TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00605-CR

Howard Thomas Douglas, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 331ST JUDICIAL DISTRICT
NO. D-1-DC-12-900059, HONORABLE BOB PERKINS, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Howard Thomas Douglas of the offense of securing execution of a document by deception.[1] The district court rendered judgment on the verdict and sentenced Douglas to five years' imprisonment. In two issues on appeal, Douglas asserts that the evidence is insufficient to support his conviction and that the district court abused its discretion in excluding evidence tending to show that there was a financial relationship between the Travis County District Attorney's Office and Texas Mutual Insurance Company (TMIC), the complainant in the case. We will affirm the judgment of conviction.

[1] *See* Tex. Penal Code § 32.46(a)(1).

BACKGROUND

The jury heard evidence that Douglas owned and operated a company, North Texas Medical Evaluators (NTME), that provided workers'-compensation-related medical services to entities that were insured by TMIC. One such service, and the one at issue in this case, was the Functional Capacity Evaluation (FCE), a medical evaluation used to determine an injured worker's ability to return to work or perform certain jobs. According to the evidence presented, NTME would perform FCEs on injured workers and then bill TMIC based on the amount of time that NTME claimed to have spent performing each FCE. After TMIC reviewed and audited each bill, it would issue payment to NTME. TMIC eventually began to suspect that NTME was billing it for time that was not compensable. According to Martha Luevano, a manager at the Texas Department of Insurance-Division of Workers' Compensation (TDI) who testified as the State's expert in medical billing procedures, NTME could bill only for "direct, one-to-one patient contact, face-to-face, where the patient is performing . . . the physical acts" associated with the evaluation. But TMIC suspected that NTME was billing it for time spent on tangential tasks associated with the FCEs, such as preparing written reports and reviewing patient medical records. Additionally, according to Kathleen Haden, a senior TMIC investigator, NTME would always bill 16 "units" of service for performing an FCE, which was the maximum amount permitted to be billed.[2] This practice "raised some red flags" that Haden "felt needed to be looked at further," and TMIC subsequently initiated an investigation of NTME and Douglas for fraud.

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[2] Luevano testified that each "unit" of service corresponded to one 15-minute increment of time and that four units corresponded to one hour. Accordingly, Luevano explained, an FCE could be billed for 16 units only if the FCE took approximately four hours to complete.

Based on the evidence obtained during TMIC's investigation, the State subsequently charged Douglas with securing execution of a document by deception. Specifically, the State alleged that:

> Douglas caused to be submitted to the TMIC Insurance Company a form HCFA (Health Care Financing Administration) 1500 seeking payment for services rendered, said services were as follows: 16 units billed under CPT (current procedural terminology) code 97750, when in fact, 16 units of service were not rendered in accordance with the Texas Department of Insurance Division of Workers Compensation Medical Fee Guidelines[,] not believing it to be true, that was likely to affect the judgment of the said TMIC Insurance Company in the transaction, which deception caused the TMIC Insurance Company to sign and execute documents affecting its property, service and pecuniary interest, where the value of the property, service or pecuniary interest was more than $20,000 but less than $100,000.

Evidence considered by the jury during trial, which we discuss in more detail below, included the testimony of Luevano; several former employees of Douglas, who explained the billing procedures that Douglas had ordered them to follow; injured workers who had been evaluated by NTME and who described the nature and scope of their evaluations; and multiple TMIC investigators, including Haden, who discussed the information TMIC had discovered during the course of its investigation, which included an undercover operation at one of NTME's facilities. Douglas called several witnesses in his defense, including his own experts on FCEs and medical billing procedures. At the conclusion of trial, the jury found Douglas guilty of securing a document by deception as charged. The district court rendered judgment on the verdict and sentenced Douglas to five years' imprisonment as noted above. This appeal followed.

ANALYSIS

Evidentiary sufficiency

A person commits the offense of securing execution of a document by deception if he, with intent to defraud or harm any person, by deception causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.[3] In his first issue, Douglas asserts that the evidence is insufficient to prove that he committed this offense.

Standard of review

When reviewing the sufficiency of the evidence supporting a conviction, "the standard of review we apply is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[4] "This standard tasks the factfinder with resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences from basic facts."[5] "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them."[6] "On appeal, reviewing courts 'determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the

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[3] Tex. Penal Code § 32.46(a)(1).

[4] *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[5] *Id*.

[6] *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

verdict.'"[7] "Thus, '[a]ppellate courts are not permitted to use a 'divide and conquer' strategy for evaluating sufficiency of the evidence' because that approach does not consider the cumulative force of all the evidence."[8] "When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that determination."[9] Moreover, "[o]ur review of 'all of the evidence' includes evidence that was properly and improperly admitted."[10] Finally, "the same standard of review is used for both circumstantial and direct evidence cases."[11] "Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient" to support a conviction.[12]

Intent to defraud or harm and deception

First, Douglas asserts that there is insufficient evidence to prove that he intended to defraud or harm TMIC and that he had engaged in deception. Specifically, Douglas claims that the evidence failed to show that he knew that it was improper to bill TMIC for tangential tasks associated with FCEs, such as preparing written reports. Douglas presented some evidence in his

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[7] *Murray*, 457 S.W.3d at 448 (quoting *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

[8] *Id*. (quoting *Hacker v. State*, 389 S.W.3d 860, 873 (Tex. Crim. App. 2013)).

[9] *Id*. at 448-49 (citing *Hooper*, 214 S.W.3d at 12).

[10] *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016) (citing *Clayton*, 235 S.W.3d at 778).

[11] *Id*. (citing *Hooper*, 214 S.W.3d at 13).

[12] *Id*. (citing *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004)).

defense tending to show that others within his industry believed that billing for time other than that spent face-to-face with a patient was permitted.[13] And, according to the testimony of Shelly Estrada, NTME's former office manager, NTME would not have billed for time spent preparing written reports unless such a practice was allowed within its industry. Thus, in Douglas's view, "[a]t best, the evidence showed that Appellant believed that NTME could legitimately bill TMIC for time related to an FCE even if such time was not spent face-to-face with the patient."

"Intent can be inferred from the acts, words, and conduct of the accused."[14] "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."[15] "Harm" as defined in the Penal Code, means "anything reasonably regarded as loss, disadvantage, or injury."[16] "Intent to defraud," although not defined in the Penal Code, has been defined by Texas courts, in the context of criminal cases, as "the intent to cause another to rely upon the falsity of a

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[13] Specifically, Douglas presented the testimony of: (1) Ida Cipriano, an occupational therapist, who testified that in her practice, she had billed for time spent preparing written reports associated with FCEs; (2) Lou Signo, an owner of a physician-billing-and-practice management consulting firm, who testified that in his opinion, a healthcare provider could bill for time spent preparing written reports associated with FCEs; and (3) Konrad Kuenstler, an attorney and licensed physical therapist with experience performing "hundreds, if not thousands," of FCEs, who similarly testified that in his opinion, a healthcare provider could bill for the time spent preparing written reports associated with FCEs and that he knew of no law or regulation prohibiting such billing.

[14] *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) (citing *Beltran v. State*, 593 S.W.2d 688, 689 (Tex. Crim. App. 1980)); *Smith v. State*, 500 S.W.3d 685, 691 (Tex. App.—Austin 2016, no pet.); *Edwards v. State*, 487 S.W.3d 330, 335 (Tex. App.—Eastland 2016, no pet.).

[15] Tex. Penal Code § 6.03(a).

[16] *Id*. § 1.07(a).

representation, such that the other person is induced to act or to refrain from acting."[17] "Moreover, 'intent to defraud and harm' as used in section 32.46 is a question of fact to be determined from all the facts and circumstances.'"[18]

"Deception," as defined in the Penal Code, means "creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true."[19] For purposes of section 32.46, deception is the "forbidden conduct" that "must be perpetrated with the specific 'intent to defraud or harm any person,' and it must 'cause another to sign or execute any document.'"[20] Stated another way, "[s]ection 32.46 prohibits the use of deception, broadly defined, to fraudulently induce

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[17] *Martinez v. State*, 6 S.W.3d 674, 678 (Tex. App.—Corpus Christi 1999, no pet.) (citing 41 Tex. Jur. 3d Fraud and Deceit § 9); *see In re E.P.*, 185 S.W.3d 908, 910 (Tex. App.—Austin 2006, no pet.) ("A person defrauds another if she takes or withholds from another 'some possession . . . by calculated misstatement or perversion of truth, trickery, or other deception.'" (quoting Webster's Third New International Dictionary 593 (1986)); *Wingo v. State*, 143 S.W.3d 178, 187 (Tex. App.—San Antonio 2004), *aff'd*, 189 S.W.3d 270 (Tex. Crim. App. 2006); *Garcia v. State*, 630 S.W.2d 303, 305 (Tex. App.—Houston [1st Dist.] 1981, no pet.) ("The use of deception by an accused is evidence of intent to defraud and harm," which "may take the form of giving false information . . . or of engaging in behavior designed to avoid detection."); *see also Hunter v. State*, No. 14-13-00847-CR, 2014 Tex. App. LEXIS 13086, at *7 (Tex. App.—Houston [14th Dist.] Dec. 9, 2014, pet. ref'd) (mem. op., not designated for publication); *Christmann v. State*, No. 08-04-00103-CR, 2005 Tex. App. LEXIS 9961, at *13 (Tex. App.—El Paso Nov. 30, 2005, no pet.) (mem. op., not designated for publication).

[18] *Goldstein v. State*, 803 S.W.2d 777, 791 (Tex. App.—Dallas 1991, pet. ref'd); *see also Martinez*, 6 S.W.3d at 678 ("The intent to defraud or harm may be established by circumstantial evidence." (citing *Williams v. State*, 688 S.W.2d 486, 488 (Tex. Crim. App. 1985); *Meade v. State*, 641 S.W.2d 345, 347 (Tex. App.—Corpus Christi 1982, no pet.))).

[19] Tex. Penal Code § 31.01(1)(A); *see Goldstein*, 803 S.W.2d at 790.

[20] *Mills v. State*, 722 S.W.2d 411, 415-16 (Tex. Crim. App. 1986).

another to sign or execute any document affecting the property, service, or pecuniary interest of any person."[21]

In this case, the following evidence supports the jury's findings that Douglas had engaged in deception and that he had done so with an intent to defraud or harm TMIC. Dr. Daniel Boudreau, a designated doctor for the State of Texas who was responsible for examining injured workers, testified that he had performed designated-doctor examinations (DDEs) for NTME in what he believed was an independent contractor capacity.[22] Dr. Boudreau testified that he would "sometimes" order an FCE to be performed on a worker, but not always. According to Boudreau, the FCEs that he had observed "averaged around 30 minutes or so," and sometimes 40 minutes, but never four hours. During his testimony, the State showed Boudreau documents with his name and signature but that he did not recall signing. The documents ordered FCEs to be performed on two injured workers. Boudreau did not recall ordering or observing the FCEs. However, Boudreau testified that he had provided NTME with a signature stamp and his medical license number for reporting and billing purposes.

Tamara Wells, a former NTME employee who had worked in accounts receivable, testified that NTME had approximately 30 designated doctors working for it in an independent contractor capacity. According to Wells, the doctors were required to provide NTME with a power of attorney and their medical license numbers "so we could bill underneath their name, if we needed

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[21] *State v. Wiesman*, 269 S.W.3d 769, 776 (Tex. App.—Austin 2008, no pet.).

[22] A DDE is a separate medical service from an FCE. According to the evidence presented, a DDE involves a doctor examining an injured worker to determine the extent of his injuries. As Dr. Boudreau testified, "[T]he State really likes to have an independent person come in and say, 'Here is what I saw. This is my report.' And that's basically what a designated doctor does."

to, along with the company." Wells testified that she believed this practice was wrong and that she had "felt very uncomfortable, especially when we started billing underneath the doctors' names, where I had to paste and copy the signature to the W-9s." She added, "[I]t was not their signature, like just signed on the paper. I had to cut and paste [the signature] . . . from the contract to the [billing document]." Wells also testified that she had seen patients come into the office to have FCEs performed and that each FCE lasted "probably 15 minutes at most." Nevertheless, Wells explained, Douglas had ordered her to bill all FCEs for four hours, or 16 units. Wells recalled, "We would start the time from the time the patient was to be seen, four hours from there," even though she had never seen an FCE last four hours.

The evidence also tended to show that at some point in 2009, TMIC had stopped issuing payment to NTME for FCEs. Lena Shockley, a former office manager at NTME, testified that Douglas had instructed her that an FCE was to be done on every patient, except those who were insured by TMIC, "because [TMIC] would not pay for them." At that point, Shockley explained, Douglas created a different company called "Marconi Physical Evaluators" in an attempt to obtain payment from TMIC for FCEs. According to Shockley, Marconi "was a company that Dr. Douglas created to bill FCEs out, thinking that it would throw Texas Mutual off, that he didn't own the company and they would pay for the FCEs." Wells similarly testified that Douglas had directed her to bill "all the FCEs that were done for Texas Mutual" using the Marconi name, to "see if they would be paid that way."

When asked to describe Douglas's policy regarding FCEs, Shockley testified:

> The policy was an FCE was to be done on every patient, and we were to bill for 16 units, as if they were there for four hours. That was the maximum you could bill

> for. . . . We could include everything on it, the time we talk with the patient, the time we prepare the report, the time we spend with them, and the time we're doing the report to send out. All of that could be included.

However, when asked if it "ever [took] four hours to do any of this stuff," Shockley testified, "No." Shockley added that, based on her observations at the office, FCEs would last approximately 10 minutes. Shockley also testified that NTME had rented facilities to perform FCEs at other locations in Texas and that they usually rented these facilities for two hours. But, Shockley explained, the bills always indicated that the facilities had been rented for four hours "[b]ecause the maximum you could bill for was four hours, and we were instructed by Dr. Douglas to bill for four hours."

Shockley also testified that Douglas had instructed her to call TMIC to discuss why it was denying payment. According to Shockley, Douglas had instructed her to tell TMIC that the FCEs were being ordered by designated doctors and that "a designated doctor can order any test that they want to order. It's not up to TDI or any insurance company. They are the doctor. They can order any tests that they want to order."

The jury also heard evidence tending to show that Douglas's practices of billing for four hours of service for all FCEs and operating under the Marconi name had been communicated to the NTME technicians who had performed the evaluations. Javier Jimenez, a medical assistant who had worked for NTME, testified that he had been instructed by Douglas to use Marconi letterhead for documentation pertaining to FCEs that were to be billed to TMIC. The purpose of this practice, according to Jimenez, was so that they could "get paid for the Functional Capacity Evaluations" when billing TMIC. Jimenez testified that he performed FCEs throughout Texas on behalf of NTME and that he had a standard procedure that he would follow when performing the

evaluations, based on a one-page form that had been provided to him by Douglas. The evaluation itself consisted of range-of-motion tests and occasionally nerve-conducting tests that Jimenez performed using "a big object that we used to measure the pushing, pulling, grasping" of a patient. According to Jimenez, Douglas had instructed him to perform an FCE on every patient and that Douglas would give him a $25 "incentive" for every FCE performed. When asked if he had ever spent four hours performing an FCE, Jimenez testified, "No, ma'am." Instead, he explained, an FCE "could take anywhere from 15 minutes to 40 minutes, depending on the injury." Although Jimenez could not recall how many FCEs he had performed for NTME, he testified that "whenever we would get a set of five, that's how many we would do for the day." Jimenez also testified that "it would take maybe 10, 15 minutes on each patient to input the [FCE] information" into a written report. Another medical technician, Jose Saldivar, similarly testified that it would take him "anywhere from 10 to 15 minutes, at most, 30 minutes" to perform an FCE and that he had never spent four hours performing one.

The jury also considered testimony and billing records from injured workers on whom NTME had performed FCEs. These individuals included: (1) Jerry Dockray, who testified that his FCE took approximately 20 minutes to complete; (2) Brad Ettinger, who testified that his FCE took "less than an hour" to complete, even though his billing records indicated that TMIC had been billed for four hours of time; and (3) Joann Jackson, who testified that there was "no way" her FCE took approximately four hours to complete, even though that was the amount of time indicated on her billing records. Additionally, TMIC had conducted an undercover operation in which TMIC investigator Bonita Reid had posed as a patient and was evaluated at one of NTME's facilities. Reid

testified that her FCE took approximately 18 minutes to complete, but the billing records associated with Reid's FCE indicated that TMIC had been billed for a full four hours and that Reid had arrived at the facility at 3:00 p.m. and had left at 7:00 p.m., even though, Reid recalled, she had in fact arrived at the facility at 12:58 p.m. and was called into the examination room at 1:12 p.m. Reid had been wearing a wire during the operation, and the audio recording of Reid's time at the facility was admitted into evidence and played for the jury.

In sum, when viewed in the light most favorable to the verdict, the evidence tended to show that: (1) Douglas had directed his office staff and technicians to always bill for four hours of time spent performing FCEs; (2) no FCE had taken four hours to complete and, in fact, most had been completed in under 30 minutes; (3) Douglas had created another company, Marconi, for the express purpose of attempting to receive payment for FCEs that Douglas believed TMIC would not pay if TMIC had known the actual identity of the FCE provider; (4) billing records indicated that rental facilities had been used for four hours to perform FCEs, when in fact the facilities had been rented for only two hours; and (5) NTME had claimed that doctors had ordered FCEs on occasions when in fact no doctor had ordered an FCE. Based on this and other evidence, the jury could have reasonably inferred that Douglas had engaged in deception through his billing and other practices. The jury could have further inferred that Douglas's deceptive practices were done with an intent to defraud or harm TMIC in that Douglas had sought to receive payment from TMIC for time that was not compensable.[23] As for the contrary evidence, summarized above, tending to show that others in

[23] Douglas also asserts that there is insufficient evidence that "but for" his fraudulent billing practices, TMIC would not have issued payment to NTME. However, the State presented evidence tending to show that TMIC and other insurance carriers determined the amount to pay the healthcare

Douglas's industry believed that it was permissible to bill for time not spent face-to-face with a patient, under our standard of review, we are to defer to the jury's resolution of any evidentiary conflicts in favor of the verdict.[24] We conclude that the evidence is sufficient to prove that Douglas had engaged in deception with an intent to defraud or harm TMIC.

Amount alleged

Douglas further asserts that the evidence is insufficient to prove that the amount of money that TMIC had paid to Douglas as a result of his alleged fraud was $20,000 or more but less than $100,000, which was the amount required for the offense to be classified as a third-degree felony.[25] Specifically, Douglas contends that the State failed to "fully segregate" the amount of money that Douglas had obtained as a result of fraud from the amount of money that he had "properly billed."

Although Douglas is correct that the State did not present evidence regarding the exact amount of money that TMIC had "properly" paid to Douglas, there was nevertheless sufficient evidence from which the jury could have reasonably inferred that the amount of money that TMIC had paid as a result of Douglas's fraudulent billing practices was within the statutorily required

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provider based on the information that was contained within the documents that the provider submitted. From this and other evidence, the jury could have reasonably inferred that "but for" Douglas's deception, TMIC would not have issued payment in the amounts that it had.

[24] *See Murray*, 457 S.W.3d at 448-49.

[25] *See* Tex. Penal Code § 32.46(b)(5). In 2015, the Legislature amended section 32.46 to provide that the offense is a third-degree felony if the value of the property, service, or pecuniary interest was $30,000 or more but less than $150,000. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 22, 2015 Tex. Gen. Laws 4209, 4218 (current version at Tex. Penal Code § 32.46(b)(5)).

range. Haden testified that the total amount of money paid to Douglas was $81,618.75, based on the full 16 units of service that Douglas had billed for each patient. But Haden also testified as to what amounts TMIC would have overpaid if Douglas had billed it for 2 units of service (i.e., 30 minutes) or 4 units of service (i.e., 60 minutes) per FCE, which the jury could have reasonably inferred corresponded to the approximate amount of time that NTME had spent actually performing the FCEs.[26] The State elicited the following testimony from Haden:

> Q. Now, Ms. Haden, with regard to State's Exhibit 5,[27] at some point you guys were instructed to give the Defendant credit for spending 30 minutes of time with a patient; is that correct?
>
> A. Yes.
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> Q. Or the technicians. And if you give them 30 minutes, how many—
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> A. 2.
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> Q. 2 units. How much in damages, as far as fraudulent payments were made?
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> A. $71,416.42.
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> Q. And that's what TMIC overpaid, as far as fraudulent amounts?
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> A. Yes.
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> . . . .

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[26] Multiple witnesses provided testimony, summarized above, from which the jury could have reasonably inferred that NTME had spent, at most, approximately 30-60 minutes performing each FCE, including the injured workers evaluated by NTME, the medical technicians who had performed the FCEs, and Bonita Reid, the undercover TMIC investigator.

[27] State's Exhibit 5 was a list of the injured workers whom NTME had treated and who were insured by TMIC. The list included a breakdown of how much money TMIC had paid or would have paid for each FCE, based on various units of service billed.

Q. Now, if you give the Defendant credit for one hour's worth of time, in other words, four units of time spent with the actual patient, how much in damages do we have?

A. It would be $61,214.07.

Thus, even without knowing the exact amount that Douglas had "properly billed" to TMIC, the jury could have reasonably inferred that the amount of money that Douglas had fraudulently billed was somewhere in the range of $60,000 to $70,000, which exceeds the alleged amount of "$20,000 or more."[28] Thus, the evidence is sufficient to prove that Douglas committed a third-degree-felony offense as charged.[29]

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[28] In its brief, the State takes the position that "it was not required to segregate the false amounts from the amounts that might be deemed legitimate." In the State's view, "[t]hat a portion of the payment may have been legitimate did not render valid the claim for the full 16 units" because "each claim submitted on behalf of appellant by NTME contained false information." Because we have concluded that there is sufficient evidence in this record for the jury to have determined an approximate amount of how much money was fraudulently obtained and that this amount was within the statutorily required range, we need not reach the merits of the State's contention. However, we note that this Court, in a similar fraud case involving Douglas, has held that no such segregation is required. *See Douglas v. State*, No. 03-13-00092-CR, 2015 Tex. App. LEXIS 8929, at *17 (Tex. App.—Austin Aug. 26, 2015, pet. ref'd) (mem. op., not designated for publication).

[29] *See, e.g.*, *Sowders v. State*, 693 S.W.2d 448, 450 (Tex. Crim. App. 1985) (explaining that State need not prove specific value of property allegedly stolen, but "need only prove that the value of the property was sufficient to satisfy the range of value that was pled"); *Wiley v. State*, 632 S.W.2d 746, 748 (Tex. Crim. App. 1982) ("The indictment alleges value of over $200 and the proof shows the items appropriated to be more than $200. Therefore, the evidence is sufficient to support the allegations of the indictment and verdict."); *Turner v. State*, 486 S.W.2d 797, 799 (Tex. Crim. App. 1972) (concluding that, "[w]hile the proof as to value leaves something to be desired," evidence was nevertheless sufficient to sustain allegation that value exceeded minimum statutory amount). *Cf. Lehman v. State*, 792 S.W.2d 82, 84 (Tex. Crim. App. 1990) ("[O]nce the defendant has been given proper notice that he must prepare to defend himself against a charge that he has stolen a certain 'bundle' of property, there is no reason that he should be acquitted if the evidence shows him guilty of stealing enough of the 'bundle' to make him guilty of the offense charged.").

Variance between pleadings and proof

Finally, Douglas asserts that there was a "fatal variance" between the pleadings and the proof. Specifically, he asserts that although the indictment alleged that he had submitted "HCFA 1500" forms to TMIC, the evidence established that he had submitted "CMS 1500" forms.

"A 'variance' occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial."[30] "In a variance situation, the State has proven the defendant guilty of a crime, but has proven its commission in a manner that varies from the allegations in the charging instrument."[31] "There are two types of variances in an evidentiary-sufficiency analysis: material variances and immaterial variances."[32] Only material variances will render evidence insufficient to support a conviction.[33] Statutory variances, i.e., those that implicate the statutory language defining the alleged offense, are always material.[34] However, non-statutory variances, i.e., those that "describe[] the offense in some way," may or may not be material, depending on the circumstances.[35] A non-statutory variance, such as the one here, is material if it (1) deprived the defendant of sufficient notice of the charges against him such that he

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[30] *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001).

[31] *Id*.

[32] *Thomas v. State*, 444 S.W.3d 4, 9 (Tex. Crim. App. 2014).

[33] *See Gollihar*, 46 S.W.3d at 257; *see also Cada v. State*, 334 S.W.3d 766, 773-76 (Tex. Crim. App. 2011).

[34] *See Johnson v. State*, 364 S.W.3d 292, 294 (Tex. Crim. App. 2012).

[35] *See id*. at 295, 298-99.

could not prepare an adequate defense, or (2) would subject him to the risk of being prosecuted twice for the same offense.[36] In other words,

> [F]or non-statutory allegations, we tolerate some variation in pleading and proof. We tolerate "little mistakes" that do not prejudice the defendant's substantial rights but we will not tolerate a variance that really amounts to a failure to prove the offense alleged. What is essential about variances with respect to non-statutory allegations is that the variance should not be so great that the proof at trial "shows an entirely different offense" than what was alleged in the charging instrument.[37]

Here, the evidence tended to show that "HCFA 1500" and "CMS 1500" were merely different names for the same form. Haden testified that an HCFA 1500 is a "form that all doctors and medical providers have to use nationally to bill their services" and that it is commonly referred to as an "HCFA." However, she explained that the name of the form had changed:

> It used to be the Health Care Finance Administration, HCFA Form 1500. And then, when the Centers for Medicare and Medicaid took over, that's CMS, they changed the name of the form to "CMS 1500." People who have been in the business for a very long time, to this day, will still call them "HCFAs."

Luevano provided similar testimony tending to show that the names were used interchangeably. She explained, "'HCFA' is an acronym that was used for Centers for Medicare and Medicaid Services before it took on that name. So that's their former name. It stands for Health Care Finance Administration. And it's typically used to refer to a paper billing form, the HCFA 1500 as it was

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[36] *See Fuller v. State*, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002); *Gollihar*, 46 S.W.3d at 257; *Hinojosa v. State*, 433 S.W.3d 742, 758 (Tex. App.—San Antonio 2014, pet. ref'd); *Rogers v. State*, 200 S.W.3d 233, 236 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

[37] *Johnson*, 364 S.W.3d at 295 (citing *Byrd v. State*, 336 S.W.3d 242, 246-48 (Tex. Crim. App. 2011)).

called before." But now, Luevano added, "'CMS 1500' is the paper billing form that is used to bill professional medical services. There's professional medical services, which are basically not hospital services. And those are billed on a HCFA 1500. So it's just the paper billing form for medical services." Thus, the evidence tended to show that any distinction between an "HCFA 1500" form and a "CMS 1500" form was in name only, and there is no indication in the record that this distinction deprived Douglas of sufficient notice of the charges against him or subjected him to the risk of being prosecuted twice for the same offense. Accordingly, to the extent that any variance exists here, we cannot conclude on this record that it is material.

We overrule Douglas's first issue.

Exclusion of evidence

During trial, Douglas had attempted to show that TMIC had a financial relationship with the Travis County District Attorney's Office. Specifically, Douglas sought to present evidence tending to show that TMIC had provided funding for the Public Integrity Unit, the division of the Travis County District Attorney's Office that, among other responsibilities, prosecutes workers' compensation fraud cases. In a hearing outside the presence of the jury, one of the prosecutors in the case acknowledged that TMIC had provided funding for her division "since its inception" and that she, the lead prosecutor at the time, "listen[ed] to [TMIC's] opinions" on which cases to prosecute. However, the prosecutor emphasized that, "ultimately, the decision [on whether to prosecute] is made by me." Following an extended discussion on whether this evidence was admissible, the district court excluded the evidence, finding that it was irrelevant or, in the

alternative, more prejudicial than probative.[38] In his second issue, Douglas asserts that the district court abused its discretion in excluding this evidence.

We review a district court's evidentiary rulings for abuse of discretion.[39] We are to view the record "in the light most favorable to the trial court's determination, and the judgment will be reversed only if it is arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'"[40] We consider the ruling in light of what was before the district court at the time the ruling was made.[41] "We will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case."[42]

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[43] However, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,

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[38] *See* Tex. R. Evid. 401, 403.

[39] *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)); *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[40] *Story*, 445 S.W.3d at 732 (quoting *Dixon*, 206 S.W.3d at 590); *see Montgomery v. State*, 810 S.W.2d 372, 391-92 (Tex. Crim. App. 1991) (op. on reh'g).

[41] *Billodeau v. State*, 277 S.W.3d 34, 39 (Tex. Crim. App. 2009).

[42] *Dixon*, 206 S.W.3d at 590 (citing *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)); *see Valtierra v. State*, 310 S.W.3d 442, 448 (Tex. Crim. App. 2010).

[43] Tex. R. Evid. 401.

misleading the jury, undue delay, or needlessly presenting cumulative evidence."[44] "[A] trial court, when undertaking a Rule 403 analysis, must balance (1) the inherent probative force of the proffered item of evidence along with (2) the proponent's need for that evidence against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted."[45] "[T]hese factors may well blend together in practice."[46]

On this record, it would not have been outside the zone of reasonable disagreement for the district court to exclude the evidence on the ground that its probative value, if any, was substantially outweighed by the danger of unfair prejudice. In Douglas's view, the evidence was relevant because "[a] jury reasonably could have inferred that the DA's office acted as the personal attorneys for TMIC with respect to this case, and such a revelation would have complemented Appellant's argument that TMIC was strong-arming Appellant because it did not want to compensate him for the full 16 units that Appellant believed was compensable." The district court, however, would not have abused its discretion in concluding that the inherent probative force of the proffered evidence was low. The prosecutor emphasized at the hearing that she reviewed all the cases herself, decided whether to accept or reject each case, and made the final call on whether to move forward

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[44] Tex. R. Evid. 403.

[45] *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006).

[46] *Id*. at 642.

with a case and present it to the grand jury. As the prosecutor repeatedly stated during the hearing, "I work for the DA's office. I don't work for Texas Mutual." In light of the prosecutor's proffered testimony, it would not be outside the zone of reasonable disagreement for the district court to conclude that this evidence, without more, would not have a strong tendency to support Douglas's theory that TMIC was primarily responsible for the prosecution.

Moreover, the district court would not have abused its discretion in concluding that any tendency of the evidence to support Douglas's defensive theory would be substantially outweighed by the danger that presenting such evidence could confuse or distract the jury from the main issue in the case, namely, whether Douglas had committed the alleged offense. The district court could have reasonably concluded that the jury, instead of focusing primarily on Douglas's guilt or innocence, would be distracted by tangential issues involving the motives of the prosecutors and their relationship with the complainant. Additionally, it would not be outside the zone of reasonable disagreement for the district court to have further concluded that the presentation of this evidence would consume an inordinate amount of time during trial. Admitting the prosecutor's testimony, the district court could have reasonably inferred, would create the need for additional evidence to be presented, including possible rebuttal evidence by the State, the testimony of other witnesses who might have further knowledge of the relationship between the prosecutors and TMIC, and possibly even evidence pertaining to Douglas's criminal history. As the district court explained during the hearing:

> And the other thing is: I have to say, if we can get into this thing about who is paying her salary and all that kind of thing, and if we can step outside the box, if you want to step outside the box and look at the thing, then, you know, I think in that situation,

> under that analysis, if that becomes relevant, then it becomes relevant as to—if you're saying, well, this is some kind of malicious prosecution or something, I think that does raise the prior case that he's already been convicted of.[47] You know, really? I mean, that's the thing.
>
> If it's the deal about, oh, well, they're just picking on this guy. He's not really all that bad a guy, this is all motivated by the fact that they're paid by Texas Mutual, well, in that case, then character and everything else becomes an issue. And I think that—under that analysis that you're talking about, I think that they could bring in the prior prosecution.

For these and other reasons, we cannot conclude on this record that the district court abused its discretion in finding that the balance of Rule 403 factors weighed in favor of excluding the evidence.

We overrule Douglas's second issue.

CONCLUSION

We affirm the judgment of the district court.

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Field

Affirmed

Filed: April 14, 2017

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[47] Douglas had previously been convicted of the offense of securing execution of a document by deception, based on his similar billing practices with another company that he had owned and operated, Western Medical Evaluators, Inc. This Court affirmed Douglas's conviction on appeal. *See Douglas v. State*, No. 03-13-00092-CR, 2015 Tex. App. LEXIS 8929, at *1-3 (Tex. App.—Austin Aug. 26, 2015, pet. ref'd) (mem. op., not designated for publication).