STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS W. BARTZ, D.O.,

Defendant-Appellant.

UNPUBLISHED
September 27, 2002

No. 224779
Ingham Circuit Court
LC No. 96-069902-FH

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of Medicaid fraud, MCL 400.607(1), and acquitted of sixteen other Medicaid and health care fraud counts. Defendant was sentenced to probation for one year and fined $300. He appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion by allowing the prosecutor's expert witness to remain in the courtroom during the testimony of other witnesses. We disagree. The expert's presence did not give rise to the type of risk that sequestration ordinarily serves to prevent, i.e., a witness "coloring" his testimony to conform to another witness' testimony. See *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). Further, MRE 703 permits an expert witness to give an opinion based on facts made known to an expert at a hearing, and an expert's presence during testimony in order to form an opinion based on the trial testimony is the type of circumstances envisioned by an exception to the sequestration rule, MRE 615. See Robinson, Longhofer & Ankers, Michigan Court Rules Practice, Evidence, § 615.4, Authors' Comment, pp 465-466.

Although the prosecutor did not show that his expert was incapable of giving an opinion on whether defendant performed osteopathic manipulative therapy (OMT) without observing the trial testimony, it was not an abuse of discretion for the trial court to allow experts for both the prosecution and the defense to be present during the testimony. *People v Jehnsen*, 183 Mich App 305, 309; 454 NW2d 250 (1990). Although defendant complains that his experts did not appear for all of the trial testimony, they were not precluded from doing so and defendant never requested an adjournment to enable his experts to be available.

Nor are we persuaded that the prosecutor's use of his expert's presence as a "tactical advantage" at trial affords a basis for relief. To the extent defendant suggests that the prosecutor engaged in misconduct, we decline to consider defendant's claim because it lacks citation to supporting authority. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *In re Toler,* 193 Mich App 474, 477; 484 NW2d 672 (1992).

II

Defendant next argues that reversal is required because the prosecutor improperly elicited evidence of a prior criminal conviction of a defense expert witness. Regardless of whether we examine this claim under the standard for preserved evidentiary error or preserved prosecutorial misconduct, we conclude that reversal is not required. The trial court struck the challenged testimony in response to a defense objection and immediately gave a curative instruction. Further, the record reflects that the prosecutor was able to impeach the expert's credibility in numerous other ways. Considered in this light, it does not affirmatively appear that it is more probable than not that the error was outcome determinative of the jury's decision to convict defendant on three of the nineteen counts against him. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999); *People v Brownridge (On Remand),* 237 Mich App 210, 216; 602 NW2d 584 (1999).

III

Defendant next argues that the prosecutor committed misconduct during his rebuttal argument. Because defendant did not object to the challenged rebuttal remarks, we review this issue for plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Examining the first challenged remarks in context, we do not find it plain that the prosecutor infringed on defendant's right to remain silent. The prosecutor was attacking the factual basis of the defense experts' opinions. It is not improper for a prosecutor to comment on the weakness of a defense. See *People v Fields,* 450 Mich 94, 115-116; 538 NW2d 356 (1995). Even if there was error, the court's instructions on the prosecutor's burden of proof, defendant's right not to testify, and attorney arguments not being evidence were sufficient to dispel any prejudice. *Schutte, supra* at 721-722.

Next, the prosecutor's remarks regarding defense counsel attempting to confuse the jury were not improper. While a prosecutor may not suggest that defense counsel intentionally attempted to mislead the jury, *People v Watson,* 245 Mich App 572, 592; 629 NW2d 411 (2001), the challenged remarks here, examined in context, indicate that the prosecutor was addressing the relevancy of certain defense arguments to the charges at hand. We are not persuaded that the rebuttal remarks constitute an outcome-determinative plain error. *Schutte, supra* at 720-722.

Finally, we reject defendant's claim that the cumulative effect of multiple errors warrants reversal. Any errors demonstrated by defendant do not show that he was denied a fair trial. *People v Bahoda,* 448 Mich 261, 292; 531 NW2d 659 (1993).

IV

We next consider defendant's claims concerning the trial court's denial of his motions for a directed verdict**.** "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in a light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The prosecutor need not negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Rather, its obligation is to prove the elements of the offense beyond a reasonable doubt, in the face of any contradictory evidence the defendant may provide. *Id.* at 400.

Defendant was convicted of violating MCL 400.607(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, Act No. 280 of the Public Acts of 1939, as amended, being sections 400.1 to 400.121 of the Michigan Compiled Laws, upon or against the state, knowing the claim to be false.

Defendant's arguments on appeal are directed at the false claim element and the requirement that the accused have knowledge that the claim is false. "False" is defined as "whole or partially untrue or deceptive." MCL 400.602(d). "Deceptive" means "making a claim or causing a claim to be made under the social welfare act . . . , which contains a statement of fact or which 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).

Here, it was the prosecutor's theory that the claims were false because defendant did not perform OMT on the occasions in question. Consistent with this Court's prior opinion in this case, *People v Bartz*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 1997 (Docket No. 195869), we hold that the prosecution could use expert testimony as a basis for establishing that defendant did not perform OMT procedures. Although this Court's prior opinion lacks precedential value because it was unpublished, MCR 7.215(C)(1), it is controlling under the law of the case doctrine.

Viewed most favorably to the prosecutor, the testimony of the prosecution's expert, considered in conjunction with other evidence, was sufficient to enable the jury to find beyond a reasonable doubt that defendant did not perform OMT and that the claims for this procedure were false. Contrary to defendant's claim on appeal, the prosecution expert did not merely criticize defendant's technique. She opined that OMT was not conducted. With regard to the three particular instances underlying the convictions, we note that the prosecutor's case was strengthened by evidence that defendant's own statements, as dictated for purposes of the "SOAP" notes in the patient chart, failed to reflect OMT as part of the plan. The weight and credibility of this evidence was for the jury to decide. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992).

Turning to the question of whether there was sufficient evidence that defendant knew of the falsity of the claims, MCL 400.602(f) defines "knowing" and "knowingly" as follows:

> [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.

Further, MCL 400.608 provides:

> (1) In a prosecution under this act, it shall not be necessary to show that the person had knowledge of similar acts having been performed in the past by a person acting on his or her behalf, nor to show that the person had actual notice that the acts by the persons acting on his or her behalf occurred to establish the fact that a false statement or representation was knowingly made.
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> (3) If a claim for Medicaid benefit is made by means of computer billing tapes or other electronic means, it shall be a rebuttable presumption that the person knowingly made the claim if the person has notified the department of social services in writing that claims for Medicaid benefits will be submitted by use of computer billing tapes or other electronic means.

Under the statutory scheme, knowledge can be actual or constructive. *People v Perez-DeLeon*, 224 Mich App 43, 48; 568 NW2d 324 (1997). It requires "knowledge of both the falseness of a claim and that the claim is substantially certain to cause payment of a benefit." *Id.* at 49. Because of the difficulty in proving state of mind, circumstantial evidence is often necessary and wholly satisfactory. *Id.* at 59.

Here, considering the evidence supporting the rebuttable presumption in MCL 400.608(3), defendant's familiarly with Medicaid requirements, the training required for a doctor of osteopathy, and other proofs, viewed most favorably to the prosecution, we conclude that a rational trier of fact could find that defendant was aware of or should have been aware of the nature of his conduct, namely, a false OMT claim, and that the claim was substantially certain to cause payment of a benefit. Thus, the evidence was sufficient to support defendant's convictions.

Finally, we have considered defendant's claim that a directed verdict should have been granted on the ground that a substandard or deficient medical practice, performed in good faith, does not constitute a crime. Because defendant was not convicted based on the nature of his medical practice, but rather, on the basis of a knowing false claim for Medicaid benefits, we find that defendant's argument lacks merit. Also, defendant's reliance on *People v Downes*, 168 Mich App 484; 425 NW2d 102 (1987), and *People v Sun*, 94 Mich App 740; 290 NW2d 68 (1980), is misplaced because neither case establishes a general standard applicable to physicians.

The earlier case, *Sun*, involved violations of a provision of the now-repealed Controlled Substances Act, MCL 335.341. The defendant, a licensed doctor, argued that he should be exempt from prosecution under MCL 335.341(1)(b), because he acted in good faith when

prescribing medication. Relying on *People v Alford*, 405 Mich 570; 275 NW2d 284 (1979), a case that applied the statutory exemption provisions of the Controlled Substances Act, this Court held that a physician who acts in good faith in the course of professional practice may not be prosecuted under MCL 335.341(1)(b). The later case, *Downes*, involved controlled substance charges under a provision of the Public Health Code, MCL 333.7401, which replaced the repealed Controlled Substances Act. This Court applied the good-faith standards in *Alford* and *Sun* in reviewing a circuit court's decision to grant a motion to quash.

Because the instant case does not involve controlled substance charges, the statutory exemption standards for such charges are not relevant. Hence, neither *Sun* nor *Downes* provides authority for the proposition that a knowing false claim for Medicaid benefits does not constitute a crime. Further, neither case makes medical necessity a relevant issue in the case at bar. Defendant's convictions were dependent on the prosecutor's ability to prove that defendant did not perform an OMT procedure and knew this fact when he caused a false claim to be submitted. Accordingly, the trial court did not err in denying defendant's motions for a directed verdict.

V

Defendant next argues that the trial court abused its discretion in denying his motion for a new trial. Under MCR 6.431(B), a trial court may grant a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." The trial court's decision on such a motion is reviewed for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

We conclude that defendant has not established that the trial court abused its discretion in denying a new trial. Indeed, while claiming an abuse of discretion, defendant's argument is directed at the sufficiency of the evidence. As previously discussed, however, defendant's convictions were supported by the evidence.

We note that defendant continues to give undue emphasis to the trial court's reliance on this Court's prior opinion in this case. As we have already indicated, the fact that the prior opinion was unpublished is not relevant. The relevant point is that this Court remanded the case to the trial court for further proceedings consistent with its opinion. "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *People v Fisher*, 449 Mich 441, 446; 537 NW2d 577 (1995), quoting *Sokol v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959).

We also note that, contrary to what defendant suggests on appeal, the jury in this case was not asked to determine if a substandard or deficient OMT procedure, performed in good faith, could serve as a basis for conviction. On the contrary, the jury was instructed that "substandard or deficient medical care or medical practice is not in and of itself a crime so long as the Defendant has a good faith belief that he was performing up to the standards of medical care." The jury was instructed to decide whether the elements of Medicaid fraud were proven for each count. We, thus, conclude that defendant's argument fails to establish any injustice.

VI

Finally, defendant argues that it is contrary to established precedent and public policy for criminal liability to be predicated on substandard or deficient medical treatment performed in good faith. For the reasons previously discussed, we hold that the authority on which defendant relies, *Sun, supra,* and *Downes, supra,* is not relevant because the instant case does not involve statutory exemption provisions for controlled substances offenses.

The other public policy questions raised by defendant are not properly before us because they lack citation to supporting authority. *In re Toler, supra* at 477. To the extent that defendant may be challenging the prosecutor's charging discretion, we note that a "prosecutor is given broad charging discretion, . . . and judicial review of the exercise of that discretion is limited to whether an abuse of discretion occurred, i.e., whether the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires." *People v Conat,* 238 Mich App 134, 149; 605 NW2d 49 (1999). We are unpersuaded by defendant's cursory argument that such an abuse of discretion was shown in this case.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens