Circuit Court for Baltimore City
Case No. 315365004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 556

September Term, 2020

KAYLA ASHLEY NELSON

v.

STATE OF MARYLAND

Fader, C.J.,
Berger,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: July 15, 2021

A Baltimore City jury convicted appellant Kayla Nelson of one count of illegal possession of oxycodone. The court sentenced her to serve three years in prison.

Nelson petitioned for post-conviction relief, asserting that she was denied the effective assistance of counsel. The circuit court held a hearing and denied her petition. This Court granted an application for leave to appeal to address one issue: "Did the circuit court err in denying post-conviction relief where (1) trial counsel failed to investigate and obtain certain key medical records and (2) that failure prejudiced the defense by depriving Appellant of critical evidence corroborating her testimony?"

We answer, "Yes," to that question, reverse the denial of post-conviction relief, and remand for a new trial.

BACKGROUND

1. The Arrest

On the evening of August 31, 2015, a Baltimore City Police detective was conducting covert surveillance for drug activity. He observed Nelson, who was wearing an orthopedic boot on one foot, engage in a brief conversation with a man, pass him a small object, and receive cash in return. The detective followed the man and observed him pass the same small object to a woman. The detective radioed other officers, who arrested the man and woman. The woman was holding a warm glass pipe that is used to smoke crack cocaine and had a rock of crack cocaine inside her bra.

The same officers then arrested Nelson for suspected distribution of crack cocaine. Upon searching her, the officers found $116 in cash and a blue Ziploc bag containing

seven oxycodone pills inside her bra. Nelson told the arresting officer that the oxycodone pills had been prescribed to her because she had a broken foot. She did not have proof of a prescription with her.

2. The District Court Proceedings and the Initial Investigation

The next day, Nelson was charged in the District Court of Maryland for Baltimore City with possession of cocaine, attempted distribution of cocaine, and possession of oxycodone.[1] She qualified for the services of the Office of the Public Defender and on December 12, 2015, was assigned counsel.

Ten days later, on the morning of Nelson's district court trial, Nelson's counsel met with her for the first time. Nelson told her counsel that she had a prescription for the oxycodone. Counsel advised Nelson not to go to trial. Nelson disregarded that advice and was convicted on all three charges.

Two days later, on December 24, 2015, counsel met with Nelson at the Baltimore City Detention Center to advise her about her right to a de novo appeal to the circuit court. During that meeting, Nelson signed authorizations for the release of her medical records from Johns Hopkins Bayview Medical Center and Patient First, an urgent care center. On the release form for Patient First, the Nelson's counsel wrote that the "Date(s)

[1] Oxycodone is a Schedule II controlled dangerous substance. Md. Code (2002, 2021 Repl. Vol.), § 5-403(b)(1)(xiii) of the Criminal Law Article. Persons may not lawfully possess oxycodone unless they obtained the drug "directly or by prescription or order from an authorized provider acting in the course of professional practice[.]" *Id.* § 5-601(a)(1).

of Service" were between January 1, 2015, and August 31, 2015, and that the records sought were emergency room records and discharge summaries. On the release form for Bayview, counsel did not specify the dates of service or the types of records sought. Both releases were on counsel's letterhead, which stated that her address was on Lexington Street in Baltimore.

On January 5, 2016, Nelson's counsel noted an appeal to the circuit court. The court set the trial for February 26, 2016, but later postponed it until March 3, 2016.

On or around February 16, 2016, counsel informed Nelson that she had received two records from Patient First. The records pertained to medical treatment that Nelson received on July 27, 2015, and August 1, 2015, about a month before her arrest on August 31, 2015. Patient First had mailed the records to Nelson's counsel on January 27, 2016.

3. <u>The Jury Trial</u>

Nelson's jury trial went forward on March 3 and 4, 2016. At trial, the State established that Nelson engaged in what appeared to be a hand-to-hand drug transaction involving crack cocaine and that, when the police officers searched her, they found cash and seven oxycodone pills in a blue Ziploc baggie in her bra.

On cross-examination, the police detectives acknowledged that Nelson was wearing an orthopedic boot. The arresting officer testified that Nelson claimed to have a prescription for the oxycodone pills. That same officer, who was accepted as an expert in

the packaging, identification, and distribution of controlled dangerous substances, opined that blue Ziploc baggies are typically used to package drugs for distribution.

Following a lunch recess on the first day of trial, Nelson's counsel advised the court that Nelson wished to discharge her. Nelson explained that she was dissatisfied with her representation because counsel did not meet with her until the day of her district court trial and, after their meeting on December 24, 2015, did not meet with her again until February 24, 2016. Nelson added that her counsel was supposed to obtain her prescription for the oxycodone.

Nelson's counsel responded that after the meeting on December 24, 2015, she had waited to travel to Jessup, where Nelson was being detained, until she had something to tell her. Counsel asserted that she did not have any information for Nelson until February 16, 2016. Counsel was unable to arrange to meet with Nelson until February 24, 2016.

The court ruled that the request to discharge counsel was unmeritorious (*see* Md. Rule 4-215(e)), and Nelson decided not to discharge her counsel and represent herself.

Nelson testified in her case. During her testimony, Nelson's counsel showed her a medical record from Patient First, dated July 27, 2015. That record, which was marked as Defense Exhibit 1, reflected that Nelson had sought treatment for an injury to her right foot, which she had sustained in a car accident. Nelson had complained of severe pain, swelling, and the inability to bear weight on her foot. On examination, the treating physician noted "impressive swelling" and bruising and gave her Tylenol with codeine.

An x-ray revealed three metatarsal fractures.[2] The treating physician placed Nelson's foot in a splint, provided her with crutches and a medical shoe, and directed her to see an orthopedic specialist. The record listed the prescriptions given as 20 Naprosyn[3] and 15 Percocet,[4] both to be taken as needed for pain. No refills were authorized.

The prosecutor objected to the admission of Defense Exhibit 1 on the ground that it was not certified as a business record in accordance with Md. Rule 5-902(b)[5] and that it

[2] The metatarsal bones are the five elongated bones between the tarsus (the bones of the ankle) and the phalanges (the bones of the toes). Together, the metatarsal bones "form the front of the instep and ball of the foot." *Metatarsal*, MERRIAM–WEBSTER MEDICAL DICTIONARY, https://www.merriam-webster.com/medical/metatarsal (last visited May 27, 2021).

[3] Naprosyn is a brand name for naproxen, an anti-inflammatory pain reliever. *Naproxen*, MERRIAM–WEBSTER MEDICAL DICTIONARY, https://www.merriam-webster.com/medical/naproxen (last visited May 27, 2021).

[4] Percocet is a combination of oxycodone and acetaminophen (the active ingredient in Tylenol). *See Percocet*, MERRIAM–WEBSTER MEDICAL DICTIONARY, https://www.merriam-webster.com/medical/percocet (last visited May 27, 2021).

[5] Rule 5-902(b)(1) provides in pertinent part as follows:

> Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that

(Continued…)

was hearsay. The prosecutor added that the record was not a prescription. Nelson's counsel responded that the document was "self-authenticating"[6] and that it was not hearsay because she was introducing it to show that Nelson had received medical care, and not to prove the truth of the matters asserted in the record. The court ruled that Nelson could testify about her medical care, but that the record itself was inadmissible because it was not accompanied by the appropriate certification to establish that it was a business record.

Nelson went on to testify that when she was arrested she had a "broken leg" and was on crutches. She said that she had been treated for her injury at Patient First and had been prescribed oxycodone.

At the end of the direct examination of Nelson, the trial judge asked the parties to approach the bench. There, the judge pointed out that Defense Exhibit 1 did not state that Nelson had been prescribed oxycodone. Nelson's counsel responded that a second medical record showed that she had been prescribed oxycodone.

That record, marked as Defense Exhibit 2, pertained to Nelson's visit to Patient First five days later, on August 1, 2015, for the evaluation of a bump on her head. The

(…continued)

> the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

[6] Pursuant to Md. Rule 5-902(b), a certified business record may be self-authenticating in some circumstances. *See supra* n. 5. Defense Exhibit 1 does not appear to have been certified as a business record.

medical history section of the record reflected that Nelson was taking "Oxycodone Hcl [hydrochloride] 15mg Tablet[s]." According to the record, the treating physician diagnosed the bump on Nelson's head as a cyst, replaced the splint on her right foot, and directed her to follow up with an orthopedic specialist within two days.

The judge disagreed that Defense Exhibit 2 showed that Nelson had been prescribed oxycodone. He observed that the reference to the medication appeared in the medical history that Nelson had supplied, not in the section for the prescriptions that the healthcare providers had written. The trial judge asked Nelson's counsel to "show [him] where it says that any doctor or hospital provided [oxycodone]." Counsel stated, ambiguously, that she did not have Nelson's Bayview records because "[t]hey sent it back." The trial judge remarked that he did not know whether the Bayview records would say that Nelson had been prescribed oxycodone, and he pressed Nelson's counsel to explain Nelson's testimony that a Patient First doctor prescribed oxycodone to her even though the medical records did not support that statement. Nelson's counsel reiterated that she did not "have all of [Nelson's] medical papers because . . . they" – apparently meaning Bayview – "didn't give it all to [her]." She only had what she had received from Patient First.

The court commented:

> There are ways to obtain medical records and this case has certainly been around long enough that they could have been obtained. I don't know what they would show, but they don't show what she just testified to. And I think that is misleading. I can give an instruction that there is no record of any prescription.

Nelson's counsel stated that she would object to such an instruction. The court questioned her basis for objecting, asking again if she had any proof that Nelson had a prescription for oxycodone. Counsel replied that Defense Exhibit 2 established that Nelson had been previously prescribed oxycodone, and she reiterated that "the medical records for Johns Hopkins [i.e., Bayview] . . . were sent back." In addition, counsel attempted to argue that Percocet was "another word for oxycodone[.]"

The court reaffirmed its earlier ruling concerning Defense Exhibit 1 and ruled that Defense Exhibit 2 was likewise inadmissible.

The prosecutor then began his cross-examination:

> [PROSECUTOR]: Ms. Nelson, you testified that you had a prescription for oxycodone?
>
> [NELSON]: Yes.
>
> [PROSECUTOR]: Where is it?
>
> [NELSON]: My lawyer was due to get them - -
>
> [PROSECUTOR]: Say it again.
>
> [NELSON]: My lawyer was supposed to get all of my medical records but it looks like you all won't let her present the records that she gave to the Court.

At the close of all the evidence, the court instructed the jurors that it was "unlawful for any person to possess any controlled dangerous substance unless such substance was [ob]tained [subject] to a valid prescription or order from [an authorized provider]."

In closing argument, the prosecutor emphasized that Nelson possessed oxycodone when she was arrested and had "plenty of opportunity to produce a prescription." He argued that she would not have hidden the pills in her bra if she had a prescription for them.

Defense counsel responded that the jurors should credit Nelson's testimony that she lawfully possessed the oxycodone under a prescription that she had received to treat pain related to her broken foot.

The jury acquitted Nelson of possession of cocaine and attempted distribution of cocaine, but convicted her of possession of oxycodone.

4. Sentencing

At a sentencing hearing on April 19, 2016, Nelson's trial counsel informed the court that after the trial she had obtained Nelson's medical record from Bayview. Counsel asserted that, according to the record, Nelson "did have a prescription issued to her . . . for her broken foot." The two-page record consisted of emergency department discharge instructions from July 28, 2015, the day after Patient First directed Nelson to see an orthopedist and four days before Patient First documented that she was taking oxycodone. The Bayview record included a business records certification, signed on April 15, 2016, which made the record admissible as substantive evidence under an exception to the general prohibition against hearsay. Md. Rule 5-902(b); Md. Rule 5-803(b)(6). On the Bayview record, a physician noted that Nelson had been diagnosed

with a toe fracture. Under a heading for "Medications Prescribed," the physician wrote "Oxy 15 [illegible]" and designated "30" in the section for "# in RX/Refills."

Trial counsel argued in "mitigation" that if Nelson was directed to take oxycodone for pain on an "as needed" basis, it was not unreasonable to believe she would still have seven pills left a little over a month later, when she was arrested. Counsel explained that it had been "very difficult to get that information from Johns Hopkins" and that she had made four attempts to get the record between the verdict and sentencing, ultimately obtaining a faxed copy from a person who worked in the medical records department.

The court imposed a sentence of three years. Her sentence later was modified to two years and 6 months.[7]

5. <u>The Post-Conviction Petition</u>

In August 2016, Nelson filed a *pro se* petition for post-conviction relief on the ground of ineffective assistance of trial counsel. Among other things, Nelson alleged that her trial counsel had failed to obtain her prescription for oxycodone before trial. She attached the Bayview record to her petition.

[7] Nelson noted an appeal to this Court, but she voluntarily dismissed it, apparently because she had no right to a further appeal after her de novo appeal from the district court to the circuit court. *See* Md. Code (1974, 2020 Repl. Vol.), § 12-302(a) of the Courts and Judicial Proceedings Article (prohibiting further appeal from "a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of the District Court").

In June 2019, Nelson, through counsel, supplemented her petition, raising two grounds, including the ineffectiveness claim at issue in this appeal. The State opposed the petition.

6. The Hearing on the Post-Conviction Petition

The court held a hearing on the petition on June 27, 2019. Both Nelson and trial counsel testified.

Nelson testified that she advised trial counsel on December 22, 2015, that she had a prescription for oxycodone and that she had received medical treatment for her broken foot at three facilities: Patient First, Bayview, and a clinic located in the Belair-Edison neighborhood. She signed medical releases for trial counsel to obtain her records.

Trial counsel testified that she first met with Nelson on December 22, 2015. On that date she learned that Nelson claimed to have had a prescription for the oxycodone. She met with Nelson a second time two days later, on December 24, 2015, and had her sign medical releases for Patient First and Bayview. Trial counsel could not locate the third facility where Nelson claimed to have received treatment. She mailed the medical releases to Patient First and Bayview on January 12, 2016. As previously stated, counsel did not specify the dates of service or the types of records sought on the Bayview release form.

Trial counsel testified that in mid-January 2016 she moved from an office on Lexington Street, which is the address that appeared on the release forms that she sent to the medical providers, to an office on Charles Street. A colleague at the Lexington Street

office would call her to let her know that she had received mail, and she would "go by periodically to pick it up[.]" There is no indication in the record that counsel employed a routine forwarding order to direct the Postal Service to send her mail to her new address.

Trial counsel testified that at some point before February 16, 2016, she received the two records from Patient First, along with a bill. On February 16, 2016, counsel wrote to Nelson to inform her that she had received documents from Patient First.

Because she had received nothing from Bayview, counsel "thought," at first, that Nelson might have been "mistaken" about having been treated there. Counsel claimed, however, that after the case had gone to the jury on the last day of trial (March 4, 2016) she picked up her mail from the Lexington Street office and discovered a letter from Bayview. According to counsel, the letter, which is not part of the record in this case, informed her that she needed to pay a bill "before they would release any kind of information."[8]

The letter from Bayview apparently included a bill in the amount of $22.88 and a marked-up copy of the medical release form that trial counsel had submitted. The bill was dated February 16, 2016 (two weeks before the first day of the trial), and was directed to trial counsel's office on Lexington Street. The marked-up copy of the release form bears a stamp indicating that Bayview received it on February 4, 2016, and a

[8] Trial counsel was not asked to explain why she told the trial judge that Bayview had "sent it back" and "didn't give it all to [her]" on March 3, 2006, if she did not receive this response from Bayview until March 4, 2006.

handwritten notation dated February 12, 2016. Next to the section pertaining to the dates of service and the types of records requested, which counsel had left blank, someone had written "INCOMPLETE" and "MUST BE COMPLETED."

On March 16, 2016, nearly two weeks after Nelson was convicted, trial counsel paid the bill. Trial counsel testified that on April 15, 2016, after multiple phone calls, a Bayview employee faxed Nelson's medical record to her. She received a hard copy of the record by mail. As previously stated, the record lists "Oxy 15" as a medication prescribed to Nelson at the Bayview emergency department on July 28, 2015. The Patient First record of August 1, 2015, reflects Nelson's report that she was taking "Oxycodone Hcl [hydrochloride] 15mg Tablet[s]" at that time.

When asked why she did not request a postponement of Nelson's trial to obtain the Bayview record, trial counsel responded that on the first day of trial she still was operating under the mistaken belief that Nelson had not been treated there. In "hindsight," counsel acknowledged that she could have done more – that she could, for example, have visited her old office on a daily basis to check for mail and that she could have followed up with Bayview.

On cross-examination, the State asked trial counsel how she would have proceeded at trial if she had had the Bayview record. Counsel responded that she would have tried to persuade the State to drop the oxycodone charge. Alternatively, she would have introduced the record and argued to the jury that Nelson was legally in possession of

the oxycodone pills. Counsel doubted that the jury would have found Nelson guilty if she had had the Bayview document at trial.

Nelson's post-conviction counsel argued that trial counsel's efforts to obtain the record before trial were insufficient. She stressed that the August 1, 2015, Patient First record reflected that Nelson had been prescribed oxycodone, but that the record was not itself a prescription. She argued that, although trial counsel had notice that Nelson had been prescribed oxycodone, trial counsel did not follow up with Bayview to determine whether her records request had been received or act to expedite the response. In the alternative, post-conviction counsel argued that trial counsel should have requested a continuance to allow more time to obtain the record. Counsel argued that Nelson was prejudiced by trial counsel's failure to act diligently, because her only defense to the charge of possession of oxycodone was that she had a valid prescription for it.

The post-conviction court questioned whether the discharge instructions from Bayview amounted to a prescription. Nelson's post-conviction counsel argued that if it was not a prescription, it was strong evidence that Bayview gave Nelson a prescription. She cited *State v. Young*, 462 Md. 159 (2018), for the proposition that the general prohibition against hearsay would not bar the introduction of the record, because a prescription evidences a "verbal act" – a physician's order that the patient receive a certain medication. A verbal act – an utterance that has independent legal significance

simply because it was made, such as an order, an offer, or an acceptance – is not hearsay. *See, e.g.*, *State v. Young*, 462 Md. at 175.[9]

The State responded that trial counsel did all that could reasonably be expected of her to obtain the prescription before trial. It argued that the Bayview record was not a prescription, pointing out that the words "Not Valid for Controlled Substances" were printed at the top of it.

7. <u>The Ruling on the Post-Conviction Petition</u>

On October 1, 2019, the circuit court issued a memorandum opinion and order denying the petition for post-conviction relief.

In its opinion, the court noted trial counsel's success in obtaining the Patient First records. The court also noted trial counsel's statements on the first day of Nelson's criminal trial, that she had attempted to obtain the Bayview records, but that "they were sent back."[10] Because counsel had made these efforts to investigate the defense and prepare for the trial, the court concluded that trial counsel's efforts did not fall below an objective standard of reasonableness.

[9] Counsel did not note that because the record was accompanied by a certification that it was a business record, it would have been admissible as substantive evidence under the business records exception to the rule against hearsay. Md. Rule 5-902(b)(1); Md. Rule 5-803(b)(6).

[10] The court did not note that counsel's statement was at odds with her testimony at the post-conviction hearing, where she said that she had received no response from Bayview until the final day of the criminal trial.

Alternatively, the court concluded that Nelson did not suffer any prejudice as a result of deficient trial preparation. In support of that conclusion, the court reasoned that the Bayview record was not a prescription and, hence, that it would not have been admissible.[11]

This Court granted Nelson application for leave to appeal the denial of post-conviction relief.

DISCUSSION

Nelson contends that the post-conviction court erred in determining that trial counsel's performance was not deficient and in its alternative ruling that she was not prejudiced by the delay in the discovery of the Bayview record. We agree and shall reverse the judgment of the post-conviction court.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the right to the assistance of counsel at critical stages of the proceedings against them. To ensure that the right to counsel provides meaningful protection, the right has been construed to require the "'effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *accord Duvall v. State*, 399 Md. 210, 221 (2007).

[11] The court also addressed and rejected Nelson's argument that trial counsel was ineffective because she did not object to improper remarks made by the prosecutor in his opening and closing statements. Because we did not grant leave to appeal on that issue, it is not before us.

To establish a claim of ineffective assistance of counsel in violation of her constitutional rights, Nelson must satisfy the two-prong test articulated in *Strickland v. Washington*. The first prong requires Nelson to show that counsel's performance was deficient because she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687. The second prong requires Nelson to show that counsel's performance was so deficient that it prejudiced her defense. *Id.*

To satisfy the first prong, Nelson must show that the acts or omissions of counsel were the result of unreasonable professional judgment and that counsel's performance fell below an objective standard of reasonableness considering prevailing professional norms. *See, e.g.*, *Cirincione v. State*, 119 Md. App. 471, 484 (1998) (citing *Oken v. State*, 343 Md. 256, 283 (1996)); *see also Coleman v. State*, 434 Md. 320, 331 (2013). Because "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

To satisfy the second prong, Nelson must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. A "reasonable probability" is "'a probability sufficient to undermine confidence in the outcome.'" *Coleman v. State*, 434 Md. at 340 (quoting *Strickland v. Washington*, 466 U.S. at 694). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. at 686.

Whether Nelson received ineffective assistance of counsel is "a mixed question of fact and law." *State v. Purvey*, 129 Md. App. 1, 10 (1999). "[W]e will defer to the post conviction court's findings of historical fact, absent clear error." *Cirincione v. State*, 119 Md. App. at 485 (citation omitted). But we exercise our "own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any." *State v. Jones*, 138 Md. App. 178, 209 (2001); *accord Coleman v. State*, 434 Md. at 331.

1. <u>Deficient Performance</u>

"'[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *State v. Johnson*, 143 Md. App. 173, 192 (2002) (quoting *Strickland v. Washington*, 466 U.S. at 691). To determine whether counsel conducted a reasonable investigation, the Court of Appeals has looked for guidance to the ABA Standards for Criminal Justice. *See State v. Syed*, 463 Md. 60, 75-76 (2019).

The ABA Standards assert that "[d]efense counsel has a duty . . . to determine whether there is a sufficient factual basis for criminal charges";[12] that the duty "is not terminated by factors such as the apparent force of the prosecution's evidence";[13] that counsel's "investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter";[14] and that the investigation "should always be shaped by what is in the client's best interests."[15]

In our independent judgment, the undisputed facts establish that trial counsel's untimely and disorganized investigation fell short of these standards. On December 22, 2015, trial counsel first learned that Nelson claimed to have a prescription for the oxycodone found on her person when she was arrested. Counsel obtained signed medical releases for Patient First Bayview and Bayview two days later, on December 24, 2015. Yet counsel waited at least 18 days – until January 12, 2016 – to mail the releases to the medical facilities. At the same time, trial counsel was moving her office. Although counsel expected the medical records to be mailed to her at her old address, she did not

[12] ABA Standards for Criminal Justice: Defense Function, Standard 4-4.1(a) (4th ed. 2017), available at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

[13] *Id.*, Standard 4-4.1(b).

[14] *Id.*, Standard 4-4.1(c).

[15] *Id.*

put in a forwarding order for her mail or check for mail at her old office location on a daily basis. Consequently, even though the Patient First records were mailed to counsel on January 27, 2016, she did not retrieve them from her former office until around February 16, 2016, just 10 days before Nelson's scheduled trial date.

The Patient First records contained two important pieces of information. First, they showed that Nelson had been assessed and treated for severe pain occasioned by multiple foot fractures on July 27, 2015, and that she had been directed to follow up with an orthopedic specialist. Second, they showed that five days later she returned to Patient First for an unrelated ailment and, according to her medical history, was taking "Oxycodone Hcl 15mg Tablet[s]." These records put trial counsel on notice that Nelson may have received a prescription for oxycodone between the July 27, 2015, and August 1, 2015, visits, perhaps from the orthopedic specialist whom she had been directed to see at the first of the two visits to Patient First. Nelson would have received that prescription about a month before her arrest on August 31, 2015. Nonetheless, the record contains nothing to indicate that counsel took any additional steps to track down the prescription between February 16, 2016, and the trial date, which was initially scheduled for February 26, 2016, and postponed until March 3, 2016.

Meanwhile, although trial counsel had specified the dates of service in the Patient First record request, she did not specify the dates of service in the Bayview record request. As a consequence, at some point on or after February 12, 2016, Bayview returned the request to her, at the address on the record request – her former address on

Lexington Street. Despite the failure to specify the dates of service, Bayview still managed to identify two pages of medical records, because at some point on or after February 16, 2016, it sent a $22.88 bill for those two pages of medical records. Once again, however, Bayview sent the bill to counsel's former address.

Trial counsel appears to have made inconsistent statements about when she first heard from Bayview. On the first day of trial she told the trial judge that Bayview had "sent it back" (perhaps referring to the defective records request) and "didn't give it all to [her]." On the other hand, she told the post-conviction court that, on the second day of trial, she picked up her mail from her old office and discovered a letter from Bayview informing her that she needed to pay the bill "before they would release any kind of information." The Bayview record, which was certified as authentic and as a business records that is admissible under an exception to the rule against hearsay, establishes that a Bayview physician prescribed oxycodone to Nelson on July 28, 2015 – one day after Patient First directed her to see an orthopedist and four days before she told Patient First that she was taking oxycodone.

Regardless of when counsel first heard from Bayview, it is obvious that she could have obtained the Bayview record in advance of trial if she had exhibited a greater degree of vigor in pursuing her investigation. She could, for example, have submitted a routine forwarding order to the Postal Service. She could have visited the old office more frequently than once a week, as she claims to have done. Or she could have called Bayview to check on the status of the records request. The trial judge himself remarked

that the case had "certainly been around long enough" for counsel to obtain all of the relevant records.

Had she taken a few additional steps, counsel would undoubtedly have learned that Bayview had had problems with the records request as she had formulated it, but that the hospital had still found two pages of records, which she could obtain for a small price. Because she failed to take those steps, she proceeded toward trial under the mistaken assumption that Bayview had no responsive documents. In short, although counsel undoubtedly conducted some investigation into whether Nelson had a prescription for oxycodone, it is difficult to resist the conclusion that she failed to conduct a reasonably diligent and thorough investigation.

Trial counsel identified no trial strategy, much less a sound strategy, justifying her action. The delays in mailing the releases and in following up with Bayview could not have been the result of a sound strategic choice. Likewise, no sound strategy animated trial counsel's failure to properly complete the release form and her failure to ensure the prompt receipt of mail sent to her former office. In our independent judgment, therefore, trial counsel's conduct of the investigation into the sole evidence that would support Nelson's defense to the charge of possession of oxycodone fell below an objective standard of reasonableness. We reject the post-conviction court's conclusion that counsel satisfied the requirements of the Sixth Amendment and Article 21 merely by sending out

records requests and informing the trial court that she had nothing from Bayview because the hospital had "sent it back."[16]

2. Prejudice

To satisfy the second prong of the *Strickland* test, Nelson must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See, e.g., Strickland v. Washington*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* The Court of Appeals has interpreted "reasonable probability" to mean "'a substantial or significant possibility that the verdict of the trier of fact would have been affected.'" *State v. Syed*, 463 Md. 60, 86-87 (2019) (quoting *Bowers v. State*, 320 Md. 416, 426 (1990)).

Nelson was charged under Maryland Code (2002, 2012 Repl. Vol.), § 5-601(a)(1) of the Criminal Law Article, which prohibits a person from "possess[ing] . . . a controlled dangerous substance, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice[.]" "[T]he subsection creates a statutory defense for possession, so long as the substance is obtained: (1) directly or by prescription or order; (2) from an authorized provider; and (3) from a provider acting in the course of professional practice." *State v. Young*, 462 Md. at 177.

[16] We also reject the State's suggestion that trial counsel's disbelief of her client could have justified a lack of diligence in investigating the existence of a prescription.

At trial, Nelson's theory of defense was that she had a valid prescription for the oxycodone, which she received to treat the pain caused by her broken foot. The court ruled that the Patient First records, which corroborated Nelson's testimony that she had a fracture and supported an inference that she had been prescribed oxycodone between July 27, 2015, and August 1, 2015, were inadmissible because they were not certified as business records, and because they did not show that a physician had prescribed oxycodone to Nelson. Trial counsel did not have Bayview's certified business records, which reflect that on July 28, 2015, a Bayview physician dispensed[17] or prescribed 30 oxycodone pills to Nelson, to treat the pain associated with her broken foot.

"Ordinarily, 'hospital records may be admitted under the business records exception to the hearsay rule, Rule 5-803(b)(6).'" *Hall v. Univ. of Md. Med. Sys. Corp*., 398 Md. 67, 86 (2007) (quoting *State v. Bryant*, 361 Md. 420, 430 n.5 (2000)). The limited exception to this rule concerns entries within a hospital record that are not "'pathologically germane' to the physical condition which caused the patient to go to the hospital in the first place." *Yellow Cab Co. v. Hicks*, 224 Md. 563, 570 (1961); *see also Hall v. Univ. of Md. Med. Sys. Corp*., 398 Md. at 93 ("entries in hospital records which

[17] Under Maryland Code (2002, 2012 Repl. Vol.), § 5-501(a) and (b) of the Criminal Law Article, an "authorized provider" may "dispense" a Schedule II controlled dangerous substance without a written prescription if he or she is dispensing it "directly to an ultimate user." A physician licensed in the state is an "authorized provider" and "dispense" includes "to prescribe, administer, package, label, or compound a substance for delivery." *Id*. § 5-101(d)(2)(ii) & (l)(2).

are pathologically germane, or relevant to the diagnosis or treatment of the patient's condition, typically fall within the business records exception to the hearsay rule").

As previously stated, the Bayview record was certified as a business record in accordance with Md. Rule 5-902(b). The discharge instructions were signed by the attending physician and by Nelson. The relevant entries in the discharge instructions were pathologically germane, as they concern the date of Nelson's visit to the emergency department at Bayview (July 28, 2015), her diagnosis (a toe fracture) and her treatment (a prescription for oxycodone). The record, therefore, would have been admissible under Md. Rule 5-803(b)(6). Although the record itself is not a prescription, it is circumstantial evidence supporting an inference that Nelson received a prescription for oxycodone or received the oxycodone directly from an authorized provider at Bayview on July 28, 2015.[18]

[18] Nelson argues that the Bayview record was admissible under *State v. Young*, 462 Md. 159 (2018), which held that a prescription is not the hearsay assertion of the prescribing physician that the patient suffers from a condition for which she needs the prescription or that the physician is authorized to provide it. *See id*. at 177-79. Instead, the prescription (or, more accurately, the writing of the prescription) is a "verbal act" – a statement that has independent legal significance, such as an offer or an agreement to enter into a contract or lease. *Id.* Because the Court of Appeals did not decide *Young* until after Nelson's trial, the State argues that trial counsel would have needed a crystal ball to appreciate that the Bayview record might be admissible. To the contrary, trial counsel would not have needed a crystal ball to know that a medical record, certified as an authentic business record in accordance Md. Rule 5-902(b), was admissible for the truth of the matters asserted therein, as long as they were medically or pathologically germane. In any event, *Young* did not announce a new legal principle; rather, it rejected the State's aberrant interpretation of longstanding principles of Maryland law. Indeed, the trial judge himself appears to have recognized that counsel

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Nelson was prejudiced by trial counsel's failure to obtain this record until after she was convicted. The evidence adduced at trial showed that Nelson possessed seven oxycodone pills when she was arrested. The officer who arrested her and the officer who surveilled her before her arrest both testified that Nelson was wearing a medical boot. Nelson testified in her defense that she had been prescribed the oxycodone. Because trial counsel did not have the Bayview record, she could not introduce any documents corroborating Nelson's testimony about her injury, her prescription, or when she may have been prescribed the medication. The prosecutor capitalized upon this evidentiary vacuum in cross-examining Nelson and during his closing argument, emphasizing that Nelson never produced a prescription for the oxycodone. Had the jurors seen the Bayview record, which was circumstantial evidence supporting a strong inference that Nelson had been prescribed 30 pills of oxycodone 34 days before her arrest, "there [i]s a substantial or significant possibility that the verdict of the trier of fact would have been affected." *State v. Syed*, 463 Md. at 86-87 (citation omitted).

The State argues that Nelson's defense had other infirmities. For example, she was never able to produce an actual prescription, or even a pill bottle. Moreover, she was holding the bills in her bra, which suggests that she was hiding them or did not have a legitimate right to possess them. Nelson had responses to these criticisms. She said that

(…continued)
could have adduced circumstantial evidence of a prescription by introducing a medical record evidencing the prescription.

after she was arrested she was unable to return home to retrieve the bottle. She also said that she kept the pills in a Ziploc bag in her bra because the orthopedic boot prevented her from wearing ordinary pants with pockets. (She was wearing spandex tights when she was arrested.) And in 2015 (as in 2021) paper prescriptions were much rarer than they once were.

For present purposes, it is unnecessary to evaluate the merits of these factual disputes. To be entitled to a new trial, Nelson need not show that the charges against her are meritless, or even that a jury would probably have acquitted her had her counsel obtained the Bayview record. Nelson need only show a significant or substantial possibility that the result at trial would have been different but for counsel's errors. In our independent judgment, she has met that standard.

For these reasons, we reverse the judgment of the post-conviction court and remand for the court to order a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.