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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1003

Filed 3 October 2023

Onslow County, Nos. 19CRS54163, 19CRS54292

STATE OF NORTH CAROLINA

v.

CODY WILLIAM RADFORD, Defendant.

Appeal by defendant from judgment entered 16 June 2022 by Judge Lee Gavin in Onslow County Superior Court. Heard in the Court of Appeals 6 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert T. Broughton, for the State-appellee.

Stephen G. Driggers, PLLC, by Stephen G. Driggers, for defendant-appellant.

GORE, Judge.

Defendant, Cody William Radford, was convicted of possession of a firearm by a felon, possession with the intent to sell or deliver methamphetamine, and possession of drug paraphernalia. Defendant pled guilty to the status of habitual felon. The trial court consolidated defendant's offenses into one judgment and sentenced him to imprisonment for 146 months to 188 months. Defendant solely appeals the trial court's denial of his motion to dismiss the possession with intent to sell or deliver methamphetamine offense for insufficiency of the evidence. Upon review of the record and the briefs, we conclude the trial court did not err.

I.

On 30 July 2019, law enforcement set up a surveillance in response to a reliable source of information that methamphetamine was being sold at the Traveler's Inn in Jacksonville, North Carolina. This Traveler's Inn had a reputation as a "high crime area" among law enforcement for previous illegal drug activity. Multiple law enforcement officers sat in unmarked cars at different angles near the Inn. A vehicle drove into the Inn's parking lot and parked by Room No. 1. At this point, law enforcement provided various testimony concerning who exited the vehicle. Detective Noel testified from his angle facing the back of the van, a woman exited the vehicle went into the room and returned soon after before a man came out to the vehicle and reached into the car; Lieutenant Fidler testified from his angle facing the passenger's side of the van that first a man came out of the room and "exchanged something with a passenger" inside the van, and second a woman exited the vehicle, went into the room, and returned to the van; and Detective Straughan testified from his angle facing the driver's side of the vehicle that the driver (later determined to be defendant) exited the vehicle, walked into the room, and returned to the van soon after.

Detective Straughan began following the van in his unmarked patrol car once the van left the parking lot, and he alerted a uniformed law enforcement officer to pursue the van. The van was stopped by the uniformed officer for a traffic violation. The driver, defendant, was accompanied by two passengers in the van. Law

enforcement searched defendant and found a syringe and baggies in his pocket. Upon discovering these items, law enforcement initiated a search of the vehicle. Law enforcement found a backpack behind the driver's seat that contained: defendant's driver's license, a handgun, a digital scale, "glassine bags," and unused syringes. They also found a pouch of a "white-ish clear," "crystal like substance" on the floorboard between the driver and passenger seats that was later confirmed to be 13.4 grams of methamphetamine. The pouch also contained a suboxone strip and smaller Ziploc baggies.

Defendant was arrested and later indicted for: possession of methamphetamine with intent to sell or deliver ("possession offense"); possession of a firearm by a felon; and possession of drug paraphernalia. At the jury trial, defendant moved to dismiss the possession of methamphetamine with intent to sell or deliver at the close of the State's evidence, but the trial court denied this motion. Defendant did not testify or present any evidence. The jury returned guilty verdicts for all the offenses, and defendant pled guilty to obtaining the status of habitual felon. The trial court consolidated defendant's convictions and sentenced defendant to 146 months to 188 months imprisonment. Defendant timely appealed pursuant to sections 7A-27(b) and 15A-1444(a).

II.

Defendant argues the trial court erred by denying his motion to dismiss the possession offense for insufficiency of the evidence. Specifically, defendant argues

there was insufficient evidence tending to show that he possessed the methamphetamine. We disagree.

A.

The State appears to challenge the preservation of defendant's argument. As previously stated in *State v. Golder*, Rule 10(a)(3) of the Rules of Appellate Procedure requires only that the defendant move to dismiss at the proper time to preserve "all insufficiency of the evidence issues for appellate review." 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020). A defendant waives this motion if he moves for dismissal at the close of the State's evidence and fails to make another motion to dismiss after presenting his own evidence. *Id.* at 245, 839 S.E.2d at 787–88. Additionally, if the defendant moves to dismiss specific charges, rather than generally seeking to dismiss all charges against him, he preserves only the specific charges for appellate review. *State v. Gettleman*, 275 N.C. App. 260, 270, 853 S.E.2d 447, 454 (2020). Because defendant sought dismissal, specifying the dismissal was for the offenses related to possession at the close of the State's evidence, and did not put on any evidence, defendant preserved the motion to dismiss the offenses related to possession for appellate review.

Accordingly, we consider the preserved motion to dismiss the possession offense under the applicable standard of review. "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Golder*, 374 N.C. at

250, 839 S.E.2d at 790 (citations omitted). Our Courts have repeatedly applied the following legal precedents under de novo review for a motion to dismiss:

In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. . . . *[I]f there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction*, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury. Because [e]vidence in the record supporting a contrary inference is not determinative on a motion to dismiss, [c]ircumstantial evidence may withstand a motion to dismiss and support a conviction *even when the evidence does not rule out every hypothesis of innocence[.]* . . . In borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury.

State v. Blagg, 377 N.C. 482, 487–89, 858 S.E.2d 268, 273 (2021) (cleaned up). We now consider whether the State presented substantial evidence to overcome a motion to dismiss.

B.

Defendant asks us to reverse the trial court’s ruling on the motion to dismiss, claiming the State did not provide substantial evidence he constructively possessed the methamphetamine found in the vehicle. Defendant emphasizes his nonexclusive

access to the illegal substance and the varied testimony between officers to demonstrate the lack of substantial evidence admitted by the State. Despite these “contrary inferences” that could be drawn from conflicting evidence in the record, we determine substantial evidence supports each element of the possession offense. *Id.*

The State must provide substantial evidence for each of the following elements to overcome a motion to dismiss the possession offense: “(1) possession; (2) of a controlled substance; (3) with intent to sell or deliver the controlled substance.” *Id.* at 489, 858 S.E.2d at 274 (citing N.C. Gen. Stat. § 90-95(a)(1) (2019)); *see* N.C. Gen. Stat. § 90-90(3) (2022) (listing methamphetamine as a schedule II controlled substance). Defendant appears to only take issue with the possession element of this offense. Therefore, we only consider whether the State produced substantial evidence defendant possessed the methamphetamine.

“Possession of contraband may be actual or constructive.” *State v. Chekanow*, 370 N.C. 488, 493, 809 S.E.2d 546, 550 (2018). The State produced evidence to demonstrate defendant constructively possessed the methamphetamine. Constructive possession of a controlled substance is “the intent and capability to maintain control and dominion over” that substance without possession on the person. *Id.* The Courts employ a “totality of the circumstances analysis” to determine whether a defendant constructively possessed the substance. *Id.*

In considering constructive possession of evidence found in a vehicle, we have held, “the driver of a borrowed car, like the owner of the car, has the power to control

the contents of the car.” *State v. Tisdale*, 153 N.C. App. 294, 298, 569 S.E.2d 680, 682 (2002) (cleaned up). “Circumstances which are sufficient to support a finding of constructive possession include close proximity to the controlled substance and conduct indicating an awareness of the drugs, such as efforts at concealment or behavior suggesting a fear of discovery[.]” *State v. Bradley*, 282 N.C. App. 292, 297, 870 S.E.2d 297, 301 (2022) (internal quotation marks and citation omitted); *but see State v. Sharpe*, __ N.C. App. __, __, 887 S.E.2d 116, 121–22 (2023) (discussing how the mere presence of a passenger in a vehicle who had awareness of the firearm is insufficient to show the passenger constructively possessed the firearm).

Alternatively, if the defendant is the driver this may be enough to establish an inference of constructive possession of any illegal substances discovered in the vehicle. *See State v. Wirt*, 263 N.C. App. 370, 375, 822 S.E.2d 668, 672 (2018) (“[W]hile [d]efendant’s status as the driver might . . . be sufficient to uphold his conviction for possession of methamphetamine, the State also presented additional incriminating evidence to support an inference of constructive possession.”); *State v. Mitchell*, 224 N.C. App. 171, 178, 735 S.E.2d 438, 443 (2012) (distinguishing how the defendant who was the driver of the vehicle and had the “power to control the vehicle” differed from a prior case in which the defendant was “only a passenger”); *State v. Best*, 214 N.C. App. 39, 47, 713 S.E.2d 556, 562 (2011) (suggesting the firearm found in the van defendant was driving could be sufficient evidence for an inference of constructive possession). Yet in those cases, we also considered the “additional

incriminating evidence” available to further support our determination the evidence was sufficient to overcome a motion to dismiss. *Wirt*, 263 N.C. App. at 376, 822 S.E.2d at 672.¹

In the present case, additional incriminating evidence exists beyond defendant’s status as the driver of the van. The State offered the following evidence to support defendant’s constructive possession of the pouch of methamphetamine: defendant was in the vehicle in a location under surveillance for suspected drug trafficking; defendant was the driver of the vehicle that contained the methamphetamine; defendant had syringes and baggies in his pockets; the pouch of methamphetamine was located on the floor within arm’s reach of defendant’s driver seat; law enforcement found a backpack with defendant’s driver’s license that also contained a gun, syringes, “glassine bags,” and a digital scale. Although defendant points to the State’s differing testimony by law enforcement as to who exited the vehicle and entered the motel room, this evidence does not overcome the inference drawn from the incriminating evidence previously listed. This evidence provides a reasonable inference of his constructive possession despite the other vehicle

¹ Although the State relies on *Blagg* for factors to demonstrate “other incriminating evidence,” those factors are for determining whether the defendant has intent to sell or deliver the substance, not whether defendant constructively possessed the illegal substance. *See Blagg*, 377 N.C. at 490, 858 S.E.2d at 274 (“In establishing defendant’s intent to sell or deliver in the present case, the State introduced evidence of the manner in which the methamphetamine was packaged, the manner in which [it] was stored, defendant’s activities, the quantity of methamphetamine found, and the presence of drug paraphernalia.”).

occupants when taken in the light most favorable to the State. Accordingly, this substantial evidence was sufficient to overcome the motion to dismiss the possession offense.

III.

For the foregoing reasons, we conclude the trial court did not err by denying defendant's motion to dismiss the offense of possession with intent to sell or deliver methamphetamine.

NO ERROR.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).