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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-446

Filed: 4 August 2020

Onslow County, No. 17CRS057390

STATE OF NORTH CAROLINA

v.

THOMAS JOHN CLARK, Defendant.

Appeal by Defendant from judgment entered 22 October 2018 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 11 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Anne Bleyman for Defendant.

McGEE, Chief Judge.

Thomas John Clark (“Defendant”) appeals the trial court’s judgment entering jury verdicts convicting him of felony trafficking in methamphetamine and misdemeanor keeping or maintaining a dwelling house that was resorted to by persons using methamphetamine. Defendant contends that the State’s evidence was insufficient to show that he had possession of the methamphetamine found inside his

“the Residence” or that he kept or maintained “the Residence.” For the reasons discussed below, we find no error.

I. Factual and Procedural Background

The State’s evidence at trial tended to show that Defendant’s mother began living in “the Residence,” a mobile home in Lot 2 of a mobile home park in Hubert, North Carolina, in the summer of 2016. The landlord (the “Landlord”) of the Residence testified that Defendant’s mother “came to my office with her son, [Defendant], [‘in about January’ of 2017,] and she told me that she was about to go into surgery . . . and that . . . she wanted him to stay there while she was recuperating[.]” The Landlord gave her permission, and Defendant moved into the Residence. When asked “how long did you believe that [Defendant] would be living in [the Residence,]” the Landlord replied that “there was no set time.” Defendant’s mother never had the surgery, but Defendant continued to live at the Residence. When the Landlord was asked at trial, “[s]o [Defendant] was in and out of th[e] [R]esidence; is that correct?” she answered: “Well, if you would call going out, down the steps, and leaving, and coming back in a few hours, yes, he left, but he lived there.” The Landlord also testified that Defendant pointed out a particular bedroom inside the Residence and affirmed that it was his room, where he was “bunking.” Over the following nine months, Defendant was often present in and around the Residence, refused the Landlord entry into the Residence while he and his girlfriend

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were its sole occupants, and generally came and went from the Residence in the manner of a usual resident. Though Defendant's mother never had back surgery, Defendant continued to live at the Residence until 6 October 2017, at least part of that time with his girlfriend. Defendant and his girlfriend freely used the laundry facilities, which were in a separate building.

Sometime after January 2017, the Landlord had difficulty collecting rent from Defendant's mother and legally evicted her from the Residence. The Landlord was asked concerning the eviction of Defendant's mother:

Q: [W]hat happened with [Defendant] and his girlfriend?

A: They were still there.

Q: Okay. You didn't evict them?

A: I didn't know that I had to. That is the reason why.

Q: Okay?

A: I was told that if I evicted [Defendant's mother], her furnishings and everything in there would go.

Q: Okay.

A: And—but, after I evicted [Defendant's mother], . . . I learned that [Defendant and his girlfriend] didn't have to go.

The Landlord testified that she only expected Defendant's mother to be responsible for rent payments and did not realize that, because Defendant had been allowed to live at the Residence, she also needed to initiate a legal eviction against Defendant. When she became aware that she would have to initiate a separate eviction action against Defendant and his girlfriend, she "had to go back to the court again, pay them \$165 to get [Defendant] and his girlfriend evicted." The Landlord completed the eviction process against Defendant sometime in August 2017.

However, as of October 2017, Defendant and his girlfriend were still residing at the Residence as the Landlord testified. She said that though she did not believe Defendant's mother was living at the Residence on 6 October 2017, Defendant and his girlfriend were living at the Residence on that date. That morning, Defendant's son entered the Residence, got into an argument with Defendant, stabbed Defendant in the stomach, and then left. Law enforcement and emergency assistance arrived at the scene around noon, and Defendant was taken to the hospital. Police executed a search warrant for the Residence in order to look for evidence related to the stabbing. While searching the Residence, they found multiple containers with three different liquids, a pill crusher with powder and residue on it, crystalline material, needles, lantern fuel, a "cooking pot," melted plastic bottles, burnt floors, salt, Sudafed, cold packs, and battery packaging. Police also observed a mattress and men's clothing

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inside the Residence. Police believed, based on the discovered items, that the Residence was being used as a methamphetamine laboratory.

Defendant was indicted on seven felony charges related to the manufacture, possession, and trafficking of methamphetamine. At trial, Mr. John Henze (“Mr. Henze”) testified that he was doing construction work on a mobile home near the Residence on the morning of October 6 when he saw Defendant emerge from the Residence with a stab wound. Mr. Henze also testified that he was hired to perform handyman work in the mobile home park at least “four times over six months” and had seen Defendant “several times prior” to when the stabbing occurred. Ms. Irma Tucker, a neighbor in the mobile home park (“Ms. Tucker”), testified that Defendant drove her to get a check cashed in February or March of 2017. During that trip, Defendant asked Ms. Tucker to purchase batteries, Sudafed, and lantern fuel for him. Ms. Tucker refused, and Defendant went into the store and purchased the items himself. Ms. Tucker also testified that Defendant then asked her if she knew where he could obtain hypodermic needles. An agent with the State Bureau of Investigation testified that each of the purchased items were either precursors for the manufacture of methamphetamine or could be used to take methamphetamine.

Defendant later testified at trial that: he had purchased Sudafed he frequently visited and slept at the Residence and he had been in the Residence the night before he was stabbed by his son at the Residence and the following morning. The State

also presented the testimony of a forensic chemist who testified regarding the chemical nature of six vials of liquid and a bag of crystalline material discovered at the Residence. The six vials were composed of two vials each of three different liquids found in containers at the Residence. The forensic chemist testified that four of the vials contained liquid methamphetamine, taken from a total of 189 grams of two of the three liquids. The crystalline material and the remaining two vials of the third liquid each contained no controlled substances.

The jury found Defendant guilty of felony trafficking in methamphetamine by possessing more than 28 grams but less than 200 grams and misdemeanor maintaining a dwelling house that was resorted to by persons using methamphetamine. The jury acquitted Defendant of the five remaining charges. The trial court entered judgment on the jury's verdict and sentenced Defendant to a consolidated term of 70 to 93 months imprisonment. Defendant appeals.

II. Analysis

Defendant appeals the trial court's denial of his motion to dismiss each of the charges for insufficient evidence. We review the denial of a motion to dismiss *de novo*, to determine "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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is relevant evidence that a reasonable mind

might accept as adequate to support a conclusion.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation and quotation marks omitted). “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. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549–50 (2018) (citation and quotation marks omitted). “[T]he defendant’s evidence should be disregarded unless it is favorable to the State or does not conflict with the State’s evidence.” *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000).

A. Preservation

We first address whether Defendant’s motion to dismiss properly preserved appellate review of the sufficiency of the State’s evidence with respect to the charges he challenges on appeal. In light of the Supreme Court of North Carolina’s recent decision in *State v. Golder*, 374 N.C. 238, 245–47, 839 S.E.2d 782, 787–88 (2020), we hold that Defendant’s motion to dismiss properly preserved this Court’s review.

In *State v. Golder*, our Supreme Court clarified that motions to dismiss for insufficiency of the evidence under Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure “place[] an affirmative duty upon the trial court to determine whether, when taken in the light most favorable to the State, there is substantial evidence for every element of each charge against the accused.” *Id.* at 246, 839 S.E.2d

at 788; N.C. R. App. P. 10(a)(3). “[A]lthough Rule 10(a)(3) requires a defendant to make a motion to dismiss in order to preserve an insufficiency of the evidence issue, unlike Rule 10(a)(1)-(2), Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence[,]” and, if a specific ground is asserted, the assertion does not narrow the scope of the motion to dismiss or subsequent appellate review. *Id.* at 245–46, 249, 839 S.E.2d at 788, 790. “By not requiring that a defendant state the specific grounds for his or her objection, Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time.” *Id.* at 246, 839 S.E.2d at 788.

In the present case, Defendant made a general motion to dismiss at the close of the State’s evidence, followed by a specific explanation for his motion that was different than the argument he now presents on appeal. The trial court considered Defendant’s motion as a general and global motion to dismiss, challenging each element of all charges against Defendant. Defendant then renewed this motion to dismiss at the close of all the evidence. The trial court denied Defendant’s motion each time. Defendant made, and correctly renewed, a motion to dismiss for insufficiency of the evidence under Rule 10(a)(3). Therefore, under *Golder*, the motion properly preserved this Court’s review of the sufficiency of the State’s evidence supporting each element of all charges against Defendant, and Defendant’s specific

explanation before the trial court does not narrow the scope of our review. *Golder*, 374 N.C. at 246, 249, 839 S.E.2d at 788, 790.

B. Evidence of Possession

The jury convicted Defendant for trafficking methamphetamine by possession of more than 28 grams but less than 200 grams, pursuant to N.C. Gen. Stat. § 90-95(h)(3b)(a) (2017). To obtain a conviction for this offense, the State must prove “the defendant (1) knowingly possessed or transported methamphetamine, and (2) that the amount possessed was greater than 28 grams.” *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003). Defendant argues, specifically, that the State failed to present sufficient evidence that Defendant possessed the methamphetamine.

Possession of a controlled substance may be (1) actual, in which the defendant has physical or personal custody of the substance, or (2) constructive, wherein the substance is not in the defendant’s physical custody but he still “has both the power and intent to control its disposition.” *See State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). If a controlled substance is found “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. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989). However, “[i]f the defendant is not in exclusive possession of the place where contraband is found, to survive a motion to dismiss the State must show other incriminating circumstances

linking the defendant to the contraband.” *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552. “Other incriminating circumstances” considered sufficient by our Courts include, generally, that the defendant “maintained the premises as a residence, or had some apparent proprietary interest in the premises or the controlled substance.” *State v. Hamilton*, 145 N.C. App. 152, 156, 549 S.E.2d 233, 235 (2001).

In the present case, the State discovered methamphetamine at the Residence while Defendant was in the hospital, and it was not in Defendant’s actual, physical custody. Examining the evidence in the light most favorable to the State, we hold that the evidence was sufficient to submit the issue of Defendant’s constructive possession of methamphetamine to the jury. *See Davis*, 325 N.C. at 697, 386 S.E.2d at 190.

The State’s evidence showed that Defendant had primarily resided at the Residence for the majority of 2017 and that he had a proprietary interest in the Residence and the items composing the methamphetamine lab. Defendant moved into the Residence in January 2017, purportedly to help Defendant’s mother recover from surgery. While there, Defendant identified to the Landlord a particular bedroom as the place where he was “bunking.” Ms. Tucker and Mr. Henze each testified that they often saw Defendant in and around the Residence. Defendant continued to live in the Residence until October 2017, even though Defendant’s mother never had surgery and the Landlord evicted her at some point earlier in the year. From then

until Defendant was stabbed on October 6, Defendant and his girlfriend were the only people living in the Residence. On at least one occasion after Defendant's mother moved out of the Residence, Defendant refused the Landlord entry into the Residence. Further, while the Landlord did not initially seek to legally evict Defendant from the Residence, she later learned that legal proceedings were necessary to evict Defendant and his girlfriend and she evicted them.

The evidence also showed that Defendant purchased precursor ingredients for the manufacture of methamphetamine. Defendant asked Ms. Tucker to purchase Sudafed, lantern fuel, and batteries for him, and asked her where he could acquire hypodermic needles. When Ms. Tucker refused Defendant's request, Defendant purchased the items himself in her presence. Defendant himself testified that he purchased the items. Additional expert testimony confirmed that these items were used in the manufacture of methamphetamine. Defendant also testified that he was present in the Residence the night before and the morning of the stabbing. Police obtained a warrant to search the Residence the afternoon of October 6, shortly after Defendant left the Residence by ambulance that morning and before anyone else entered the Residence. Police then found what appeared to be a methamphetamine lab.

Defendant contends that the present case is distinguishable from a majority of the constructive possession jurisprudence in our state's caselaw because the

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methamphetamine and related items were found in areas of the Residence other than the bedroom he identified as his own, the Landlord did not consider him responsible for rent or utilities at the Residence, and no identifying papers or other evidence were found in the Residence. Defendant is correct that such evidence has often been found indicative of constructive possession. *See State v. Miller*, 363 N.C. 96, 100–01, 678 S.E.2d 592, 594–95 (2009) (finding sufficient incriminating circumstances where the defendant’s birth certificate and State-issued identification card were found in the same room as cocaine); *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684–85 (1971) (finding sufficient evidence of the defendant’s control of the premises where “utilities at that address were listed in [the] defendant’s name, and that an Army identification card and other personal papers bearing his name were found in the bedroom”).

However, our Courts do not require the presence of these forms of evidence in order to find constructive possession. Rather, “[w]hether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry[,]” and our “[C]ourts must consider the totality of the circumstances.” *Chekanow*, 370 N.C. at 496–97, 809 S.E.2d at 552 (citations omitted). Also, “proper application of [this Court’s] standard of review focuses our analysis on the evidence that the State *did* present in these highly fact-specific cases, not on evidence that a

reviewing court thinks the State should have presented.” *Miller*, 363 N.C. at 101, 678 S.E.2d at 595 (emphasis added).

In this case, Defendant and his girlfriend were in sole possession of the entire Residence for some time before October 6; they were the only people present in the Residence the evening before October 6 and the morning of October 6; Defendant was observed in possession of precursor materials for methamphetamine prior to their discovery inside the Residence; and Defendant had previously asserted control over the Residence by continually occupying it and refusing to allow the Landlord entry into the Residence. While the State’s evidence did not show that Defendant had exclusive control over the location where the methamphetamine and precursor materials were discovered, Defendant’s continued presence and display of authority over the Residence did show Defendant had established a residence there and had a proprietary interest in the property. The State presented sufficient “other incriminating evidence” to submit Defendant’s constructive possession of the methamphetamine to the jury.

C. Maintaining a Dwelling

Defendant was also convicted of “knowingly keep[ing] or maintain[ing] any . . . dwelling house . . . which is resorted to by persons using controlled substances.” N.C. Gen. Stat. § 90-108(a)(7) (2017). The State must prove that the defendant (1) knowingly (2) kept or maintained (3) a dwelling house (4) which was

resorted to for the use (5) of controlled substances to obtain a conviction under N.C.G.S. § 90-108(a)(7). *See State v. Rogers*, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018) (citation omitted).

Defendant contends that the State’s evidence showed only “temporary, non-exclusive occupancy by [Defendant] of [the Residence,]” which was insufficient to prove the second element—that he kept or maintained the property. Specifically, Defendant argues that this case is once again distinguishable from our caselaw because the evidence showed only temporary occupancy, there was no evidence identifying him or connecting him with the Residence, and he was not responsible for the rent or utilities for the Residence. We again disagree.

Whether a defendant kept or maintained property under N.C.G.S. § 90-108(a)(7) requires consideration of several factors: “ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent.” *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000) (citations omitted). This Court has also considered a defendant’s “possession [of the property] over a duration of time” and “possession of a key used to enter or exit the property[.]” *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001) (citations omitted). “None of the above factors is dispositive, and the court must consider the totality of the circumstances when determining whether the evidence was sufficient to support the

conclusion that the defendant kept or maintained the dwelling.” *State v. Williams*, 242 N.C. App. 361, 371, 774 S.E.2d 880, 887 (2015) (citations omitted).

Therefore, evidence of a defendant’s temporary occupancy of property, alone, is insufficient to show that he kept or maintained the property. *State v. Cowan*, 194 N.C. App. 330, 337, 669 S.E.2d 811, 817 (2008) (citation omitted). However, “evidence of residency, standing alone, is sufficient to support the element of maintaining.” *State v. Spencer*, 192 N.C. App. 143, 148, 664 S.E.2d 601, 605 (2008) (citation omitted). This Court has also clarified that

[N.C.G.S. §] 90-108(a)(7) does not require residence, but permits conviction if a defendant merely keeps or maintains a building for the purpose of keeping or selling controlled substances. Defendant’s payment of rent and possession of the key to the padlock support the inference that he maintained the building, and the evidence that defendant did not actually reside there permits the inference that he maintained it for an illegal purpose.

State v. Alston, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988).

“Occupancy” refers to a defendant’s temporary presence on the property, while “residency” denotes that the defendant “actually live[s] there,” and thus has had a prolonged presence in and responsibility for the property. *See Williams*, 242 N.C. App. at 372, 774 S.E.2d at 888. Caselaw finding sufficient evidence based on a defendant’s residency often bases the fact of residency upon the defendant’s own admission. *Spencer*, 192 N.C. App. at 148, 664 S.E.2d at 605 (finding sufficient evidence of keeping or maintaining a dwelling where the defendant confessed to police

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that he resided at the dwelling); *Cowan*, 194 N.C. App. at 337, 669 S.E.2d at 817 (finding sufficient evidence of keeping or maintaining a dwelling where the defendant told police that he resided at the dwelling). However, residency has also been established based upon a consideration of evidence which would nonetheless ordinarily be sufficient to show that the defendant kept or maintained the property. *See Williams*, 242 N.C. App. at 371–72, 774 S.E.2d at 887–88 (finding residency where the defendant received mail at the property, had visits by his probation officer at the property, kept personal property at the property, and referred to the property as “his house”); *State v. Moore*, 188 N.C. App. 416, 424, 656 S.E.2d 287, 292–93 (2008) (holding a dwelling was the defendant’s residence because he raised his children there, contributed money toward expenses, and referred to the property as “his home”). Therefore, when the State presents sufficient “evidence of residency” as set forth in the opinions cited above, it also satisfies its burden for “the element of maintaining.” *Spencer*, 192 N.C. App. at 148, 664 S.E.2d at 605; *State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987).

Defendant argues that this case is analogous to this Court’s decisions in *State v. Bowens* and *State v. Harris*. In *Bowens*, the State presented evidence that the defendant was seen at the dwelling about ten times over a three-day period, no one else was seen entering the dwelling during that time, and men’s clothing was found in a closet inside the dwelling, but presented no evidence that the defendant owned

the dwelling or had any responsibility to pay for the dwelling's general upkeep. *Bowens*, 140 N.C. App. at 221–22, 535 S.E.2d at 873. In *Harris*, the State's evidence showed that the defendant was seen at the dwelling several times over a two-month period and that his personal property was found in a bedroom inside, but there was no evidence that the defendant “owned the property, bore any expense of renting or maintaining the property, or took any other responsibility for the property.” *State v. Harris*, 157 N.C. App. 647, 652, 580 S.E.2d 63, 66–67 (2003). In each case, this Court held that there was insufficient evidence to show that the defendant kept or maintained the property because the State failed to show that the defendant had any responsibility for the property. *Id.*; *Bowens*, 140 N.C. App. at 221–22, 535 S.E.2d at 873. *See also State v. Kraus*, 147 N.C. App. 766, 768–69, 557 S.E.2d 144, 147 (2001) (holding temporary occupancy of hotel room insufficient evidence when the defendant “occupied the room for less than twenty-four hours” and the State offered no evidence that the defendant paid for the room); *Hamilton*, 145 N.C. App. at 154, 549 S.E.2d at 235 (holding evidence insufficient where the State showed only that defendant frequently visited an apartment leased by his girlfriend).

We find this case distinguishable. Similar to *Bowens* and *Harris*, the State's evidence failed to show that Defendant directly bore any responsibility for the expenses and upkeep of the Residence. Rather, the Landlord testified for the State that only Defendant's mother was responsible for rent, and that she did not initially

believe that a formal eviction process was required to evict Defendant from the Residence. However, we do not find this dispositive in this case.

The Landlord also testified that Defendant pointed out a particular bedroom inside the Residence and affirmed that it was his room, where he was “bunking.” Though Defendant’s stay at the Residence was allowed due to Defendant’s mother’s need for assistance following back surgery, the State’s evidence showed that Defendant continued to occupy the Residence until October despite Defendant’s mother never undergoing surgery. Indeed, Defendant was seen coming and going from the Residence for nearly ten months, a much longer period of time than the three-day period in *Bowens* or the two-month period in *Harris*. Defendant continued to occupy the Residence after Defendant’s mother was formally evicted from the property, was able to come and go from the property as he wished, and “would not permit [the Landlord] to come back into [the Residence] after [his mother] was evicted.”

Contrary to Defendant’s contention, the State’s evidence showed more than “temporary occupation” of the Residence by Defendant. The evidence was sufficient to show that Defendant “used, treated, and perceived the dwelling as his residence and not merely as a place he occupied [] from time to time.” *Moore*, 188 N.C. App. at 424, 656 S.E.2d at 293 (citation and quotation marks omitted). Therefore, the State’s

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evidence was sufficient to submit to the jury the issue of keeping or maintaining a dwelling place resorted to by persons using methamphetamine.

III. Conclusion

Considering the evidence in the light most favorable to the State, the evidence was sufficient to submit each of Defendant's charges to the jury. Therefore, we hold that the trial court did not err by denying Defendant's motion to dismiss.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).