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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-900

Filed 16 April 2024

Cabarrus County, No. 21 CRS 54377

STATE OF NORTH CAROLINA

v.

DARIUS JOSIAH GREEN

Appeal by defendant from judgment entered 12 April 2023 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 21 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael Bulleri, for the State.

Edward Eldred for defendant-appellant.

THOMPSON, Judge.

In this criminal case, defendant appeals the trial court's order entered upon a unanimous jury verdict, wherein defendant was found guilty of speeding in excess of fifteen miles per hour (mph) over the legal speed limit; guilty of possession of psilocin; and guilty of possession of one-half ounce or less of marijuana. On appeal, defendant contends that the trial court prejudicially erred by allowing the State to amend the

indictment regarding the second charge, possession of a Schedule I controlled substance. After careful review, we affirm.

I. Factual Background and Procedural History

On 21 November 2021, a law enforcement officer with Concord Police Department (officer) initiated a traffic stop because Darius Josiah Green (defendant) was driving sixty-seven mph in a forty-five mph zone. To clock the speed of the vehicle, the officer used a department-issued radar unit, known as The Raptor RP1, which he was certified to operate.

On 3 January 2022, a Cabarrus County grand jury indicted defendant for the following offenses: (1) speeding, (2) possession of Schedule I controlled substance, and (3) possession of marijuana up to one-half ounce. On 16 September 2022, a forfeiture of counsel hearing was held, and the court concluded as a matter of law that defendant had forfeited his right to counsel “by his intentional conduct.”

The case came on for hearing at the 10 April 2023 Criminal Session of Cabarrus County Superior Court. That same day, the trial court conducted pretrial motions. During the pretrial motions, the State orally entered a motion to amend the second charge on the indictment. The second charge on the indictment, possession of a Schedule I controlled substance, stated that, “[t]he Jurors for the State upon their oath present that on or about the date of the offense shown above and in the county named above, the defendant named above unlawfully, willfully, and feloniously did possess a controlled substance, Psilocybin, which is included in Schedule I of the

North Carolina Controlled Substances Act.” The State’s proposed amendment was for the indictment to read “Psilocin” instead of “Psilocybin.”

Initially, defendant did not object to the State’s motion to amend the indictment; however, approximately thirteen minutes later, defendant objected to the State’s motion. The trial court took the State’s motion to amend the indictment under advisement.

At the trial court’s request, the State called the forensic analyst who was responsible for testing and analyzing the mushrooms found in defendant’s possession to provide information about the proposed indictment amendment. The forensic analyst testified that her job is to “analyze evidence for the presence or absence of controlled substances” The forensic analyst’s testimony confirmed that hallucinogenic mushrooms contain *both* psilocybin and psilocin compounds, that the human body converts the first compound into the second compound, and that psilocybin and psilocin are considered the same under forensic toxicology. Based on the forensic analyst’s testimony, the trial court granted the State’s motion to amend the indictment, stating that “the amendment d[id] not substantially alter the charge and it [was] therefore permissible[,]” and that there was “no basis for prejudice to the defendant under these circumstances”

The State’s first witness was the officer who initiated the traffic stop of defendant. The officer testified that, following the initiation of the traffic stop, he detected a strong odor of marijuana coming from the open driver’s side window as he

approached the vehicle driven by defendant. The officer further testified that he identified himself to defendant, asked defendant for identification, and asked if defendant possessed marijuana in the vehicle. Defendant responded “yes” and “retrieved a small baggie of a green leafy substance that [the officer] knew, based on [his] training and experience, to be consistent with marijuana” The officer then called for another unit so that he could “conduct a probable cause search of the vehicle safely.” Once the other unit arrived, the officer asked defendant to step out of the vehicle to conduct a “quick frisk” of defendant’s person. While frisking defendant, the officer felt an abnormal object in defendant’s waistband, which defendant subsequently identified as “a bag of edibles.” The officer placed defendant in handcuffs to detain defendant while retrieving the object from defendant’s waistband, and while the officer was locating gloves to safely remove the object from defendant’s waistband, defendant stated, “I’ll be honest with you, I also have three grams of mushrooms in there.”

Once the officer had gloves on, he removed the bag of edibles and the bag of mushrooms from inside defendant’s underwear. The officer testified that based on his experience, he knew the mushrooms to be “a hallucinogenic controlled substance.” After removing the items from defendant’s underwear, the officer briefly examined the items to confirm what defendant had told him, and then appropriately bagged them. The officer completed his search of defendant’s vehicle (nothing else was found), transported defendant to the Concord Police Department for processing, and

processed the edibles and mushrooms into evidence.

After the officer's testimony, the State called the aforementioned forensic analyst to the stand. The forensic analyst testified that she works for the North Carolina State Crime Lab at the Western Regional Lab. She further testified that "forensic chemistry is the application of chemistry to the law[.]" meaning that she "tak[es] evidence from a submitting agency, analyz[es] it for . . . controlled substances, if there are any," and is then able to write a report and testify as to the results of her analysis. When a substance is submitted for analysis, "it undergoes two rounds of testing[.]" a preliminary test and a confirmatory test. The preliminary test gives the analyst "an idea of what could potentially be present" in the substance, and the confirmatory test "identif[ies] exactly what is present" in the substance.

In the present case, the forensic analyst testified that she ran both tests on the "plastic bag containing mushrooms[.]" found in defendant's underwear, and determined that the substance in the bag contained psilocin, which is a Schedule I controlled substance. She further testified that "psilocin is a compound[.]" that it is "consider[ed] the active ingredient in the hallucinogenic mushrooms[.]" and that psilocin is also sometimes called psilocybin.

Meanwhile, defendant testified that he did not want to "argue the facts or the evidence presented" to the jury "because it [was] true." Defendant admitted to having the mushrooms on his "natural, living body[.]" and that they were "in [his] waistband."

Following the close of evidence and closing arguments, the court gave jury instructions. As to the charge of possession of a Schedule I controlled substance, the court instructed the jury that to find defendant guilty of possessing psilocin, “the State must prove beyond a reasonable doubt the defendant knowingly possessed psilocin. Psilocin is a controlled substance. A person possesses psilocin when the person is aware of its presence and has both the power and intent to control the disposition or use of that substance.”

The jury unanimously found defendant guilty as to all three charges, and the court sentenced defendant to “a minimum of [six] months and a maximum of [seventeen] months in the North Carolina Department of Adult Corrections[,]” but suspended that sentence and placed defendant on “supervised probation for [twelve] months” with stipulations.

Defendant entered oral notice of appeal at trial.

II. Analysis

On appeal, defendant contends that “the trial court committed prejudicial error by allowing the State to amend the indictment so that it charged possession of a controlled substance legally and chemically distinct from the original substance the State charged [defendant] of possessing.” We disagree.

A. Standard of review

“This Court reviews a trial court’s granting of the State’s motion to amend an indictment de novo.” *State v. Pierce*, 238 N.C. App. 141, 146, 766 S.E.2d 854, 858

(2014) (emphasis omitted).

B. Discussion

“Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution.” *State v. De La Sancha Cobos*, 211 N.C. App. 536, 540, 711 S.E.2d 464, 468 (2011). “[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused” *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (citation omitted). “An indictment charging a statutory offense must allege all of the essential elements of the offense.” *Cobos*, 211 N.C. App. at 540, 711 S.E.2d at 468. “A conviction based on a flawed indictment must be arrested.” *Id.*

A bill of indictment may not be amended. N.C. Gen. Stat. § 15A-923(e) (2023). “This statute fails to include a definition of the word ‘amendment.’” *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). However, in *State v. Carrington*, this Court defined ‘amendment’ as being “any change in the indictment which would substantially alter the charge set forth in the indictment.” *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478 (1978). Our Supreme Court accepted the aforementioned definition as a “correct[] interpretation of [the] statute’s subsection.” *Price*, 310 N.C. at 598, 313 S.E.2d at 558. 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 (1999).

Under the North Carolina Controlled Substances Act, a hallucinogenic substance is defined as “[a]ny material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances” N.C. Gen. Stat. § 90-89(3). Under the enumerated “[h]allucinogenic substances” found in the statute are *both* “[p]silocybin” and “[p]silocin.” *Id.* §§ 90-89(3)(r)-(s).

In the present case, defendant was charged with possession of hallucinogenic mushrooms, “which is included in Schedule I of the North Carolina Controlled Substances Act.” Defendant was indicted on the Schedule I controlled substance charge for possession of “[p]silocybin[.]” At trial, the State made a motion to amend the indictment to read ‘psilocin’ instead of ‘psilocybin,’ which, as noted above, is also a “[h]allucinogenic substance” under the North Carolina Controlled Substances Act. N.C. Gen. Stat. § 90-89(3). The State’s amendment to the indictment did not add an essential element of the crime of possession of a Schedule I controlled substance; it corrected the name of the “hallucinogenic substance” in the original indictment to match the chemical compound name of the “hallucinogenic substance” *after* forensic analysis had been conducted.¹

Furthermore, we are not persuaded that defendant was “misled” or “surprised”

¹ As discussed above, the forensic analyst in the present case testified that under forensic toxicology, “the lab [has] never thought it necessary to actually determine if [the substance] started as psilocybin or psilocin because they are both considered the same[.]” and both psilocybin and psilocin are considered hallucinogenic substances.

by the amendment in the indictment. Defendant admitted to the officer that he “ha[d] three grams of mushrooms” in his possession while he was being frisked. Similarly, at trial, defendant admitted to having the mushrooms on his “natural, living body[,]” and that they were “in [his] waistband.” Furthermore, defendant testified at trial that he “d[id] not want to argue the facts or the evidence presented” to the jury “because it [was] true.” Moreover, defendant received the forensic analysis report—which informed him that the mushrooms found in his possession contained psilocin—approximately one month before pretrial motions began.

Therefore, we conclude that changing the indictment from “psilocybin” to “psilocin” did not “substantially alter the charge set forth in the indictment[,]” *Carrington*, 35 N.C. App. at 58, 240 S.E.2d at 478, because under both the original and the amended indictments, defendant was charged with possession of a “hallucinogenic substance” pursuant to N.C. Gen. Stat. § 90-89(3).²

III. Conclusion

Based on our careful review and the analysis above, we conclude that the trial court properly granted the State’s motion to amend the indictment to read ‘Psilocin’ instead of ‘Psilocybin’ regarding the charge of possession of a Schedule I controlled substance. The record on appeal indicates that the hallucinogenic mushrooms found

² While we hold in the instant case that the State’s amendment to the indictment did not “substantially alter the charge set forth therein,” this holding is to be narrowly construed to the unique factual circumstances of this particular case.

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in defendant's possession contained both psilocybin and psilocin, which are hallucinogenic substances included in the North Carolina Controlled Substances Act, N.C. Gen. Stat. § 90-89(3), and therefore the amendment did not substantially alter the charge set forth in the indictment.

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(f).