NO. COA01-335

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Craven County
No. 00 CRS 4000, 7057

REGINALD ARTAVIS MOORE

Appeal by defendant from judgment entered 30 November 2000 by Judge Jay D. Hockenbury in Craven County Superior Court. Heard in the Court of Appeals 23 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Richard L. Harrison, for the State.

Mills & Willey, by Joshua W. Willey, Jr., for defendant.

BIGGS, Judge.

Reginald Artavis Moore (defendant) appeals his convictions of non-felonious breaking and entering, possession of cocaine, and habitual felon status. For the reasons set forth below, we find no error.

The evidence at trial tended to show the following: On 1 April 2000 at around 2:00 A.M., Amanda Gaskins (Gaskins) was awakened by the repeated ringing of her doorbell. When she went to the door to inquire, she could hear mumbling; however, unable to identify the voice, she decided to call the police. Before she could complete the call, the door burst open and defendant entered Gaskins' house. Gaskins ran out the back door, went to a neighbor's house and

called the police.

When the police arrived, they found defendant in the back of Gaskins' residence. Officer Melton (Melton) of the New Bern Police Department arrived at the scene after defendant was arrested and taken into custody. He found what appeared to be a "crack pipe" on the floor in the kitchen area. He labeled the pipe and sealed it in an evidence bag for chemical analysis.

Defendant was subsequently charged with first-degree burglary, felony possession of cocaine, and with being an habitual felon. Defendant was convicted of all the charges and was sentenced to 60 - 81 months imprisonment. From these convictions, defendant appeals.

I.

In defendant's first two arguments, he contends that the trial court committed reversible error in the admission of the SBI lab report, which determined that cocaine was in the pipe found in Gaskins' kitchen area. Specifically, defendant argues that the State failed to properly establish the chain of custody pursuant to N.C.G.S. § 90-95(g1) (1999). We find no error in the admission of the SBI report.

This Court has long held that in order to establish a proper chain of custody, "[a] two-prong test must be met before real evidence is properly received into evidence." *State v. Harding*, 110 N.C. App. 155, 163, 429 S.E.2d 416, 422 (1993) (citations omitted). "First, the item offered into evidence must be authenticated as the same object involved in the incident; and

second, it must be demonstrated that the object has not undergone a material change." *Id.* "'A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered.'" *State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 424 (1992) (quoting *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984)).

"'The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition.'" *Taylor,* 332 N.C. at 388, 420 S.E.2d at 424 (quoting *Campbell*, 311 N.C. at 388-89, 317 S.E.2d at 392). "[I]f there are weak links in the chain of custody, these links relate to the weight of the evidence, not its admissibility." *State v. Brown*, 101 N.C. App. 71, 75, 398 S.E.2d 905, 907 (1990).

The legislature, through the enactment of N.C.G.S. § 90-95(g) and (g1) (1999), has created a method by which lab reports of a chemical analysis, stating whether an item is, or contains, a controlled substance, may be admitted into evidence without the necessity of calling witnesses. First, N.C.G.S. § 90-95 (g) provides that an SBI report that has been certified to, upon a form approved by the Attorney General by the person performing the analysis, is admissible *without further authentication* if:

> (1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report

> to the defendant, and
> (2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

N.C.G.S. § 90-95(g) (1) & (2) (1999). In addition, N.C.G.S. § 90-95(g1) provides for a "[p]rocedure for establishing chain of custody without calling unnecessary witnesses." The statute authorizes the State to provide a statement signed by each person in the chain of custody if:

> (3)(a) The State notifies the defendant at least 15 days before trial of its intention to introduce the statement into evidence under this subsection and provides the defendant with a copy of the statement, and
> (b) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

N.C.G.S. § 90-95(g1)(3) (1999). Moreover, neither of these statutory provisions precludes either party from calling witnesses if they elect to do so. *See* N.C.G.S. § 90-95(g); N.C.G.S. § 90-95(g1)(4) (1999).

In the case *sub judice*, the defendant concedes that the State complied with § N.C.G.S. § 90-95(g) and that he failed to give notice of objection as required by that provision. Thus, the lab report is admissible without further authentication. In addition, the State presented the following testimony of Officer Melton: that he found what appeared to be a crack pipe in the kitchen area of Gaskins' residence; that he placed the pipe in a small evidence bag and took it immediately to the police department; that, upon arrival, he placed the pipe in a glass tube, packaged it in a small

manila envelope, and sealed it with red evidence tape; that when he submits an item, he submits it to the New Bern Police Department's property and evidence department; and that the New Bern Police Department handles the packages, sends them off, receives them back and then notifies the officer who made the request for examination. Further, at trial, Melton identified the envelope, marked as Exhibit Number 2, as the same envelope into which he packaged the metal pipe before sending it off to the lab for examination, and testified that the envelope was the same envelope in that "[i]ts got [his] handwriting on it, [his] seal tape, [his] initials and it's [in the] same way that [he] packaged [the] evidence when [he] sent it off". After following instructions in court to open the package, Melton stated that he recognized the pipe, marked as Exhibit Number 3, as the same pipe he picked up from Gaskins' residence; and that the pipe was in the same, or substantially the same, condition on the trial date as it was on the date that he found it.

We hold that the lab report in the case *sub judice* was properly authenticated pursuant to N.C.G.S. § 90-95(g), and that the State established an adequate chain of custody through the testimony of the officer. Accordingly, the trial court properly admitted this testimony.

We reject defendant's argument that in addition to establishing a proper chain of custody through the testimony of the officer, the State was also required to comply with N.C.G.S. § 90-95(g1).

While N.C.G.S. § 90-95(g1) establishes a procedure through which the State may introduce into evidence the laboratory report of a chemical analysis conducted on an alleged controlled substance without calling witnesses, it does not however, "dictate the only proper method of proving the chain of custody when not all persons in the chain are called to testify." *State v. Greenlee*, ___ N.C. App. ___, ___, 553 S.E.2d 916, 918 (2001). In the present case, since the State complied with the requirements of N.C.G.S. § 90-95(g) for authenticating the report and utilized the officer's testimony to establish an adequate chain of custody, it was unnecessary for the State to also comply with N.C.G.S. § 90-95(g1). *Id.*

We hold that the trial court did not abuse its discretion in admitting into evidence the SBI report. Accordingly, this assignment of error is overruled.

II.

Defendant next assigns as error the admission of testimony of Officer Melton, that Lorie Richards was the technician who examined the evidence, and that her examination determined that the pipe contained cocaine. Specifically, defendant argues that this testimony regarding Richards' report was inadmissible hearsay. We disagree.

As defined in N.C.G.S. § 8C-1, Rule 801(c) (1999), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c). Pursuant to Rule 802, "hearsay

is not admissible except as provided by statute or by these rules." N.C.G.S. § 8C-1, Rule 802 (1999). N.C.G.S. § 90-95(g), specifically, provides that a chemical analysis report is admissible without further authentication as evidence of the identity, nature, and quality of the matter analyzed. Thus, the legislature has created an exception to Rule 801(c), pertaining to the admissibility of reports of chemical analyses.

In the case *sub judice*, this Court has concluded that the lab report was properly admitted. Thus, the admission of Officer Melton's testimony regarding the information also contained in the lab report, if error, is harmless. *See State v. Garner,* 330 N.C. 273, 410 S.E.2d 861 (1991). This Court has held that the erroneous admission of hearsay testimony is not necessarily prejudicial enough to require a new trial, *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986), and that the burden is on the defendant to show prejudice. *Id.*, see also N.C.G.S. § 15A-1443(a) (1999). Prejudicial error occurs when there is a reasonable possibility that, had the error not been committed, a different result would have been reached. *Id.*

Here, defendant has not shown that there is a reasonable possibility that, if Officer Melton's testimony were excluded, the jury would have reached a different result. The lab report stating that Lorie Richards conducted the chemical analysis, and setting out the results of the analysis was properly admitted into evidence pursuant to N.C.G.S. § 90-95(g). Thus, we hold that defendant was not prejudiced by Melton's testimony regarding the same

information. Accordingly, this assignment of error is overruled.

III.

Lastly, defendant assigns as error the trial court's order granting the prosecution's motion to correct the date of the offense listed in the indictments from 19 December 1995 to 18 December 1995. This assignment is without merit.

N.C.G.S. § 15A-923(e) (1999) provides that "[a] bill of indictment may not be amended"; however, "amendment" in this context has been interpreted to mean only that an indictment may not be amended in a way which "'would substantially alter the charge set forth in the indictment.'" *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (quoting *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475 (1978)). Where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible, because the amendment would not "substantially alter the *charge* set forth in the indictment." *Id.* A change in an indictment does not constitute an amendment "where the variance . . . was inadvertent and the defendant was neither misled nor surprised as to the nature of the charges." *State v. Bailey*, 97 N.C. App. 472, 475, 389 S.E.2d 131, 133 (1990).

In the case *sub judice,* time is not an essential element of the crime. Defendant was obviously aware that the 19 December date on the indictment was incorrect. Defendant was neither misled nor surprised as to the nature of the charges. "While a variance as to time does become material and of essence when it deprives a

defendant of an opportunity to adequately present his defense", such was not the case here. *See State v. Campbell,* 133 N.C. App. 531, 536, 515 S.E.2d 732, 735, *disc. review denied,* 351 N.C. 111, 540 S.E.2d 370 (1999). We conclude that the change of the date in this indictment was not an amendment as proscribed by N.C.G.S. § 15A-923(e). Accordingly, we overrule this assignment of error.

Defendant received a fair trial free of prejudicial error.

No error.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).