IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-832

Filed: 6 August 2019

Jackson County, No. 16 CRS 51385

STATE OF NORTH CAROLINA

v.

DALTON DEWAYNE FLOWERS

Appeal by defendant from judgments entered 9 November 2017 by Judge Jeffrey P. Hunt in Jackson County Superior Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael E. Bulleri, for the State.

Guy J. Loranger for defendant-appellant.

ZACHARY, Judge.

Defendant Dalton Dewayne Flowers appeals from judgments entered upon a jury's verdicts finding him guilty of felony possession of a Schedule I controlled substance and possession of drug paraphernalia. After careful review, we conclude that Flowers received a fair trial, free from error.

I. Background

This case arises from the same underlying incident as *State v. Radford*, COA18-609, ___ N.C. App. ___, ___ S.E.2d ___ (filed July 2, 2019) (unpublished), 2019 N.C. App. LEXIS 584. The relevant procedural and factual background were set forth in *Radford* as follows:

> In the early morning hours of 12 September 2016, Lieutenant Zach Dezarn of the Sylva Police Department was traveling on Asheville Highway behind a white Lincoln registered to an individual named "Amanda Eaton." Lieutenant Dezarn was familiar with Eaton because he and another officer previously stopped and arrested her for possession of cocaine. Lieutenant Dezarn observed the white Lincoln pull into a gas station called "P.J.'s" and park on the right side of the gas pumps. As Lieutenant Dezarn continued to drive down Asheville Highway, he observed a gray or silver vehicle pass him, traveling in the opposite direction. When he noticed that the vehicle's license plate tag light was broken, Lieutenant Dezarn turned around and began to follow the car. This vehicle also turned into P.J.'s, but parked on the left side of the gas pumps, opposite the white Lincoln.
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> P.J.'s was a location of concern for the Sylva Police Department. Lieutenant Dezarn testified that the Department had received a narcotics complaint after "one of the clerks . . . found a syringe in the bathroom." According to Lieutenant Dezarn, officers "had also dealt with and seen many . . . local drug offenders visiting the gas station at late night hours." With these circumstances in mind, Lieutenant Dezarn turned off his patrol lights, pulled into a parking area several hundred yards away, and used binoculars to surveil the area outside of P.J.'s.
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> Through his binoculars, Lieutenant Dezarn observed a man wearing a black shirt and hat hug a blonde female who Lieutenant Dezarn believed to be Amanda Eaton. Lieutenant Dezarn thought that the hug was "the

beginning of a possibility of a narcotics deal or trade." After the individuals hugged, they each left P.J.'s. in their own cars.

The gray vehicle with the broken tag light drove down Asheville Highway toward Lieutenant Dezarn. Lieutenant Dezarn observed the car and confirmed the tag-light violation and then entered the road and began to follow the car. Both vehicles stopped at a traffic light at the intersection of NC 107 and Asheville Highway. Lieutenant Dezarn attempted to run the gray car's tag, but he was unable to do so because it was a temporary plate, and he could not see the expiration date clearly due to the broken tag light. When the light turned green, the gray vehicle turned left onto NC 107, and Lieutenant Dezarn followed. Shortly thereafter, the vehicle pulled into another gas station. Lieutenant Dezarn considered it "odd that a vehicle that had just left a gas station would immediately go to another gas station a mile away." At 1:21 a.m., Lieutenant Dezarn activated his patrol lights to initiate a traffic stop for the tag-light violation.

Upon approaching the vehicle, Lieutenant Dezarn noticed that it was packed full of items. Alicia Radford was in the passenger's seat and Dalton Flowers, wearing a black T-shirt and hat, was in the driver's seat. Both individuals provided identification. Without being asked, Flowers began explaining where they were coming from and that they had run out of gas. Lieutenant Dezarn returned to his patrol vehicle to run the identification provided to him, but then realized he did not have the vehicle's registration. Lieutenant Dezarn returned to the vehicle, and after some delay, Radford located the registration.

Through his database searches, Lieutenant Dezarn determined that Flowers had a non-extraditable warrant from Colorado, that he was on probation in Haywood County, and that while he presented a Florida driver's license, he also had a revoked North Carolina driver's

license. In addition, Lieutenant Dezarn found that there was an "Alicia Radford" with an outstanding warrant, but the middle name of that individual was different than Defendant's. By this time, Lieutenant Dezarn had decided to issue Flowers a warning for the tag-light violation and a citation for driving while license revoked. However, Lieutenant Dezarn thought that Radford may have provided a false name, so he exited his vehicle to speak with her. Lieutenant Dezarn asked Radford to step behind the vehicle, and he returned her license. He then informed Radford about the individual with the outstanding warrant and the same name. When asked about her own middle name, Radford told Lieutenant Dezarn that her middle name was Diane, and she showed Lieutenant Dezarn a necklace with her name on it.

Accepting Radford's responses, Lieutenant Dezarn began questioning Radford about what happened at P.J.'s. Radford explained that she and Flowers were traveling from Asheville toward Clyde, which did not make sense to Lieutenant Dezarn, because someone coming from Asheville would drive through Clyde before reaching Sylva. When confronted with this fact, Radford became frustrated and said that she was not from the area. Then Flowers yelled that they were coming from Balsam Mountain. Radford told Lieutenant Dezarn that their vehicle had run out of gas and that they "were traveling down a hill so that they could go to the next gas station." Radford stated that a man driving a green car had stopped to help them, and they followed him to the gas station; however, Lieutenant Dezarn never saw a green car on Asheville Highway when their car originally turned into P.J.'s.

Lieutenant Dezarn then asked Flowers to step out of the vehicle and returned his Florida driver's license. Lieutenant Dezarn asked Flowers about his revoked North Carolina driver's license, and they discussed the tag-light violation. At 1:47 a.m., Lieutenant Dezarn gave Flowers all of his paperwork and citations. At that time, Lieutenant Dezarn asked Flowers what happened at P.J.'s.

Flowers told Lieutenant Dezarn that he had run out of gas and first went to another gas station. A man tried to assist him there, but none of the man's credit cards worked, so then Flowers decided to go to P.J.'s for gas. Flowers mentioned that another man attempted to sell him heroin at P.J.'s. Lieutenant Dezarn then asked Flowers where he and Radford had come from, and Flowers explained that they were originally at a friend's house near a rest stop in Waynesville.

When asked whether Flowers's responses to his questions raised any concerns, Lieutenant Dezarn testified:

> Yeah, I mean, there was a lot of things going on. There were a lot of—from meeting with someone, from the directions and where they had came from, from the gas stations to . . . being out of gas but the vehicle's still driving, and it was able to come into town where I know that they had at least came up one hill, which is the on-ramp to Sylva, and then with him being on probation and, like I had said, what I appeared to see, somebody matching his description and clothing meeting with a woman that I had know[n] had been arrested for possession of a narcotic at a place where we had already had narcotics complaints, which he himself even said that there was somebody trying to sell him narcotics at.

Flowers consented to Lieutenant Dezarn's request to conduct a search of his person, but he refused to consent to a search of the vehicle because it belonged to Radford. Radford refused consent to search her vehicle. Believing that he had reasonable suspicion of criminal activity, at 2:02 a.m., Lieutenant Dezarn decided to detain both of the vehicle's occupants in order to call for a K-9 unit to perform a drug sniff around the vehicle.

> The Sylva Police Department did not have a K-9 unit, so Lieutenant Dezarn called Deputy Megan Rhinehart with the Jackson County Sheriff's Office, because he "believed of all the available K-9s, she would have the best chance of coming the quickest." Deputy Rhinehart was off duty when she received the call, and it took her approximately twenty-five minutes to arrive on scene to perform the drug sniff. Deputy Rhinehart arrived at the scene at 2:26 a.m. and began the walk-around with her K-9 at 2:29 a.m. After the dog indicated a positive alert for controlled substances, Lieutenant Dezarn began searching the vehicle.

Radford, 2019 N.C. App. LEXIS 584 at *1-8.

Lieutenant Dezarn found two marijuana joints in the center console, a glass pipe in the rear seat behind the driver, a large assortment of plastic baggies in the front passenger area, and a charcoal bag containing a white cardboard box on the backseat floorboard. The box held a plastic bag with capsules, another plastic bag with capsules containing a brown and yellow substance, a plastic bag containing pills, and dehydrated bananas. Ultimately, the yellow substance inside the capsules tested positive for dimethyltryptamine ("DMT"), a hallucinogenic Schedule I controlled substance.

On 27 March 2017, a Jackson County grand jury indicted Flowers for one count of possession of a Schedule I controlled substance and one count of possession of drug paraphernalia based on the plastic baggies and empty capsules found in the car. On 6 November 2017, in Jackson County Superior Court, the Honorable Jeffrey P. Hunt heard Flowers's and Radford's individual motions to suppress their statements and

any evidence obtained from Lieutenant Dezarn's warrantless search of the vehicle. The trial court entered one order denying both motions. Flowers pleaded not guilty and proceeded to trial on 7 November 2017.

At trial, Flowers failed to object when the State offered evidence obtained during the traffic stop. However, Flowers moved to dismiss the charges against him at the close of the State's evidence and at the close of all the evidence, both of which the trial court denied.

On 9 November 2017, a jury found Flowers guilty of both charges. On the conviction of possession of drug paraphernalia, the trial court sentenced Flowers to 120 days in the Misdemeanant Confinement Program. For the conviction of possession of controlled substances, the trial court sentenced Flowers to six to seventeen months in the custody of the North Carolina Division of Adult Correction, suspended the sentence, and placed Flowers on thirty-six months of supervised probation. Flowers gave notice of appeal in open court.

II. Discussion

Defendant Flowers argues on appeal that the trial court: (1) plainly erred by denying Flowers's motion to suppress when Lieutenant Dezarn impermissibly extended the traffic stop without reasonable suspicion to do so; (2) erred by denying Flowers's motions to dismiss the charges of possession of a Schedule I controlled substance and possession of drug paraphernalia; and (3) plainly erred by admitting

seized items into evidence that were irrelevant. For the reasons explained below, we find no error.

A. Denial of Motion to Suppress

First, Flowers argues that "the trial court plainly erred by denying [his] motion to suppress where the officer unlawfully extended the stop beyond the mission of addressing the tag light violation." We disagree.

"A pre-trial motion to suppress evidence is insufficient to preserve for appeal the question of the admissibility of the challenged evidence, if Defendant fails to object to the admission of that evidence at the time it is offered at trial." *State v. Fuller*, ___ N.C. App. ___, ___, 809 S.E.2d 157, 160 (2017). Flowers concedes that he failed to object at trial when the State sought to admit the evidence seized from the traffic stop, and requests that we review for plain error. *See id.*; N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

Where a defendant fails to object to the admission of challenged evidence, the defendant must show plain error to prevail on appeal. To establish plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable

> impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted). "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *Id.*

"The first step under plain error review is . . . to determine whether any error occurred at all." *State v. Oxendine*, 246 N.C. App. 502, 510, 783 S.E.2d 286, 292, *disc. review denied*, 368 N.C. 921, 787 S.E.2d 24 (2016). When reviewing the denial of a motion to suppress, this Court must

> determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if the evidence is conflicting. Conclusions of law, however, are fully reviewable on appeal and must be legally correct, reflecting a correct application of applicable legal principles to the facts found.

State v. Johnson, 371 N.C. 870, 873, 821 S.E.2d 822, 825 (2018). Unchallenged findings are deemed supported by competent evidence and are binding on appeal. *State v. Degraphenreed*, ___ N.C. App. ___, ___, 820 S.E.2d 331, 336 (2018).

The Fourth Amendment to the United States Constitution and Article I, section 20 of the North Carolina Constitution prohibit law enforcement officers from conducting unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const.

art. I, § 20. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quotation marks omitted). Traffic stops are reviewed under the analysis set forth in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), which provides that "a traffic stop is permitted if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)).

"Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence," and "is satisfied by some minimal level of objective justification." *Id.* (quotation marks omitted). The traffic stop must result from "specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* This Court "must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists." *Id.* at 414, 665 S.E.2d at 440 (quotation marks omitted).

A police stop that exceeds the time necessary "to handle the matter for which the stop was made" is an unreasonable seizure under the Fourth Amendment. *Rodriguez v. United States*, 575 U.S. ___, ___, 191 L. Ed. 2d 492, 496 (2015). "A seizure justified only by a police-observed traffic violation . . . becomes unlawful if it

is prolonged beyond the time reasonably required to complete the mission of [the stop]." *Id.* (brackets and quotation marks omitted). "The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket." *State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017). "[A]n officer's mission includes ordinary inquiries incident to the traffic stop[,] . . . [such as] checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citation, quotation marks, and brackets omitted). However, a police officer may only extend the stop beyond its original mission if "reasonable suspicion of another crime arose before that mission was completed." *Id.*

In the instant case, Flowers challenges the following findings of fact in the trial court's suppression order:

> 10. . . . [Lieutenant] Dezarn saw [Flowers's] car pull in and a male subject, who was dressed like . . . Flowers, embrace a blonde female, who the [Lieutenant] believed was Amanda Eaton, a known drug possessor . . . .
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> . . . .
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> 18. Both [Flowers and Radford] gave confusing, inconsistent background information to [Lieutenant Dezarn] as to where they were traveling and where they had been and their purpose of traveling that night.
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> 41. Thereupon [Lieutenant Dezarn] reasonably satisfied [himself] as to . . . Radford's correct identity and learned

> that . . . Flowers was on felony probation and may have a probation condition that he not leave Haywood County without prior approval as well as a condition that he not violate any laws while on probation.

Flowers also challenges the following conclusion of law, which is actually a finding of fact: "P.J.'s was a location at which the officers knew there had been some recently reported drug use, both inside and outside the store."

Flowers argues that the trial court erred in finding that Lieutenant Dezarn saw Flowers hug Ms. Eaton, a known drug possessor. Lieutenant Dezarn testified that he was "with another officer a couple months prior to this date where he had stopped [Ms. Eaton] and she was arrested for possession of cocaine." Flowers notes that Lieutenant Dezarn never stated that he knew Ms. Eaton had been convicted of the charge. However, "[a] considerable body of case law has established what 'specific and articulable facts' give rise to 'rational inferences' supporting a determination of reasonable suspicion when considered in 'the totality of the circumstances' with other such facts [including] . . . a person's history of criminal arrests." *State v. Campola*, ___ N.C. App. ___, ___, 812 S.E.2d 681, 689 (2018) (citation omitted). The fact that Lieutenant Dezarn never testified that Ms. Eaton was convicted of the drug possession charge is immaterial to the determination of whether reasonable suspicion existed to extend the traffic stop. Lieutenant Dezarn's awareness of Eaton's prior arrest history is a fact that may support a finding of reasonable suspicion. Thus,

Lieutenant Dezarn's testimony supports the trial court's finding that "[Lieutenant] Dezarn saw . . . Flowers embrace . . . a known drug possessor."

Next, Flowers challenges the finding that "[b]oth [Flowers and Radford] gave confusing, inconsistent background information" about their travels. Yet, Flowers does not challenge finding of fact number 19, which states that "[Flowers and Radford] claimed they had driven to Sylva from opposite directions: [Flowers] from the southwest, that is, Balsam, and . . . Radford from the northeast, that is, Asheville." This unchallenged finding is binding on appeal. *Degraphenreed*, ___ N.C. App. at ___, 820 S.E.2d at 336. Radford told Lieutenant Dezarn that they were driving to Clyde from Asheville while Flowers told Lieutenant Dezarn that they were coming from Balsam Mountain. Lieutenant Dezarn testified that Radford's explanation of their travels confused him, stating that it "didn't make sense to me why someone coming from Asheville would end up in Sylva when trying to go to Clyde." Therefore, Lieutenant Dezarn's testimony supports the trial court's finding that Flowers and Radford gave confusing and inconsistent information about their travels.

Flowers also challenges finding of fact number 41. Flowers paraphrases finding of fact number number 41 as stating, "Lieutenant Dezarn learned of . . . Flowers'[s] probation status *after* he had finished verifying [Radford's] identity." (Emphasis added). However, finding of fact number 15 states that "[t]he

officers checked the computer in their vehicle and learned that . . . [Flowers's] North Carolina license was revoked and that he was on probation for a felony conviction and that he may not have been supposed to leave Haywood County without prior permission." Finding of fact number 15 is unchallenged by Flowers and therefore binding on appeal. Any challenge to finding of fact number 41 is remedied by finding of fact number 15 and Lieutenant Dezarn's testimony, in which he states that he was in his patrol vehicle running the records check when he discovered that Flowers "was on active probation." Thus, Lieutenant Dezarn learned about Flowers's probation status while he was completing the mission of the traffic stop, and that evidence supports finding of fact number 15.

Finally, Flowers challenges the finding that "P.J.'s was a location at which the officers knew there had been some recently reported drug use, both inside and outside the store." However, Lieutenant Dezarn testified that his fellow officers had previously received complaints about P.J.'s, explaining that "one of the clerks had found a syringe in the bathroom. . . . [and] we had also dealt with and seen many of our local drug offenders visiting the gas station at late night hours." Lieutenant Dezarn had also personally arrested individuals for drug possession at P.J.'s, and he testified that "a lot of our drug offenders and known drug users have been frequenting [P.J.'s] playing on the slot electronic gambling machines." Lieutenant Dezarn's

testimony supports the trial court's findings that there was "recently reported drug use, both inside and outside the store."

Driving with a broken tag light is a violation of N.C. Gen. Stat. § 20-129(d); thus, the initial stop of the vehicle was supported by reasonable suspicion. As a result, this Court must determine whether Lieutenant Dezarn had reasonable suspicion of a separate offense before he completed the mission of addressing the tag-light violation, thereby allowing him to extend the scope of the stop. The following circumstances have been found to support an officer's reasonable suspicion of criminal activity: (1) inconsistent travel plans, *State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012); (2) activity at an "unusual hour," *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994); (3) the presence of individuals at a location known for drug activity, *State v. Parker*, 137 N.C. App. 590, 601, 530 S.E.2d 297, 304 (2000); and (4) other "more particularized factors," *id.*

In the instant case, Lieutenant Dezarn observed Flowers meet and embrace a known drug dealer in the early morning hours. Lieutenant Dezarn believed that the embrace between Flowers and Eaton was the beginning of a drug transaction. During the course of the traffic stop, Lieutenant Dezarn learned about Flowers's probation status and revoked license. Flowers and Radford gave confusing and contradictory accounts about their travel plans, and Flowers told Lieutenant Dezarn that someone had tried to sell him cocaine earlier that night. Based upon the totality of the

circumstances, Lieutenant Dezarn observed and witnessed suspicious behavior sufficient to raise a reasonable suspicion of ongoing criminal activity. As such, Lieutenant Dezarn justifiably detained Flowers and Radford to conduct a walk-around dog-sniff of the vehicle.

Accordingly, the trial court did not err in denying Flowers's motion to suppress. Because we conclude that the trial court did not err, we need not review for plain error.

B. Constructive Possession

Flowers next argues that the trial court erred by denying his motion to dismiss the charges against him when the State failed to present sufficient evidence that he possessed the contraband. We disagree.

When reviewing the denial of a criminal defendant's motion to dismiss, "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 [the] defendant[ ] being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005). Such evidence may be direct, circumstantial, or both. *Id.* "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or

the identity of the defendant as the perpetrator of it, the motion should be allowed." *Scott*, 356 N.C. at 595, 573 S.E.2d at 868. The evidence is viewed "in the light most favorable to the State and [we must] give the State the benefit of every reasonable inference from the evidence." *Thaggard*, 168 N.C. App. at 281, 608 S.E.2d at 786.

In the present case, Flowers was charged with possession of a Schedule I controlled substance and possession of drug paraphernalia. N.C. Gen. Stat. §§ 90-95(a)(3), -113.22 (2015). "To obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) [the] 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). In order to prove possession of drug paraphernalia, the State must produce substantial evidence that the defendant (1) possessed drug paraphernalia (2) with "the intent to use the [drug paraphernalia] in connection with controlled substances." *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d. 777, 781 (1992). Drug paraphernalia "means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act, including . . . packaging, repackaging, storing, containing, and concealing controlled substances." N.C. Gen. Stat. § 90-113.21(a).

Concerning the charge for possession of a controlled substance, Defendant does not challenge that the substance found was DMT, a controlled substance, but he does

challenge the sufficiency of the evidence that he possessed the DMT. Thus, we need only address whether Flowers possessed the DMT.

Possession may be either actual or constructive. *State v. Steele*, ___ N.C. App. ___, ___, 817 S.E.2d 487, 493, *disc. review denied*, 371 N.C. 788, 821 S.E.2d 183 (2018). Where the contraband was not found in the defendant's exclusive possession, the State must prove that he constructively possessed the controlled substance. *See id.* at ___, 817 S.E.2d at 493. An individual constructively possesses a controlled substance when he or she "has the intent and capability to maintain control and dominion over a controlled substance." *Id.* at ___, 817 S.E.2d at 493. "This Court has held that constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *Id.* at ___, 817 S.E.2d at 493-94 (quotation marks and emphasis omitted). When a defendant shares occupancy of the place where the contraband is found, "the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Id.* at ___, 817 S.E.2d at 493.

Our appellate courts have found sufficient "other incriminating circumstances" to support a finding that the defendant constructively possessed contraband where: (1) the defendant was observed in a place where police had received complaints of drug sales, *State v. McNeil*, 359 N.C. 800, 813, 617 S.E.2d 271, 279 (2005); (2) the defendant driver and co-defendant passenger offered conflicting information about

their travel, *State v. Wiggins*, 185 N.C. App. 376, 388, 648 S.E.2d 865, 873, *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007); (3) the defendant interacted with a known drug seller, *id.*; (4) the defendant was the driver of a vehicle in which drugs were found, *State v. Baublitz*, 172 N.C. App. 801, 810-11, 616 S.E.2d 615, 622 (2005); and (5) the defendant exhibited nervous or suspicious behavior, *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996).

Here, the trial court was presented with substantial circumstantial evidence of Flowers's constructive possession of the controlled substance. The evidence at trial showed that the DMT discovered on the backseat floorboard of the vehicle that Flowers was driving was within his reach from the driver's seat. Lieutenant Dezarn was aware of drug complaints about P.J.'s. At P.J.'s, Lieutenant Dezarn observed Flowers and a known drug possessor embrace, which he believed was a drug transaction. Further, Flowers and Radford provided Lieutenant Dezarn with inconsistent descriptions of their travel. Accordingly, the State presented substantial evidence of "other incriminating circumstances" that Flowers constructively possessed the DMT discovered in close proximity to him. As a result, the trial court did not err in denying Flowers's motions to dismiss the charge of possession of a controlled substance.

The State established the same incriminating circumstances with respect to Flowers's possession of drug paraphernalia. Empty pill capsules, among other items

such as empty plastic baggies and a glass pipe, were found in the same location on or near the DMT. Deputy Rhinehart testified that the empty pill capsules were "the same types of capsules" that she found containing the DMT. Evidence that packaging material was found in close proximity to the controlled substance, together with testimony describing the use of those materials, is sufficient to survive a motion to dismiss. Accordingly, the trial court did not err in denying Flowers's motions to dismiss the charge of possession of drug paraphernalia.

C. Admission of Relevant Evidence

Finally, Flowers argues that the trial court plainly erred by admitting items into evidence seized from the car that had no connection to the charges against Flowers and were irrelevant. We disagree.

Flowers objects to the admission of seven items into evidence: marijuana joints, a glass pipe, plastic sandwich baggies, a crystal substance found beneath the charcoal bag containing the DMT, a plastic bag holding clear capsules, dehydrated bananas, and other clear pill capsules. Flowers failed to object to the admission of any of the evidence that he now complains the trial court admitted in error, and requests plain error review. Defendant contends that "the admission of those items 'magnified the amount' of controlled substances, suspected controlled substances[,] and paraphernalia purportedly associated with [Defendant] and, as such, greatly prejudiced him and significantly affected the fairness of his trial."

Defendant further asserts that absent the admission of these items into evidence, the jury would not have found Defendant guilty. However, as established above, the State presented substantial evidence that Defendant possessed the DMT and drug paraphernalia. Even assuming that the trial court erred in admitting these items into evidence, Defendant cannot establish that the admission of those items "had a probable impact on the jury's finding that . . . [D]efendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, the trial court did not commit plain error in admitting these items into evidence.

III. Conclusion

The trial court did not err in denying Flowers's motion to suppress, in denying his motions to dismiss the charges against him, or in admitting certain items into evidence. Accordingly, we conclude that Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges STROUD and INMAN concur.

Report per Rule 30(e).