Circuit Court for Washington County
Case No. 21-K-17-054075

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 332

September Term, 2018

DARREN LYNN HAWKINS

v.

STATE OF MARYLAND

Wright,
Kehoe,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: February 25, 2019

Appellant Darren Lynn Hawkins was convicted in the Circuit Court for Washington County of three related charges for attempting to obtain a controlled dangerous substance from a pharmacist with a false prescription. Appellant presents the following questions for our review:

> "1. Did the trial court abuse its discretion by refusing to give a "knowingly" instruction to the jury?
>
> 2. Is the evidence insufficient to sustain [appellant]'s convictions?
>
> 3. Did the trial court abuse its discretion by denying defense counsel's request for the rule on witnesses?"

Finding that there was insufficient evidence to sustain appellant's convictions for attempting to obtain a prescription drug by making a false prescription and by fraud, we shall reverse. We shall affirm his conviction for attempting to obtain a controlled dangerous substance by presenting a false prescription.

I.

On January 22, 2018, a jury in the Circuit Court for Washington County convicted appellant of attempting to obtain a controlled dangerous substance by presenting a counterfeit prescription in violation of Maryland Code, Criminal Law Article, § 5-601(a)(2)(vi), attempting to obtain a prescription drug by making a false prescription in violation of § 5-701(d)(4)(vi), and attempting to obtain a prescription drug by fraud in violation of § 5-701(d)(4)(i). The court sentenced him to a term of incarceration of thirty days, all suspended, for attempting to obtain a controlled dangerous substance, eighteen

months for attempting to obtain a prescription drug with a false prescription, and eighteen months, concurrent, for attempting to obtain the same by fraud. Two months later, the circuit court revised appellant's sentence pursuant to appellant's motion to modify and suspended all but the sixty-six days served, followed by six months supervised probation and eighteen months unsupervised probation.

We set out the following facts established at trial. On March 22, 2017, a car with a female driver and a male passenger stopped at a CVS Pharmacy drive-through in Hagerstown, Maryland. The passenger handed a prescription for Percocet to the driver, who handed it to the pharmacist at the window, Ms. Fraley. The passenger leaned back in his seat when Ms. Fraley tried to look at him, and she was unable to identify him. Another CVS employee, Cory Ray, recognized the passenger as appellant because he saw appellant two or three times before March 22. Mr. Ray identified appellant at trial.

The pharmacy manager who reviewed the prescription, Kendra Kearin, noticed that the signature of "Dr. Pappas" on the prescription did not look like Dr. Pappas's signature. Mrs. Kearin also noticed that the prescription strength and dosage instructions written on the prescription were incorrect. When the car returned to pick up the prescription, Mr. Ray saw again that appellant was the passenger. Mrs. Kearin made a copy of appellant's driver's license, noticing that he "was leaning back so I really couldn't see him." She told appellant that the prescription was invalid and that she would not fill it, and the driver drove the car away.

Dr. Pappas testified that appellant was not one of his patients and that he does not write prescriptions for patients he has never seen. He testified that the signature on the

prescription was not his. He acknowledged that someone could have torn from his prescription pad the prescription paper that appellant used.

At the close of the State's case in chief, appellant moved for judgment of acquittal on the first two counts—attempting to obtain a controlled dangerous substance by the alteration of a prescription and attempting to obtain a prescription drug by alteration of a prescription—arguing that the charges were incorrect. He argued also that the State presented insufficient evidence to establish his guilt on the other counts. The court denied the motions, and appellant rested. After further discussion with the court and the State, appellant moved again for judgment of acquittal on the first two counts. Now with the State's concurrence, the court granted judgment of acquittal on those two counts and denied it as to the remaining counts: attempting to obtain a controlled dangerous substance by presenting a counterfeit prescription, attempting to obtain a prescription drug by making a false prescription, and attempting to obtain a prescription drug by fraud.

Following a conference in chambers, appellant requested and the court denied an instruction regarding appellant's knowledge. The jury convicted appellant, the court imposed sentence, and appellant filed this timely appeal.

II.

Appellant presents three questions for our review. First, appellant argues that the circuit court abused its discretion in refusing to instruct the jury that it could not convict him unless he knew that the prescription was false or counterfeit. He contends that trial counsel "substantially complied" with the requirements to preserve the issue for our

review. Appellant argues that knowledge is an element of possession and that the evidence therefore warranted an instruction that he knew the prescription he passed was false or counterfeit. Because the court refused to issue such an instruction, he argues that his conviction under Maryland Code, Criminal Article, § 5-601[1] should be reversed.

Appellant argues also that there is insufficient evidence to prove that he knowingly passed a false prescription, requiring reversal of all three of his convictions. As to his conviction under § 5-701(d)(4), he argues that his two convictions under that section should be reversed because that section applies only to the actions of the pharmacy professionals listed in § 5-701(a), which states that §§ 5-701 through 5-704 apply to "the sale of prescription drugs by a manufacturer, wholesale distributor, retail pharmacists, or jobber to a person not legally qualified or authorized to purchase and hold prescription drugs for use or resale" or by "an authorized provider's assistant who is not licensed to administer prescription drugs." Because the State offered no evidence that appellant was one of the listed pharmacy professionals, there was insufficient evidence to convict him under that statute. He concedes, as he must, that he did not preserve this issue for our review, but argues that his counsel was ineffective for not raising it and that we should exercise our discretion and consider it on direct review.

Finally, appellant argues that the circuit court abused its discretion by refusing to invoke the rule for sequestration of witnesses. Although he did not request the imposition of the rule on witnesses prior to the commencement of the trial, and did so only after

[1] All subsequent statutory references herein shall be to Maryland Code, Criminal Law Article unless otherwise specified.

opening statements and the first witness testimony, he contends that the court abused its discretion because the court's only explanation for refusal to impose the rule was that the trial had already begun.

The State does not oppose the Court's consideration of appellant's arguments as to the statutory applicability of § 5-701 and concedes error. On the issue of the knowledge instruction, the State argues that this issue is not preserved for our review for two reasons: first, appellant did not request a knowledge instruction with sufficient specificity, and second, appellant did not object to the court's failure to instruct on knowledge after the court instructed the jury.

As to the merits, the State argues that the state of mind instruction the court issued, that appellant needed to "intend" to commit the crimes at issue, adequately conveyed to the jury that appellant needed knowledge that the prescription was false. Finally, the State argues that any error was harmless. During deliberations, the jury asked the court "Which charge is for physically writing the script?" After learning that Count Four, "fraudulently attempting to obtain a prescription by making a false prescription," applied to forging the prescription, the jury convicted appellant of that charge and the other charges it considered. The State argues that whatever the jury's understanding of the knowledge requirement, it intended to convict appellant of a crime for creating the false prescription, which necessarily required knowledge that the prescription was false.

The State argues next that it presented sufficient evidence to convict appellant of attempting to obtain a controlled dangerous substance with a counterfeit prescription under § 5-601. The State stresses that the standard of review is whether *any* rational trier of fact

could have found the essential elements beyond reasonable doubt. It argues that it presented evidence sufficient for two inferences. First, it argues that the fact that appellant presented a false prescription made out to him was sufficient for the jury to infer that he forged the prescription. In the alternative, it argues that appellant's possession of a counterfeit prescription from a doctor he never met, with multiple handwriting styles on it, combined with appellant's leaning back to avoid being seen and leaving the pharmacy without explanation, provided evidence sufficient for the jury to infer that appellant knew the prescription was false.

As indicated, the State agrees with appellant that his § 5-701 convictions should be reversed. The disagreement is in the remedy. Where appellant argues that we should simply reverse the two convictions without resentencing, the State argues that we should remand for resentencing. The State argues that in accordance with *Twigg v. State*, 447 Md. 1 (2014), the resentencing court could sentence appellant to a term of incarceration up to one year or eighteen months, the maximum permitted sentences for first-time and repeat offenders for appellant's remaining § 5-601 conviction.

The State's final argument is that the circuit court did not abuse its discretion in denying appellant's motion to invoke the rule on witnesses. The State argues that the court had good reason to deny appellant's request in that the court was, in its own words, "on a roll" with the testimony of the first witness. The court denied appellant's request "[a]t this point," which the State views as an invitation to move for the sequestration of witnesses at a more convenient time. The State argues further that any error was harmless because the few points on which witnesses referenced the testimony of earlier witnesses were either

helpful to appellant, related to issues not contested by appellant, or purportedly based upon the witnesses' own memories. The State concludes that appellant's inability to point to prejudicial testimony obviously influenced by an earlier witness's testimony is fatal to any argument of prejudice from the purported error.

III.

Appellant's "knowledge" issue is multi-faceted and complicated. It is centered around the trial court's failure to instruct the jury as to appellant's "knowledge" that the prescription was forged. The State's response is likewise hydra-headed. As to the jury instruction, the State argues that because defense counsel did not object following the court's instructions, the issue is not preserved for our review. On the merits, the State argues that the court's instructions fairly covered the *mens rea* or *scienter* (knowledge) requirement of the statute. And finally, if the court erred, it argues that the error was harmless beyond a reasonable doubt. Appellant argues also the sufficiency of the evidence as to his knowledge. The State claims in response that the evidence is sufficient to show that appellant knew that the passed prescription was forged or counterfeit.

The instruction issue is difficult for us to resolve because much of the discussion between the court and counsel took place in chambers, and there is an insufficient recitation on the record for us to discern the substance of that discussion. In addition, although appellant asserts that he requested an instruction on knowledge, there is no copy of the requested instruction in the record for our review. All we have before us is a request for an instruction on "knowledge." Without citing authority, both the State and appellant agree

that the defendant's knowledge that the prescription is forged is an element of the offenses of § 5-601 and § 5-701. Our independent research supports that conclusion. *See, e.g.*, *Goodman v. State*, 2 Md. App. 473, 476 (1967) (requiring knowledge for the crime of passing a false prescription); *Hill v. State*, 266 P.2d 979, 982 (Okla. Crim. App. 1954) (requiring same); *Maxey v. Com.*, WL 1129724, at *1 (Va. Ct. App. June 29, 1999) (requiring same). We shall assume that the requirement that appellant knew that the prescription was forged is an element of the offenses.

We begin with appellant's argument that the court erred in declining to instruct the jury on the issue of knowledge. First, was the issue preserved for our review? Maryland Rule 4-325(e) provides that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." In *Braboy v. State*, 130 Md. App. 220 (2000), following trial, the defendant requested and the court denied an instruction as to a possible defense to his assault charges. *Id.* at 226. After the court read the instructions, excluding the instruction the defendant requested, the defendant's counsel stated that "the defense has no exceptions," *id.*, and did not object to the instructions again. *Id.* at 227. This Court held that based upon Rule 4-325, the defendant did not preserve the issue for our review. *Id.*

Prior to instructing the jury in appellant's case, the court advised counsel that "when we're done then you can put objections on the record." Although appellant clearly requested an instruction as to knowledge, as noted above, we do not know what precisely he asked the court to tell the jury. Significantly, however, appellant failed to make any

objection *after* the court instructed the jury. Following jury instruction, the court invited counsel to the bench. After correcting a misreading of a different instruction to the jury, defense counsel told the court there was "[n]othing from the Defense," and the parties proceeded to closing argument with no further objection on the issue from appellant. Applying the Rule under factual circumstances nearly identical to those in *Braboy*, we hold that appellant has not preserved this issue for our review. Not only did he fail to object when given the opportunity after jury instruction, he affirmatively stated that he had nothing to say.

The question then arises: did appellant substantially comply with Rule 4-325(e) because any objection from the defense would have been futile or useless? To show substantial compliance, appellant must show that: (1) appellant objected to the instruction; (2) the objection appears on the record; (3) the objection was accompanied by a definite statement of the grounds for the objection; and (4) the circumstances show that objecting after instruction would have been futile. *Id.* Our cases make clear that a finding of substantial compliance is rare. In *Simms v. State*, 319 Md. 540, 549 (1990), the Court of Appeals explained:

> "We make clear, however, that these occasions [of substantial compliance] represent the rare exceptions, and that the requirements of the Rule should be followed closely. Many issues and possible instructions are discussed in the usual conference that takes place between counsel and the trial judge before instructions are given. Often, after discussion, defense counsel will be persuaded that the instruction under consideration is not warranted, and will abandon the request. Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there

> is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost."

In the instant case, appellant has not satisfied his burden to show that had he objected after the court instructed the jury, it would have been futile or useless. Before the court instructed the jury, appellant's on-the-record arguments as to knowledge lacked specificity as to what he wanted the court to tell the jury. Had he made clear to the court that intent and knowledge were different notions or informed the court what he wished the court to tell the jury as to the knowledge requirement and the law surrounding it,[2] the court may well have changed its ruling. Appellant has not preserved this issue for our review.

Even if the issue were preserved, we would find that the court did not commit reversible error in declining a specific instruction on knowledge. Although we reject the State's argument that the intent instruction satisfied the knowledge element of the offenses,[3] any error was harmless beyond a reasonable doubt in light of the jury's apparent finding that appellant wrote the false prescription. *See Dorsey v. State*, 276 Md. 638, 659 (1976). During deliberations, the jury asked the court "Which charge is for physically writing the script? Number Two?" The court informed the jury that it should rely on the

[2] The court declined to instruct specifically on knowledge, agreeing with the State's argument that "the intent instruction" was "where you're going to get the knowledge." It instead gave "the intent instruction which I believe is supplanted in the (inaudible) knowing instruction," apparently a reference to *Wesbecker v. State*, 240 Md. 41, 45–46 (1965).

[3] The court instructed the jury from the Maryland Criminal Pattern Jury Instructions on intent. MPJI-Cr 3:31. We reject the State's argument that the court's instruction on intent fairly covered the knowledge element. Intent is different from knowledge and, if knowledge that the prescription is forged is an element of the offense, as we assume it is, an intent instruction does not suffice to inform a jury that knowledge is a required element.

second verdict sheet, which pertained to § 5-701(d)(4)(vi). Following deliberation, the jury convicted appellant of all three counts, including the § 5-701(d)(4)(vi) count found on the second verdict sheet. As the jury intended to convict appellant of writing the false prescription, it necessarily concluded that he knew the prescription was false—appellant could not have written the false prescription to himself without knowing that it was false. Therefore, even if appellant had preserved the issue, any error would be harmless in light of the verdict.

Appellant's second issue questions the sufficiency of the evidence as to all three of his convictions. He argues first that the State failed to present evidence sufficient to convict him of "making, issuing, or presenting a false or counterfeit prescription or written order." Section 5-601(a)(2)(vi). Appellant argues that the evidence was insufficient to prove that he *knowingly* made, issued, or presented the false prescription. When reviewing the sufficiency of the evidence, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Williams v. State*, 329 Md. 1, 15 (1992).

Section 5-601(a)(2) criminalizes an attempt to obtain a controlled dangerous substance by presenting a false prescription. Where a defendant attempts to fill a counterfeit prescription made out to himself, it may rationally be inferred that he knew it to be false. *See Wesbecker v. State*, 240 Md. 41, 45–46 (1965); *Goodman*, 2 Md. App. at 476. In *Wesbecker*, the defendant attempted to deposit a forged check payable to him. *Wesbecker*, 240 Md. at 44. He admitted that he endorsed the check, but denied having

forged it, testifying that his business partner "filled in the front of the check." *Id.* On appeal of the sufficiency of the evidence for the defendant's forgery conviction, the Court of Appeals held that "[a]s the possessor of the forged $432.50 check and the utterer of it, there is an inference which established a prima facie case of guilty of forgery by the possessor." *Id.* at 45.

In *Goodman*, the defendant was convicted under Art. 27, § 55[4] of passing a falsely made, forged, or counterfeited prescription. *Id.* at 475. Because the defendant passed the prescription, this Court noted that "[o]ne of the burdens of the State, therefore, was to prove that the prescription was falsely made, forged or counterfeited, for if it was, it may be rationally inferred that the appellant so knew, in the absence of sufficient credible evidence to prove otherwise." *Id.* at 476. Because the State relied solely upon inadmissible evidence to prove that the prescription was false, we reversed. *Id.* at 477–78.

In the instant case, we hold that the evidence was sufficient to prove circumstantially that appellant knew the prescription was forged when presented to the pharmacy. The evidence showed that appellant presented a prescription to a CVS pharmacist to be filled in his name and that Dr. Pappas did not write the prescription. When appellant raised this sufficiency of evidence argument in a motion for judgment of acquittal at trial, the court denied it. The court noted that based upon *Wesbecker*, "if a person is seen in possession or passing [a] fraudulent or forged prescription . . . that that is sufficient to create a presumption under the law that that person did . . . knowingly pass it." Similarly, the

[4] Art. 27, § 55 is now codified at § 5-610(b).

evidence showed that appellant presented a false prescription, attempted to conceal his identity from pharmacists upon presentation, and left the pharmacy when the pharmacist refused to fill the false prescription. Such actions were sufficient circumstantial evidence to prove that appellant knew he uttered a false prescription. We hold that the State presented sufficient evidence for a rational finder of fact to find appellant's knowledge beyond a reasonable doubt.

The State agrees with appellant that § 5-701(a) does not apply to appellant and that we should consider it on direct appeal even though not preserved for our review. We accept the State's concession, and we shall reverse the judgments of conviction under § 5-701(d)(4)(i) and § 5-701(d)(4)(vi) on the basis of ineffective assistance of counsel. *See Testerman v. State*, 170 Md. App. 324, 342–44 (2006). We turn to the only issue remaining—appellant's remedy.

The State's position is that this Court should vacate appellant's § 5-601 sentence and remand for resentencing not to exceed one year (assuming that the conviction is appellant's first applicable offense).

> "If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper judgment or sentence, or conduct a new trial, and if there is a conviction following this new trial, the lower court may impose any sentence authorized by law to be imposed as punishment for the offense. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:
>
> (1) The reasons for the increased sentence affirmatively appear;
>
> (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and

> (3) The factual data upon which the increased sentence is based appears as part of the record."

Md. Code, Courts and Jud. Proc. Art., § 12-702(b). Because ineffective assistance of counsel is the basis for our reversal of appellant's judgments of conviction under § 5-701, we need not vacate his other sentences and remand for resentencing. *See Testerman*, 170 Md. App. at 343–44. Thus, only the sentences for appellant's § 5-701 convictions are vacated, and the sentence for his § 5-601 conviction remains the same.

Finally, we address appellant's third issue, whether the circuit court abused its discretion in refusing to apply the rule on sequestration of witnesses. Appellant argues that the court abused its discretion because its only explanation in denying the request was that the trial had begun. We disagree. Generally, the trial court is given discretion "over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Rule 5-611(a). Relevant here,

> "[U]pon the request of a party made *before* testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. . . . The court *may* order the exclusion of a witness on its own initiative or upon the request of a party at any time."

Rule 5-615(a) (emphasis added). As appellant concedes, if a party requests sequestration of witnesses *after* testimony begins, the court may exercise its discretion in deciding whether to exclude witnesses. *See Tharp v. State*, 129 Md. App. 319, 338 (1999), *aff'd on*

other grounds, 362 Md. 77 (2000). We therefore review appellant's issue for the trial court's abuse of discretion. *Id.*

Appellant requested the sequestration of witnesses after testimony began, in the middle of an unrelated objection to the direct examination of the State's first witness. At that time, noting that "the trial has already begun," the court denied appellant's request: "I believe we are on a roll where we are. At this point I'm going to deny your request belatedly to remove the witnesses." The court was well within its discretion to deny the request to maintain the pace of witness testimony. We hold that the court did not abuse its discretion in denying appellant's belated request to exclude witnesses.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED AS TO APPELLANT'S CONVICTION UNDER § 5-601. JUDGMENTS OF CONVICTION REVERSED AS TO APPELLANT'S CONVICTIONS UNDER § 5-701. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY WASHINGTON COUNTY.