Circuit Court for Montgomery County
Case No. 131435C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2284

September Term, 2017

ROSIE M. GARNETT

v.

STATE OF MARYLAND

Meredith,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: September 16, 2019

Rosie Mae Garnett, appellant, was charged in the Circuit Court for Montgomery County with 32 counts relating to the illegal procurement, possession, and distribution of prescription narcotics. At the conclusion of a jury trial, she was convicted of twenty counts, including eight counts of violating Maryland Code, Criminal Law Article ("CL"), § 8-610(b)(2). After sentencing, this appeal followed. Garnett presents the following questions:

> 1. Did the trial court have jurisdiction to convict appellant of crimes that were not contained in the charging document?
>
> 2. Did the trial court err in allowing audio recordings of three telephone calls to be sent back with the jury while it deliberated?

For the reasons discussed below we conclude that Garnett was not convicted of crimes that were not contained in the charging document, and the trial court did not err in sending to the jury room during deliberations pursuant to Maryland Rule 4-326 three audio recordings that had been admitted in evidence. We shall affirm the circuit court's judgments.

BACKGROUND

Yifeng Wang had known Garnett for five or six years before Wang was arrested for possession of heroin and suboxone on March 7, 2016. At the time, he faced a sentence of up to eight years' imprisonment and a maximum $50,000 fine for both possession charges. Seeking lenient treatment in exchange for cooperating with the police, Wang provided information to Montgomery County Police Detective Michael Farmer accusing Rosie Mae Garnett—the appellant—of selling illegal drugs.

Wang participated with the police in executing three controlled buys, during which he purchased oxycodone from Garnett. He testified that he set up the arranged buys with Garnett via telephone, and that these calls were recorded and monitored by the police. Recordings of the three phone calls were admitted into evidence over Garnett's objection. Wang further testified that his car was searched prior to the arranged transactions and that he attended the buys alone. According to Wang, the locations for the illegal drug buys were monitored by police, and, after the transactions, he returned to Detective Farmer and handed over what he received from Garnett, and his car was once again searched. Azize Zerkiroski, forensic scientist at the Montgomery County Police Department, later testified that a test conducted on the pills Wang purchased from Garnett confirmed that the pills were oxycodone, a controlled dangerous substance.

Detective Ian Iacoviello of the Montgomery County Police Department, Special Investigations Division, testified as an expert in pharmaceutical investigations. The Detective stated that he investigated Garnett's prescriptions at the Ibex Pharmacy and obtained records for Garnett, her granddaughter Tina Hall, and Garnett's longtime partner, Nelson Cooper. According to Detective Iacoviello, within the pharmacy records was a "patient profile" that contained "a unique identification" of a particular patient at a pharmacy, including personal information, addresses, medical doctors, and "an ongoing continuing list of prescriptions that that [sic] patient has filed[.]" Detective Iacoviello testified that, pursuant to the pharmacy records for Garnett, Hall, and Cooper from the Ibex Pharmacy, many prescriptions were filled for oxycodone, written by various physicians. He further testified that, during the course of his investigation, he spoke with

the medical doctors directly or their office managers concerning the prescriptions and several doctors attested that they did not write the prescriptions reflected in the pharmacy records for Garnett, Hall and Cooper.

Detective Micah Farmer of the Maryland National Capital Park Police, Montgomery County division, assigned to the Montgomery County Department of Police Drug Investigation Unit with the special investigations division, testified that a search warrant was obtained for Garnett's residence at 97 Bralan Court in Gaithersburg, Maryland. Several witnesses with the Montgomery County Police Department testified that the following was recovered from the execution of the search warrant: oxycodone and Xanax pills, a Ziploc bag containing marijuana joints, three Direct Express Mastercards in the names of Garnett, Hall and Cooper, Western Union receipts, a shoebox containing zip-top bags and a cellphone, a separate cell phone located on a bedroom nightstand, a single zip-top bag with a "spade" logo located in a bedroom dresser and U.S. currency totaling more than $7,000. Garnett's vehicles were also searched, resulting in the discovery of several small zip-top bags with varying symbols on the outside.

Officer Sean Thielke of the Montgomery County Police Department testified as an expert in the field of pharmaceutical investigations. According to Officer Thielke, the evidence recovered from Garnett's home was indicative of an individual engaged in the illegal sale and distribution of controlled dangerous substances, using fraudulent prescriptions.

Garnett testified in her own defense. She stated that she is 71 years old and worked as a beautician from home, but that she also has other sources of income such as gambling and working as a foster care mother. Garnett testified that she is in poor health and requires medications for the following ailments: Alzheimer's, diabetes, nerve pain, glaucoma, slipped spinal disks, heel spurs, and "bad knees" that require injections. Two such medications are for pain control, Lyrica and oxycodone. Garnett explained that Dr. Alferra prescribed her oxycodone for about 4 years, but then refused to prescribe her 30 milligrams, so Garnett switched to Dr. Tran. She further testified that she uses several pharmacies because, if one pharmacy is out of a medication, she can go to a "second or third one" in order to fill the prescription. On cross-examination, Garnett testified that she did not remember why she switched from Dr. Alferra to Dr. Tran, but that Dr. Alferra was not giving her "satisfactory medication." She also testified on cross-examination that she was not familiar with some of the doctors who were listed on the prescriptions on her patient file at the Ibex Pharmacy. Garnett testified that social security puts money on "direct deposit cards" and that she, Cooper, and Hall all collect social security.

Garnett testified that she picks up prescriptions for a number of people, including her biological daughter, Tineta Hall, her common law husband, Nelson Cooper, her niece Bernice Pumphrey, her granddaughter Tina Hall, and another individual, Sherika Martin. She explained the reason for this was as convenience and a desire to help individuals with limited transportation (such as Cooper, who is blind).

Garnett testified that she kept cash at home "all the time" because, as a senior citizen, it was more "convenient" to pick up cash from the house than stand in line at the

bank, especially with medical conditions where standing causes pain. She further testified that she used small zip-top bags to store various items, like cotton balls or hair ties. Garnett stated that the symbols on the bags had "no significance whatsoever." According to Garnett, her granddaughter, Tina Hall, owned the residence.

Garnett also testified that she knew Mr. Wang "very well," but that she forgot how she initially met him. She described how Wang would stay at her house and sleep on her couch. According to Garnett, Wang was "slow to the facts of life" and he wanted her help in robbing a bank. Over the State's objection, Garnett described how Wang would give her sums of money or purchase items on his credit card in expectation that she would assist him in robbing a bank, but that nothing came from those plans.

Garnett testified that her niece, Bernice Pumphrey, used her name as an alias at times when Pumphrey was "caught in negative behavior" with the police. According to Garnett, they "look alike," are the "same size" and "same height." Although Garnett acknowledged that, in some of the recordings between herself and Wang, she was the other person speaking, she testified that some of the recordings were not "very clear" and that she has memory issues due to her Alzheimer's. When asked questions about her participation in the controlled illegal drug buys, Garnett testified that she "truly [could] not remember" and that she did not remember the incidents from a year prior.

As noted above, the jury found Garnett guilty of twenty counts, including eight counts of violating CL § 8-610(b)(2), which provides that a person may not "knowingly issue, pass or possess a counterfeit prescription."

DISCUSSION

I.

Garnett first contends that she was found guilty of eight counts of an offense with which she was not charged. Garnett asserts that the indictment, which charged her pursuant to CL § 8-610(b)(2), only included two of the statutory modalities, *i.e.*, "issuing" and "possessing," but she was convicted of a third modality, *i.e.*, "passing," which was the sole modality mentioned in the jury instruction. Garnett maintains that the statute contains three separate modalities and that they cannot be used interchangeably for one another. Accordingly, Garnett contends that she was found guilty of an uncharged crime and, therefore, her conviction and sentence must be vacated.

The State responds that Garnett was charged with violating a statute—CL § 8-610(b)(2)—and was convicted of violating that same statute. Quoting *Tarray v. State*, 410 Md. 594, 614 (2009), the State asserts that "where a statute [is] 'drawn in the disjunctive, the State [is] entitled to prove the offense by any one of the prescribed modalities.'" The State agrees with Garnett that the statute is drawn in the disjunctive, but maintains that one of the modalities, *i.e.*, "passed," was used to prove the offense and, therefore, Garnett's conviction is proper.

Criminal Law § 8-610(b)(2) provides that a person may not "knowingly issue, pass or possess a counterfeit prescription." Nine counts of the indictment against Garnett charged her with "ISSUING FORGED PRESCRIPTION" in violation of CL § 8-610(b)(2) on nine different dates. Counts 6, 9, 12, 15, 18, 21, 24, 27 and 30 included the following language:

> . . . that ROSIE MAE GARNETT on or about [differing dates inserted] . . . did knowingly issue and possess a counterfeit prescription for a drug, in violation of Section 8-610(b)(2) of the Criminal Law Article against the peace, government and dignity of the State.

At trial, the State requested that the court give the following jury instruction to describe these counts, noting that there is no pattern jury instruction available:

> The defendant is charged with passing a forged prescription. In order to convict the defendant of passing a forged prescription, the State must prove that the defendant knowingly passed a counterfeit prescription. A prescription is defined as an order or paper purported to have been made by an authorized provider for a drug or medicine.

Garnett's trial counsel requested MPJI-Cr 4:41.1 for Issuing a Counterfeit Document. The pattern jury instruction for issuing a counterfeit document provides, in part:

> The defendant is charged with the crime of issuing a counterfeit document. **Issuing is** presenting or **passing a counterfeit document as genuine**, knowing that it is counterfeit and with the intent to cheat or defraud. A counterfeit document is one that appears to be a valid legal document, but was [falsely made] [materially altered] with the intent to cheat or defraud. **In order to convict the defendant of issuing, the State must prove:**
>
> > (1) that **the defendan**t presented or **passed**, **or attempted** to present or **to pass**, a counterfeit document as genuine;
> >
> > (2) that the defendant knew that the document was counterfeit; and
> >
> > (3) **that the defendant** presented or **passed, or attempted** to present or **to pass**, the document with the intent to cheat or defraud.

MPJI-Cr 4:14.1 (emphasis added).

When the court and counsel conferred to discuss the requests for jury instructions, Garnett objected to the State's proposed jury instruction, pointing out that there was a

discrepancy between the two modalities of violating CL § 8-610(b)(2) that had been charged in the indictment ("issue and possess a counterfeit prescription") and the single modality mentioned in the jury instruction ("passing a forged prescription"). The following colloquy ensued:

> THE COURT: Okay, so do you object to that, [defense counsel]?
>
> [DEFENSE COUNSEL]: I do in that the indictment that the State is going on here alleges a knowing—that the defendant knowingly issued and possessed a counterfeit prescription, and so that is the language in which the jury should be instructed, and that's the language under which they should decide the issue. So—
>
> THE COURT: But what's the difference between issue and pass?
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> [DEFENSE COUNSEL]: The statute talks about issue, and—
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> THE COURT: No, the statute talks about passing.
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> [DEFENSE COUNSEL]: Well the statute talks about all of them. The Statute says knowingly issue, pass, or possess.
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL]: But the language of the indictment is knowingly issued and possessed, and so I think the jury should be, should return a verdict on those terms.
>
> THE COURT: But then I'd have to define issue for them.
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> [ASSISTANT STATE'S ATTORNEY]: Right. I think issue is the same as pass.
>
> THE COURT: Okay. So, I will give the instruction as proposed [by the State]. You can put your objection on the record.
>
> [DEFENSE COUNSEL]: Thank you.

At the close of instructions, however, defense counsel did not object to either the instruction that was given or the failure to give MPJI-Cr 4:14.1. With respect to the charges related to counterfeit prescriptions, the court instructed the jury as follows:

> And finally, the defendant is also charged with passing a forged prescription. In order to convict the defendant of passing a forged prescription, the State must prove that the defendant knowingly passed a counterfeit prescription. A prescription is defined as an order or paper purported to have been made by an authorized provider for a drug or medicine. And counterfeit means to forge, materially alter, or falsely make.

After the court concluded giving the jury instructions, the court called counsel to the bench, and the following transpired:

THE COURT: Is the State satisfied?

[ASSISTANT STATE'S ATTORNEY]: The State is satisfied.

THE COURT: The Defense satisfied?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay.

(Bench conference concluded.)

The jury found Garnett guilty of eight counts of "passing a counterfeit prescription," and found her not guilty of committing that crime on February 7, 2017. Garnett asserts that the judgments of conviction entered on the eight counts cannot stand because she was never charged with "passing a counterfeit prescription." She insists that she was charged only with issuing and possessing counterfeit prescriptions on the eight pertinent dates.

At the outset, we find that the objection to the jury instruction given by the trial court was not properly preserved for appellate review. Maryland Rule 4-325 states:

> **No 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.** Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(Emphasis added.) Here, there was no objection placed on the record after the court instructed the jury. And the error alleged by Garnett is not a "plain error." Consequently, the argument is not preserved.

And, even if we were to conclude that the comments placed on the record *before* the court instructed the jury could satisfy the requirements for demonstrating substantial compliance with Rule 4-325—*see, e.g.*, *Horton v. State*, 226 Md. App. 382, 413-14 (2016) (citing *Gore v. State*, 309 Md. 203, 209 (1987))—we would nevertheless conclude that the instruction given by the trial court was not reversible error.

As noted, there is no pattern jury instruction that provides a model instruction for the offense of violating CL § 8-601(b)(2). Black's Law Dictionary defines "pass" as "to publish, transfer or circulate." BLACK'S LAW DICTIONARY (10th ed. 2014) (Westlaw). It defines "possess" as "to have in one's actual control." BLACK'S LAW DICTIONARY (10th ed. 2014) (Westlaw). It defines "issue" as "[t]o be put forth officially" and "[t]o send out or distribute officially." BLACK'S LAW DICTIONARY (10th ed. 2014) (Westlaw). Furthermore, legislative notes for CL § 8-604.1—which governs possessing or issuing

counterfeit United States currency—provides that, "the word 'issue' [in the current statute] is substituted for the former word 'utter'" found in the former version of the statute, Maryland Code, Art. 27, § 44(d). CRIM. LAW § 8-604.1, Legislative Notes (Westlaw). Similarly, in the counterfeit prescription statute, the current iteration of the statute (CL § 8-610(b)(2)) uses the word "issue," whereas the former version of the statute, Md. Code, Art. 27, § 55, used the word "utter." *Goodman v. State*, 2 Md. App. 473, 475 (1968).[1] Black's Law Dictionary defines "utter" as "[t]o say, express, or publish" and "[t]o put or send . . . into circulation; esp., to circulate." BLACK'S LAW DICT. (10th ed. 2014) (Westlaw).

The State asserts that there is "overlap" in the meanings between "issue" and "possess" and between "pass" and "possess" because, according to the State, it is reasonable to infer that an individual who is either issuing or passing a counterfeit prescription would also be in possession of it.

We agree with the State that there is sufficient connection between "issue" and "possess," which were mentioned in the indictment, and "pass," which was used in the jury instruction, such that it is not unreasonable for us to conclude that Garnett's convictions pursuant to Crim. Law § 8-610(b)(2) were consistent with the charges set forth in the indictment. As noted above, to "issue" or "utter" a counterfeit prescription requires it to be "sent out," "put forth," "said," "expressed," "published" or "circulated."

[1] "If any person. . . shall utter or pass, knowing it to be falsely made, altered, forged or counterfeited, any . . . prescription . . . or other device purporting to have been made by a regular practicing physician, for any drugs, (or) medicines, he shall be deemed guilty of a misdemeanor[.]"

To "pass" a counterfeit prescription requires it to be "transferred," "published," or "circulated." And a person who is found to have "passed" a prescription undoubtedly also "possessed" the passed prescription.

Accordingly, it was reasonable for the trial court to conclude that Garnett was on notice, from the language in the indictment charging her with "issuing" and "possessing" a counterfeit prescription, that she would also need to defend against "passing" a counterfeit prescription. Furthermore, Garnett's own requested jury instruction, MPJI-Cr 4:14.1, defines "issuing" as "presenting or passing a counterfeit document[,]" and utilizes the words "passing," "passed," and "pass" as constituting "issuing" multiple times.

Consequently, assuming arguendo that the objection to the court's jury instruction regarding CL § 8-610(b)(2) had been properly preserved, we would conclude that Garnett was not convicted of crimes that were not charged, but was convicted of committing conduct in violation of CL § 8-610(b)(2) as charged.

II.

Garnett contends that the trial court erred by sending to the jury for their review during the course of deliberations all of the trial exhibits, including audio recordings of three telephone calls. Three audio recordings of telephone calls Wang made to Garnett to schedule appointments to meet for drug transactions were admitted into evidence as State's Exhibits Nos. 8, 10 and 12. When the State moved to admit the first audio recording as evidence, Garnett's trial counsel objected and the following colloquy occurred:

> [DEFENSE COUNSEL]: So, I don't object to it being admitted as part of the record. I object to it going back to the jury. It should be treated as testimonial evidence, no different than any other, no different than any other witness testimony.
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> [ASSISTANT STATE'S ATTORNEY]: Your Honor, I disagree. I think—
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> THE COURT: I agree with the State. It is not testimony. This is evidence that the transaction took place. Just as if they had videotaped it, it would be evidence. I'll overrule it. It's received.

Garnett's trial counsel noted the same objection when the two additional audiotapes were admitted into evidence. Discs of the audio recordings, along with all other received exhibits, were sent to the jury room with the jury during deliberations.

Garnett argues that permitting the jury to have unfettered access to these three exhibits during deliberations "prejudiced [her] by giving undue prominence to the audio recordings," which Garnett characterizes as "the functional equivalent of testimonial evidence." The State responds that the trial court properly allowed the audio recordings to be sent back with the jury during its deliberations. Citing *McClain v. State*, 425 Md. 238, 253-55 (2012), the State notes that the Court of Appeals rejected arguments similar to Garnett's in that case and found no abuse of discretion when the trial court in McClain's case sent audio recordings to the jury room during deliberations.

We agree with the State for the following reasons.

Maryland Rule 4-326 provides general guidance relative to the items that jurors may take into the jury room during deliberation. With respect to trial exhibits, Rule 4-326(b) states:

> (b) **Items Taken to Jury Room.** Sworn jurors may take their notes with them when they retire for deliberation. **Unless the court for good cause**

> **orders otherwise, the jury may also take the charging document and *exhibits that have been admitted in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and the consent of the court.*** Electronically recorded instructions or oral instructions reduced to writing may be taken into the jury room only with the permission of the court. On request of a party or on the court's own initiative, the charging documents shall reflect only those charges on which the jury is to deliberate. The court may impose safeguards for the preservation of the exhibits and the safety of the jury.

(Emphasis added.)

Under the plain language of this rule, the trial court may send to the jury room with the jury any exhibits that have been admitted in evidence *except* that depositions must be withheld unless all parties agree. The recordings of the three phone calls were all exhibits admitted evidence, and we perceive no good cause for the trial judge to have withheld them.

In *McClain v. State*, 425 Md. 238 (2012), the Court of Appeals considered a very similar situation. Examining subparts (b) and (c) of Maryland Rule 4-326, the Court explained:

> ["]We construe Rule 4–326(b) as meaning precisely what it says: that, 'unless the court for good cause orders otherwise,' ***exhibits admitted into evidence may be taken to the jury room by the jury while it deliberate****s*. . . ."]
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> * * *
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> . . . In other words, section (b) of Rule 4–326 presumes all exhibits in evidence, except for depositions, may go to the jury room unless "good cause" exists to withhold them from the jury. ***Here, the audiotapes in question had been admitted into evidence as exhibits, and, therefore, section (b) guides our inquiry.***

Id. at 254 (emphasis added) (quoting *Adams v. State*, 415 Md. 585, 599-600 (2010)). *Cf. Adams v. State*, 415 Md. at 589 (wherein the Court observed that, where "evidence has been admitted and the trial judge has not made a good cause determination as to its appropriateness to be taken into the jury room, the trial judge abuses his or her discretion when he or she thereafter denies the jury the right to review that evidence in the jury room").

Garnett asserts that the audio recordings are the "functional equivalent of testimonial evidence" and urges us to find that the trial court gave this evidence undue prominence by giving the jury the ability to play the recordings repeatedly, but the plain language of Rule 4-326(b) does not support Garnett's assertion. *See McClain*, *supra*, 425 Md. at 254, declining to treat audiotaped statements as "depositions," and stating: "When interpreting the Maryland Rules, 'if the language of a rule is clear and unambiguous, it will be applied thusly in a common-sense manner.' *Brown v. Daniel Realty Co.*, 409 Md. 565, 585, 976 A.2d 300, 311 (2009)."

We review the trial court's ruling on a request to withhold from the jury any particular exhibit under an abuse of discretion standard. Garnett has shown no abuse of discretion in the trial court's decision to treat the three audio recording exhibits like other trial exhibits that had been admitted in evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.