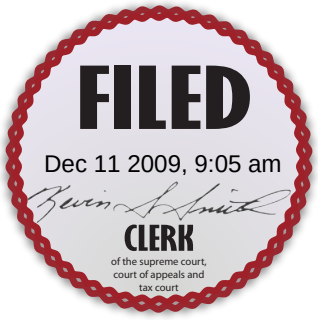

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IN THE
COURT OF APPEALS OF INDIANA

STANLEY B. FRYMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0908-CR-397
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Jonathan N. Cleary, Judge
Cause No. 15D01-0802-FD-19

December 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Stanley Fryman appeals his conviction for possession of a controlled substance as a class D felony.[1]

We affirm.

ISSUE

Whether the trial court abused its discretion in admitting evidence.

FACTS

In August of 2007, a doctor's office contacted Lawrenceburg Police Officer Nicholas Beetz, who was assigned to the narcotics division of the Dearborn County Special Crimes Unit. The office reported that Fryman had been visiting numerous physicians in the area, possibly obtaining multiple prescriptions for controlled substances. Officer Beetz followed up on the reported information by initially contacting several pharmacies in and around Dearborn County and requested Fryman's records pursuant to Indiana Code section 25-26-13-15.[2]

The records revealed that between 2006 and 2007, Fryman had obtained approximately fifty-eight prescriptions for controlled substances from six different pharmacies; the majority of the prescriptions were for hydrocodone and oxycodone, both

[1] Ind. Code § 35-48-4-14(c).

[2] This statute provides that a pharmacist may divulge "prescriptions, drug orders, records, and patient information" when requested by "a law enforcement officer charged with the enforcement of laws pertaining to drugs or devices or the practice of pharmacy."

classified as controlled substances. Ten different doctors or health-care providers had prescribed the medications to Fryman.

Based on the information received from the pharmacies, the State filed motions with the trial court for the issuance of six subpoenas duces tecum to the following health-care providers: Neurology and Neurodiagnostic Clinic; Dearborn County Hospital; Jarman Orthopedics and Sports Medicine; Dr. Everett L. Jones; The Pain Management Group; and Advanced Pain Management Surgery, Inc. Specifically, the State sought "the production of copies of any and all records pertaining to the treatment and testing of Stanley B. Fryman, DOB [deleted], from on or about January 1st, 2006 to present in relation to an investigation concerning possible criminal acts . . . ." (State's Exs. 9-14) (emphasis omitted). In support of these motions, Officer Beetz averred to the following: "That [he] is currently involved in the investigation of criminal acts (Unlawfully Obtaining a Legend Drug) that have occurred in Dearborn County, and needs the requested information to complete the investigation of said incident." *Id.*

After review, the trial court granted the State's motions. On August 22, 2007, the Clerk of the Dearborn Superior Court therefore issued the subpoenas, ordering the production of all records pertaining to "the treatment and testing of Stanley B. Fryman, DOB [deleted] . . . from on or about January 1st, 2006 to present . . . ." *Id.* (emphasis omitted). The health-care providers did not object to the subpoenas.

Subsequently, on February 8, 2008, the State charged Fryman with illegally acquiring possession of a controlled substance "by misrepresentation, fraud, forgery,

deception, subterfuge, alteration of a prescription order, concealment of a material fact, or use of a false name or false address" as a class D felony. (App. 8). On January 9, 2009, Fryman filed a motion in limine, seeking to exclude all medical and pharmacy records obtained pursuant to the subpoenas. Following a hearing, the trial court denied Fryman's motion on January 12, 2009.

The trial court commenced a four-day jury trial on January 13, 2009. During the trial and over Fryman's objection, the trial court admitted into evidence records from several pharmacies and health-care providers.

The records from an Aurora Wal-Mart showed that on February 18, 2006, he had prescriptions for a cough syrup containing hydrocodone as well as hydrocodone tablets filled; a nurse practitioner at Dearborn County Hospital had prescribed both medications. According to the records from an Ohio Kroger, it filled Fryman's prescriptions for hydrocodone on August 2 and 28, 2006; September 22, 2006; October 10 and 25, 2006; December 21 and 27, 2006; and May 27, 2006. The records also showed that three different doctors had prescribed these medications.

The records from a Lawrenceburg Kroger revealed that Fryman obtained either hydrocodone or oxycodone on February 8 and 24, 2006; March 7, 13, 22, and 29, 2006; April 7, 9, 10, and 18, 2006; May 1, 2006; June 30, 2006; November 6 and 28, 2006; December 5 and 19, 2006; January 6, 2007; February 2 and 20, 2007; April 18 and 23, 2007; May 2 and 8, 2007; June 23, 2007; July 9 and 20, 2007; and August 3, 2007. Four different doctors had provided Fryman with these prescriptions.

The records from a Greensburg CVS showed that Fryman obtained a prescription for oxycodone from Janet Smith, a nurse practitioner, on July 11, 2007. According to the records from a Lawrenceburg CVS, Fryman obtained hydrocodone on January 2, 2007; June 5 and 20, 2007; July 5, 2007; and September 14, 2007. Fryman had obtained the prescriptions for hydrocodone from three different doctors.

The records from a Greendale Walgreens indicated that it filled Fryman's prescriptions for hydrocodone on January 23, 2007; February 5, 2007; March 12 and 19, 2007; April 2, 4, 9, 12, and 27, 2007; and May 11, 2007. It also filled prescriptions for oxycodone on March 31, 2007; May 21, 2007; June 20, 2007; and July 16 and 31, 2007. Five different doctors had provided Fryman with these prescriptions.

Dr. Usman Siddiqui testified that she had treated Fryman for neck and back pain at the Neurology and Neurodiagnostic Clinic in Dearborn County. As part of her treatments, she prescribed both oxycodone and hydrocodone to Fryman. She testified, however, that she was unaware that Fryman had been obtaining prescriptions for oxycodone and hydrocodone from other physicians.

She also testified that her clinic required patients to sign a Chronic Pain Medication Treatment Agreement. According to Dr. Siddiqui, Fryman signed such an agreement on December 5, 2006, and again on July 12, 2007. Over Fryman's objection, the trial court admitted both signed agreements into evidence.

The agreements both provided, in pertinent part, as follows:

> I understand it can be a felony to continue to receive controlled medications from different physicians. I shall provide Neurology & Neurodiagnostic Clinic with a list of all prescription medications I am taking while a patient of N & N Clinic. I agree to inform other physicians of any pain medication prescriptions I receive from N & N Clinic.
>
> I understand and acknowledge this legal situation and agree that I will not obtain or attempt to obtain pain medication from both Neurology & Neurodiagnostic and any other physician or medical provider simultaneously without the knowledge of my N & N physician.
>
> * * *
>
> To further emphasize the importance of communication with your physician, N & N Clinic feels it is necessary to inform you of the current laws in place to prevent patients from obtaining medications and treatment from different physicians.
>
> • It can be a felony offense to receive prescriptions and/or treatment from two separate physicians without both of the physicians' prior knowledge. It is important for you as a patient to communicate all treatment/prescriptions received from other physicians. A patient does not have to intentionally hide this fact in order to be found in violation of the law. Silence can be considered deception and therefore a felony offense.

(State's Exs. 21 and 21A).

Dr. Leslie Glick testified that she had treated Fryman after he arrived at the Dearborn County Hospital's emergency room with an infection. As part of his treatment, she prescribed hydrocodone on September 14, 2007.

Dr. Michael Whitworth testified that he is the managing physician of the Advanced Pain Management Surgery, Inc. According to Dr. Whitworth, his clinic had been treating Fryman for back pain and "hypermobility syndrome with dislocated wrist

and hips." (Tr. 537). He testified that both he and his nurse practitioner, Janet Smith, prescribed oxycodone to Fryman; however, he was unaware that other health-care providers had prescribed controlled substances to Fryman, despite Advanced Pain Management's "opiate use policy . . . ." (Tr. 524).

The trial court then admitted into evidence the Advanced Pain Management Surgery, Inc. Opiate Use Policy, signed by Fryman on May 21, 2007. The policy provided, in relevant part, as follows:

> 1. One pharmacy alone should be used for narcotic prescription refills unless there is a change in insurance which dictates otherwise or there is an emergency situation. The clinic should be notified of the change of pharmacy . . . immediately.
>
> * * *
>
> 3. If Advanced Pain Management agrees to treat pain with narcotics, we will be the only physician/practice from which the patient will receive or obtain prescriptions for these substances.

(State's Ex. 26).

Fryman designated a Walgreens as the pharmacy from which he would purchase his medication. According to the pharmacy records, however, Fryman obtained one of his prescriptions from a CVS. Dr. Whitworth testified that Advanced Pain Management terminated its relationship with Fryman due to "medication over usage and simultaneously getting narcotics from other providers." (Tr. 540).

Dr. Steven Scheiner, a pain management physician with The Pain Management Group of Dearborn County, testified that on or about July 31, 2007, he prescribed

oxycodone for Fryman. He also testified that on July 31, 2007, Fryman signed The Pain Management Group's contract for treatment. Over Fryman's objection, the trial court admitted into evidence the signed contract, which provided, in part, that "[t]he patient agrees not to obtain pain medication from any other physician or emergency room or other person." (State's Ex. 22).

Dr. Raymond Keith Jarman, an orthopedic surgeon, testified that he had prescribed hydrocodone for Fryman on or about April 12, 2007, April 27, 2007, May 11, 2007, June 5, 2007, June 20, 2007, and August 3, 2007. He testified, however, that he was unaware that Fryman had obtained prescriptions for hydrocodone and oxycodone from other physicians. He further testified that he required patients taking controlled substances to sign agreements regarding their use.

The trial court then admitted into evidence the Long-term Controlled Substances Therapy for Chronic Pain Agreement, signed by Fryman. The agreement provided as follows:

> 1. All controlled substances must come from the physician whose signature appears below, or during his or her absence, by the covering physician, unless specific authorization is obtained for an exception . . . .
>
> 2. You should use one pharmacy to obtain all opioid medications and adjunctive analgesics.
>
> * * *
>
> 3. You should inform your physician of all medications you are taking . . . You are expected to inform our office of any new medications . . . .

* * *

> 11. Any evidence of drug hoarding, acquisition of any opioid medication or adjunctive analgesia from other physicians (which includes emergency rooms) . . . may result in termination of the doctor/patient relationship.

(State's Ex. 25). Fryman designated a Lawrenceburg Walgreens as the pharmacy from which he would obtain his medications.

On January 16, 2009, the jury found Fryman guilty as charged. Following a sentencing hearing on March 5, 2009, the trial court sentenced him to 545 days, with 180 days to be served as in-home detention.

DECISION

Fryman asserts that the trial court abused its discretion in admitting his medical records into evidence.

> We note that the admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court's determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the appellant's favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party's substantial rights, we assess the probable impact of the evidence on the trier of fact.

Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (citations omitted), *reh'g denied*.

The State acquired the admitted medical records pursuant to subpoenas duces tecum. Fryman contends, however, that the subpoenas were "overly broad, unreasonable, and unconstitutional" and therefore improper. Fryman's Br. at 4.

Whether to enforce a subpoena duces tecum "'is a question for the trial court and will not be disturbed unless the decision is clearly arbitrary.'" *Dylak v. State*, 850 N.E.2d 401, 406 (Ind. Ct. App. 2006) (quoting *Turpin v. State*, 435 N.E.2d 1, 4 (Ind. 1982)), *trans. denied*.

> Decisions regarding discovery matters, including rulings on discovery violations, are within the broad discretion of the trial court as part of its inherent power to guide and control the proceedings. We may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even reasons not enunciated by the trial court. "Due to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal."

Id. (internal citations omitted).

"[A] properly issued investigative subpoena—one that is reasonable under the Fourth Amendment—must only be: (1) relevant in purpose; (2) sufficiently limited in scope, and (3) specific in directive so that compliance will not be unreasonably burdensome." *Oman v. State*, 737 N.E.2d 1131, 1141 (Ind. 2000), *cert. denied*, 534 U.S. 814 (2001). Requiring only a standard of reasonableness, rather than a probable cause standard, "incorporates appropriate constitutional safeguards designed to limit overzealous prosecutors and at the same time minimize judicial second-guessing that could unnecessarily bog down pre-charge investigations." *Id.*

1. Relevant in Purpose

Fryman argues that the subpoenas were not relevant in purpose where "[t]he only independent evidence provided to support the issuance of the subpoenas was that [he] was being investigated for criminal activity"; the affidavit in support of the motion for the issuance of the subpoenas did not identify him "as the target of the investigation"; and the affidavit "did not provide any specificity to dates, or even a range of dates, of the alleged criminal activity." Fryman's Br. at 9, 10. Again, we note that a subpoena is reasonable if it is "relevant in purpose to a valid criminal investigation." *Oman*, 737 N.E.2d at 1147.

Here, Indiana Code section 25-26-13-15 authorized the release of pharmacy records to Officer Beetz. The records indicated that over a nineteen-month span from early 2006 to the summer of 2007, Fryman had acquired numerous prescriptions for hydrocodone and oxycodone, both controlled substances; furthermore, ten different health-care providers, including those subsequently subpoenaed by the State, had prescribed the medications to Fryman.

Given the received information, we conclude that Officer Beetz commenced a valid investigation, with the pharmacy records "form[ing] the requisite initial evidentiary basis" into a possible offense. *See id.* at 1148; *see also State v. Eichhorst*, 879 N.E.2d 1144, 1154 (Ind. Ct. App. 2008) (finding that the driver's involvement in an accident formed the requisite initial basis into the State's inquiry into a possible DUI offense), *trans. denied*. The subpoenas therefore were relevant in determining whether Fryman had acquired his prescriptions for controlled substances by misrepresentation, fraud,

forgery, deception, subterfuge, alteration of a prescription order, concealment of a material fact, or use of a false name or false address . . . ." I.C. § 35-48-4-14(c).

2. Sufficiently Limited in Scope and Limited in Directive

Fryman also argues that the subpoenas were insufficiently limited in scope or in directive where the State issued six subpoenas to "six separate physicians or medical providers"; "[t]he time span of the records requested was from January 1, 2006 to August 22, 2007, or more than nineteen months"; and the State requested all medical records pertaining to him, resulting in "a production of approximately 350-400 pages of medical records . . . ." Fryman's Br. at 9. We disagree.

The State issued subpoenas only to doctors or health-care providers who had subscribed controlled substances to Fryman, as revealed by the pharmacy records. The time span for those records was less than two years and corresponded with the dates that Fryman had obtained numerous prescriptions for controlled substances hydrocodone and oxycodone. We therefore find the subpoenas sufficiently limited in scope.

Finally, while the State's request encompassed all of Fryman's medical records and not just prescribed medications, we do not find that the requests were overly broad. In addition to containing Fryman's prescribed medicines, the records also would contain information relevant to determining whether he had obtained the numerous prescriptions by "misrepresentation, fraud, forgery, deception, subterfuge, alteration of a prescription order, concealment of a material fact, or use of a false name or false address . . . ." *See* I.C. § 35-48-4-14(c); *see also Eichhorst*, 879 N.E.2d at 1154 (finding a subpoena

requesting all of Eichhorst's medical records, rather than just her blood alcohol test results, relevant as the "records would naturally contain the medical staff's observations of [her], which could be relevant in determining whether she was intoxicated at the time of the accident"). Additionally, none of the health-care providers objected to the subpoenas. *See Forbes v. State*, 810 N.E.2d 681, 685 (Ind. 2004) (determining that test results provided as a result of a facially overbroad subpoena need not be suppressed where the hospital did not object to the subpoena). Thus, we cannot say the subpoenas were so unspecific in directive so as to be unduly burdensome.

We find that the subpoenas duces tecum were reasonable under the Fourth Amendment. Accordingly, we find no abuse of discretion in admitting the evidence obtained pursuant to the subpoenas.

Affirmed.

ROBB, J., and MATHIAS, J., concur.