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NO. COA06-184

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v.

EUGENE HAIRSTON, JR.,
Defendant.

Forsyth County
Nos. 04 CRS 35962
04 CRS 57673

Appeal by defendant from a judgment dated 16 September 2005 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Brian Paxton, for the State.

Mercedes O. Chut for defendant-appellant.

BRYANT, Judge.

On 16 September 2005, Eugene Hairston, Jr. (defendant) was found guilty of possession of cocaine, driving while license revoked, and of having attained the status of an habitual felon. The trial court entered, consistent with the jury verdict, a judgment dated 16 September 2005, sentencing defendant to 116 to 149 months imprisonment. Defendant appeals. For the reasons set forth below, we find no error in defendant's trial.

Facts

The State's evidence at trial tended to show the following: On 21 June 2004, North Carolina State Highway Patrol Trooper

Carlton Ray Wilson was in his patrol car facing "east in the median on Interstate 40." Shortly after 5:00 a.m., he observed a white Dodge Intrepid traveling west at approximately 85 miles per hour. Trooper Wilson pulled onto the interstate after the vehicle passed him, activated his blue lights and siren, and stopped the vehicle.

Defendant was the driver of the Dodge Intrepid. After observing and questioning defendant, Trooper Wilson placed defendant under arrest for driving while impaired and drove him to the Forsyth County Detention Center. When attempting to remove the handcuffs on defendant, Trooper Wilson noticed "a small piece of plastic sticking out" from defendant's right hand. Defendant then attempted to raise his hands up, bent his body over to the side, and opened his mouth as if he was attempting to put the object in his mouth. Trooper Wilson slapped defendant's right hand and saw a small plastic bag containing two small, white rocks fall onto the floor. The plastic bag containing the white rocks was identified and subsequently introduced at trial as State's Exhibit 3. Trooper Wilson then asked defendant whether he was under the influence of alcohol, marijuana, or any other drugs. Defendant admitted he used cocaine the night before.

Thereafter, Trooper Wilson placed the plastic bag containing the two rocks into a temporary storage locker at the district's office in Winston-Salem. Later that day, the evidence was placed into a permanent storage locker. Trooper Wilson testified the evidence was later removed from the permanent storage locker to be sent to the North Carolina State Bureau of Investigation ("SBI")

laboratory for analysis. Before the evidence was sent to the SBI laboratory, Trooper Wilson placed it inside a second plastic bag, and then placed it into another larger plastic bag. He placed a piece of evidence tape across the top of the plastic bag where he wrote his initials. In addition, defendant's name, a description of the evidence, and the date of offense was placed on the front of the plastic bag. Trooper Wilson then placed the evidence, which was inside three sealed plastic bags, into a manila folder to be sent to the SBI laboratory. He received the evidence back from the SBI laboratory sometime after 4 May 2005, gave the evidence to the evidence supervisor at the district office, and the evidence was again placed in the permanent evidence locker. The evidence remained in the permanent evidence locker until it was removed for defendant's trial.

Special Agent Hope Copeland, a forensic drug chemist assigned to the SBI crime laboratory in Raleigh, testified that State's Exhibit 3 was assigned SBI laboratory number R2004-22325, and she received it in a sealed condition in its first-class mail packaging on 4 May 2005. Agent Copeland testified that she removed the substance, which was located inside three sealed plastic bags, to weigh and analyze it. She determined it to be 0.2 grams of cocaine base Schedule II. Although she crushed the rocks to make it easier to test the substance, she testified that crushing the rocks did not in any way change their chemical composition. After she analyzed State's Exhibit 3, she returned the material to its original packaging and sealed it. Agent Copeland then placed the

SBI laboratory number, date and her initials on it. The evidence remained in her custody until it was mailed back to Trooper Wilson. At trial, Agent Copeland identified State's Exhibit 3 as 0.2 grams of cocaine base Schedule II and noted it was marked with SBI laboratory number R2004-22325, as well as her initials and the date on which she received it.

Defendant presents three arguments on appeal. First, defendant argues the trial court erred by allowing the State's motion to amend the habitual felon indictment. Second, defendant argues the trial court erred by admitting State's Exhibit 3 (the cocaine) into evidence on the ground the State failed to establish a sufficient chain of custody. Third, defendant argues the trial court erred by denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence.

I

Defendant contends the trial court erred by allowing the State's motion to amend the habitual felon indictment to include the correct date of offense for one of defendant's prior felony convictions. We disagree. Section 15A-923(e) of the North Carolina General Statutes provides that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2005). This statute, however, has been construed 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, 58, 240 S.E.2d 475, 478, *disc. rev. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)). Furthermore, "[a] change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999).

In the instant case, the habitual felon indictment against defendant was supported by three prior felony convictions, including a conviction in Forsyth County on 23 June 1992 for possession with intent to sell and deliver cocaine. The habitual felon indictment correctly listed the date of the conviction of this offense, however, the habitual felon indictment incorrectly listed the date of the offense as 12 February 1992 rather than 14 February 1992. The trial court brought this variance to the parties' attention and the State moved to amend the indictment to correct the variance. Over defendant's objection, the trial court allowed the correction.

The variance in the habitual felon indictment in the instant case was inadvertent. Furthermore, defendant has not asserted he was surprised or misled by the charge in the original indictment. As this Court has stated, "it was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment." *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994); *see also State v. Hargett*, 148 N.C. App. 688, 693, 559 S.E.2d 282, 286 (holding that

an amendment of a conviction date on an habitual felon indictment does not constitute a substantial change to the indictment), *disc. review improvidently allowed*, 356 N.C. 423, 571 S.E.2d 583 (2002). Therefore, we conclude the trial court did not err in allowing the State's motion to amend the habitual felon indictment.

II

Next, defendant contends the trial court erred by admitting State's Exhibit 3, the cocaine, into evidence on the ground the State failed to establish a sufficient chain of custody. It is well-settled that a two-pronged test must be met before real evidence may be admitted into evidence: (1) the evidence offered must be identified as the same object in question, and (2) it must be established that the evidence has not undergone a material change. *State v. Zuniga*, 320 N.C. 233, 255, 357 S.E.2d 898, 912-13 (citation omitted), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). The trial court has sound discretion to determine the standard of certainty required to show that the evidence offered is the same as the one involved in the incident and has not been changed materially. *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." *Id.*

Here, Trooper Wilson testified that after he retrieved the small plastic bag containing what appeared to be "two small white rocks," he placed it into a temporary storage locker at the district's office in Winston-Salem. Later that day, the evidence

was placed into a permanent storage locker. Only the evidence supervisor at the district office and the first sergeant had access to this locker. Before the evidence was sent to the SBI laboratory, Trooper Wilson placed it inside a second plastic bag, and then placed it into another larger plastic bag. He placed a piece of evidence tape across the top of the plastic bag where he wrote his initials. In addition, defendant's name, a description of the evidence, and the date of offense was placed on the front of the plastic bag. Trooper Wilson then placed the evidence, which was inside three sealed plastic bags, into a manila folder to be mailed to the SBI laboratory.

Agent Copeland, who was tendered as an expert in forensic chemistry without objection, testified that State's Exhibit 3 was sealed and marked with the case information when she received it on 4 May 2005. She further testified she analyzed and weighed the substance contained in the plastic bags and determined it to be 0.2 grams of cocaine base Schedule II. The evidence remained in Agent Copeland's custody until it was mailed back to Trooper Wilson. Trooper Wilson received the evidence back from the SBI laboratory sometime after 4 May 2005, gave the evidence to the evidence supervisor at the district office, and the evidence was again placed in the permanent evidence locker until it was removed for defendant's trial.

There is no evidence suggesting the seal on the plastic bag was tampered with before it reached Agent Copeland. Indeed, she testified that in order for the SBI to receive evidence into the

crime laboratory, it had to be in a sealed and initialed state. Agent Copeland further testified the evidence was in three sealed plastic bags when she received it. Defendant argues that because there was no evidence about when State's Exhibit 3 was sent to the SBI laboratory, Agent Copeland did not analyze the evidence until nearly one year after it was seized from defendant, and because there was a weight discrepancy, the State was required to provide a detailed chain of custody. We disagree.

Any discrepancy in the weight of the evidence may be explained by the use of different scales by Trooper Wilson and Agent Copeland. Trooper Wilson testified that he weighed the evidence with a small, portable scale and determined it weighed 0.3 grams. Trooper Wilson also testified that he did not remember whether he weighed the two rocks by themselves or in the plastic bag and that he did not know whether the scale at the district office was checked for accuracy. Agent Copeland testified that she removed the evidence from the plastic bags before weighing it on a calibrated, electronic balance. Unlike the scale used by Trooper Wilson, Agent Copeland testified the SBI laboratory maintained a log of the balance's calibration dates and she checks the weights of the balance everyday to ensure it is weighing properly. Furthermore, if there are weak links in the chain of custody, these links relate to the weight of the evidence, not its admissibility. *Zuniga*, 320 N.C. at 255, 357 S.E.2d at 913. Accordingly, this assignment of error is overruled.

III

Finally, defendant contends the trial court erred by denying his motion to dismiss at the close of the State's evidence and at the close of all evidence. A motion to dismiss should be denied if there is substantial evidence "(1) of each essential element of the offense charged . . ., and (2) of defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation and quotations omitted). When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must

> view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. . . . Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Id. at 75-76, 430 S.E.2d at 918-19 (internal citations and quotations omitted) (emphasis and alteration in original). The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *Id.* at 75, 430 S.E.2d at 918-19.

Here, defendant makes three arguments in support of his contention the trial court erred in denying his motion to dismiss. First, defendant argues there was insufficient evidence establishing the chain of custody of the cocaine and, thus, the State failed to establish the substance in defendant's possession was cocaine. A motion to dismiss challenges the sufficiency of *all*

the evidence, not just one particular piece of evidence. *See Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 918-19. In this case, defendant essentially challenges the admissibility of a particular piece of evidence on the basis of the chain of custody, not the sufficiency of *all* the evidence. As stated above, the determination of whether there are weak links in the chain of custody relate to the weight of the evidence, not its admissibility, and is for the jury to determine. *Zuniga*, 320 N.C. at 255, 357 S.E.2d at 913. Accordingly, this argument is without merit.

Second, defendant argues the trial court erred by failing to dismiss the habitual felon indictment because the incorrect date was listed for the offense date for defendant's 23 June 1992 conviction for possession with intent to sell and deliver cocaine. Because the trial court allowed the State to amend the indictment to correct this date, we conclude this argument is without merit.

Third, defendant argues the evidence was inadequate to support defendant's conviction of the habitual felon charge because of variances between the indictment and the evidence. In particular, defendant argues the documents relied upon by the State to prove this charge are inadequate because one of the documents supporting one of the underlying felony convictions shows defendant's date of birth as 13 April 1971 and his date of birth is 15 April 1971. Further, although defendant's correct name is "Eugene Hairston, Jr.," documents supporting two of the convictions set forth in the habitual felon indictment refer to defendant as "Eugene Hairston."

The evidence, considered in the light most favorable to the State and giving the State the benefit of every reasonable inference that may be drawn from the evidence, shows that the State presented documents supporting the habitual felon indictment including arrest warrants, plea transcripts, and judgments relating to defendant's previous felony convictions. With respect to defendant's 15 October 1996 conviction, the judgment correctly identifies defendant as "Eugene Hairston, Jr." but incorrectly lists his date of birth as 13 April 1971. However, the transcript of plea for that conviction, which was signed by defendant, correctly lists defendant's date of birth as 15 April 1971. Further, although the judgment for one of the underlying convictions (02 CRS 9295) identifies defendant as "Eugene Hairston," the transcript of plea relating to that conviction is signed "Eugene Hairston, Jr." Accordingly, we conclude there was sufficient evidence from which the jury could find that defendant was convicted of the offenses set forth in the habitual felon indictment. This assignment of error is overruled.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).