NO. COA10-165

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 08 CRS 237200-01, 65524

LARRY DEAN LOWRY

Appeal by defendant from judgment entered 28 October 2009 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 October 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General I. Faison Hicks, for the State.

William D. Auman, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted for possession with intent to sell or deliver cocaine, delivery of cocaine, and for being a habitual felon. He entered pleas of not guilty to the underlying offenses, and was found guilty by the jury. Thereafter, he pleaded guilty to having attained the status of habitual felon. He appeals from the judgment entered upon the convictions.

The State's evidence at trial tended to show that on 5 August 2008, Officer Angelo Anthony Demaioribus of the Charlotte-Mecklenburg Police Department was working a "buy-bust operation" where undercover officers would purchase narcotics and arrest the

individuals who sold the drugs to them. Officer Demaioribus was driving his vehicle when he observed defendant "standing off to the side of the road dressed in all black, black ball cap, and a white du-rag." Officer Demaioribus looked to defendant and gave him a nod of the head, and defendant walked up to Officer Demaioribus' vehicle and asked him what he needed. Officer Demaioribus asked for a "dub" or twenty dollars worth of crack cocaine. Defendant got into the passenger seat of the car, and Officer Demaioribus drove down the street and gave defendant a twenty dollar bill. Eventually, defendant had Officer Demaioribus drive back to where defendant had been picked up, and defendant exited the car. Defendant walked out of Officer Demaioribus' view into an apartment complex. Two minutes later defendant returned, got back into the car, and Officer Demaioribus drove away. Officer Demaioribus held out his hand, and defendant dropped a piece of crack cocaine in Officer Demaioribus' hand. Officer Demaioribus then gave the "take-down signal" to the other officers. After driving a couple of blocks, Officer Demaioribus pulled the car over to let the defendant out. As defendant reached for the door handle, officers arrived and took defendant into custody.

After defendant was arrested, Officer Demaioribus drove to a remote location, filled out a property sheet for the cocaine he had purchased from defendant, placed the cocaine in an envelope, and wrote notes on the envelope regarding the arrest. At the end of his shift, Officer Demaioribus turned the cocaine over to Property Control at police headquarters. At trial, Kamika Holloway, a chief

criminalist in the chemistry section of the Charlotte-Mecklenburg Police Department, testified that the substance contained in the envelope was cocaine.

Defendant first argues that the trial court committed plain error by not instructing the jury on the lesser included offense of possession of cocaine. Defendant claims that "[a]lthough defense counsel did not request the lesser included jury instruction, fundamental fairness should mandate that the court submit such even if it be on an *ex mero motu* basis." We disagree.

N.C.G.S. §15A-1443(c) states "[a] defendant is not prejudiced . . . by error resulting from his own conduct." N.C. Gen. Stat. §15A-1443(c) (2009). Here, prior to instructing the jury, the trial court asked defendant's counsel if she wanted "to be heard on whether or not simple possession should be submitted in this case[.]" Counsel responded: "I don't think it should since this is an habitual case. *No, I don't want it submitted*." (Emphasis added).

In *State v. Williams*, 333 N.C. 719, 727, 430 S.E.2d 888, 892 (1993), the defendant "indicated unequivocally to the trial court that he did not wish for the jury to be instructed on the lesser included offense of second-degree murder." The defendant in *Williams* argued that the trial court nonetheless erred by failing to give the instruction on the lesser included offense. *Id.* Our Supreme Court disagreed, concluding that "any error in not

instructing on the lesser-included offense was invited by defendant, who expressly requested that such an instruction not be given." *Id.* We conclude that *Williams* is applicable. In the instant case, as in *Williams*, defendant's counsel specifically and unequivocally indicated that she did not want the jury to be instructed on the lesser included offense. Thus, we hold that any purported error was invited error. Accordingly, defendant is not entitled to any relief.

Defendant next argues that the trial court erred by allowing the State to amend the habitual felon indictment after the jury's verdict on the underlying offenses. Defendant asserts that the amendment was a substantial alteration and should not have been allowed pursuant to N.C.G.S. § 15A-923(e). We disagree.

N.C.G.S. § 15A-923(e) states that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2009). However, this statute "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. May*, 159 N.C. App. 159, 162, 583 S.E.2d 302, 304 (2003) (emphasis in original) (quoting *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475, *disc. rev. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)). Furthermore, this Court has stated that "[t]he purpose of an habitual felon indictment is to provide a defendant 'with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge,' and not to provide the defendant with an opportunity to defend himself against

the underlying felonies." *State v. Briggs*, 137 N.C. App. 125, 130, 526 S.E.2d 678, 681 (2000) (quoting *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995)).

Here, following defendant's conviction on the substantive charges, the State moved to amend the habitual felon indictment to change the date of conviction of one of defendant's prior felonies from 24 May 1988 to 26 May 1988. The trial court granted the motion. Defendant contends that the amendment was a material change in the allegations. We disagree. This Court has stated that "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 a 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 hold the trial court did not err in allowing the State's motion to amend the habitual felon indictment.

Defendant next argues that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. Specifically, defendant contends that the substance identified at trial by Holloway could not have been the same substance obtained by Officer Demaioribus from the defendant. Defendant claims that the evidence analyzed by Holloway had been received by property control prior to the time Officer Demaioribus submitted any items

to property control. Defendant further cites discrepancies in Officer Demaioribus' description of the defendant, the fact that he made ten to twenty arrests on the night defendant was arrested, and argues that Officer Demaioribus' identification of the defendant was mistaken.

After careful review of the record, briefs and contentions of the parties, we find no error. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994) (citing *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991)). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002) (citations omitted).

Here, the State presented substantial evidence that the cocaine tested by Holloway was the same substance obtained from defendant by Officer Demaioribus. Even assuming *arguendo* that

there were issues with the chain of custody, the matter of whether there are weak links in the chain of custody relates to the weight of the evidence and is for the jury to determine. *See State v. McDonald,* 312 N.C. 264, 274, 321 S.E.2d 849, 855 (1984)("Any potentially weak links in the chain of custody relate only to the weight to be given this evidence by the jury.")(citing *State v. Montgomery*, 291 N.C. 91, 103, 229 S.E.2d 572, 580 (1976)); *State v. Berryman*, 170 N.C. App. 336, 340, 612 S.E.2d 672, 675 (2005), *aff'd,* 360 N.C. 209, 624 S.E.2d 350 (2006). Consequently, weak links in the chain of custody are not grounds for dismissal for insufficiency of the evidence.

Defendant also contends that Officer Demaioribus may have been mistaken in his identification of the defendant. However, Officer Demaioribus positively identified defendant at trial as the person who sold him the crack cocaine. Again, any discrepancies in Officer Demaioribus' description of the defendant, or questions regarding whether he may have been mistaken, go to the weight, not the sufficiency of the evidence, and were questions for the jury to determine. Accordingly, we find no error.

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).