Circuit Court for Baltimore City
Case No. 118114013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 0741 and 2652

September Term, 2019

SUSAN IWUNZE NWOGA

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Shaw Geter,
JJ.

Opinion by Kehoe, J.

Filed: February 17, 2021

After a bench trial in the Circuit Court for Baltimore City, the Honorable Marcus Z. Shar presiding, Susan Iwunze Nwoga was found guilty of one count of Medicaid fraud (Crim. Law § 8-509), one count of theft of over $100,000 (Crim. Law § 7-104(g)(iii)) and 287 counts of distribution of controlled dangerous substances (Crim. Law § 5-602(1)). The court sentenced her to twenty years' incarceration with all but five years suspended to be followed by five years of supervised probation. The State also sought restitution. After a separate hearing, the court ordered her to pay a total of $507,433.46 in restitution.

Nwoga presents five issues on appeal,[1] which we have reworded and consolidated into three:

> A. Was there sufficient evidence to support Nwoga's convictions?
>
> B. Did the trial court abuse its discretion by failing (i) to postpone the restitution hearing to enable Nwoga to hire replacement counsel, or (ii) to order the Office of the Public Defender to represent her at the restitution hearing?
>
> C. Was the restitution award supported by legally sufficient evidence? [2]

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[1] Nwoga filed three notices of appeal, which were docketed as Nos. 741, 2652, and 2653 of the 2019 Term. After the appeals were consolidated for briefing, Nwoga dismissed No. 2653.

[2] Nwoga articulates the issues as follows:

> I. Whether the evidence was sufficient to support the convictions for distribution of controlled dangerous substances under Md. Code Ann. Criminal Law §5-602(1)?
>
> II. Whether the evidence was sufficient to support a conviction for Medicaid fraud as charged under Md. Code Criminal Law §8-509(a)?

We will affirm the convictions and the restitution order.

Background

The State's theory of the case was that Nwoga, a licensed pharmacist, participated in a drug distribution scheme by filling hundreds of false prescriptions for medications containing opioids and other controlled dangerous substances.[3] She fraudulently billed Maryland's Medicaid program for these medications and received hundreds of thousands of dollars in reimbursements. Although the evidence produced at trial in this case was voluminous, the underlying facts were largely uncontested.

Beginning in 2012 and ending in 2016, Nwoga, operated the Poplar Grove Pharmacy in Baltimore. She was Poplar Grove's sole pharmacist and filled thousands of prescriptions for medications containing controlled dangerous substances. Under the relevant federal and state regulations, pharmacists must ensure that controlled dangerous substance prescriptions are written for legitimate medical purposes by physicians or other health

III. Whether the evidence was sufficient to support the conviction for theft scheme under Md. Code Ann. Criminal Law §7-104?

IV. Whether the trial court abused its discretion in failing to order the Office of the Public Defender to represent Nwoga or to sufficiently inquire and postpone the matter for her to find counsel?

V. Whether any restitution order must be vacated because the court-imposed restitution beyond that which was supported by competent evidence?

[3] We use "CDS" to refer to the substances listed in Crim. Law §§ 5-402–406.

professionals acting within the normal scope of their professional practices.[4] A pharmacist is also required to exercise her professional judgment to assess the validity of each prescription for CDS medication before filling it.

Poplar Grove was a Medicaid provider. As part of the agreement to become a Medicaid provider, Poplar Grove agreed to comply with all federal and state laws and regulations, administrative policies and guidelines issued by the Food and Drug Administration and the Maryland Department of Health, including filing accurate and truthful claims submitted to the Department for reimbursement. All pharmacies are subject to periodic inspections by agents of the Department of Health's Division of Drug Control (the "DDC").[5]

In 2012, DDC inspector Peter Smith reviewed Poplar Grove's records for CDS prescriptions and discovered "seven or eight" apparently fraudulent prescriptions as well as discrepancies in Nwoga's record-keeping. He discussed these problems with her.

In May 2013, Smith and James Polek, the Deputy Director of the DDC, conducted another inspection. They uncovered a large number of apparently fraudulent CDS prescriptions. The prescriptions contained errors in the security features and/or the

[4] Specifically, prescriptions must be conveyed to the pharmacist "[i]n a manner that contains the handwritten, pen-to-paper signature of the prescriber," by a secure and State-approved electronic system, or by oral communications via a voice messaging system or by telephone as long as the pharmacist reads the prescription back to the physician or the physicians' assistant. COMAR 10.34.20.02.

[5] The Division of Drug Control has been renamed. It is now called the Office of Controlled Substance Administration. At Nwoga's trial, however, witnesses referred to the agency as to the "DDC" as do the parties on appeal.

accompanying physician's directions as to dosage were unusual. For example, the directions on some prescriptions directed the ultimate user to take the medicine every 46 or 68 hours, instead of four to six or six to eight hours and the same errors appeared on prescriptions from different physicians. In other prescriptions, the first and last names of the prescribing physician were transposed.

Polek and Smith contacted the prescribing physicians to verify the legitimacy of the prescriptions. This led the inspectors to conclude that 260 prescriptions appeared to be fraudulent, which was an extremely high number for a pharmacy. Polek discussed his findings with Nwoga and explained to her why these prescriptions were suspicious and probably fraudulent. He provided her with a list of "red flags," that is, indicators that a prescription was potentially fraudulent.[6] He warned her that the presence of one or more red flags should cause her to exercise her due diligence to make sure that the prescription was legitimate.

In their 2014 inspection of Nwoga's records, Smith and Polek uncovered 62 fraudulent prescriptions. Once again, Polek provided Nwoga with a report explaining the "red flags" uncovered in the inspection.

[6] The red flags included: "cocktail prescriptions," that is, multiple prescriptions for controlled dangerous substances to the same patient and the same time; prescriptions paid for in cash; prescriptions for high strengths or large quantities of CDS medications; unusual distances between the patient, the prescriber, and/or the pharmacy; a prescription being filled too soon; multiple family members receiving prescriptions for the same CDS medications; prescriptions for the same drugs to more than one person at the same address; and error in directions for dosages and usage.

The last inspection was not a routine one. The Department of Health received a complaint that a Darnella Carter and a staff member of a methadone clinic were obtaining drugs from Nwoga by means of fraudulent prescriptions. Polek reviewed Poplar Grove's records and found that the pharmacy had filled prescriptions for Carter. The DDC then subpoenaed records for all of Poplar Grove's prescriptions for medications containing controlled dangerous substances that were filled between January 1, 2012, and September 24, 2015, approximately 6,000 prescriptions in total. Polek did not complete his analysis of these records—he stopped after finding 748 fraudulent prescriptions. As a result of the information uncovered by the investigation, Nwoga was charged with a total of 320 counts of theft, fraud and drug distribution.[7]

At the trial, the State introduced physical and testimonial evidence. It first produced the HIPAA logs that Nwoga maintained at her pharmacy. These logs contained information about the prescriptions filled by Nwoga and the signatures of the persons who had picked them up. The State matched this information with claims that Poplar Grove submitted to Medicaid.

Polek, who was qualified as an expert witness, testified that the 2015 inspection showed an "overwhelming presence of fraudulent activity." He also noted that Nwoga had shown him seven prescriptions that she did not fill because she thought they were fraudulent.

[7] Darnella Carter was a co-defendant but was tried separately.

Polek told the court that if Nwoga had been "able to spot those," then she should have been able to identify the other fraudulent prescriptions.

Additionally, the State called as witnesses five physicians and one physician's assistant who purportedly issued the prescriptions that were referenced in the indictment. They testified that they had not written the prescriptions in question, that none of those who signed the HIPAA logs were in fact their patients, that Nwoga had never reached out to them to verify the prescriptions, and that many of the prescriptions themselves had glaring issues. These problems included prescriptions that lacked the patient's date of birth or address, prescriptions for unusually high dosages or amounts of medication, and prescriptions for multiple opiates for the same patient on the same day.

In addition to the testimony of Polek, Smith, and the health care providers, the State also called Todd Sheffer, an investigator and auditor for the Medicaid Fraud Control Unit of the Office of the Attorney General. Sheffer concluded that the State had paid Nwoga $365,131.68 as reimbursement for the fraudulent prescriptions purportedly issued by the health care providers who testified at trial. The State also introduced voluminous documentary exhibits to support the testimony.

Nwoga testified in her own defense. She did not deny that she had filled the prescriptions that the State alleged were fraudulent. She asserted that she had done so because she believed that they were legitimate. According to Nwoga, before she opened Poplar Grove, she had worked in suburban pharmacies where fraudulent prescriptions were not an issue. She was naive, credulous, and, as the only pharmacist at Poplar Grove, was,

in her lawyer's words, "easy pickings" for sophisticated groups of criminals looking to get these drugs.

Nwoga confirmed that nearly 98% of her patients were Medicaid recipients. And she admitted that without the payments she received from Medicaid, she would have been forced to close Poplar Grove within a matter of weeks. Nwoga testified that she often took a financial loss by filling prescriptions for CDS covered by Medicaid, so she had no reason to defraud or steal from the program.

To support this argument, her counsel introduced Nwoga's accounting logs for Poplar Grove into evidence. Those logs were kept by a third-party vendor, Best Rx. And because Nwoga was the sole pharmacist at Poplar Grove, only she entered information into the logs.

According to those logs, Nwoga filled, distributed, submitted a claim to, and received a payment from Medicaid for each of the fraudulent prescriptions at issue. The logs noted the type and quantity of medication Nwoga filled for each prescription, how much Medicaid paid Nwoga for filling each prescription, and had Nwoga's initials next to each of the prescriptions showing that she had filled them.

Based on this evidence, the trial court convicted Nwoga of one count of Medicaid fraud, one count of theft of over $100,000 and 287 counts of distribution of CDS.

After she was sentenced, Nwoga discharged both of her trial attorneys and filed a *pro se* motion to postpone the restitution hearing so she could find new counsel. The trial court held a hearing on the motion in early October, granted Nwoga's request, and postponed the restitution hearing until January 2020.

Nwoga arrived at the January hearing unrepresented and asked the court to again postpone the hearing. The trial court refused to postpone the hearing a second time and found that Nwoga had waived her right to counsel. In response, Nwoga told the court that she would not participate in the hearing without an attorney. Noting this, the trial court let the State proceed with its case.

At the restitution hearing, the only witness was Sheffer, the investigative auditor in the Maryland Attorney General's Medicaid Fraud Control Unit. He testified that Nwoga had fraudulently obtained $365,131.68 from the State from the prescriptions issued in the names of the six health care providers who testified at trial, $104,596.49 for the fraudulent prescriptions that were filled in the name of Darnella Carter, and $37,705.29 for other fraudulent claims submitted to Medicaid by Nwoga. These sums totaled $507,433.46, and the court ordered Nwoga to pay restitution in that amount.

Analysis

A. Sufficiency of the evidence: the CDS distribution convictions

To this Court, Nwoga presents several sufficiency arguments which we will address separately.

1. Did the State charge Nwoga under the correct statute?

Nwoga was convicted of 287 counts of CDS distribution in violation of Crim. Law § 5-602(1), which states (emphasis added):

> Except as *otherwise provided* in this title, a person may not:
> (1) distribute or dispense a *controlled dangerous substance*; or

> (2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance.

Nwoga contends that, because the evidence showed that any distribution she was engaged in occurred through her filling prescriptions, § 5-602 does not apply to her case. According to her, the applicable statute in Crim. Law § 5-701, which states in pertinent part:

> (a) Sections 5-701 through 5-704 of this subtitle apply to:
>
> (1) the sale of *prescription drugs* by a manufacturer, wholesale distributor, retail pharmacist, or jobber to a person not legally qualified or authorized to purchase and hold prescription drugs for use or resale. . . .
>
> (b) A person may not dispense a *prescription drug* except:
> (1) on an authorized provider's:
> (i) written prescription; or
> (ii) oral prescription that the pharmacist reduces to writing and files; or
> (2) by refilling a written or oral prescription that is authorized:
>
> * * *

She asserts:

> The State's argument and purported evidence was that Nwoga, in her role as the pharmacist of Poplar Grove Pharmacy, filled prescriptions, which she should have recognized as fraudulent and not filled. Maryland's legislature specifically enacted a statute for charging those such as Nwoga, and thus they are "otherwise provided" within Title 5, specifically in Subtitle 7 of Title 5.

This argument is not persuasive. As the State points out in its brief, Crim. Law § 5-701 prohibits the dispensation of a "prescription drug" without a valid prescription. The definition of "prescription drug" for the purposes of Maryland's controlled dangerous

substances law specifically excludes "a controlled dangerous substance." Crim. Law 5-101(w).[8]

Crim. Law § 5-701 is limited to the dispensation of prescription drugs. But Nwoga was accused of unlawfully distributing or dispensing controlled dangerous substances, which are excluded from the statutory definition of "prescription drugs." That Nwoga distributed controlled dangerous substances by means of fraudulent prescriptions does not bring this case under the ambit of subtitle 7: It is the substance distributed, and not the modality of distribution, that is determinative. Nwoga was correctly charged.

2. Sufficiency of the evidence as to distribution

Evidence is legally sufficient to support a conviction if "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) (emphasis in original); *see also Ross v. State*, 232 Md. App. 72, 81–82,

[8] Crim. Law5-101(w) states (emphasis added):

> (1) "Prescription drug" means a drug that:
>
> (i) is intended to be used by an individual; and
> (ii) because of its toxicity, other potentiality for harmful effect, method of use, or collateral measures necessary for its use:
> 1. bears a cautionary label warning a person that under federal law the drug may not be dispensed without a prescription; or
> 2. is designated by the Department as not safe for use except under the supervision of a person licensed by the State to administer a prescription drug.
> (2) *"Prescription drug" does not include a controlled dangerous substance*.

155 A.3d 943, (2017) ("*Jackson* . . . is the universally followed pole star" for sufficiency analyses.). Additionally, in a sufficiency of the evidence review, appellate courts "draw all rational inferences that arise from the evidence in favor of the prevailing party." *Abbott v. State*, 190 Md. App. 595, 616 (2010).

Nwoga presents two arguments as to why there was insufficient evidence to sustain any of her convictions for distribution.

The first is that the State failed to introduce the actual prescription, fraudulently obtained or otherwise, for certain distribution counts.[9] She asserts that "the actual prescription was necessary to be produced to support the testimony that it was fraudulent."

In the context of this case, the State needed to prove that Nwoga filled fraudulent prescriptions. In our view, the universe of "fraudulent prescriptions" extends to non-existent ones. All of the individuals who picked up the prescriptions signed Nwoga's HIPAA signature logs and she submitted claims for reimbursement for each of them. Additionally, each of the physicians and the physician's assistant who were called as witnesses testified that none of the prescriptions purportedly issued by them and filled by Nwoga were legitimate. A fact finder could reasonably infer from this evidence that Nwoga had filled the purported prescriptions.

[9] Specifically, Nwoga points to counts 84, 85, 87, 88, 89, 94, 103, 112, 132, 146, 148, 149, 151, 152, 153, 154, 157, 159, 161, 164, 165, 170, 187, 188, 189, 191, 192, 194, 196, 199, 200, 204, 205, 206, 207, 219, 223, 224, 225, 226, 229, 233, 234, 235, 236, 237 and 263.

Second, Nwoga contends that the State failed to prove that any of the fraudulent prescriptions were actually filled. The short answer to this is that Nwoga's log entries contained a signature for each prescription and she herself testified that individuals picked up the medications in question. Nwoga also argues that there was "no testing of the actual *thing* that was distributed" (emphasis in original). But the evidence showed that over the course of several years, Nwoga filled hundreds of bogus prescriptions for medications containing CDS. A fact finder could reasonably infer that if the medications themselves were as phony as the prescriptions that were issued for them, Nwoga's customers would have gone elsewhere.[10]

Nwoga also contends that the evidence was insufficient to support her convictions of Medicaid fraud and theft. Without belaboring the issue, we agree with the State's characterization of the evidence before the trial court as to Medicaid fraud:

> After Polek alerted Nwoga that she had filled many fraudulent prescriptions, he educated her about various red flags for which she should be on the lookout. Nonetheless, a subsequent . . . inspection revealed that there was an "overwhelming presence of fraudulent activity" associated with the prescriptions filled by Nwoga. In Polek's expert opinion, the prescriptions

[10] Nwoga argues that her HIPAA logs contained inadmissible hearsay evidence. To be sure, the State used the signatures to prove that the prescriptions were actually distributed. But the HIPAA logs were records of a regularly conducted business activity and were admissible under Md. Rule 5-803(b)(6). Nwoga did not object to the introduction of the logs at trial and, even if she had, legal sufficiency is measured "on the basis of all of the evidence in the case, that which was improperly admitted just as surely as that which was properly admitted." *Emory v. State*, 101 Md. App. 585, 629-30 (1994) (citing *Lockhart v. Nelson*, 488 U.S. 33 (1988)).

> filled by Nwoga—a licensed pharmacist with 15 years of experience—were so "obviously fraudulent" that it was "grossly negligent" for her to have filled them.
>
> That each of the prescribers who testified at trial were able to identify multiple errors and red flags in the prescriptions with which they were presented supported the inference that Nwoga should have been able to spot them too and that she should have acted with due diligence to confirm their validity. She did not. None of the prescribers recalled ever speaking to Nwoga. In some instances, Nwoga even falsely claimed that she had verified the prescription. . . . By filling hundreds of "obviously fraudulent" prescriptions —even after repeated interventions by DDC—and submitting corresponding claims for payment, Nwoga received payments from Medicaid to which she was not legally entitled and thereby defrauded Medicaid.

Finally, Nwoga argues that the State failed to prove that she had "asserted control" over the funds obtained from the State's Medicaid program for the fraudulent prescriptions. But in an affidavit signed by Nwoga, she stated that "[v]irtually all of the Pharmacy's prescriptions are filled through Medicaid." Nwoga testified at trial that she had received payment from the Medicaid program for some of the prescriptions. Additionally, the State introduced records showing payments by Medicaid to claims submitted by the Poplar Grove pharmacy from January 2013 to May 2016, including the amounts paid. Finally, Nwoga conceded that she filled the prescriptions at issue. From all of this, a reasonable factfinder could have concluded that she had in fact received the Medicaid reimbursement payments.

B. Nwoga's right to counsel at the restitution hearing

As we have related, after Nwoga was sentenced, she discharged her trial attorneys. They filed unopposed motions to strike their appearances. The motions were granted. Nwoga then filed a pro se motion to postpone the restitution hearing.

After a hearing on October 16, 2019, the trial court granted Nwoga's motion. It postponed the restitution hearing for three months to give her an opportunity to find new counsel and for her new lawyer(s) time to prepare for the restitution hearing. The court advised Nwoga of her right to counsel and explained to her that it was her responsibility to obtain one. The court suggested that she contact the Office of the Public Defender or retain an attorney. The trial court warned Nwoga: "[I]f you appear at the next hearing date without a lawyer, the Court may presume that you have waived, you have given up your right to counsel." Nwoga confirmed that she understood that warning, as well as the importance of having a lawyer to assist her at the restitution hearing.

On January 15, 2020, Nwoga appeared at the restitution hearing without counsel. She told the court that she had contacted the Office of the Public Defender and the OPD declined to represent her. A copy of the OPD's letter, dated November 15, 2020, was presented to the court and is included in the record. It stated in pertinent part:

> Unless representation was provided by the Office of the Public Defender at the original trial, our office does not provide representation at restitution hearings, where there is no prospect of the imposition of additional incarceration time (either suspended or non-suspended). . . . Therefore, the Office of the Public Defender cannot appoint an attorney to represent you at the restitution hearing.

After verifying that Nwoga was a pharmacist with a graduate school education, that she could read and write the English language, and that she was not under the influence of anything that would stop her from thinking clearly, the court returned to the issue of whether she wanted to proceed without an attorney:

> Now, you are saying that—well, you're here without an attorney. And we've spoken a few times about proceeding without an attorney. That I know you wanted an attorney at one point. The question is whether you want to proceed at this point.

In response, and without interruption by the court, Nwoga explained that she felt that her trial counsel had failed to provide her with adequate representation, that she was in fact innocent, and that there were a number of persons, including officials from the DDC and the federal Drug Enforcement Administration, who, if they had been called as witnesses, would have provided exculpatory evidence. None of these witnesses were called, she said, because her prior lawyers had a conflict of interest. The trial court explained that her concerns were matters for a post-conviction proceeding and could not be addressed in the context of a restitution hearing. Nwoga again stated that she desired to have an attorney represent her in the restitution proceeding, and asked the court to stay the proceeding until this Court ruled on the merits of the trial court's denial of her request for an appeal bond.[11]

[11] This appeal was docketed as No. 2653 of the 2019 Term and was dismissed by Nwoga prior to briefing and oral argument.

The State objected to a further continuance, noting that Nwoga had not made other efforts to obtain counsel after the OPD had declined to represent her. Nwoga responded that she would not participate in the hearing without an attorney and that she had a right to counsel at the restitution hearing. The court denied her request for an additional postponement because it "lack[ed] sufficient merit." In response, Nwoga stated that she would not participate in the hearing. The court told her that whether she participated was up to her, but that he would ask her questions throughout the proceeding to see if she wanted to present evidence of her own.

To this Court, Nwoga asserts that the trial court abused its discretion in failing to order the OPD to represent her or to sufficiently inquire and postpone the matter for her to find counsel. Neither contention is persuasive.

Nwoga is correct that a defendant has a right to have counsel at a restitution hearing. *See Pete v. State*, 384 Md. 47, 55 (2004) (explaining that restitution "is a form of punishment for criminal conduct." (quoting *Songer v. State*, 327 Md. 42, 46 (1992)). And defendants certainly have the right to counsel at sentencing proceedings. *See, e.g.*, *Smallwood v. State*, 237 Md. App. 389, 406 (2018). The trial court was fully aware of this and, after Nwoga discharged her trial lawyers, postponed the restitution hearing for three months to permit her to retain new counsel. Two months prior to the restitution hearing, Nwoga learned that the OPD would not represent her. From the record, she made no other attempts to retain counsel.

On appeal, Nwoga argues that the trial court erred when it did not order the OPD to provide representation to her at the restitution hearing. But she did not ask the trial court to do so at the hearing. Courts rarely err by not doing something that no one asks them to do. Additionally, she does not present any legal argument or analysis in her brief to support her contention. In failing to do so, she has waived the argument. *See* Md. Rule 8–504(a)(6) (Briefs must contain "argument in support of the party's position on each issue."); *Wallace v. State*, 142 Md. App. 673, 684 n.5 (2002) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal." (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999)).

As to the second contention, the trial court did not abuse its discretion when it denied Nwoga's request for a second postponement after initially postponing the restitution hearing to give her an opportunity to obtain new counsel. Nwoga's appellate contention is premised on the notion that Md. Rule 4-215(d) sets out the procedure that the court was required to follow to permit her to obtain new counsel. This is not correct. Appellant discharged her original lawyers and sought a continuance to find new counsel after her trial had begun. Md. Rule 4-215 does not apply to this case. *See State v. Brown*, 342 Md. 404, 412 (1996) (Rule 4-215 "is not intended to deprive the courts of discretion regarding motions to discharge counsel after trial has commenced. We therefore conclude that the Rule is inapposite once trial is underway."). In any event, even if Rule 4-215 did apply, the trial court complied with its relevant provisions: At the October 16, 2019 hearing, the court gave Nwoga an opportunity to explain why she had discharged her trial lawyers and

postponed the restitution hearing for three months to give her an opportunity to obtain new counsel. Tellingly, at that hearing the court warned her that, if "you appear at the next hearing date without a lawyer, the Court may presume that you have waived . . . your right to counsel."

In situations where Md. Rule 4-215(d) does not apply, whether a court grants a continuance to permit a defendant to retain counsel is reserved for the court's discretion. *Howard v. State*, 440 Md. 427, 441 (2014). The trial court did not abuse its discretion when it denied Nwoga's January 15, 2020 request for a postponement to obtain counsel after having granted her a three-month postponement to obtain counsel on October 16, 2019.

C. Sufficiency of the evidence: the restitution order

The State called Mr. Sheffer, a Senior Auditor at the Medicaid Fraud Control Unit, to testify and present three exhibits. Exhibit 12 showed that Nwoga had received about $4.6 million from Medicaid from 2013 to the first six months of 2016. Exhibits 1–6 and the six prescribers' testimony showed that $365,131.68 of that total came from fraudulent prescriptions that Nwoga had filled. Exhibit 29 showed that Medicaid paid Poplar Grove $104,596.49 for filling prescriptions issued in Carter's name. And Exhibit 20 showed that the Division had identified $37,705.29 of fraudulent prescriptions and refills that Medicaid

had also paid. In total, the State argued that Nwoga had stolen $507,433.46 from Medicaid.[12]

Nwoga did not object to Mr. Sheffer's testimony. Nor did she object to the State's exhibits. And when the court asked her if she wanted to cross-examine Mr. Sheffer, or if she had any witnesses or evidence to present, all she said was, "I want it on the record that I'm not participating on [sic] this trial." Based on the State's evidence, the court ordered Nwoga to pay the $507,433.46 in restitution.

On appeal, Nwoga asserts that the evidence was not sufficient to support the restitution award. She concedes that she did not raise the issue at the restitution hearing but asks us to exercise our discretion under the plain error doctrine to address her contentions on their merits. We decline to do so.

Appellate courts have the discretion to consider unpreserved trial error but that discretion can only be exercised if three criteria are met: (1) the alleged error "must be clear or obvious, rather than subject to reasonable dispute," (2) the error was not affirmatively waived at trial, and (3) the error affected the appellant's substantial rights, that is, the error affected the outcome of the trial. *State v. Rich*, 415 Md. 567, 578 (2010) (citing *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Even when these threshold requirements are satisfied, appellate courts should engage in plain error review only when the asserted error

[12] The State also produced these exhibits at trial.

"seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up).

Appellant's invocation of the plain error review doctrine is unavailing because she has not convinced us that there was error in the first place. *See Morris v. State*, 153 Md. App. 480, 507 n.1 (2003) ("[T]here are some limitations on the affirmative act of noticing plain error. 1) There must be error. 2) It must be plain."). In her brief, Nwoga asserts that the evidence introduced by Sheffer was inadmissible because, although he was the Senior Investigative Auditor of the Medicaid Fraud Control Unit of the Office of the Attorney General, he "was not part of Medicaid, and he suffered no loss." She cites no authority to support this contention. We believe that an auditor need not suffer personal financial harm to be able to testify as to financial losses incurred by a state agency as the result of a fraudulent scheme. Because Sheffer's evidence was properly before the trial court, there was a substantial factual basis for the restitution order.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANT TO PAY COSTS.