

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1023

Filed 6 August 2024

Union County, No. 21 CRS 053085

STATE OF NORTH CAROLINA

v.

AMANDA LEIGH RAPE, Defendant.

Appeal by Defendant from judgment entered 13 March 2023 by Judge Jonathan Wade Perry in Union County Superior Court. Heard in the Court of Appeals 11 June 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Ashley B. Weathers, for the State.*

*Tin Fulton Walker & Owen PLLC, by Zachary Ezor, for Defendant.*

GRIFFIN, Judge.

Defendant Amanda Leigh Rape appeals from the trial court's judgment entered after a jury found her guilty of possession of a Schedule-II controlled substance under N.C. Gen. Stat. § 90-95(a)(3). Defendant contends the trial court erred by denying her motion to dismiss as there was insufficient evidence to support a finding of constructive possession. We hold the trial court did not err.

## **I. Factual and Procedural Background**

On 23 August 2021, Monroe Police Sergeant Adam Craig observed a red Jeep Cherokee in a parking lot with two men lying on the ground beside the vehicle. Sgt. Craig pulled up next to the vehicle to check on the two men and discovered both were asleep.

Sgt. Craig then checked on the two individuals occupying the driver and passenger seats in the vehicle. The vehicle was filled with belongings and blankets covered the windows. The occupant of the driver's seat, Betty King Mills, was "completely unalert" with a used syringe in her hand. Defendant, who appeared to be asleep, was sitting in the passenger seat. Sgt. Craig contacted EMS, requested backup, and attempted to wake up Defendant and Ms. Mills. He was only able to wake Defendant. After waking up, Defendant began stuffing money into a wallet, and Sgt. Craig ordered Defendant to get out of the car while they waited for EMS. Sgt. Craig observed used syringes covering the front and back compartments of the vehicle. In addition to the syringes, Sgt. Craig noticed a bag containing a white powdery substance in an open compartment beneath the passenger's side glove box. A forensic scientist later confirmed and testified at trial that the white powdery substance contained fentanyl. The compartment was within arm's reach of where Defendant had been sitting.

Sgt. Craig and Officer Todd Haigler searched the vehicle after EMS arrived. During the search, the officers located the bag of fentanyl that was in the open

STATE V. RAPE

*Opinion of the Court*

compartment in front of Defendant. In addition to the fentanyl found in the vehicle, the officers collected ten used syringes, another loaded syringe in a box between the seats, several burnt spoons, needles, and Suboxone strips. Officer Haigler also discovered a glass pipe used to smoke methamphetamine, a spoon with brown residue in the passenger-side door, and an empty plastic baggy in between the passenger seat and the console.

On 29 August 2022, Defendant was indicted for possession of fentanyl, a Schedule-II controlled substance, and for possession of drug paraphernalia. Defendant's case came on for trial on 6 March 2023 in Union County Superior Court. Defendant's counsel moved to dismiss the charges—both at the close of the State's evidence, and at the close of all evidence—for insufficient evidence. The trial court denied both motions.

On 13 March 2023, the jury returned a verdict finding Defendant guilty of possession of fentanyl. Defendant gave oral notice of appeal seven days after her trial concluded.

**II. Petition for Writ of Certiorari**

Defendant's notice of appeal failed to comply with the requirements of Rule 4(a) of the North Carolina Rules of Appellate Procedure. Pursuant to Rule 4(a), to appeal from a judgment in a criminal case “(1) [a] party may give oral notice of appeal at the time of trial or of the pretrial hearing, or (2) notice of appeal may be in writing and filed with the clerk of court . . . at any time between the date of the rendition of

STATE V. RAPE

*Opinion of the Court*

the judgment or order and the fourteenth day after entry of the judgment or order. *State v. Jordan*, 242 N.C. App. 464, 468, 776 S.E.2d 515, 518 (2015) (citation and internal quotation marks omitted); see N.C. R. App. P. 4(a). Here, Defendant gave oral notice of appeal seven days after trial. In acknowledgement of this error, Defendant filed a Petition for Writ of Certiorari. Appellate Rule 21(a)(1) allows this Court to review trial court judgments “when the right to prosecute an appeal has been lost by failure to take timely action[.]” N.C. R. App. P. 21(a)(1). Accordingly, this Court is authorized to review Defendant’s criminal judgment and conviction. Although Defendant’s notice of appeal was improper, the trial court acknowledged Defendant’s appeal and appointed appellate counsel to assist her. In our discretion, we grant Defendant’s petition for writ of certiorari and proceed to address the merits of the case.

**III. Standard of Review**

We review a trial court’s denial of a defendant’s motion to dismiss *de novo*. *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020). To survive a motion to dismiss based on insufficiency of the evidence, the State must present substantial evidence (1) of each essential element of the charged offense and (2) of the defendant being the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.” *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and quotation marks omitted).

## STATE V. RAPE

### *Opinion of the Court*

In ruling on a motion to dismiss, the court must view all evidence “in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]” *Id.* (citation and internal marks omitted). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Thomas*, 350 N.C. 315, 343, 514 S.E.2d 486, 503 (1990) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). The standard for a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. “When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.” *Id.* at 379, 526 S.E.2d at 455–56 (citation omitted).

#### **IV. Analysis**

Defendant argues the trial court erred by denying her motion to dismiss for insufficient evidence. Specifically, Defendant contends the State failed to present evidence of “incriminating circumstances” sufficient to support a finding of constructive possession.

Under North Carolina law, “it is unlawful for any person to possess a controlled substance.” N.C. Gen. Stat. § 90-95(a)(3) (2023). “Possession of a controlled substance may be actual or constructive.” *State v. Ferguson*, 204 N.C. App. 451, 459,

STATE V. RAPE

*Opinion of the Court*

694 S.E.2d 470, 477 (2010) (citation omitted). “A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.” *State v. Reid*, 151 N.C. App. 420, 428–29, 566 S.E.2d 186, 192 (2002) (citation omitted). Constructive possession of a substance occurs when a person lacks actual possession but has the intent and capability to maintain control and dominion over the substance. *Ferguson*, 204 N.C. App. at 459, 694 S.E.2d at 477.

To survive a motion to dismiss when a defendant is not in exclusive possession of the place where the substance is found, the State must provide evidence of other incriminating circumstances linking the defendant to the substance. *State v. Chekanow*, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018). “[T]he mere presence of the defendant in an automobile containing drugs does not, without additional incriminating circumstances, constitute sufficient proof of [constructive] drug possession.” *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996) (citation omitted). To determine whether sufficient incriminating circumstances exist to support a finding of constructive possession, courts consider:

- (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.

STATE V. RAPE

*Opinion of the Court*

*Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552. No one factor is controlling. *Id.* Whether sufficient incriminating circumstances exist is a fact-specific inquiry requiring courts to consider the totality of the circumstances. *Id.*

Here, Defendant did not have actual possession of the fentanyl and was not in exclusive possession of the place where the contraband was found. Thus, the State was required to present evidence of other incriminating circumstances to support a finding of constructive possession. *Id.* Defendant argues the State's evidence was insufficient.

Defendant contends the contraband could not be attributed to her because Ms. Mills was the driver and owner of the vehicle. Although Defendant did not own the vehicle, the State presented evidence tending to show Defendant was sleeping in the vehicle, living out of the vehicle, and solely occupying the passenger side of the vehicle within arm's reach of where the contraband was found.

Moreover, the State introduced evidence that Defendant was asleep in a vehicle with drug paraphernalia, was located next to an active drug user, and was in an area known for drug and criminal activity, all of which support a reasonable inference that Defendant was aware of the presence of drugs inside the vehicle. *See State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (holding that where there was an odor of marijuana and the presence of drug paraphernalia in a vehicle "a juror could reasonably determine [the] defendant knew drugs were in the car").

STATE V. RAPE

*Opinion of the Court*

Additionally, Defendant was located in close proximity to the contraband and could easily access and control the open space where it was found. Defendant was the sole occupant of the passenger side, was within arm's reach of the contraband, and was the only individual to exit that side of the vehicle. *See Carr*, 122 N.C. at 373, 470 S.E.2d at 73 (holding that cocaine found in the floorboard of the front passenger side of a vehicle where the defendant had been sitting was sufficient indicia of the defendant's control, as he solely occupied that side of the car and was the only individual to exit that side of the vehicle); *see also State v. Miller*, 363 N.C. 96, 97–98, 678 S.E.2d 592, 593 (2009) (holding that an individual's personal items found in the same area where the contraband was found were a sufficient indicator of control). Despite Defendant's contention that the belongings in the vehicle could not be directly attributed to her, an inference could be drawn from facts in the record that she was living inside the vehicle. Thus, it can reasonably be inferred that some of the personal belongings in the car belonged to Defendant.

Further, the State showed that Defendant was the only one capable of exercising control over the fetanyl as Ms. Mills, the owner and other occupant of the vehicle, was “completely unalert” and had no intent or capability to exercise dominion and control over the contraband. However, even if Ms. Mills was not “completely unalert,” Defendant “may have the power to control either alone or jointly with others.” *Id.* at 99, 678 S.E.2d at 594 (citing *State v. Fuqua*, 234 N.C. 168, 170–71, 66 S.E.2d 667, 668 (1951)). “[A] defendant's opportunity to place contraband in the place

STATE V. RAPE

*Opinion of the Court*

where it was found is additional indicia of control.” *Chekanow*, 370 N.C. at 497, 809 S.E.2d at 553; *see Matias*, 354 N.C. at 552–53, 556 S.E.2d at 271 (holding that the defendant, one of four passengers in a vehicle, was the only person in the car who could have put the package of cocaine where it was located – the crease of the car seat where he was sitting). Similar to the defendant in *Matias*, Defendant did not solely occupy the vehicle, but was the only person capable of exercising control over the area where the contraband was found. *Cf. Ferguson*, 204 N.C. App. at 461–62, 694 S.E.2d at 478 (holding that there was insufficient evidence to support a finding of constructive possession where the defendant was fleeing from a vehicle and could not be linked to the specific area of the car where the contraband was found). Unlike the defendant in *Ferguson*, here, the officers found Defendant inside the vehicle and within arm’s reach of the contraband.

Viewing the evidence in the light most favorable to the State, the evidence of Defendant’s occupation of the vehicle, her proximity to the contraband, and her control over the area where the contraband was found, constitute sufficient incriminating circumstances to support a finding of constructive possession. Accordingly, the trial court did not err by denying Defendant’s motion to dismiss.

**V. Conclusion**

We hold the trial court properly denied Defendant’s motion to dismiss.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE V. RAPE

*Opinion of the Court*

Report per Rule 30(e).