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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM MCKENZIE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0605-CR-372

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David A. Shaheed, Judge
Cause No. 49G14-0502-FD-19084

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

William McKenzie appeals his conviction of Possession of Marijuana,¹ a class D felony, and presents the following restated issue for review: Did the State establish a proper chain of custody of the marijuana?

We affirm.

The facts favorable to the judgment are that on February 6, 2005, Indianapolis Police Department (IPD) Detective Keith Minch observed McKenzie turn without signaling. Detective Minch briefly followed McKenzie, then executed a traffic stop, turning on his emergency lights and shining a spotlight on the interior of McKenzie's vehicle. Approximately thirty feet before McKenzie came to a complete stop, he tossed two small bags out of his passenger door window. When McKenzie finally stopped, Detective Minch located the two bags, which contained marijuana. Detective Minch then ran a check of McKenzie's information, discovered McKenzie's driver's license was suspended, arrested him, and took him to jail.

After Detective Minch retrieved the bags, he placed them in his squad car, transported the bags to an IPD narcotics vault, placed the bags in a heat-sealed envelope, and labeled the envelope with a sticker indicating Detective Minch's name, McKenzie's name, the location where the bags were recovered, and the case number. A supervisor at the Indianapolis – Marion County Forensic Services Agency (the Agency) took the envelope from the IPD's narcotics vault and placed it in the Agency's vault, which is locked at all times and is accessible only by a key.

¹ Ind. Code Ann. § 35-48-4-11 (West 2004).

Glenn Maxwell, a forensic chemist at the Agency, was assigned to McKenzie's case. Maxwell gained access to the Agency's vault and retrieved the envelope in order to conduct a chemical analysis of the marijuana. When Maxwell took the envelope from the Agency's vault, it was already labeled with a sticker indicating another forensic chemist, Tim Spears, conducted chemical analyses of the two bags' contents. The envelope was properly resealed when Maxwell retrieved it. Upon handling the envelope, Maxwell placed another sticker on it that indicated the case number, Maxwell's initials, the date of the analysis, and the date Maxwell resealed the envelope. The results of Maxwell's observations and microscopic and chemical analyses indicated the substance was 6.45 grams of marijuana.

The State charged McKenzie by information with: (1) possession of marijuana as a class A misdemeanor and alleged McKenzie had a prior conviction of an offense involving marijuana, which had the potential to elevate the class A misdemeanor to a class D felony; and (2) operating a motor vehicle with a suspended license (Count II) as a class A misdemeanor. A jury trial was held on April 5, 2006, during which the trial court admitted, over McKenzie's objection, a bag containing the marijuana and the two bags. At the trial's conclusion, the trial court granted McKenzie's motion for judgment on the evidence as to Count II, and the jury found McKenzie guilty of possession of marijuana as a class A misdemeanor, which was increased to a class D felony because McKenzie admitted he had a prior conviction of an offense involving marijuana. McKenzie now appeals.

McKenzie contends the trial court erred by admitting evidence of the marijuana, arguing the State failed to establish a proper chain of custody because “[w]ithout Spears’s testimony, it is impossible to establish whether the material examined by Maxwell was, in fact, the same material taken from the scene of McKenzie’s arrest.” *Appellant’s Brief* at 9. We initially note that, contrary to McKenzie’s assertion, the admission of evidence is a determination left to the trial court’s discretion.² *McCotry v. State*, 722 N.E.2d 1265 (Ind. Ct. App. 2000), *trans. denied*. We will reverse a trial court’s decision only when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

“‘The chain-of-custody doctrine requires an adequate foundation to be laid showing the continuous whereabouts of physical evidence before it may be admitted into evidence.’” *Robinson v. State*, 724 N.E.2d 628, 640 (Ind. Ct. App. 2000) (quoting *Shipley v. State*, 620 N.E.2d 710, 715 (Ind. Ct. App. 1993)) (citations omitted), *trans. denied*. When the evidence is fungible, as in the case of drugs, *Everroad v. State*, 570 N.E.2d 38 (Ind. Ct. App. 1991), *vacated on other grounds by Everroad v. State*, 590 N.E.2d 567 (Ind. 1992), the State’s burden is to give reasonable assurance the property passed through the hands of the parties in an undisturbed condition. *Whaley v. State*, 843 N.E.2d 1 (Ind. Ct. App. 2006), *trans. denied*. The State need not exclude all possibility of tampering, however, and merely raising the possibility of tampering is an insufficient method of challenging the chain of custody. *Id.* Further, the State is not required to

² In his brief, McKenzie states, “[t]he ‘clearly erroneous’ standard of review is appropriate in the instant case[.]” citing *Pruitt v. State*, 834 N.E.2d 90, 104 (Ind. 2005), *cert. denied*, ___ U.S. ___ (June 26, 2006). *Pruitt*, including the pinpoint-cited page, is wholly factually and legally dissimilar from this case, and we are unable to discern its relevance.

establish a perfect chain of custody, and any gaps impact solely on the weight, not the admissibility, of the evidence. *Id.*

Detective Minch testified that he collected the bags of marijuana at the crime scene, transported them to the IPD's narcotics vault, placed the bags of marijuana into a sealed envelope, and locked the evidence in the vault. Maxwell provided the following testimony about the protocol followed by the Agency's chemists when handling evidence:

our chemistry supervisor[,] the head of our unit, goes over to the Indianapolis Police Department property room in the drug vault and brings [the drugs] over to our laboratory, and then he divides those up between how ever [sic] many chemist[s] that are there. Puts them into a . . . There is a vault inside the chemist section in the laboratory and we go in there and retrieve whatever items that have been assigned to us.

Transcript at 106 (ellipsis in original). Maxwell further testified that the Agency's vault is locked "24 hours [per] day[,] seven [] days a week[.]" *Id.* at 112. Regarding this case, Maxwell testified that Spears, another forensic chemist, previously analyzed the marijuana, and that the bag indicated Spears followed the proper chain-of-custody protocol. After Maxwell was assigned to the case, he retrieved the envelope from the Agency's vault, which was locked, analyzed the marijuana, resealed the envelope, and placed it back into the locked vault.

McKenzie points to the possibility that the marijuana may have been the subject of tampering, asserting "[t]he State did not present evidence sufficiently demonstrating who that person was, what the condition of the material was when they handled [sic], what they did to the material and whether the material was in a similar condition on the day of

trial.” *Appellant’s Brief* at 7. Although Spears did not testify, the absence of this testimony goes to the weight of the evidence and not to its admissibility. *See Jenkins v. State*, 627 N.E.2d 789 (Ind. 1993) (failure of FBI technician to testify did not create error), *cert. denied*, 513 U.S. 812 (1994); *see also Troxell v. State*, 778 N.E.2d 811 (Ind. 2002) (absence of documentation of the specific dates and times of the movement of the defendant’s samples within FBI processes went to the weight and not the admissibility of the defendant’s DNA sample). Given the totality of the evidence regarding the Agency’s protocol, IPD’s and the Agency’s handling of the marijuana, and the Agency’s analyses, the State gave reasonable assurances the marijuana passed through the parties’ hands in an undisturbed condition and, therefore, the trial court did not abuse its discretion by admitting the evidence. *See Bussberg v. State*, 827 N.E.2d 37, 42 (Ind. Ct. App. 2005) (“[w]hile the courier who transported the specimen was not brought into the court to testify, we are confident that the State established a sufficient chain of custody”), *trans. denied*.

Judgment affirmed.

KIRSCH, C.J., and RILEY, J., concur.