NO. COA07-1326

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v. Rutherford County
No. 05CRS50129

DANNY RAY BRIDGES,
Defendant.

Appeal by defendant from judgment entered on or about 11 January 2006 by Judge C. Phillip Ginn in Rutherford County Superior Court. Heard in the Court of Appeals 21 July 2008.

Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

Danny Ray Bridges ("defendant") was indicted on 6 June 2005 for felony manufacturing of methamphetamine in violation of N.C. Gen. Stat. § 90-95(b)(1a). After trial, the jury convicted defendant of attempted manufacture of methamphetamine, and the trial court sentenced defendant within the presumptive range for a Class C felony for a prior record level III to an active term of a minimum of 93 months to a maximum of 121 months imprisonment. From the judgment entered, defendant appeals and raises the following issues: (1) whether the trial court erred in allowing the State's

motion to amend the indictment to attempted manufacture of methamphetamine, and (2) whether trial counsel provided ineffective assistance for failing to move to dismiss the charge for insufficient evidence and for failing to object to the amendment of the indictment. We find no error.

Officer Chad Murray testified that on 9 January 2005, he and Corporal Kelly Aldridge went to defendant's residence to execute a warrant for his arrest. The inside door was open, and Officer Murray opened the screen door and could hear someone walking in the house. He announced himself and entered the house when he saw defendant approach the door. Within a few feet of entering the house, Officer Murray smelled a strong odor that he knew from experience was associated with methamphetamine labs. He told defendant he was under arrest and instructed him to turn around and get down on his knees. As defendant began to comply he spoke to someone in the house to stay put, a person the officer could not see. Defendant was taken outside where he was handcuffed and searched. Items found on defendant's person included money and a small set of scales. Corporal Aldridge entered the house to clear it, and subsequently indicated to Officer Murray that it appeared someone had left through the back door which was open. Officer Murray called in a request for a task force to come out and investigate a possible methamphetamine lab. EMS was summoned to attend to defendant, who suffered an injury to his face while being taken into custody.

Narcotics investigator Will Sisk arrived at the scene. Defendant told him that although he was doing a pill wash, nothing was mixed together that would cause an explosion or injury to anyone. Detective Sisk and his supervisor conducted a safety assessment of the house before obtaining a search warrant to search the home. Items found in the home included glassware, a device made of PVC pipe, a glass jar containing a bilayered liquid, a breathing mask, a medicine dropper, cold and sinus medication, red-stained coffee filters, and coffee filters containing a white substance.

Detective Sisk advised defendant of his *Miranda* rights, defendant waived those rights and gave a statement. He stated his addiction to methamphetamine began in 2002 or 2003, that he had seen others "cook crank" (homemade methamphetamine), and he described making drug buys to support his habit. He learned the process of producing methamphetamine and he and another person tried twice, without success, to produce the drug. He stated that the items in the house belonged to him and to his acquaintance, and that they were manufacturing methamphetamine.

State Bureau of Investigation Special Agent Georgian Baxter was tendered and accepted as an expert in forensic drug chemistry. She described the process of manufacturing methamphetamine and explained how certain everyday items are used at each stage of the process. Items found at defendant's residence that could be used for producing methamphetamine were plastic funnels, coffee filters, plastic tubing, rubber gloves, wooden mortar and pestle, iodine, pH

strips, face masks, plastic droppers, hydrogen peroxide, pseudoephedrine tablets, rubbing alcohol, matchbooks containing red phosphorus, propane torches, rock salt, butane fuel, glass jars and dishes, a single burner stove, cat litter, and Coleman fuel.

Agent Baxter tested residue found on different coffee filters and identified the three necessary substances that are immediate precursor chemicals in the manufacture of methamphetamine: red phosphorus, pseudoephedrine, and iodine. Although preliminary tests indicated a presence of methamphetamine in the bilayered liquid, the tests overall were not conclusive that it was actually produced. Also, no container was found holding all three of the precursor chemicals together. After Agent Baxter's testimony, the State rested its case. Defendant did not make any motions at the close of the State's evidence and court adjourned for the night.

The next day, the prosecutor stated to the trial court that the evidence to that point showed attempted manufacturing, not manufacturing, since no evidence was presented that any methamphetamine was actually manufactured. The State indicated the case should proceed on attempted manufacturing. The trial court first addressed defendant's request to have a new attorney come in to represent him alongside his appointed counsel. The trial court allowed defendant to bring in the new attorney, and granted a continuance to the next day to allow new counsel time to familiarize himself with the case. Defendant then moved to dismiss the charge for insufficient evidence and the trial court stated that the State had met its threshold and denied the motion. The

trial court noted that the State had just amended the charge by asking for attempt.

The following day when the trial resumed, defendant presented evidence in his defense. First, defendant testified that when the officers came to his house to execute the warrant for his arrest, Donald Trotter was with defendant. Mr. Trotter fled the scene when defendant was taken into custody. Later that day defendant spoke with Detective Sisk and he told the detective that the materials found at his house were Mr. Trotter's. He admitted his addiction to methamphetamine, but he told the detective that he didn't know anything about the drug other than how to use it. He stated he was not attempting to manufacture the drug, that he did not know how to manufacture it, that he had never tried to make it, and that Mr. Trotter was at his house preparing the pills and other things to take somewhere else to produce methamphetamine. He testified that what Mr. Trotter was going to make was for defendant's personal use.

With regard to some of the items found in the house that the State's witnesses stated could be used for producing methamphetamine, defendant testified that the mask, rubber gloves, medicine dropper, and hydrogen peroxide were used by his wife to provide medical care to relatives. He stated the iodine found was from the veterinarian's office for use with his animals. Defendant believed the bilayered liquid was fuel and water, used by his son and brother-in-law to clean out filters on their go-carts. The PVC pipe was a drain for his tub. Defendant denied that any of the

materials found at his house were used to manufacture methamphetamine.

Defendant first argues the trial court erred by allowing the State's motion to amend the indictment. Defendant contends that by allowing the State to change the offense from manufacturing to attempted manufacturing, the trial court allowed the State to substantially alter the charge by entering an entirely new charge. This change mid-trial deprived defendant of his ability to properly prepare for his defense against the amended charge. After careful consideration, we disagree.

We first note that while defendant did not object to the amendment of the indictment at trial as required to preserve the issue for appeal, he has raised an ineffective assistance of counsel claim that counsel should have objected to the amendment. We therefore begin by addressing the merits of the underlying argument regarding the propriety of allowing the State to amend the charge.

"An indictment charging a statutory offense must allege all the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). Section 15A-923(e) provides that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2005). However, our Supreme Court has interpreted this section to prohibit "any change in the indictment which would substantially alter the charge set forth in the indictment." *Snyder*, 343 N.C. at 65, 468 S.E.2d at 224 (citation and quotation marks omitted). A criminal indictment "is constitutionally

sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *Snyder*, 343 N.C. at 65, 468 S.E.2d at 224 (citation and quotation omitted). Further, "[t]he indictment must also enable the court to know what judgment to pronounce in the event of conviction." *Id.* at 65-66, 468 S.E.2d at 224 (citation and quotation omitted).

N.C. Gen. Stat. § 90-95(b)(1a) (2005) criminalizes the manufacture of methamphetamine. Although that particular section does not specify attempted manufacture as a crime, N.C. Gen. Stat. § 90-98 clearly contemplates that controlled substance offenses include attempted offenses, since it provides that "any person who attempts or conspires to commit any offense defined in this Article is guilty of an offense that is the same class as the offense which was the object of the attempt or conspiracy." N.C. Gen. Stat. § 90-98 (2005). Moreover, N.C. Gen. Stat. § 15-170 provides, "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." N.C. Gen. Stat. § 15-170 (2005). Therefore, attempt to manufacture methamphetamine is a valid offense for which punishment may be imposed, and a defendant may be convicted of attempted manufacturing upon an indictment for manufacturing. *See State v. Gray*, 58 N.C. App. 102, 106, 293 S.E.2d 274, 277 ("A defendant may be convicted of the crime charged in the bill of indictment, or, *inter alia*, of an attempt to commit

it."), *disc. review denied*, 306 N.C. 746, 295 S.E.2d 482 (1982).

Here, we do not find that the trial court erred by allowing the State to amend the charge to attempted manufacturing to conform to the evidence. In fact, the State was not required to amend the indictment at all, given that an indictment may support a conviction for a lesser-included offense or an attempt to commit the crime charged pursuant to N.C. Gen. Stat. § 15-170.

Further, the evidence presented by defendant to refute the charge would also refute an attempt charge. "The two elements of an attempt to commit a crime are: (1) [a]n intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, *but falling short of the completed offense*." *Gray*, 58 N.C. App. at 106, 293 S.E.2d at 277 (emphasis in original) (citation and quotation marks omitted). Defendant's defense consisted of explaining the presence of the items in the house and denying that any of the items were used to manufacture or attempt to manufacture methamphetamine. Defendant also denied knowing how to manufacture the drug, or that he ever attempted to do so. Therefore, defendant was not deprived of an opportunity to adequately prepare his defense where the original indictment specified that he was charged with manufacturing methamphetamine. This assignment of error is overruled.

Defendant argues that his counsel provided ineffective assistance for his failure (1) to move to dismiss at the close of the State's evidence and (2) to object to the amendment of the indictment. We disagree.

The test for ineffective assistance of counsel is two-fold. A defendant must show that his counsel's performance was deficient, and that the deficiency prejudiced defendant's case. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1984).

Defendant contends his counsel should have moved for dismissal of the charges once the State conceded it did not have enough evidence to prove manufacture of methamphetamine. He argues that since the State's amendment of the indictment should not have been allowed, the trial court would have dismissed the original charge for lack of evidence. In light of our conclusion that the trial court did not err in allowing the State to proceed on the charge of attempted manufacture of methamphetamine, and that the State was entitled to proceed on an attempt charge regardless of whether or not the indictment was amended, we do not find that counsel's failure to move to dismiss the charge would have resulted in prejudice. However, we find that sufficient evidence was presented for the State's case to proceed to the jury such that the trial court would not have granted a motion to dismiss.

Defendant also argues his counsel should have objected to the amendment of the indictment from manufacturing methamphetamine to attempted manufacturing of methamphetamine. Once again, given our discussion and conclusion above regarding the trial court's appropriate decision to allow the State to continue with the attempt charge, defendant has not shown that his counsel's failure to object to the amendment, even if deficient, would have prejudiced his defense. This assignment of error is overruled.

Defendant's remaining assignments of error listed in the record but not brought forth or argued in the brief are deemed abandoned. N.C.R. App. P. 28(b)(6).

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).