UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2391

September Term, 2014

JASON CLENDENING

v.

STATE OF MARYLAND

Meredith,
Hotten,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: November 10, 2015

Following a three-day jury trial in the Circuit Court for Harford County, Jason Clendening, appellant, was convicted for possession of oxycodone, but acquitted of possession with intent to distribute oxycodone. The circuit court sentenced appellant to serve twenty-three months incarceration, all but one year suspended, to be followed by one year of supervised probation. In his timely filed appeal, appellant raises two questions for our consideration:

1. Is the evidence sufficient to support appellant's conviction for possession of a controlled dangerous substance without a valid prescription?

2. Did the trial court abuse its discretion in denying appellant's motion for new trial?

Discerning no error or abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

The evidence presented at appellant's trial, framed in the light most favorable to the State, indicates that on March 23, 2013, appellant consented to be searched after the car in which he was a passenger was stopped by the police after the driver was observed driving the wrong way on a one way street. In the course of the search, the police recovered a prescription pill bottle from appellant's pocket, bearing a label indicating that the prescription for ten, 20 milligram oxycodone tablets had been filled in appellant's name at a Walgreen's the previous day. The pill bottle contained three grey 20 milligram pills, ten light green 15 milligram oxycodone pills, and a single scored light green tablet, all of which were later submitted for analysis and identified as oxycodone.

A second pill bottle was recovered from the floorboard of the car where appellant had been sitting. The second pill bottle was empty but its label indicated that the prescription in appellant's name for one-hundred-five, 15 milligram oxycodone tablets had been filled the previous day at a CVS in Bel Air, Maryland.

Appellant was arrested and charged with possession of oxycodone and possession with intent to distribute oxycodone. At his trial appellant testified that he had been prescribed oxycodone to treat pain he suffered because of herniated disks in his neck. He said that he routinely took five 15 milligram tablets of oxycodone every day, and sometimes took additional 20 milligram pills for break through pain. Appellant attested that he had two doctors, both of whom he had seen on March 22, 2013, who had provided the two prescriptions that he had filled on that day at pharmacies that were close to the respective doctors' offices. Appellant further asserted that he had left most of the pills in a cabinet at his mother's home, where he resided, and that he carried only enough for his personal use. In a statement made to the police following his arrest, appellant admitted that in the past he had traded and sold some of his prescription medication to others.

DISCUSSION

I. Sufficiency of the Evidence

At appellant's trial, at the close of the State's case, defense counsel made a motion for judgment of acquittal, stating:

> At this time, Your Honor, given that the State has now rested, we would make a motion for judgment of acquittal as to each count. We would argue that in each count there is insufficient evidence. Otherwise, I'll submit.

The circuit court denied the motion finding that there was sufficient evidence to prove a *prima facie* case of possession and possession with intent to distribute oxycodone. Defense counsel renewed appellant's motion at the close of all evidence, stating:

> At this time, Your Honor, I would renew my motion for judgment of acquittal as to all counts for the same reason insufficient evidence.

Again, the court denied the defense motion.

Maryland Rule 4–324(a) provides in pertinent part:

> A defendant may move for judgment of acquittal on one or more counts ... at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state **with particularity all reasons** why the motion should be granted.

Id. (emphasis added). It is well established that "[u]nder [Maryland] Rule 4–324(a), a defendant is ... required to argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient." *Fraidin v. State*, 85 Md. App. 231, 244–45, *cert. denied*, 322 Md. 614 (1991). Furthermore, "a motion which merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with [Maryland] Rule [4–324(a),] and thus does not preserve the issue of sufficiency for appellate review." *Brooks v. State*, 68 Md. App. 604, 611 (1986), *cert. denied*, 308 Md. 382 (1987) (citation omitted); *see also Muir v.*

State, 308 Md. 208, 219 (1986) ("[F]ailure to particularize the reasons for granting a motion for judgment of acquittal in accordance with [Maryland Rule 4–324(a)]'s requirements necessarily would result in a failure to preserve the issue for appellate review.")

Because defense counsel failed to state with particularity the manner in which the evidence was insufficient to support the charges against appellant, and instead alleged only that there was "insufficient evidence[,]" appellant's sufficiency challenge was not properly preserved for appellate review. We need not, therefore, consider it any further. *See, e.g., Byrd v. State*, 140 Md. App. 488, 494 (2001) (engaging in no additional review of sufficiency claim where "[d]efense counsel merely asserted that the evidence was insufficient to send the case to the jury[,]" concluding that "[s]uch a proffer is not particular and leaves the question of sufficiency unpreserved for our review.")

II. Motion for New Trial

During *voir dire,* the trial court asked all of the potential jurors:

> Now, have any of you or any members of your family or close personal friends ever been employed by or associated with any law enforcement agency anywhere in the world at any point in time?

Sixteen venire members responded affirmatively; juror number 22,[1] however, was not one of them.[2] Juror number 22 was eventually chosen to fill seat number 6 on the jury that ultimately convicted appellant for possession of oxycodone.

At appellant's sentencing hearing, defense counsel made an oral motion for a new trial, asserting, in pertinent part:

> Additionally, juror number 6 did not disclose that her father is a prosecutor, if my notes are correct. I may be wrong about that. She apparently told a witness in my office. It was just happenstance that they happened to have this discussion. We didn't go seeking this out, it came into my lap. That is why I'm bringing it to the Court's attention. She happened to have informed him that she either didn't understand the question or just didn't feel like answering the question, but she is a prosecutor's daughter. All she disclosed to us is that she had two bakeries, one in Towson and one in Harford County, and it was a hardship. That is why we talked to her back there. That is the only reason that we talked to her back there.
>
> So, I would submit to the Court that based on that my client did not receive a fair trial and I would respectfully ask for a new trial.

[1]Throughout his brief, appellant asserts that juror number 6 was the individual who acted improperly by failing to respond to the court's *voir dire* question regarding relationships with persons employed in law enforcement. The record indicates, however, that defense counsel used a peremptory strike to dismiss juror number 6. It appears, instead, that appellant intends to challenge the fairness of the jury based on the actions of juror number 22, who was seated in seat number 6 during his trial.

[2]Juror number 22 responded affirmatively to questions regarding involvement in substance abuse treatment, and undue hardship caused by jury duty, explaining that her husband had just been discharged from treatment for alcohol abuse, and that she was the owner of two bakeries, so being away from her shops for two days would be difficult.

In response, the State argued that any information regarding the juror's parentage was "hearsay twice removed[,]" noting that defense counsel was offering the unsubstantiated report of an unidentified individual in his office who had purportedly conversed with the juror the day before. After hearing the arguments of the parties, the court ruled as follows:

> The motion is being made today orally. Certainly there was nothing in writing or nothing in advance. I understand that [defense counsel] said he just got all of the alleged information, but that is all we have here is bald allegations. We don't have anything. That's as to the first one.
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> * * *
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> Obviously you don't go behind the jury's verdict and you don't invade that province. You don't take double hearsay from one alleged juror in the middle of deliberations. It just isn't done. There are good reasons for that. So, the Court will deny the Defendant's motion on that basis.

Appellant contends that the circuit court abused its discretion by denying his motion for a new trial. He asserts that by concealing that her father was a prosecutor, the dishonest juror deprived appellant of his right to a fair and impartial jury. Appellant asserts that the circuit court improperly concluded that it was "precluded from considering any evidence and argument that the defense was offering on its motion[,]" because to do so "would require [the court] to 'go behind the verdict' and 'invade the province' of the jury." Appellant concludes that "[h]aving met his burden of adducing sufficient proof that Juror Number 6 did not provide a truthful response to the court's *voir dire* question concerning he[r] connection to anyone who had worked in law enforcement, [appellant] is entitled to a hearing where the

trial court can determine whether such a failure of disclosure was intentional or simply a[n] honest mistake."

Maryland Rule 4-331 provides, in pertinent part: "On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." Md. Rule 4-331(a). When requesting a new trial, the moving party bears the burden of persuading the court that the alleged error had a "substantial likelihood of causing an unjust verdict." *See Isley v. State,* 129 Md. App. 611, 619 (2000). In cases where a defendant's motion for a new trial is based on the alleged misconduct of a juror that was not discovered until after the verdict was rendered and the jury excused, this Court reviews a trial court's determination for abuse of discretion. *Jenkins v. State*, 375 Md. 284, 298-99 (2004).

To find that a circuit court abused its discretion, we must find that it acted "'without reference to any guiding rules or principles,' or that 'no reasonable person would take the view adopted by the [circuit] court,' or that the decision of that court is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Michael Gerald D. v. Roseann B*., 220 Md. App. 669, 686 (2014) (citations omitted); *Jones v. State*, 403 Md. 267, 291 (2008)(same). In this case, the trial court's decision to deny the motion for new trial was not an abuse of discretion.

In support of appellant's motion for a new trial, and now in support of his appeal, the only information proffered by appellant is that, according to some unnamed source in the

public defender's office, juror number 6 is the daughter of a prosecutor and at appellant's trial "[j]uror number 6 apparently led the charge for the conviction." Appellant has not provided any additional details, not even the name of the juror and/or the name of her prosecutor father. We have no idea in what jurisdiction the juror's father works or worked as a prosecutor, nor how long he has held or did hold the position. Appellant has not offered any witness or affidavit to confirm defense counsel's account of the conversation between juror number 6 and the unnamed employee of the public defender's office with whom she spoke. Nor has the defense at any time, submitted any other evidence substantiating the hearsay account of the juror's parentage. As the trial court concluded, "all we have here is bald allegations. We don't have anything."

Clearly, defense counsel did not meet his burden of convincing the trial court that the alleged failure of the juror to respond to a *voir dire* question necessarily rendered appellant's trial unfair. The children of prosecutors are not prohibited from serving as jurors in criminal cases. To the extent defense counsel offered any evidence that appellant was prejudiced by the juror's participation in his trial, the court correctly noted that it could not invade the province of the jury by considering what purportedly occurred during the jurors' deliberations. Under all the circumstances, we discern no abuse of discretion in the trial court's denial of appellant's motion for a new trial.

The Court of Appeals has adopted the following test in non-disclosure cases:

> [T]he grant of a new trial, where information inadvertently is withheld by a juror's failure to respond to voir dire inquiry, should be left to the sound discretion of the trial judge unless:
>
> (a) actual prejudice to the accused is demonstrated, or
>
> (b) the withheld information, in and of itself, gives rise to a reasonable belief that prejudice or bias by the juror against the accused is likely.

Williams v. State, 394 Md. 98, 102 (2006)(adopting test formulated in *Burkett v. State*, 21 Md. App. 438, 445 (1974)). The Court of Appeals has also held that "where there is a non-disclosure by a juror of information that a voir dire question seeks and the record does not reveal whether the non-disclosure was intentional or inadvertent, the defendant is entitled to a new trial." *Id*. at 114.

In this case, the trial court did not specifically ask whether any of the potential jurors or any members of their families had ever been employed by or associated with the U.S. Attorney's Office or a State's Attorney's Office or a District Attorney's Office or any other body with a prosecutorial role. The *voir dire* question propounded by the court inquired only about employment or association with "any law enforcement agency." Many people would not automatically include prosecutors, who carry no badge or gun and who do not make arrests or issue citations, as agents of law enforcement. The trial court did not provide any guidance for the potential jurors regarding what qualified as a "law enforcement agency" and appellant did not object or otherwise request that the court do so.

Under all the circumstances, any failure on the part of the juror to respond to the *voir dire* question can be attributed to possible confusion regarding the relevant definition of the term "law enforcement agency." We are persuaded that any failure of the potential juror to disclose that her father was a prosecutor was inadvertent. Because there is no indication that the juror's purported failure to disclose was intentional, appellant is not entitled to a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.