ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
HARVEY CLARKE JENKINS, JR.	)	**NOT FOR PUBLICATION**
	)	
TASHONDA RENEE DIXON	)	**Case No. S-2020-500**
	)	
JULIE BROWN	)	
	)	
MICHAEL WAYNE OXLEY	)	
	)	
Appellee.	)	

OPINION

ROWLAND, PRESIDING JUDGE:

On March 24, 2016, the State filed a thirty count Information against Harvey Clarke Jenkins, Jr., M.D., Tashonda Renee Dixon, Julie Brown, Michael Wayne Oxley, Taylor Shai Zamarripa, and Elsie Murguia. An Amended Information alleging thirty-three counts was filed on February 1, 2017.[1] Preliminary hearing was held before the

[1] Murguia entered a guilty plea on March 20, 2017 and Zamarripa entered a guilty on December 13, 2017.

Honorable Donald Easter, Special Judge, on several dates from March 20, 2017 through November 15, 2017. A Second Amended Information charging fifty-one counts was filed on November 17, 2017. Subsequently, on December 5, 2017, Brown and Dixon filed demurrers to the evidence presented at preliminary hearing in response to the State's Second Amended Information.[2] On December 20, 2017, the State filed a response to the demurrers. On January 11, 2018, the magistrate heard argument from the parties, denied the demurrers as to some counts, sustained the demurrers as to several others, and amended some other counts. Dr. Jenkins, Brown, and Dixon were bound over for trial.[3]

On January 23, 2018, the State filed a Third Amended Information alleging fifty-one counts against the defendants as follows:

Harvey Jenkins, Jr., M.D.:

Conspiracy to Illegally Possess/Distribute/Dispense/Prescribe Controlled Dangerous Substances in violation of 63 O.S.2011, § 2-401(A)(1) and 21 O.S.2011, § 421 (Count 1); Unlawful Distribution of

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[2] Dr. Jenkins mailed an unfiled demurrer to the office of the Oklahoma Attorney General.

[3] On August 21, 2017, Oxley waived preliminary hearing, entered a plea of not guilty, and was bound over for trial.

a Controlled Dangerous Substance in violation of 63 O.S.2011, § 2-401(A)(1) (Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 34, 35, 36, 37, 38, 39, 40, 41, 42); Maintaining a Place/Building Where Controlled Dangerous Substances are Kept in violation of 63 O.S.2011, § 2-404(A)(6) (Count 13); Conspiracy to Defraud the State by Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) and 21 O.S.2011, § 424 (Count 14); Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) (Counts 15, 16, 17, 18, 19, 20); False Personation of Another in violation of 21 O.S.2011, § 1531(3) (Counts 22, 23, 24, 25, 26, 27, 28); Failure to Maintain Medicaid Records in violation of 56 O.S.2011, § 1005(A)(7) (Counts 47, 48, 49, 50, 51).

Tashonda Dixon:

Conspiracy to Illegally Possess/Distribute/Dispense/Prescribe Controlled Dangerous Substances in violation of 63 O.S.2011, § 2-401(A)(1) and 21 O.S.2011, § 421 (Count 1); Unlawful Distribution of a Controlled Dangerous Substance in violation of 63 O.S.2011, § 2-401(A)(1) (Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44); Conspiracy to Defraud the State by Making or

Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) and 21 O.S.2011, § 424 (Count 14); Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) (Counts 15, 16, 17, 18, 19, 20); False Personation of Another in violation of 21 O.S.2011, § 1531(3) (Counts 22, 23, 24, 25, 26, 27, 28); Using Access to Computers to Violate Oklahoma Statutes in violation of 21 O.S.2011, § 1958 (Count 46).

Julie Brown:

Conspiracy to Illegally Possess/Distribute/Dispense/Prescribe Controlled Dangerous Substances in violation of 63 O.S.2011, § 2-401(A)(1) and 21 O.S.2011, § 421 (Count 1); Unlawful Distribution of a Controlled Dangerous Substance in violation of 63 O.S.2011, § 2-401(A)(1) (Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 34, 35, 36, 37, 38, 39, 40, 41, 42); Conspiracy to Defraud the State by Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) and 21 O.S.2011, § 424 (Count 14); Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) (Counts 15, 16, 17, 18, 19, 20); False Personation of Another in violation of 21

O.S.2011, § 1531(3) (Counts 22, 23, 24, 25, 26, 27, 28); Assuming the Title of Registered Nurse in violation of 59 O.S.2011, § 567.5(C) or in the alternative Assuming the Title of Licensed Practical Nurse in violation of 59 O.S.2011, § 567.6 (Count 30).

Michael Wayne Oxley:

Conspiracy to Illegally Possess/Distribute/Dispense/Prescribe Controlled Dangerous Substances in violation of 63 O.S.2011, § 2-401(A)(1) and 21 O.S.2011, § 421 (Count 1); Unlawful Distribution of a Controlled Dangerous Substance in violation of 63 O.S.2011, § 2-401(A)(1) (Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12); Maintaining a Place/Building Where Controlled Dangerous Substances are Kept in violation of 63 O.S.2011, § 2-404(A)(6) (Count 13); Conspiracy to Defraud the State by Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) and 21 O.S.2011, § 424 (Count 14); Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1) (Counts 15, 16, 17, 18, 19, 20).

On July 23, 2019, Brown and Dixon filed motions to quash for insufficient evidence. On August 1, 2019, Oxley filed a demurrer to the Information, motion to quash, and brief in support. On August 2,

2019, Dr. Jenkins filed motions to quash for insufficient evidence. The State responded to the motions to quash on October 1, 2019. Brown and Dixon filed replies to the State's response on October 28, 2019. Oxley and Dr. Jenkins filed replies to the State's response on November 1, 2019. A hearing on the motions was held on March 2 and 5, 2020, and July 20, 2020, before the honorable Ray Elliott, District Judge.[4] At the close of this hearing, the district judge sustained Oxley's demurrer as to all counts and sustained Brown's and Dixon's motions to quash as to all counts. The district judge sustained Dr. Jenkins' motions to quash Counts 1, 14, 22, 23, 24, 25, 26, 27, and 28. The district judge overruled Dr. Jenkins' motions to quash Counts 2 – 13, 15 – 20, 34 – 42, and 47-51.

The State of Oklahoma appeals, raising the following issues:

(1) whether evidence at preliminary hearing sufficiently established probable cause to bind over Dr. Jenkins, Brown, and Dixon for trial;

(2) whether the district court's ruling on Oxley's demurrer is erroneously based on a sufficient evidence argument; and,

(3) whether, if preliminary hearing evidence was insufficient, the proper remedy is to remand the case back to continue preliminary hearing.

[4] The record shows that delay in this case occurred for several reasons including the COVID-19 pandemic.

We affirm the district court's order for the reasons discussed below.

FACTS

Dr. Harvey Jenkins, a Harvard educated physician, owned and operated Aria Orthopedics, a pain management clinic located in Oklahoma City. Dr. Jenkins was a licensed physician in Oklahoma also licensed with the Oklahoma Bureau of Narcotics (OBN) to prescribe controlled substances. Patients were referred to him by other physicians for treatment of chronic pain through narcotic maintenance. He contracted with the State of Oklahoma through the Oklahoma Health Care Authority (OHCA) to bill Medicaid for care provided to eligible patients.

At some point during the operation of his clinic, the Medicaid Fraud Control Unit of the Oklahoma Attorney General's Office investigated a complaint alleging that Dr. Jenkins was fraudulently overbilling for urine testing. As a result, Dr. Jenkins was placed on probation from about 2009 through 2014 or 2015. His probation prohibited him from supervising any mid-level medical staff. However, from January 2010 through January 2015, Dr. Jenkins employed several lower level staff, including medical assistants, to work in his

clinic. Among them were Julie Brown, who worked as a medical assistant, Tashonda Dixon, who worked primarily as an office manager, and Michael Wayne Oxley, a reserve deputy with the Oklahoma County Sheriff's office hired to work security.

Agent April Carpenter, who was working the fraud investigation, surveilled the clinic during Dr. Jenkins' probation and noticed that long lines of patients waited for the clinic to open in the mornings and afternoons after lunch. This high volume of patients coming in and out of the clinic caused Agent Carpenter to suspect that the clinic was a pill mill. At the end of 2012, the focus of the investigation shifted accordingly.

During this period of investigation, two undercover agents from the Oklahoma Bureau of Narcotics (OBN) went to the clinic as patients; B.C. went as a cash pay patient and A.B. went as a Medicaid patient. Both B.C. and A.B. were seen by Dr. Jenkins and Brown on their first visit. After a short examination during which they described their symptoms, each was prescribed a Schedule II drug by Dr. Jenkins. A.B. was seen by Dr. Jenkins and Brown in two subsequent visits and only by Brown in another visit. B.C. was seen by Dr. Jenkins in two follow-up visits. While Dr. Jenkins saw these patients during most

visits and all patients during their initial visit, Dr. Jenkins authorized Brown and Dixon to see patients during follow-up visits and give them prescription refills.[5]

The charges in this case arose out of these and other activities performed by Aria Orthopedics employees during the course of their employment at the pain management clinic.

PROPOSITION ONE: EVIDENCE AT PRELIMINARY HEARING SUFFICIENTLY ESTABLISHED PROBABLE CAUSE TO BIND OVER DR. JENKINS, BROWN, AND DIXON FOR TRIAL.

At preliminary hearing, the State is required to present sufficient evidence to establish (1) probable cause that a crime was committed, and (2) probable cause to believe that the defendant committed the crime. *State v. Juarez*, 2013 OK CR 6, ¶ 11, 299 P.3d 870, 873; *State v. Heath*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725. The State is not required to present evidence at the preliminary hearing that would be sufficient to convict at trial, as there is a presumption that the State will strengthen its evidence at trial. *Id.*; *Turner v. State*, 1976 OK CR 108, ¶ 6, 549 P.2d 1346, 1348.

[5] Each prescription for a Schedule II drug was signed by Dr. Jenkins. While refills of non-Schedule II drugs could issue using electronic signature, refills of Schedule II drugs required the doctor's manual signature.

The State challenges the district court's order sustaining the motions to quash for insufficient evidence on all counts charged against Brown and Dixon and in sustaining the motion to quash the two conspiracy counts charged against Dr. Jenkins. We exercise jurisdiction under 22 O.S.2011, § 1053(4). We review the district court's ruling for an abuse of discretion. *State v. Haliburton*, 2018 OK CR 28, ¶ 12, 429 P.3d 997, 1000. This Court finds an abuse of discretion only where the district court's decision is unreasonable or arbitrary and was made without proper consideration of the relevant facts and law. *Id. See also Bramlett v. State*, 2018 OK CR 19, ¶ 19, 422 P.3d 788, 795.

Because this case concerns multiple charges and counts against multiple defendants, we will address the charged crimes individually.

Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program.

The State challenges the district court's ruling sustaining Brown's and Dixon's motions to quash all six charged counts of making or causing to be made false claims under the Oklahoma Medicaid Program in violation of 56 O.S.2011, § 1005(A)(1). The Information asserts that Dr. Jenkins, Brown, Dixon, Oxley, and

Zamarripa, acting jointly and in concert with one another, submitted, or caused to be submitted, to the OHCA, fraudulent claims for $2,500.00 or more, for services allegedly rendered to six different individuals. The State charged as follows:

> The alleged services claimed were for services never performed by certified or licensed medical personnel, billed in excess of the service provided, or for alleged services claimed to have been performed that were never rendered at all, a fact that [the Appellees] either knew or should have known but permitted to be submitted, or caused to be submitted, a false claim for payment regardless, contrary to that provisions of [56 O.S.2011, § 1005A)(1)].

The Oklahoma Medicaid Program Integrity Act, at 56 O.S.2011, § 1005(A)(1), provides that, "[i]t shall be unlawful for any person to willfully and knowingly ... [m]ake or cause to be made a claim, knowing the claim to be false, in whole or in part, by commission or omission." It further provides that, "[f]or the purposes of this section, a person shall be deemed to have known that a claim, statement, or representation was false if the person knew, or by virtue of the person's position, authority or responsibility, had reason to know, of the falsity of the claim, statement or representation." 56 O.S.2011, § 1005(D).

The State argued below and on appeal that Dixon and Brown participated in submitting claims to the Oklahoma Medicaid Program

that they knew to be false. There were different provider codes for different types of patient visits and the State asserts that Brown and Dixon knew the difference between the provider codes and purposefully billed Medicaid for the higher level of service when only the lower level of service had been provided.[6]

The evidence presented by the State at preliminary hearing showed that staff, including Brown and Dixon, had no formal medical training or licensure but were trained at the clinic by Dr. Jenkins or other employees to perform minor medical duties.[7] The State asserts that Brown and Dixon often saw patients alone for very short time periods and coded the visits as a higher level doctor visits rather than nurse visits. The State asserts that Brown and Dixon, because of their positions and responsibility, knowingly participated in the submission of false Medicaid claims.

In support of its assertion that Brown and Dixon knew that the billing codes they used were wrong, the State presented the testimony

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[6] Codes 99212 and 99213 were for differing levels of service provided to established patients. Both codes required that the physician meet with the patient face-to-face. Code 99211 is for a nurse or ancillary staff visit where the doctor does not see the established patient.

[7] State's witnesses testified that this does not violate Oklahoma laws or regulations. While Brown and Dixon referred to themselves informally as nurses, they did not hold themselves out as R.N.s or L.P.N.s to the patients.

of two former clinic employees - Stacey Neuhauser and Taylor Zamarippa.[8] Neuhauser testified on direct examination that Dixon instructed her on which codes to use on the superbill and that these codes were not appropriate for the service provided because they required a doctor's presence when, in fact, a doctor had not seen the patient.[9] While Neuhauser testified on direct examination that she knew what she was doing when she entered the codes, she clarified on cross-examination that it was not until after the office had been raided and closed down that she learned she had been using the wrong codes; she looked up the codes and discovered that they had been coding visits incorrectly. She agreed that Dr. Jenkins was aware of what and how she was billing. Neuhauser recounted a conversation she had with Dr. Jenkins and Zamarippa when she asked why a superbill was marked with a particular code. Zamarippa said that she marked it that way because Dr. Jenkins told her to do so. When she inquired of Dr. Jenkins, he replied that he was the doctor, not her. Neuhauser also

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[8] Neuhauser was a long-term clinic employee who cooperated with the State and was not charged as a codefendant. Zamarippa was charged as a codefendant and entered a negotiated plea for a deferred sentence in exchange for her testimony. Zamarippa testified that she did not intend to do anything illegal and did not know the crime to which she would be pleading guilty.

[9] A superbill is an itemized form, filled out at the time of a patient's appointment, with codes for services and diagnosis.

testified that at one point, either before or after a Medicare audit, Dixon told her to switch the billing codes. It was her understanding that a conversation with an auditor had resulted in the change. Neuhauser did not think at the time that it was illegal or that Dixon had knowingly asked her to do something illegal.

Zamarripa testified that she was told what codes to mark on the superbill by Neuhauser. Both Dixon and Brown confirmed the use of these codes. There was, however, no testimony that Dixon or Brown knew that the codes they were using were incorrect. Without more, the State imputes knowledge of the improper code use to Brown and Dixon based upon their positions and responsibility in the clinic.

The evidence presented at preliminary hearing showed that Medicaid codes are complicated and the responsibility to ensure accurate coding lies with the physician who has contracted with OHCA to bill Medicaid.[10] Staff are dependent upon instructions from the doctor to code the services correctly. While it is true, as the State asserts, that Brown and Dixon instructed other ancillary staff about how to code superbills, the testimony from witnesses who were also

[10] Even the certified coder who testified for the state had to refer back to the manuals to explain the different requirements for billing different codes.

unlicensed medical staff at the clinic was that all training at the clinic was at the direction of Dr. Jenkins and they did not know or have reason to know that anything he instructed them to do was illegal.

Based upon this record, this Court cannot find that the district judge abused his discretion in sustaining Brown's and Dixon's motions to quash the six charged counts of making or causing to be made false claims under the Oklahoma Medicaid Program.

Unlawful Distribution of a Controlled Dangerous Substance

Brown and Dixon were both charged with numerous counts of unlawful distribution of a controlled dangerous substance for "acting jointly and in concert with each other, for willfully and knowingly, for other than legitimate medical or scientific purposes and/or without a doctor/patient relationship, and/or without a valid medical license, distributed or dispensed" various Schedule II drugs to various patients.

Before addressing the merits of the State's argument, we first pause to explain the legal backdrop behind the distribution charges against Brown and Dixon. Title 63 O.S.2011, 2-302(A) provides that every person who distributes, dispenses, or prescribes any controlled dangerous substance within the State shall obtain a registration

issued by the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control (OBN). Under 63 O.S.2011, § 2-101(11) and (12), "'[d]ispense' means to deliver a controlled dangerous substance to an ultimate user or human research subject by or pursuant to the lawful order of a practitioner, including the prescribing" and "'[d]istribute' means to deliver other than by administering or dispensing a controlled dangerous substance . . . ." A "practitioner" is defined, among other things, as a medical doctor or "any other person licensed, registered or otherwise permitted to prescribe, distribute, dispense, conduct research with respect to, use for scientific purposes or administer a controlled dangerous substance in the course of professional practice or research in this state." 63 O.S.2011, § 2-101(32)(8).

It is the State's position that the illegality of a physician's prescription of controlled substances hinges upon whether the drug was prescribed without a legitimate medical purpose or outside the usual course of professional practice.[11] The State argues that the

[11] The State acknowledges that there is no Oklahoma case law on point. It cites to federal cases for their treatment of correlating federal laws and regulations. *See United States v. Nelson*, 383 F.3d 1227, 1233 (10th Cir. 2004) (a medical practitioner who prescribes controlled substances may be convicted of illegal

evidence presented at preliminary hearing was sufficient to establish probable cause to believe that Dr. Jenkins' prescribing of Schedule II drugs in the counts at issue was not for a legitimate medical purpose and was outside the usual course of professional practice and that Brown and Dixon aided and abetted this illegal distribution.

The State called numerous witness to testify at preliminary hearing. The two undercover OBN agents who posed as patients testified about their initial and subsequent examinations by Dr. Jenkins and about their interactions with staff at the clinic. Three physicians testified about and took issue with the way Dr. Jenkins operated his medical practice from the cursory initial and subsequent evaluations of patients, to the procedures used in the office to prescribe prescriptions of the controlled drugs.[12] This testimony formed the basis for the State's assertion that Dr. Jenkins prescribed controlled drugs without a legitimate medical purpose or outside the usual course of professional practice.[13]

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distribution or dispensing "if he acts without a legitimate medical purpose *or* outside the usual course of professional practice."); 21 C.F.R. § 1306.04(a).

[12] The three testifying physicians were Dr. Frische with the Oklahoma Medical Board, Dr. Herndon with the OHCA, and Dr. Brittingham a private practitioner.

[13] Both the magistrate and the district court found sufficient evidence to bind Dr. Jenkins over on the distribution charges.

In order to show that Brown and Dixon aided and abetted Dr. Jenkins' illegal distribution of CDS, the State asserts, basically, not that they knew the drugs were improperly prescribed, but rather that they should have known. The State argues that any lay person would have known that the way Dr. Jenkins' clinic operated was outside of the ordinary practice of medicine. It cites to *United States v. Elliott*, 876 F.3d 855, 866 (6th Cir. 2017) (quoting *United States v. Binder*, 26 F.Supp.3d 656, 658 (E.D. Mich. 2014)) for the holding that a doctor's cursory examinations, high volume of dosages prescribed, and irregularity of clinic operations are "evidence of plainly improper prescribing practices that a lay juror could recognize as illegitimate." Warning signs, or "red flags" that a clinic may be a pill mill include "the types of its patients, the distance they traveled to the clinic, the quantities of drugs prescribed, the clinic's cursory examinations, and its advertising techniques." *Elliott*, 876 F.3d at 859.

Brown and Dixon argue conversely that the clinic did not operate outside the norms; while the clinic served a large number of patients, it operated during normal business hours and appeared otherwise to be an ordinary medical clinic. Additionally, cutting against the State's assertion that Dr. Jenkins clinic was clearly a pill mill was the evidence

presented at preliminary hearing that Dr. Jenkins refused to refill prescriptions for Schedule II drugs from patients when he suspected that a patient was not taking the medication as prescribed.[14] Similarly, patients who did not use their prescribed drugs appropriately were sometimes "fired" or had their prescription drugs taken away.[15]

Although the three physician witnesses testified about Dr. Jenkins' conduct that they believed to be outside the usual course of professional practice, they acknowledged that staff did not have the skill to discern this; in Oklahoma, a physician may train unskilled, unlicensed lay people to work as medical assistants. Dr. Frische acknowledged that in Oklahoma there are no standards of education a doctor is obligated to meet in educating his staff. He testified that staff trained by a physician rely upon what the doctor tells them and

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[14] The OBN Agent who went to Dr. Jenkins' clinic undercover as cash pay patient B.C. testified that on his initial visit to Dr. Jenkins on October 9, 2013, he was prescribed Lortab, Acetaminophen and Hydrocodone, and Flexeril Cyclobenzaprine. At his next appointment on October 23, 2013, B.C. saw Dr. Jenkins again, was administered a urinalysis drug test, and was prescribed Ambien for his reported sleep issues. B.C.'s next appointment was on November 7, 2013. At this appointment was administered another urinalysis drug test. When this drug test revealed that B.C. had not been taking any of the prescribed drugs, Dr. Jenkins told him that he would not prescribe him any additional drugs on that visit.

[15] State's witness Zamarripa testified that if a patient came in for a pill count and the count was off, Dr. Jenkins would often take the medication away from the patient.

that the doctor is responsible for the actions of his staff. Dr. Herndon agreed that the burden is on the doctor to provide proper training. Dr. Brittingham agreed that while the legality of prescribing a Schedule II drug depends on whether or not the doctor performed a medically appropriate exam, he would not expect a staff member to know whether the doctor had done this; "it would be outside the purview of their skill set." He also agreed that if a physician writes an invalid prescription and asks a staff member to give it to a patient, the doctor, not the staff member who followed the doctor's directive, is the person who "distributed" it.

Thus, staff is dependent on the doctor's level of expertise and the burden is on the physician to provide proper training. While the State imputes knowledge of the impropriety of cursory examinations to Brown and Dixon, this is contra to the testimony of the State's own expert witnesses. Even if staff could discern a proper exam, the evidence showed that the initial new patient examinations were performed by Dr. Jenkins without staff present.

Former employees Zamarippa and Neuhauser testified that clinic employees were trained at the direction of Dr. Jenkins; the clinic was run the way he wanted and he was aware of what his employees were

doing. Zamarippa testified that while Brown would print blank prescriptions each morning, this was done at the direction of Dr. Jenkins and was part of the clinic's normal operating procedure.[16] Zamarippa testified that all employees knew that prescriptions for Schedule II drugs were given to patients when Dr. Jenkins was not present at the clinic but this was done with the permission of and at the instruction of Dr. Jenkins. While Dr. Jenkins authorized medical assistants to see returning patients and give them refills, Neuhauser testified that Dr. Jenkins explained to her that he authorized them to give refills so it was okay.[17] She added that if he had asked her to do something "obviously illegal" she would not have done it. Additionally, during periods when Dr. Jenkins was on probation, when the Medical Board came into the clinic, some changes were made but nothing was said about staff seeing patients and handing out Schedule II

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[16] Typically, Brown would print each day's prescriptions for Schedule II drugs and Dr. Jenkins would sign them. Neuhauser testified that the blank prescriptions for Schedule II drugs were for returning patients. If the prescription was changed after the patient's appointment, a new prescription would be printed. On a few occasions, Zamarippa saw Dixon sign Dr. Jenkin's name to a prescription for a Schedule II drug. Neuhauser testified that on one occasion when she saw Dixon sign Dr. Jenkins' name to a Schedule II prescription it was with Dr. Jenkins' apparent permission.

[17] When Dr. Brittingham was asked about the propriety of staff giving a Schedule II refill to an established patient, he replied that its fine, "it happens in my office every day."

prescription refills; Neuhauser agreed that if this was illegal she assumed that the Medical Board would have instructed them to change this practice.

Dr. Jenkins was a Harvard educated physician. As is permissible in Oklahoma, he trained unskilled, non-medically educated people to be his assistants and work in his clinic. He assured his employees that what he instructed them to do was fine. Although there were some irregularities, the clinic was not run in an obviously illegal manner and the staff were not asked to perform obviously illegal tasks. Given this evidence, this Court cannot find that the district judge abused his discretion in sustaining Brown's and Dixon's motions to quash the numerous charged counts of unlawful distribution of a controlled dangerous substance.

Conspiracy to Defraud the State by Making or Causing to be Made False Claims Under the Oklahoma Medicaid Program and Conspiracy to Distribute Controlled Dangerous Substance.

The State challenges the district court's ruling sustaining Brown's, Dixon's, and Dr. Jenkins' motions to quash the charged counts of conspiracy to illegally distribute controlled dangerous substances and conspiracy to defraud the State by making or causing

to be made false claims under the Oklahoma Medicaid Program. Title 21 O.S.2011, § 424 provides that:

> If two or more persons conspire either to commit any offense against the State of Oklahoma, . . . or to defraud the State of Oklahoma, . . . in any manner or for any purpose, and if one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be guilty of a felony punishable by a fine of not more than Twenty-five Thousand Dollars ($25,000.00) or imprisonment for not more than ten (10) years or both such fine and imprisonment.

Evidence of an unlawful agreement and an overt act in furtherance of the plan is all that is required to support a conviction for conspiracy. 21 O.S.2011, §§ 421, 423. "In a conspiracy prosecution, the critical inquiry is whether the circumstances, acts, and conduct of the parties are of such a character that the minds of reasonable men may conclude therefrom that an unlawful agreement exists." *Mitchell v. State*, 2018 OK CR 24, ¶ 19, 424 P.3d 677, 684, (quoting *State v. Davis*, 1991 OK CR 123, ¶ 10, 823 P.2d 367, 370).

With regard to both the charges of conspiracy to defraud Medicaid and conspiracy to distribute a controlled dangerous substance, the State imputes knowledge of wrongdoing based upon the assertion that Brown and Dixon were in positions to know that they were submitting or causing false billing to be submitted to

Oklahoma's Medicaid Program. The State points to no testimony indicating that clinic staff knew the clinic operations were illegal. In fact, evidence presented by the State was contrary to this allegation. State's witness Zamarripa testified that she had no conversations or concerns that things were not being done correctly at the clinic. Zamarripa testified specifically that she never had a conversation or agreement with Brown or Dr. Jenkins to commit illegal acts; Dr. Jenkins never asked her to do anything that she knew to be illegal.

With regard to the fraud charges, Neuhauser testified that she never had a plan or agreement with Dr. Jenkins to do illegal things or to "mismark the superbills to increase funds coming into [the clinic]." Neuhauser testified that she had no agreement with Dr. Jenkins to commit a crime; Dr. Jenkins told her that the things he asked her to do were fine. With regard to the distribution charges, Neuhauser testified that staff handed out prescriptions for Schedule II drugs to patients when Dr. Jenkins was not present and that he personally told her that this was okay. Evidence was also presented that no staff person received any financial reward from the improper coding.

Given this evidence, this Court cannot find that the district judge abused his discretion in sustaining Dr. Jenkins', Brown's, and Dixon's motions to quash the conspiracy counts.

False Personation

The State challenges the district court's ruling sustaining Brown's and Dixon's motions to quash all seven charged counts of false personation of another in violation of 21 O.S.2011, § 1531.

The Information charges that Dr. Jenkins, Brown, Dixon, and Elsie Murguia:

> acting jointly and in concert with each other, falsely personated another, specifically, Dr. Deborah Nilson, D.O., by subscribing, verifying, publishing, acknowledging, and/or proving, in the name of Dr. Deborah Nilson, D.O., written instruments including but not limited to prescriptions for controlled dangerous substances and nurse notes with the intent that the same may be delivered as true. Specifically, the electronic signature of Dr. Nilson, was used without her consent, with the intent to fraudulently represent that Dr. Nilson authorized prescriptions for controlled dangerous substances . . . and to verify as true the fraudulent nursing notes. . . .

In order to convict a person for false personation the State must prove that (1) the defendant falsely assumed the identity of another person; (2) the impersonation of that identity was intentional; (3) under that false identity the defendant subscribed, verified, published,

acknowledged, or proved a written instrument; (4) with the intent that the instrument be delivered or used as true. 21 O.S.2011, § 1531(3); OUJI-CR2d 5-50. A written instrument is defined in 21 O.S.2011, § 1625 as follows:

> Every instrument partly printed and partly written, or wholly printed with a written signature thereto, and every signature of an individual . . . and every writing purporting to be such signature, is a writing or a written instrument, within the meaning of the provisions of this article.

During a period of time when Dr. Jenkins was ill and unable to work in the clinic, Dr. Deborah Nilson was hired for approximately two months in 2012 to keep the clinic operating. She declined to see new patients but agreed to see established patients in Dr. Jenkins' absence. When she started working at the clinic, she understood the general operations and provided an electronic signature to be used for billing and level one nurse visits.[18] Dr. Nilson testified that she did not give permission for her electronic signature to be used to sign nursing notes or prescriptions.[19] Dr. Nilson testified that despite her directive, her

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[18] Dr. Nilson testified at the preliminary hearing that a level one nurse visit is one in which the nurse takes the patient to an exam room, checks vital signs, asks about new issues or problems and problems with medication, and then provides the patient with refills if there are no changes.

[19] Dr. Nilson clarified that she refused her electronic signature be used to sign prescriptions for controlled medications because that would be illegal. She added

electronic signature was used on several prescriptions, including some for controlled substances, without her permission.[20] She testified that it was also used without her consent on fraudulent nurse notes.

Evidence presented at preliminary hearing showed that codefendant Elsie Murguia created all of the prescriptions bearing Dr. Nilson's electronic signature that are at issue relating to the false personation charges.[21] The State argues that this evidence is sufficient to implicate Brown and Dixon in the commission of the crime of false personation because if they had not previously secured Dr. Nilson's electronic signature the ultimate goal of this "conspiracy" would not have been accomplished. As noted above, there was no evidence of a conspiracy. Furthermore, the evidence showed that there was nothing nefarious about the act of securing Dr. Nilson's electronic signature; she willingly provided her electronic signature for the limited purposes discussed above. That Murguia used Dr. Nilson's properly procured electronic signature in an unauthorized way does not impute

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that she intended her electronic signature not be used to sign any prescriptions, even for non-controlled drugs; she intended to manually sign all prescriptions.

[20] Most of the prescriptions introduced into evidence bearing Dr. Nilson's electronic signature were for Lortab. While Lortab was a Schedule II controlled drug at the time of trial, Dr. Nilson testified that it was not in 2012 when her electronic signature was printed on these prescriptions.

[21] Murguia entered a guilty plea to the false personation charges.

wrongdoing to Brown and Dixon. Given this evidence, this Court cannot find that the district court abused its discretion in granting the motions to quash all counts of false personation charged against Brown and Dixon.

PROPOSITION TWO: DISTRICT COURT'S RULING GRANTING OXLEY'S DEMURRER IS ERRONEOUSLY BASED ON SUFFICIENT EVIDENCE ARGUMENT.

The initial felony Information alleged twenty-six counts against Oxley. He was charged with twenty-nine felony counts in the amended Information. Over halfway through preliminary hearing, Oxley waived preliminary hearing and entered a plea of not guilty. After preliminary hearing, the State filed a second amended Information alleging twenty-one counts against Oxley. The third amended Information alleged twenty counts against Oxley. Subsequently, Oxley filed a demurrer to the Information, Motion to Quash, and brief in support. At the conclusion of a motion hearing the district court sustained Oxley's demurrer as to all counts charged against him. The State announced its intent to appeal this ruling. Oxley filed in this Court a motion to dismiss the State's appeal for lack of jurisdiction.

As is recognized by both parties, this Court's scope of review on a State appeal is limited by 22 O.S.2011, § 1053 which permits the

State to appeal only from certain delineated adverse rulings by a district court. The State acknowledges that a ruling granting a demurrer is not an appealable ruling under Section 1053. Thus, the State asks this Court to characterize the lower court's ruling as a ruling sustaining a motion to quash appealable under 1053(4). It also asks this Court to find that the motion to quash is waived as it was filed after Oxley entered his plea.

It is true that failure to file motion to quash prior to entering a plea on the merits waives any complaint that the magistrate erred in bind-over. *See Mitchell v. State*, 2005 OK CR 15, ¶ 51 n.11, 120 P.3d 1196, 1209 n.11; *Farmer v. State*, 1977 OK CR 215, ¶ 25, 565 P.2d 1068, 1072 ("as the defendant did not file the motion to quash prior to entering a plea on the merits, any complaint that the examining magistrate erred is waived"). Presumably, this is precisely why the district court ruled on all other codefendants' motions to quash but omitted reference Oxley's motion to quash, ruling instead on Oxley's demurrer to the Information. While Oxley's demurrer to the Information, motion to quash, and brief in support largely addressed the facts supporting the motion to quash, Oxley's demurrer was timely

and properly alleged that "the Third Amended Information states facts that do not constitute a public offense. . . ."

Under these circumstances, we will not construe the district court's ruling as anything other than that intended – a ruling sustaining Oxley's demurrer to the Information. This is not an appealable ruling under Section 1053. Furthermore, because the district court did not direct that a new Information be filed as is provided for in 22 O.S.2011, § 508, the district court's ruling sustaining Oxley's demurrer to the Information operates as a bar to further prosecution. *See State v. Young*, 1994 OK CR 25, ¶¶ 6-8, 874 P.2d 57, 59. The State's appeal of the district court's ruling on Oxley's demurrer to the Information is dismissed.

PROPOSITION THREE: EVEN IF PRELIMINARY HEARING EVIDENCE WAS INSUFFICIENT, THE PROPER REMEDY IS TO REMAND THE CASE BACK TO CONTINUE PRELIMINARY HEARING

The State argues that the magistrate, upon determining that probable cause existed to bind the defendants over for trial, terminated the preliminary hearing precluding the State from presenting further evidence in support of its case.[22] Thus, it complains that if this Court

[22] This is allowed under 22 O.S.2011, § 258(Sixth) which provides as follows:

finds that the State failed to present sufficient evidence, it should remand the case back to the district court to allow the State to resume preliminary hearing to put on the evidence it intended to show the probable cause necessary to bind defendants over for trial.

As the State points out, the record shows that at the end of the day on November 14, 2017, the magistrate announced that he had "sufficient information and evidence upon which to determine the issues in this preliminary hearing, and I see no further reason to continue it." The magistrate added that he would allow further cross-

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A preliminary magistrate shall have the authority to limit the evidence presented at the preliminary hearing to that which is relevant to the issues of: (1) whether the crime was committed, and (2) whether there is probable cause to believe the defendant committed the crime. Once a showing of probable cause is made the magistrate shall terminate the preliminary hearing and enter a bindover order; provided, however, that the preliminary hearing shall be terminated only if the state made available for inspection law enforcement reports within the prosecuting attorney's knowledge or possession at the time to the defendant five (5) working days prior to the date of the preliminary hearing. The district attorney shall determine whether or not to make law enforcement reports available prior to the preliminary hearing. If reports are made available, the district attorney shall be required to provide those law enforcement reports that the district attorney knows to exist at the time of providing the reports, but this does not include any physical evidence which may exist in the case. This provision does not require the district attorney to provide copies for the defendant, but only to make them available for inspection by defense counsel. In the alternative, upon agreement of the state and the defendant, the court may terminate the preliminary hearing once a showing of probable cause is made.

examination of the witness currently testifying and another whose testimony had been cut short but he stated, "the preliminary hearing, for all intents and purposes, is finished. . . ." The following morning, the prosecutor asked for clarification, stating that it was his understanding that the magistrate had terminated preliminary hearing under Section 258. After much discussion, the magistrate clarified that he was vacating his order terminating the preliminary hearing only to the extent that the defense had not had the opportunity to cross-examine two witnesses; Agent Carpenter, who had not returned to court for cross-examination because of illness, and Dr. Brittingham, who had not been cross-examined when the magistrate stated his intent to terminate the proceeding the day before. It was agreed that defense counsel could cross-examine Agent Carpenter and Dr. Brittingham. The prosecutor, however, objected to the magistrate precluding him from further examination of Dr. Brittingham. He asserted, without explanation, that Dr. Brittingham's further testimony would not have been cumulative but would have supported additional counts. Dr. Brittingham testified on direct examination for over eighty pages. His testimony, ultimately, did not provide the requisite probable cause regarding the counts charged and the State

did not argue below and does not argue on appeal that further direct examination of this witness would have elicited additional testimony providing the necessary probable cause on the counts charged. The State's request for remand for further preliminary hearing is denied.

DECISION

The ruling of the district court sustaining the motions to quash and demurrer are **AFFIRMED**. Oxley's motion to dismiss the State's appeal for lack of jurisdiction is **DENIED** as **MOOT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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LUMPKIN, J.: Concur
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