

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA23-990

Filed 15 October 2024

Forsyth County, Nos. 21 CRS 57780-83

STATE OF NORTH CAROLINA

v.

TONI MARIA GORDON

Appeal by defendant from judgment entered 24 January 2023 by Judge L. Todd Burke in Superior Court, Forsyth County. Heard in the Court of Appeals 25 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Dylan C. Sugar, for the State.

Kimberly P. Hoppin for defendant.

ARROWOOD, Judge.

Toni Maria Gordon (“defendant”) appeals from the trial court’s judgment entered 24 January 2023. For the following reasons, we affirm the trial court’s judgment.

I. Background

Defendant was indicted on 3 January 2022 on charges of simple possession of

STATE V. GORDON

Opinion of the Court

drugs and drug paraphernalia, trafficking, and possession with intent to sell and deliver. The case went to trial on 23 January 2023, and the evidence tended to show the following:

On 25 August 2021, Corporal J.F. Bross (“Corporal Bross”) of the Winston-Salem Police Department responded to 134 North Spring Street, which he had determined to be the residence of defendant. Corporal Bross had received information that defendant had active warrants for her arrest. Corporal Bross knocked on the front door and spoke with William Bates (“Bates”), who opened the front door. Inside the apartment were four individuals: Bates, who initially gave his name as “River Sandino”; defendant, who was seated on a bed; Rayshawn Counsel, who was asleep on the bed; and an individual known as “Mr. Fulton,” who was hiding behind the door. Upon opening the door, Corporal Bross detected the odor of what he testified to be marijuana coming from the apartment. At that point, Corporal Bross arrested defendant, seized the apartment “as-is,” and applied for a search warrant. Corporal Bross provided the following description of the apartment:

[W]hen the front door opened there was a bed, a dresser with a TV in front of the bed. And I could see directly into a bathroom and a small kitchenette. There are no other doors on this apartment. There are no back windows or any other access into the apartment, it’s just the front door and the front window that was to my left.

While waiting for the search warrant and after advising defendant of her rights, Corporal Bross questioned her while she was in the back of the patrol car.

STATE V. GORDON

Opinion of the Court

Defendant admitted to smoking marijuana¹ and mentioned that there might still be “roaches” left, a slang term for used marijuana cigarettes.

Once Corporal Bross received a search warrant, he immediately began a search of the apartment. In a plastic storage container underneath the front window of the apartment, Corporal Bross found digital scales with a white substance on them. He also found what he testified as being a “meth pipe,” used for smoking crystal methamphetamine. Underneath a makeshift nightstand by the bed, on the same side of the apartment as the plastic storage container, Corporal Bross found baggies that contained a substance he believed to be marijuana. Also near the bed, Corporal Bross found a collapsible canvas storage container, which his colleague Officer Mager searched. After this, Corporal Bross searched a dresser at the foot of the bed, which contained women’s clothing but no illegal substances. Corporal Bross then proceeded to search a second nightstand, on the right side of the bed, upon which he found a red jewelry box. He found two bags inside, one of which contained a white powder, while the other contained an “off-white crystal substance.” Officer Mager then notified Corporal Bross that he found bags with pills inside the canvas storage container, which Corporal Bross identified at the time as acetaminophen. Corporal Bross then concluded the search by searching the other three individuals who had been found in the apartment and found no contraband on them. Defendant indicated that her

¹ Corporal Bross testified that he specifically asked defendant if she had been smoking marijuana.

daughter, who was on scene, could take the keys to the apartment to keep it secure. Corporal Bross attempted to question defendant about the contraband found in her apartment, but she did not answer.

At trial, the State called Alexis Blankenship (“Blankenship”), a forensic chemist with NMS Labs of Winston-Salem, to testify as an expert witness regarding her testing of the evidence collected at defendant’s apartment. Blankenship testified that her testing of the evidence revealed the presence of the following substances: methamphetamine, 4-ANPP, fentanyl, Phenethyl-4-ANPP, and the plant marijuana. Blankenship noted that the testing did not reveal the drug marijuana, as this would have required further testing that had not been requested.

Defendant was found guilty by jury on all counts on 24 January 2023, after which the trial court sentenced her to a term of 90 to 120 months’ imprisonment. The defendant gave oral notice of appeal in open court.

II. Discussion

On appeal, defendant contends that the trial court (1) erred by denying defendant’s motion to dismiss for insufficiency of evidence, (2) plainly erred by admitting testimony identifying marijuana, and (3) committed plain and reversible error by admitting responsive questions and testimony commenting on defendant’s right to silence. We find no error on (1) and (2), and no plain error on (3).

A. Motion to Dismiss

Defendant contends that the trial court erred when it denied her motion to

dismiss for insufficient evidence to prove constructive possession of controlled substances. We disagree.

“This Court reviews the trial court’s denial of a motion to dismiss de novo.” *State v. Smith*, 186 N.C. App. 57, 62 (2007) (citation omitted). “In ruling upon a motion to dismiss, the trial court must determine whether, upon consideration of all of the evidence in the light most favorable to the State, there is substantial evidence that the crime charged was committed and that defendant was the perpetrator.” *State v. Beasley*, 118 N.C. App. 508, 511–12 (1995) (cleaned up). “If the record developed before the trial court 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.” *State v. Massey*, 287 N.C. App. 501, 509–10 (2023) (cleaned up). “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 (1980) (citations omitted). “Substantial evidence” is real, rather than seeming or imaginary, evidence. *State v. Powell*, 299 N.C. 95, 99 (1980) (citations omitted). When deciding a defendant’s motion to dismiss, “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. Rose*, 339 N.C. 172, 192–93 (1994) (citations omitted).

STATE V. GORDON

Opinion of the Court

Possession of a controlled substance may be proven even when the accused does not have actual possession, but rather exercises control over the substance, even non-exclusive control. *State v. McLaurin*, 320 N.C. 143, 146 (1987) (citations omitted). In cases where the defendant does not have exclusive control over the substance, the court must find other “incriminating circumstances” to infer constructive possession. *State v. Wynn*, 276 N.C. App. 411, 418-19 (2021) (quoting *State v. Neal*, 109 N.C. App. 684, 686 (1993)). The factors for determining these circumstances are the following:

(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. Chekanow, 370 N.C. 488, 496 (2018). “[O]wnership of the premises on which the contraband is found is ‘strong evidence of control’ ” and should be considered as a weighty factor. *Id.* at 497 (quoting *State v. Thorpe*, 326 N.C. 451, 455 (1990)).

In the case *sub judice*, none of the contraband found in the apartment was under the direct control of defendant, thereby requiring the State to rely on the theory of constructive possession. Viewing the evidence in the light most favorable to the State, there is ample evidence that defendant had constructive possession and that the question of constructive possession was properly before the jury.

The first three *Chekanow* factors weigh heavily against defendant. First,

regarding ownership and occupation, which we note with particularity, defendant's registered address was the location where police found defendant and the contraband, and defendant's daughter took possession of the apartment with explicit approval of defendant. While several other individuals were in the apartment at the time of the investigation, defendant presented no evidence that anyone else resided there at the time of incident. Second, defendant's apartment is a very small, studio-style dwelling, with only a main room, a kitchenette, and a bathroom. In the main room was a bed with a nightstand next to it, as well as a plastic container with drawers and a canvas storage container. All the contraband was found in and around these objects and furniture. Simply by nature of the dwelling, defendant was very close to all the contraband. Third, most of the possessions found in the apartment appear to belong to defendant. There were women's clothes throughout the dresser, and a red jewelry box on the nightstand. No evidence was presented that the purse, jewelry box, or storage container belonged to anyone but defendant. The pervasive presence of defendant's belongings indicates her control over the dwelling. While the other two factors favor defendant, they are thoroughly outweighed by the first three. Therefore, there was no error in denying the motion to dismiss.

B. Admission of Testimony Identifying Marijuana

Because defendant did not object to any testimony concerning the suspected marijuana, we review for plain error. *See* N.C.R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error

occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citing *State v. Odom*, 307 N.C. 655, 660 (1983)). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citations and quotation marks omitted). “Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (alteration in original) (cleaned up).

Under the North Carolina Rules of Evidence, the testimony of a lay witness “in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C.G.S. § 8C-1, Rule 701 (2019). We have held “that a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana” *State v. Garnett*, 209 N.C. App. 537, 546 (2011) (citing *State v. Fletcher*, 92 N.C. App. 50, 57 (1988)). Defendant, while recognizing this legal precedent, believes the precedent “no longer acceptable,” given the difficulty in distinguishing between legal hemp and illegal marijuana²; she contends that

² Defendant, in her brief, cites *State v. Parker*, which quotes a North Carolina State Bureau of Investigations memo that addresses this issue. 277 N.C. App. 531, 540 (2021); *Industrial Hemp/CBD Issues*, State Bureau of Investigations,

permitting an officer to testify that a substance is marijuana on sight and smell alone is unreasonable error. We disagree.

In *In re Civil Penalty*, the North Carolina Supreme Court held that “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” 324 N.C. 373, 384 (1989) (citations omitted). Given that our Supreme Court has not yet ruled on police officer competency to identify marijuana now that hemp is legal, and the testimony in the case *sub judice* falls squarely within the precedent set by *Garnett* and other cases, there was no error for the lower court to permit the testimony.

Even assuming, *arguendo*, that defendant’s legal argument has merit, it does not apply to the facts of this case. Corporal Bross did not need to rely on sight and smell alone when opining that the substance he found was marijuana, given that defendant herself admitted to smoking marijuana shortly after her arrest, and told Corporal Bross that there could still be marijuana “roaches” left in the apartment. Further, at no time did defendant argue that the substance was actually hemp. Sight, smell, admission, and lack of counterargument provided more than enough basis for Corporal Bross to form an opinion.

C. Testimony on Defendant’s Silence

https://www.sog.unc.edu/sites/default/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf

STATE V. GORDON

Opinion of the Court

Defendant did not object to the State's questions or Corporal Bross' testimony regarding her silence, so we review for plain error. N.C.R. App. P. 10(a)(4). The Fifth Amendment of the U.S. Constitution, applicable to the states through the Fourteenth Amendment, provides that criminal defendants cannot be compelled to testify against themselves. U.S. Const. amend. V; U.S. Const. amend. XIV. This right extends beyond the mere right to remain silent, to preventing the State from introducing evidence that a criminal defendant exercised this right. *State v. Moore*, 366 N.C. 100, 104 (2012) (citations omitted). In *Moore*, the trial court admitted testimony from a State's witness that the "defendant 'refused to talk about the case at that time,'" and that the witness "had not spoken to 'defendant or any of the other parties in this since that time.'" *Id.* at 105. Our Supreme Court found the admission to be in error. *Id.*

During his direct examination, Corporal Bross engaged with the prosecution in the following exchange:

STATE: After you stored that evidence, was that the conclusion of your part of this investigation?

CORPORAL BROSS: There's one other thing. I did attempt to interview Ms. Gordon afterward, to speak with her about the items that had been located, to see if she had anything to offer or any explanation and –

STATE: She didn't speak with you; is that right?

CORPORAL BROSS: She did not.

STATE: Okay. And that's her right?

CORPORAL BROSS: Correct, it is her right.

Defendant had already been *Mirandized* before the exchange in question occurred. Since Corporal Bross commented on defendant's silence, and the trial court admitted that testimony, the trial court was in error.

Although the trial court was in error, its error does not meet the plain error standard required to grant defendant a new trial. Previously, we developed a test to evaluate testimony concerning a defendant's silence, employing a list of non-determinative factors:

- (1) whether the prosecution directly elicited the improper testimony or explicitly made an improper comment;
- (2) whether the record contained substantial evidence of defendant's guilt;
- (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and
- (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony

State v. Richardson, 226 N.C. App. 292, 302 (2013).

These factors overwhelmingly favor the State. First, the prosecution did not ask Corporal Bross if defendant remained silent; it was rather he who mentioned it in response to a broader question. Second, there was substantial evidence of defendant's guilt, when considering the amount of contraband located in an apartment in possession of the defendant. Finally, the prosecution did not capitalize on the improper testimony, but swiftly concluded the direct examination while underscoring the defendant's right to silence.

STATE V. GORDON

Opinion of the Court

III. Conclusion

Thus, for the forgoing reasons we hold that defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges CARPENTER and STADING concur.

Report per Rule 30(e).