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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-14

Filed: 7 January 2020

Wake County, No. 17 CRS 211949

STATE OF NORTH CAROLINA

v.

SHARO DORELLE JONES

Appeal by defendant from judgment entered 26 April 2018 by Judge Winston Miller Rozier in Superior Court, Wake County. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory P. Agan, for the State.

William D. Spence for defendant-appellant.

STROUD, Judge.

Defendant appeals from the trial court's denial of his motion to dismiss the charges of trafficking in cocaine hydrochloride by possession and transportation, and possession with intent to sell or deliver cocaine hydrochloride. Because there was sufficient evidence to support the elements of these charges, the trial court did not err by denying Defendant's motion to dismiss.

I. Background

At trial, the State's evidence tended to show that on the evening of 25 June 2017 Deputy Shaun Adams and Deputy Unberto Espinoza of the Wake County Sheriff's Department observed Defendant's vehicle change lanes without properly signaling. Deputy Adams engaged his emergency lights and siren, and Defendant slowed down but did not stop his vehicle. The deputies observed Defendant roll down his passenger side window and throw a dark object and then a plastic bag out the window. Deputy Espinoza described the area where Defendant threw the objects as a downhill slope with shrubbery. After throwing the second object out of the window, Defendant stopped his vehicle, got out of the car, put his hands up and said, "You got me. I f---ed up." Defendant was the only person in the vehicle, and he did not have a license as it had been revoked for a prior driving while impaired offense. In the car, the deputies found a cup containing brown liquor in it; they found \$441 in cash on Defendant but no contraband.

Defendant told the deputies he had thrown a blue cup containing marijuana and Viagra pills out the window. The deputies placed Defendant in the back of their car while they searched the embankment where they saw Defendant throw the items. After searching for 30 to 40 minutes, Deputy Espinoza found a purple Crown Royale bag and Deputy Adams found a clear plastic bag containing marijuana nearby. Inside the Crown Royale bag was a digital scale that looked like a phone, and a white

substance which Deputy Adams described as “rock-like” and Deputy Espinoza described as “powder” cocaine. The deputies continued to look for the second item thrown from the vehicle, and they were assisted by a K9 officer and her dog. The K9 officer left after being requested for another call, but Deputy Espinoza found a small baggie with a white substance inside it.

Defendant was charged with trafficking cocaine hydrochloride by possession and transportation, and possession with intent to sell or deliver cocaine hydrochloride. Defendant was also charged with felony maintaining a vehicle, but this charge was later dismissed. At trial, the white substance from the first toss was State’s exhibit 3. The State’s expert witness in forensic chemistry identified this substance as cocaine hydrochloride weighing 28.38 grams. The substance from the second toss was State’s exhibit 4 at trial and was identified by the forensic chemist as cocaine base weighing 2.37 grams.

At the close of the State’s evidence, Defendant moved to dismiss all charges. The trial court denied Defendant’s motion. Defendant did not present any evidence and moved to dismiss all charges again, which was denied. Defendant was found guilty of trafficking cocaine hydrochloride by transportation and possession, and felony possession of cocaine hydrochloride. All of Defendant’s convictions were consolidated for judgment, and he was sentenced accordingly. Defendant gave notice of appeal in open court.

II. 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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 914, 918-19 (1993)). “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). “In making its determination, the trial court 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. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

“Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the

defendant is actually guilty.

State v. Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and brackets omitted).

III. Motion to Dismiss

Defendant argues that the trial court erred by denying his motion to dismiss the charges of trafficking in cocaine by possession and transportation, and possession with intent to sell or deliver on “every element of each charge and also on the grounds of variance.”¹

A. Trafficking by Possession

[Defendant] contends that the State failed to offer sufficient evidence to show that the cocaine found by the deputies along the side of the highway was the very item(s) [Defendant] tossed out his car. The State’s evidence was insufficient to prove [D]efendant had ever knowingly possessed the found cocaine, either actually or constructively.

The elements of trafficking in cocaine by possession are: “(1) knowing possession of cocaine, and (2) the cocaine weighing 28 grams or more.” *State v. Rodelo*, 231 N.C. App. 660, 664, 752 S.E.2d 766, 771 (2014); N.G. Gen. Stat § 90-95(h)(3) (2017).

“It is well established in North Carolina that possession of a controlled substance may be either actual or constructive.” Constructive possession is not required to be exclusive: “Proof of nonexclusive, constructive possession is sufficient.” “A person is said to have constructive

¹ On appeal, Defendant does not challenge the weight of the cocaine, and we have considered only the arguments made on appeal. N.C. R. App. P. 28(b)(6). Defendant also does not present any arguments for the fatal variance claim made below.

possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it.”

As the terms “intent” and “capability” suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury The fact that a person is present in a [vehicle] where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs There must be evidence of other incriminating circumstances to support constructive possession.

Where [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.” Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance.

Rodelo, 231 N.C. App. at 664-65, 752 S.E.2d at 771-72 (alterations in original) (citations omitted).

Defendant compares this case to *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967). In *Chavis*, police observed the defendant wearing a hat. *Id.* at 310, 154 S.E.2d at 343. After he was arrested, defendant was no longer wearing a hat. *Id.* The police did not find any drugs on defendant but found a hat identical to the one

defendant had been wearing earlier in the area where he had been, and there was marijuana inside the hat. *Id.* Our Supreme Court reversed the trial court finding that “[t]here is no evidence that either officer observed defendant make any disposition of the hat he had been wearing or of any article or articles he may have had in his possession.” *Id.* at 310, 154 S.E.2d at 344. “The identity of the person who had possession of the marijuana prior to the discovery thereof by [the police officer] is not disclosed.” *Id.*

Defendant also compares this case to *State v. Acolastse*, 158 N.C. App. 485, 581 S.E.2d 807 (2003). In *Acolaste*, the defendant parked his car behind a vehicle under police surveillance. *Id.* at 486, 581 S.E.2d at 808. Defendant was driving with a revoked license and was approached by detectives. *Id.* Defendant fled, and, during a foot pursuit, one detective saw defendant make a throwing motion towards some bushes. *Id.* at 487, 581 S.E.2d at 809. Nothing was found in the bushes, but after being alerted by a K9 officer’s dog to narcotics, five bags of cocaine were found on the roof of a detached garage. *Id.* No one saw the defendant throw the bags on the roof. *Id.* This Court, relying on *Chavis*, held “that the State has failed to present any incriminating circumstances from which one can infer constructive possession.” *Id.* at 490, 581 S.E.2d at 811.

This case is distinguishable from *Chavis* and *Acolastse*. Here the deputies actually observed Defendant toss items out of the window, and they found the drugs

in the area where Defendant tossed the items. After throwing the items out of the window, Defendant continued to drive slowly after the detectives initiated their emergency lights and siren. Once he came to a stop Defendant stated, “You got me. I f---ed up.” The items the deputies found were not dirty or weathered and were on top of the brush. Further, the deputies never found what Defendant said he threw out the window, but the items they found were similar in size and color to the items he said he threw out.

Viewed in the light most favorable to the State, all of these factors are relevant incriminating circumstances which support an inference of constructive possession of the found cocaine. *See Rodelo*, 231 N.C. App. at 665, 752 S.E.2d at 772. Accordingly, there is substantial evidence to support Defendant’s knowing possession of cocaine, and the trial court properly denied Defendant’s motion to dismiss this charge. *See id.* at 664, 752 S.E.2d at 771. This argument is overruled.

B. Trafficking by Transporting

“The elements for trafficking by transportation are that defendant (1) knowingly transported a given controlled substance; and (2) that the amount transported was greater than 28 grams.” *State v. Johnson*, 217 N.C. App. 605, 608, 720 S.E.2d 441, 443 (2011) (quotation marks and brackets omitted); N.C. Gen. Stat. § 90-95(h)(3).

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Defendant cites to cases where this Court has held “that a defendant personally tossing a bag or package containing a controlled substance may constitute real movement to support a charge of trafficking by transportation.” *State v. Harrington*, 171 N.C. App. 17, 26–27, 614 S.E.2d 337, 346 (2005). Defendant contends the relevant factor for trafficking in transportation is whether the “defendant’s purpose in transporting the cocaine . . . was for his own use in a future drug sale.” *See State v. Manning*, 139 N.C. App. 454, 468, 534 S.E.2d 219, 228 (2000), *aff’d*, 353 N.C. 449, 545 S.E.2d 211 (2001). Defendant argues that evidence at trial shows he “had no intention to ever come back to retrieve what he had thrown from the car.” Further,

[t]he evidence in [Defendant’s] trial below shows that there was no effort by him to toss the drugs with the intent to sell or distribute them at any future time – only to permanently dispose of them before the deputies searches his car.

This Court has determined that “the question of whether the movement [of contraband] is a ‘substantial movement’ so as to constitute transportation requires, among other things, considerations as to the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved.” *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991). In *State v. Boyd*, a defendant argued that where the State had not established actual possession of cocaine and instead established that he had constructively possessed cocaine, he

could not be found guilty of trafficking in cocaine by transportation. 154 N.C. App. 302, 307, 572 S.E.2d 192, 196 (2002). This Court rejected this argument:

The element at issue, however, is transportation. “[O]nly a person in the actual or constructive possession of [contraband], absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof.” We find no merit to the argument that in the absence of an instruction on acting in concert, the State could not rely upon constructive possession to prove the element of transportation.

Id. at 307, 572 S.E.2d at 196 (alterations in original) (citing *State v. Wells*, 259 N.C. 173, 177, 130 S.E.2d 299, 303 (1963)).

Here, at issue is not the movement of the cocaine from the car when thrown by Defendant—although this type of transportation has been found to support trafficking by transportation depending on the circumstances, *see Harrington*, 171 N.C. App. at 26-27, 614 S.E.2d at 346—but rather the transportation of the cocaine in the moving vehicle prior to discarding it. As established above, there was substantial evidence to show Defendant’s constructive possession of cocaine. Therefore, viewed in the light most favorable to the State, there is substantial evidence to support Defendant’s transportation of the cocaine in his vehicle “for his own use in a future drug sale.” *See State v. Manning*, 139 N.C. App. at 468, 534 S.E.2d at 228. The trial court did not err in denying Defendant’s motion to dismiss, and this argument is overruled.

C. Possession with Intent to Sell or Deliver

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Defendant does not make any additional arguments in his brief and relies on his arguments presented above for trafficking by possession and transportation. Since we have rejected those arguments, and Defendant does not make any additional arguments, this argument is also overruled.

IV. Conclusion

For the reasons stated above, we find no error by the trial court in denying Defendant's motion to dismiss.

NO ERROR.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).