An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1030

Filed: 7 August 2018

Alamance County, No. 15-CRS-52242

STATE OF NORTH CAROLINA

v.

LEONARDO MENDEZ MELGAREJO, Defendant.

Appeal by defendant from a judgment entered 16 February 2017 by Judge Reuben F. Young in Alamance County Superior Court. Heard in the Court of Appeals 6 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Julie C. Boyer for defendant-appellant.

BERGER, Judge.

An Alamance County jury convicted Leonardo Mendez Melgarejo ("Defendant") of possession with intent to sell or deliver cocaine and maintaining a dwelling place for keeping or selling a controlled substance in February 2017. On appeal, Defendant contends the trial court erred by denying his motion to dismiss on

the ground that the State failed to prove constructive possession of the controlled substance. We disagree.

Factual and Procedural Background

On May 1, 2015, officers with the Alamance Narcotics Enforcement Team ("ANET") obtained a search warrant for Defendant's truck and his residence on North Avenue in Burlington. Pursuant to the search warrant, ANET officers initiated a traffic stop of Defendant's vehicle and found $2,114 in cash and a key to the North Avenue residence in Defendant's possession. Officers traveled to Defendant's residence, and used Defendant's key to gain entry. During the search of the residence, officers seized two containers of suspected cocaine inside a closet in the front bedroom, digital scales, Defendant's passport, and a remote that had the name "Jorge," a name by which Defendant was known.

On January 4, 2016, the Alamance County Grand Jury indicted Defendant for one count of possession with intent to sell and deliver cocaine and one count of maintaining a dwelling for the keeping or selling of controlled substances. At trial, Defendant moved to dismiss all charges against him on the ground that the State failed to introduce sufficient evidence of possession. The trial court denied the motion. Defendant renewed his motion to dismiss at the close of all evidence, which was also denied.

On February 16, 2017, Defendant was convicted of felonious possession with intent to sell and deliver cocaine and misdemeanor maintaining a dwelling for keeping or selling a controlled substance. Defendant was sentenced to eight to nineteen months in prison. Defendant timely appealed and argues that the State did not provide sufficient evidence to prove that he possessed a controlled substance.

Standard of Review

"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) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). "In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essential element of the offense and substantial evidence that the defendant was the perpetrator of the offense." *State v. Smith*, 307 N.C. 516, 518, 299 S.E.2d 431, 434 (1983). "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) (citation omitted).

Analysis

"The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175 (citations omitted), *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005). Possession of contraband may be either actual or constructive. *State v. Sawyers*, ___ N.C. App ___, ___, 808 S.E.2d 148, 153 (2017). "Actual possession requires that a party have physical or personal custody of the item." *State v. Squirewell*, ___ N.C. App. ___, ___, 808 S.E.2d 312, 317 (2017). "Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397 (1996) (citation omitted).

To establish constructive possession, the State is not required to prove that a defendant has "exclusive control" of the area where the contraband is found. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). But where a defendant does not have exclusive control of the area where contraband is found, "the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (citation and quotation marks omitted). "[C]ases addressing constructive possession have tended

to turn on the specific facts presented." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009).

Here, ANET officers conducted extensive surveillance of Defendant. Upon stopping Defendant and conducting the search pursuant to a search warrant, Defendant had more than $2,000.00 in cash and a key to the residence where cocaine was located. In addition, Defendant's passport and other personal effects were located in the North Avenue residence. *See State v. Brown*, 310 N.C. 563, 569-70, 313 S.E.2d 585, 589 (1984) (finding sufficient evidence of constructive possession where the defendant had on his person a key to the residence where the drugs were found, had over $1700 in his pockets, and police had surveilled him for some time at the location where the police found the controlled substance).

Moreover, Defendant had exclusive possession of the room in which the cocaine was found. Defendant had been renting a room at the North Avenue location for more than six months. Although he initially shared the room with another man, Defendant lived in the room by himself. The person from whom Defendant rented the house testified that he went everywhere in the house apart from Defendant's room, referring to it as "a very private place where I don't have to be." Furthermore, the cocaine was found in Defendant's bedroom along with Defendant's government-issued identification. *See Miller*, 363 N.C. at 100, 678 S.E.2d at 595 (concluding that defendant's birth certificate and State-issued identification card, which were located

in the same room as the cocaine along with other pieces of evidence, could be considered an incriminating circumstance); *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684-85 (1971) (finding sufficient evidence of constructive possession where heroin was found in the defendant's bedroom, the premises were under his complete control, an Army identification card bearing his name was also found in the bedroom, and defendant testified that he had provided heroin for resale).

Thus, the evidence demonstrates extensive police surveillance of the Defendant and his residence; that Defendant possessed a key to the residence under surveillance as well as a large sum of money when he was arrested; and evidence indicated that Defendant was in exclusive possession of the room in which the cocaine was located. Under these circumstances, we hold the State presented sufficient incriminating circumstances to permit a jury to conclude that Defendant had constructive possession of the cocaine.

Therefore, the trial court properly denied Defendant's motion to dismiss, and we find no error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).