Circuit Court for Caroline County
Case No. C-05-CR-21-000144

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1039

September Term, 2021

MELISSA LYNN BURKE

v.

STATE OF MARYLAND

Arthur,
Shaw,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 4, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Convicted by the Circuit Court for Caroline County of possession of oxycodone, possession of Suboxone, and three counts of possession of paraphernalia, Melissa Lynn Burke, appellant, presents for our review two issues: whether the evidence is sufficient to support the convictions, and whether the court erred in failing to merge the convictions for possession of paraphernalia. For the reasons that follow, we shall vacate two of the sentences for possession of paraphernalia. We shall otherwise affirm the judgments of the circuit court.

At trial, the State called Maryland State Trooper Jacob Rideout, who testified that on December 20, 2020, he conducted a traffic stop of a vehicle driven by Ms. Burke. When Trooper Rideout asked Ms. Burke

> for documents for the vehicle and her driver's license, she appeared to be overly nervous. She had broken speech. She had different stories about where she was going and where she was coming from. She appeared overly nervous, more nervous than a typical person that you would stop on the roadway[.]

Trooper Rideout subsequently "requested a narcotics canine," which "performed an open-air sniff of the vehicle" and gave "a positive alert for the presence of narcotics." The trooper conducted a search of the vehicle and discovered "three cut plastic straws containing a white powder residue . . . suspected to be oxycodone," a "metal vial containing a powder residue[] suspected [to be] oxycodone," "[o]ne Suboxone[] sublingual film," and a "plastic pill grinder containing a white powder substance suspected [to be] oxycodone." After Trooper Rideout placed Ms. Burke under arrest and began to transport her to the trooper's office, she stated "that she had [an] additional controlled dangerous substance inside of her undergarments." Ms. Burke "advised that . . . they were percs," which "is a

slang term for . . . perco[c]et, which is also a form of oxycodone." At Trooper Rideout's office, Ms. Burke "was able to get the item out, and [the trooper] was able to seize it." The State subsequently submitted into evidence documentation indicating that Trooper Rideout seized from Ms. Burke two "[s]ilver, metal container[s]," the contents of one of which was tested and determined to be oxycodone.

Following the close of the State's case, Ms. Burke testified that she "did have a crushed perco[c]et in" a "metal vial," and she "did have the pill grinder." Ms. Burke stated that she "would grind them and put them on [her] tongue and swallow them like Goody Powders." Ms. Burke submitted into evidence documentation from a Walgreens in Seaford, Delaware, indicating that on November 24, 2020, she "had gotten a prescription" for oxycodone, and confirmed that "the oxycodone that was seized by Trooper Rideout [was] prescribed pursuant to that prescription." Ms. Burke further confirmed that she had previously used the straws "to snort controlled dangerous substances up [her] nose," but she "no longer" did so. Ms. Burke also denied that that the Suboxone belonged to her and that she used the substance. During cross-examination, Ms. Burke confirmed that on November 24, 2020, she received fourteen oxycodone pills and was "told to take them twice a day." Ms. Burke stated that "[a]fter they were gone, [she] didn't get no more until January."

Ms. Burke subsequently called Maureka James, who testified that he is Ms. Burke's friend. Mr. James stated that "between November and Christmas," Ms. Burke had given him a ride in her vehicle, but he had "accidentally left" behind his "prescribed Suboxone." Ms. Burke submitted into evidence a "prescription box" indicating that on September 2,

2021, Mr. James had received a prescription for Suboxone for "an event that happened in December of 2020."

Following the close of the evidence, the court convicted Ms. Burke of the offenses, stating in pertinent part:

> Certainly she was in possession of drug paraphernalia . . . . . [Y]ou show me somebody that's got straws that are cut down to two inches and nine out of ten, if not ninety-nine out of a hundred times, it's cut cause they're using it for drugs. So, I don't have any problem . . . finding her guilty because she was in possession of those items and they are commonly used for that. . . . I've already indicated with possession of Suboxone that I don't believe it was his . . . . His meaning Mr. James and even if he left it there, she was in possession of it at the time the [t]rooper stopped her and at the time he found it and that's all that's required to find somebody guilty. Finally, the oxycodone to me is in the same category. She didn't have and still doesn't have a valid prescription as far as I'm concerned. She may have a print out . . . showing that they gave her certain prescriptions on a certain date. But that doesn't prove there was a prescription for it. It just proves that she got them somehow or another and maybe the pharmacy goofed up. Maybe they have it, if they have the prescription there which they're supposed to do, why don't I get a copy of that instead of the print out of the bill, basically, or all of the drugs that she's taken.

The court subsequently sentenced Ms. Burke to a term of imprisonment of thirty days for possession of oxycodone. The court "generally suspended" the "sentences on the other counts."

Ms. Burke first contends that because she "could have been mistaken about her use of the November prescription," and the oxycodone seized during and after the traffic stop "could [have] just be[en] the remainder of her prior legitimate prescription," the evidence is insufficient to sustain the conviction for possession of oxycodone. We disagree. It is true that one may "possess . . . a controlled dangerous substance" if it is "obtained directly or by prescription or order from an authorized provider acting in the course of professional

practice." Md. Code (2002, 2012 Repl. Vol., 2020 Supp.), § 5-601(a)(1) of the Criminal Law Article. But, if Ms. Burke had taken the oxycodone prescribed to her on November 24, 2020 as directed, she would have taken the last of the substance on or about December 8, 2020, and she admitted that she was not prescribed additional oxycodone until January 2021. Also, the State produced evidence that Ms. Burke kept some of the oxycodone in her undergarments, and was "overly nervous" during the traffic stop. From these circumstances, the court could reasonably infer that Ms. Burke was aware that her possession of the oxycodone was illegal and attempted to hide the substance, and hence, the evidence is sufficient to sustain the conviction for possession of oxycodone.

Ms. Burke next contends that one of the convictions for possession of paraphernalia "must be reversed," because she "could not be convicted of a separate count[] for possession of the vial containing the very [substance] she was convicted of possessi[ng]." But, Trooper Rideout seized from Ms. Burke two vials, one of which was determined to contain oxycodone. We think that it is clear from the court's verdict that the untested vial is the basis not of the conviction for possession of oxycodone, but of one of the convictions for possession of paraphernalia, and hence, the evidence is sufficient to support this conviction.

Ms. Burke next contends that the convictions for "possession of paraphernalia based on her possession of the straws, the pill crusher[,] and the vial[] must be merged." The State concurs, as do we. *See Satterfield v. State*, 325 Md. 148, 155 (1992) ("separate convictions for two items of paraphernalia, each used in conjunction with the same

controlled dangerous substance, cannot stand"). Accordingly, we vacate two of the sentences for possession of paraphernalia.

Finally, Ms. Burke contends that because the court erred "in not crediting [Mr.] James'[s] testimony," and "there was no evidence presented that Ms. Burke ever used [S]uboxone, or that she even knew that the [S]uboxone film was in . . . her car," the evidence is insufficient to sustain the conviction for possession of Suboxone. We disagree. We have stated that "it is the [fact-finder's] task to . . . assess the credibility of witnesses," and "[i]n so doing, the [fact-finder] can accept all, some, or none of the testimony of a particular witness." *Westley v. State*, 251 Md. App. 365, 419 (2021) (internal citations, quotations, and brackets omitted). Also, the Court of Appeals has stated "that the status of a person in a vehicle who is the driver . . . permits an inference, by a fact-finder, of knowledge, by that person, of contraband found in that vehicle." *State v. Smith*, 374 Md. 527, 550 (2003). Hence, the evidence is sufficient to sustain the conviction for possession of Suboxone.

TWO OF THE SENTENCES FOR POSSESSION OF PARAPHERNALIA VACATED. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID THREE-FOURTHS BY APPELLANT AND ONE-FOURTH BY CAROLINE COUNTY.