DIVISION IV

NOT DESIGNATED FOR PUBLICATION

CACR05-1040

April 19, 2006

WILLIE J. WATKINS, III APPELLANT	APPEAL FROM THE DREW COUNTY CIRCUIT COURT [NO. CR-2004-122-4]
V.	HON. R. BYNUM GIBSON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Willie J. Watkins, III, was convicted by a Drew County jury of two counts of delivery of a controlled substance (methadone), delivery of a counterfeit substance, and possession of a controlled substance (cocaine). He was sentenced to a total of forty years in the Arkansas Department of Correction. On appeal, appellant argues that the trial court erred in admitting into evidence the State's Exhibits four, five, and six, which were envelopes containing the alleged controlled substances, because the chain of custody was not established to ensure the authenticity of the items and because the testimony of the witnesses failed to properly identify the substances as those that were purchased from him. We find no error and affirm.

Appellant purported to sell drugs to Officer Jason Akers of the Monticello Police Department in three separate controlled drug buys that occurred on March 12, 2004, March 24, 2004, and March 26, 2004. Appellant was arrested at the scene of the third drug buy, at which time additional substances were retrieved from his person. At trial, appellant unsuccessfully objected on three separate occasions to the admission of State's Exhibits four, five, and six, based on his challenge to the establishment of the chain of custody. Appellant

was convicted on all counts pursuant to a judgment and commitment order filed on February 25, 2005. He filed a timely notice of appeal on March 21, 2005.[1]

The decision to admit or exclude evidence is within the sound discretion of the trial court, and the appellate courts will not reverse a trial court's evidentiary ruling absent an abuse of discretion and a showing of prejudice. *LeFever v. State*, __ Ark. App. __, __ S.W.3d __ (May 18, 2005). The purpose of establishing the chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Kincannon v. State*, 85 Ark. App. 297, 151 S.W.3d 8 (2004). The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with, but it is not necessary for the State to eliminate every possibility of tampering. *Id.* Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law. *Id.* Our courts have required that the chain of custody for interchangeable items like drugs or blood be more conclusive than for other evidence. *Id.*

Rule 901 of the Arkansas Rules of Evidence states that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims, including testimony of a witness, public records or reports. To prove the authenticity of evidence, the State must demonstrate a reasonable probability that the evidence has not been altered in any significant manner. *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003).

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[1]We note that the judgment and commitment order contained in the Addendum is the amended judgment and commitment order filed on March 10, 2005. Although appellant's notice of appeal references the original judgment, the notice is not defective because the only change in the amended judgment is the correction of appellant's date of birth from June 16, 1949, to June 15, 1949, and because appellant filed his notice of appeal in a timely manner based on the date of the filing of the original judgment.

Although the trial court heard testimony from Officer Akers and Arkansas State Police Officer Todd Daley regarding the chain-of-custody issue, appellant points out that no one from the crime lab testified as to the condition of the exhibits or the substances supposedly contained therein. The envelopes that comprised State's Exhibits four, five, and six were not opened to reveal their contents, and no testimony was given that the substances contained in the challenged exhibits appeared to be the substances that Officer Akers claimed to have purchased from appellant. Appellant contends that no proof was offered that the substances contained in the envelopes were even similar to those acquired by the officers. Specifically, neither of the testifying officers looked at the contents of the packages that were supposedly returned from the crime lab to see what, if anything, was contained in them. Appellant argues that it was impossible for the trial court to determine that the contents of the exhibits were drugs, much less to be satisfied that the contents were the same as those originally sent to the crime lab, with any degree of certainty.

Appellant asserts that the higher standard set forth in *Kincannon*, *supra*, with respect to the chain of custody of items of an interchangeable nature such as drugs, was simply not met by the State in this case. To do so, he claims, would have required the inspection of the contents outside of the packaging, along with reliable testimony from the officers that the items appeared similar to those placed in the packaging prior to being sent to the crime lab. Appellant asserts that because the State failed to provide adequate indicia of genuineness of the articles of physical evidence, the admission of State's Exhibits four, five, and six into evidence was error.

Finally, appellant concedes that appellate courts have ruled that the chain of custody of physical evidence is sufficient, based upon the testimony of a substantial portion of the persons having contact with the evidence in question. *See Dixon v. State*, 310 Ark. 460, 839

S.W.2d 173 (1992). He distinguishes this case, however, because there was insufficient testimony from certain key persons involved in transporting, safekeeping, and testing of the drugs. Specifically, he contends that the chemists who analyzed the substances should have been required to testify, not only as to the specific substances, but also as to the procedures utilized by them to assure the genuineness and authenticity of physical evidence at the crime lab. There was no testimony in this case that the substances produced at trial as State's Exhibits four, five, and six were in substantially the same condition and had the same appearance as the drugs seized during the investigation.

Under our standard of review, it is clear that the trial court did not abuse its discretion by admitting State's Exhibits four, five, and six into evidence. Officer Akers testified that, on each occasion, he counted the tablets and put those proceeds from the buy in an evidence bag and kept them in a safe in the office that he shared with Officer Daley. Officer Daley testified that he sealed the evidence envelopes, initialed them, and sent them to the crime lab. He also testified that, from the time he received the envelopes from Officer Akers until he delivered them to the crime lab, the envelopes remained secured in a file cabinet in his office and that no one else had access to them. He explained that the crime lab preserved his seal by opening the bags on their sides or bottom and resealing them with the initials of Nick Dawson ("N. J. D.") , or of Veronica Norris ("V. N."), the chemists performing the analysis on the drugs. Each exhibit had a corresponding lab submission sheet confirming that Officer Daley had hand delivered the exhibits to the lab. Each submission report was signed and dated by Officer Daley and contained a description of each exhibit's contents. Officer Daley pointed out that the exhibits were picked up at the crime lab by evidence custodian Special Agent Roger McLemore, who kept them in an evidence vault until Officer Daley picked them up on the day of the trial.

Officer Daley also testified as to the original laboratory reports that were signed by the chemist performing the analysis and notarized and that corresponded to each of the challenged exhibits. He explained that he received the reports by mail from the Arkansas State Crime Lab. Each of the reports satisfied the statutory requirements for admissibility under Ark. Code Ann. § 12-12-313(a). *See Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996). The lab case numbers on the reports corresponded to the number on the lab submission sheet as well as the numbers on the envelopes. State's Exhibit one was the lab report for State's Exhibit four, indicating that the exhibit was 100 tablets of methadone. State's Exhibit two was the lab report for State's Exhibit five, indicating that it was fifty tablets of methadone. State's Exhibit three was the lab report for State's Exhibit six, indicating that it consisted of fourteen tablets of methadone, forty-seven tablets of cyproheptadine, twelve tablets of pseudoephedrine, six tablets of promethazine hydrochloride, and .0860 grams of cocaine base.

Arkansas Code Annotated section 12-12-313 provides that records and reports of the State Crime Lab are to be received as competent evidence when duly attested to by the lab personnel who performed the analysis, or by certain designated officials of the laboratory. The statute provides that the accused shall give at least ten days' notice prior to the proceedings if he wants the person who performed the analysis to be present for cross-examination. If he does not give such notice, the right of confrontation is waived. *See Johnson v. State*, 303 Ark. 12, 792 S.W.2d 863 (1990). The purpose of Ark. Code Ann. § 12-12-313 is to remove these reports from exclusion under the hearsay rule and make them admissible when certain requirements designed to establish their trustworthiness have been met. *Hendrix v. State*, 40 Ark. App. 52, 842 S.W.2d 443 (1992). Our supreme court previously explained that the state official who actually performed the test *must* appear at the trial for cross-examination if the defendant gives notice at least ten days prior to trial. *Marta v. State*, 336 Ark. 67, 983 S.W.2d

924 (1999). From our review of the record, we are unable to find that appellant gave notice pursuant to Ark. Code Ann. § 12-12-313; accordingly, the lab personnel were not required to testify.

There were no overt allegations of tampering made by appellant during the trial and, given that appellant's attorney objected to the introduction of these exhibits on a technical argument, we hold that the trial court did not abuse its discretion in finding that the evidence presented was genuine and, in reasonable probability, had not been tampered with or altered. At best, appellant's argument went to the weight, rather than the admissibility, of the evidence.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.