COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1737-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHEILA E. NOVIN,

DEFENDANT-APPELLANT,

LISA R. BLANCHARD,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Sheila E. Novin appeals from a judgment entered after a jury found her guilty of one count of creating a fraudulent writing, *see*

§ 943.39, STATS., and three counts of medical assistance fraud, *see* § 49.49(1)(a)1 and 2, STATS.[1] She also appeals from the trial court's order denying her motion for postconviction relief. Novin argues: (1) that she was improperly convicted of two felony counts of medical assistance fraud because the state alleged that she did not render any services, and thus, she claims, the offenses were merely misdemeanors; (2) that the trial court erred in admitting evidence of other uncharged misconduct; (3) that the trial court erred in admitting allegedly prejudicial hearsay; and (4) that her convictions should be reversed due to alleged prosecutorial misconduct. We affirm.

I. BACKGROUND

Novin was a registered nurse who worked for several home healthcare agencies, providing care to patients at their homes. In 1993, Novin formed Alpha Nursing Services, Incorporated, to provide independent nursing to

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[1] Section 943.39, STATS., provides, in relevant part:

> **Fraudulent writings.** Whoever, with intent to injure or defraud, does any of the following is guilty of a Class D felony:
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> **(1)** Being a director, officer, manager, agent or employe of any corporation or limited liability company falsifies any record, account or other document belonging to that corporation or limited liability company by alteration, false entry or omission, or makes, circulates or publishes any written statement regarding the corporation or limited liability company which he or she knows is false ….

Section 49.49, STATS., provides, in relevant part:

> **Medical assistance offenses. (1)** FRAUD. (a) *Prohibited conduct.* No person, in connection with a medical assistance program, may:
>
> 1. Knowingly and wilfully make or cause to be made any false statement or representation of a material fact in any application for any benefit or payment.
>
> 2. Knowingly and wilfully make or cause to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment.

patients at their homes. Many of the patients Alpha served were former patients of Novin, or Novin's partner (Alpha's co-owner), at the home healthcare agencies where Novin and her partner worked while simultaneously operating Alpha.

In order to be reimbursed pursuant to the Wisconsin Medical Assistance Program for services provided to Alpha clients, Novin was required to submit prior authorization forms to get approval of the proposed services. Novin was not eligible to receive reimbursement from the Wisconsin Medical Assistance Program for independent nursing services to a patient unless no home healthcare agency was available to provide care to the patient. *See* WIS. ADM. CODE § HFS 107.11(6)(b). On June 21, 1996, a jury found Novin guilty of one count of creating a fraudulent writing, and three counts of medical assistance fraud, based upon the false representations made in medical records and documents that Novin submitted to the Wisconsin Medical Assistance Program to obtain payment for services allegedly provided to Alpha clients.

II. DISCUSSION

Novin argues that she was improperly convicted of two counts of medical assistance fraud as felonies rather than misdemeanors. The statutory penalty for medical assistance fraud is as follows:

> 1. In the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing by that person of items or services for which medical assistance is or may be made, a person convicted of violating this subsection may be fined not more than $25,000 or imprisoned for not more than 5 years or both.
>
> 2. In the case of such a statement, representation, concealment, failure, or conversion by any other person, a person convicted of violating this subsection may be fined not more than $10,000 or imprisoned for not more than one year in the county jail or both.

Section 49.49(1)(b), STATS. The interpretation of a statute is a question of law, which we review *de novo*. *See* ***State v. Petty***, 201 Wis.2d 337, 354–355, 548 N.W.2d 817, 823 (1996). When interpreting a statute, we first look to the plain language, and if it is unambiguous we need not resort to extrinsic aids. *See* ***State v. Williams***, 179 Wis.2d 80, 88, 505 N.W.2d 468, 470 (Ct. App. 1993).

Two of the counts of medical assistance fraud against Novin were based on Novin's false representations that she had provided independent nursing care to two patients, when, in fact, she had not done so. Novin asserts that because the two counts at issue allege that she did not provide services, she cannot be found to have made false representations in connection with the furnishing of services by her, and that, therefore, she cannot be penalized under § 49.49(1)(b)1, STATS.

We reject Novin's disingenuous interpretation of the statute because it conflicts with its plain language. A person need not actually provide services in order to make a false representation "in connection" with the furnishing of services by that person. All that is required is that the person make a representation, that the content of the representation relate to the furnishing of services by that person, and that the representation be false. Novin's false representation that she had furnished services, when, in fact, she had not furnished services, is clearly a false representation "in connection" with the furnishing of services by Novin. Novin was properly convicted under § 49.49(1)(b)1, STATS.[2]

[2] Novin also asserts that Alpha, rather than Novin, made the misrepresentation that Novin provided services, and that Novin is thus not accountable under § 49.49(1)(b)1, STATS. We reject this argument. Section 49.49(1)(a), STATS., prohibits a person from knowingly and wilfully making *or causing to be made* any false statement or representation, and § 49.49(1)(b)1, STATS., provides the penalty when the false statement or representation is in connection with the furnishing of medical services by that person (the person who made *or caused to be made* the (continued)

Novin next argues that the trial court erred in admitting evidence of her other uncharged misconduct. Specifically, she challenges the admission of evidence that Alpha began providing care for some patients within a day after either Novin or her partner discharged those patients from home healthcare agencies at which they worked. She also challenges the admission of evidence that the doctor of one former healthcare agency patient, whom Alpha had attempted to admit, determined that the patient did not need Alpha's services.[3]

Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. ***State v. Larsen***, 165 Wis.2d 316, 319–320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. ***Id.***, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. ***State v. McConnohie***, 113 Wis.2d 362, 370, 334 N.W.2d 903, 907 (1983).

The State argues that the evidence of Novin's other misconduct was properly admitted under § 904.04, STATS., to show Novin's intent, and to show that the charged crimes were part of a pattern or scheme. We agree.

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false statement). *See* ***State v. Williams***, 179 Wis.2d 80, 89–90, 505 N.W.2d 468, 471 (Ct. App. 1993). Novin is punishable under § 49.49(1)(b)1, STATS., for any misrepresentation she caused to be made by Alpha.

[3] Novin also challenges the trial court's pretrial order permitting evidence that Alpha clients were receiving more extensive care than they had received from the home healthcare agencies. Novin fails to provide any record cite to establish that such evidence was admitted at trial, and fails to assert any prejudice as a result of such evidence. We therefore reject any assertion of error predicated on such evidence. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments); RULE 809.19(1)(e), STATS. (the argument portion of a brief shall contain the contention of the appellant, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on).

Section 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Three of the counts against Novin alleged that she knowingly and wilfully misrepresented that home healthcare agencies were not available to provide care for her patients. The evidence that Novin discharged other patients from home healthcare agencies and then retained them as patients at Alpha tends to establish that Novin's charged misrepresentations were not merely the result of a mistake, as Novin alleged, but that Novin had the intent to service patients for whom home healthcare agencies were available, and to misrepresent agency availability when applying for payment. With respect to the patient Alpha attempted to admit, the evidence established that Novin would have serviced yet another patient for whom an agency had been available, but that she was unable to do so because a doctor would not authorize the services. The uncharged misconduct was properly admitted to show Novin's criminal intent. *See* ***State v. Sullivan***, 216 Wis.2d 768, 784, 576 N.W.2d 30, 37 (1998) ("Criminal intent is the state of mind that negatives accident or inadvertence. Evidence of other acts may be admitted if it tends to undermine an innocent explanation for an accused's charged criminal conduct.").

Novin also argues that the prejudicial effect of the uncharged misconduct evidence substantially outweighed its probative value, and that it should have been excluded pursuant to § 904.03, STATS. We disagree. As noted, the evidence was directly relevant to Novin's intent to provide services to patients

for whom a healthcare agency was available and to falsely represent that such agencies were unavailable when applying for reimbursement. Any prejudicial effect did not substantially outweigh the value of this highly probative evidence.

Novin next argues that the trial court erred in admitting hearsay regarding the needs of one of Alpha's patients. Novin complains about the following testimony by Sharon Rusch, a clinical care manager for one of the home healthcare agencies that Novin claimed was unavailable to service an Alpha client:

> Q. And do you recall what time they told you these visits needed to be done?
>
> A. Early morning hours.
>
> Q. Any other patients that they – that somebody from Alpha called about?
>
> A. One was with regard to a gentleman living in an area around 35th and Vliet and that – there was [sic] some unsafe questions regarding the client, and the other would be with regard to a diabetic client needing early morning nursing visits prior to 7:00 a.m.
>
> Q. This diabetic patient, did they indicate – did the person calling indicate whether it was female or male?
>
> A. Female patient.
>
> Q. Did they indicate – let me back up. This patient – this diabetic that you received a referral on, do you remember who [sic] you spoke to about that?
>
> A. At this time I can't remember exactly. I may have talked to both Lisa and Sheila.
>
> Q. And what criteria was [sic] given to you regarding this patient?
>
> A. It was a diabetic patient on the north –
>
> ….
>
> THE WITNESS: I believe the criteria was [sic] the client was living – residing on the northwest side of the city and needed insulin injections early in the morning preferably between 6:00 and 6:30 in the morning.
>
> MS. OSWALD [prosecutor]:
>
> Q. And were you able to staff that patient?

> A. Without getting further information definitely could not say we were not able to staff it.
>
> Q. Did you request more information?
>
> A. Yes, I did.
>
> Q. Do you recall who [sic] you spoke to when you asked for more information?
>
> A. I def – at this time I really can't remember who [sic] I spoke with, one of the two ladies.
>
> Q. And what – and what were you told?
>
> A. That they would fax the information to me.
>
> Q. And did you ever receive a fax?
>
> A. No, I didn't.
>
> Q. Were you ever given a name of this patient?
>
> A. No, I was not.

Novin argues that the foregoing testimony that either Novin or her partner said that one of Alpha's clients needed care early in the morning, preferably between 6:00 a.m. and 6:30 a.m., was prejudicial hearsay. Novin fails, however, to sufficiently explain how she was prejudiced by this testimony. In fact, Novin herself testified that she cared for the client early in the morning, usually between 6:30 a.m. and 7:30 a.m. Further, another witness testified, without objection, that Novin had called her regarding a female diabetic patient who Novin said needed insulin injections at 6:15 a.m. Thus, the challenged testimony is cumulative and not prejudicial. *See* ***Jones v. Dane County***, 195 Wis.2d 892, 937, 537 N.W.2d 74, 89 (Ct. App. 1995) (no prejudice results when challenged evidence is cumulative).

We also reject Novin's assertion that the challenged testimony is hearsay. Section 908.01(3), STATS., provides, in relevant part: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

When reviewed in context, it is clear that the statement was not offered to show that the patient needed care at a specific time, but rather to show that the healthcare agency did not reject a patient who was represented as needing care at that time. The statement was thus not hearsay.

Finally, Novin argues that the prosecutor, in closing argument, improperly commented on Novin's failure to produce certain witnesses at trial, and that the comment impermissibly shifted the burden of proof onto Novin. The State replies that the challenged comment was proper rebuttal to Novin's closing argument. We agree.

A prosecutor may properly refer to the defense's ability to subpoena a witness in response to a defense argument regarding the potential testimony of witnesses who were not produced at trial. *See* ***State v. Patino***, 177 Wis.2d 348, 381–382, 502 N.W.2d 601, 614–615 (Ct. App. 1993). A "'comment [to observe that the defendant could produce a witness if he wished] does not alter the burden of proof or penalize the exercise of a constitutional right.'" ***Id.***, 177 Wis.2d at 381–382, 502 N.W.2d at 614 (brackets in ***Patino***) (quoted source omitted). Such comment is "'an accurate piece of information combined with a legitimate argument. The jury is entitled to know that the defendant may compel people to testify; this legitimately affects the jury's assessment of the strategy and evidence.'" ***Id.***, 177 Wis.2d at 382, 502 N.W.2d at 615 (quoted source omitted).

During closing argument, Novin's counsel made the following several comments about the State's failure to present certain witnesses:

> We're not here about care. We're here because the State saw fit to charge. What they decided to do – that's their prerogative. But clearly, they don't care about care. They didn't talk to any of the doctors – or any of the

> doctors in the counts that are involved here – to find out if the care was any good.
>
> ….
>
> Count 4 deals with the [sic] Gladys Johnson about her availability or – the necessity for her to get shots or to get her treatment prior to seven o'clock or eight o'clock or whatever. And you heard conflicting testimony as to what was her situation. The only person still alive that knows exactly what time she was available is Bernice Jackson, and the State didn't call her.
>
> ….
>
> As I said, the State didn't contact the doctors.
>
> ….
>
> If the State wanted to check the services to see if they were provided, they could have gone to the doctor's office and checked their [sic] reports. They could have checked the flow charts.
>
> ….
>
> Gladys Johnson is Count 4. We've already gone into that about what the document shows. The State wants you to find beyond a reasonable doubt that she was – she could have had her shots at a much later time. And I'm saying for you to make that determination you must speculate. And the only way you can do that is to say Ms. Novin is lying because of inconsistent statements made in the report[s], which say on one occasion she needs the service early in the morning, and on another, she doesn't get up until seven. Those are both Ms. Novin's statements.
>
> But if the State wanted to disagree, they should have brought Bernice Jackson in here to testify that her mother was diabetic, and that she was not able to provide the service.

In rebuttal, the prosecutor was permitted to respond to the foregoing argument, over Novin's objection, as follows:

> Now Mr. Cannon [Novin's counsel] said a number of things about what you didn't see. The State didn't bring in any doctors. The State didn't bring any flow sheets to show you. The State didn't bring in witnesses. You shouldn't speculate about what other evidence exists out there.

> But I can tell you this, that the defendant had every opportunity to subpoena witnesses and bring in documents, so if there was something they wanted you to see, she could have brought them in. If there is somebody she wanted you to hear from –
>
> MR. CANNON: Objection.
>
> THE COURT: Overruled. Obviously, both sides have the right to subpoena witnesses and they have a right to present that. Obviously, there is a difference. And the State has the burden of proof, and the defense does not. With that understanding, there is nothing improper about the statement.
>
> MS. OSWALD: If there was a witness that they wanted, she would have brought in that witness.

The State's comments were proper rebuttal to Novin's argument, and they did not shift the burden of proof.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.