

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA24-586

Filed 7 May 2025

New Hanover County, No. 23 CRS 210491

STATE OF NORTH CAROLINA

v.

KEVIN MARQUEL NEWTON, Defendant.

Appeal by Defendant from judgment entered 25 October 2023 by Judge Tiffany P. Powers in New Hanover County Superior Court. Heard in the Court of Appeals 29 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Justin M. Bradley, for the State.

Sherrill & Emehel, PA, by Attorney Johneric C. Emehel for the Defendant–Appellant.

MURRY, Judge.

Kevin M. Newton (Defendant) appeals the trial court’s denial of his motion to dismiss at the close of the State’s evidence at trial. Defendant argues that the trial court erred in its denial because the State adduced insufficient evidence to sustain his conviction for possession of a Scheduled II controlled substance. For the reasons below, this Court disagrees with Defendant and holds no error.

I. Background

On 11 January 2023, Wrightsville Police Officer Kevin P. Dumas stopped a car for revoked tags. Defendant was a passenger in this car. Officer Dumas arrested Defendant for three outstanding warrants and searched him incident to the arrest, finding no contraband. Officer Dumas then transported Defendant to the Wrightsville Beach Police Department (the Department) and secured him in a holding cell (Cell One) at approximately 3:35 AM on 11 January 2023. Cell One is one of the Department's two holding cells, both of which are small, windowless rooms with one entrance requiring a key card to open. Each room contains two metal benches bolted to the floor in front of a centered grate.

Department officers must regularly search the holding cells for unauthorized occupants, illicit contraband, and forgotten items. If none are found, the officers mark the cell as "secure" on the Department's Prisoner and Holding Cell Search Log (Search Log). At 6:58 PM on 10 January 2023, prior to Defendant's arrest, Officer Dumas searched Cell One by examining the benches' various "nooks and crannies," checking the floor grate, and inspecting the doorjambs. Finding no contraband, Officer Dumas marked Cell One "secure." Other than the Defendant, no other individuals were placed in Cell One on the morning of 11 January 2023. While in Cell One, a police camera monitored Defendant for approximately 22 minutes. The surveillance video captured at least three instances of note:

- (1) Defendant got up from the bench, walked around Cell One, and stood in a

- blind spot out of view of the camera for approximately 12 seconds.
- (2) Upon returning into frame, Defendant sat on the opposite side of the bench as before, kept his right hand out of view of the camera, placed his left hand in his pocket, and removed his shoes.
 - (3) Keeping his hand out of view of the camera and down near the seat of the bench, Defendant moved his shoulder up and down for approximately 23 seconds.

An officer escorted Defendant out of Cell One around 4:55 AM and transported him to the New Hanover County Jail around 6:30 AM. Soon after, Officer Brian Neague conducted a routine search of Cell One by “look[ing] under the benches in all the nooks and crannies,” where he discovered a blue-tinted bag of cocaine under the same metal bench on which Defendant sat hours prior. Defendant was subsequently charged with felony possession of a Schedule II controlled substance under N.C.G.S. § 90-95. N.C.G.S. § 90-95(a)(3) (2023). On 25 October 2023, a jury found Defendant guilty as charged, and the trial court sentenced him to an intermediate sentence of 6–17 months suspended for 18 months of supervised probation. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear Defendant’s appeal because the trial court’s entry of the jury’s guilty verdict implicates the “final judgment of a superior court,” N.C. Gen. Stat. § 7A-27(b)(1) (2023), for a defendant “who has been found guilty of a crime” despite his “plea of not guilty to [the] criminal charge,” *id.* § 15A-1444(a).

III. Analysis

The issue before this Court is whether the trial court erred in denying

Defendant’s motion to dismiss his felony charge of cocaine possession. To support this assertion, Defendant argues that the State failed to adduce sufficient evidence of possession. “We review the trial court’s denial of a motion to dismiss de novo . . . [by] consider[ing] the matter anew and freely substitut[ing] [our] own judgment for that of the trial court.” *State v. Battle*, 253 N.C. App. 141, 143 (2017) (citation and italicization omitted). We disagree with Defendant for the reasons below.

Our standard of review for a motion to dismiss for insufficient evidence is well-settled. *State v. Bradshaw*, 366 N.C. 90, 92 (2012). A trial court may grant that motion only “where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture.” *State v. Stone*, 323 N.C. 447, 452 (1988). “When ruling on a defendant’s motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense.” *State v. Smith*, 186 N.C. App. 57, 62 (2007). “[S]ubstantial evidence” is any “relevant evidence . . . adequate to support a conclusion.” *State v. Franklin*, 327 N.C. 162, 171 (1990). This evidence “need only . . . satisfy a reasonable mind” to withstand appellate scrutiny. *State v. Butler*, 356 N.C. 141, 145 (2002). Thus, “any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction . . . is for the jury” to decide “beyond a reasonable doubt.” *Franklin*, 327 N.C. at 171–72; see *State v. Miller*, 363 N.C. 96, 99–101 (2009) (applying these standards to uphold jury conviction for crack cocaine possession).

To determine whether substantial evidence exists, “the trial judge must view all evidence . . . in the light most favorable to the State” by drawing “every reasonable inference . . . and resolving any [evidentiary] contradiction . . . in its favor.” *State v. Lee*, 348 N.C. 474, 488 (1998). This analysis “is the same whether the State’s evidence is direct, circumstantial, or a combination of the two.” *State v. Powell*, 299 N.C. 95, 99 (1980). The trial court need not “determine . . . [whether] the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant’s motion to dismiss.” *Franklin*, 327 N.C. at 172.

This Court must often “distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla” that “only raises a suspicion or possibility of the fact in issue.” *Battle*, 253 N.C. App. at 144. Evidence demonstrating “only a suspicion of possession” is insufficient to withstand a motion to dismiss. *State v. Acolatse*, 158 N.C. App. 485, 486 (2003). The synonymous terms of “‘more than a scintilla of evidence’ and ‘substantial evidence’ . . . simply mean that the evidence must be existing and real, not just seeming or imaginary.” *State v. Earnhardt*, 307 N.C. 62, 66 (1982) (citing *Powell*, 299 N.C. at 99).

We apply these principles here. Under N.C.G.S § 90-95, an individual cannot “possess a controlled substance”—such as cocaine—unless otherwise authorized by North Carolina law. N.C.G.S § 90-95(d)(2) (2023) (emphasis added). Possession of a controlled substance may be actual or constructive. *State v. McLaurin*, 320 N.C. 143, 146 (1987). A person constructively possesses a substance when he “lacks actual

physical possession,” *Acolatse*, 158 N.C. App. at 488 (quotation omitted), but still “has both the power and intent to control its disposition or use,” *State v. Harvey*, 281 N.C. 1, 12 (1972). An illicit substance “found . . . under the control of an accused” implies “knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.” *Id.*

Nevertheless, “unless the person has *exclusive* possession” of the location where the narcotics are found, “the State must show other incriminating circumstances” to adequately imply constructive possession. *State v. Davis*, 325 N.C. 693, 697 (1989) (emphasis added). This Court has identified many “incriminating circumstances” that give rise to constructive possession, including whether a defendant was the only person who could have placed the controlled substance in its originating location or otherwise “resided in, had some control of, or regularly visited” therein. *State v. Alston*, 193 N.C. App. 712, 716 (2008) (quotation omitted). “No single factor controls” this totality-of-the-circumstances analysis that is “ordinarily . . . for the jury.” *State v. James*, 81 N.C. App 91, 93 (1986).

This case is analogous to *Butler*, where the North Carolina Supreme Court affirmed the trial court’s denial of a defendant’s motion to dismiss based on many incriminating circumstances. *Butler*, 356 N.C. 141. In *Butler*, the State presented evidence showing that law enforcement approached the defendant as he entered the rear driver’s side of a cab and asked him to step outside. *Id.* at 143. At that point, defendant bent over at the waist, fumbled his hands around at his feet, and exited

the cab. *Id.* at 143–44. The arresting officer could not see what defendant was doing with his hands while bent over. *Id.* at 147. Meanwhile, the cab driver served another customer and, upon returning to the bus station, allowed law enforcement to search the cab, in which officers found a cocaine baggie under the driver’s seat. *Id.* at 143–45. The driver confirmed “that he had cleaned and vacuumed the cab prior to beginning his shift and that [the] defendant was his first fare of the morning.” *Id.* at 144. At trial, the State sustained the defendant’s conviction by adducing only evidence of “additional incriminating circumstances tending to establish” his “plenary” “constructive possession of the cocaine.” *Id.* at 141. The *Butler* Court held that the State’s evidence of incriminating circumstances was sufficient to overcome a motion to dismiss because “a juror could reasonably infer that defendant possessed the cocaine.” *Id.* at 148.

Here, the State offered sufficient competent evidence of multiple incriminating circumstances that established Defendant’s constructive possession of cocaine. As in *Butler*, Department officers could not see what Defendant was doing with his hands outside the frame of the surveillance video camera. Viewing the evidence in the light most favorable to the State, Defendant removed the cocaine and hid it under a bench after being placed in Cell One. The State’s Exhibit 1 shows Defendant walking outside the surveillance video camera frame, sitting down on a bench, removing his shoes, and moving his hands around off-camera in the exact vicinity where the cocaine was found. Regardless of whether Defendant actually spent the time outside the camera

frame removing and hiding the cocaine, these actions are incriminating circumstances that “would satisfy a reasonable” juror, *Butler*, 356 N.C. at 145, and give rise to the “fairly logical and legitimate deduction” that Defendant constructively possessed cocaine in Cell One. *Franklin*, 327 N.C. at 171–72. Therefore, we leave to the jury the question of “whether it is convinced beyond a reasonable doubt” the Defendant was guilty. *Id.*

The State also presented sufficient evidence that Defendant was the only person who could have placed the cocaine under the bench in Cell One. As confirmed by both testimony and the Search Log, Cell One was properly secured and empty of any other arrestees or controlled substances until Defendant later arrived. Just as the *Butler* defendant was the only passenger to enter the car since the driver’s cleaning, Defendant was the only individual to enter Cell One since Officer Dumas had conducted his routine search and found it to be secure. Viewed in a light most favorable to the State, this evidence shows that Defendant “had some control” over the substance’s eventual location “and was the only person who could have placed the controlled substance [there]in.” *Alston*, 193 N.C. App. at 716.

These incriminating circumstances “adequate[ly] . . . support a conclusion” that Defendant constructively possessed cocaine to a degree sufficient for a jury. *Franklin*, 327 N.C. at 171. Drawing all reasonable inferences in the State’s favor, this Courts hold that the State presented sufficient evidence to warrant jury consideration of whether Defendant possessed a Schedule II controlled substance. Accordingly, the

trial court did not err in denying his motion to dismiss for insufficient evidence.

IV. Conclusion

For the reasons above, this Court holds the trial court did not err in holding that the State adduced sufficient evidence to prove each element of possession of a Scheduled II controlled substance and that Defendant was the perpetrator of the offense.

NO ERROR.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).