IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-385

No. COA20-410

Filed 20 July 2021

Cabarrus County, Nos. 17 CRS 051404-06, 17 CRS 1999

STATE OF NORTH CAROLINA

v.

JUAN ANTONIO JOHNSON, Defendant.

Appeal by Defendant from judgments entered 19 February 2020 by Judge William A. Wood, II, in Cabarrus County Superior Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Munashe Magarira, for the State.

Daniel J. Dolan for Defendant-Appellant.

INMAN, Judge.

¶ 1 Juan Antonio Johnson ("Defendant") appeals following a jury verdict finding him guilty of possession of a firearm by a felon, possession of a stolen firearm, possession of cocaine, and knowingly maintaining a dwelling to keep a controlled substance. Defendant asserts the trial court erred by denying his motions to dismiss each charge for insufficiency of the evidence. He also contends the trial court plainly

erred in two ways: (1) by instructing the jury on a definition of "keeping and maintaining a dwelling" contrary to law and the pattern jury instruction and (2) by admitting expert testimony that failed to meet the standard for reliability under North Carolina Rule of Evidence 702.

¶ 2 After careful review, we hold the trial court erred as to Defendant's motion to dismiss the charge of knowingly maintaining a dwelling to keep a controlled substance. We otherwise hold Defendant has failed to demonstrate reversible error.

I. FACTS & PROCEDURAL HISTORY

¶ 3 The evidence presented at trial tends to show the following:

¶ 4 On 22 March 2017, the Kannapolis Police Department executed a search warrant at 656 Wilson Street, a small mill house. Police found Defendant and his girlfriend, Helvitia Collins ("Ms. Collins"), just inside the entrance to the home and immediately detained them. There was no one else in the house. Ms. Collins purportedly leased the property.

¶ 5 Police searched the house pursuant to the warrant. They found a small plastic bag containing less than one-tenth of a gram of a white, grainy substance, which they "recognized . . . to be consistent with cocaine," on a folding table in the middle room of the house. Police believed that the amount of cocaine in the bag suggested that it was for personal use.

¶ 6 In a closet in the middle room, police found male hygiene products, male clothing, a pistol later determined to be stolen[1] inside a Nike men's shoe, two digital scales, and a box of bullets. Police also found in the middle room an insurance bill and at least one other piece of mail addressed to Defendant at 656 Wilson Street.[2] Police found three photographs of Defendant throughout the home.

¶ 7 Defendant was interrogated by police later that day. Defendant claimed he was homeless but said he had been staying with Ms. Collins. He admitted to knowledge of the bag of cocaine in the home.

¶ 8 Defendant was charged with possession of a firearm by a felon, possession of a stolen firearm, possession of cocaine, knowingly maintaining a dwelling place to keep a controlled substance, and possession of drug paraphernalia. His case came on for jury trial on 17 to 19 February 2020.

¶ 9 At trial, the prosecution relied on expert testimony from Britnee Meyers ("Ms. Meyers"), an analyst at the North Carolina State Crime Lab in Greensboro, to identify the white substance found in the living room at 656 Wilson Street. Defense counsel did not challenge Ms. Meyers' qualifications as an expert witness at trial. Ms. Meyers

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[1] The pistol belonged to Beverly Butts, from whom it had been stolen in 2016. She had not given Defendant, Ms. Collins, or anyone else who had lived at the address permission to have the pistol.

[2] The State also produced mail addressed to Defendant at another address on Wilson Street.

testified about her training, duties, and experience, as well as her lab's general testing procedures, including its quality controls and its chain of custody processes. She testified that all her lab reports were "peer-reviewed" and that she had testified as an expert witness in more than 25 other cases. In this case, Ms. Meyers performed both a preliminary and a confirmatory test on the white powder found in the home and determined it was cocaine.

¶ 10 Defendant moved to dismiss all charges for insufficiency of the evidence. The trial court denied the motion. The trial court also denied renewed motions to dismiss later in the trial.

¶ 11 During deliberation, the jurors asked the trial court for a definition of "keeping or maintaining a dwelling house." The trial court instructed the jury to "give the terms or words in question the same meaning that you would if used in your everyday lives." Neither party objected to the trial court's clarification and counsel for Defendant declined the trial court's offer to reread the original jury instruction to the jurors.

¶ 12 The jury found Defendant not guilty of possession of drug paraphernalia, and guilty of possession of a firearm by a felon, possession of a stolen firearm, possession of cocaine, and knowingly maintaining a place to keep a controlled substance. Defendant admitted to having attained the status of habitual felon. The trial court

entered two judgments against Defendant and sentenced him to consecutive active sentences of 90 to 120 months followed by 30 to 48 months in prison.

¶ 13 Defendant gave oral notice of appeal. The second judgment was amended to correct the habitual felon conviction class. Defendant did not file written notice of appeal from the amended judgment. *See* N.C. R. App. P. 4(a)(2)-(b) (2021) ("The notice of appeal required to be filed . . . shall designate the judgment or order from which appeal is taken."). On appeal, concurrently with his brief, Defendant has filed a Petition for Writ of Certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e), (g) and has requested our review under North Carolina Rule of Appellate Procedure 21 in the event his oral notice of appeal was insufficient.

II. ANALYSIS

A. Defendant's Petition for Writ of Certiorari

¶ 14 Defendant failed to provide written notice of appeal from the amended judgment under North Carolina Rule of Appellate Procedure 4. N.C. R. App. P. 4(a)-(b) (2021) (requiring written notice of appeal designate the judgment from which appeal is taken). In our discretion, and because one of Defendant's arguments on appeal is meritorious, we issue the writ of certiorari. N.C. R. App. P. 21(a)(1) (2021) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.").

B. Standards of Review

¶ 15 We review 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) (citation omitted), considering the matter anew and freely substituting our own judgment for that of the trial court, *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (cleaned up). We view all evidence in the light most favorable to the State and give the State the benefit of all reasonable inferences. *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation omitted).

¶ 16 We review unpreserved instructional and evidentiary errors for plain error. N.C. R. App. P. 10(a)(4) (2021). To establish plain error, a defendant must show that the error was so fundamental that it had a probable impact on the jury verdict. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

1. Substantial Evidence of Constructive Possession of Pistol & Cocaine

¶ 17 Defendant challenges the trial court's denial of his motions to dismiss the charges of possession of a firearm by a felon, possession of a stolen firearm, and possession of cocaine, arguing there was not substantial evidence to establish his constructive possession over these items.

¶ 18 On these charges, the State must prove that Defendant possessed the pistol or cocaine. N.C. Gen. Stat. §§ 14-415.1(a), 14-71.1, 90-95(a)(3), (d)(2) (2019). Possession may be actual or constructive. *State v. Minor*, 290 N.C. 68, 73, 224 S.E.2d 180, 184

(1976). "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." *State v. Chekanow*, 370 N.C. 488, 493, 809 S.E.2d 546, 550 (2018) (cleaned up). Constructive possession is a fact-specific inquiry and this Court has considered the following factors to determine whether there is sufficient incriminating evidence connecting the defendant to the contraband:

> (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.

¶ 19 The following evidence tended to establish Defendant's intent and capability to maintain control and dominion over the cocaine and pistol: (1) two pieces of mail addressed to and received by Defendant at 656 Wilson Street, (2) male clothing and hygiene products in the closet of the living area where the pistol was found, (3) three photographs of Defendant throughout the home, (4) Defendant was dating the purported lessee of the home, and (5) Defendant was present in the home at the time of the search.

¶ 20 We are satisfied there was substantial evidence of Defendant's constructive possession over the pistol and cocaine for these charges to go to the jury. We hold the

trial court did not err by denying his motions to dismiss the possession charges.

2. No Substantial Evidence Defendant Allowed Others to Resort to the Dwelling to Consume Controlled Substances

¶ 21 Defendant asserts that the trial court erred in denying his motion to dismiss the charge of intentionally maintaining a place to keep a controlled substance, arguing that the small amount of cocaine and digital scales did not constitute substantial evidence that he knowingly allowed others to resort to the dwelling to use cocaine. On this point, we agree with Defendant.

¶ 22 The State must prove "substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020) (cleaned up). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* at 249-50, 839 S.E.2d at 790 (cleaned up). A trial court must grant a motion to dismiss if the evidence only raises a suspicion or conjecture that the defendant committed the offense. *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 550 (citation omitted).

¶ 23 It is unlawful "[t]o knowingly keep or maintain any . . . dwelling house . . . , which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same." N.C. Gen. Stat. § 90-108(a)(7) (2019). In *State v. Simpson*, 230 N.C. App. 119, 748 S.E.2d 756 (2013), this Court clearly held that "resorted to" does not

include people living in the dwelling. 230 N.C. App. at 122, 748 S.E.2d at 759 (citing *State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987)). Certainly, the presence of drug paraphernalia, like scales, *State v. Kelly*, 120 N.C. App. 821, 826, 463 S.E.2d 812, 815 (1995), or a firearm, *State v. Yisrael,* 255 N.C. App. 184, 191, 804 S.E.2d 742, 746 (2017), in a home may suggest evidence of drug-related offenses.

¶ 24 In this case, however, Defendant was charged with "knowingly and intentionally keep[ing] and maintain[ing] a dwelling house . . . that was *resorted to by persons using controlled substances*." (emphasis added). The trial court instructed the jury based on the language of the indictment: "[t]he defendant has been charged with intentionally keeping or maintaining a dwelling house which was resorted to by persons using controlled substances unlawfully."

¶ 25 The State concedes "it would be improper to pursue a conviction under [Section] 90-108(a)(7) if the only evidence was that defendant and his or her co-occupant used drugs at their home." That was, indeed, the only evidence presented at trial; the State provided no evidence that *others* resorted to the home to use controlled substances. Ms. Collins, purportedly the lessee of 656 Wilson Street, and Defendant alone occupied the home. Because a person who lives in a dwelling cannot "resort to" it to consume drugs for purposes of Section 90-108(a)(7), *Simpson*, 230 N.C. App. at 122, 748 S.E.2d at 759, the presence of a firearm, less than one-tenth of a

gram of cocaine, and two digital scales cannot constitute substantial evidence that *others* resorted to 656 Wilson Street to use controlled substances.

¶ 26 We are not persuaded by the State's argument that Defendant needed a weapon because of his "dangerous line of work," "dangerous guests," and "clients," so that the firearm constitutes evidence of maintaining a dwelling for the commission of drug offenses. No evidence in the record suggests or allows a reasonable inference that anyone other than Defendant and Ms. Collins used the home, let alone that they conducted illicit drug activity with other people.

¶ 27 Viewing the evidence in the light most favorable to the State, we hold that the State failed to produce substantial evidence that Defendant maintained a dwelling so that others could resort to the home to consume drugs. Accordingly, we vacate the judgment and the amended judgment on this conviction and remand the case for resentencing. *See State v. Humphreys*, __ N.C. App. __, __, 853 S.E.2d 789, 797 (2020).

¶ 28 Defendant also contends the trial court plainly erred in instructing the jury to "give the terms or words in question the same meaning you would if used in your everyday lives" when the jury requested a definition of "keeping or maintaining a dwelling house." Because we have vacated Defendant's conviction on this charge for insufficient evidence, we need not address this assignment of error.

3. No Plain Error in Admitting Expert Testimony

¶ 29 Defendant argues the trial court plainly erred in admitting Ms. Meyers' expert

identification of the white substance found in the home as cocaine because the testimony failed to meet the reliability standards under Rule 702. We disagree.

¶ 30 To satisfy the requirements of Rule 702, the expert testimony must be relevant, the expert must be qualified, and "the testimony must meet [a] three-pronged reliability test . . . : (1) [t]he testimony [must be] based upon sufficient facts or data[,] (2) [t]he testimony [must be] the product of reliable principles and methods [and ,] (3) [t]he witness [must have] applied the principles and methods reliably to the facts of the case." *State v. McGrady*, 368 N.C. 880, 889-90, 787 S.E.2d 1, 8-9 (2016) (cleaned up). A non-exhaustive list of five factors bears on reliability:

> (1) whether a theory or technique . . . can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the . . . technique's known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique has achieved general acceptance in its field.

Id. at 890-91, 787 S.E.2d at 9 (quotation marks omitted) (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593-94, 125 L. Ed. 2d. 469, 483 (1993)).

¶ 31 Ms. Meyers testified about her training, duties, and experience, as well as her lab's general testing procedures, including its quality controls and its chain of custody processes. She testified that all her lab reports were "peer-reviewed" and that she had been an expert witness over 25 times for other cases. Ms. Meyers then testified that, in this case, she performed both a preliminary and a confirmatory test on the

white powder found in the home and determined it was cocaine. Defense counsel did not object to the testimony or Ms. Meyers' qualifications at trial.

¶ 32 Independent of Ms. Meyers' testimony, police officers and Defendant himself testified that the substance was cocaine. Even if the trial court erred in admitting the expert testimony, Defendant has failed to demonstrate plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted).

III. CONCLUSION

¶ 33 For the above reasons, we hold the trial court erred by denying Defendant's motion to dismiss the charge of knowingly maintaining a place to keep a controlled substance. We otherwise conclude that Defendant has failed to demonstrate reversible error. Accordingly, we vacate the trial court's judgment on the erroneous conviction and remand the case for resentencing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges DIETZ and WOOD concur.

Report per Rule 30(e).