

IN THE COURT OF APPEALS 12/3/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-00690 COA

KEN MILLER a/k/a KENNETH MILLER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOHN LESLIE HATCHER

COURT FROM WHICH APPEALED: COAHOMA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

STEPHEN A. BRANDON

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEWITT ALLRED III

DISTRICT ATTORNEY: LAWRENCE Y. MELLEN

NATURE OF THE CASE: CRIMINAL/OBTAINING DRUGS BY FRAUD

TRIAL COURT DISPOSITION: OBTAINING A CONTROLLED SUBSTANCE BY
MISREPRESENTATION OR FRAUD, TO-WIT: PERCOCET: SENTENCED TO SERVE 4 YRS
IN THE MDOC AND PAY A FINE OF \$500.00 FOR THE CRIME; SENTENCE SHALL RUN
CONSECUTIVE TO ANY SENTENCES PREVIOUSLY IMPOSED.

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

SUMMARY

Ken Miller was convicted of obtaining a controlled substance by fraud or misrepresentation. Aggrieved, Miller appeals to this Court raising three issues:

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING PHOTOCOPIES IN VIOLATION OF THE BEST EVIDENCE RULE;

II. WHETHER THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR DIRECTED VERDICT SINCE THE EXHIBITS WERE NOT PROPERLY AUTHENTICATED; and

III. WHETHER THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR NEW TRIAL.

Finding no merit to Miller's claims, we affirm.

FACTS

On May 21, 1992, Ken Miller obtained a prescription from Dr. Marshall Ellis for four tablets of the drug Percocet. Miller altered the quantity of the prescription from "4" to "20" tablets by tracing the prescribing doctor's handwriting. After photocopying the originally altered prescription, Miller took the altered prescription and presented it to Benita Sykes, the cashier at Medi-Center Pharmacy. Miller then gave Sykes his address, and Sykes wrote the information on the prescription. Sykes then handed the prescription to the pharmacist, Malcolm Knight. While filling the prescription, Knight became suspicious that the prescription may have been altered, and he filled the prescription for only four tablets.

Later that same day, Miller and his cousin, Dandrell Miller, took the photocopy of the originally altered prescription to Economy Drugs (Economy). Miller gave the photocopied prescription to Dandrell who presented the prescription to the pharmacist, Joe Wilson. Wilson, asked Dandrell to whom the prescription belonged. Dandrell replied, "Kenny Miller." Wilson then asked for Miller's address and wrote the information on the prescription. Wilson also initialed the prescription with his initials, "J.W."

While filling the prescription, Wilson became suspicious that the quantity had been altered. He also filled the prescription for only four tablets. Wilson later showed the prescription to another pharmacist, Billy Donald, who identified the prescription as a photocopy of an original prescription. The pharmacists notified the police. The presentment of the photocopied prescription to Economy

Drugs was the incident that led to the indictment.

On the day of trial but prior to jury selection, the State announced to the court that it had lost the both original prescription and the photocopy of the original which Miller had allegedly used to obtain drugs from Economy. The State requested to be allowed to use photocopies instead of the original exhibits under Rule 1004 of the Mississippi Rules of Evidence. The State had photocopies of both prescriptions which had been made while the prescriptions were in police custody. State's Exhibit One was a photocopy of Miller's photocopy of the prescription which was presented to the pharmacist at Economy. State's Exhibit Two was a photocopy of the originally altered prescription.

Next, the State sought to show the absence of bad faith on its part by calling Officer Donald Wood to testify as to the loss of the originals. The officer stated that the originals were indeed lost, and although the State had made every effort to find the originals, they could not be located. The trial court allowed the State to use the photocopies at trial.

At trial, the State called a number of witnesses. Among these witnesses was Frank Hicks, a forensic document examiner employed by the Mississippi Crime Laboratory in Jackson, Mississippi. After he was qualified as an expert, Hicks testified that he had ample opportunity to examine and, in fact, did examine the original prescriptions before they were lost by the police department. He stated that, in his opinion, the prescription presented to Medi-Center had indeed been traced over or overwritten. He also stated that the prescription presented to Economy was a photocopy of the one presented to Medi-Center. He based this opinion on the fact that the two prescriptions were exact copies of each other except that one had been printed by toner cartridge which is used in copiers.

The prosecution then asked Hicks to examine State's Exhibit 1, a photocopy of the photocopied prescription used at Economy, and State's Exhibit 2, a photocopy of the originally altered prescription used at Medi-Center. Hicks stated that Exhibits 1 and 2 were both true and accurate depictions of the originals that he had previously examined.

The State also called Officer Donald Wood to the stand. Woods was in charge of the investigation against Miller. Woods testified that he had made every effort to find the original prescriptions to no avail. He testified that State's Exhibit 1 and State's Exhibit 2 were true and accurate copies of the originals which were lost by the police department.

Additionally, the State called the pharmacists and the cashiers who helped fill the prescriptions. Sykes, the cashier at Medi-Center, stated that State's Exhibit 2 was a true and accurate copy of the prescription presented to Sykes at Medi-Center. She also identified her own handwriting on the prescription. Wilson, the pharmacist at Economy, testified that State's Exhibit 1 was a true and accurate copy of the prescription presented to him by someone claiming that the prescription was for Kenny Miller. In addition, Wilson identified his own handwriting on the prescription where he had filled in the address and initialed the prescription.

Dandrell Miller testified that he had accompanied Miller to Economy. He stated that Miller handed the prescription to him and asked him to present the photocopied prescription to the pharmacist at Economy. After examining State's Exhibit 1, Dandrell stated that the photocopy was an accurate and fair representation of the copy of the altered prescription he presented to the pharmacist at Economy.

After State's case-in-chief, the defense made a motion for a directed verdict which was denied. The defense did not call any witnesses.

ANALYSIS

A party has an affirmative duty to provide support for his or her assignments of error. *Peterson v. State*, 671 So. 2d 647, 659 (Miss. 1996). If a party fails to support his assignments of error with argument or citation to authority, we need not address the issue. *Pierre v. State*, 607 So. 2d 43, 48 (Miss. 1992); *Reining v. State*, 606 So. 2d 1098, 1102 (Miss. 1992). Because Miller makes no meaningful argument in support of his first two assignments of error and provides this Court with no citation to authority, he is procedurally barred from asserting these issues. However, we will address all of Miller's assignments of error; none of which has any merit.

I. WHETHER THE TRIAL COURT ERRED IN ADMITTING PHOTOCOPIES IN VIOLATION OF THE BEST EVIDENCE RULE

Rule 1002 of the Mississippi Rules of Evidence provides, "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided by law." M.R.E. 1002. Rule 1003 governs the admissibility of duplicates as follows: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." M.R.E. 1003. Rule 1004 provides that other evidence of the contents of a writing is admissible if the evidence has been lost or destroyed absent a finding of bad faith on the part of the proponent. M.R.E. 1004.

The best evidence rule expresses a preference for original documents but does not preclude the admission of secondary evidence. *Watson v. State*, 465 So. 2d 1091, 1092 (Miss. 1985). As a general rule, photostatic copies of original documents are admissible after a showing that they are correct copies and after the absence of the originals has been accounted for. *Watson*, 465 So.2d at 1091 (citation omitted). In *Bass v. State*, our supreme court held that a photostatic copy of a check was properly admitted into evidence where the absence of the original was explained and the copy was identified as an exact copy of the original. *Bass v. State*, 328 So. 2d 665, 667 (Miss. 1976). Because the State submitted testimony that the loss was accidental and certainly not in bad faith, and because the copies were identified by several witnesses as exact copies of the originals, the trial court did not err in allowing the photocopies to be used as evidence at trial.

II. WHETHER THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR DIRECTED VERDICT SINCE THE EXHIBITS WERE NOT PROPERLY AUTHENTICATED.

A motion for directed verdict challenges the sufficiency of the evidence supporting a guilty verdict. *Butler v. State*, 544 So. 2d 816 (Miss. 1989). To test the sufficiency of the evidence of a crime on a motion for directed verdict,

the trial judge is required to accept as true all of the evidence that is favorable to the State, including all reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. If, under this standard, sufficient evidence to support the jury's verdict of guilty exists, the motion for a directed verdict. . . should be overruled.

Isaac v. State, 645 So. 2d 903, 907 (Miss. 1994) (citations omitted); *Edwards v. State*, 615 So. 2d

590, 594 (Miss. 1993) (citations omitted).

Miller asserts that he was entitled to a directed verdict because the State did not introduce testimony at trial from the prescribing physician to prove he prepared the prescription and that the prescription was altered. Under Rule 901, a document is authenticated when there is sufficient evidence to support a finding that the matter in question is what its proponent claims. M.R.E. 901.

Miller was indicted for obtaining a controlled substance by fraud or misrepresentation. It is irrelevant whether the original prescription was real or forged. It also does not matter who initially prescribed the Percocet. Even assuming that the original prescription was not prepared by Dr. Ellis, there was sufficient evidence at trial that Miller altered the prescription and presented it for filling at Economy. Even if the original prescription had been for twenty tablets, there was sufficient evidence that Miller presented the prescription first at Medi-Center and then attempted to have the prescription filled a second time. It was simply not necessary to have the doctor testify.

Hicks, the forensic scientist, stated that the original prescription presented to Medi-Center, of which Exhibit Two was a photocopy, had indeed been altered. He also stated that the prescription presented to Economy, of which Exhibit One was a photocopy of the original. Moreover, the record contains the testimony of the cashiers and pharmacists who filled the prescriptions. Each identified their own handwriting on the prescriptions and told the jury that the prescription had been filled on the behalf of Kenny Miller. Dandrell Miller testified that he accompanied Miller to Economy Drugs where he gave Kenny Miller's prescription to the pharmacist. Miller called no witnesses to the stand to refute or explain the testimony presented by the State.

The jury had more than sufficient evidence to convict Miller of the crime charged.

III. WHETHER THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR NEW TRIAL.

A motion for a new trial challenges the weight of the evidence rather than its sufficiency. *Butler*, 544 So. 2d at 819. New trial decisions rest in the sound discretion of the trial court, and the motion should not be granted except to prevent an unconscionable injustice. *McClain v. State*, 625 So. 2d 774, 781 (Miss. 1993) (citation omitted). On review we accept as true all evidence favorable to the State, and the State is given the benefit of all reasonable inferences that may reasonably be drawn from the evidence. *Id.*; *Griffin v. State*, 607 So. 2d 1197, 1201 (Miss. 1992). This Court will reverse such a ruling only for an abuse of discretion. *McClain*, 625 So. 2d at 781.

Clearly, the jury's verdict was not against the overwhelming weight of the evidence, and the trial court properly denied the motion for new trial. This issue is without merit.

THE JUDGMENT OF THE COAHOMA COUNTY CIRCUIT COURT OF CONVICTION OF OBTAINING A CONTROLLED SUBSTANCE BY MISREPRESENTATION OR FRAUD, (PERCOCET) AND SENTENCE OF FOUR (4) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$500.00 IS AFFIRMED. SENTENCE SHALL RUN CONSECUTIVELY TO ANY SENTENCES PREVIOUSLY IMPOSED. COSTS ARE ASSESSED TO COAHOMA COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.