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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-514

No. COA20-703

Filed 21 September 2021

Haywood County, Nos. 18CRS053893, 19CRS000226

STATE OF NORTH CAROLINA

v.

CASEY ALLEN MAY, Defendant.

Appeal by Defendant from judgments entered 9 August 2019 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 9 June 2021.

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

William D. Spence for the Defendant.

DILLON, Judge.

¶ 1 Defendant Casey Allen May appeals from judgments finding him guilty of trafficking in methamphetamine, maintaining a dwelling for controlled substances, and conspiracy to traffic in methamphetamine.

I. Background

¶ 2 The evidence at trial tended to show as follows: On 7 November 2018, narcotics investigators from the Haywood County Sheriff's Office surveilled an apartment complex in Clyde based on reports of drug activity in the area. Building C was specifically identified during the investigation. Defendant had been arrested on 6 November on unrelated charges. He was showering in Apartment C4 at the time of that arrest. Defendant was released shortly after his arrest.

¶ 3 Two days later, on 8 November 2018, officers executed a search warrant covering Apartment C4, a warrant which was obtained based on observations of people coming and going from the apartment in a manner consistent with drug activity and at least one individual leaving the apartments with methamphetamine on her person. Five people were found in Apartment C4 during the search, including the woman who leased it. Defendant and a co-defendant were in a bedroom together. The bedroom contained male and female clothing.

¶ 4 In the bedroom, officers found drug paraphernalia, including needles, digital scales, syringes, tourniquets, spoons, a bong, and opioid response overdose kits. In a woman's purse, officers found a gum container marked "Lo's Change."[1] The gum container held a plastic baggie tied shut with 22.39 grams of methamphetamine inside. Officers also found a black plastic bag of methamphetamine on the ground

[1] "Lo" was a known nickname for the co-defendant in this case.

outside the window unit of the bedroom. The window had been pushed open to leave an opening, and the bag was still warm without any dew on it. The black plastic bag was tied in the same way as the bag found inside the gum container. While the occupants of the apartment were waiting outside during the search, Defendant requested a jacket from the bedroom where he and his co-defendant had been found.

¶ 5 Defendant and his co-defendant were both charged with several drug-related crimes. The State moved to join their cases for trial. The trial court granted the motion over Defendant's objection. Defendant was convicted of a number of crimes. Defendant timely appealed.

II. Analysis

¶ 6 Defendant makes a number of arguments on appeal. We hereby allow Defendant's petition for writ of *certiorari* in order to address many of these issues. We choose not to reach Defendant's third and fourth arguments.

A. Motion to Suppress

¶ 7 In his first argument, Defendant argues that the trial court committed plain error in denying his motion to suppress evidence seized through a search warrant. We disagree.

¶ 8 Because Defendant failed to object at trial when the State admitted the evidence in question, we review this issue for plain error. *See* N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 874 (2007). Plain error is

defined as a "fundamental error . . . where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted).

¶ 9 "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). The Fourth Amendment protects citizens from unreasonable searches and seizures, U.S. Const. amend. IV, and "permits warrants to be issued only upon a showing of probable cause." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015).

¶ 10 "Probable cause requires only a *probability or substantial chance* of criminal activity, not an actual showing of such activity." *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (emphasis in original). In cases where a search warrant is issued to search a residence, "the facts set out in the supporting affidavit must show some connection or nexus linking the residence to illegal activity. Such a connection need not be direct, but it cannot be purely conclusory." *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020).

¶ 11 Defendant specifically challenges Finding of Fact 11 and contends that Finding of Fact 16 ("The Court finds no irregularities in the warrant[.]") is more appropriately a conclusion of law. Finding of Fact 11 reads:

> The information submitted by the detective includes that [the known drug dealer] had been at the Meadowland Apartments and specifically around [Defendant and co-defendant,] and was then found to have 32.3 grams of methamphetamine on her person. Additionally, law enforcement observed a female wearing a dark long sleeve shirt and jeans go into apartment C4, leave in a white Ford Focus, and was then stopped by law enforcement and had over an ounce of methamphetamine in the vehicle.

¶ 12 Competent evidence supported Finding of Fact 11. In part, the affidavit stated that: (1) a known trafficker of narcotics had been seen coming and going from the apartment complex in the days prior to Defendant's arrest, (2) a white female with dark hair was seen leaving Apartment C4, was thereafter stopped in her car, and methamphetamine was found pursuant to a search of her vehicle, (3) Defendant was seen exiting Apartment C4 on foot, meeting with a vehicle, and going back into Apartment C4, and (4) the detective observed numerous people come and go from Apartment C4 because he was parked where he could watch room C4 and give descriptions of the people coming and going.

¶ 13 The affidavit provided facts which supported a nexus between Apartment C4 and illegal drug activity, sufficient to show probable cause. *See Bailey*, 374 N.C. at 335, 841 S.E.2d at 280. We conclude that the affidavit provided probable cause for

issuance of the search warrant of Apartment C4. Therefore, the trial court did not err in denying Defendant's motion to suppress the evidence seized through the search warrant.

B. Motion to Dismiss Charge of Maintaining a Dwelling

¶ 14 In Defendant's second argument, he contends that the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling for keeping and selling controlled substances. We disagree.

¶ 15 In reviewing the denial of a 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 . . . 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). "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, 265 S.E.2d 164, 169 (1980). The evidence must be considered in the light most favorable to the State in making this determination. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 16 Defendant was charged under N.C. Gen. Stat. § 90-108(a)(7) (2018), which prohibits (1) keeping or maintaining a dwelling for the purpose of (2) keeping or selling controlled substances.

1. Keeping or Maintaining a Dwelling

¶ 17 Certain factors, none of which are dispositive, should be considered in determining whether a person "keeps or maintains" a place, including: "occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses." *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001). And while "occupancy, without more, will not support the element of maintaining a dwelling . . . 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) (internal quotation marks and citation omitted).

¶ 18 Here, Defendant met several of the occupancy factors and satisfied the question of residency. The evidence presented at trial, considered in the light most favorable to the State, showed that Defendant occupied a room in Apartment C4, possessed the property over a period of time, and had access to the property (suggesting the use of a key to enter and exit the property). Defendant's residence at the property, which alone is sufficient to support a conviction for keeping or maintaining a dwelling, was supported by the additional evidence of Defendant showering and keeping clothing at the property.

2. Keeping or Selling

¶ 19 The second half of N.C. Gen. Stat. § 90-108(a)(7) requires "keeping or selling" controlled substances. The State meets its burden by establishing *either* "keeping" or

"selling." *See State v. Rogers*, 371 N.C. 397, 401 n.1, 817 S.E.2d 150, 154 n.1 (2018). "Keeping" controlled substances in this context refers to storing them for a period of time. *Id.* at 403, 817 S.E.2d at 155.

¶ 20 In cases of "selling" controlled substances, our courts consider the following factors in totality: "the amount of drugs present, any paraphernalia (including cutting devices, scales, and containers for distribution) found in the dwelling, the amount of money found in the dwelling, and the presence of multiple cellular phones or pagers." *State v. Thompson*, 188 N.C. App. 102, 106, 654 S.E.2d 814, 817 (2008). The mere presence of cash *or* drugs, without more, has been held to be insufficient evidence of keeping or maintaining a dwelling or the purpose of selling controlled substances. *See In re I.R.T.*, 184 N.C. App. 579, 589, 647 S.E.2d 129, 137 (2007) ("As with a large quantity of drugs, we determine that the presence of cash, alone, is insufficient to infer an intent to sell or distribute.").

¶ 21 Here, surveillance of Apartment C4 and the surrounding apartment complex revealed activity suggesting drug transactions. Methamphetamine was discovered on persons stopped coming from or near Apartment C4, and Defendant was observed by officers engaging in what appeared to be drug transactions. Finally, when Apartment C4 was searched pursuant to a warrant, methamphetamine was found along with needles, scales, syringes, and other drug paraphernalia.

¶ 22 We conclude that there was substantial evidence of each essential element of the offense charged and of Defendant being the perpetrator. Therefore, the trial court did not err in denying Defendant's motion to dismiss the charge of maintaining a dwelling for keeping and selling controlled substances.

C. Sufficiency of Evidence for Trafficking in Methamphetamine

¶ 23 Defendant next argues that there was insufficient evidence to support his conviction of trafficking in methamphetamine by possession of twenty-eight (28) grams or more. Defendant failed to make a motion to dismiss this charge at the close of the State's case, and we decline to review this argument. *See* N.C. R. App. P. 10(a)(3) ("In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial.").

D. Ineffective Assistance of Counsel

¶ 24 Defendant next argues that his trial counsel provided ineffective assistance of counsel in failing to move to dismiss the charge of trafficking in methamphetamine by possession of twenty-eight (28) grams or more at the close of all evidence. We decline to review the merits of this argument under Defendant's petition for writ of *certiorari*.

E. Motion to Dismiss Charge of Conspiracy to Traffic in Methamphetamine

¶ 25 Defendant next argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to traffic in methamphetamine. We disagree. The standard of review for the denial of a motion to dismiss is the same as set forth in Section II.B. above.

¶ 26 A criminal conspiracy is "an agreement between two or more people to do an unlawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). Courts review "the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom" to determine whether a conspiracy exists. *State v. Whiteside*, 204 N.C. 710, 713, 169 S.E. 711, 712 (1933).

¶ 27 Defendant argues that there was a lack of agreement between himself and his co-defendant to traffic in methamphetamine. He points to the evidence of methamphetamine being found in a container marked "Lo's Change," a known nickname of his co-defendant. We are unpersuaded by Defendant's argument. It is well-settled that an agreement between defendants need not be express in nature. *See Morgan*, 329 N.C. at 658, 406 S.E.2d at 835.

¶ 28 While some of the contraband in this case was found in a container with his co-defendant's name on it, Defendant shared the room in which methamphetamine,

needles, syringes, scales, and other drug paraphernalia were found. Methamphetamine was not only found in the container marked "Lo's Change" and drug paraphernalia was in plain sight in the bedroom, making it likely that Defendant knew of its presence. The evidence at trial also showed that Defendant and his co-defendant were in a relationship and lived together. Finally, detectives observed Defendant engaging in what appeared to be drug transactions outside the apartment, indicating that he was a participant in the storage and/or sale of methamphetamine inside the bedroom with his co-defendant.

¶ 29 We conclude that there was substantial evidence of each essential element of the offense charged and of Defendant being the perpetrator. Therefore, the trial court did not err in denying Defendant's motion to dismiss the charge of conspiracy to traffic in methamphetamine.

F. Joinder

¶ 30 Defendant next argues that the trial court erred in granting the State's motion to join his and his co-defendant's case for trial. We disagree.

¶ 31 A trial court's ruling on joinder is reviewed on appeal for abuse of discretion. *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987). A trial court may be reversed for abuse of discretion "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

¶ 32 Our General Statutes provide, in relevant part:

> (b) Separate Pleadings for Each Defendant and Joinder of Defendants for Trial.
>
> > (1) Each defendant must be charged in a separate pleading.
> >
> > (2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
> >
> > > a. When each of the defendants is charged with accountability for each offense; or
> > >
> > > b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
> > >
> > > > 1. Were part of a common scheme or plan; or
> > > >
> > > > 2. Were part of the same act or transaction; or
> > > >
> > > > 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

N.C. Gen. Stat. § 15A-926(b) (2018).

¶ 33 However, the court must deny joinder or grant a severance upon motion of a party when "it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants[.]" *Id.* § 15A-927(c)(2)(a).

¶ 34 A trial court does not err in allowing joinder where "competent evidence introduced at the joint trial would have been competent against [the defendant] at a separate trial." *State v. Nelson*, 298 N.C. 573, 588, 260 S.E.2d 629, 641 (1979). In *Nelson*, the defendants argued that "certain inconsistencies in their respective testimony amounted to antagonistic defenses requiring that they be given separate trials." *Id*. at 586, 260 S.E.2d at 640 (internal quotation marks omitted). However, our Supreme Court concluded that the joinder of the cases was permissible because the State did not "simply [stand] by and [rely] on the testimony of the respective defendants to convict them[;]" rather, independent evidence was introduced of defendants' guilt. *Id*. at 588, 260 S.E.2d at 641. In sum, the "conflict between each defendant's respective testimony was not of such magnitude when considered in the context of other evidence that the jury was likely to infer from that conflict alone that both were guilty." *Id*. at 588, 260 S.E.2d at 641.

¶ 35 Here, the evidence introduced in Defendant's case could have been introduced in a separate trial. Defendant and his co-defendant did not testify against one another, so the jury could not have relied on their testimony to conclude that both were guilty. The underlying factual circumstances were appropriate for the trial court to consider joinder as they indicated a common scheme or plan. *See* N.C. Gen. Stat. § 15A-926(b). Therefore, we conclude that the trial court did not abuse its discretion in joining Defendant's and his co-defendant's cases for trial.

G. Jury Instructions on Actual Possession

¶ 36 In his final argument, Defendant contends that the trial court plainly erred by instructing the jury on the theory of *actual* possession. We disagree. Because Defendant failed to object to the instruction on actual possession at trial, we review this issue under the plain error standard set forth in Section II.A above.

¶ 37 "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). Here, Defendant argues that the trial court should not have given an *actual* possession instruction because it was unsupported by the evidence.

¶ 38 Possession of contraband may be actual or constructive. *State v. Malachi*, 371 N.C. 719, 730, 821 S.E.2d 407, 416 (2018). "Actual possession requires that a party have physical or personal custody of the item" while constructive possession refers to "the intent and capability to maintain control and dominion" over the item. *Id.* at 730-31, 821 S.E.2d at 416.

¶ 39 Here, the trial court instructed the jury on both actual and constructive possession:

> [P]ossession of a substance may be either actual or constructive. A person has actual possession of a substance if the person has it on the person, is aware of its presence, and either alone or together with others, has both the power and intent to control its disposition or use. A person has constructive possession of a substance if the person does not have it on the person but is aware of its presence

> and has either alone or together with others both the power and intent to control its disposition or use.

¶ 40 The ample evidence supporting the alternate theory of *constructive* possession of the contraband leads us to conclude that the trial court did not commit plain error because Defendant has not shown that the error, if any, was "so prejudicial that without the error it is likely that a different result would have been reached." *State v. Loren*, 302 N.C. 607, 613, 276 S.E.2d 365, 369 (1981).

III. Conclusion

¶ 41 After allowing Defendant's petition for writ of *certiorari* as to Defendant's first, second, fifth, sixth, and seventh arguments, we conclude that the trial court did not commit reversible error. We decline to review the merits of Defendant's third and fourth arguments.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).