

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

XUN WANG,

Defendant-Appellant.

MSC No. _____

COA No. 336673

LC No. 2015-754-FH

DEFENDANT-APPELLANT'S APPLICATION
FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD DEFENDANT’S CONVICTION FOR THE UNLAWFUL PRACTICE OF MEDICINE BE VACATED WHERE THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF DEFENDANT’S GUILT BEYOND A REASONABLE DOUBT, WHERE THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONSISTENT WITH A VERDICT OF GUILT AND WHERE COUNSEL WAS INEFFECTIVE IN FAILING TO MAKE A MOTION FOR A DIRECTED VERDICT?**

Defendant answers “Yes.”

Prosecution answers “No.”

Court of Appeals answered “No.”

- II. SHOULD DEFENDANT’S CONVICTIONS FOR MEDICAID FRAUD BE VACATED WHERE THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF DEFENDANT’S GUILT BEYOND A REASONABLE DOUBT, AND WHERE THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONSISTENT WITH A VERDICT OF GUILT.?**

Defendant answers “Yes.”

Prosecution answers “No.”

Court of Appeals answered “No.”

STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant was convicted of Counts I and II: Medicaid Fraud - False Claim and Count III: Unlawful Practice of Medicine, after a bench trial in the Ingham County Circuit Court, on November 4, 2016. She was sentenced on January 11, 2107, to a period of probation. Defendant filed a timely Claim of Appeal. The Court of Appeals affirmed Ms. Wang's conviction by opinion dated May 10, 2018 (Exhibit A). The Court vacated the portion of Ms Wang's sentence imposing a \$105,000.00 fine and remanded for resentencing (Exhibit A at 9). Ms. Wang now files the instant application for leave to appeal with this Court. This Court has jurisdiction pursuant to MCR 7.303(B)(1) and MCR 7.305(B)(5).

STATEMENT OF JUDGEMENT APPEALED FROM AND RELIEF SOUGHT

Jessie Wang files the within Application for Leave to Appeal the Court of Appeals' Opinion dated May 10, 2018, affirming her conviction (Exhibit A). This Court ought to grant leave to appeal because the lower court rulings are clearly erroneous and if permitted to stand, will cause a material injustice. MCR 7.305(B)(5).

In affirming Ms. Wang's conviction for the unauthorized practice of medicine, the Court of Appeals has misinterpreted and misapplied MCL 333.16215. The Court of Appeals upheld Ms. Wang's conviction finding that the statute, "does not allow for the delegation of acts, tasks and functions that one must be a licensed doctor to perform, regardless of supervision" (Exhibit A at 5). This holding is erroneous. On the contrary, the statute specifies that a physician *may* delegate acts to an "unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision." The Court of Appeals has essentially ruled that residents and interns may not perform medical tasks. This view of the statute is overly narrow and arguably impacts the medical education of every doctor-in-training, nurse-in-training, or other medical professional-in-training.

Further, in affirming Jessie Wang's convictions for Medicaid Fraud, the Court of Appeals ignored the general principle of individual culpability. The Court upheld her conviction on a finding that although Ms. Wang did not personally submit the charges to Medicaid, "defendant was familiar with the Medicaid system, and was aware that the clinic saw Medicaid patients." (Exhibit A at 8). As such, the Court inferred Ms. Wang's guilt as to the two patients from whose treatment these charges arose, without any evidence that she was aware of their claimed Medicaid status. Rather, the

Court approved the convictions simply Jessie Wang was employed in an office where some of the patients were Medicaid recipients and she should have known that taking notes on patient care - regardless of whether she was aware that the patients were Medicaid recipients - would be used to submit false Medicaid claims. A finding of guilt under this theory is erroneous and ignores the requirements of personal knowledge and individual culpability.

STATEMENT OF FACTS

Xun “Jessie” Wang, was charged in a three count Information with Counts I and II charged: Medicaid Fraud - False Claim, MCL 400.607(1). Count III charged: Unlawful Practice of Medicine, MCL 333.16294. The allegations were based on Ms. Wang’s conduct while employed at Livernois Family Medical Services and the clinic’s billing of approximately \$260.00 to Medicaid.

Ms. Wang filed a motion to quash the information. The motion was heard and denied on December 9, 2015 (MT 12-9-15)¹. As to Count I, the Court found that Ms. Wang’s acts, which included evaluating patients and providing prescriptions at a time when no licensed physician was on the premises, was sufficient to establish she was practicing medicine without a license (MT 12-9-15 at 14). The trial court also denied the motion as to Counts II and III, but indicated concern because the doctor had “caused his staff to behave in a manner that was illegal, and maybe they did not realize what was going on.” (MT 12-9-15 at 16-17).

Ms. Wang waived her right to a jury trial (TI 6). The parties stipulated that Ms. Wang did not possess a Michigan health profession license in 2014 or 2015 (TI 8). The parties agreed that Dr. Hussain was not present in the Livernois Family Medical Clinic on May 6, 2014, August 12, 2014, August 14, 2014 or December 29, 2014 (TI 9).

Attorney General Special Agent Drew Macon testified he was originally investigating Dr. Murtaza Hussain, owner of Livernois Family Medical Services, in Detroit, regarding the over prescribing of medications (TI 34, 35). Dr. Hussain was enrolled as a Medicaid provider. Agent Macon scheduled an appointment for August 12, 2014, in an undercover capacity (TI 36).

¹Motion transcripts will be references by date as (MT). The Trial will be referenced: 10-31-16 (TI), 11-1-16 as (TII-A) and (TII-B), 11-3-16 as (TIII) and 11-4-16 as (TIV). The sentencing will be referenced as (ST).

Agent Macon used the alias of Christopher Anderson. On arrival at the clinic, he completed paperwork and provided his Medicaid card (TI 37). Ms. Wang came out and accompanied Agent Macon to obtain his weight and blood pressure (TI 37). She placed him in an exam room, obtained his medical history and left the room for a few minutes (TI 38). Agent Macon did not know if Ms. Wang contacted Dr. Hussain when she left the room. Upon returning, Ms. Wang advised that Agent Macon needed to forward his New York medical records to the office and she provided a release form and instructions to do so (TI 83). She also provided several prescriptions at his request.

Ms. Wang never identified herself as a doctor (TI 40, 65). Agent Macon thought that she was a physician assistant (TI 85). He did not believe she was a medical doctor (TI 85). Ms. Wang did not conduct any physical examination and spent only five or six minutes with Agent Macon (TI 40, 42). The entire exchange was captured on video and played for the court (TI 42). The officer identified the prescriber's signature on the medication prescriptions as that of Murtaza Hussain (TI 46).

Agent Macon also identified several billing documents. He identified the billing summary for his outpatient visit, with a procedure code of 99204, and totaling, \$220.00. The amount paid by Medicaid was \$71.70 (TI 47). He also identified his own patient progress notes as well as the notes for Krystal Jackson (alias used by second investigator), as well as the records of three other patients that he had interviewed: Alicia Jackson, Loretta Wilson and Sara Jackson.

The patient notes relevant to Agent Macon had been entered in to the computer and electronically signed by Dr. Hussain. The notes reflected Agent Macon's reported medical and prescription history. Those progress notes also indicated that he was seen by Jessie Wang and Dr. Hussain (TI 54). Agent Macon never saw Dr. Hussain. The officer had no idea who entered the notes into the computer (TI 69). He saw Ms. Wang writing notes during his visit but was unaware of what

happened to those notes (TI 70). “Krystal Jackson’s” progress notes similarly indicated that the patient was seen by Jessie Wang and Dr. Hussain (TI 55).

Agent Macon obtained and executed a search warrant for the Livernois practice. He located pre-signed prescription pads bearing the signature of Dr. Hussain and spoke with Dr. Hussain. He learned that Jessie Wang had been placed in the clinic originally through AmeriClerkships on December 17, 2013 (TI 58, 61). The documentation for the AmeriClerkships program specified that members could not practice medicine and should refrain from presenting themselves as licensed medical practitioners. Participants were cautioned to remain under the direct supervision of the attending physician (TI 59). Agent Macon had no information as to Ms. Wang’s knowledge of, or involvement in, the office’s Medicaid billing procedures (TI 78). He did not locate any documentation signed by Ms. Wang relating to Medicaid procedures (TI 79).

Attorney General Special Agent Lorrie Bates was employed in the Health Care Fraud Division of the Attorney General’s Office (TI 89). She also scheduled an appointment at the Livernois Family Clinic in an undercover capacity. She claimed to be Krystal Jackson and appeared at the clinic on December 29, 2014. (TI 90). She identified herself as a Medicaid patient. She was accompanied into an exam room by a medical technician who noted her complaints and advised that the doctor would be in momentarily (TI 92). Ms. Wang was the next person to enter the room.

When Jessie Wang entered the exam room she identified herself as Dr. Hussain’s assistant and did not claim to be a physician (TI 136; TII-A 10). Agent Bates knew that Jessie Wang was not the doctor (TII-A 34, 37). Ms. Wang did not say she was a “physician assistant” but only that she was Dr. Hussain’s assistant (TII-A 39).

Ms. Wang asked the same general questions as the technician and obtained a medical history from Agent Bates. Agent Bates complained of headaches. Ms. Wang asked questions related to the headaches and then left the room for five or six minutes (TI 95, 121, TII 58). Upon her return, Ms. Wang provided advice about sleep and caffeine reduction and indicated that she would provide a prescription for the controlled substance Ambien (TI 95, 99, 101). Agent Bates had no idea who actually called in the prescription (TII-A 17). Ms. Wang said that she was not the doctor but that she was Dr. Hussain's assistant and he was not there that day (TI 99). A video tape of the exchange was played for the court (TI 102). Jessie Wang spent eight or nine minutes with Agent Bates (TI 121).

Agent Bates was part of the team that executed the search warrant at Livernois Family Clinic. Ms. Wang was not present and Agent Bates went to Ms. Wang's home. Ms. Wang agreed to speak with the agents (TI 106). She advised that she had been placed at the clinic through AmeriClerkships and after she finished her internship, she became employed by Dr. Hussain (TI 106-107). She was not a doctor and worked only under Dr. Hussain's guidance. If she saw a patient when the doctor was not in the office, she contacted him by phone to make ultimate decisions (TI 108). He made all decisions relevant to prescriptions (TII-A 26).

Ms. Wang obtained patient medical histories and entered the information in the computer (TI 107). Dr. Hussain would review her input, make desired changes and finalize the computer entries (TI 110). Agent Bates reviewed the patient records for "Krystal Jackson" and noted they had been electronically signed by Dr. Hussain (TI 112). Agent Bates also noted that several examinations were reflected in the electronic report that had not been conducted during her visit (TI 114). Agent Bates did not have Ms. Wang's written notes to compare to those that were electronically signed by Dr.

Hussain (TI 126-127). She had no idea how many employees had accessed the final entries (TI 129). She found no evidence that Jessie Wang was involved in Medicaid billing (TII-A 16).

Agent Bates contacted AmeriClerkships (TI 116). She reviewed the AmeriClerkships documentation signed by Jessie Wang, even though Ms. Wang was not a participant in AmeriClerkships during the relevant time period and was not bound by the requirements of that program (TI 116-118; TII-A 24). The documentation cautioned participants not to appear to be practicing medicine and to advise patients of their non-physician status (TI 120).

The parties thereafter stipulated to the testimony of the MRE 404B witnesses. Sierra Jackson was a Medicaid beneficiary and seen at Livernois Family Medical Services on May 6, 2014 (TII-B 4). Jessie Wang conducted a gynecological examination on that date and Dr. Hussain was not in the office. Ms. Jackson had no idea if Ms. Wang was in contact with Dr. Hussain. Alecia Jackson testified to a similar experience on August 14, 2014, and was a Medicaid/Medicare patient.

Trina Guy was a data specialist with the Attorney General's Office Health Care Fraud Division (TII-B 7). She pulled Medicaid data for Murtaza Hussain at Livernois Family Services (TII-B 7). The Medicaid processing system reflected that a claim was submitted and paid for Chris Anderson for services on August 12, 2014, in the amount of \$71.70 (TII-B 12). Prescription were paid in the amount of \$51.30, \$8.87 and \$4.33 (TII-B 19). Similar payments were made to Dr. Hussain resulting from "Krystal Jackson's" visit on December 29, 2014. There was a payment for the office visit, in the amount of \$110.59 (TII-B 13). The total amount for both Agent Bates and Agent Macon's undercover visits and medications was approximately \$260.00 (TII-B 24).

Ms. Guy was not familiar with the billing practices of Livernois Family Services (TII-B 21). She had never worked in an office that billed Medicaid and had no information as to the layers of medical office employees involved in such billings.

Michele Warstler was employed by the Office of the Inspector General in the Michigan Department of Health and Human Services (TII-B 28). She explained that providers of Medicaid services are responsible for reviewing the Medicaid Provider Manual - a 2000 page document found on-line. That manual requires that the care of Medicaid beneficiaries may only be delegated to unlicensed, certified persons when the physician is physically present and providing direct supervision (TII-B 32). The procedures billed for Agent Bates and Macon required such supervision and if billed without such supervision would be considered a false claim (TII-B 34). Similarly, Medicaid would not pay for prescriptions provided by an unlicensed person even if written under the physician's name. The Medicaid provider is required to properly train staff but there is no requirement that the staff review or acknowledge the Provider Manual (TII-B 36-37).

Dr. Catherine Reid was an employee of the State of Michigan Office of Medical Affairs - part of the Michigan Department of Health and Human Services (TII-B 39). She testified that it was her opinion that Jessie Wang was engaged in the practice of medicine with respect to her contacts with Agent Lorrie Bates and Agent Drew Macon (TII-B 51).

Dr. Reid also reviewed the computer generated progress notes and diagnosis codes in reaching her opinion although she had no information as to who actually authored the notes (TII-B 59-62). Dr. Reid never visited the office and was not aware how the documents could have been altered or amended by Dr. Hussain (TII-B 92). She could not tell by reviewing the notes whether Jessie Wang had actually completed them and she never spoke with Jessie about this issue. She

simply assumed that Ms. Wang had authored the reports (TII-B 95). She made this assumption even though the notes were dated approximately eight days after Agent Bates' appointment (TII-B 96).

Dr. Reid further opined that anyone that had done an internship ought to be familiar with billing procedures (TII-B 69). She added that the patient insurance record was a part of the file in this instance and sheet of paper could be observed in the videotape sitting on the desk while Ms. Wang was making notes and filling out the prescription (TII-B 70). Dr. Reid never saw the actual piece of paper and the agents told her that they could not obtain a copy of the billing document but the prosecutor told her that it was the billing sheet (TII-B 105, 108). She had no independent knowledge of the billing practices of the Livernois Family Practice (TIII 14). She had no idea if Jessie Wang had personally submitted anything to Medicaid.

Dr. Reid reached the same conclusion with respect to Agent Macon ("Christopher Anderson") even though the video was not as clear and Ms. Wang did not appear on the video - only her voice was heard (TII-B 70). During much of the video, Ms. Wang was asking questions about Agent Macon's medication and dosage. Dr. Reid opined that the decision to prescribe medication involved the practice of medicine (TII-B 73). Such a decision cannot be delegated to an unlicensed person without the physician's presence. Dr. Reid reviewed the computer generated patient notes associated with Agent Macon. The notes alleged that the patient had been seen by Ms. Wang and Dr. Hussain. The progress notes indicated that a very detailed physical examination occurred - all of which was necessary for accurate billing - but that intensive examination did not occur (TII-B 85). Dr. Reid opined that as a foreign doctor having completed several clerkships, Jessie Wang would have been aware of the American model of medical practice and the necessity of obtaining a license

to engage in such activity. Further, unless it is a free clinic, Ms. Wang would have been aware that visits would be billed to an insurance company or paid in cash by the patient.

The prosecution rested after the completion of Dr. Reid's testimony. Defense counsel moved for a directed verdict as to Counts I and II - charging Medicaid Fraud (TIII 39). Counsel submitted that all that Jessie Wang had done was to fill out progress notes. She had nothing to do with submitting a Medicaid claim. There was no fraud and such a finding in this matter would essentially allow the conviction of anyone at any doctor's office having any input into putting notes in a file that resulted in a claim for payment. The prosecution responded:

[B]ut for the fact that defendant saw these patients, there would have been no claim. That is causing it. Not just by the fact that she saw the patient but she wrote up her notes and passed them along and they were billed, and we know that happened because what was in the notes is consistent with that we see in the video for the most part, except for where she stated that Doctor Hussain also saw the patient. (TIII 42-43).

The prosecution contended that Jessie Wang was guilty as an aider and abettor because she aided Dr. Hussain in his scheme by seeing patients inputting her notes into the computer. The prosecutor opined that Jessie passed her notes to the doctor so that he could review them and make or change information in order to facilitate a Medicaid billing (TIII 45). The trial court denied the directed verdict:

There has to be sufficient evidence to show Medicaid claims were filed and that defendant did some actions and that she knew that she caused or presented or caused to be made false claims, and that she had actual or constructive knowledge that these claims were false, and at this point in the trial the prosecution has presented enough evidence that these counts should go forward. (TIII 48).

Murtaza Hussain testified that he owned Livernois Family Medical Services from 1993 until 2015 (TIII 49). As a part of his practice, he accepted training responsibilities for one or two foreign doctors a year through the AmeriClerkships - a company that places foreign doctors for internship

rotations (TIII 95). At the time of the instant investigation, Dr. Hussain there were three foreign doctors at the clinic. Ms. Wang was one of those individuals. Prior to the instant matter, Dr. Hussain believed it appropriate for those foreign physicians, though unlicensed, to see patients so long as Dr. Hussain was available by phone (TIII 87). He had also believed that it was legitimate to leave signed prescription pads with his office manager for the convenience of his patients (TIII 96). As a result of the investigation, he pleaded guilty to one count of Medicaid Fraud and one count of Health Care Fraud (TIII 85). His medical license was suspended for three years.

Dr. Hussain explained that Jessie Wang was initially involved in the clinic through AmeriClerkship. Ms. Wang completed an internship of one or two months. After Ms. Wang completed her rotation, she began to apply for residency programs but stayed at the clinic as a volunteer (TIII 52). She later accepted a part-time paid position at the clinic.

At the beginning of the AmeriClerkships rotation, Dr. Hussain met with Ms. Wang to discuss the clinic schedule and his expectations. She was permitted to take patient history, conduct physical evaluations and discuss the results with the doctor. He did not believe that he, as the supervising physician, was required to remain in the room the entire time. Ms. Wang was taught to write her notes out on paper so that she would remember what occurred and to enter the notes in the computer (TIII 56). The backside of the note sheet contained billing information. Ms. Wang did not circle or otherwise indicate evaluation or management codes on the billing form (TIII 95). Once Jessie entered her notes into the computer, Dr. Hussain reviewed them. He made necessary changes and electronically signed the notes (TIII 59). He could access the notes from the office or off-site. He was able to change anything including the diagnosis, treatment, assessment and plan (TIII 90).

The Livernois clinic had been a Medicaid provider since 1993. During the years of association with AmeriClerkships, Dr. Hussain never trained the foreign doctors in billing practice (TIII 57). The internship agreement did not require any such training. Jessie Wang was never trained in office billing procedures nor involved in Medicaid billing (TIII 58, 95). Dr. Hussain never discussed billing with Ms. Wang nor did he review the back portion of the form with her (TIII 79).

Dr. Hussain reviewed the clinic billing process. When a patient arrived at the clinic, the receptionist generated a two-sided encounter form. One side was for billing information and one side was blank. Whoever saw the patient put their notes on the blank side of the form to preserve the information to be electronically entered later. Dr. Hussain would review the notes and make changes, additions or deletions and then sign the final notes. He was the only one who reviewed the notes and after he signed, a diagnostic code was automatically generated for Medicaid (TIII 65). Dr. Hussain could modify that code if he chose to do so or accept it. The encounter forms were stacked up and at the end of a week either the stack was forwarded to the billing company. The billing company forwarded the information to the insurance company or Medicaid. Ms. Wang's involvement ended when she input her notes into the electronic system (TIII 68). She never reviewed bills prior to the submission of bills to Medicaid (TIII 84).

Dr. Hussain had electronically signed the patient progress notes for August 12, 2014. He did not sign until August 18, 2014 (TIII 71). Dr. Hussain was not in the clinic on August 12th but he was present on August 18th. The clinic did not shut down in Dr. Hussain's absence and Ms. Wang could reach him by phone. He left signed prescription pads as well in his absence and employees were permitted to provide prescriptions to patients after consultation with Dr. Hussain (TIII 74-75).

Jessie Wang 's husband, Xiang Zhang, met Jessie at Purdue University in 2001, where they were both students (TIII 106-107). At the time of trial, the couple had two boys, ages eight and six, and Jessie was pregnant with a third child. He testified that Jessie was an honest person. Yiping Zeng-Wang was acquainted with Jessie Wang through church and similarly opined that Jessie was an honest person (TIII 110). Roosevelt King knew Jessie from art school and described her as the most honest person he knew (TIII 143).

Darius Baty had been employed by Livernois Family Medical Services in 2010 (TIII 121). Prior to that date he had been employed as a certified nursing assistant. He was hired as a medical assistant after he was trained in coding and billing (TIII 121). He was employed as a medical assistant throughout 2014 and knew Jessie Wang during the relevant time periods (TIII 112, 130). He knew that she was not a licensed physician (TIII 127).

Mr. Baty believed about half of the clinic's patients were Medicaid beneficiaries (TIII 132). Other patients were direct-pay and others were insured through Medicare or private insurers (TIII 138). A patient's insurance status was known to the front desk staff, the clinical manager and billing (TIII 132). A copy of a patient's Medicaid card would be included in the paper chart but no one would see it unless there was occasion to flip through the actual paper chart (TIII 133).

Mr. Baty was familiar with the office's Medicaid billing procedure. He was the last person to review billing sheets before they were sent to the third party biller (TIII 113). Dr. Hussain circled the procedure codes and updated progress notes on the computer and then the billing was directed to Mr. Baty to confirm that the progress notes matched the billing codes. Mr. Baty would forward the information to the third party billing company and that company would submit the actual bills.

Jessie Wang had no involvement in the billing process (TIII 115). He did not recall processing any billings with Jessie Wang's signature (TIII 119).

Xun "Jessie" Wang testified that she obtained her medical degree from Beijing, China after completing a five year program. She completed a two years of a three year residency in internal medicine and left China in 2001 because she received a full scholarship to Purdue University (TIII 148, 169). She received her PhD in Basic Medical Science and accepted a job as a medical researcher at the University of Michigan Medical School (TIII 147). After working for five years, she decided to stay home to care for her eldest son. She later returned to work at Beaumont Hospital, researching clinical trials in the surgical department.

In 2012, Ms. Wang became involved with AmeriClerkships as a way of obtaining the experience necessary prior to entering a residency program (TIII 177). She worked with several clinics in one month rotations. In 2013, Ms. Wang was placed with Livernois Family Medical Services. Ms. Wang was charged with taking medical histories, conducting physical examinations, writing notes and reporting to Dr. Hussain (TIII 152). The clinic rotation lasted a month and she subsequently volunteered at the clinic one or two days a week for three or four months. She was later hired to work 10-15 hours per week (TIII 154). Dr. Hussain paid her \$20.00-\$30.00/hour (TIII 212).

Dr. Hussain asked Ms. Wang to gather medical histories, write down the information she obtained and report to him; he would return to the patient room with Ms. Wang to make a diagnosis (TIII 155). Ms. Wang identified the form on which she placed her handwritten notes and explained that the back of the form contained billing codes with which she was unfamiliar (TIII 156). Ms. Wang would later enter her notes into the computer as a draft (TIII 162). She had no idea what happened to the notes once they were entered (TIII 157). Dr. Hussain never discussed diagnosis

codes or billing with her (TIII 213). Ms. Wang never considered her notes would be used by the doctor for billing, she “didn’t think that far.” (TIII 184). She was simply taking notes for assisting with patient treatment. She never used the backside of the encounter sheet (TIII 189).

Ms. Wang was never trained in clinic billing practices (TIII 157-158). She knew that the Chinese and American medical systems were different but was unfamiliar with the specifics of the American insurance system. Ms. Wang believed that some of Dr. Hussain’s patients were Medicaid beneficiaries but never paid attention to an individual patient’s insurance. The piece of paper (encounter sheet) with which Ms. Wang was provided at the clinic did not indicate the nature of a patient’s insurance coverage (TIII 182). Jessie knew that some of the patients were receiving Medicaid but did not know which ones (TIII 182-183).

Ms. Wang recalled the visits with both Agent Macon and Agent Bates. She recalled leaving the room on each occasion to call Dr. Hussain and obtain his decision as to how to proceed and whether to prescribe medication (TIII 159). Every decision and every act that Ms. Wang took as to patient care and treatment was at the direction of Dr. Hussain (TIII 197- 201). Even when Dr. Hussain was out of the office, Ms. Wang discussed every patient with him. Ms. Wang did not did not make diagnosis or treatment decisions (TIII 206-207, 210, 214). Jessie Wang had no idea that her acts were criminal (TIII 165-167).

In closing, the prosecution argued, as to the Medicaid Fraud allegations, that Ms. Wang was guilty because she knew that some of the clinic patients were Medicaid patients and she knew an insurance claim would be made based on her involvement with patient care. The prosecution argued that Ms. Wang was guilty because Dr. Hussain could not bill a case without relying on Ms. Wang’s documentation (TIII 10).

The trial judge found Ms. Wang guilty of all counts although noted that it was a difficult decision (TIV 44). Jessie Wang appeared for sentencing on January 11, 2017. There were no objections to the sentencing guidelines. The prosecution indicated that the restitution had been paid by Dr. Hussain but requested the maximum fines of \$105,000.00, be assessed to Ms. Wang (ST 9). Defense counsel reminded the court that the restitution as to Jessie Wang, although paid by Dr. Hussain, was less than \$300.00 (ST 11).

The trial judge noted that she believed Ms. Wang was a good doctor and not a bad person. Ms. Wang took care of her patients and listened to them (ST 13). The judge placed Ms. Wang on probation for five years. She ordered 365 days in jail but that it be held in abeyance. The court ordered that probation would terminate upon completion of the affirmative condition that Ms. Wang (1) pay: \$204.00 in state costs, \$650.00 in court costs, and fines in the amount of \$105,000.00 (ST 16)². Ms. Wang filed a timely claim of appeal.

On May 10, 2018, the Court of Appeals issued an opinion. The Court affirmed Ms. Wang's convictions but vacated the order to pay a fine of \$105,000.00. The opinion will be referenced as necessary in the **ARGUMENT** herein.

²Judgment of Sentence e-filed as Exhibit B. Order of Probation and notes e-filed as Exhibit C.

ARGUMENTS

I. DEFENDANT’S CONVICTION FOR THE UNLAWFUL PRACTICE OF MEDICINE MUST BE VACATED WHERE THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF DEFENDANT’S GUILT BEYOND A REASONABLE DOUBT, WHERE THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONSISTENT WITH A VERDICT OF GUILT AND WHERE COUNSEL WAS INEFFECTIVE IN FAILING TO MAKE A MOTION FOR A DIRECTED VERDICT.

Standard of Review: The issue of insufficiency of the evidence is reviewed *de novo*. *People v Wolfe*, 440 Mich 508 (1992). Ineffective assistance of counsel is reviewed *de novo*. *People v Pickens*, 446 Mich 298, 359 (1994).

Discussion: The Due Process Clause prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 US 358, 361-362; 90 SCt 1068; 25 LEd 2d 368 (1970). The reasonable doubt requirement is a due process safeguard developed to protect citizens. “The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.” *In re Winship*, 397 US at 363.

MCR 6.403 provides that the court sitting as fact-finder “must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record.” See also MCR 2.517. This articulation of the path the fact-finder takes in reaching its verdict is analogous to a judge's charge in a jury trial, as it reveals the law applied by the fact-finder. *People v Jackson*, 390 Mich 621, 627 (1973); *People v Ramsey*, 89 Mich App 468 (1979). Even in a case where there is contradicting evidence, a reviewing court must reverse a trial court's finding "when although there is evidence to support it, the reviewing court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed." *Tuttle v Dep't of State Highways*, 397 Mich 44, 46 (1976).

In this case, Jessie Wang was convicted of the unlawful practice of medicine, MCL §333.16294. The statute provides:

Except as provided in section 16215, an individual who practices or holds himself or herself out as practicing a health profession regulated by this article without a license or registration or under a suspended, revoked, lapsed, void, or fraudulently obtained license or registration, or outside the provisions of a limited license or registration, or who uses as his or her own the license or registration of another person, is guilty of a felony. [Footnote omitted, emphasis added].

MCL §333.16215 provides exceptions to this general prohibition and permits a physician to delegate certain acts and tasks to unlicensed persons. The statute provides in relevant part:

(1) Subject to subsections (2) to (6), a licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision. A licensee shall not delegate an act, task, or function under this section if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee under this article.^{3]}

The "supervision" required by MCL §333.16215, is defined by MCL §333.16109(2):

(2) "Supervision", except as otherwise provided in this article, means the overseeing of or participation in the work of another individual by a health professional licensed under this article in circumstances where at least all of the following conditions exist:

(a) *The continuous availability of direct communication in person or by radio, telephone, or telecommunication between the supervised individual and a licensed health professional.*

³The additional subsections relate to the delegation of surgical procedures and acupuncture which require the direct physical supervision by the licensee.

(b) The availability of a licensed health professional on a regularly scheduled basis to review the practice of the supervised individual, to provide consultation to the supervised individual, to review records, and to further educate the supervised individual in the performance of the individual's functions.

(c) The provision by the licensed supervising health professional of predetermined procedures and drug protocol.

The trial court concluded that Jessie Wang was guilty of the charged offense because Ms. Wang held herself out to be a doctor and provided advice and information within the realm of a physician (TIV 45). The court found that Ms. Wang conducted invasive and non-invasive procedures⁴ and the patients (the undercover officers) believed she was the doctor:

Even when you said you were not a doctor, you still gave them medical advice, information that really is in the realm of a doctor, and I understand why you did it. It's just against the law * * * (TIV 45).

The trial court erred in so finding. The trial court failed to consider the statutory exceptions referenced in the applicable statutes and failed to consider whether Dr. Hussain had properly delegated and supervised Ms. Wang. Had the trial judge done so, she would have entered a finding of “not guilty” as to this charge. The Court of Appeals similarly erred in considering this issue.

The Court of Appeals affirmed Ms. Wang’s conviction. The Court rejected Ms. Wang’s contention that Dr. Hussain had properly delegated and supervised her activities and ruled that the statute did not permit a physician to delegate acts which encompassed “the practice of medicine”:

In addition, the “delegation exception” does not allow for the delegation of acts, tasks and functions that one must be a licensed doctor to perform, regardless of supervision. Defendant’s actions were consistent with the practice of medicine and therefore could not be delegated to her under the statute. [Exhibit A at 5].

⁴This is an erroneous statement in that there were no invasive procedures conducted in either charged offense. In fact, in Agent Macon’s case, he testified that there was no physical examination (TI 40, 42).

The Court of Appeals erred in so ruling. There is nothing in the statute which prohibited Dr. Hussain's delegation of medical tasks to Jessie Wang. The text of the statute is attached as Exhibit D. A review of the statute confirms that it does not prohibit the delegation of the acts for which Jessie Wang was convicted, so long as Dr. Hussain established that Ms. Wang had the proper level of education, skill and judgment required. The Court of Appeals' view of the statute is overly narrow and if taken to its logical conclusion, would prohibit medical internships and residency.

Dr. Hussain's delegation of tasks to Ms. Wang complied with the applicable statutes. The Michigan Public Health Code is instrumental in regulating health professional delegation and supervision. *See*, "Scope of Practice of Health Professionals in the State of Michigan," Prepared by Public Sector Consultants, <https://www.msms.org/Portals/0/Documents/ScopePracBook.pdf> (2001),⁵ and that publication expressly supports a finding that Jessie Wang acted within properly delegated functions.

Physicians have broad authority to delegate tasks:

Because they generally have the highest levels of formal education and training and broadest scope of practice, allopathic and osteopathic physicians, including those in the entire range of specialties (e.g., family practitioners, ophthalmologists, OB-GYNs, psychiatrists, and anesthesiologists), possess the most far-reaching authority to supervise and delegate of all the health professions. It is physicians' responsibility, under the Public Health Code, to supervise—either directly (in person) or indirectly (through another designated physician or through phone or other communication)—all people to whom they delegate tasks. [Exhibit E at 35].

Such permissible physician oversight specifically encompasses the supervision and delegation of interns and residents:

Physician oversight is not limited to people practicing other health professions; it also encompasses physician supervision of and delegation to other physicians, typically

⁵The relevant chapter discussing delegation and supervision are efiled as Exhibit E.

students, interns, or residents. Again, as specified in law, who oversees whom is based on knowledge, skill, and experience. One criterion for judging these factors is the length of time a professional has practiced medicine or number of times s/he has performed a procedure. [Exhibit E at 38].

The Health Code goes so far as to define the terms, specifying that delegation is authorization granted by a licensed health professional to another licensed or unlicensed person to perform selected acts, tasks, or functions that (1) fall under the scope of practice of the delegator and (2) are not within the scope of practice of the person to whom the assignment is delegated. *Id.* MCL §333.16215, *supra*, specifically grants authority to a licensed health professional to delegate activities. There are, of course, prerequisites to such delegation and each of those prerequisites was met in the instant case, illustrating that the delegation of tasks to Jessie Wang was not criminal.

The statute requires that prior to delegating a task, the licensed health provider must consider whether the non-licensed person is qualified and in so doing, must consider the unlicensed person's formal education as well as his or her training and whether the experience is consistent with the training. Additionally, the licensed health professional cannot delegate a task that exceeds the judgment of the unlicensed individual. Implicit in this provision is the consideration of any potential for harm to the patient. "This means, for example, that even though an RN could learn to perform brain surgery, a surgeon may not delegate this task because acceptable standards of care dictate that an RN has not been appropriately trained or educated to perform such a task." *See*, "Scope of Practice of Health Professionals in the State of Michigan," *supra* at 34 (Exhibit E).

In this case, the acts delegated to Ms. Wang were within the scope of Dr. Hussain's practice. Nothing about those tasks or about the interactions with either Agent Macon or Agent Bates, support a finding that the delegation was outside of the prevailing standards of care or beyond Ms. Wang's abilities.

Dr. Hussain was an internist and owned Livernois Family Medical Services (TIII 49). He was qualified - and the prosecution does not assert otherwise - to meet with patients (for as little as six to nine minutes), to gather medical and social histories, obtain vital signs, perform brief physical examinations, make notes of patient complaints, ask follow up questions regarding those complaints and discuss associated issues. Because Dr. Hussain was so qualified, he was authorized to delegate those tasks to a qualified unlicensed individual. Ms. Wang was such a person.

Ms. Wang was a trained doctor from a foreign country and she was a medical student (TIII 52). She had completed prior medical rotations in the United States and was applying for a medical residency (TIII 52). In fact, Ms. Wang had obtained a medical degree from Beijing, China after completing a five year program. She completed a two years of a three year residency in internal medicine and left prior to completing the residency because she received a full scholarship to Purdue University (TIII 148, 169). Ms. Wang received her PhD in Basic Medical Science from Purdue. She was thereafter employed by the University of Michigan for five years as a medical researcher (TIII 147). After the birth of her first child, Ms. Wang decided to stay home to care for her son. She later returned to work at Beaumont Hospital, researching clinical trials in the surgical department. When she decided to return to the practice of medicine, she associated with AmeriClerkships and was placed in several medical rotations in clinics in Illinois and Michigan. Her last AmeriClerkships placement was with Dr. Hussain. After completing her rotation, she volunteered at the clinic and was then hired as a part time employee. She was qualified by training and experience to accept the delegated tasks and the trial judge recognized that Jessie was a good doctor. At sentencing, the trial judge stated her opinion that Ms. Wang was a good doctor, that she listened to her patients and took

good care of them (ST 13). Ms. Wang had the requisite knowledge, training and experience to permit Dr. Hussain to delegate the above noted tasks.

The statute permitting delegation has an additional requirement, that is, the unlicensed person must be supervised by the delegator. Yet, contrary to the prosecution's position and the finding of the trial court, "supervision" *does not* mean that the licensed healthcare provider must be physically present at all times. While such a requirement might be relevant in analyzing a charge of Medicaid Fraud, the statute provides that physical presence *is not* required under the charge herein.

MCL §333.16109(2)(a), specifically defines "supervision." The statute requires the delegating physician to maintain direct communication "in person, or by radio, telephone, or telecommunication between the supervised individual and a licensed health professional." On-site physical supervision is not required. As such, the activities of Dr. Hussain and Ms. Wang did not run afoul of the law. Ms. Wang could always reach the doctor by phone. *Cf., Cherry v State Farm Mut. Auto Ins. Co.*, 195 Mich App 316, 321-322 (1992) (MCL §333.16109(2), prohibited a registered nurse from performing acupuncture where she was not "supervised" by someone licensed as a physician and trained or knowledgeable about acupuncture).

Under the facts and circumstances presented in this matter, Jessie Wang did not violate the law. In addition to the statutory assertions, *supra*, there is simply no evidence that Ms. Wang held herself out to be a physician. Agent Macon specifically testified Ms. Wang never identified herself as a doctor (TI 40, 65). She accompanied him from the waiting room to obtain his weight and vital signs and she directed him into an examination room (TI 38). These are not the activities of a physician but are more akin to a medical assistant. Nor did Ms. Wang conduct any physical examination of Agent Macon (TI 40). She only spent five or six minutes with him (TI 40, 42).

Agent Bates testified that during her visit, Ms. Wang specifically stated that she was not the doctor but that she was Dr. Hussain's assistant and he was not in the office that day (TI 99). Ms. Wang did not say she was a "physician assistant" but simply Dr. Hussain's "assistant" (TII-A 39). Agent Bates' entire exchange with Ms. Wang lasted only eight or nine minutes (TI 121). The fact that another medical assistant told Agent Bates that the doctor would be in shortly and that Jessie Wang entered thereafter is of no mind because there is no evidence that Ms. Wang was privy to the medical assistant's statement and because Ms. Wang specifically advised Agent Bates otherwise.

Ms. Wang did not make treatment decisions. Rather, after gathering the above noted information from the patient, Ms. Wang left the examination room, contacted Dr. Hussain and followed his directives as to patient care (TI 38, TI 95, 121, TII 58, TI 108, TII-A 26, TIII 155, TIII 159). Every decision and every act that Ms. Wang took as to patient care and treatment was at the direction of Dr. Hussain (TIII 197- 201). Ms. Wang did not make diagnosis or treatment decisions, Dr. Hussain did so (TIII 206-207, 210, 214).

A reasonable reading of the trial court findings of fact and conclusions of law leaves the reader with the definite and firm conviction that a mistake has been made. *People v Parney*, 98 Mich App 571 (1979); *People v Saxton*, 118 Mich App 681 (1982). There was insufficient evidence to support the trial court's verdict and the conviction should be vacated. In fact, had the trial court been presented with the relevant statutes, it is unlikely that Ms. Wang would have been convicted.

Trial counsel did not present the trier of fact with the relevant statutory provisions. In fact, while counsel made a directed verdict motion as to the two counts of Medicaid Fraud, he did not make such a directed verdict motion to the charge of unlawful practice of medicine. Trial counsel

failed to articulate that a complete reading of the relevant statutes supported a finding that Ms. Wang was not guilty. There is no possible trial strategy to justify this failure.

Had a properly articulated motion for a directed verdict been raised, or had the appropriate statutory provisions been referenced, a directed verdict or request for a finding of “Not Guilty,” would have been granted. As such, review is possible without an evidentiary hearing. *People v Cicotte*, 133 Mich App 630 (1984); *People v Johnson*, 124 Mich App 80 (1983); *People v Davis*, 102 Mich App 403 (1980); *People v Means (On Remand)*, 97 Mich App 641, 645 (1980). Nonetheless, if the Court feels that an additional record is required, Defendant hereby moves for a remand, pursuant to *People v Ginther*, 390 Mich 436, 442-43 (1973).

II. DEFENDANT’S CONVICTIONS FOR MEDICAID FRAUD MUST BE VACATED WHERE THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF DEFENDANT’S GUILT BEYOND A REASONABLE DOUBT, AND WHERE THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONSISTENT WITH A VERDICT OF GUILT.

Standard of Review: The issue of insufficiency of the evidence is reviewed *de novo*. *People v Wolfe*, 440 Mich 508 (1992).

Discussion: The Due Process Clause prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 US 358, 361-362; 90 SCt 1068; 25 LEd 2d 368 (1970); *See* cases cited, *supra*, **ISSUE I**. MCR 6.403 provides that the court sitting as fact-finder “must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. *See*, additional cases cited *supra*, **ISSUE I**.

Counts I and II charged Jessie Wang with Medicaid Fraud under MCL 400.607(1), which provides:

(1) A person shall not make or present or cause to be made or presented to an employee or officer of this state a claim under the social welfare act, 1939 PA 280, MCL 400.1 to 400.119b, upon or against the state, knowing the claim to be false.

Thus, in order to sustain a conviction under the statute, a prosecutor must prove the following elements beyond a reasonable doubt:

‘(1) the existence of a claim, (2) that the accused makes, presents, or causes to be made or presented to the state or its agent, (3) the claim is made under the Social Welfare Act, 1939 PA 280, MCL 400.1 et seq.; MSA 16.401 et seq., (4) the claim is false, fictitious, or fraudulent, and (5) the accused knows the claim is false, fictitious, or fraudulent.’ *People v Orzame*, [224 Mich App 551, 558 (1997)], citing *In re Wayne Co. Prosecutor*, [121 Mich App 798, 801–802 (1982)].

People v Kanaan, 278 Mich App 594, 619 (2008).

“Knowingly” is defined by MCL 400.602(f):

“Knowing” and “knowingly” means that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit. Knowing or knowingly includes acting in deliberate ignorance of the truth or falsity of facts or acting in reckless disregard of the truth or falsity of facts. Proof of specific intent to defraud is not required.

In this matter, the prosecution contended that Jessie Wang was guilty of Medicaid Fraud because she had lived in the United States for 15 years, had worked in several medical offices, had her own personal medical insurance, was aware of the existence of the Medicaid program, should have known that the information that she charted in the computer would be used for billing, was paid as a part time employee and because she knew that the clinic income was derived either from patients paying cash or from private insurance or Medicaid, she ought to have known that part of her paycheck came from such income (TIV 8-11). The prosecution concluded that, based on these assertions, “at a minimum [Ms. Wang] was aiding and abetting in the filing of false Medicaid claims.” (TIV 8).

The trial court found Ms. Wang, guilty of both counts charging Medicaid Fraud:

There is evidence that at least half of the money -- and it doesn't matter if it's half or any other portion, but I believe the testimony is or was that Livernois Family Medical Services received about half of their income from Medicaid. Exhibit B that we physically have here, it was just the one side, but I further inquired just to clarify, and the form that defendant used, this encounter form, Exhibit B, is not the full form, the other side is the billing form, so defendant clearly knew that there was billing going on to insurance. That there are multiple forms of insurance. This was not her only job. She had multiple experiences. She testified to that. And she clearly knew that her paycheck was derived from insurance, that insurance was going to be billed, that that's what her paycheck was coming from, at least in part -- at least in part from Medicaid.

A doctor must be present in order to delegate to an unlicensed physician, which she was clearly an unlicensed physician in Michigan. There is testimony that at least on two occasions, and that is in multiple places in the record, Doctor Hussain was not there, so at least twice Medicaid was billed and should not have been billed, so defendant caused Medicaid to be billed that was false and defendant knew or should have known that this was a wrongful act. (TIII 46-47).

The Court of Appeals affirmed the conviction, holding:

Evidence presented at trial demonstrated that defendant was familiar with the Medicaid system, and was aware that the clinic saw Medicaid patients. Although she did not personally submit the charges to Medicaid, she was aware that the patients she saw were billed for her services as though the patient had been seen by a doctor. In other words, defendant's conduct was "substantially certain to cause the payment of a Medicaid benefit." MCL 400.602(f). We therefore conclude from the evidence presented, and the reasonable inferences drawn from that evidence, that the trial court did not err in finding the prosecution proved this element. [Exhibit A at 8].

Both the Court of Appeals and the trial court erred. Neither Court made any finding, nor was there any evidence, that Jessie Wang possessed personal knowledge as to the claimed Medicaid status of either patient upon whose care these charges were filed. None of the facts relied upon by the prosecution or by either of the lower courts established that Jessie Wang, a part-time employee who examined and consulted with patients and placed draft notes into a chart, caused a claim to be submitted to Medicaid or that Ms. Wang's actions established that she acted knowingly.

A. The Prosecution Failed to Establish That Jessie Wang Possessed The Required Knowledge to Support the Convictions.

There are several key facts missing from the prosecution's proofs. Most importantly, there is not one scintilla of evidence that Jessie Wang was aware either Agent Macon or Agent Bates claimed to be a Medicaid beneficiary. The prosecution argued that Jessie, a part time employee, should be somehow imputed with this "knowledge" because roughly half of the clinic patients were Medicaid beneficiaries. Ms. Wang disagrees with this assertion on several levels.

There was no evidence that Ms. Wang knew the percentage of Medicaid clients at the clinic. It was Darius Baty, another employee of the clinic, that testified *he* believed about half of the clinic's patients were Medicaid beneficiaries (TIII 132). Mr. Baty added that clinic employees were not privy to the way in which clinic income was generated and a particular patient's insurance status was not common knowledge among employees. A patient's insurance status was known to the front desk staff, the clinical manager and billing (TIII 132). And while a copy of a patient's Medicaid card should be included in a client's paper chart, no one would see it unless there was occasion to flip through the actual paper chart (TIII 133).

In this case, there is no evidence that Ms. Wang ever had possession of the paper chart nor is there any evidence that the paper chart in the instant cases did, in fact, contain a copy of the Medicaid cards for Agent Bates or Agent Macon. The testimony offered at trial was that Ms. Wang had a single sheet of paper (or perhaps two sheets) with her in the examination room and she wrote notes thereon. No testimony was offered as to whether a paper chart was in Ms. Wang's possession, and if so, whether she had reviewed the entirety of its contents, whether copies of the Medicaid cards were contained therein or whether the paper chart was in a file cabinet. Nor did either Agent Macon or Agent Bates discuss their Medicaid status with Ms. Wang. The piece of paper (encounter sheet) with which Ms. Wang was provided at the clinic, did not indicate the patients' insurance coverage (TIII 182). Even the prosecution recognized that while Ms. Wang knew some of the clinic patients were receiving Medicaid, *she did not know which ones* (TIII 182-183). Without such proofs of Ms. Wang's knowledge as to the Medicaid status of the patients, an essential element of the charge is missing. Ms. Wang cannot be convicted of Medicaid Fraud without evidence that she knew the patient was a Medicaid beneficiary. She had no direct knowledge of such nor was there any evidence

that she should have familiarized herself with the insurance status of the patients that she was asked to examine of that she acted in deliberate ignorance of the facts or in reckless disregard thereof.

The theory that Jessie Wang was guilty because she transcribed her written notes into a computer and those notes were coded and changed by the billing physician and the physician's final notes were used to bill Medicaid and because she was paid by the clinic and knew that part of the clinic income was generated through Medicaid, is far too attenuated a theory to support these criminal convictions. The facts do not support a finding that she acted "knowingly" or that she was somehow responsible for causing the submission of a Medicaid claim and the trial court's holding to the contrary is erroneous. *See, People v Kanaan*, 278 Mich App 594 (2008).

In *Kanaan*, the defendant dentist was convicted of numerous counts of Medicaid Fraud. On appeal, he contended that there was insufficient evidence to uphold his convictions and to establish that he knew the submitted claims were false. In deciding that the defendant possessed the requisite knowledge of the false claims, this Court noted:

Paulette Carter, the office manager, testified that [Defendant] Kanaan was intimately involved in the billing process. According to Carter, [Defendant] Kanaan performed dental work according to a treatment plan and would then mark his initials on the chart next to the number indicating the treated tooth. Once treatment information was entered into the computer for billing purposes using various codes corresponding to the tooth number, Carter would check the form or chart against the computer screen to confirm billing accuracy, and Carter, as well as [Defendant] Kanaan, would review the patient's chart and compare it with the billing or claim form actually generated by the computer. Carter's testimony was not contradicted, and, further, it was supported by the testimony of Tasha Rieves, defendants' dental billing specialist during the period in question, who testified that [Defendant] Kanaan handwrote a treatment plan and noted on the patients' charts when the work had been performed before the charts were turned over to her for entry into the billing system. Thus, no claims would have been submitted for billing to Medicaid without [Defendant] Kanaan's express approval and acknowledgment that the work had been performed. Considering this evidence in conjunction with [expert] testimony that the number of tooth surfaces restored or filled was falsely identified in the claims for Medicaid reimbursement, there was sufficient evidence, when viewing it in a light most

favorable to the prosecution, showing that defendants had actual or constructive knowledge that the claims were false. MCL 400.607(1); MCL 400.602(f); [*People v Perez-DeLeon*, 224 Mich App 43, 48-50 (1997)].

People v Kanaan, *supra*, at 622–23.

The facts presented in the instant case are a far cry from those in *Kanaan*. Jessie Wang was placed with Livernois Family Medical Services as part of her Americleerks association in 2013. Ms. Wang was a student and was charged with taking medical histories, conducting physical examinations, writing notes and reporting to Dr. Hussain (TIII 152). Her clinic rotation lasted a month and she subsequently volunteered at the clinic one or two days a week, for three or four months. She was later hired to work 10-15 hours per week (TIII 154). At the beginning of her placement, Dr. Hussain instructed her to that when she saw a patient, she should take notes to preserve her memory and input the notes into the computer (TI 107, TIII 56, 162). She followed his directive in order to insure good patient care (TIII 184-185). She did not do so as part of a scheme between herself and Dr. Hussain and none was illustrated - even taking all of the evidence in the light most favorable to the prosecution.

No evidence was introduced that illustrated that Ms. Wang was trained in billing. There was no evidence that she circled codes on the billing form. There was no evidence that she had been trained in what billing codes were or how to identify a proper billing code. There was no evidence that Ms. Wang ever reviewed the billing form or made any entries thereon. And, while there is conflicting testimony as to whether the billing form was on the backside of the note sheet or on a different piece of paper,⁶ there is no evidence as to what information was actually included on the

⁶The prosecution expert, Dr. Reid, testified that she saw a sheet of paper, separate from that upon which Ms. Wang took notes, on the desk in the examination room and was told by the investigating agents that it was the billing sheet. Other testimony was that the billing form was on

billing form. And, because Dr. Hussain never discussed billing with Ms. Wang, he never had reason to review the form with her (TIII 79). The evidence was consistent and clear that Jessie Wang, a part time medical student, had zero input into office billing practices and zero knowledge about them.

B. The Prosecution Failed to Establish That Jessie Wang Caused a Medicaid Claim to Be Submitted.

There is no evidence of causation. Jessie Wang was no more responsible for the submission of the billing than the receptionist that printed the encounter form or the medical assistant that walked the patient into the examination room or the office manager that walked the forms to the mailbox. “But for” the independent actions of any one of them, there would have been no billing to Medicaid. Criminal liability requires more. *See, People v Hudson*, 241 Mich App 268 (2000).

In *Hudson, supra*, the district court bound defendant, a nurse, over for trial on one count of second-degree vulnerable adult abuse, MCL § 750.145n(2). The theory had been that the defendant was guilty because she had released the victim from her restraints at a nursing home, that the victim fell and subsequently died. The Court of Appeals reversed:

We are also troubled by the lack of evidence showing that Hudson's act of releasing Parle from her restraints, even assuming that was reckless, actually caused Parle to fall. *See People v Tims*, [449 Mich. 83, 95–97 (1995)]. In *People v. Zak*, [184 Mich.App. 1 (1990)], in which the prosecutor charged defendant Zak with involuntary manslaughter for selling a gun to Gene Anderson, who used the gun to kill Richard Solo, this Court looked at what proof of causation is necessary to show that a defendant is criminally responsible for involuntary manslaughter. The Zak Court, citing Dressler, *Understanding Criminal Law*, § 14.02, pp. 158–159, extensively explained that the prosecutor had the burden of proving that the defendant actually caused the killing. [*Zak, supra* at 9–14]. To establish actual causation, the prosecutor had to prove that “but for” Zak's act of selling the gun to Anderson, Solo would not have been shot and killed. [*Id.* at 9–10].

the backside of the note sheet (TII-B 106, TIII 56, 63, 186-187).

Although the Court took notice that, logically, Anderson had to obtain a gun before he could shoot and kill Solo, the Court concluded that Zak's act of selling the gun to Anderson was not an act sufficiently tied to the shooting to support a conclusion that Zak caused Solo's death by shooting. [Id. at 10]. The Court's decision made clear that not every act or omission leading up to an injury or social harm is its cause. Id. Rather, "common sense" dictates that some precursors to an injury or social harm are merely "conditions" and not causes. "Conditions are normal events or circumstances that, although necessary for the result to occur, do not positively contribute to it." [Id. at 11], quoting Dressler at 159. Zak's act of selling the gun to Anderson was just such a condition.

People v Hudson, 241 Mich App 268, 284–85 (2000) (Emphasis added, Footnotes omitted). The *Hudson* Court concluded that the district court judge had abused his discretion in binding the defendant nurse over for trial. The lack of any evidentiary support or connection between the prosecution's theories and the defendant's act demonstrated that the evidence of actual causation was insufficient to bind her over for trial. *Id* at 286-287.

Similarly, in the instant case there is no proof that Jessie Wang's actions either caused the submission of a Medicaid claim or aided and abetted such a submission. The trial court's conclusion that Jessie Wang was guilty of submitting a false Medicaid claim based on her knowledge that the clinic in which she worked collected Medicaid proceeds and thus, part of her wages was paid by Medicaid was unsupported and erroneous (TIV 46-47). None of those facts, nor any of the other evidence submitted, is sufficient to support a finding of criminal culpability in this matter. There is no proof of knowledge. There is no proof of causation.

Once Jessie Wang typed her notes into the computer as a draft of patient progress notes, Dr. Hussain took over (TIII 68). He accessed notes. He was the only one to review those notes (TIII 65). He changed them as he saw fit (TIII 59). And, because the prosecution did not produce the actual notes that Ms. Wang had handwritten nor had any witness compared them to the final electronic patient notes signed by Dr. Hussain, it was impossible to know to what degree those notes had been

altered or supplemented by Dr. Hussain prior to submitting them for billing (TI 70, 126-127). Dr. Hussain had the ability to alter billing codes once they were generated (TIII 90). He never discussed billing codes or billing issues with Ms. Wang (TIII 79). Ms. Wang never reviewed bills prior to their submission to Medicaid (TIII 84). Thus, it mattered not what Jessie Wang typed in to the computer if Dr. Hussain chose to bill something else.

Not one witness was called that testified Jessie Wang was familiar with or involved in the billing process at Livernois Family Medical Services nor could the investigating officers locate any person to support such a claim (TI 78, TII-A 16). Every witness agreed that Ms. Wang was not trained in billing (TIII 58, 95, 115, 157-158). She was not trained in Medicaid nor its rules and regulations (TIII 181). She understood that the American system of paying physicians was different from the Chinese system but she was not familiar with the specific differences (TIII 174). Her training was in the care of a patient's physical well being and not billing practices. Knowledge of billing systems was not required to obtain a medical license nor was it a requirement of AmeriClerkships (TIII 57). Without any evidence of Ms. Wang's involvement in the billing process, there is no support for a finding of causation and, thus, there is insufficient evidence to support a conviction.

C. Conclusion.

Jessie Wang is facing resentencing as well as the prospect of deportation and the loss of her entire life, her family and her future. The verdict in this case is unsupported and a reading of the trial court findings of fact and conclusions of law and ought to leave this Court with the definite and firm conviction that a mistake has been made. *People v Parney*, 98 Mich App 571 (1979); *People v Saxton*, 118 Mich App 681 (1982). There was insufficient evidence to support the trial court's

finding that Jessie Wang possessed the requisite knowledge to sustain the convictions or that her acts were sufficiently connected to the submission of the Medicaid claims to support the verdict. The trial court verdicts are unsupported and the convictions should be vacated.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant the applicaiton for leave to appeal or summarily vacate her convictions.

Respectfully submitted,

/s/Robyn B. Frankel

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Dated: June 28, 2018.