281. However, "the State presented no evidence in addition to [the] Defendant having been seated in a vehicle when the cocaine purchase occurred. As such, the trial court erred by failing to dismiss the charge of keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine." *Id.* at 716–17, 568 S.E.2d at 282.

While the alleged "place" used for keeping a controlled substance in the instant case was a dwelling rather than a vehicle, the rationale in *Dickerson* is applicable here: "the fact that a defendant was in his [dwelling] on one occasion when he sold a controlled substance does not by itself demonstrate the [dwelling] was kept or maintained to sell a controlled substance." *Id*. at 716, 568 S.E.2d at 282. Accordingly, we hold that the trial court erred by failing to dismiss the charge of keeping or maintaining a dwelling used for keeping and selling cocaine.

Conclusion

Because the State failed to present sufficient evidence that defendant was keeping or maintaining a dwelling for the keeping of a controlled substance, the trial court erred in denying defendant's motion to dismiss.

REVERSED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).