IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-777

Filed: 26 March 2019

Gaston County, No. 15 CRS 062832

STATE OF NORTH CAROLINA

v.

ROGER DALE FRANKLIN, JR., Defendant.

Appeal by Defendant from judgment dated 18 May 2017 by Judge Yvonne Mims Evans in Superior Court, Gaston County. Heard in the Court of Appeals 26 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for Defendant.

McGEE, Chief Judge.

Roger Dale Franklin, Jr. ("Defendant") was charged with possession of a methamphetamine precursor, methamphetamine trafficking, and the manufacture of methamphetamine in indictments dated 21 March 2016. At the close of the State's evidence, the trial court granted Defendant's motion to dismiss the trafficking charge, but denied Defendant's motion to dismiss the remaining charges. Defendant did not

present evidence. The jury found Defendant guilty of possession of a methamphetamine precursor and not guilty of manufacturing methamphetamine. Defendant contends on appeal that the trial court erred in denying his motion to dismiss. For the reasons stated below, we agree.

I. Factual and Procedural Background

Evidence presented at trial tended to show that an informant told the Mount Holly Police Department that methamphetamine was likely being manufactured at 116 Edinburgh Court in Mount Holly, North Carolina. Several police officers searched the garbage can in front of that address and found items commonly used to make methamphetamine. The officers obtained a search warrant for the house located at 116 Edinburgh Court ("the house") and executed it three days later. Detective Fred Tindall ("Detective Tindall") testified he smelled ammonia and sulfur upon approaching the house, which were odors he believed to be consistent with methamphetamine manufacturing. The officers knocked on the door and heard movement inside the house, but no one answered. The officers then forced down the door with a battering ram, entered the house, and found Kelly Swayngim ("Ms. Swayngim") lying face down on the floor of the living room. Defendant was also within the house when the officers entered. The officers placed Ms. Swayngim and Defendant into custody and searched the house.

Detective Tindall testified the officers found a vial containing eight grams of methamphetamine in the house. Detective Tindall also photographed many items consistent with methamphetamine manufacturing strewn about the house, including empty "blister packs" for pseudoephedrine — a methamphetamine precursor — and coffee filters, which Detective Tindall claimed are used to separate methamphetamine oil from a solid byproduct. The only pseudoephedrine officers located at the house was detected on a coffee filter found in the kitchen trash can that was later laboratory tested. The officers did not locate methamphetamine or pseudoephedrine on the persons of Defendant or Ms. Swayngim, nor was there evidence about the proximity of either Defendant or Ms. Swayngim to the blister packs, coffee filters, methamphetamine, pseudoephedrine, or other items in the house.

Although both Ms. Swayngim and Defendant were present at the house when it was searched, Detective Tindall testified Gaston County Tax Department records "show[ed] that the current owner [of the house], number one, was Taylor Daniel Pension Trust; and current owner number two, Sarah Grace Pension Trust c/o Kelly E. Swayngim, Trustee, 116 Edinburgh Court." Officer Danny Osborne ("Officer Osborne") stated he "believe[d he] remember[ed] hearing [from another officer] that" the Gaston County Department of Social Services had called the Mount Holly Police Department and mentioned Defendant lived at the house, but he "c[ould]n't testify

on that." Detective Tindall also testified he found correspondence with Defendant's name on it located in an outside garbage can, but did not testify whether it was addressed to or sent from Defendant.

II. Analysis

Defendant contends the trial court erred in denying his motion to dismiss the charge of possession of a methamphetamine precursor at the close of the State's evidence. We agree.

"Upon a defendant's motion to dismiss for insufficient evidence, the question for the court is 'whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.'" *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* "We 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. Mitchell*, 234 N.C. App. 423, 426, 759 S.E.2d 335, 338 (2014) (quoting *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994)). "For purposes of a motion to dismiss, evidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002) (citation omitted). "If the evidence fails to rise above this

threshold, 'the motion for nonsuit should be allowed . . . . even though the suspicion so aroused by the evidence is strong.'" *State v. Miller*, 363 N.C. 96, 104, 678 S.E.2d 592, 597 (2009) (citation omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 550 (citation omitted). N.C. Gen. Stat. §§ 90-95(d1)(2)(a)-(b) (2017) provides that:

> [I]t is unlawful for any person to:
> a. Possess an immediate precursor chemical with intent to manufacture a controlled substance; or
> b. Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance[.]

"Possession of contraband may be actual or constructive." *Chekanow*, 370 N.C. at 493, 809 S.E.2d at 550 (citation omitted). In *Chekanow*, our Supreme Court summarized the law of constructive possession as follows:

> A defendant constructively possesses contraband when he or she does not have actual possession of the contraband but has the intent and capability to maintain control and dominion over it. A finding of constructive possession requires a totality of the circumstances analysis. The defendant may have the power to control either alone or jointly with others.
>
> 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. 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.

Id. at 493, 809 S.E.2d at 550 (internal citations and quotations omitted). "[F]or evidence of constructive possession to be sufficient, if the defendant owns the premises on which the contraband is found, (1) he must also have exclusive possession of the premises . . . or (2) the State must show additional incriminating circumstances demonstrating the defendant has dominion or control over the contraband." *Id.* at 494-95, 809 S.E.2d at 552 (citations omitted). Our Supreme Court identified the following factors to consider in determining whether sufficient incriminating circumstances exist when ownership is nonexclusive:

> (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.

Id. at 496, 809 S.E.2d at 552 (citations omitted).

In the present case, the State presented no evidence that Defendant had actual possession of the precursor. The State instead contends that "because the Defendant was a resident, and present, when the chemical precursor was found, he was at least in constructive possession of the pseudoephedrine." We disagree.

In *State v. Tate*, upon which the State relies, this Court held "[i]n North Carolina, an inference of constructive possession arises against an owner or lessee who occupies the premises where contraband is found, regardless of whether the owner or lessee has exclusive *or nonexclusive* control of the premises." *State v. Tate*, 105 N.C. App. 175, 179, 412 S.E.2d 368, 370-71 (1992) (emphasis added). "This Court is without authority to ignore its own precedent, which is binding upon it unless overturned by a higher court." *State v. Change Yang*, 174 N.C. App. 755, 759, 622 S.E.2d 632, 635 (2005), *writ denied, discretionary review denied*, 360 N.C. 296, 628 S.E.2d 12 (2006). However, in *Chekanow*, our Supreme Court stated "[i]n a nonexclusive possession context, ownership of property is insufficient on its own to withstand a motion to dismiss." *Chekanow*, 370 N.C. at 495, n.3, 809 S.E.2d at 551, n.3 (citing *Tate*, 105 N.C. App. at 179, 412 S.E.2d at 370-71). Our Supreme Court cited the precise passage from *Tate* relied on by the State as contrary to this proposition. *See id.* Thus, there can be no "inference of constructive possession" based on nonexclusive ownership alone, and in such situations, courts must look to "other incriminating circumstances." *Chekanow*, 370 N.C. at 495, 809 S.E.2d at 551. The State's reliance on *Tate* is misplaced. We apply the framework summarized in *Chekanow* to determine whether there was sufficient evidence to support the conclusion that Defendant in this case constructively possessed contraband.

We first consider whether there was sufficient evidence to conclude Defendant owned the house in question. The State cites three grounds for its assertion that sufficient evidence of ownership exists: (1) Officer Osborne's testimony that he believed Defendant lived at the house because of statements made by another officer, whose belief in turn stemmed from a purported call from the Department of Social Services mentioning Defendant living there; (2) the letter Detective Tindall testified he found in the garbage can outside the house with Defendant's name on it; and (3) Defendant's presence at the house. Officer Osborne did not have a basis for believing Defendant lived at the house beyond another officer's belief that there had been a call from DSS and indeed Officer Osborne testified that he "[could not] testify to that" and "didn't feel comfortable speculating on that." This testimony "raises no more than mere suspicion or conjecture" and does not rise to the level of substantial evidence. *Butler*, 356 N.C. at 145, 567 S.E.2d at 139-40. Detective Tindall's testimony that he found a letter with Defendant's name on it in an outside garbage can is also insubstantial, since he specifically did not testify whether the letter was addressed to or sent from Defendant, and, if the letter was from Defendant, a reasonable inference would be Defendant did not live at the house. Thus, there was insufficient information to permit an inference either way. Finally, Defendant's presence at the house is not substantial evidence that Defendant resided at the house, and "mere presence . . . does not itself support an inference of constructive possession," nor that

Defendant lived at the house. *State v. Slaughter*, 212 N.C. App. 59, 71, 710 S.E.2d 377, 384 (Hunter, J., dissenting) (citation omitted), *dissent adopted* 365 N.C. 321, 718 S.E.2d 362 (2011). The trial court concluded there was "nothing that really ties [Defendant] to living in that house." We find no reason to overturn this finding on appeal, as there is insufficient evidence to support a finding that Defendant lived at 116 Edinburgh Court.

Even assuming, *arguendo*, there is sufficient evidence to support a finding that Defendant was a resident, any possession of the house by Defendant was still nonexclusive. The evidence shows Ms. Swayngim owned the house as trustee for two children. Ms. Swayngim was also present at the time of the search; thus, any possession the Defendant might have had at the time was nonexclusive. Because there is insufficient evidence Defendant owned the house and, alternatively, any ownership by Defendant was nonexclusive, we must consider whether there are other incriminating circumstances to support a finding of constructive possession.

The first factor to consider is a defendant's "ownership and control of the property." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted). As stated above, the only evidence the State presented that Defendant lived in the house is speculative, and the only non-speculative evidence of Defendant's control over the property is Defendant's presence there at the time of the search. "Without 'a showing of some independent and incriminating circumstance, beyond mere association or

presence,' there is insufficient evidence to support a reasonable inference of constructive possession." *Slaughter*, 212 N.C. App. at 71, 710 S.E.2d at 385 (internal citations omitted). As such, more is needed before a jury can infer constructive possession.

Second, we consider "[] [D]efendant's proximity to the contraband." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted). Here, the State presented no evidence about Defendant's proximity to the contraband. Although the contraband in issue was found in the kitchen trash can, the State presented no written or oral testimony about where Defendant was found in the house relative to the trash can. Indeed, no officer could recall where Defendant was first seen within the house.

Third, we consider "indicia of [D]efendant's control over the place where contraband is found." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted). Although Defendant was present in the house, there is no evidence he exerted any control over the house or the trash can in which the contraband was found. Moreover, there is no evidence items belonging to Defendant were located in the house at all, let alone near the contraband.

Fourth, we consider "[] [D]efendant's suspicious behavior at or near the time of discovery of the contraband." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted). Here, the evidence shows the police knocked on the door, announced their presence, and, when no one answered and they heard movement

inside, knocked down the door. It also shows Defendant was one of the people discovered inside the house and he had not answered the door. However, the State presented no evidence about where Defendant was within the house, so there is no evidence Defendant even heard the knock and announce. Moreover, there is no evidence Defendant acted suspiciously after police entered the house, such as by attempting to flee. The State contends Detective Tindall's testimony that he smelled ammonia and sulfur upon approaching the house is also relevant; however, assuming, as we must, this odor existed, it does not tell us anything about whether it was Defendant who possessed the pseudoephedrine in the trash can. Assuming Defendant was aware the odor of ammonia and sulfur is a byproduct of methamphetamine manufacture, the most it can show is that he knew methamphetamine was manufactured in the house, not that he participated, exerted control over the pseudoephedrine, or was aware that some of the precursor remained.

Finally, the record does not show there was "other evidence found in [] [D]efendant's possession linking [D]efendant to the contraband." *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552 (citations omitted).

Where there is joint occupancy of a residence, dominion over the premises by itself is insufficient to establish constructive possession[, and] . . . there must be some additional nexus linking the defendant to the contraband." *Id.* at 495, 809 S.E.2d at 551-52 (citations and quotations omitted). Here, the evidence is insufficient to permit

an inference that Defendant lived in the house, and, even if he did, any control Defendant may have had was necessarily nonexclusive. The evidence, when considering the totality of the circumstances — including Defendant's presence, his failure to answer the door, and the smell of ammonia and sulfur reported by an officer — fails to create any nexus directly linking Defendant to the pseudoephedrine found in the trash can. Indeed, it does not even show he knew it was there.

The State contends this case is analogous to *State v. Matias*, in which our Supreme Court held there were sufficient facts to permit an inference of constructive possession because officers there detected an odor of marijuana and the defendant was in close proximity to cocaine and marijuana hidden in the crease of his car seat, even though the car was not the defendant's and there were other occupants. *See State v. Matias*, 354 N.C. 549, 552-53, 556 S.E.2d 269, 271 (2001). But as Defendant points out in his brief, in *Matias* the defendant was literally "sitting on the bag of drugs." *See id.* Indeed, an officer testified the defendant "was the only person in the car who could have shoved the package containing the cocaine into the crease of the car seat." *Id.* at 552, 556 S.E.2d at 271. In contrast, in the present case there is simply no evidence about Defendant's proximity within the house to the pseudoephedrine from which the jury could infer Defendant was close to it, let alone that he had constructive possession of it. Also, unlike the other occupants of the car in *Matias*, Ms. Swayngim, who admitted to being the person who acquired the

pseudoephedrine and manufactured the methamphetamine, cannot be excluded as the person who put the contraband in the trash can.

The present case is also distinguishable from *Miller*. In *Miller*, our Supreme Court held there was sufficient evidence to convict the defendant of constructive possession, although the defendant did not live at the house, where "[the] defendant was found within touching distance of the crack cocaine in question and [the] defendant's identity documents were in the same room[.]" *Miller*, 363 N.C. at 97-98, 678 S.E.2d at 593. In *Miller*, the crack cocaine was found on the side of a bed where the defendant was sitting "[w]hen first seen" by police. *Id.* at 100, 678 S.E.2d at 595. In contrast, in the present case there was no evidence presented as to Defendant's proximity to the contraband when he was first seen or what he was doing. There was no evidence about any possessions of Defendant that would connect him to the house or to the contraband.

Rather than *Matias* and *Miller*, the present case is most similar to *Slaughter*. In *Slaughter*, a divided panel of this Court held there was sufficient evidence from which to infer constructive possession, even though "[the] defendant did not have exclusive control over the place where the contraband was found[,]" and "there was no evidence that he owned any other items found in proximity to the contraband, that he was the only person who could have placed the contraband in the positions where it was found, [or] that he acted nervously in front of law enforcement personnel[.]"

Slaughter, 212 N.C. App. at 64-65, 710 S.E.2d at 381. This Court held the defendant's proximity to the contraband when he was detained in a room surrounded by marijuana, bags of cash, handguns, and drug paraphernalia was sufficient to permit an inference of constructive possession. *Id.* at 65, 710 S.E.2d at 381. Our Supreme Court reversed, adopting Judge Hunter's dissent, which held the evidence was insufficient because of the following:

> [T]he State presented absolutely no evidence of [the] defendant's proximity to the contraband prior to being placed on the floor face down in the bedroom where the contraband was found, [the] defendant's proximity to the contraband after being placed on the floor, or defendant's proximity to the contraband relative to the other two individuals detained in the room[.]

Id. at 70-71, 710 S.E.2d at 384 (internal citations and quotations omitted). As stated in Judge Hunter's dissent and adopted by the Supreme Court, we can find no North Carolina appellate decision "where a defendant's mere presence in a location where contraband is visible is sufficient to support a conviction for a possessory offense based on constructive possession." *Id.* at 72, 710 S.E.2d at 385. In the present case, like *Slaughter*, the State presented no evidence of Defendant's proximity to the pseudoephedrine in the trash can prior to or after being placed in custody. Here, the evidence is even more clearly insufficient, since the small amount of pseudoephedrine officers recovered was not visible and there was no evidence Defendant knew it was there, unlike the many drugs and drug paraphernalia in plain view in *Slaughter*.

Although the State contends Defendant acted suspiciously by not opening the door, the circumstances here were far less suspicious than in *Chekanow*, where the defendant "directed an 'unfortunate gesture'" at a police helicopter flying over her property and "appeared to flee the premises in a vehicle as the helicopter hovered to investigate the possible field of marijuana." *Chekanow*, 370 N.C. at 498-99, 809 S.E.2d at 554. This case is also distinguishable from *Butler*, where the defendant made eye contact with officers, walked "very briskly[,]" and jumped into a taxi shouting "let's go, let's go, let's go." *Butler*, 356 N.C. at 147-48, 567 S.E.2d at 141. Unlike *Chekanow* and *Butler*, in the present case, Defendant made no effort to flee. Rather, as in *Slaughter*, the record in the present case reveals "no evidence . . . Defendant acted nervously in front of law enforcement personnel[.]" *Slaughter*, 212 N.C. App. at 69-70, 710 S.E.2d at 383-84. Analogy to *Chekanow* or *Butler* is therefore also unavailing.

III. Conclusion

Having considered the totality of the circumstances, we hold the evidence is insufficient to support a conviction on the basis of a theory of constructive possession where the only indication Defendant resided at the house was suspicion and his mere presence there; there was no evidence of Defendant's proximity to the contraband; and the only suspicious behavior was Defendant's failure to answer the door. As our Supreme Court held in *Slaughter*, "[i]n short, the most the State has shown is that

[D]efendant was in an area where he could have committed the crime charged." *Id.* at 71, 710 S.E.2d at 384 (citation omitted). In the present case, there is no "additional nexus linking [] [D]efendant to the contraband." *Chekanow*, 370 N.C. at 495, 809 S.E.2d at 552 (citations omitted). We reverse the trial court's denial of Defendant's motion to dismiss and vacate the judgment below.

VACATED.

Judges DAVIS and DIETZ concur.

Report per Rule 30(e).

Judge Davis concurred in this opinion prior to 25 March 2019.