IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-KA-01366-COA

DANA IRONS **APPELLANT**

v.

STATE OF MISSISSIPPI **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	06/21/2002
TRIAL JUDGE:	HON. LARRY EUGENE ROBERTS
COURT FROM WHICH APPEALED:	KEMPER COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES A. WILLIAMS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: DEIRDRE MCCRORY
DISTRICT ATTORNEY:	BILBO MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CHARGED WITH OBTAINING CONTROLLED SUBSTANCE BY FRAUD, DEFENDANT IS SENTENCED TO A TERM OF FIVE YEARS IN THE CUSTODY OF THE MDOC WITH THREE YEARS SUSPENDED AND FIVE YEARS OF SUPERVISED PROBATION.
DISPOSITION:	AFFIRMED: 4/6/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., THOMAS AND MYERS, JJ.

KING, P.J., FOR THE COURT:

¶1. Dana Irons was convicted by the Kemper County Circuit Court of obtaining a controlled substance by fraud. Irons was sentenced to a term of five years in the custody of the Mississippi Department of Corrections, with three years suspended, and five years of supervised probation. Aggrieved, Irons appeals and raises the following issues which we quote verbatim:

I. Whether when the grand jury returns an indictment for an attempt to commit a crime, the court may not allow an amendment of the indictment and the case then be tried upon a charge of having committed the attempted crime.

II. Whether defendant was denied a fair trial and fundamental fairness when the judge overruled an objection to a leading question and remarked that the answer was "foundational" and further commented that the purported telephone call from the doctor's office did not contain the truth.

III. Whether defendant is denied effective assistance of counsel when trial counsel fails to present a motion to dismiss for failure to grant a speedy trial, fails to object to comments by the trial judge, fails to object to denial of confrontation when hearsay was introduced on a material issue.

IV. Whether the weight and sufficiency of the evidence do not support a verdict of guilty of obtaining controlled substance by fraudulent prescription and defendant is entitled to a new trial.

FACTS

¶2. On August 21, 2000, at approximately 9:00 a.m., Jim VanDevender, a pharmacist at VanDevender Drugs in DeKalb, received a telephone call. The caller, a female, stated, "This is Becky from Dr. Hensleigh's office in Butler, Alabama." She then ordered 100 Lorcet 10/650 (Hydrocodone, a schedule III controlled substance) for Dana Irons. As VanDevender began writing the information down, he looked at the caller ID and noticed that the call was from a Neshoba County phone number. After getting the information, VanDevender called the doctor's office to verify the prescription. VanDevender testified that the doctor's office did not call in this prescription.

¶3. VanDevender then reported this matter to the DeKalb Police Department and was instructed by Police Chief Jeff Jowers to fill the prescription and give it to Irons. According to VanDevender, Irons came in and asked if they had a prescription called in for her from Dr. Hensleigh. VanDevender indicated that he did have the prescription and gave it to her. As Irons was leaving the store, Police Chief Jowers stopped her.

¶4. According to Irons, Jowers questioned her about the prescription, after which she was allowed to proceed on her way. Several days later, Irons was arrested and charged with attempting to obtain a controlled substance by fraud.

¶5. Detective Michael Oliver of the DeKalb Police Department testified that on March 21, 2001, he informed Irons of her *Miranda* rights, she executed a waiver of those rights, after which she gave a statement. Irons testified that on the morning in question, she had stopped by the Texaco station and called the drug store to see if her prescription was ready. She then went to the drug store and picked it up.

¶6. Dr. Katherine Hensleigh testified that Irons had been treated by her from March 4, 1999 until July 10, 2000. She stated that the last time a prescription was called in for Irons was June 16, 2000. Dr. Hensleigh indicated that Irons called her office on July 25, 2000, requesting a refill of Lorcet and that request was denied because it was too early to refill the prescription.

¶7. Irons denied having made a telephone call claiming to be a nurse from Dr. Hensleigh's office to try and obtain a refill of her medication.

ISSUES AND ANALYSIS

I.

Whether the indictment was defective.

¶8. Irons asks this Court to reverse and remand this matter because the trial court should not have allowed the trial to proceed on the amended indictment. The amended indictment changed the charge from an "attempt" to obtain a controlled substance by fraud to one of "obtaining" a controlled substance by fraud.

¶9. Regarding the amendment of indictments, Rule 7.09 of the Uniform Rules of Circuit and County Court Practice states: All indictments may be amended as to form but not as to the substance of the offense charged. . . . Amendment shall be allowed only if the defendant is afforded a fair opportunity to present

a defense and is not unfairly surprised. *Id.* It has been construed that if both the defense and the evidence remain unhindered after the indictment has been amended, the amendment is considered one of form rather than substance. *Chandler v. State*, 789 So. 2d 109 (¶4) (Miss. Ct. App. 2001). The well-established test in this jurisdiction for determining whether the defendant is prejudiced by the amendment depends on whether a defense as it originally stood would be equally available after the amendment is made. *Id.* The court must therefore determine whether the evidence presented would be equally applicable to the amended indictment. *Id.*

¶10. Irons was charged with violating Mississippi Code Annotated Section 41-29-144.[1] The proof of this charge remained the same, but more importantly, the defenses available to Irons remained the same. We find no merit to this issue.

II.

Whether the trial court erred in overruling Irons' objections to leading questions.

¶11. Irons argues that the trial judge prejudicially disclosed his view of the evidence to the jury during VanDevender's testimony when the defense objected to a leading question to the pharmacist regarding a telephone call.

¶12. The transcript reveals that the following occurred:

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[1] Mississippi Code Annotated Section 41-29-144 (Rev. 2000) provides: (1) It is unlawful for any person knowingly or intentionally to acquire or *obtain* possession or *attempt to* acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge.
(2) It is unlawful for any person knowingly or intentionally to possess, sell, deliver, transfer or attempt to possess, sell, deliver or transfer a false, fraudulent or forged prescription of a practitioner.
(3) Any person who violates this section is guilty of a crime and upon conviction shall be confined for not less than one (1) year nor more than five (5) years and fined not more than one thousand dollars ($1,000.00) or both.

Q. Do you recall receiving a phone call from a Dr. Hensleigh's office on that day?

BY MR. SMITH: Object, your Honor. Leading.

BY THE COURT: Well, I think it's –

BY MR. DAVIS: Predicate, Judge.

BY THE COURT: -- foundational. Overruled.

Q. You can answer.

A. Yes, sir.

Q. Would you please tell the Court the circumstances or tell the jury the circumstances surrounding that phone call specifically as it involved the defendant, Dana Irons.

BY MR. SMITH: Your Honor, I object. It calls for hearsay.

BY MR. DAVIS: We're not offering it for the truth of the matter asserted, Judge.

BY THE COURT: I don't think he's offering it for the truth of the matter asserted but the fact that the phone call was received. Objection's overruled.

¶13. Irons claims that the judge expressed his belief of how critical the telephone call was and that it was not a call from the doctor's office. She contends that the comment by the judge was more than an explanation of his ruling. In support of her position, Irons cites *Thompson v. State*, 468 So. 2d 852, 854 (Miss. 1985), where the supreme court noted that "[i]t is a matter of common knowledge that jurors, as well as officers in attendance upon court, are very susceptible to the influence of the judge. The sheriff and his deputies, as a rule, are anxious to do his bidding; and jurors watch closely his conduct, and give attention to his language, that they may, if possible, ascertain his leaning to one side or the other, which, if known, often largely influences their verdict. He cannot be too careful and guarded in language and conduct in the presence of the jury, to avoid prejudice to either party. . . ." This is recognized in Mississippi Code Annotated Section 99-17-35, which states in part: "The judge in any criminal cause, shall not sum up or

comment on the testimony, or charge the jury as to the weight of the evidence. . . ." *Id.* However, trial judges may explain their rulings on objections "so long as they do not comment upon the evidence in a prejudicial manner." *Lofton v. State*, 818 So. 2d 1229 (¶10) (Miss. Ct. App. 2002). Having reviewed the record, this Court does not find the trial judge's explanation for his ruling to be an impermissible comment on the evidence, or a communication of his views.

III.

Whether Irons received effective assistance of counsel.

¶14. Irons contends that she received ineffective assistance of counsel for the following reasons: (1) counsel failed to present a motion to dismiss for failure to grant a speedy trial, (2) counsel failed to object to comments made by the trial judge, and (3) counsel failed to object to the denial of confrontation when hearsay was introduced on a material issue. To prevail on this issue, Irons must establish that (1) the performance of counsel was deficient and (2) she was prejudiced by counsel's deficient performance. *Day v. State*, 818 So. 2d 1196 (¶10) (Miss. Ct. App. 2002).

¶15. The first claim of ineffective assistance concerns a violation of the right to a speedy trial which would have required a hearing on the factors in *Barker v. Wingo*, 407 U. S. 514, 530-33, (1972).[2] However, this claim was not presented to the trial judge for review. This Court will not address an issue which has not been properly preserved for appeal. *Bishop v. State*, 771 So. 2d 397 (¶14) (Miss. Ct. App. 2000).

[2] The *Barker* court identified four factors which are to be considered in making such a determination: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has asserted his right to a speedy trial; and (4) whether the defendant has been prejudiced by the delay. No one factor is dispositive; rather, they must be considered together on a case by case basis.

¶16. Next, Irons claims that her attorney should have objected to the trial judge's comments mentioned in issue two. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall[s] within the ambit of trial strategy." *Roberts v. State*, 820 So. 2d 790 (¶7) (Miss. Ct. App. 2002). Because the attorney did not object when Irons thought he should have objected does not establish that the attorney's performance was ineffective.

¶17. Finally, Irons argues that the entries made by the nurse at Dr. Hensleigh's office were hearsay and that the nurse, or person that made the entries, should have been presented as a witness. Irons maintains that her attorney should not have allowed this information (exhibit 8) to be introduced. This exhibit was offered by her attorney and may be considered as trial strategy. *Roberts,* 820 So. 2d 790 at (¶7). Having a trial strategy negates an ineffective assistance of counsel claim, regardless of counsel's insufficiencies. *Hall v. State*, 735 So. 2d 1124 (¶10) (Miss. Ct. App. 1999). Therefore, we find that Irons has failed to prove her claim of ineffective assistance of counsel.

IV.

Whether the weight and sufficiency of the evidence support the verdict.

¶18. Irons argues that this was a circumstantial evidence case and the contradictions between her version and the State's version do not support a guilty verdict.

¶19. In viewing the weight and sufficiency of the evidence, this Court adheres to the following: "In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence presented as supportive of the verdict, and we will disturb a jury verdict only when convinced that the circuit court has abused its discretion in failing to grant a new trial or if the final

result will result in an unconscionable injustice." *Carter v. State,* 803 So. 2d 1191 (¶5) (Miss. Ct. App. 1999).

¶20. On the other hand, a challenge to the sufficiency of the evidence requires a determination that, as to one or more essential elements of the crime, the State's evidence is so lacking that a fair-minded juror could only find the defendant not guilty. *McClain v. State,* 625 So. 2d 774, 778 (Miss. 1993).

¶21. The evidence presented at trial revealed that on August 21, 2000, VanDevender received a phone call from an individual who indicated that she worked for Dr. Hensleigh. The individual called in a prescription for Dana Irons. Irons went to VanDevender Drugs and indicated that she came to pick up a prescription called in by Dr. Hensleigh's office.

¶22. The State also offered Dr. Hensleigh's testimony that Irons contacted her office requesting a refill of Lorcet and that her office denied Irons' request.

¶23. In opposition to the State's evidence, Irons testified that she did not make a phone call to the drug store from the above number and did not realize that the phone number was listed to her address that same day. She acknowledged calling the doctor's office to verify whether she had another refill.

¶24. Applying the standards this Court is bound to follow in evaluating both the weight and sufficiency of the evidence, this Court finds no error and accordingly, we must affirm the trial court.

¶25. **THE JUDGMENT OF THE CIRCUIT COURT OF KEMPER COUNTY OF CONVICTION OF OBTAINING A CONTROLLED SUBSTANCE BY FRAUD AND SENTENCE OF FIVE YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH THREE YEARS SUSPENDED AND FIVE YEARS OF SUPERVISED PROBATION AND FINE OF $1,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO KEMPER COUNTY.**

BRIDGES, THOMAS, LEE, IRVING, MYERS, CHANDLER AND GRIFFIS, JJ., CONCUR. McMILLIN, C.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, P.J., BRIDGES, LEE AND GRIFFIS, JJ.

MCMILLIN, C.J., CONCURRING:

¶26. I concur in the decision of the majority to affirm this conviction. However, it is my view that the majority's analysis regarding the court-ordered amendment to the indictment does not fully address the legal issues raised in this appeal. I would conclude that the amendment was allowed in error but that, on the particular facts of this case, the error was harmless.

¶27. First, it must be observed that the legislative practice of defining criminal conduct in this state, insofar as attempts at criminal behavior are concerned, takes two different directions. In one instance, the State defines all the essential elements of the crime in one statute, but preserves by separate statute its right to punish those whose apparent purpose is to commit that crime but who fall short for reasons beyond their control. An example of this is the crime of grand larceny, as defined by Miss. Code Ann. § 97-17-41(1) (Supp. 2003), considered in conjunction with the general "attempt" statute found at Section 97-1-7, which provides criminal punishment for one who does "any overt act toward the commission [of an offense], but [who] shall fail therein, or shall be prevented from committing the same . . . ." Miss. Code Ann. § 97-1-7 (Rev. 2000). In the other instance, the State defines the elements of the crime in a self-contained enactment where a particular crime is defined and one of the elements is framed in the alternative as either (a) accomplishing a particular act, or (b) attempting to accomplish the act. An example of this is found in the armed robbery statute, which defines the crime as either taking or attempting to take away the property of another by violence or by exhibiting a deadly weapon. Miss. Code Ann. § 97-3-79 (Rev. 2000). Thus, once a person commits an act of violence or brandishes a deadly weapon in an effort to deprive another of property, an armed robbery has been committed without regard as to whether the culprit is successful in obtaining the property. In such a situation, though the concept of "attempt" comes into play in measuring

the success of the culprit in actually obtaining the property, it is incorrect to speak of an "attempted armed robbery." *See Stevens v. State*, 840 So. 2d 785, 787 (¶10) (Miss. Ct. App. 2003).

¶28. The statute now under consideration in this case is of the latter variety; that is, it defines the crime as being the commission of an overt fraudulent act whose purpose is to permit the actor to obtain controlled substances without proper legal authority for doing so. Miss. Code Ann. § 41-29-144(1) (Rev. 2001). Thus, it is the overt act of fraud or misrepresentation that constitutes the completed crime without particular regard as to whether the act accomplished its intended purpose of actually obtaining contraband narcotics.

¶29. The issue that presents itself, therefore, is what role, if any, the law relating to the general attempt statute (Section 97-1-7) has in relation to such crimes as that for which Irons now stands convicted. That is of some importance based on the fact that, in the case of an indictment for an attempted crime brought under Section 97-1-7, evidence showing unequivocally that the crime was, in fact, accomplished serves to invalidate a conviction on the attempt charge. Miss. Code Ann. § 97-1-9 (Rev. 2000). Though there does not appear to be any case law directly on point, the necessary corollary to that proposition is that it would be improper to permit an amendment to an indictment brought under the general attempt statute to charge instead the completed crime since that would mean a conviction could be obtained under the amended indictment upon proof of facts that would render invalid a conviction obtained under the original indictment. It seems evident, without saying more, that such an amendment would so alter the nature of the charge as to be considered substantive in nature.

¶30. Is the same result mandated in, for instance, an armed robbery conviction when the State charges only an attempt to obtain property by one of the prohibited means defined in the statute but the proof shows unequivocally that the victim was, in fact, deprived of the property? No authority appears to be directly on point, but, on purely logical principles only, it would not appear that the same issues are raised. In such

crimes as armed robbery and the fraudulent procurement of narcotics, the State's interest appears to be in punishing – and hopefully deterring – certain types of behavior harmful to society that are undertaken with some underlying motivation. In the case of armed robbery, the State seeks to deter the actual infliction of violence or the inherently-dangerous brandishing of deadly weapons in a threatening manner when the aim of that behavior is to deprive another person of his property. In that situation, the harm to society has already been incurred before it is apparent whether or not the effort to obtain the property has succeeded. The State seems to intend to punish the act of violence or brandishing of the deadly weapon and, thus, considers the crime as having been accomplished and the injury to society to be essentially the same without particular consideration as to whether these harmful acts accomplished their intended purpose. This notion is borne home by the fact that robbery is a crime against the person rather than a crime of property even though its ultimate objective is the unlawful acquisition of property belonging to another.

¶31. Similarly, in the case before us, it would appear reasonable that the State is attempting to discourage any manner of scheme or artifice intended to fraudulently induce one rightfully in possession of controlled narcotics to part with that possession in a manner not authorized by law. Because of the necessary safeguards and precautions required of those in charge of administering the distribution of narcotic substances, the mere overt effort of attempting to improperly overcome or circumvent these legal safeguards has caused a societal injury that may not be, and often is not, significantly increased by the fortuitous event of whether the subterfuge is, or is not, successfully practiced. It is for that reason that the same crime has been accomplished whether or not the narcotics are actually obtained, and , in that situation, it does not appear proper to let the perpetrator escape punishment simply because his efforts were perhaps more successful than the State originally gauged when framing its indictment.

¶32. It would be my view that the amendment to change from "attempted to obtain" to "obtained" was unnecessary. There was more than sufficient proof that Irons attempted to obtain contraband narcotics through various misrepresentations to the druggist. At that point, the crime as defined in Section 41-29-144(1) was accomplished, and evidence tending to show that her misrepresentations actually succeeded was surplusage.

¶33. In that regard, I would point out that there seems to be a legitimate question as to whether she did actually obtain the drugs by fraudulent means within the meaning of the statute since, in a case on the related crime of obtaining money through false pretenses, the supreme court has held that the false pretenses must be the "moving cause" in the result. For example, when a deputy sheriff, in the course of a criminal investigation, paid money for a bottle of oil being falsely represented by the seller as a cure for arthritis, a conviction could not stand because the officer did not rely on the representations when paying the money for the oil. *Hughes v. State*, 326 So. 2d 469, 471 (Miss. 1976). Similarly, in this case it is at least arguable that Irons's efforts were not the moving cause in the delivery of the drugs since they were delivered to her primarily as a result of the secret directive of a law enforcement official at a time when the druggist had already become so suspicious of Irons that it is doubtful he would have filled the prescription anyway.

¶34. I, therefore, would affirm, but with this added explanation of why the amendment did not constitute reversible error.

SOUTHWICK, P.J., BRIDGES, LEE, AND GRIFFIS, JJ., JOIN THIS SEPARATE WRITTEN OPINION.