

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

XUN WANG,

Defendant-Appellant.

MSC No: 158013
COA No: 336673
LC No. 2015-000754-FH

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF QUESTIONS PRESENTED

- I. IS THE STATUTORY EXCEPTION DEFINED IN MCL 333.16294 AN ELEMENT OF THE OFFENSE FOR WHICH THE PROSECUTION HAS THE BURDEN OF PROOF TO PROVE BEYOND A REASONABLE DOUBT?**

Trial Court made no answer.

Court of Appeals said “Yes.”

Defendant-Appellant says “Yes.”

Plaintiff-Appellee says “No.”

- II. DID THE MICHIGAN COURT OF APPEALS ERR IN HOLDING THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN DEFENDANT’S CONVICTION UNDER MCL 333.16294?**

Trial Court said “No.”

Court of Appeals said “No.”

Defendant-Appellant says “Yes.”

Plaintiff-Appellee says “No.”

- III. DID TRIAL COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO BRING THE RELEVANT STATUTORY PROVISIONS TO THE TRIAL COURT’S ATTENTION AND FAILING TO ARGUE THAT THE PROPER DELEGATION OF DUTIES BARRED PROSECUTION UNDER MCL 333.16294?**

Trial Court made no answer.

Court of Appeals made no answer.

Defendant-Appellant says “Yes.”

Plaintiff-Appellee says “No.”

IV. DID THE PROSECUTION PRESENT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF DEFENDANT'S GUILTY BEYOND A REASONABLE DOUBT AS TO THE CONVICTIONS OBTAINED UNDER MCL 400.607(1)?

Trial Court said "Yes."

Court of Appeals said "Yes."

Defendant-Appellant says "No."

Prosecutor-Appellee says "Yes."

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 (28a). 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 (32a). 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.” (33a).

Ms. Wang waived her right to a jury trial (57a). The parties stipulated that Ms. Wang did not possess a Michigan health profession license in 2014 or 2015 (58a). 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 (58a).

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 (64a, 65a). Dr. Hussain was enrolled as a Medicaid provider. Agent Macon scheduled an appointment for August 12, 2014, in an undercover capacity (65a).

Agent Macon used the alias of Christopher Anderson. On arrival at the clinic, he completed paperwork and provided his Medicaid card (65a). Ms. Wang came out and accompanied Agent

Macon to obtain his weight and blood pressure (65a). She placed him in an exam room, obtained his medical history and left the room for a few minutes (65a). 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 (77a). She also provided several prescriptions at his request.

Ms. Wang never identified herself as a doctor (66a, 72a). Agent Macon thought that she was a physician assistant (77a). He did not believe she was a medical doctor (77a). Ms. Wang did not conduct any physical examination and spent only five or six minutes with Agent Macon (66a). The entire exchange was captured on video and played for the court (66a). The officer identified the prescriber's signature on the medication prescriptions as that of Murtaza Hussain (67a).

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 (68a). 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 (69a). Agent Macon never saw Dr. Hussain. The officer had no idea who entered the notes into the computer (73a). He saw Ms. Wang writing notes during his visit but was unaware of what happened to those notes (73a). "Krystal Jackson's" progress notes similarly indicated that the patient was seen by Jessie Wang and Dr. Hussain (70a).

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 (70a, 71a). 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 (71a). Agent Macon had no information as to Ms. Wang's knowledge of, or involvement in, the office's Medicaid billing procedures (75a). He did not locate any documentation signed by Ms. Wang relating to Medicaid procedures (76a).

Attorney General Special Agent Lorrie Bates was employed in the Health Care Fraud Division of the Attorney General's Office (78a). 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. (78a). 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 (79a). 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 (90a, 97a). Agent Bates knew that Jessie Wang was not the doctor (103a, 104a). Ms. Wang did not say she was a "physician assistant" but only that she was Dr. Hussain's assistant (105a).

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 (80a, 86a, 109a). 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 (80a, 81a). Agent Bates had no idea who actually called in the prescription (99a). Ms. Wang said that she was not the doctor but that she was Dr. Hussain's assistant and he was not there that day (81a). A video tape of the exchange was played for the court (81a). Jessie Wang spent eight or nine minutes with Agent Bates (86a).

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 (82a). She advised that she had been placed at the clinic through AmeriClerkships and after she finished her internship, she became employed by Dr. Hussain (82a, 83a). 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 (83a). He made all decisions relevant to prescriptions (101a).

Ms. Wang obtained patient medical histories and entered the information in the computer (83a). Dr. Hussain would review her input, make desired changes and finalize the computer entries (83a). Agent Bates reviewed the patient records for "Krystal Jackson" and noted they had been electronically signed by Dr. Hussain (84a). Agent Bates also noted that several examinations were reflected in the electronic report that had not been conducted during her visit (84a). Agent Bates did not have Ms. Wang's written notes to compare to those that were electronically signed by Dr. Hussain (87a, 88a). She had no idea how many employees had accessed the final entries (88a). She found no evidence that Jessie Wang was involved in Medicaid billing (99a).

Agent Bates contacted AmeriClerkships (85a). 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 (85a, 101a). The documentation cautioned participants not to appear to be practicing medicine and to advise patients of their non-physician status (86a).

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 (96a). 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 (97a). She pulled Medicaid data for Murtaza Hussain at Livernois Family Services (97a). 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 (98a). Prescription were paid in the amount of \$51.30, \$8.87 and \$4.33 (100a). 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 (98a). The total amount for both Agent Bates and Agent Macon's undercover visits and medications was approximately \$260.00 (101a).

Ms. Guy was not familiar with the billing practices of Livernois Family Services (118a). 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 (120a). She explained that providers of Medicaid services are responsible for reviewing the Medicaid Provider Manual - a 2,000 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 (121a). The procedures billed for Agent Bates and Macon required such supervision and if billed without such supervision would be considered a false claim (121a). 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 (122a).

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 (123a). 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 (126a).

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 (128a). Dr. Reid never visited the office and was not aware how the documents could have been altered or amended by Dr. Hussain (136a). 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 (137a). She made this assumption even though the notes were dated approximately eight days after Agent Bates' appointment (137a). Dr. Reid further opined that anyone that had done an internship ought to be familiar with billing procedures (130a). She added that the patient insurance record was a part of the file in this instance and a sheet of paper could be observed in the videotape sitting on the desk while Ms. Wang was making notes and filling out the prescription (130a). 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 (139a, 140a). She had no independent knowledge of the billing practices of the Livernois Family Practice (146a). 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 (130a). 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 (131a). 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 (134a). 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. (134a).

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 (153a). 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. (153a, 154a).

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 (154a). 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. (155a).

Murtaza Hussain testified that he owned Livernois Family Medical Services from 1993 until 2015 (155a). 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 (167a). 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 (165a). He had also believed that it was legitimate to leave signed prescription pads with his office manager for the convenience of his patients (167a). As a result of

the investigation, he pleaded guilty to one count of Medicaid Fraud and one count of Health Care Fraud (164a). His medical license was suspended for three years.

Dr. Hussain explained that Jessie Wang was initially involved in the clinic through AmeriClerkships. 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 (156a). 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 (157a). 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 (167a). Once Jessie entered her notes into the computer, Dr. Hussain reviewed them. He made necessary changes and electronically signed the notes (158a). He could access the notes from the office or off-site. He was able to change anything including the diagnosis, treatment, assessment and plan (165a).

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 (157a). The internship agreement did not require any such training. Jessie Wang was never trained in office billing procedures nor involved in Medicaid billing (157a, 167a). Dr. Hussain never discussed billing with Ms. Wang nor did he review the back portion of the form with her (163a).

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 (159a). Dr. Hussain could modify that code if he chose to do. All patient encounter forms with their individual insurance information, whether it was Medicaid, Medicare, Blue Cross or another company were collected and at the end of a week they were forwarded to a third party billing company. The billing company forwarded the information to the appropriate insurance company for processing. Ms. Wang's involvement ended when she input her notes into the electronic system (160a).

Dr. Hussain had electronically signed the patient progress notes for August 12, 2014. He did not sign until August 18, 2014 (161a). 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 (161a, 162a).

Jessie Wang 's husband, Xiang Zhang, met Jessie at Purdue University in 2001, where they were both students (169a, 170a). 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 (170a). Roosevelt King knew Jessie from art school and described her as the most honest person he knew (179a).

Darius Baty had been employed by Livernois Family Medical Services in 2010 (173a). 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 (173a). He was employed as a medical assistant throughout 2014 and knew Jessie Wang during the relevant time periods (171a, 175a). He knew that she was not a licensed physician (175a).

Mr. Baty believed about half of the clinic's patients were Medicaid beneficiaries (176a). Other patients were direct-pay and others were insured through Medicare or private insurers (177a). A patient's insurance status was known to the front desk staff, the clinical manager and billing (176a). 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 (176a).

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 (171a). 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 (172a). He did not recall processing any billings with Jessie Wang's signature (173a).

Xun "Jessie" Wang testified that she obtained her medical degree from Beijing, China after completing a five year program. She completed two years of a three year residency in internal medicine and left China in 2001 because she received a full scholarship to Purdue University (180a, 185a). She received her PhD in Basic Medical Science and accepted a job as a medical researcher at the University of Michigan Medical School (180a). 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 (187a). 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 (181a). 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 (181a). Dr. Hussain paid her \$20.00-\$30.00/hour (196a).

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 (182a). 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 (182a). Ms. Wang would later enter her notes into the computer as a draft (183a). She had no idea what happened to the notes once they were entered (182a). Dr. Hussain never discussed diagnosis codes or billing with her (196a). Ms. Wang never considered her notes would be used by the doctor for billing, she “didn’t think that far.” (189a). She was simply taking notes for assisting with patient treatment. She never used the backside of the encounter sheet (190a).

Ms. Wang was never trained in clinic billing practices (182a). 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 (188a). Jessie knew that some of the patients were receiving Medicaid but did not know which ones (188a, 189a).

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 (183a). Every decision and every act that Ms. Wang took as to patient care and treatment was at the direction of Dr. Hussain (192a, 193a). Even when Dr. Hussain was out of the office, Ms. Wang discussed every patient with him. Ms. Wang did not make diagnosis or treatment decisions (194a, 195a, 196a). Jessie Wang had no idea that her acts were criminal (184a, 185a).

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 (202a).

The trial judge found Ms. Wang guilty of all counts although noted that it was a difficult decision (211a). 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 (217a). Defense counsel reminded the court that the restitution as to Jessie Wang, although paid by Dr. Hussain, was less than \$300.00 (218a).

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 (218a). 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 (219a). 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. (13a). Defendant-Appellant filed an Application for Leave to Appeal to this Court, which was granted in an order dated March 27, 2019 (222a). The parties were ordered to brief the issues addressed within. The Clerk will be scheduling oral arguments pursuant to MCR 7.305(H)1.

ARGUMENTS

I. THE STATUTORY EXCEPTION DEFINED IN MCL 333.16294 IS AN ELEMENT OF THE OFFENSE FOR WHICH THE PROSECUTION HAS THE BURDEN OF PROOF AND *PEOPLE V LANGLOIS*, 325 MICH APP 236 (2018) INCORRECTLY ANALYZED THE STATUTORY EXCEPTION AS A DEFENSE TO THE CRIME OF THE UNAUTHORIZED PRACTICE OF MEDICINE.

The crime of the unauthorized practice of a health profession is defined in MCL 333.16294.

Specifically, 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 license or registration of another person, is guilty of a felony.”

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.[¹]

The State of Michigan, through the passage of its compiled laws and statutes, defines criminal conduct. Every crime is made up of parts called elements. M Crim JI 3.2. Due process requires that the prosecution bear the burden of proving every element of the crime charged beyond

¹The additional subsections relate to the delegation of surgical procedures and acupuncture which require the direct physical supervision by the licensee.

a reasonable doubt. *In re Winship*, 397 US 358, 364; 90 Sct 1068; 25 LEd2d 368 (1970). In order to meet this burden, the prosecution must present evidence sufficient to overcome the presumption of innocence and convince the jury of the defendant's guilt beyond a reasonable doubt. *People v McClintic*, 193 Mich 589, 603; 160 NW 461 (1916). 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*, at 363.

Matters of statutory construction are questions of law, which this Court reviews *de novo*. *People v Williams*, 491 Mich 164, 168, 814 NW2d 270 (2010). Determining the elements of a crime is also a question of law that this Court reviews *de novo*. *People v Holtschlag*, 471 Mich 1, 4-5, 684 NW2d 730 (2004). In reviewing the elements of MCL 333.16294, clearly the statutory exception of MCL 333.16215 is an element of the unauthorized practice of a health profession. Negating the statutory exception is an element of the offense for which the prosecution, not the defendant, has the burden of proof. In the instant case, the prosecution failed to prove that element and as such, Ms. Wang's conviction should be vacated.

In *People v Rios*, 386 Mich 172; 191 NW2d 297 (1971), the Michigan Supreme Court ruled that in a prosecution for the unlawful sale of narcotics, the prosecution must prove the element of lack of license, just as all other elements of the crime, beyond a reasonable doubt. *Rios*, at 179. The crime at issue in *Rios* was defined as:

“Any person not having a license under the provisions of Act No. 343...who shall sell, manufacture, produce, administer, dispense or prescribe any narcotic drug shall be deemed guilty of a felony...” MCL 335.152.

The *Rios* Court found that based on the clear language of the statute, the elements of the crime are: (1) the lack of license; (2) sale of a prohibited narcotic drug; (3) to another identifiable

person. The People must prove the element of lack of a license the same as all other elements of a crime. *Rios* at 178.

Similarly, the prosecution must prove the lack of a proper delegation in a prosecution brought under MCL 333.16294. The prosecution cannot establish the offense of the unauthorized practice of a health care professional unless it proves there was an improper delegation beyond a reasonable doubt. In *Rios*, the prosecution had to prove that an individual did not have a license to sell a narcotic drug in order to prove a crime occurred. In this case, the prosecution must prove the lack of a proper delegation to obtain a conviction.

Respectfully, *People v Langlois*, 325 Mich App 236; 924 NW2d 904 (2018) was improperly decided. The *Langlois* court failed to recognize that pursuant to *Rios*, the prosecution had to prove the lack of a proper delegation to sustain a conviction. The legal error began in the trial court, when the prosecutor improperly brought a motion in limine to preclude the defendant from presenting a “delegation defense.” The trial court denied the motion and the prosecution filed an interlocutory appeal. The *Langlois* court examined the trial court’s decision with no regard for this Court’s holding in *Rios*. The *Langlois* court examined the underlying facts presented in the trial court and ruled that the defendant “may not present the defense of delegation.” *Langlois*, at 240.

Clearly, there is not a “delegation defense.” The lack of a proper delegation is a critical element of the crime which the prosecution must prove to sustain a conviction under MCL 333.16294. This Honorable Court has long held that in interpreting a criminal statute, the goal is to “give effect to the Legislature’s intent, focusing first on the statute’s plain language....when a statute’s language is unambiguous, the statute must be enforced as written.” *People v Pinkney*, 501 Mich 259, 263-264; 912 NW2d 535 (2018). Stated another way, “a criminal statute ought to be so

plain and unambiguous that ‘he who runs’ may read, and understand whether his conduct is in violation of its provisions,” *Id.*²

The plain reading of MCL 333.16294 establishes that MCL 333.16215 is a statutory exception to the offense. Negating the statutory exception is an element of the offense. The prosecution bears the burden of proving all elements of an offense. The Court of Appeals erroneously decided *Langlois* in violation of this Court’s longstanding holding in *Rios*.

II. THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN DEFENDANT JESSIE WANG’S CONVICTION UNDER MCL 333.16294 AS THE PROSECUTION FAILED TO NEGATE THE STATUTORY EXCEPTION.

In ruling that there was sufficient evidence to sustain Ms. Wang’s conviction for the unlawful practice of medicine, the Court of Appeals failed to correctly apply the testimony taken at trial with the statutory requirements of MCL 333.16294. The Court begins with the stipulated fact that Ms. Wang did not have a medical license to practice medicine in the State of Michigan. The Court then makes a sweeping analysis that at trial, “ample evidence was presented that defendant was engaged in the diagnosis, treatment, prevention, cure or relieving of a human disease, ailment, defect, complaint or other physical or mental condition.” (22a).

The testimony taken at trial does not support the Court’s holding. Specifically, Agent Macon testified Ms. Wang never identified herself as a doctor (66a, 72a). She accompanied him from the waiting room to obtain his weight and vital signs and she directed him into an examination room (65a). These are not the activities of a physician but are more akin to a medical assistant. Nor did

² Quoting *People v Ellis*, 204 Mich 157, 161; 169 NW 930 (1918).

Ms. Wang conduct any physical examination of Agent Macon (66a). She only spent five or six minutes with him (66a).

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 (81a). Ms. Wang did not say she was a "physician assistant" but simply Dr. Hussain's "assistant" (105a). Agent Bates' entire exchange with Ms. Wang lasted only eight or nine minutes (86a). The fact that another medical assistant told Agent Bates that the doctor would be in shortly and that Jessie Wang entered thereafter is not relevant. There is no evidence that Ms. Wang was privy to the medical assistant's statement. More importantly, 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 (65a, 80a, 86a, 83a, 109a, 101a, 157a, 183a). Every decision and every act that Ms. Wang took as to patient care and treatment was at the direction of Dr. Hussain (192a-193a). Ms. Wang did not make diagnosis or treatment decisions, Dr. Hussain did so (194a-195a, 196a).

While the Court of Appeals acknowledged that MCL 333.16215 was a statutory exception that the prosecution had to negate, the Court did not apply that legal analysis. If it had, clearly Ms. Wang's actions and her professional relationship with Dr. Hussein would have established that a proper delegation was in place, exonerating her of the criminal charge. Dr. Hussein was a proper licensee who made a legal delegation 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.” MCL 333.16215.

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.* (Emphasis added)

(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.

Ms. Wang and Dr. Hussain specifically 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).³ 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 certain activities. There are,

³See pages.224a-237a of the Appendix.

of course, prerequisites to such delegation and each of those prerequisites was met in the instant case. The delegation of tasks to Jessie Wang was completely legal.

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," (228a).

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 (155a). 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 (156a). She had completed prior medical rotations in the United States and was applying for a medical residency (156a). In fact, Ms. Wang had obtained a medical degree from Beijing, China after completing a five year program. She completed 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 (180a, 185a). 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 (180a). When Ms. Wang 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. Ms. Wang had the requisite knowledge, training and experience to permit Dr. Hussain to delegate the above noted tasks.

In affirming Ms. Wang's conviction, the Court of Appeals misinterpreted and misapplied MCL 333.16215. The Court of Appeals upheld her 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" (23a). This holding is incorrect. 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." MCL 333.16215. The Court of Appeals has essentially ruled that residents and interns may not perform medical tasks. This view of the statute is incorrect and

arguably impacts the medical education of every doctor-in-training, nurse-in-training or other medical professional in-training.

Further, MCL 333.16215 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. In fact, 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 Mutual Auto Ins. Co.*, 195 Mich App 316, 321-322 (1992) [MCL333.16109(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]

Finally, the Court of Appeals erred by excusing the trial court's failure to rule on the "delegation exception" based on the testimony of Catherine Reid, M.D., who testified for the prosecution. The Court of Appeals erroneously found that as Dr. Reid testified that the activities in which Ms. Wang was engaged were the tasks usually performed by a doctor, the trial court could conclude that defendant's activities did not fall within the exception. That analysis is incorrect and was summarily dismissed by the Michigan Supreme Court in *Rios*.

In *Rios*, the prosecution used the same flawed reasoning to excuse its failure to establish that the defendants did not have a license to sell drugs. The prosecution pointed to testimony that because Rios had a criminal record and that both defendants had jobs not requiring a narcotic license, this was “sufficient proof that they did not have a license.” The *Rios* court adamantly held it was not sufficient proof for a criminal conviction.

“A verdict of guilty in a criminal case cannot properly rest on a mere preponderance of the evidence, but should be based on proof that leaves no reasonable doubt.” *Rios*, at 178 (internal citations omitted.)

Jessie Wang’s guilty verdict cannot properly rest on the erroneous speculations made by the trial court and sanctified by the Court of Appeals which were culled from Dr. Reid’s testimony. Dr. Reid’s testimony is nullified in its importance because she was not questioned about the delegation exemption. Ms. Wang’s actions of interviewing patients, obtaining personal and medical histories and discussing healthcare options with them under the supervision of Dr. Hussein are allowable under Michigan law.

III. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO BRING THE RELEVANT STATUTORY PROVISIONS TO THE TRIAL COURT’S ATTENTION AND FAILING TO ARGUE THAT THE PROPER DELEGATION OF DUTIES BARRED PROSECUTION UNDER MCL 333.16294.

Whether this Honorable Court rules as a matter of law that MCL 333.16215 is a statutory exception which is an element that the prosecution is required to negate as an element of the offense or that there is a “delegation defense” which the defendant must prove, trial counsel was clearly ineffective. Trial counsel failed to present to the trier of fact the relevant statutory provisions. In fact, while he made a directed verdict motion as to the two counts of Medicaid Fraud, he did not

make a directed verdict motion to the charge of unlawful practice of medicine. There is no possible trial strategy to justify this failure.

Further, the testimony taken at trial from Dr. Hussein and Ms. Wang establish that a proper delegation was made, which, at a minimum, is a complete defense to the crime. As argued, *infra*, Dr. Hussein was an internist and owned Livernois Family Medical Services (155a). 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.

Further, the proper supervision was maintained at all times under Michigan law. Pursuant to MCL 333.16109(2)(a), supervision does not mandate on-site, face to face 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. Both Dr. Hussein and Ms. Wang testified that the two were in direct communication after Ms. Wang initially spoke to both Agents Macon and Bates. After gathering the personal histories, Ms. Wang left the examination room, contacted Dr. Hussain and followed his directives as to patient care (65a, 80a, 86a, 83a, 109a, 101a, 182a, 183a). Every decision and every act that Ms. Wang took as to patient care and treatment was at the direction of Dr. Hussain (192a-193a). Ms. Wang did not make diagnosis or treatment decisions. Dr. Hussain ordered the treatment plans and made all medical diagnoses. (194a-195a, 196a).

Clearly, Jessie Wang was deprived of the right to the effective assistance of counsel and the right to present a defense as a result. US Const. Ams VI, XIV; Const 1963, art 1 Sect. 20. To demonstrate ineffective assistance, Ms. Wang must satisfy the familiar standard in *Strickland* by showing that counsel's performance "fell below an objective standard of reasonableness," *People v Grant*, 470 Mich. 477, 485; 684 NW2d 686 (2004), citing *Strickland v Washington*, 466 US 668, 689; 104 S.Ct 2052; 80 LEd2d 674 (1984), that it was not part of a reasonable strategy and that absent the error, a reasonable probability exists that the outcome would have been different. *Strickland*, at 689, 694.

The lower court record is completely devoid of trial counsel arguing or presenting MCL 333.16215 in any way. He clearly failed to argue the statute as a defense. A defendant is entitled to have her counsel prepare, investigate and present all substantial defenses. *People v Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999); *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The U.S. Supreme Court has held:

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment...or in the Compulsory Process or Confrontation clauses of the Sixth Amendment...the Constitution Guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v Kentucky*, 476 US 683, 690 (1986); *California v Trombetta*, 467 US 479 (1984).

Trial counsel's complete failure to argue MCL 333.16215 cannot be deemed sound trial strategy. Sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make an independent examination of the facts, circumstances, pleadings and **laws** involved. *Grant*, 486-87, (emphasis added).

Ms. Wang has met her burden of establishing prejudice as required under *Strickland*. Had her trial attorney properly investigated and argued the issue of delegation, there is a reasonable probability she would not have been convicted. At a minimum, he could have informed the trial court that the prosecution's position as to the level of supervision required was legally incorrect. There is no possible trial strategy to justify trial counsel's failure to argue the statutory law.

IV. 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.

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; 751 NW2d 57 (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.

The trial is devoid of any testimony establishing that Jessie Wang was in possession of facts that her conduct was “substantially certain to cause the payment of a medicaid benefit,” especially as to the treatment of the undercover agents. The prosecution argued, and the trial court and Court of Appeals adopted, a kind of “cosmic culpability” as to MCL 400.602(f). Because the Livernois Clinic saw patients covered by Medicaid, Ms. Wang should have known that **any** action on her part in treating **any** patient could result in Medicaid fraud. Taking that analysis to the extreme, simply walking into the Livernois Clinic and putting on her lab coat would be enough to hold Ms. Wang responsible for any improper insurance billing!

Additionally, 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 (202a-203a). The prosecution concluded that, based on these assertions, “at a minimum [Ms. Wang] was aiding and abetting in the filing of false Medicaid claims.” (202a).

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. (154a-155a).

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 (26a).

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.

In confirming Ms. Wang's convictions on these facts, the Court of Appeals ignored the general principle of individual culpability. The Court upheld her convictions 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." (26a). 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. The Court approved the convictions simply because 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. Finding her guilty under this theory is erroneous and completely eviscerates the requirements of personal knowledge and individual culpability.

Additionally, 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 (176a). 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 (176a). 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 (176a).

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 (188a). Even the prosecution recognized that while Ms. Wang knew some of the clinic patients were receiving Medicaid, *she did not know which ones* (188a-189a). Without proof 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 or that she acted in deliberate ignorance of the facts or in reckless disregard thereof.

The prosecution maintains that Jessie Wang was guilty because she transcribed her written notes into a computer. Even though those notes were sometimes edited by Dr. Hussain before the medical treatment was coded for billing, thereby making **his** notes the basis for the medical code, the simple act of typing her handwritten observations into the computer makes her liable for any

future fraud. There was no proof offered that she knew what was coded, in fact Mr. Baty, Dr. Hussain and Ms. Wang all testified she was not trained and did not know about billing codes. After Dr. Hussain imputed the information, sometimes that information and or subsequent codes were changed by Mr. Baty, before he sent the information to a third party billing company. The third party billing company finalized the bill and **then** the claim was presented to Medicaid for payment. Ms. Wang had no knowledge of what was being submitted to Medicaid, or Medicare or Blue Cross for that matter. To claim that she did based on this record is ridiculous.

The prosecution further asserts that because Ms. Wang was a part-time employee, paid by the clinic and knew that part of the clinic income was generated through Medicaid, she is guilty beyond a reasonable doubt of Medicaid fraud. The prosecution's argument is far too attenuated a theory to support these criminal convictions. By that theory, the receptionist who makes every patient appointment, taking insurance information over the phone, who is also paid by the clinic should have been charged with Medicaid fraud. The facts do not support a finding that Ms. Wang acted "knowingly" or that she was somehow responsible for causing the submission of a Medicaid claim. The lower courts ruled incorrectly. *Kanaan, supra*.

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, the Court of Appeals 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*. The facts in *Kanaan* clearly support Dr. Hussain's admitted guilt, but not Jessie Wang's. Jessie Wang was placed with Livernois Family Medical Services as part of her AmeriClerks 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 (181a). 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 (181a). At the beginning of her placement, Dr. Hussain instructed her that when she saw a patient, she should take notes to preserve her memory and input the notes into the computer (83a, 157a, 183a). She followed his directive in order to insure good patient care (189a). 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 established that Ms. Wang was trained in billing. In fact, Mr. Baty was the individual in charge of billing. Ms. Wang did not circle 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,⁴ there is no evidence as to what information was actually included on the billing form. Because Dr. Hussain never discussed billing with Ms. Wang, he never had reason to review the form with her (163a). 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.

Nor is there any evidence to support 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; 615 NW2d 784 (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

⁴The 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 the backside of the note sheet (139a, 157a, 159a, 189a-190a).

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].

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.

Hudson, 241 at, 284–85 (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 (211a-212a). 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 (160a). He accessed notes. He was the only one to review those notes (150a). He changed them as he saw fit (158a). 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 (73a, 87a-88a). Dr. Hussain had the ability to alter billing codes once they were generated (165a). He never discussed billing codes or billing issues with Ms. Wang (163a). Ms. Wang never reviewed bills prior to their submission to Medicaid (164a). 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 (75a, 99a). Every witness agreed that Ms. Wang was not trained in billing (157a, 167a, 172a, 182a). She was not trained in Medicaid nor its rules and regulations (188a). She understood that the American system of paying physicians was different from the Chinese system but she was not familiar with the specific differences (186a). 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 (157a).

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.

CONCLUSION AND RELIEF REQUESTED

THEREFORE, based on the above and consistent with the arguments presented herein, Defendant-Appellant Xun Wang respectfully requests that this Honorable Court set aside her convictions and sentence. Ms. Wang has been improperly convicted of the charged offenses, in violation of Michigan law.

Respectfully Submitted,

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