

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 158013

Plaintiff-Appellee,

Court of Appeals No. 336673

v

Ingham County Circuit Court
No. 15-754-FH

XUN WANG,

Defendant-Appellant,
_____ /

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellee, the People of the State of Michigan, agrees that this Court has jurisdiction over Defendant-Appellant Xun Wang's application for leave to appeal pursuant to MCR 7.303(B).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Under Michigan law, MCL 333.16215, a licensed health professional may delegate selected acts, tasks, or functions within the licensee's profession to an unlicensed individual, but may not delegate to an unlicensed person an act, task, or function if the standards of practice require that it be performed with the level of education, skill, and judgment of a licensed professional. A person who exceeds the scope of a valid delegation or performs an act, task, or function that may not be delegated under MCL 333.16215 and constitutes the practice of the licensed health profession is in violation of MCL 333.16294. In light of these two statutes, this Court is presented with the following four questions:

1. Under this Court's holding in *People v Rios*, 386 Mich 172 (1971), does the prosecution have the burden of proving that an unlicensed person who engaged in the practice of a health profession did not do so pursuant to a valid delegation under the statutory exception in MCL 333.16215 that is referenced in MCL 333.16294?

Appellant's answer: Yes.

Appellee's answer: Yes.

Trial court's answer: None.

Court of Appeals' answer: Yes.

2. Did the Court of Appeals correctly conclude that Ms. Wang engaged in the practice of medicine that could not be delegated to her under MCL 333.16215, and correctly hold that the evidence was sufficient to sustain Ms. Wang's conviction under MCL 333.16294?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: Yes.

Court of Appeals' answer: Yes.

3. Was Ms. Wang’s trial counsel ineffective for failing to raise a “delegation defense” where lack of valid delegation was an element of the offense?

Appellant’s answer: Yes.

Appellee’s answer: No.

Trial court’s answer: None.

Court of Appeals’ answer: No.

4. Was the People’s evidence sufficient to show that Ms. Wang was aware or should have been aware that her conduct was substantially certain to cause the payment of a Medicaid benefit, in support of her convictions of Medicaid Fraud-False Claim in Counts I and II?

Appellant’s answer: No.

Appellee’s answer: Yes.

Court of Appeals’ answer: Yes.

INTRODUCTION

An unlicensed person cannot prescribe a controlled substance to a patient. Such an act constitutes the practice of medicine and when done without a license, constitutes a felony. That is what Defendant Xun Wang did here, under circumstances in which she knew or should have known that her patients were Medicaid beneficiaries and her actions would result in unlawful or “false” claims for Medicaid reimbursement under the program’s rules. For that reason, Wang was charged with, tried for, and convicted of two counts of Medicaid Fraud-False Claim and one count of Health Profession-Unauthorized Practice. This Court has directed the parties to brief four issues arising from Wang’s convictions and subsequent appeal.

First, consistent with this Court’s holding in *People v Rios*, 386 Mich 172 (1971), to convict a defendant for violating MCL 333.16294—practicing a health profession without a license—the People must prove that the defendant was not acting pursuant to a valid delegation by a licensed practitioner, as delineated in MCL 333.16215 (the “delegation exception”). The People agree with Ms. Wang that this is an element of the offense that the prosecution must prove in every case where a person is charged with the unlicensed practice of medicine.

Second, the evidence here was sufficient to support Ms. Wang’s conviction for two reasons. As initial matter, the evidence demonstrated that Wang prescribed controlled substances to two Attorney General agents who were posing as patients. The People’s evidence showed that prescribing may not be delegated to an unlicensed professional under MCL 333.16215, which places limits on delegation.

Moreover, the language of that statute does not allow licensed practitioners to delegate the full scope of their professional practice to an unlicensed such as Ms. Wang. Recorded evidence captured Ms. Wang practicing medicine by diagnosing and treating patients. Her actions therefore violated MCL 333.16294.

Third, Ms. Wang's counsel was not deficient here. The prosecution was bound to prove the element of lack of a valid delegation, which it did by showing that she engaged in a medical act that could not be delegated—prescribing drugs—as well as engaging in the full scope of practice of a licensed physician.

Fourth, the People's evidence proved that Ms. Wang engaged in the illegal practice of medicine at a clinic when she knew or should have known that her conduct would result in Medicaid claims. Ms. Wang is no stranger to the United States, having lived here since 2001. She was preparing to enter a residency program, having done research at two hospitals and rotated through five clinics in order to learn about the practice of medicine in this country. At the Livernois Family Medical Center, approximately half of the clinic's patients were Medicaid beneficiaries, and bills for their treatment were submitted to the State for Medicaid payment. One of Ms. Wang's own witnesses, the operations manager of the clinic, confirmed that she was familiar with the clinic's billing procedures.

In short, Ms. Wang is the paradigm example of an unlicensed person illegally practicing medicine and benefitting from false Medicaid claims. This Court should deny leave or otherwise affirm her convictions on all counts.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Ms. Wang was charged by Information as follows: Counts I and II – Medicaid Fraud-False Claim; and Count III – Health Profession-Unauthorized Practice.

Although this case originally was scheduled for a jury trial, Ms. Wang elected to proceed with a bench trial, which commenced on October 31, 2016, and ended on November 4, 2016, when the court found Ms. Wang guilty on all three counts.

(Appellant’s App at 57a, 211a-212a.)

When the trial began, before calling witnesses, the parties entered several stipulations into the record: (1) that Ms. Wang had no health profession license in 2014 and 2015; (2) that Dr. Murtaza Hussain was not present in the offices of Livernois Family Medical Center on May 6, 2014; August 12, 2014; August 14, 2014; and December 29, 2014; and (3) that the People’s proposed exhibits would be admitted. (Appellant’s App at 58a.)

A. Agent Drew Macon poses as patient “Christopher Anderson” and Ms. Wang prescribes him controlled substances—Klonopin, for a sleep disorder, and Adderall, for attention deficit disorder.

The People’s first witness was Attorney General Special Agent Drew Macon. (Appellant’s App at 63a.) Agent Macon testified that his job duties included investigating Medicaid fraud. (Appellant’s App at 64a.) Agent Macon became involved with an investigation of Dr. Hussain and Livernois Family Medical Center, a Detroit primary care clinic, but not a free clinic, in 2014. *Id.*

As part of his investigation, Agent Macon conducted an undercover visit at the clinic on August 12, 2014, posing as a patient and Medicaid beneficiary named

“Christopher Anderson.” (Appellant’s App at 65a.) After checking in and presenting a Medicaid insurance card for payment, Agent Macon remained in the waiting area until Ms. Wang called him back to a patient room. *Id.* Ms. Wang weighed him, took his blood pressure, and solicited information about the reason for his visit and his medical history. *Id.*

Agent Macon presented as a new patient and requested prescription medications. *Id.* Ms. Wang provided him with prescriptions for Vitamin D, an inhaler, and Klonopin, a controlled substance. (Appellant’s App at 66a.) Ms. Wang further indicated she would provide a prescription for Adderall (also a controlled substance) when Agent Macon provided information about his previously prescribed dosage. *Id.* He later provided that information and received a prescription for Adderall. *Id.* Agent Macon had all the prescriptions except the Adderall filled at the on-site pharmacy at Livernois Family Medical Center on the same day as his undercover visit. (Appellant’s App at 66a-67a, 70a) During his undercover visit with a hidden camera, Agent Macon captured audio recording, but not video, of his interactions with Ms. Wang. (Appellant’s App at 66a.) That recording was filed with this Court as Attachment A to Plaintiff-Appellee’s first Brief in Opposition to Defendant-Appellant’s Application for Leave to Appeal.

In the patient chart for “Christopher Anderson,” Ms. Wang documented a medical history of asthma, attention deficit disorder, and sleep disorder and the prescriptions provided. (Appellant’s App at 69a.) The documentation further states

that Ms. Wang and Dr. Hussain saw “Christopher Anderson,” although Dr. Hussain was not in the office that day, per stipulation. *Id.*

When Agent Macon and others executed a search warrant at Livernois Family Medical Center, they found prescription pads pre-signed by Dr. Hussain. (Appellant’s App at 70a.)

B. Agent Lorrie Bates poses as patient “Krystal Jackson” and Ms. Wang prescribes her a controlled substance, Ambien, for insomnia.

Attorney General Special Agent Lorrie Bates was the People’s second witness, and also conducted an undercover visit to Livernois Family Medical Center posing as a new patient, and received medical treatment from Ms. Wang. Agent Bates presented to the clinic as “Krystal Jackson,” a Medicaid patient, on December 29, 2014. (Appellant’s App at 78a-79a.) As noted above, the parties also stipulated that Dr. Hussain was not present in the clinic that day.

After waiting for about an hour, Agent Bates was brought to an exam room by another female employee of the clinic who obtained Agent Bates’ weight and blood pressure and the reason for her visit, which she stated as headaches. (Appellant’s App at 79a.) The female employee then told Agent Bates that “the doctor” would “be in shortly.” *Id.*

Agent Bates captured most of the events in the exam room on video, by means of a hidden camera. (Appellant’s App at 81a-82a.) That video is included in Attachment A.

The video shows that Ms. Wang entered the room wearing a long, white lab coat and had a stethoscope around her neck. (Appellant's App at 79a-80a.) Ms. Wang asked Agent Bates about her medical history, including whether she smoked or drank, and when she had her last physical and her last pap smear. (Appellant's App at 79a.) Ms. Wang also asked about blood pressure, blood sugar, prior surgical history, and recreational drug use *Id.* Ms. Wang then asked for more detailed information about Agent Bates' reported headaches, including how long she had been experiencing the headaches, whether they were aggravated by light, and how she had attempted to treat the headaches. *Id.*

Ms. Wang suggested she could provide prescription medication to treat the headaches, and advised Agent Bates to avoid caffeine. (Appellant's App at 80a.) After asking the witness which pharmacy she preferred to use, Ms. Wang again asked about a pap smear and then left the room for about five minutes. *Id.* Upon inquiry by the court, Agent Bates said it was her understanding that Ms. Wang was acting as the treating physician and would perform the pap smear if she agreed. *Id.*

When Ms. Wang returned after being out of the room for about five minutes, she again asked Agent Bates which pharmacy she wanted to use. *Id.* Ms. Wang then asked Agent Bates if she had any other medical issues, and Agent Bates told Ms. Wang that she was having trouble sleeping. *Id.* Ms. Wang then performed a physical exam, which Dr. Catherine Reid, an expert witness for the People, subsequently explained was a neurological exam. (Appellant's App at 80a, 126a.) Ms. Wang initially recommended that Agent Bates take over-the-counter melatonin

for trouble sleeping. (Appellant's App at 81a.) Ms. Wang also discussed possible causes of the problem, as well as sleep hygiene. *Id.* Significantly, during that conversation, Ms. Wang produced a prescription pad and wrote Agent Bates a prescription for 10 pills of Ambien, a controlled substance. As documented by the video, Ms. Wang did so during the course of her conversation with Agent Bates, without talking with anyone else.

When Agent Bates asked Ms. Wang how long she had been a doctor, she replied, "about a year." *Id.*

The video recording of Agent Bates' undercover visit to Livernois Family Medical Center, including her interactions with Ms. Wang, was entered into evidence as People's Exhibit 15 and shown to the court. (Appellant's App at 82.) Due to the camera angle, the video does not depict the entirety of Agent Bates' encounter with Ms. Wang. *Id.* The video does not show the physical exam Ms. Wang performed, but it does show her writing a prescription for Ambien. The prescription itself was admitted into evidence. (Appellant's App at 109a.)

Agent Bates further testified that later, on January 15, 2015, when she presented herself as a law enforcement official to Ms. Wang and interviewed her, Ms. Wang stated that while working at the clinic, she saw patients in Dr. Hussain's absence, although she did not have a license to practice medicine or a license to write prescriptions. (Appellant's App at 83a-84a.)

People's Exhibit 10, the patient chart for "Krystal Jackson," documents much of Agent Bates' undercover encounter with Ms. Wang, including the prescriptions

provided by Ms. Wang and the physical exam she performed. (Appellant's App at 84a-85a.) The patient chart also contains a copy of the Medicaid card issued to Krystal Jackson that Agent Bates presented upon her arrival and check-in at the clinic. (Appellant's App at 85a.)

C. Other witnesses testified about the operation and rules of the Medicaid program.

The People's next witness was Trina Guy, a data specialist with the Michigan Attorney General's Health Care Fraud Division. (Appellant's App at 114a.) Ms. Guy testified that her job duties include obtaining Medicaid claims data from state databases, and that Medicaid claims were submitted by Livernois Family Medical Center and Dr. Hussain for the undercover visits by Agents Macon and Bates. (Appellant's App at 115a-116a.) Those claims were paid to Dr. Hussain in the amounts of \$71.70 and \$110.59, respectively. (Appellant's App at 116a.) Medicaid also paid for the prescriptions provided to Agent Macon. (Appellant's App at 118a.)

Michele Warstler of the Michigan Department of Health and Human Services' Office of Inspector General (OIG) testified next for the People. (Appellant's App at 120a.) Ms. Warstler explained that part of the OIG's mission is to "prevent, detect, refer, and address Medicaid fraud." *Id.* She further explained that the Medicaid program assists indigent people in obtaining medical care. *Id.* In order to participate in the program, health care providers must be licensed, and must obtain approval to participate. *Id.* If a provider is approved to participate, the provider may submit claims and receive reimbursement for providing medical

services to Medicaid beneficiaries. *Id.* Provider enrollment, participation, and reimbursement are contingent upon compliance with federal and state laws, rules, and policies, which are set forth in the Medicaid Provider Manual, a public document that is available online. (Appellant's App at 121a.)

Ms. Warstler testified that under Medicaid rules, a participating provider may not claim reimbursement for care delegated to and provided by an unlicensed person unless a participating physician was physically present and supervising the unlicensed person when the care was provided. *Id.* The witness further testified that claims submitted for reimbursement for care that was not actually provided, or that was provided by an unlicensed person who was not supervised in compliance with Medicaid rules, would be considered false claims and not payable. *Id.* If paid, Medicaid rules would require that the payment be returned. *Id.* Specifically, Medicaid will not pay for unlicensed persons to provide or write prescriptions. *Id.*

D. Dr. Catherine Reid testified that Ms. Wang had engaged in the practice of medicine with "Anderson" and "Jackson," including illegally prescribing controlled substances.

The People next called Dr. Catherine Reid, a consulting physician employed by the Michigan Department of Health and Human Services' Office of Medical Affairs in the Medicaid Service Administration. (Appellant's App at 123a.) Dr. Reid has been a licensed physician in Michigan since 2004. *Id.* She graduated from the School of Medicine at Texas Tech University, completed residencies in anesthesiology and internal medicine, and subsequently worked at a primary care clinic in Battle Creek. *Id.* Ms. Wang did not object to Dr. Reid testifying as an

expert. (Appellant's App at 123a.) She provided her expertise regarding the practice of medicine in an outpatient clinic, including delegation and supervision, prescribing, and billing.

Dr. Reid's job duties include reviewing cases involving suspected Medicaid fraud, as well as formulating Medicaid policy. *Id.* She is familiar with the Michigan Medicaid Provider Manual. (Appellant's App at 132a-124a.) Her review of the instant case included review of relevant portions of the manual, particularly the chapter pertaining to practitioners, as well as portions of the Public Health Code. (Appellant's App at 124a.) Dr. Reid also reviewed the undercover videos obtained by Agents Macon and Bates, medical records obtained from Livernois Family Medical Center pertaining to the Special Agents' visits, and records pertaining to other patients of the clinic. *Id.*

Significantly, after reviewing the above, and following objections from Ms. Wang's counsel that the trial court overruled, Dr. Reid testified and opined that Ms. Wang had engaged in the practice of medicine. (Appellant's App at 126a.) With reference to the undercover patient visit by Agent Bates posing as Krystal Jackson and the video of Agent Bates' interactions with Ms. Wang, Dr. Reid described the factual basis for her opinion in detail. (Appellant's App at 126a-127a.) The People's expert then summarized the factual basis for her opinion:

[Ms. Wang] did a specific[,] oriented history, discussing the specific symptoms, going into the past medical history of that patient, the family history, the social history. This was a new patient, so she covered all of those.

She then did a physical exam, concentrating on the symptoms you would look for with somebody coming in complaining of a headache.

And then she went on to counsel the patient about, you know, headache, avoidance, and sleep hygiene and how to, you know, get better sleep. And she offered her two products. One the over-the-counter Melatonin that she said she could take with milk, and the prescription Ambien. (Appellant's App at 127a.)

Dr. Reid further noted that Ms. Wang offered "Krystal Jackson" medications for her headaches. (Appellant's App at 126a.) Ms. Wang also performed a neurological exam that "a physician would do . . . not necessarily what a neurologist would do, but . . . what a primary care specialist would do" to assess possible causes of a headache. (Appellant's App at 126a-127a)

Dr. Reid also focused on the fact that in the video, after discussing "Krystal Jackson's" reported difficulty sleeping, and without leaving the exam room, making any phone calls, or otherwise consulting with any other person, Ms. Wang wrote a prescription for Ambien, a controlled substance. (Appellant's App at 127a.) "And she did that in the video. You could see her writing the prescription in the video." *Id.* Significantly, the video shows that between the times that Agent Bates first mentioned insomnia to Ms. Wang and the time Ms. Wang wrote the Ambien prescription, Ms. Wang did not leave the exam room or communicate with anyone else. (Attachment A.) She made the decision to prescribe a controlled substance, and did so entirely independently.

The People's expert witness confirmed that in Michigan, in order to engage in Ms. Wang's actions as depicted in the video with Agent Bates, including writing prescriptions for controlled substances, one must be both licensed as a health care professional, and possess an appropriate certification from the Federal Drug Enforcement Agency. (Appellant's App at 129a.) The expert further stated that a

doctor may not authorize an unlicensed person to provide prescriptions.

(Appellant's App at 134a.)

Dr. Reid also noted that during her encounter with Agent Bates, Ms. Wang wore a long, white lab coat, like a physician, and had a stethoscope around her neck, like a physician. (Appellant's App at 126a.) When asked how long she had been a doctor, Ms. Wang replied, "a year." (Appellant's App at 127a.)

The prosecutor then asked Dr. Reid about the contents of the progress note from Livernois Family Medical Center pertaining to Agent Bates' presentation as Krystal Jackson. *Id.* Dr. Reid confirmed that the progress note indicated that Ms. Wang had prepared it, and that much of the information in the note was consistent with the information provided to Ms. Wang by Agent Bates, and/or consistent with the actions taken by Ms. Wang, indicating that Ms. Wang had documented and/or provided the information for inclusion in the note. (Appellant's App at 128a-130a.) Dr. Reid explained that the information in progress notes is used for both subsequent treatment and for billing purposes. (Appellant's App at 130a.) Dr. Reid pointed out that in the video, Ms. Wang had a billing sheet in her hand. *Id.*

Dr. Reid next testified regarding Agent Macon's presentation to Ms. Wang as "Christopher Anderson." *Id.* The expert noted that although the video did not visually depict the interaction between Agent Macon and Ms. Wang, the audio recording captured their conversation. *Id.* Agent Macon presented as a new patient to Livernois Family Medical Center, reportedly having recently moved to Detroit from New York, and Ms. Wang provided him with multiple medication "refills,"

including prescriptions for Vitamin D, an inhaler to treat asthma, Klonopin, and Adderall. (Appellant's App at 130a-131a.) The latter are both controlled substances. (Appellant's App at 130a, 133a.) After Dr. Reid noted that Ms. Wang requested "Christopher Anderson's" previous medical records, the following exchange occurred between the prosecutor and the expert witness:

- Q. What was the reason that she asked for his records to be sent to that practice?
- A. As I just stated in my previous testimony a few minutes ago, she specifically asked the agent if he was a new patient, and he said yes. And he said he had moved from New York. And then she responded, you know, you moved here from New York? So it was in the video she specifically asked him if he was a new patient, and he said yes, he was a new patient.
- Q. Okay. Is there anything about the fact that a patient is new that would make a difference in whether you simply filled, refilled a prescription or wrote a new prescription?
- A. It would be bad medicine to just accept a new patient and refill medications without a very detailed history and physical exam during the – you know, during the visit. And certain medications, for instance, Adderall, which are subject to abuse, then it would be best that you got the previous medications or some record that that had been the medication the patient was on before. That he did, in fact, have diagnosis of ADD before you refilled something like that. The same could be said of Klonopin. So if you did a detailed history and physical examination, you might even be able to see if you could get some of the records faxed right then, you might have been able to get some pharmacy records before you refilled controlled substances that were subject to abuse.
- Q. Does the decision then to give a prescription for something that somebody comes in asking for, does that involve the practice of medicine?
- A. Yes. (Appellant's App at 131a.)

In further testimony, Dr. Reid explained why any person who has a meaningful interaction with a patient for the purpose of providing treatment inevitably is engaged in the independent practice of medicine:

The person who is actually in the office seeing the patient is the one asking the questions, seeing the results of the physical exam, hearing the results of the answer. They are actually making the diagnosis themselves. ***And even if they were to then call the licensed physician, who is nowhere around physically, they are still presenting the diagnosis that they've already made to that person who is not there and has not seen that patient.*** (Appellant's App at 132a; emphasis added.)

Significantly, Dr. Reid also made clear in her testimony that a licensed physician may not delegate the practice of medicine to an unlicensed person, and under Medicaid rules, a licensed health care provider must "be physically present to directly supervise" an unlicensed individual, such as Ms. Wang, in providing care to a patient. (Appellant's App at 131a.)

The expert further testified that an individual, such as Ms. Wang, who worked in a primary care clinic that was not a free clinic, could be expected to be aware of the American health care model. (Appellant's App at 134a.) Under that model, providers must be licensed, and patients pay for the care they receive either with cash or through insurance. *Id.* Ms. Wang had not only worked at Livernois Family Medical Center; she had worked through AmeriClerkships, a program for foreign medical graduates, and had done three other clerkships at other health care facilities — one in pediatrics, and two in internal medicine. *Id.*

Following Dr. Reid's testimony, the People rested their case-in-chief, and the court denied Ms. Wang's motions for acquittal as to the two counts of Medicaid

fraud against her. Ms. Wang's counsel did not move for acquittal on the count of unauthorized practice of medicine. (Appellant's App at 152a-155a.)

E. Ms. Wang presented her witnesses, including herself.

Ms. Wang first called Dr. Murtaza Hussain, the former owner and operator of Livernois Family Medical Center, and her former employer. (Appellant's App at 155a.) Dr. Hussain confirmed that Ms. Wang first came to his clinic as a clerk through AmeriClerkships. *Id.*

Dr. Hussain agreed that his clinic "did not shut down" when he was not there. (Appellant's App at 161a.) Individuals such as Ms. Wang, who was not licensed, continued to see patients in his absence, although Dr. Hussain was available by phone. *Id.* He testified:

- Q. And what would be your reasoning for providing your phone number to Ms. Wang? Why would you do that?
- A. There are two reason [sic], one is that *if* they need to discuss any case about patient findings or *treatment* or *if* they run into any problem.
- Q. Okay. How about as relates to if a patient [sic] presents and they need a prescription of some kind?
- A. Well, the prescriptions, if I'm not in the clinic, I have some prescription pads that I sign and give it to my office manager and they call me that they can give it to the patient if I'm not there.
- Q. If I can clarify, when you say they, who would they be?
- A. Whoever is seeing the patient. ***They tell my office manager and then my office manager call me and I approve or disapprove.*** (Appellant's App at 161a-162a; emphasis added)

In further testimony, Dr. Hussain reiterated that he only permitted his employees to provide prescriptions to patients “after consulting with me.” (Appellant’s App at 162a.) When asked whether Ms. Wang was permitted to write prescriptions without consulting with him, Dr. Hussain again said, “No, they were supposed to consult with me,” and added in response to further inquiry that he was not aware of Ms. Wang writing prescriptions without consulting with him. (Appellant’s App at 162a-163a.)

As noted above, Ms. Wang did write a prescription for Ambien to “Krystal Jackson” without consulting Dr. Hussain. (Appellant’s App at 127a; Attachment A.)

On cross-examination, Dr. Hussain acknowledged that he pled guilty to one count of health care fraud and one count of Medicaid fraud, in a case related to the instant case. (Appellant’s App at 164a.)

Dr. Hussain testified that when he was not present in the clinic and Ms. Wang was seeing patients, he would talk with her by telephone “one or two times” per day. (Appellant’s App at 168a.)

Ms. Wang called Darius Baty to testify. (Appellant’s App at 171a.) Mr. Baty said that he worked as a nursing assistant and an “operations manager” at Livernois Family Medical Center, and was involved in processing Medicaid billing. (Appellant’s App at 171a, 175a.) Mr. Baty testified that “a good 50 percent” of the clinic’s patients were Medicaid patients. (Appellant’s App at 176a.) The witness agreed that “the bulk” of the clinic’s income was from Medicaid, Medicare, and private insurance. (Appellant’s App at 177a.) With Medicaid patients, a paper copy

of their Medicaid card was placed in their patient chart, and anyone who looked at the chart could see the copy of the card. (Appellant's App at 176a.)

Mr. Baty further agreed that "everybody [who worked in the clinic] that had contact with the patient was involved with completing the paperwork that was used for billing purposes." (Appellant's App at 178a.) Moreover, "everybody who had contact with the patient knew that a bill was going to be generated and sent to somebody so that the clinic could be paid for that patient visit." *Id.* Ms. Wang was among those who were generally aware of the billing process as it related to patient care. *Id.*

Ms. Wang testified on her own behalf. (Appellant's App at 179a.) She said that she received a medical degree in China and practiced medicine there before moving to the United States in 2001 to complete a Ph.D. program in basic medical studies at Purdue University. (Appellant's App at 179a-180a.) Thereafter, she held medical research positions at the University of Michigan, for five years, and then at William Beaumont Hospital in Royal Oak, Michigan before starting student rotations through AmeriClerkships. (Appellant's App at 180a.) As a student, she rotated through four clinics before going to Livernois Family Medical Center in September 2013. (Appellant's App at 179a-181a.) After a one-month rotation there, Ms. Wang said she began working at the clinic as a volunteer, which she did for three-to-four months before becoming a paid, part-time employee, earning \$20 to \$30 per hour. (Appellant's App at 181a, 196a)

Ms. Wang testified that during interactions with patients, she made notes on a form that had “billing code[s]” on the other side. (Appellant’s App at 182a.) She clarified that “the other side of the encounter form was for billing.” *Id.* In her testimony, Ms. Wang alleged that when she saw patients when Dr. Hussain was not present in the clinic, as when she saw Agents Macon and Bates when they presented undercover as patients, she telephoned Dr. Hussain to “report everything I wrote . . . to gather his opinion” about providing prescriptions. (Appellant’s App at 183a.) Ms. Wang further testified that although she entered information she obtained from patients into computers at the clinic, she was not involved with “third-party billing.” *Id.*

On cross-examination, Ms. Wang acknowledged that in the United States, she has been a patient, currently had health insurance, and had health insurance in the past. (Appellant’s App at 188a.) Her children were born in this country. *Id.* She agreed that as a rotating student with Livernois Family Medical Center and four other clinics, she was learning about the American medical system. (Appellant’s App at 187a.) She ultimately acknowledged she was aware of the Medicaid program and that some of the clinic’s patients were Medicaid beneficiaries:

Q. Okay. So you did know that some of the patients received Medicaid, you just didn’t necessarily know which ones, right?

A. Yeah. (Appellant’s App at 188a-189a.)

Ms. Wang said that after she entered information into the clinic's computers, Dr. Hussain reviewed that information, and Dr. Hussain was responsible for billing. (Appellant's App at 189a.)

Ms. Wang agreed that based upon her experiences in China, she is familiar with the practice of medicine. She admitted that she treated Agent Bates as "Krystal Jackson," for headaches and insomnia. (Appellant's App at 192a-193a.)

In further examination, Ms. Wang admitted that when Dr. Hussain was not present in the clinic, she spent 8-to-9 hours seeing 10-to-15 patients per day. (Appellant's App at 194a.) She spent 30 to 45 minutes with each patient. *Id.* She said she communicated with Dr. Hussain by phone and text message regarding each patient. *Id.* Ms. Wang acknowledged, however, that she wrote Agent Bates a prescription for Ambien after she left the room, allegedly to consult Dr. Hussain, and then returned. (Appellant's App at 195a.) Per the video, after Ms. Wang returned to the room, Agent Bates told her that she was having a problem with insomnia. (Attachment A.) Without again leaving the room or using her phone or any other communication device, Ms. Wang then handwrote a prescription for Ambien for Agent Bates. *Id.*

On November 4, 2016, the court convened for the final day of trial. No evidence was presented, and the parties made their closing arguments. (Appellant's App at 201a-210a.) Thereafter, the court took a recess, and then returned to state its findings of fact and conclusions of law on the record. (Appellant's App at 211a.)

In doing so, the trial judge stated the elements of each of the charged offenses and also her factual findings as to each element. (Appellant's App at 211a-212a.)

F. The trial court finds Ms. Wang guilty as charged.

As to unauthorized practice of a health profession, in addressing Ms. Wang and finding her guilty, the court cited "ample evidence" that was "both direct and circumstantial" that Ms. Wang caused patients "to believe that you were the doctor." (Appellant's App at 211a.) The court further commented to Ms. Wang that "[e]ven when you said you were not a doctor, you still gave them medical advice, information that really is in the realm of a doctor. . . ." *Id.* The court found that Ms. Wang "did practice or hold herself out as practicing medicine." *Id.* The trial judge further noted that in Michigan, medicine is a regulated health profession for which a license to practice is required, and Ms. Wang did not hold such a license. *Id.*

As to Medicaid Fraud-False Claim, the court noted that the elements of the crime are: (1) that the defendant made or caused a claim to be made to the state; (2) that the claim was made to Medicaid, which is part of the Social Welfare Act; (3) the claim was false; and (4) the defendant knew the claim was false. *Id.* The court noted that the crime is one of general intent, although the People still must meet the burden of proving the culpable *mens rea* of knowledge, which can be proved circumstantially. *Id.*

As to the evidence of Medicaid fraud, the court noted that Livernois Family Medical Center received a significant portion of its income from billing insurance,

including Medicaid, and found that in light of the fact that Ms. Wang in her patient encounters was recording information on a document that had a billing form on the opposite side, “defendant clearly knew that there was billing going to insurance,” and “there are multiple forms of insurance.” (Appellant’s App at 212a.) The court further found:

This was not [Ms. Wang’s] 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, and that’s what her paycheck was coming from, at least in part - at least in part from Medicaid. *Id.*

G. Ms. Wang is sentenced to five years’ probation and fines totaling \$105,000.

The court held the sentencing hearing on January 11, 2017, and sentenced Ms. Wang to five years’ probation and imposed fines totaling \$105,000 (\$50,000 on each of Counts I and II, and \$5,000 on Count III), as well as costs. (Appellant’s App at 219a.) The court further sentenced Ms. Wang to 365 days in jail, held in abeyance, and stated that she could be discharged from probation upon payment in full of fines and costs. (Appellant’s App at 218a-219a.)

ARGUMENT

I. **Under this Court’s holding in *People v Rios*, the prosecution has the burden of proving that an unlicensed person who engaged in the practice of a health profession did not do so pursuant to a valid delegation under the statutory exception in MCL 333.16215 that is referenced in MCL 333.16294.**

A. **Standard of Review**

In *People v Rios*, this Court held that it would “not infer a change in the burden of proof without express statutory language to that effect.” 386 Mich 172, 175 (1971).

B. **Analysis**

Neither MCL 333.16294 nor MCL 333.16215 contains language regarding the burden of proof. Therefore, the People agree with Ms. Wang that, pursuant to *Rios*, the burden of disproving the exception contained in the latter statute as referenced in the former remains on the prosecution.

Ms. Wang in her supplemental brief goes on to assert that “*People v Langlois*, 325 Mich App 236; 924 NW2d 904 (2018) was improperly decided.” (Appellant’s Supp Br, p 17.) In that case, the Court of Appeals held that as a matter of law, the “delegation defense” was not available to the defendant, a veterinarian charged with violating MCL 333.16294 for performing veterinary surgery after his license to practice veterinary medicine was revoked. 325 Mich App at 245-246. The *Langlois* court did not consider, and thus did not analyze or decide, the issue of whether the existence of a valid delegation under MCL 333.16215 was a defense to be raised by

the defendant or the lack of a valid delegation was an element of MCL 333.16294 to be proved by the prosecution.

Rather, the court assumed the provisions in the delegation statute constituted a defense and then focused its analysis on whether those provisions could apply to the defendant. 325 Mich App at 240-246. To the extent that the Court of Appeals assumed that delegation was a defense, it was in error in light of *Rios*. As will be discussed below, however, the *Langlois* court's analysis regarding the application of MCL 333.16215 under the facts of that case was sound and is relevant here.

II. The Court of Appeals correctly concluded that Ms. Wang had engaged in the practice of medicine that could not be delegated to her under MCL 333.16215, and correctly held that the evidence was sufficient to sustain Ms. Wang's conviction under MCL 333.16294.

A. Standard of Review

This Court interprets statutes de novo with the goal of effectuating the Legislature's intent, based primarily upon the express language of the statute. See *Badeen v Par, Inc.*, 496 Mich 75, 81 (2016). The Court looks at the entire statute and avoids constructions "that would render any part of the statute surplusage or nugatory." *Id.*

When reviewing a defendant's claim of insufficiency of the evidence to support a criminal conviction, an appellate court views the evidence "in the light most favorable to the prosecution [to] determine whether a rational trier of fact

could find that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Reese*, 491 Mich 127, 139 (2012).

B. Analysis

The primary statute at issue here reserves the practice of a health profession to licensed persons, and makes it a felony to practice without a license:

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. (MCL 333.16294.)

The key language at issue here is the exception in §16215, which provides that “selected” medical acts may be delegated but other acts may not be delegated if the nature of the act requires that it be performed by a license professional:

[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.*** (MCL 333.16215(1) (emphasis added).)

With reference to MCL 333.16294, the practice of medicine is a “health profession” regulated under the Public Health Code, defined pursuant to MCL 333.17001(j) as follows:

(j) “Practice of medicine” means the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts. *Id.*

1. Ms. Wang engaged in the unlicensed practice of medicine by prescribing controlled substances and engaging in the full scope of the practice of medicine, neither of which may be delegated to an unlicensed person.

The evidence demonstrated that Xun Wang engaged in the illegal practice of a health profession in that: (1) under “standards of acceptable and prevailing practice” the act of prescribing controlled substances constitutes medical treatment that must be performed by a licensed health professional and may not be delegated to an unlicensed person such as Ms. Wang; and (2) also under “standards of acceptable and prevailing practice,” an unlicensed person may not engage in the full scope of the practice of medicine, as contrasted with a “selected acts, tasks, or functions.” MCL 333.16215. Ms. Wang violated MCL 333.16294 in both ways.

With respect to prescribing controlled substances, the record is clear that Ms. Wang examined the agents, believing them to be patients, and then informed them that they would be receiving prescriptions for controlled substances. For Agent Macon, posing as “Christopher Anderson,” it was Klonopin and Adderall, and for Agent Bates, posing as “Krystal Jackson,” it was Ambien. (Appellant’s App at 66a, 81a.) The record evidence belies the claim that Ms. Wang was able to consult in any meaningful way with Dr. Hussain about these prescriptions, but that issue ultimately is not relevant. As found by the Court of Appeals, Ms. Wang’s actions “could not be delegated to her under the statute,” as she “engaged in the tasks of

examining patients, diagnosing patients, and prescribing medication, i.e., the tasks of a doctor.” (Appellant’s App at 23a.) These acts—diagnosing and then prescribing controlled substances—constitute the practice of medicine and cannot be delegated to an unlicensed professional, under the language of the delegation exception as supported by Dr. Reid’s trial testimony.

The Court of Appeals’ decision in *People v Ham-Ying*, 142 Mich App 831 (1985), supports this conclusion. In *Ham-Ying*, the defendant’s license was suspended after he was convicted of illegally prescribing a controlled substance. 142 Mich App at 833. The defendant subsequently dispensed prescriptions for a controlled substance while his license was suspended, and he was charged with violating MCL 333.16294. *Id.* He argued in a motion to quash the information that he was properly delegated the ability to prescribe controlled substances pursuant to MCL 333.16215. 142 Mich App at 833-834. The circuit court ruled prior to trial that the question of whether the alleged delegation was proper was a question of fact for the jury. *Id.* at 834. The Court of Appeals granted the prosecution’s interlocutory application for leave to appeal and ruled that the delegation question was one of law for the court, rather than a factual question for the jury. *Id.*

The *Ham-Ying* court framed the question presented as “whether under [MCL 333.16215(1)] a licensed physician may delegate the tasks of prescribing and dispensing drugs to a physician whose license has been suspended.” 142 Mich App at 835. The court did not hesitate to answer that question in the negative. It

construed the Public Health Code “in light of [its] purpose” of protecting and promoting public health and safety, and held that this act could not be delegated:

If defendant is held to be a proper delegate of the rights afforded licensed physicians, including the right to prescribe or dispense controlled substances, he will in effect be allowed to circumvent the terms of and reasons for his suspension. Such a result could not have been intended by the Legislature. In addition, such a holding would frustrate the purpose behind the [Public Health] code’s enactment of protecting the public from incompetence, deception, and fraud. (142 Mich App at 835-836.)

While Ms. Wang had never obtained a license to practice medicine and the *Ham-Ying* defendant’s license was suspended, there is no principled basis to distinguish between the two situations, and the Court of Appeals’ reasoning applies with equal force here. Like the defendant in that case, Ms. Wang unlawfully prescribed a controlled substance. As in that case, to hold that MCL 333.16215(1) legitimizes her actions, which included engaging in the full scope of the practice of medicine, would allow her to circumvent her lack of licensure and frustrate the purpose of the Public Health Code.

As to Ms. Wang performing the full scope of medical acts that are reserved to a licensed professional, if the Legislature intended to authorize such delegation, it could and would have said so. Instead, the Legislature specified that only “selected” acts under MCL 333.16215 “within” the scope of the licensee’s practice may be delegated.

To interpret MCL 333.16215 as providing that *all* of the acts, tasks, or functions of a licensee’s profession may be delegated to unlicensed persons would not only contravene the plain language of the delegation exception, but also would

obviate the licensure requirement as applied to unlicensed practitioners where they are willing to delegate the full practice of their profession under circumstances that otherwise met the requirements of MCL 333.16215. Surely that could not have been the legislative intent, and the last sentence of MCL 333.16215(1), which limits the delegation of practice by a licensed professional, supports this conclusion.

The case law that has addressed the scope and applicability of MCL 333.16215(1) places limits on the delegation exception, based upon public policy, legislative intent, professional standards, and the language of the statute itself. In addition to the *Ham-Ying* decision, in *Langlois*, the Court of Appeals pointed out that the defendant's argument that MCL 333.16215(1) permitted delegation of veterinary surgery to a veterinarian whose license had been suspended ignored the statutory language set forth above. 325 Mich App at 243. The *Langlois* court noted that per the testimony of the prosecution's expert witness, a licensed veterinarian, the "acceptable and prevailing practice" language in the last sentence of MCL 333.16215(1) did not allow for delegation of surgery to an unlicensed individual. *Id.* Likewise, in this case, prosecution expert Dr. Reid testified that Ms. Wang's actions as depicted in the video and audio recordings of her interactions with Agents Bates and Macon, respectively, constituted the practice of medicine and could not be delegated to an unlicensed individual such as Ms. Wang. (Appellant's App at 129a, 131a.)

Under the proper appellate standard of review, the trial evidence was more than sufficient to convict Ms. Wang of one count of Health Profession-Unauthorized

Practice. Ms. Wang held no license to practice medicine. The dispute at trial concerned whether she practiced or held herself out as practicing medicine.

Ms. Wang in her brief fails to weigh the fact that she violated MCL 333.16294 when she committed the single act of writing a prescription for a controlled substance, Ambien, for Agent Bates, and could have been convicted on that basis alone.

During her undercover encounter with Ms. Wang, Agent Bates informed Ms. Wang that she was having trouble sleeping. (Appellant's App at 81a.) Ms. Wang then recommended that Agent Bates take over-the-counter melatonin for her insomnia. *Id.* Ms. Wang also discussed possible causes of the problem, as well as sleep hygiene. *Id.* Ms. Wang then produced a prescription pad and wrote Agent Bates a prescription for 10 pills of Ambien, a Schedule 4 controlled substance. *Id.*; *See Mich Admin Code R 338.3123(1); Bloomfield Twp v Kane*, 302 Mich App 170 (2013). As documented by the video, Ms. Wang did so without leaving the patient room or communicating with anyone else, which did not comport with Dr. Hussain's (illegal) drug protocol. (Appellant's App at 81a; Attachment A); *See also* MCL 333.16109(2)(c) (Defining "supervision" as used in MCL 333.16215(1) as including "The provision by the licensed health professional of predetermined procedures and drug protocol.") Per the testimony of the People's expert, Dr. Reid, Ms. Wang's interactions with Agent Bates regarding her insomnia constituted the practice of medicine. (Appellant's App at 126a.) Dr. Reid further testified that to legally write prescriptions for controlled substances in Michigan, one also must possess a

certification from the Federal Drug Enforcement Agency, which Ms. Wang did not have.¹ (Appellant's App at 126a-127a, 129a, 134a)

In addition to Dr. Reid's testimony, the video of Agent Bates' encounter with Ms. Wang clearly depicts her holding herself out as a physician. (Appellant's App at 127a, Attachment A.) She entered the room in a long, white coat with a stethoscope around her neck. (Attachment A.) She solicited a detailed medical history from Agent Bates, as well as a detailed history about her presenting complaints. *Id.* Ms. Wang performed a neurological exam, gave medical advice, prescribed medications, and told Agent Bates that she had been a doctor for "about a year." *Id.* Those actions were consistent with the practice of medicine, according to Dr. Reid and as defined by statute. (Appellant's App at 126a-127a.); *See* MCL 333.17001 ("Practice of medicine means the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts.").

Likewise, Ms. Wang provided medical treatment to Agent Macon by soliciting medical history and prescribing medications. (Attachment A.) Although Ms. Wang has tried to minimize the significance of the treatment she provided to "Christopher Anderson" as merely providing prescription "refills," Dr. Reid made clear that because Agent Macon was posing as a new patient who had not previously received

¹ Under the Michigan Public Health Code, one must be a licensed health professional to prescribe a drug. MCL 333.17751; MCL 333.17708.

prescriptions from Livernois Family Medical Center, Ms. Wang's decision to provide him with prescriptions, including for controlled substances, necessarily involved medical decision-making and constituted the independent practice of medicine. (Appellant's App at 130a-133a.)

The evidence that Ms. Wang acted as a physician was substantial. Viewed in the light most favorable to the prosecution it was more than sufficient to support a conviction on the charge of Health Profession-Unauthorized Practice.

2. The Court of Appeals properly affirmed.

The Court of Appeals noted that "ample evidence" at trial showed that Ms. Wang was engaged in the practice of medicine and held herself out as such. (Appellant's App at 22a.) Ms. Wang engaged in diagnosis and treatment of Agents Bates and Macon in the absence of her alleged supervisor, Dr. Hussain. The People's expert witness, Dr. Reid, opined that Ms. Wang engaged in the activities of a doctor and the practice of medicine, thereby practicing a health profession without a license. (Appellant's App at 23a.)

In response to Ms. Wang's arguments that her actions were properly delegated to her pursuant to MCL 333.16215 by Dr. Hussain, the Court of Appeals first cited *Rios*, then reviewed the delegation statute and related provisions, including the definitions of key terms therein. *Id.* The court concluded its review of the applicable statutory provisions by stating, without detailed analysis or explanation, that "[T]he '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." *Id.* The Court of Appeals further found that the trial court properly concluded that the prosecution negated the "delegation exception" by introducing Dr. Reid's testimony that Ms. Wang's activities were "tasks usually performed by a doctor." (Appellant's App at 24a.)

The Court of Appeals correctly interpreted MCL 333.16294 and MCL 333.16215. Based upon the language of those statutes, the court reasonably held that they do not authorize a licensed doctor to delegate these responsibilities or for unlicensed person to exercise the full scope of the practice of medicine. (Appellant's App at 23a.)

In sum, neither the language of MCL 333.16215(1) nor the case law interpreting that statute permitted Ms. Wang's employer to lawfully delegate the full scope of the practice of medicine to her. Notably, the "Scope of Practice of Health Professionals in the State of Michigan" document that Ms. Wang cites in her brief and includes in her appendix states that "[T]he law allows a health professional to delegate specific activities, **but not a broad component of his/her scope of practice.**" (Appellant's App at 228a; emphasis added.)² That document further states limits on the ability to delegate:

When it comes to supervision, **delegation**, and scope of practice, MDs and DOs have the broadest responsibility and authority, but **without**

² "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).

a State of Michigan license, these and other health professionals, regardless of their background, legally may not practice. (Appellant’s App at 237a; emphasis added.)

Clearly, the “standards of acceptable and prevailing practice” do not permit delegation of the practice of medicine to an unlicensed individual such as Ms. Wang. MCL 333.16215(1).³

Ms. Wang also argues, as she did at trial, that her role in Dr. Hussain’s practice was limited to that of an assistant or scribe who merely gathered information. (Appellant’s Supp Br at 19.) In continuing to advance that narrative, Ms. Wang ignores the standard of review that requires the appellate court to view the evidence in the light most favorable to the prosecution. *Reese*, 491 Mich at 139. Instead, Ms. Wang invites this Court to retry the case.

³ Further, a letter signed by the CEO and Legal Counsel of the American Association of Medical Assistants addressing “what tasks are delegable legally to medical assistants according to Michigan law” states:

Tasks which constitute the practice of medicine, or which state law permits only certain health care professionals to perform...may not be delegated to unlicensed professionals such as medical assistants.

American Association of Medical Assistants, *Letter Regarding Delegable Duties in Michigan*, <<http://www.aama-ntl.org/docs/default-source/legal/delegable-duties-michigan.pdf?sfvrsn=4>> (accessed July 31, 2019).

III. Ms. Wang’s trial counsel was not ineffective for failing to raise a “delegation defense” where lack of valid delegation was an element of the offense.

A. Issue Preservation

Since Ms. Wang did not raise a claim of ineffective assistance of trial counsel in a motion for a new trial under *People v Ginther*, 390 Mich 436 (1973), this Court’s review is limited to mistakes apparent on the record.

B. Standard of Review

To prevail on her claim of ineffective assistance of counsel, Ms. Wang must show: (1) that her trial attorneys’ performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *People v Vaughn*, 491 Mich 642 (2012). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Eisen*, 296 Mich App 326, 329 (2012). Further, Ms. Wang must establish a factual predicate for her ineffective assistance claim. *People v Putnam*, 309 Mich App 240, 248 (2015).

C. Analysis

Logically, Ms. Wang’s trial counsel cannot have been ineffective for failing to raise a “defense” that does not exist. Both the People and Ms. Wang in her supplemental brief agree that proving the lack of a lawful delegation under MCL 333.16215(1) is an element of unauthorized practice of a health profession under

MCL 333.16294, pursuant to this Court's holding in *Rios*. Ms. Wang further argues that the Court of Appeals in *Langlois* erred in recognizing a "delegation defense."

While the People interpret *Langlois* differently, the People agree that there is no "delegation defense," and Ms. Wang's trial counsel therefore were not ineffective in failing to raise it. There is no basis to conclude that her representation fell below an objective standard of reasonableness, or to conclude that but for the failure to raise a nonexistent defense, the outcome of the trial would have been different.

Rather than focus on the delegation element, Ms. Wang's counsel argued that her allegedly limited duties in Dr. Hussain's employ fell well short of the full-scale practice of medicine and therefore did not violate MCL 333.16294. (Appellant's App at 63a.) Ms. Wang stated in the videos obtained by the Agents, and her attorneys argued at trial, that she was a "medical assistant." (Appellant's App at 63a, 206a-207a.) Ms. Wang's counsel argued that as a "medical assistant," she was not practicing medicine, and to the extent that she might have done so, she was "duped" by her employer into doing so, and she was his "victim." (Appellant's App at 61a.) On cross-examination, Ms. Wang said she followed Dr. Hussain's instructions, and although she admitted to and was shown in the video evidence performing many actions that constituted the practice of medicine, she denied independent medical decision-making. (Appellant's App at 195a.) In sum, in the view of Ms. Wang and her counsel, the evidence showed that she was not practicing medicine, as opposed to doing so pursuant to a lawful delegation. Although the trial court rejected that

contention, in light of Ms. Wang's own testimony, her counsel's strategy did not fall below an objective standard of reasonableness.

IV. The People's evidence was sufficient to show that Ms. Wang was aware or should have been aware that her conduct was substantially certain to cause the payment of a Medicaid benefit, and supported her convictions of Medicaid Fraud-False Claim in Counts I and II.

A. Standard of Review

When reviewing a defendant's claim of insufficiency of the evidence to support a criminal conviction, an appellate court views the evidence "in the light most favorable to the prosecution [to] determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139 (2012).

B. Analysis

The evidence was more than sufficient to convict Ms. Wang of two counts of Medicaid Fraud-False Claim. Ms. Wang was charged in Counts I and II with violating MCL 400.607(1), which provides that a false Medicaid claim must be known to be false:

(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. (*Id.* (emphasis added).)

"Knowing" is broadly 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.*** (*Id.* (emphasis added).)

Applying the standard of review above to the evidence introduced by the People, there is ample basis to affirm Ms. Wang's convictions for violating MCL 400.607(1). Ms. Wang contested only the *mens rea* element of "knowing" on those charges; the remaining elements were not in dispute. (Appellant's Supp Br at 27-37.) As to the knowledge element of Medicaid fraud, Ms. Wang has a working familiarity with the American medical system. (Appellant's App at 179a-181a.) She has been a patient, a student, a researcher, and a provider, albeit unlawfully. She has lived in the United States since 2001. *Id.* She completed a Ph.D. in basic medical science, did research at two hospitals, and then rotated through five clinics learning about the practice of medicine in this country. *Id.* Her children were born in the United States, and she herself has health insurance. (Appellant's App at 179a-181a, 188a.)

Dr. Catherine Reid, the People's expert witness, testified that an individual such as Ms. Wang, who worked in a primary care clinic that was not a free clinic, could be expected to be aware of the American health care model. (Appellant's App at 134a.) Under that model, patients pay for the care they receive either with cash or through insurance payments. *Id.*

Ms. Wang admitted when she testified that she is aware of the Medicaid program as a government health insurance program. (Appellant's App at 188a-189a.) She was aware that some of the patients she was treating at Livernois

Family Medical Center were Medicaid beneficiaries, and knew that the clinic derived income from patients' insurance, while she was an employee earning \$20 to \$30 per hour. (Appellant's App at 188a-189a, 196a.) The evidence showed that copies of patients' Medicaid cards were placed in their paper charts, including those of "Christopher Anderson" and "Krystal Jackson," the undercover Agents whose presentations as patients to Ms. Wang were the basis of Counts I and II. (Appellant's App at 54a, 85a.) During those presentations, Ms. Wang recorded information on a document that had a billing form on the other side. (Appellant's App at 182a.)

Defense witness Darius Baty testified that "a good 50 percent" of the clinic's patients were Medicaid patients. (Appellant's App at 176a.) Those patients' Medicaid card was placed in their chart, and anyone who looked at the chart could see a copy of the card. *Id.* The witness agreed that "the bulk" of the clinic's income was from Medicaid, Medicare, and private insurance. (Appellant's App at 177a.) Mr. Baty further agreed that "everybody [who worked in the clinic] that had contact with the patient was involved with completing the paperwork that was used for billing purposes." (Appellant's App at 178a.) Moreover, Mr. Baty agreed that "everybody who had contact with the patient knew that a bill was going to be generated and sent to somebody so that the clinic could be paid for that patient visit." *Id.* The witness said that Ms. Wang was among those who were generally aware of the billing process as it related to patient care. *Id.*

There was abundant evidence of Ms. Wang was aware or should have been aware that any patient she treated at the clinic could be a Medicaid patient and could result in a Medicaid claim. Viewed in the light most favorable to the prosecution, the evidence showed that Ms. Wang either had actual knowledge that “Christopher Anderson” and “Krystal Jackson” were Medicaid patients, as copies of their Medicaid cards were in their charts, which Ms. Wang accessed, or, at a minimum, showed that she should have been aware of the nature of her conduct and that her conduct was substantially certain to cause the payment of a Medicaid benefit, as contemplated by the expansive definition of “knowing” in MCL 400.602(f).

The trial court noted that Livernois Family Medical Center received a significant portion of its income from billing insurance, including Medicaid, and found that in light of the fact that Ms. Wang in her patient encounters was recording information on a document that had a billing form on the opposite side, “defendant clearly knew that there was billing going to insurance,” and “there are multiple forms of insurance.” (Appellant’s App at 212a.) The court further found:

This was not [Ms. Wang’s] 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, and that’s what her paycheck was coming from, at least in part – at least in part from Medicaid. (*Id.*)

Further, the fact that Ms. Wang was working to enter a residency program demonstrates that she knew she needed additional experience and credentials to become a licensed physician, and she either knew or should have known that to lawfully provide services for which insurance, particularly Medicaid, would be

billed, she needed to be a licensed medical practitioner. By purposely seeing and treating patients without a license and in the absence of a licensed health care provider, contrary to Medicaid rules as reflected in the Provider Manual, she acted in deliberate ignorance or reckless disregard of the truth or falsity of the claims that would be submitted to insurance based upon her actions.

In light of her general knowledge and the surrounding circumstances, Ms. Wang was aware or should have been aware that her actions would result in the submission to the state of false Medicaid claims, as “knowing” and “knowingly” are defined in MCL 400.602(f). At best, she acted in deliberate ignorance or with reckless disregard. This Court should affirm Ms. Wang’s convictions on the Medicaid fraud charges in Counts I and II.

CONCLUSION AND RELIEF REQUESTED

The People respectfully request that this Court deny Ms. Wang's application for leave to appeal or otherwise issue an opinion affirming her convictions.

Respectfully submitted,

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