IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-976

Filed: 21 August 2018

Iredell County, No. 12 CRS 054927

THE STATE OF NORTH CAROLINA,

v.

BRIAN NICHOLAS EVANS, Defendant.

Appeal by Defendant from Judgment entered 18 April 2017 by Judge Lori Hamilton in Iredell County Superior Court. Heard in the Court of Appeals 21 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Arnold & Smith, PLLC, by Paul A. Tharp, for Defendant-Appellant.

INMAN, Judge.

Brian Nicholas Evans ("Defendant") appeals from a judgment and commitment following a jury verdict finding him guilty of several drug charges. Defendant argues that the trial court erred by: (1) excluding evidence of another's guilt; (2) excluding expert testimony regarding the weight of the substance found; and (3) denying his motion for a mistrial following a discovery violation by the State.

After careful review of the record and applicable law, we hold Defendant has failed to demonstrate reversible error.

Factual and Procedural History

In January 2012, Gregory Greenhalgh and his wife leased to Defendant a house they owned at 525 Murdock Road in Troutman, North Carolina. The lease term ran through 30 June 2013.

On 19 July 2012, Mr. Greenhalgh visited the Murdock Road property to investigate the maintenance of the yard. No one was home when he arrived. As he pulled into the carport he noticed a "very heavy smell of marijuana." Mr. Greenhalgh then knocked on the door and proceeded to call police and the realtor who brokered the rental agreement.

Detective Christopher Pitts ("Defective Pitts") of the Iredell County Sheriff's Office responded to the scene. After obtaining a search warrant, he and six other officers searched the Murdock Road property and discovered a complex marijuana grow operation throughout the house. In the kitchen, the officers found a bag of marijuana stored in the freezer. In one bedroom, officers discovered children's furniture, a mattress, and strings stretched across the room which were used for drying marijuana. The other bedroom contained mailing labels and shipping supplies. Several envelopes were later found by Mr. Greenhalgh in the house that were addressed to Yancy Irwin at an address in Statesville, North Carolina. In the

basement, the officers found a water filtration system, grow lights, a ventilation system, and a number of marijuana plants in various stages of growth. The officers seized the marijuana and sent it to a private laboratory for weighing and identification.

Another detective with the Iredell County Sheriff's Office, Andy Poteat ("Major Poteat"), located Defendant at a separate address in Iredell County on Freeze Crossing Drive in Mooresville, and approached him to discuss the Murdock Road investigation. Following a short conversation, Defendant permitted Major Poteat to search the Mooresville house and his vehicle. Major Poteat found a Duke Energy bill for the Murdock Road address in Defendant's name, along with several money orders in the amount of the agreed upon rent. Major Poteat then arrested Defendant.

Defendant was indicted on 8 April 2013 and went to trial on 10 April 2017. In addition to testimony by Mr. Greenlalgh, the realtor, and officers who searched the Murdock Road residence, the State introduced testimony by Lori Knops—a lead forensic chemist at NMS Labs in Winston-Salem, North Carolina—who identified the substance seized from the house as marijuana weighing 12.015 pounds. Defendant sought to elicit testimony from Detective Pitts regarding his investigation into Yancy Irwin; the State objected and the trial court sustained the objection. Defendant offered expert testimony from Dr. Frederic Whitehurst, a forensic chemist, contesting

the weight of the marijuana calculated by the State's expert. The trial court, however, excluded Defendant's evidence.

On 18 April 2017, the jury found Defendant guilty of five felonies—possession of marijuana, possession with the intent to manufacture marijuana, trafficking marijuana by possession in excess of 10 pounds, but less than 50 pounds, trafficking marijuana by manufacturing an amount in excess of 10 pounds, but less than 50 pounds, and maintaining a building or dwelling place for the use or keeping of controlled substances—and of misdemeanor possession of drug paraphernalia. Defendant was sentenced to 25 to 30 months of imprisonment for the two trafficking convictions, and received a suspended sentence of 6 to 17 months, with 36 months of supervised probation, for the remaining convictions. Defendant gave notice of appeal in open court following his sentencing.

Analysis

1. Evidence of Another's Guilt

Defendant argues that the trial court erred by excluding evidence that someone else was responsible for the marijuana grow operation, because another person's name was listed on a mailing label found in the Murdock Road house. We disagree.

"The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy stated in Rule 401." *State v. Israel*, 353 N.C. 211, 217, 539 S.E.2d 633, 637 (2000) (internal quotation marks and

alterations omitted) (quoting *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987)). "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (quoting N.C. Gen. Stat. § 8C-1, Rule 401 (2003)). "Although 'the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.' " *Id.* at 266, 591 S.E.2d at 17 (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)). The North Carolina Supreme Court has held:

> Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant.

Israel, 353 N.C. at 217, 539 S.E.2d at 637 (emphasis in original) (quoting *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279-80).

Detective Pitts's testimony about the shipping labels addressed to Irwin and any subsequent criminal investigation into Irwin certainly implicates another person with specificity as required by our precedent. *See, e.g., Israel*, 353 N.C. at 217, 539 S.E.2d at 637. However, his testimony fails to be "inconsistent with the guilt of

[D]efendant." *Id.* at 217, 539 S.E.2d at 637. Nothing in the proffered evidence is inconsistent with Defendant's constructive possession of the residence at 525 Murdock Road. *See State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) ("Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics.") (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). Accordingly, we hold the trial court did not err in excluding the evidence that Irwin, and not Defendant, was in actual possession of the property at 525 Murdock Road.

2. N.C. Gen. Stat. § 90-87(16)

Defendant appeals from the denial of his motion to dismiss all charges for insufficient evidence. Defendant argues that the State's evidence as to the identification and weight of the marijuana seized improperly included material outside the scope of the definition of marijuana under N.C. Gen. Stat. § 90-87(16), and therefore the State failed to present sufficient evidence of the substance's weight. We disagree.

The standard of review from the denial of a motion to dismiss for insufficiency of the evidence in a criminal trial is well settled. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). In ruling on a motion to dismiss, the "trial

court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Bradshaw*, 366 N.C. 90, 92, 728 S.E.2d 345, 347 (2012) (internal quotation marks and citations omitted). Upon reviewing the evidence, the trial court is required to determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *Id.* at 93, 728 S.E.2d at 347 (internal quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 93, 728 S.E.2d at 347 (internal quotation marks and citations omitted).

Defendant was indicted for trafficking marijuana pursuant to N.C. Gen. Stat. § 90-95(h)(1), which specifies that "[a]ny person who sells, manufactures, delivers, transports, or possesses *in excess of 10 pounds* (avoirdupois) of marijuana shall be guilty of a felony . . . ." N.C. Gen. Stat. § 90-95(h)(1) (2015) (emphasis added). For the purpose of N.C. Gen. Stat. § 90-95(h)(1), marijuana is defined as:

> all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, *but shall not include the mature stalks of such plant*, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. The term does not include industrial hemp as defined in [N.C. Gen. Stat. §] 106-

> 568.51, when the industrial hemp is produced and used in compliance with rules issued by the North Carolina Board of Agriculture upon recommendation of the North Carolina Industrial Hemp Commission.

N.C. Gen. Stat. § 90-87(16) (2015) (emphasis added).

It is well settled that an essential element of the trafficking offense in question is the weight of the marijuana, which the State has the burden of proving beyond a reasonable doubt. *See State v. Gonzales*, 164 N.C. App. 512, 515, 596 S.E.2d 297, 299 (2004). "For this issue to survive a motion to dismiss on a trafficking charge, the State must come forth with substantial evidence, viewed in a favorable light, that the weight of the marijuana meets the 10-pound threshold." *Id.* at 515, 596 S.E.2d at 299 (citation omitted). Once the State has presented such evidence, the burden shifts to the defendant to make an affirmative showing "that the weight of marijuana, for the purposes of meeting the weight element of a trafficking charge, improperly included one of the exclusions from the definition." *Id.* at 515-16, 596 S.E.2d at 299-300 ("[I]t is the defendant's burden to show that any part of the seized matter is not 'marijuana' as defined."). "In such a case where the defendant does come forth with evidence that the State's offered weight of the marijuana includes substances not within the definition (e.g., mature stems or sterile seeds), it then becomes the jury's duty to accurately 'weigh' the evidence." *Id.* at 516, 596 S.E.2d at 300.

Defendant argues that the testimony of the State's witnesses allows for a finding that some material not within the statutory definition of marijuana—mature

stalks—was included in the weight offered by the State. Defendant points to Detective Pitts's testimony that he placed everything "above the root ball" in a bag and sent it to the lab. Defendant argues that this testimony, along with the chemist's testimony that she weighed everything in the bag, was sufficient to show that the State's evidence as to the weight of the substance seized included material not within the definition of marijuana pursuant to N.C. Gen. Stat. § 90-87(16).

Defendant's argument overlooks the standard by which we review the denial of a motion to dismiss for insufficient evidence. As the North Carolina Supreme Court in *Bradshaw* explained, the court "must consider the evidence in the light most favorable to *the State*, *drawing all reasonable inference in the State's favor*." *Bradshaw*, 366 N.C. at 92, 728 S.E.2d at 347 (internal quotation marks and citation omitted) (emphasis added). The State's expert witness, Ms. Knops, testified that the material she weighed did *not* include "mature stalks" that would fall outside the statutory definition of marijuana:

> DEFENSE COUNSEL: So you can't testify today as to whether or not when you weighed the stuff you were weighing mature stalks, you just don't know?
>
> MS. KNOPS: Well I can, I made notes on the day in which I tested that all items number 1, number 2, number 3, number 45 have stems present. However, the stems are immature, they're not mature stalks and are included in the reported weight. And that's for all the items, 1, 2, 3 –
>
> DEFENSE COUNSEL: Thirty-five seconds ago you just testified that you can't testify to whether something is

> mature or not.
>
> MS. KNOPS: Well as a mature plant or mature stalk, during my training, if you want to know, but during my training and experience with working at Washington State Patrol Crime Laboratory, the State crime laboratory, Iredell County Sheriff's Office Crime Laboratory, and the private lab that I work for now, NMS Labs, the definition of, I use that term loosely, as far as I don't want to really call it a definition, but the meaning of that term would be a stalk that looks like a tree trunk, that's brown in color, that is woody, and that's been consistent across the board. That's what my training and experience has been. It's usually done around the root and it's been consistent throughout. That's my definition and that's my opinion.

Ms. Knops further testified that she had removed mature stalks in the past prior to weighing a substance and that had the evidence that was submitted to her contained such stalks she "would have removed them, packaged them separately. [She] would have not weighed that material, and [she] would have made a note in [her] case file." While Defendant seeks to highlight a contradiction in Ms. Knops' testimony, "[a]ny contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347 (internal quotation marks and citation omitted).

Because the State presented sufficient testimonial evidence as to the weight of the marijuana meeting the statutory threshold of ten pounds, the trial court did not err in denying Defendant's motion to dismiss for insufficient evidence.

3. Expert Testimony

Defendant next argues that the trial court abused its discretion by excluding testimony from Defendant's expert witness regarding the weight of the substance seized. We disagree.

We review a trial court's decision to exclude certain expert testimony for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation omitted). A trial court's ruling will not be reversed for abuse of discretion absent "a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* at 893, 787 S.E.2d at 11.

Defendant offered expert testimony by Dr. Frederick Whitehurst, who was prepared to testify that a certain percentage of the material was stem and not within the material defined by the statute as marijuana. The State requested *voir dire* before Dr. Whitehurst was tendered as an expert. Following the *voir dire*, the trial court ruled that Dr. Whitehurst's testimony was not relevant to the weight of the material on the day it was seized.

Rule 702 of the North Carolina Rules of Evidence provides the following:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.

> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2015). In 2016, the North Carolina Supreme Court clarified that a 2011 amendment to Rule 702 conformed to the federal *Daubert* standard for admissibility of expert testimony. *McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8.

Under the *Daubert* standard, the primary focus of a trial court's inquiry into the reliability of an expert's testimony relies on "the reliability of the witness's principles and methodology, not on the conclusions that they generate." *Id.* at 890, 787 S.E.2d at 9 (internal quotation marks and citation omitted). The *McGrady* Court enumerated the following factors from *Daubert* that a trial court should consider when determining whether to admit testimony by an expert witness:

> (1) whether a theory or technique . . . can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the theory or technique's known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique has achieved general acceptance in its field.

Id. at 890-91, 787 S.E.2d at 9 (internal quotation marks and citation omitted). The Court further explained that "the trial court [also] must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 701(a)(1) to

(a)(3)." *Id.* at 892, 787 S.E.2d at 10. "The court has discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify, that are reasonable measures of whether the expert's testimony is based on sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the expert has reliably applied those principles and methods in that case." *Id.* at 892, 787 S.E.2d at 10 (citation omitted).

Defendant argues that the trial court excluded Dr. Whitehurst's testimony regarding the weight of the substance on the basis that Dr. Whitehurst did not provide a distinction between "stalks" and "stems,"[1] and that the trial court misinterpreted the statute to require such a distinction. However, a review of Dr. Whitehurst's testimony reveals that he was presented as a witness to testify solely as to the weight of the material on the day he tested it, almost a year and a half *after* the day it was seized. The trial court, in attempting to determine the admissibility of Dr. Whitehurst's testimony, probed the nature of the testimony. During *voir dire* the trial court and defense counsel engaged in the following colloquy:

> THE COURT: So you are proffering this witness solely to testify about the weight of the material on the date that he weighed it?

[1] N.C. Gen. Stat. § 90-87(16) distinguishes between certain parts of a plant that do not qualify as "marijuana" for the purpose of establishing the weight of the illegal substance. The statute specifically excludes "the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." N.C. Gen. Stat. § 90-87(16).

DEFENSE COUNSEL: Yes, ma'am. He wouldn't be able to give any opinion as to the weight on that particular day [the day the State's expert weighed it] because he didn't weigh it.

. . .

THE COURT: You know, I'm sorry, Mr. Smith [defense counsel], I don't think that the weight of this material in November of 2013 is relevant to the weight, to its weight when it was discovered, which is the issue.

DEFENSE COUNSEL: Then we would be assuming, your Honor, that there is something that happens with respect to the material—let's keep in mind, the plant material in this particular case was drying. We don't even know how much moisture was in it at the time it was weighed.

THE COURT: And your witness is not going to be able to clarify that.

DEFENSE COUNSEL: But he does get the right to testify to the material weight at the time he weighed it.

THE COURT: Why is that relevant? Tell me why that is relevant.

DEFENSE COUNSEL: What is the weight in which the State's expert testified to at the time in which it was weighed.

THE COURT: Because that's what the law says, you calculate the weight on the date that it was found. Not a-year-and-a-half later when it's dried out for a-year-and-a-half.

. . .

THE COURT: So we're at ground zero. I don't see how the weight a-year-and-a-half later is relevant to its weight in

> this—this gentleman has already said I can't tell you how much it weighed when it was discovered, which is the time when the law says and base the charge on the weight at the time it was discovered. If he testifies that a-year-and-a-half later it's three pounds and some, what I think you probably want to do is create the impression in the jury's mind that maybe it didn't really weigh 10 pounds, but this witness can't say that. And all you do is you create—
>
> There's a very serious possibility that this jury will be mislead by this testimony. I don't think that the weight a-year-and-a-half later is relevant for the purposes of determining the weight of what purports to be marijuana at the time it was discovered. *Now, do you intend to try to elicit testimony from this witness about whether or not it even is marijuana*?
>
> DEFENSE COUNSEL: No.
>
> THE COURT: Then I'm not going to let your witness testify.

(Emphasis added). Despite what Defendant argues on appeal, Dr. Whitehurst was not seeking to testify as to whether or not the material weighed by the State fell within the definition of marijuana. Rather, he was prepared to testify only about the weight of the substance in November 2013, more than a year after the date relevant to the trafficking charges. The trial court ruled that such testimony was irrelevant to the weight of the substance on the day it was seized, which, as the trial court correctly notes, is the applicable date under the statute. *See Gonzales*, 164 N.C. App. at 521, 596 S.E.2d at 302 (holding that "North Carolina case law . . . impliedly accept that the determinative weight of marijuana is at seizure").

Because Dr. Whitehurst sought to testify only as to the weight of the substance on the day he weighed it, and not as to whether or not any part of the substance weighed by the State's expert fell outside the scope of the definition of marijuana pursuant to N.C. Gen. Stat. § 90-87, we conclude that the trial court's decision to exclude his testimony was not so unsupported by reason that it could not be the product of a reasoned decision. Accordingly, we hold the trial court did not abuse its discretion in excluding this testimony.

Defendant further argues that the trial court abused its discretion by permitting the State's witness to testify as an expert regarding both the nature of the substance seized and as to its weight. We disagree.

As discussed above, it is within the sound discretion of the trial court to determine whether or not to qualify a witness as an expert under the *Daubert* standard. *See McGrady*, 368 N.C. at 893, 787 S.E.2d at 11. Here, Ms. Knops testified as to her qualifications, education, and experience involving forensic chemistry. She testified as to her training in testing and identifying controlled substances, as well as the protocols for such tests. She also testified about the reliability of the tests performed. Based on our review of Ms. Knops' testimony, we cannot conclude that the trial court abused its discretion by qualifying Ms. Knops as an expert and permitting her to testify as to the nature of the materials tested.

Accordingly, we hold Defendant's argument is without merit.

4. Motion for a Mistrial

Lastly, Defendant argues that the trial court erred by denying his motion for a mistrial on the basis of surprise evidence in the form of photographs of the Mooresville house where Defendant was arrested, which were first disclosed by the State during the trial. We disagree.

The standard of review from the denial of a motion for mistrial on the grounds of a discovery violation is an abuse of discretion. *State v. Harring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988) ("The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.") (citation omitted).

Discovery in criminal proceeding is governed by Section 15A-901, *et seq.*, of the North Carolina General Statutes. Section 15A-910 provides that:

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
>
> > (1) Order the party to permit the discovery or inspection, or
> >
> > (2) Grant a continuance or recess, or
> >
> > (3) Prohibit the party from introducing evidence not disclosed, or
> >
> > (3a) Declare a mistrial, or
> >
> > (3b) Dismiss the charge, with or without prejudice,

or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2015). Our Court has explained that a "trial court is not required to impose any sanctions. However, prior to imposing any of the above sanctions, the trial court must consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with the discovery requirements." *State v. Jaaber*, 176 N.C. App. 752, 755, 627 S.E.2d 312, 314 (2006) (internal quotation marks and citation omitted). "A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985).

Here, Defendant argues that his trial counsel was unfairly surprised by photographs first disclosed by the State after the cross-examination of one of the State's witnesses, Major Poteat:

> DEFENSE COUNSEL: There were no children living there, didn't appear to be any kids that lived at [the Mooresville residence]?
>
> MAJOR POTEAT: I do recall, and I would have to look at the photographs to be sure, but I think I recall some children's stuff, but I can't say specifically that there was any indication that the kids were living there or not, I don't recall.
>
> . . .

> DEFENSE COUNSEL: Did you all take pictures of inside that house?
>
> MAJOR POTEAT: Yes, sir, I think so.
>
> DEFENSE COUNSEL: Are you sure?
>
> MAJOR POTEAT: No, sir, I'm not sure so I don't want to misspeak.
>
> DEFENSE COUNSEL: Mr. Evans didn't have any kids; is that correct? Him and his wife, the Winston-Salem police officer, they didn't have any children?
>
> MAJOR POTEAT: I don't know the answer. I don't know if they did or didn't.
>
> DEFENSE COUNSEL: I don't think you took any pictures inside of that house, but do you have any pictures if you did?
>
> MAJOR POTEAT: No, sir.
>
> DEFENSE COUNSEL: There were no car seats or anything like that in his pickup truck?
>
> MAJOR POTEAT: Not that I recall, no, sir.

The prosecutor later, after Defendant called his first witness, informed the trial court that he had just been provided with a CD that contained photographs from the search warrant of Defendant's Mooresville house, which Major Poteat discovered after his cross-examination by defense counsel.

The prosecutor did not dispute that the photographs should have been disclosed during discovery. Defendant moved for a mistrial.

In response to Defendant's motion, the trial court ordered the following: (1) Defendant was allowed a copy of the photographs; (2) Defendant was not prohibited from using the photographs; (3) the State was to make Major Poteat available as a witness for Defendant; (4) Defendant was permitted to ask Major Poteat when he first realized he had the photographs and to create "whatever inference with the jury that [he] want[s] with the fact that [the evidence] was not disclosed" until the trial; and (5) the State was prohibited from using the photographs. While Defendant argues that "[w]here one piece of evidence that was not turned over to defendant after a proper request for it has the potential to fundamentally alter a defense strategy, this Court may find prejudice[,]" *State v. Tuck*, 191 N.C. App. 768, 773, 664 S.E.2d 27, 30 (2008), he has failed to demonstrate how the trial court abused its discretion by not awarding a mistrial.

The trial court took appropriate action to lessen the effect of the discovery violation by offering Defendant the opportunity to re-examine Major Poteat and to raise the issue of delayed disclosure of the photographs. We are unpersuaded that this violation made it impossible for Defendant to attain a fair and impartial verdict under the law, and we therefore conclude that the trial court did not abuse its discretion in denying the motion for a mistrial.

Conclusion

For the foregoing reasons, we conclude that Defendant has failed to demonstrate reversible error.

NO ERROR.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).