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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-315

Filed: 15 January 2019

Rowan County, Nos. 15 CRS 2590, 51562, 51564

STATE OF NORTH CAROLINA

v.

TONY JOHNELL MILLS, Defendant.

Appeal by Defendant from judgment entered 27 September 2017 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 20 December 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Tony J. Mills ("Defendant") appeals from a judgment entered upon his convictions for possession of a firearm by a convicted felon, felony possession of a Schedule II controlled substance, and having attained habitual felon status. We find no error.

I. Factual and Procedural History

On 17 March 2015, Probation Officer Patrick Carter ("Officer Carter") was on duty in Rowan County conducting home visits. Officer Carter arrived at Defendant's residence at 6:46 p.m. and found Defendant and an unknown male inside. Officer Carter stated Defendant was normally very calm and laid back, but on this occasion he was acting strange. Officer Carter testified Defendant appeared intoxicated, and he could smell alcohol on his breath, but he was "still very articulate and extremely high energy." Officer Carter spoke with Defendant briefly and then left, but subsequently decided to return to the residence to conduct a search due to Defendant's "suspicious behavior."

Upon his return, Officer Carter informed Defendant he wished to search his residence as a part of his probation, and Defendant consented. The unidentified male requested to leave and was allowed to do so. Officer Carter placed Defendant in handcuffs per standard practice during a probation search. Prior to beginning the search, Defendant informed Officer Carter there was marijuana on a table in the living room and cocaine in a dresser in his bedroom. Officer Carter collected the items and placed them in the kitchen. He then asked Defendant if there were any other items in the residence he needed to know about, and Defendant told Officer Carter there was a handgun under his bed. Immediately thereafter, Officer Carter called dispatch and requested a police officer come to assist him with the search because he did not feel comfortable retrieving the firearm while alone with Defendant. Upon the

officer's arrival, Officer Carter retrieved the handgun from underneath the mattress. Officer Carter conducted a further search of the residence and found another baggie of a white substance in another dresser in Defendant's bedroom.

On 8 June 2015, Defendant was indicted for possession of a firearm by a convicted felon, felony possession of a Schedule II controlled substance, and having attained habitual felon status. At trial, Defendant testified the unidentified male Carter encountered on 17 March 2015 was his temporary roommate, Michael Smith ("Smith"). Defendant further testified Smith was sleeping in the bedroom where the drugs and firearm were found, and they belonged to Smith.

On 27 September 2017, Defendant was convicted by a jury of the two possession offenses. Defendant subsequently pled guilty to attaining habitual felon status. The trial court consolidated the offenses for judgment and sentenced Defendant to 76 to 104 months imprisonment. Defendant gave written notice of appeal.

II. Standard of Review

The trial court's denial of Defendant's motion to dismiss is reviewed *de novo*. *See State v. Hernandez*, 170 N.C. App. 299, 612 S.E.2d 420, (2005). "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) (quotation marks and citations omitted). "[T]he trial court's

conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). "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) (citation omitted). The evidence must be examined in the light most favorable to the State. *See State v. Harrison*, 169 N.C. App. 257, 263, 610 S.E.2d 407, 412-13 (2005).

III. Analysis

Defendant argues on appeal the trial court erred in denying his motion to dismiss the possession charges because there was insufficient evidence he constructively possessed the cocaine and handgun found in the bedroom of his home. We disagree.

The essential elements of possession of a firearm by a felon are: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007); *see also* N.C. Gen. Stat. § 14-415.1 (2017). "Possession of a controlled substance has two essential elements: (1) the substance must be possessed, and (2) the substance must be knowingly possessed." *State v. Hall*, 203 N.C. App. 712, 714, 692 S.E.2d 446, 449 (citation

omitted); *see also* N.C. Gen. Stat. § 90–95(a)(3) (2017) ("Except as authorized by this Article, it is unlawful for any person . . . [t]o possess a controlled substance.").

"Possession may be actual or constructive." *State v. Sawyers*, ___ N.C. App ___, ___, 808 S.E.2d 148, 153 (2017) (citation omitted). "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) (citations omitted). "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 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) (citations omitted). Our Supreme Court stated:

> Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry. In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession, a review of this Court's cases reveals that we have considered the following factors: (1) the defendant's ownership and occupation of the property . . .; (2) the defendant's proximity to the contraband; (3) indicia of the

> defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

State v. Chekanow, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018) (citations omitted).

In the instant case, the contraband was found in Defendant's home, and he was the only person listed on the lease. *See id.* at 497, 809 S.E.2d at 552-53 (stating "ownership of the premises on which the contraband is found is 'strong evidence of control,' and thus, should be considered as a weighty factor in the analysis." (citation omitted)). Additionally, Officer Carter testified he found multiple magazine subscriptions with Defendant's name on them, as well as clothing "for a single person that matched [Defendant's] size" in the bedroom where he recovered the contraband. *See State v. Miller*, 363 N.C. 96, 100, 678 S.E.2d 592, 595 (2009) (finding incriminating circumstances sufficient to demonstrate defendant's constructive possession of the bedroom where contraband was found where the defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom); *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684 (1971) (concluding that defendant exercised constructive possession over the bedroom in which heroin was found where his Army identification card and other personal papers bearing his name were also found in the bedroom). Furthermore, at no point did Defendant inform Officer Carter the contraband did not belong to him, and Officer

Carter testified Defendant told him the contraband could be found in *his* bedroom and under *his* bed. While our Supreme Court's previous holdings in *Miller* and *Allen* are not directly congruent to the case *sub judice*, they are instructive in weighing the factors promulgated in *Chekanow*. Thus, Officer Carter's testimony presented sufficient evidence necessary to allow a jury to reasonably find Defendant guilty.

Defendant cites several inconsistencies in Officer Carter's testimony and claims it lacked specificity, reliability, and corroboration. Thus, Defendant argues a jury could not reasonably infer Defendant constructively possessed the contraband based upon Officer Carter's testimony. Defendant's arguments, however, concern the weight of the evidence and not its sufficiency. *See State v. Brown*, 177 N.C. App. 177, 187, 628 S.E.2d 787, 793 (2006) ("Alleged contradictions or issues of credibility are for a jury to resolve and do not warrant dismissal." (citation omitted)). Therefore, we hold the trial court did not err by denying Defendant's motion to dismiss. Accordingly, we find no error.

IV. Conclusion

The trial court did not err in denying Defendant's motion to dismiss, because the State presented sufficient evidence satisfying the elements of the crimes charged to support the jury's verdict. Accordingly, we find no error.

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).