COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2489-CR **Cir. Ct. No. 2012CF1844**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

YVETTE L. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEAN A. DIMOTTO and MARK A. SANDERS, Judges. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Yvette Harris appeals a judgment of conviction, entered following a jury trial, for Medicaid fraud[1] and theft by false representation of an amount under $2500. Harris also appeals two orders. Harris appeals an order denying her postconviction motion contending: (1) the two convictions were multiplicitous and thus in violation of the constitutional prohibition against double jeopardy; (2) her trial counsel provided ineffective assistance; and (3) the evidence at trial was insufficient to support her convictions. In addition, she appeals an order denying her motion for reconsideration of the circuit court's denial of her postconviction motion. On appeal, Harris again contends that: (1) Medicaid fraud and theft by false representation are multiplicitous charges; (2) she was denied effective assistance of counsel on various grounds; (3) insufficient evidence was presented at trial to support her convictions; and (4) she should receive a new trial in the interest of justice. We reject all of Harris's arguments and affirm.

BACKGROUND

¶2 The State charged Harris with three counts: Medicaid fraud totaling $32,330.41, in violation of WIS. STAT. § 49.49(1)(a)1. (2011-12);[2] theft by false representation totaling $32,330.41, in violation of WIS. STAT. § 943.20(1)(d) and (3)(c); and unauthorized use of personal identification information, in violation of WIS. STAT. § 943.201(2). All three charges stemmed from Harris billing Medicaid

[1] The jury verdict form refers to the crime as "Medical Assistance Fraud." The parties use the terms "Medicaid fraud" and "medical assistance fraud" interchangeably. For the purposes of this appeal, we do not differentiate between these terms.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. The Legislature amended and renumbered WIS. STAT. § 49.49(1)(a)1. as WIS. STAT. § 946.91(2)(a) in 2013 Wis. Act 226, § 13.

for private nursing care she allegedly provided to Kayla,[3] a child with muscular dystrophy, between June 18, 2010, and April 1, 2011. The State alleged Harris did not actually perform all of the billed services.

¶3 The case was tried to a jury. In its opening statement, the State explained, "Essentially the allegation the State is making is that Yvette Harris submitted those claims for payment from Medicaid when she did not actually provide services for [Kayla], the seven year old child." The State described Kayla's mother's likely testimony, stating:

> Most importantly[,] I think in the context of this case, [Mary[4]], the mother of the child, will tell you that Yvette Harris did not provide cares for [Kayla] in her residence on 27th Street between May and November of 2010 or in [Mary]'s house on 17th Street between November and April of 2011.

The State also predicted the evidence would show Harris provided some care for Kayla—because she filled in for Kayla's regular nurse several times—but she did not work on all the days for which Medicaid paid her.

¶4 The State called three witnesses to establish the Medicaid billing process: David Miess, Cindy Zander, and Lori Schey. Miess, the provider relations manager for Hewlett Packard, testified that Hewlett Packard was the fiscal agent for the Wisconsin Department of Health Services (DHS), running the day-to-day activities for Medicaid. He stated that Harris had been a certified provider eligible to bill Medicaid in Wisconsin since December 1992. Miess

[3] For the sake of privacy, we use a pseudonym instead of Kayla's real name.

[4] We again use a pseudonym in reference to Kayla's mother.

further testified that Harris billed Medicaid electronically for her work via a billing service, and he explained that billing process. Schey testified that she ran Badger Land Billing, the billing service Harris used. Schey explained that in order to submit her claims to Medicaid, Harris reported her hours for each patient by phone to Schey. Schey would then transmit those claims to Hewlett Packard on Harris's behalf on a weekly basis.

¶5 Zander, a nurse consultant with DHS, testified that Harris was listed as a care provider on multiple prior authorization care plans for Kayla. Zander explained that those forms indicate the treatment and orders for Medicaid services requested for a particular patient. Zander also explained that a nurse, Lawana Al-Dhari, prepared Kayla's forms.

¶6 Two witnesses testified as to Harris's work for other companies—namely, as a field staffer for a home health services company and at a nursing home—during the same time period that Harris had submitted claims for her care of Kayla. Kayla's other care providers, Al-Dhari and Loretta Lee, testified that Harris never provided care for Kayla. Al-Dhari testified that she and Harris had both a professional and personal relationship for close to twenty years. Al-Dhari also described various instances when Harris came to Kayla's home and when Al-Dhari took Kayla to Harris's home. Al-Dhari, Mary, and several witnesses presented by the defense testified that Kayla and her family attended Harris's son's graduation party.[5] Harris's daughter, Harris's friend, and two of Harris's neighbors all testified that they saw Kayla with Harris on various occasions.

[5] Specifically, Mary testified she and her family, including Kayla, had gone to a birthday party that Harris organized, but that it could have been a graduation party.

¶7 Kayla lived with Mary, though Kayla had been hospitalized for the first years of her life before her mother could arrange in-home care. Kayla's father testified he was always involved in Kayla's care, despite having been "split up" with Mary for some time. Mary and Kayla's father both testified that Harris never provided care for Kayla. While Mary testified that she interviewed Harris in 2010 to provide in-home care to Kayla, she explained that she hired Al-Dhari and Lee, not Harris. Mary initially stated that she did not authorize Harris to bill Medicaid on behalf of Kayla or provide Kayla's Medicaid member identification number to Harris. On cross-examination by Harris's counsel, Mary acknowledged that she had signed a prior authorization form allowing Harris to provide care for Kayla. Kayla's aunt testified that she did not know Harris, and that Lee and Al-Dhari were Kayla's private nurses.

¶8 Alfredo Gutierrez, the Medicaid fraud investigator who investigated Harris, also testified. Gutierrez explained that Harris had billed Medicaid for 138 dates of service related to care for Kayla, and she had been paid for 136 dates of service for a total of about $32,000.[6] Gutierrez interviewed Mary during his investigation, and she told him that she did not know Harris. Gutierrez also interviewed Harris as part of his investigation. Although Harris told him she provided care to Kayla, she seemed unsure of Kayla's home address. Gutierrez asked Harris if she had her nursing notes, and she told him she did not have them but that Al-Dhari should have a copy of her nursing notes.

[6] Harris did not receive payment for two of the total 138 dates of service for which she billed Medicaid. Those two dates were not at issue in this case. We will therefore refer only to the 136 dates of service for which Harris received payment.

¶9 The State then asked Gutierrez to look at nursing notes signed by Harris, which Harris's counsel had "supplied," and to compare them to progress notes from one of Harris's employers. Gutierrez examined these exhibits and explained that they showed some days on which Harris provided care for Kayla (based on her nursing notes), but, at the same time, Harris had been working at another job (based on the progress notes). Gutierrez also explained that, for one particular date, Harris's nursing notes indicated that she worked from 7:30 a.m. to 9:30 a.m., but she billed Medicaid for twelve hours. When asked what he could conclude from that, Gutierrez stated, "It could be just a mistake on Ms. Harris'[s] part instead of putting 0730 to 1930, which she usually documented, she put 0—a zero instead of a one—9[:]30." Harris's counsel did not object to the introduction of this evidence.

¶10 Janice Gordon, a registered nurse, testified that she worked as a prior authorization liaison (PAL) and explained this work meant she would complete the paperwork for private duty nurses. Gordon was a PAL for Al-Dhari and prepared Kayla's plan of care. Gordon testified that Al-Dhari told her to put Harris on the plan of care, and she did so. Gordon further testified that Al-Dhari said Harris provided care for Kayla.

¶11 The State acknowledged in its closing argument that there was evidence Harris had provided some care for Kayla, but it argued Harris did not provide all the care for which Medicaid had paid her. Harris argued that her nursing notes showed merely a few unintentional billing mistakes, but not fraud.

¶12 The jury found Harris guilty of medical assistance fraud and theft by fraud, but it acquitted her of unauthorized use of personal identification information. On the verdict form, the jury was asked that if it found Harris guilty

of theft, to answer whether the value of the property to which Harris obtained title was more than $10,000. The jury answered "No" to this question. The circuit court then convicted Harris of medical assistance fraud and Class A misdemeanor theft, rather than of a Class G felony theft as charged.[7]

¶13 Harris then filed a postconviction motion raising substantially the same issues she now raises on appeal. With respect to her ineffective assistance argument, Harris alleged that if her trial counsel had advised her to testify, she would have explained that the nursing notes on which the State relied could have been inaccurate because she recreated them after the originals were destroyed in a July 2010 flood. Further, Harris claimed she would have addressed and explained the specific billing dates Gutierrez identified during his testimony. Harris's explanations for the instances of double-billing included that she took Kayla with her when she visited several other patients for her other job, and that she made a data entry mistake. Harris also argued that her trial attorney was ineffective for failing to respond to Medicaid's demand for payment, which caused her to lose the opportunity to settle the case before charges were filed. The circuit court denied Harris's postconviction motion, concluding that her convictions were not multiplicitous, that her trial counsel had not provided ineffective assistance, and that the evidence was sufficient to support her convictions.

¶14 Thereafter, Harris filed a motion for reconsideration, arguing: (1) the circuit court erred in concluding the State would have obtained

[7] The value of the property must exceed $10,000 for a defendant convicted of theft by false representation to be guilty of a Class G felony. WIS. STAT. § 943.20(3)(c).

her nursing notes had her attorney not provided them; (2) the court's determination incorrectly presumed that it was illegal for a Medicaid provider to bill for the care of two patients at the same time; and (3) the court erred in denying her ineffective assistance claim on the basis of its finding that she would not have settled with Medicaid prior to charging. The circuit court determined that she was not entitled to a ***Machner***[8] hearing and denied Harris's motion. Harris now appeals.

DISCUSSION

I. Multiplicity

¶15 Harris contends medical assistance fraud and theft by false representation are multiplicitous criminal charges because the legislature intended only one punishment for Harris's singular set of conduct. Multiplicity occurs where a defendant is charged with more than one count for a single offense, which violates the double jeopardy provisions of the state and federal constitutions. ***State v. Davison***, 2003 WI 89, ¶34, 263 Wis. 2d 145, 666 N.W.2d 1. If the legislature intends to authorize cumulative punishments for the same offense, the charges are not multiplicitous, nor do they violate double jeopardy. ***Id.***, ¶37.

¶16 Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that we review de novo. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Determining whether a multiplicity violation exists in a given case, which requires a determination of legislative intent, is also a question of law subject to independent appellate review. ***Davison***, 263 Wis. 2d 145, ¶15.

[8] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶17 Courts use a two-pronged test to determine whether convictions are multiplicitous. ***State v. Ziegler***, 2012 WI 73, ¶60, 342 Wis. 2d 256, 816 N.W.2d 238. First, we determine whether the two offenses are identical in law and in fact. ***Id.*** If the charged offenses are different in fact or in law, a presumption arises that the legislature did intend to permit cumulative punishments. ***Davison***, 263 Wis. 2d 145, ¶44. This presumption can only be rebutted by clear legislative intent to the contrary. ***Id.*** Second, we consider legislative intent. ***Ziegler***, 342 Wis. 2d 256, ¶¶61-62. The results of the first prong determine the presumption under which a court analyzes the second prong. ***Id.***, ¶61. Offenses with elements identical in law and fact establish a presumption that the legislature did not intend to permit multiple punishments; while offenses with elements that differ in law or fact establish a presumption that the legislature intended to permit multiple punishments. ***State v. Patterson***, 2010 WI 130, ¶15, 329 Wis. 2d 599, 790 N.W.2d 909. We consider the second prong regardless of the outcome of the first prong. ***Ziegler***, 342 Wis. 2d 256, ¶61.

¶18 Here, it is undisputed that the Medicaid fraud and theft charges are identical in fact, but different in law. The same conduct on Harris's part—billing Medicaid for 136 days of work caring for Kayla—forms the basis for both charges. However, we agree with the parties' concession that the two charges are different in law because they have different elements—Medicaid fraud requires only that a false representation be made, and theft requires that the defendant obtain title to the property. *Compare* WIS. STAT. § 49.49(1)(a)1. *with* WIS. STAT. § 943.20(1)(d). Accordingly, Harris must overcome a presumption that the legislature intended to permit cumulative punishments for these charges, and she must do so by showing a clear legislative intent to the contrary. ***Davison***, 263 Wis. 2d 145, ¶¶44-45.

¶19 Turning to the second prong of the multiplicity analysis, we consider the following four factors to determine legislative intent: "(1) all applicable statutory language; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct." ***Id.***, ¶50. We conclude that all four factors demonstrate a legislative intent to allow cumulative punishments with regard to the two charges Harris faced, and therefore she has failed to meet her burden of showing the contrary.

A. Statutory language

¶20 As to legislative intent, we note WIS. STAT. § 939.65 "gives a green light to multiple *charges*, which may result in multiple *convictions*, under different statutory provisions." ***Davison***, 263 Wis. 2d 145, ¶51. However, under WIS. STAT. § 939.66, an individual "may be convicted of either the crime charged or an included crime, but not both." As relevant here, an included crime is "[a] crime which does not require proof of any fact in addition to those which must be proved for the crime charged." Sec. 939.66(1).

¶21 WISCONSIN STAT. § 49.49(1)(a)1., on medical assistance fraud, provides that: "No person, in connection with a medical assistance program, may ... [k]nowingly and willfully make or cause to be made any false statement or representation of a material fact in any application for any benefit or payment." WISCONSIN STAT. § 943.20(1)(d), on theft, provides that whoever "[o]btains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made," is guilty of theft.

¶22 Harris does not develop a legal argument as to the first factor of the legislative intent test. Harris's brief merely recites the statutory language without any argument as to why it shows legislative support for her multiplicity argument. Ordinarily, we will not address undeveloped arguments, *see* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), and we only do so here to the extent we must address the first factor. We note that the elements of medical assistance fraud and the elements of theft are clearly distinct. This is because medical assistance fraud requires only a false statement or representation in the application for benefits or payment, while theft by fraud requires the individual to actually obtain title to property of another person. Accordingly, neither WIS. STAT. § 49.49(1)(a)1. nor WIS. STAT. § 943.20(1)(d) are "included crimes" of each other under WIS. STAT. § 939.66(1).

B. Legislative history and context

¶23 Both parties agree that WIS. STAT. § 49.49 was created to increase the penalties for medical assistance fraud. However, Harris argues the legislature's focus was on creating a "stiffer penalty, not creating multiple charges," when it enacted § 49.49. She contends the legislature would have noted its intent to allow for multiple charges in the legislative drafting record had that been its intent. Harris is incorrect in asserting that the legislature must explicitly indicate its intent to allow multiple charges in order to accomplish that effect. To the contrary, where two charges are different in law, as they are here, we presume the legislature intended to permit cumulative punishments. *See* ***Davison***, 263 Wis. 2d 145, ¶44. Harris has not rebutted that presumption. The lack of any indication otherwise in the legislative drafting record does not show "clear legislative intent" to rebut that presumption. *See* ***id.*** It merely shows silence in

that regard. Having the burden here, Harris has failed to show any legislative history or context supporting her multiplicity argument.

C. Nature of the proscribed conduct and appropriateness of multiple punishments

¶24 In a multiplicity analysis, our conclusions as to the nature of the proscribed conduct often inform our consideration of the appropriateness of multiple punishments, and therefore the two factors may be analyzed together. ***Davison***, 263 Wis. 2d 145, ¶98. We consider whether the relevant statutes protect different interests. ***Id.***, ¶¶95-99. "Where the statutes intend to protect multiple and varied interests of the victim and the public, multiple punishments are appropriate." ***State v. Wolske***, 143 Wis. 2d 175, 184, 420 N.W.2d 60 (Ct. App. 1988). In addition, multiple punishments are appropriate where the grounds for punishment are different. ***Id.*** at 184-85.

¶25 Harris contends that the nature of the proscribed conduct is identical under both charges. She further contends that multiple punishments are inappropriate "because the practice of charging defendants with Medical Assistance Fraud and Theft has not been uniformly applied by prosecutors" and "doing so is the exception." We disagree, as the proscribed conduct is not identical, nor are multiple punishments inappropriate for the reason Harris raises. Although the same general course of conduct on Harris's part satisfied both charges in this case, the nature of the proscribed conduct underlying each crime is distinct, and it is readily possible for an individual to commit either medical assistance fraud or theft, while not committing both offenses. The medical assistance fraud statute prohibits a person from submitting a false claim for reimbursement. WIS. STAT. § 49.49(1)(a)1. The fraud is complete when the person submits the claim seeking payment, regardless of whether Medicaid

provides the benefit or payment sought. *See* ***State v. Abbott Labs.***, 2012 WI 62, ¶¶96, 101, 341 Wis. 2d 510, 816 N.W.2d 145. Moreover, a fraudulent claim may cause the State to incur costs of investigation and prosecution even if the attempted fraud is discovered or otherwise unsuccessful. *See* § 49.49(6) (allowing the Wisconsin Department of Justice to recover costs it incurs by investigating and prosecuting violations of this statute). The statute protects these distinct interests of the government (and, by extension, the taxpaying public) separate from those interests regarding an individual's completed receipt of unearned medical assistance funds.

¶26 To commit theft by false representation, on the other hand, a person must "[o]btain[] title to property of another." WIS. STAT. § 943.20(1)(d). Section 943.20(1)(d) applies in situations in which the property obtained is money or "monetary overpayments." *See* ***State v. Ploeckelman***, 2007 WI App 31, ¶24, 299 Wis. 2d 251, 729 N.W.2d 784. Accordingly, while WIS. STAT. § 49.49 protects the public's interest in avoiding the various costs incurred in discovering, investigating and preventing payment of fraudulent Medicaid claims, § 943.20(1)(d) distinctly protects a victim's property rights. Because these statutes protect different interests, punishment under both is appropriate.

¶27 As far as we can tell, Harris's appellate argument seems to relate more to a claim of "selective prosecution," in that she contends the State generally does not charge defendants with both theft and medical assistance fraud. In an attempt to support this claim, Harris contended in the circuit court that out of over one hundred cases charging defendants with medical assistance fraud, in only twelve were the defendants also charged with some kind of theft under WIS. STAT. § 943.20. Harris's selective prosecution argument is unpersuasive because it is undeveloped and she fails to explain how it is relevant to the question of

legislative intent for purposes of a multiplicity analysis. We generally do not address undeveloped arguments and decline to do so here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). In addition, her argument fails to account for prosecutorial discretion in deciding to bring one charge against some defendants. Her argument also ignores the possibility that the supposed low number of cases where theft was not charged might be explainable in that some fraud defendants did not actually receive payment from Medicaid, and therefore a theft charge was not warranted.

¶28 Considering all four factors for determining whether the legislature intended to allow for multiple punishments, we conclude Harris has not met her burden to establish that the legislature did not intend to permit multiple punishments for medical assistance fraud and theft. Therefore, we reject Harris's contention that the two convictions violate the constitutional prohibition against double jeopardy.

II. Ineffective assistance of trial counsel

¶29 Harris argues she is entitled to a new trial because she was deprived of her right to effective assistance of counsel for four reasons: (1) her trial counsel failed to raise a multiplicity challenge to her charges; (2) her counsel failed to answer Medicaid's demand for repayment prior to Harris being charged with any crime; (3) her counsel provided the State with documentary evidence that the State used to convict Harris, and he advised her not to testify about that evidence; and (4) her counsel failed to object to evidence introduced by the State that exceeded the date range of the alleged offenses as stated in the complaint.

¶30 Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of

counsel. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing ***Strickland v. Washington***, 466 U.S. 668 (1984)). To establish ineffective assistance of counsel, Harris must show both that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defense. *See* ***id.*** Our review of counsel's performance is highly deferential. ***State v. Jenkins***, 2014 WI 59, ¶36, 355 Wis. 2d 180, 848 N.W.2d 786. The defendant must show that the attorney's representation fell below an objective standard of reasonableness under all the circumstances. ***Id.*** "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. We will attempt to reconstruct the circumstances under which defense counsel made his or her decisions when evaluating the reasonableness of his or her conduct. ***Jenkins***, 355 Wis. 2d 180, ¶36.

¶31 A defendant proves prejudice by demonstrating there is a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. ***Id.***, ¶37. A "reasonable probability" is a probability sufficient to undermine our confidence in the outcome. ***Id.*** "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." ***Strickland***, 466 U.S. at 693. "A defendant need not prove the outcome would 'more likely than not' be different in order to establish prejudice in ineffective assistance cases. ***State v. Sholar***, 2018 WI 53, ¶44, __ Wis. 2d __, 912 N.W.2d 89 (citing ***Strickland***, 466 U.S. at 693). "Accordingly, a defendant need not prove the jury would have acquitted him [or her], but he [or she] must prove there is a reasonable probability it would have, absent the error." ***Id.***, ¶46.

¶32 Whether a circuit court properly granted or denied relief on an ineffective assistance of counsel claim presents a mixed question of fact and law. ***Jenkins***, 355 Wis. 2d 180, ¶38. We review a circuit court's findings of historical fact—including its findings of the circumstances of the case and counsel's conduct—using the "clearly erroneous" standard. ***Id.*** However, whether counsel's conduct meets the legal standard for ineffective assistance is a question of law, which we review de novo. ***Id.***

¶33 Because we have already rejected Harris's multiplicity claim on the merits, her trial counsel was not ineffective for failing to challenge the charges or convictions on that basis. Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

¶34 Harris next argues her trial counsel was ineffective for failing to respond to Medicaid's demand for payment prior to her being criminally charged. Harris states that, prior to the State bringing criminal charges against her, she received a notice of intent to recover payments from Medicaid, and she retained counsel specifically to respond to this letter.[9] She alleges counsel failed to do so, which led to the criminal charges.

¶35 This part of Harris's ineffective assistance claim is not cognizable because the alleged failure occurred before the State filed criminal charges against

[9] For record support of these facts, Harris improperly cites to her brief in support of her postconviction motion before the circuit court. Harris's circuit court brief does not, and cannot, support the existence of evidentiary facts. She also fails to indicate whether the notice letter is in the record, and her postconviction brief similarly lacks citation to any affidavit or record evidence of the notice letter. While we could reject Harris's argument on this matter based on the lack of any record support, we choose to reject this argument on the merits.

her. Harris acknowledges that the time prior to charging "may not usually be viewed as [a] critical stage of a criminal proceeding," but she nevertheless claims it was a critical stage in this case. Harris contends that, in Medicaid fraud cases, negotiations at the precharging stage are analogous to plea negotiations after charging because "[i]t is common practice for Wisconsin Medicaid to resolve billing disputes such as this without filing charges." However, the law is clear that "[t]he Sixth Amendment right to counsel attaches when a warrant is issued or a complaint filed." ***State v. Hornung***, 229 Wis. 2d 469, 476, 600 N.W.2d 264 (Ct. App. 1999) (citing ***State v. Harris***, 199 Wis. 2d 227, 235 n.3, 544 N.W.2d 545 (1996)). Harris did not have a right to effective assistance of counsel prior to the State filing charges against her. Accordingly, she cannot bring a claim for ineffective assistance for any action or inaction on the part of counsel at that time.

¶36 Harris also claims her trial counsel was ineffective by providing "inculpatory re-created nursing notes" to the State, by failing to object to the introduction of those documents at trial, and by instructing Harris not to testify about those records. The circuit court concluded that counsel was not ineffective by providing those notes and by not objecting to their introduction because they would have been admitted into evidence. The court reasoned Harris was required to keep and disclose her notes to the Medicaid program and the State could have subpoenaed those records. The State apparently concedes that trial counsel's performance was deficient when he provided the State with Harris's nursing notes. We therefore assume, without deciding, that counsel performed deficiently by providing the notes to the State. Nevertheless, we conclude Harris has not proven she was prejudiced by counsel providing those notes or by not objecting to their introduction into evidence, or by counsel's failure to object to their admission.

¶37 At trial, the State introduced nursing notes regarding specific dates on which Harris submitted claims to Medicaid for her care of Kayla including: June 5, June 11-12, August 1, and November 14, 2010. On each of the June and August dates, the nursing notes reflected that Harris provided care to Kayla for twelve to sixteen hours. The State presented other evidence showing that Harris was providing services for other clients (while working at another job) in several locations during overlapping time periods on those dates. The November 14 nursing note reflected that Harris provided two hours of care to Kayla, but other evidence showed that Harris billed Medicaid for twelve hours that day. However, Gutierrez testified this discrepancy may have been due to a mistake on the nursing notes, and not the result of fraud.

¶38 Harris contends the jury must have focused on, and actually based her convictions solely upon, these discrepancies because the jury found her guilty of theft for an amount under $10,000, rather than the total $32,330.41 Medicaid paid Harris for Kayla's care. We disagree. There was other, strong evidence of her guilt, and the nursing notes were insignificant in light of the other evidence. The evidence included testimony from Kayla's parents, Kayla's aunt, and Al-Dhari that Harris never provided care for Kayla. In addition, Lee testified that she did not know Harris and that she did not know of any nurses providing care for Kayla other than Al-Dhari. For purposes of the Medicare fraud count, the State only needed to prove one of the 136 submissions was fraudulent.

¶39 Further, Harris cannot show that the jury specifically relied on the evidence from her notes in its determination that she committed theft of under $10,000. There was other evidence presented at trial that Harris did not provide care to Kayla during all of the hours she billed to Medicaid. In fact, the State argued from the beginning of the trial that Harris probably provided some care to

Kayla, but she did not provide care on all the 136 dates for which she billed Medicaid.[10] The testimony of Kayla's family members supports the State's theory that Harris was not one of Kayla's regular nurses. Moreover, Gutierrez's overall testimony regarding his investigation was not limited to the specific dates that Harris emphasizes.

¶40 Gutierrez also testified as to his interview with Harris, *see supra* ¶8, and that he had found Harris's inability to quickly or accurately describe Kayla's home address "unusual." In addition, he testified that during the interview, Harris could not recall any types of care she provided to Kayla other than tracheal and ventilator, and Harris could not remember when she began providing care. In its rebuttal at closing, the State emphasized the weight of its witnesses' evidence and the relative unimportance of some of the "small" details, stating: "I can't believe how much time we're spending on inconsequential matters like digits in places ... when the big picture is, did [Harris] provide those services, on [1]36 occasions for [Kayla]." Harris has not proven prejudice simply because the jury found she committed theft of under $10,000, rather than over $10,000. Given the significance of the other evidence presented at trial, Harris has not demonstrated a reasonable probability that, but for the introduction of the nursing notes, the result of the proceeding would have been different. *See* ***Sholar***, __ Wis. 2d __, ¶33, 912 N.W.2d 89.

[10] Harris contends the State's theory of the case "evolved" over the course of the trial—that initially the State contended Harris had never provided care for Kayla, but then argued at closing that Harris provided some care, but not all that she had claimed. The record reflects otherwise. In its opening statement, the State acknowledged Harris may have provided some care to Kayla.

¶41 In a related argument, Harris contends her trial counsel was deficient by advising her not to testify at trial. In particular, she contends counsel should have advised her to testify, so that she could have offered explanations regarding the nursing notes and how she provided care to Kayla while visiting patients for her other job. Again, assuming without deciding counsel was deficient in this regard, Harris has not come close to her burden of establishing prejudice.

¶42 Regarding the nursing notes, in her postconviction motion, Harris alleged she would have testified that her notes could have been inaccurate because she recreated them after the originals were destroyed in a flood in July 2010. Regardless of such testimony, other evidence at trial showed that the notes were not contemporaneous, but rather that Harris had recreated them after the fact. The State actually argued this very point. Harris does not explain how her testimony would have caused the jury to conclude anything other than what the State argued—that the nursing notes were not made contemporaneously.

¶43 In addition, Harris claims her testimony would have explained how she could have provided care to Kayla while also visiting patients for her other job. She argues that it is permissible, and not fraudulent, to care for multiple patients at the same time. Harris has not demonstrated a reasonable probability that her testimony would have impacted the result of the proceeding due to the weight of the other evidence. The evidence showed that during the relevant time period, Kayla needed "total care" when she was between three and five years old, disabled, in a wheelchair, dependent on a ventilator because she could not breathe on her own, and had to be fed through a gastric tube. Harris's other jobs required her to care for patients at various locations. As the court explained:

> Even if the jury would have heard that a young patient in a wheelchair on a ventilator had been carted around for a

> significant period of time throughout these days while the defendant was caring for other patients elsewhere, there is not a reasonable probability that a jury would have believed it.

We conclude there is not a reasonable probability that the addition of Harris's testimony would have made a difference to the jury.

¶44 Harris further contends she would have testified that the November 14 nursing note that reflected only two hours of work was made in error, and that she had actually worked twelve hours that day. Again, Harris fails to demonstrate how she was prejudiced by her trial counsel's failure to present her testimony in that regard. The jury heard from Gutierrez that the November 14 note was likely an error, not fraud, and the State did not contest that conclusion during trial. Harris's testimony would have been cumulative to the evidence on this point.

¶45 Finally, Harris argues her trial counsel was deficient for failing to object to evidence presented at trial that related to dates outside the timeline charged in the complaint. The complaint charged Harris with Medicaid fraud and theft on or between June 18, 2010 and April 1, 2011. At trial, the State presented evidence as to Harris's Medicaid claims earlier in June 2010—just outside the charging dates. Harris's argument fails because, here, the charges were automatically amended to conform to the evidence by operation of statute. WIS. STAT. § 971.29(2).

¶46 Here, the amendment allowed the charging period to begin a mere thirteen days earlier, which constitutes a merely technical error or variance. It is well within the court's discretion to allow such an amendment of the complaint. *See* ***State v. Frey***, 178 Wis. 2d 729, 734, 505 N.W.2d 786 (Ct. App. 1993)

("Whether to allow amendment of the information to conform to the proof is discretionary with the trial court."); *see also* WIS. STAT. § 971.29(2). Indeed, Harris makes no argument on appeal that the circuit court's professed allowance of the amendment over an objection would have been erroneous. Accordingly, Harris's counsel was not deficient because we have no basis to conclude the objection would have been overruled. *See* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369.

III. Sufficiency of the evidence

¶47 Harris contends the evidence at trial was insufficient to support her convictions. The question of whether the evidence was sufficient to sustain a guilty verdict in a criminal prosecution is a question of law, subject to de novo review. ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. "When conducting such a review, we consider the evidence in the light most favorable to the State and reverse the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***Id.*** (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Therefore, we will uphold the conviction if there is any reasonable hypothesis that supports it. ***Id.*** Although the jury must be convinced that the evidence presented at trial is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence in order to find guilt beyond a reasonable doubt, "that rule is not the test on appeal." ***Poellinger***, 153 Wis. 2d at 503.

¶48 We disagree with Harris and conclude there was sufficient evidence to support the verdict. We have already discussed the testimony presented at trial. Harris argues that the evidence was insufficient as to both counts, largely because

she believes the State did not prove she knew her representations to Medicaid were false and that she made them with intent to deceive or defraud. Harris also posits that her convictions hinged solely on three dates when her billing and nursing notes overlapped with her other job.

¶49 As an initial matter, it is incorrect to limit our review of the evidence to the three suggested dates. Testimony was presented showing that Harris was not one of Kayla's caregivers. Indeed, both of Kayla's parents testified as such, and the jury was permitted to assess their (and other witnesses') credibility on this key issue. In all, we have little difficulty concluding that it was reasonable for the jury to believe that Harris did not actually provide nursing care to Kayla on all of the 136 dates she billed to Medicaid, and that Harris billed Medicaid for at least some work she did not perform, and she did so knowingly and with intent to defraud. *See* ***Bautista v. State***, 53 Wis. 2d 218, 223, 191 N.W.2d 725 (1971) ("Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.").

¶50 In presenting an alternate theory of the case, Harris has failed to demonstrate that there is no reasonable hypothesis to support the jury's verdicts. We therefore uphold her convictions.

IV. Interest of justice

¶51 Harris argues she is entitled to a new trial in the interest of justice because the real controversy was not fully tried. Specifically, Harris claims the jury was not sufficiently informed because it did not hear: (1) that she recreated her nursing notes after a flood; and (2) that it is not a crime to care for two Medicaid patients at the same time.

¶52 Under WIS. STAT. § 752.35, appellate courts have discretionary reversal power if the real controversy has not been fully tried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). This power is "reserved for exceptional cases." ***State v. Jones***, 2010 WI App 133, ¶43, 329 Wis. 2d 498, 791 N.W.2d 390. There are two situations in which we may reverse on this ground: (1) "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case;" and (2) "when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Smalley***, 2007 WI App 219, ¶7, 305 Wis. 2d 709, 741 N.W.2d 286.

¶53 We agree with the State that Harris's arguments for a new trial in the interest of justice merely rehash her ineffective assistance of counsel claim, which we have rejected, including on these particular claims. Harris apparently contends the jury placed too much weight on her nursing notes because it believed they were made contemporaneously. However, the jury heard that the notes were not made contemporaneously. Therefore, the only aspect the jury did not hear was that the original notes were destroyed in a flood. We cannot conclude that the issue of whether the original notes were lost in a flood "bore on an important issue of the case." *See* ***id.***

¶54 Harris also fails to develop an argument as to her second claim concerning her caring for two patients at one time. Harris's brief merely states: "Regardless of whether trial counsel was ineffective, the jury was not informed that ... it is not a crime to care for two Medicaid patients at the same time." We shall not further address these undeveloped arguments. *See* ***Pettit***, 171 Wis. 2d at 647.

By the Court.—Judgment and orders affirmed.

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