

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NICHOLAS W. BARTZ, D.O,

Defendant-Appellee.

UNPUBLISHED

December 2, 1997

No. 195817

Ingham Circuit Court

LC No. 96-069902-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BAY VIEW FAMILY PHYSICIANS, P.C.,

Defendant-Appellee.

No. 195869

Ingham Circuit Court

LC No. 96-069903-FH

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendants were charged and bound over for trial on numerous counts alleging violations of the Medicaid False Claim Act, MCL 400.607(1); MSA 16.614(7)(1), and the Health Care False Claim Act, MCL 752.1003(1); MSA 28.547(103)(1). The circuit court granted defendant's motion to quash. The prosecutor now appeals and we reverse.

Defendant Bartz is a licensed osteopathic physician and defendants are enrolled as providers in Medicaid, Medicare and Blue Cross and Blue Shield of Michigan programs. The charges against defendants arise out of billings for osteopathic manipulative therapy (OMT). OMT is described under the Michigan Uniform Procedure Code manual as a "brief, osteopathic manipulative therapy performed in office or location other than inpatient." To oversimplify the case against defendants, the prosecutor's

claim is that the manipulation performed by Bartz was simply too brief to be of therapeutic value or to constitute OMT.

At the preliminary examination, the prosecutor presented testimony from patients, an investigator, and a physician who had worked in defendants' office. They each described the procedures performed by Bartz under the label OMT, describing them as being relatively brief.¹ The physician testified that the procedure that Bartz taught her was not one that she was familiar with from medical school. She further testified that Bartz told her that she should ideally be able to include enough procedures to bill at least \$100 per patient.

Dr. David Neff, an expert in osteopathic medicine, also testified at the preliminary examination. Dr. Neff testified, in essence, that while there were no rules regarding the minimum amount of time necessary to perform an OMT procedure, it would certainly take longer than a few seconds. Dr. Neff testified that the procedures described as being performed by Bartz would not constitute OMT.

The circuit court granted defendants' motion to quash because the prosecutor had failed to produce any identifiable document or standard that states that OMT must be performed for a particular duration in order to be recognized as a medically accepted procedure. We agree with the prosecutor that the trial court erred in so ruling.

We review this matter to determine whether the trial court erred in concluding that the district court abused its discretion in binding defendants over for trial. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

The essence of the trial court's holding is that, because the prosecutor is unable to show that there is a minimum durational requirement for an OMT procedure, it is not possible to show that Bartz failed to perform an OMT and, therefore, falsely submitted a claim to be paid for an OMT which was not performed. We disagree.

While it may be that there is no handbook or manual that provides a specific definition of an OMT with guidelines or requirements for how long the procedure requires, we are not convinced that that is the only manner in which the prosecutor can show that Bartz failed to actually perform an OMT. In fact, the expert, Dr. Neff, testified that the procedures performed by Bartz do not constitute an OMT under the teachings of any recognized school or osteopathic medicine or authoritative literature. In short, we are satisfied that "OMT", a central aspect of osteopathic treatment, has a technical or special meaning sufficiently well known within the osteopathic community to allow practitioners to know what it means without further definition. See *Connally v General Construction Co*, 269 US 385, 391-392; 46 S Ct 126; 70 L Ed 322 (1925).

In addition to the issue whether there is a sufficient definition of OMT to establish probable cause that defendants violated the statute, defendants present two more arguments in support of the conclusion that a bind-over was inappropriate. First, defendants argue that even if it can be shown that Bartz failed to perform an OMT, there was insufficient notice that what he did was a crime. However, the statutes, MCL 400.607(1); MSA 16.614(7)(1) and MCL 752.1003(1); MSA 28.547(103)(1),

clearly put defendants on notice that it is illegal to submit a claim knowing it to be false. Therefore, if defendants knowingly submitted a bill for an OMT when one was not performed, they were on notice that that is illegal.

This does bring us to defendants' remaining argument, that there is no showing of an intent to defraud. If the jury were to conclude that Bartz was merely incompetent rather than fraudulent—that is, that he honestly believed he was performing an OMT, but was merely doing so in a substandard manner—then defendants should be acquitted. That, however, is a question for the jury to resolve. The testimony of Dr. Neff and that of the physician who worked in defendants' office supports the proposition that Bartz knowingly billed for a procedure that he was not performing. Dr. Neff's testimony outlined what is generally accepted as constituting an OMT. The testimony of Bartz' associate established that Bartz was unable to justify to her, by producing a journal or other authoritative source, the basis for his use of such a brief procedure and his pressuring her to bill procedures and to include procedures to justify billing at least \$100 per patient. From this evidence, a jury could conclude that Bartz knowingly billed for a procedure which he knew was of no therapeutic value, and thus was not an OMT and therefore was submitting a false claim.

The standard for a bind-over is probable cause, not guilt beyond a reasonable doubt. It is for the jury to decide whether Bartz possessed the mens rea necessary for this crime. But that is a question for the jury, not one for this Court or the trial court to resolve. The prosecutor presented enough evidence to establish probable cause to believe that defendants knowingly submitted false claims. That is sufficient for the case to proceed to trial.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra

¹ The general description of these procedures was a brief rubbing of the shoulders and Bartz running his hands down the spine. These procedures took from a few seconds to less than a minute.