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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 11/03/2011  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 10-0920  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
GARY PATRICK EPPERSON, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Yuma County

Cause No. S1400CR2009-00756

The Honorable Lawrence C. Kenworthy, Judge

**AFFIRMED**

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By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Katia Méhu, Assistant Attorney General  
Attorneys for Appellee

Yuma County Public Defender Yuma  
By Edward F. McGee, Deputy Public Defender  
Attorneys for Appellant

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**T H O M P S O N**, Judge

¶1 Gary Patrick Epperson (defendant) appeals his conviction for possession of the dangerous drug psilocyn, arguing the trial court erred in allowing the state to amend the indictment on the first day of trial. For the reasons set forth below, we affirm defendant's conviction and sentence.

#### FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant was indicted for five counts of drug related charges following a "canine alert" at a border patrol checkpoint.<sup>1</sup> Among the contraband in the vehicle, a border patrol agent found some mushrooms he suspected to be hallucinogenic. Count 2 charged defendant with possession of the "dangerous drug, to-wit: **PSILOCYBIN.**" Chemical tests performed on the substance approximately a year before trial established that it was actually psilocyn.<sup>2</sup> The state provided defendant with the DPS scientific examination report and the criminalist's laboratory notes approximately a year before trial.

¶3 One month before trial, on September 1, 2010, the state moved to amend count 2 to instead read "to-wit: PSILOCYN

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<sup>1</sup> Because defendant challenges only the amendment to count 2 of the indictment, we confine our discussion to the facts and proceedings relevant to that issue.

<sup>2</sup> Both psilocybin and psilocyn are chemicals that can be found in mushrooms. The substances are closely related and may be chemically synthesized. *State v. Justice*, 704 P.2d 1012, 1014 (Kan. Ct. App. 1985) (noting testimony of botanist specializing in mycology).

(mushrooms)" in order to conform the indictment to the evidence. At the final trial management conference on September 17, the court made note of the motion to amend count 2, but did not rule on the motion. The motion was again discussed, but not ruled upon, at a second final trial management conference on September 22.

¶14 On the first day of trial, October 5, the prosecutor explained that the motion to amend was requested because the indictment identified the dangerous drug as psilocybin, but laboratory testing indicated the drug was actually psilocyn. Defendant opposed the motion contending that the amendment alleged a different drug, requiring the grand jury to issue a new indictment. After further argument, the trial court amended the indictment finding that defendant had received adequate notice and would not be prejudiced by the amendment.

¶15 Following a three-day trial, the jury found defendant guilty of all charges. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) section 12-120.21 (2010).

#### **DISCUSSION**

¶16 On appeal, defendant argues that the court improperly granted the motion to amend the indictment and deprived him of his notice and due process rights. We review the court's

decision for an abuse of discretion. *State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶7 Criminal trials are limited to the specific charge or charges stated in the grand jury indictment. Ariz. R. Crim. P. 13.5(b). Due process requires that a charging document fairly indicate the crime charged, state the essential elements of the alleged crime, and be sufficiently definite that the accused may prepare a defense. *McKaney v. Foreman ex rel. County of Maricopa*, 209 Ariz. 268, 271, ¶ 14, 100 P.3d 18, 21 (2004). Absent a defendant's consent, a charge may only be amended to "correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Freeney*, 223 Ariz. 110, 112, ¶ 11, 219 P.3d 1039, 1041 (2009) (quoting *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980)). In determining whether the nature of a charge was changed by an amendment, we consider two rights of the defendant: (1) a defendant must have been put on notice of the charge against him with an ample opportunity to prepare to defend against it, and (2) a defendant must have a right to double jeopardy protection from the original charge. *Johnson*, 198 Ariz. at 248, ¶ 8, 8 P.3d at 1162.

¶18 The Sixth Amendment notice requirement is met when the defendant has actual notice of the charge, whether from the indictment or from another source. *Freeney*, 223 Ariz. at 115, ¶ 29, 219 P.3d at 1044. Defendant contends the amendment prejudiced him because he had no notice prior to the amendment that he would have to defend against a psilocyn possession charge rather than psilocybin. To the contrary, the record demonstrates defendant had abundant notice the state intended to prove possession of psilocyn. Defendant had notice that the state was alleging possession of the hallucinogenic mushrooms seized from the vehicle. Over a year before trial, defendant received notice of the drug test results. Amending the indictment to reflect the true chemical composition of the mushrooms did not allege a different and separate crime with materially different elements, but merely corrected a technical error. Considering that both psilocyn and psilocybin are hallucinogenic substances found in mushrooms, the error was understandable.

¶19 Furthermore, this is not the situation where the state waited to request the amendment until the first day of trial. A motion to amend must be made no later than twenty days prior to trial. Ariz. R. Crim. P. 13.5(a). Although the trial court did not rule on the motion until the first day of trial, the state

filed the motion over a month before trial easily meeting the twenty day deadline.

¶10 We next consider defendant's right to double jeopardy protection. "When the elements of one offense materially differ from those of another-even if the two are defined in subsections of the same statute-they are distinct and separate crimes." *Freeney*, 223 Ariz. at 113, ¶ 16, 219 P.3d at 1042. Such a situation would exist where the elements and evidence required to prove the original violation differ from those required to prove the amended violation. *State v. Leenhouts*, 218 Ariz. 346, 349, ¶ 13, 185 P.3d 132, 135 (2008); *State v. Sustaita*, 119 Ariz. 583, 591, 583 P.2d 239, 247 (1978). We have found permissible amendments to include those that change a charge of theft by control of property valued at \$1000 or greater to the charge of theft of a motor vehicle, *State v. Eastlack*, 180 Ariz. 243, 883 P.2d 999 (1994), a correction of one digit of a four-digit address, *State v. Suarez*, 106 Ariz. 62, 470 P.2d 675 (1970), to correct the name of a victim corporation, *State v. Barber*, 133 Ariz. 572, 653 P.2d 29 (App. 1982), and to substitute the name of the brokerage firm for that of the stockbroker, *State v. Phelps*, 125 Ariz. 114, 608 P.2d 51 (App. 1979).

¶11 Here, because the entire record of the case would be available to a subsequent court, the amendment granted would not

limit defendant's defense of double jeopardy to bar subsequent prosecution. *Phelps*, 125 Ariz. at 119, 608 P.2d at 56 (double jeopardy defense is not limited to the four corners of the indictment). The factual amendment to the indictment reflecting the correct name of the drug did not change the nature of the substantive charge or the elements and evidence required to prove that charge. We find no prejudice to the defendant in the amendment granted by the trial court.

**CONCLUSION**

¶12 For the foregoing reasons, we affirm defendant's conviction and sentence.

/s/

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JON W. THOMPSON,  
Presiding Judge

CONCURRING:

/s/

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MAURICE PORTLEY, Judge

/s/

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JOHN C. GEMMILL, Judge