

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL MANN,

Defendant-Appellant.

UNPUBLISHED

May 13, 1997

No. 175373

Ingham Circuit Court

LC No. 93-066366-FH

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of two counts of Medicaid fraud MCL 400.607; MSA 16.614(7). He was sentenced to two years' probation with the first thirty days to be served in the county jail. We affirm.

Defendant was a long time employee of the Department of Social Services Medical Services Administration (MSA). While so employed, defendant signed a three-year contract with Health Care Claims Corporation (HCC), a third-party medical claims billing company, to provide consulting services. In order for a provider to receive reimbursement from Medicaid for services rendered, a claim must be submitted, with limited exceptions, within twelve months from the date of service to MSA. Individuals associated with HCC discovered a means to circumvent the twelve-month deadline by using improper reference codes to make stale claims appear to be legitimately payable when, under the existing policy, they were not.

When the scheme came to light, defendant was charged with and convicted of violating MCL 400.607(1); MSA 16.614(7)(1) which provides:

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 . . . upon or against the state, knowing the claim to be false.

Defendant first argues that there was insufficient evidence to convict him of filing a false Medicaid claim because the prosecutor did not show beyond a reasonable doubt that the claims he filed were false. We disagree. Under the statute, "false" means wholly or partially untrue or deceptive. MCL 400.602(d); MSA 16.614(2)(d). "Deceptive" means making a claim or causing a claim to be

made that contains a statement of fact or that fails to reveal a material fact, which statement or failure leads the department to believe the represented or suggested state of affair to be other than it actually is. MCL 400.602(c); MSA 16.614(2)(c).

Testimony indicated that defendant prepared two claims for submission on behalf of Hurley Hospital that were deceptive in that each used reference numbers belonging to other patients to represent to MSA that the claims had been submitted within twelve months of treatment when, in fact, they had not. Defendant denied knowing the reference numbers he used belonged to other patients. Defendant acknowledged that there was no legitimate reason for using a different patient's reference number on a claim form and that placement of such reference numbers on a claim form would constitute a representation that the reference numbers belonged to the patient for whom the claim was being submitted. Linda Zimmerman, defendant's supervisor at HCC, testified that defendant knew he was using reference numbers from other patients when he filled out the two Hurley claims because they had discussed doing so. Defendant denied this conversation took place. Questions of credibility are properly left to the jury to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). The jury apparently chose to believe Zimmerman and not defendant, and this Court will not interfere with that decision where there is sufficient evidence to support the verdict. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201-1202 (1992).

Defendant also argues that the evidence was insufficient to show that he knew the claims were bogus. Under the statute,

"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 does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present. [MCL 400.602(f); MSA 16.614(2)(f).]

Testimony was presented stating that defendant panicked when he received a telephone call first indicating that inquiries were being made into how HCC was able to get stale claims paid and he immediately called Zimmerman and asked her what he should do. Defendant was also very nervous during an interview with the attorney general's investigator. Defendant admitted having a hypothetical conversation with Zimmerman about whether it would be possible to use reference numbers from other patients to get stale claims paid. Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of an offense. *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Viewing this evidence in a light most favorable to the prosecution, together with Zimmerman's testimony that she and defendant discussed using bogus reference numbers to fill out the Hurley claims, a rational jury could have concluded that defendant had knowledge that the claims were bogus. Sufficient evidence therefore was presented to convict defendant of two counts of Medicaid fraud. *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

Defendant further claims that no crime was committed because there were limited exceptions to the one-year rule. We disagree. MCL 400.111b(11); MSA 16.490(21b)(11) sets forth the one year cut-off provision. Although the statute allows the director to prescribe conditions under which a

provider may qualify for a waiver of the time limit, there is no suggestion that such a waiver was sought herein. Further, the fact that some discretion potentially existed is irrelevant because the reason the claims were false was not because they were more than one year old, but because defendant inserted codes from other patients to make the claims appear to fit within an exception within which they did not fit.

Defendant also argues that the trial court erred in ruling that MCL 400.607(1); MSA 16.614(7)(1) does not require a finding of actual knowledge of falsity and in instructing the jury about the requisite intent by reading the statutory definition of “knowing” and “knowingly” instead of giving the jury a specific intent instruction requested by defendant. Specifically, defendant argues that the statute is a codification of the common law crime of fraud which requires proof of specific intent. We reject defendant’s argument. Defendant premises this claim on *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952). There, the Court ruled that Congress’ failure to include a mens rea element in legislation codifying a common law crime did not automatically signify that the mens rea element had been eliminated. Key to defendant’s argument, that the *Morissette* doctrine should be applied in this case to infer that MCL 400.607(1); MSA 16.614(7)(1) requires specific intent, would be the threshold finding that the act as codified dispensed with knowledge, i.e., mens rea, as a necessary element. Because the statute clearly contains a mental element--knowing and knowingly--and also defines those terms, thus seeming to debilitate defendant’s argument, defendant resorts to arguing that the statute as written is so ambiguous and contradictory that it effectively cannot be construed as containing a coherent mens rea element. In constructing this argument, defendant claims the first sentence of the definition imposes an objective standard of actual knowledge while also eliminating the element of mens rea by permitting the jury to alternatively find guilt if the person should have known that his or her conduct was likely to result in payment of the claim. Building thereon, defendant then suggests the second sentence of the definition, that “knowing” does not include error or mistake unless it is systematic or persistent, is to define intent in terms of the subjective knowledge, not the actual knowledge, of the person filing the claim. Accordingly, defendant argues a contradiction exists within the statute because a person who makes a single mistake would not be guilty of actual knowledge, but a person who makes the same mistake persistently or systematically would be held to have had actual knowledge. We disagree. Under the statute, if a person knew, that is had mens rea, or should have known, no mens rea, he or she is guilty. Further, the “should have known” requirement is fleshed out by the provision that indicates that knowledge is indicated by a systemic or persistent tendency to cause the error or mistake. In that situation, a person may be found guilty under a theory of constructive knowledge. The statutory definition of the mental element of the offense is not so ambiguous as to require this Court to judicially impose an element of specific intent based upon the common law crime of fraud. The presence of the “should be aware” language in the statute negates any suggestion that the statute is a specific intent crime. The jury was adequately instructed as to the element of intent when the trial court read to the jury the statutory definition of knowing and knowingly and where the prosecution’s theory of the case was premised on a showing of actual, and not constructive, knowledge. Cf. *People v Wilson*, 159 Mich App 345, 352; 406 NW2d 294 (1987).

Defendant next argues that Zimmerman misrepresented the terms of her plea agreement during her testimony at trial and that the prosecution knew she would do so and failed to reveal that exculpatory evidence to defendant. Defendant claims he was denied the ability to attack Zimmerman’s

credibility and that his due process rights were violated. We disagree. The record reveals that Zimmerman accurately testified about the terms of her plea agreement as it had been previously stated on the record on June 30, 1993. In an affidavit prepared before defendant's trial, an assistant attorney general indicated that the Zimmerman agreement as it had been placed on the record was not an accurate representation of the plea agreement even though no objection had been made to the terms of the agreement. The record reveals that before the trial, defendant's counsel was provided with copies of documents that make reference to the existence and contents of the affidavit. The plea agreement about which Zimmerman testified at trial was more favorable to her than the plea agreement the affidavit said she actually negotiated. Under these circumstances, the jury was not denied a chance to assess the effect of promises of special favors upon Zimmerman's motivation to lie. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972); *Napue v Illinois*, 360 US 264, 269, 79 S Ct 1173, 3 L Ed 2d 1217 (1959). Defendant was not denied a fair and impartial trial because there was no evidence that the prosecution failed to disclose exculpatory evidence or that the prosecution suppressed such evidence where Zimmerman did not give false testimony about the terms of her plea agreement at defendant's trial. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991).

Finally defendant argues that his counsel at trial rendered ineffective assistance. Specifically, defendant argues his counsel did not raise a "certification defense" because of the failure to read a controlling statute and was thus unaware that defendant had no legal duty to verify the accuracy of the claims he submitted. In order to establish that counsel was ineffective, defendant must show that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

The portion of the act on which defendant relies in making this claim ensures that providers are ultimately responsible for the claims made by their billing agents such that providers cannot escape responsibility by arguing that they did not know what their billing agents were doing. MCL 400.111b(17); MSA 16.490(21b)(17). However, this provision is irrelevant because it does not address nonproviders such as defendant and it does not mean that defendant had no legal duty to verify the accuracy of the claims he prepared. Defendant's counsel enjoys a "strong presumption" of having given effective assistance. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). There was no evidence that the performance of defendant's counsel fell below an objective standard of reasonableness or so prejudiced defendant that he was denied a fair trial. Defendant's counsel appropriately focused on defending against the prosecution's theory of the case that defendant had actual knowledge that the claims he prepared were false. *Pickens, supra* at 309.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor