An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-75

Filed: 7 August 2018

Johnston County, No. 16-CRS-001495

STATE OF NORTH CAROLINA

v.

ALFONSO MOORE, Defendant.

Appeal by defendant from judgment entered 24 May 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 6 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Laura H. McHenry, for the State.

Richard J. Costanza for defendant-appellant.

BERGER, Judge.

Alfonso Moore ("Defendant") appeals from the judgment entered upon his conviction of possession of cocaine and his guilty plea to having attained habitual felon status.

Factual and Procedural Background

The State's evidence tended to show that on February 23, 2016 at approximately 1:30 a.m., Sergeant Harvey Godwin ("Sergeant Godwin") with the Kenly Police Department responded to a report that an occupant of a vehicle parked at a truck stop was masturbating. When Sergeant Godwin approached the vehicle, he observed Defendant sitting alone in the driver's seat with his genitals exposed. Defendant's eyes were closed, and his head was turned towards the passenger seat. Sergeant Godwin also noticed that Defendant's left hand was next to his testicles, and his right hand was draped across the center console, resting on the edge of the passenger seat.

The vehicle was not registered to Defendant, but to Nora Moore Joyner, whose connection to Defendant is unknown. Sergeant Godwin was unsure of Defendant's condition, so he opened the unlocked car door to check on Defendant's welfare. As he opened the door, Sergeant Godwin observed what he believed to be a crack pipe in the interior door handle. He retrieved the crack pipe and placed it on top of the car. Because Defendant's head was still turned towards the passenger seat, Sergeant Godwin tried to get Defendant's attention by calling out to him and shaking his shoulder several times. Defendant responded after about ten seconds, appearing startled and disoriented. Sergeant Godwin asked Defendant to pull up his pants and step out of the vehicle.

After Defendant exited the vehicle, Sergeant Godwin handcuffed him and advised Defendant that he was being detained for possession of the crack pipe. While Defendant was standing next to the vehicle, Sergeant Godwin looked into the car and observed a cell phone sitting on the center console playing a pornographic video. When he reached in to pick up the phone, he noticed a small rock-type substance that he believed to be crack cocaine sitting on the passenger seat. The substance was readily observable and located no more than six inches from where Defendant's right hand had been resting when Sergeant Godwin initially approached the vehicle. Sergeant Godwin secured the cocaine and crack pipe in an evidence bag and arrested Defendant for possession of cocaine. Subsequent testing performed by the State Bureau of Investigations confirmed that the substance was cocaine.

The trial court denied Defendant's motion to dismiss at the conclusion of the State's evidence and at the close of all the evidence. The jury found Defendant guilty of possession of cocaine, and Defendant subsequently pled guilty to having attained habitual felon status. The trial court sentenced Defendant to forty to sixty months in prison. Defendant appeals, arguing that the trial court erred in denying his motion to dismiss the charge of possession of cocaine. Specifically, Defendant contends that the State's evidence was insufficient to establish that he constructively possessed the cocaine found in the automobile. We disagree.

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). "Upon defendant's motion for dismissal, the question for the 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 and quotation marks 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).

"When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009). "The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citations omitted). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture . . . the motion should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted).

Analysis

To survive a motion to dismiss a charge of possession of cocaine, the State must provide substantial evidence to prove two essential elements beyond a reasonable doubt: "(1) defendant possessed the substance; and (2) the substance was a controlled substance." *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007); *see also* N.C. Gen. Stat. § 90-95(a)(3) (2017). Defendant does not contest that the cocaine was a controlled substance but challenges the sufficiency of the evidence regarding his possession of the cocaine.

"Possession of contraband may be actual or constructive." *State v. Chekanow*, ___ N.C. ___, ___, 809 S.E.2d 546, 550 (2017) (citing *State v. Minor*, 290 N.C. 68, 73, 224 S.E.2d 180, 184 (1976)). Constructive possession exists when the defendant has "the intent and capability to maintain control and dominion over" the contraband. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citation omitted). "The defendant may have the power to control either alone or jointly with others." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). When contraband is "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). "However, unless the person has exclusive possession of the place where the narcotics are 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).

As this Court has explained,

> [i]n car cases, not only is ownership sufficient, but [a]n inference of constructive possession can also arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Hudson, 206 N.C. App. 482, 490, 696 S.E.2d 577, 583 (citation and quotation marks omitted), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010); *accord State v. Eppley*, 282 N.C. 249, 254, 192 S.E.2d 441, 445 (1972) ("One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof." (citation omitted)).

Here, the State's undisputed evidence showed that Defendant was the sole occupant of the vehicle and was sitting in the driver's seat. Although another individual was the registered owner of the vehicle, the evidence tended to show that Defendant had exclusive custody of the vehicle at the time the cocaine was found. This evidence, standing alone, is arguably sufficient to support a reasonable inference that Defendant possessed the cocaine at issue. *See State v. Best*, 214 N.C. App. 39,

47, 713 S.E.2d 556, 562 (surmising that evidence that the "revolver was found in a van driven by Defendant, standing alone, might be sufficient to permit a reasonable inference that Defendant possessed the firearm in question"), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011).

The State, however, presented additional evidence tending to show that Defendant possessed the cocaine. Sergeant Godwin testified that the cocaine was located no more than six inches from where Defendant's right hand had been resting when he initially approached the vehicle. *See Harvey*, 281 N.C. at 12-13, 187 S.E.2d at 714 ("[T]he State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." (citation and quotation marks omitted)). Moreover, the cocaine was located in plain view within Defendant's reach. *See State v. Rice*, ___ N.C. App. ___, ___, 798 S.E.2d 432, 435 (2017) ("Incriminating circumstances relevant to constructive possession include evidence that defendant . . . was near contraband in plain view . . . ."). Sergeant Godwin also found drug paraphernalia in the car where Defendant was sitting. *See Matias*, 354 N.C. at 552-53, 556 S.E.2d at 271 (holding that a jury could reasonably determine that a passenger had knowledge that narcotics were in the vehicle when, *inter alia*, officers discovered marijuana seeds and rolling papers inside the car).

This evidence, when viewed in the light most favorable to the State, was sufficient to support a reasonable inference that the cocaine was in Defendant's possession, and thus, the issue was properly submitted to the jury. The trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).