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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0843**

State of Minnesota,
Respondent,

vs.

Twin Cities Care Services,
Appellant.

**Filed June 11, 2018
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-15-10323

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Considered and decided by Smith, Tracy M., Presiding Judge; Cleary, Chief Judge;
and Rodenberg, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Twin Cities Care Services (TCCS) is a personal care provider organization that bills the Minnesota Department of Human Services (DHS) for services it provides to Medicaid recipients. Following a bench trial, TCCS was convicted of four counts of theft by false representation based on claims that it submitted to DHS. On appeal,

TCCS argues that the evidence is insufficient to support the district court's factual findings and conclusion that TCCS intended to commit the offenses. TCCS also argues that its trial counsel's performance constituted ineffective assistance of counsel. We affirm.

FACTS

TCCS provides personal care assistance (PCA) to Medicaid recipients. It also provides qualified professional (QP) services. QPs supervise and monitor PCA services by visiting clients' homes to ensure that the services are being provided as indicated in the client's care plan. TCCS submitted claims to DHS for QP services it provided to Medicaid recipients.

Abdulkarim Dahir was a 50% owner of TCCS and became the 100% owner as of April 21, 2011. DHS rules, which Dahir was aware of, required that TCCS document the actual time of every QP service and that claims submitted reflect only the amount of time actually documented by the QPs.

The state charged TCCS with six counts of theft by false representation.¹ According to the complaint, from April 2009 through November 2012, TCCS made false claims for reimbursement on different occasions by billing for QP services based on the amount of services that DHS authorized a recipient to receive rather than the amount of services that the QPs actually provided, resulting in overbilling.

¹ All counts were charged as violations of either Minn. Stat. § 609.52, subd. 2(3)(iii), or Minn. Stat. § 609.52, subd. 2(a)(3)(iii), for conduct occurring between April 28, 2009 and November 20, 2012. The language of the applicable statutes in 2008, 2010, and 2012 is identical. In 2012, the legislature amended subdivision 2 to include clause (b). As a result, Minn. Stat. § 609.52, subd. 2(3)(iii), was rearranged as Minn. Stat. § 609.52, subd. 2(a)(3)(iii).

TCCS waived its right to a jury trial, and a four-day bench trial began on November 28, 2016. The state called 11 witnesses, including three DHS employees, three former QPs, three former employees of TCCS, a supervisor of the digital forensic lab at DHS, and an investigator from the Minnesota Attorney General’s Office (AGO). TCCS did not call any witnesses. The district court received over 40 exhibits offered by the state and one exhibit offered by TCCS.

After the state rested, TCCS moved for judgment of acquittal on all counts. The district court granted the motion on count one but denied it on the remaining counts. After the parties submitted their written closing arguments, the district court issued its verdict and order, finding TCCS not guilty of count two, but guilty of counts three through six.

TCCS appeals.

D E C I S I O N

I. The evidence is sufficient to support the district court’s factual findings and its conclusion that TCCS intended to commit the offenses.

An appellate court uses “the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence.” *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). When an appellant challenges the sufficiency of evidence, an appellate court’s review “is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the [fact-finder] to reach the verdict which [it] did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The district court’s factual findings are reviewed under the clearly erroneous standard. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). “A finding of fact is not

clearly erroneous if it is reasonably supported by the evidence as a whole.” *State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016). Appellate courts defer to the fact-finder’s credibility determinations. *Id.* “The verdict will be upheld if the fact finder, giving due regard to the presumption of innocence and to the state’s burden of proof beyond a reasonable doubt, could reasonably have found the defendant guilty of the offense charged.” *State v. Thomas*, 590 N.W.2d 755, 757-58 (Minn. 1999).

To prove theft by false representation, the state had to prove that TCCS obtained “for the actor or another the possession, custody, or title to property of . . . a third person by intentionally deceiving the third 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.” Minn. Stat. § 609.52, subd. 2(a)(3) (2012).

The district court found that QPs did not record the time they spent per client visit. It further found that TCCS, despite knowledge of DHS rules, intentionally submitted claims for QP services based not on the actual time that QPs spent providing services but rather on the two-hour monthly maximum that TCCS was permitted to bill for QP services to each Medicaid recipient. By billing for two hours per QP service event, regardless of the time actually spent, TCCS on multiple occasions billed for a QP’s services in excess of eight hours per day, even though no QP worked more than eight hours per day. TCCS thus intentionally submitted false claims to DHS and, based on those claims, was overpaid by DHS.

A. The evidence supports the specific factual findings challenged by TCCS.

TCCS challenges several specific findings of fact as clearly erroneous. First, it challenges the district court's finding that "PCA clients are, by law, automatically authorized to receive eight units (two hours) of QP time per month." TCCS argues that there is no law that sets a two-hour-per-visit maximum. But a DHS employee testified that "in 2009 [the state] had health care reform in legislation . . . this is the absolute requirement, where people will automatically get the 96 [units] per year," and that "[t]he average is about two hours per month." While the district court's factual finding is not quite as precise as the testimony, the finding of an effective two-hour monthly maximum for reimbursement is not clearly erroneous.

Second, TCCS challenges the district court's finding that TCCS personnel "Dahir, Kassim, and an employee named Ade (or Adde) trained others within the corporation to bill DHS for reimbursements." TCCS asserts that DHS, not TCCS personnel, trained employees. But three former billers of TCCS testified at trial regarding who trained them to bill for reimbursements, and they identified Dahir, Adde, and Kassim. This finding is not clearly erroneous.

Third, TCCS challenges the district court's finding that, in an interview with the AGO investigator, Dahir acknowledged that TCCS billed for QP services "according to the number of hours the client was entitled to receive," which "contravene[d] the DHS requirement that QP services be billed by actual time spent." The investigator testified that, during her interview with Dahir, Dahir admitted that TCCS always billed the maximum number of hours allowed by the service agreement. And testimony from DHS

established that it reimburses only for time actually spent by QPs at recipients' homes. TCCS argues that Dahir's interview with the investigator "was taken out of context." But Dahir did not testify at trial, and thus no other context was provided. TCCS also argues that the finding is erroneous because it contradicts the district court's oral rulings on TCCS's motion for judgment of acquittal. Those rulings, however, concern "overbilling for the visits documented by the QP notes," whereas the district court's factual findings supporting the guilty verdicts concern "billing for visits that exceeded the length of the QPs' work day." There is no inconsistency, and the challenged finding is not clearly erroneous.

B. The evidence supports the findings and conclusion that TCCS intended to commit the offenses.

TCCS argues that the evidence is insufficient to support the district court's findings and legal conclusion that TCCS had the intent to defraud. Again, we review factual findings for clear error. *See Bourke*, 718 N.W.2d at 927. And "[a] district court's application of statutory criteria to the facts found is a question of law that [this court] review[s] de novo." *State v. Perez*, 779 N.W.2d 105, 108 (Minn. App. 2010), *review denied* (Minn. June 15, 2010).

Theft by false representation is a specific-intent crime. *See State v. Schoenrock*, 899 N.W.2d 462, 467 (Minn. 2017) (citing *State v. Williams*, 324 N.W.2d 154, 158-59 (Minn. 1982)). A corporation is determined to have specific intent under the following test:

[A] corporation may be guilty of a specific intent crime committed by its agent if: (1) the agent was acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular

corporate business which was conducted criminally; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests; and (3) the criminal acts were authorized, tolerated, or ratified by corporate management.

State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 20 (Minn. 1984). TCCS focuses on the third element only, arguing that the evidence is insufficient to show that TCCS's management knew, authorized, tolerated, or ratified the billings with intent to commit Medicaid reimbursement theft.²

TCCS argues that the evidence is insufficient because (1) TCCS's QPs were not pressured or incentivized by management to exaggerate the number of visits, (2) the AGO found no memoranda directing employees to falsify time, and (3) a former TCCS biller testified that Dahir "was very strict about compliance with the [billing] rules." We find these arguments unpersuasive because they invite us to examine evidence as isolated facts. We decline to do so because, "[i]n determining whether there is sufficient evidence . . . [,] we examine the evidence as a whole." *State v. Hurd*, 819 N.W.2d 591, 599 (Minn. 2012).

At trial, the state called 11 witnesses and introduced over 40 exhibits. Based on that evidence, the district court found that (1) Dahir signed an agreement agreeing to abide by the rules and requirements for participating providers, including to "[a]ssume full responsibility for the accuracy of claims submitted to DHS in accordance with" applicable rules and statutes; (2) the QPs did not record the actual time they spent per client visit, and no one at TCCS regularly asked or recorded how long each QP visit lasted; (3) on no

² In its briefing, TCCS makes no argument that the circumstantial-evidence standard articulated in *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013), applies, nor does it make any argument as to why the convictions fail under that standard.

occasion did any of the QPs provide client services in excess of eight hours per day; (4) Dahir knew that each QP worked a maximum of eight hours per day; (5) TCCS repeatedly billed for more than eight hours of client visits by a single QP in a single day; (6) in an interview with the AGO, Dahir stated the QP services were billed by TCCS according to the number of hours the client was entitled to receive; and (7) Dahir received notice of the bills and payments relative to counts three through six, accepted those payments, and did not reverse them.

The evidence, when “viewed in a light most favorable to the conviction,” is sufficient to support these findings. *See Webb*, 440 N.W.2d at 430. And these findings support the district court’s further finding that TCCS’s management knew of the false nature of the billings and tolerated or ratified them after the fact. Under the test for corporate specific intent, the findings are sufficient to support the district court’s conclusion that TCCS had the requisite intent to commit the offenses.

TCCS also argues that the district court violated public policy by lowering the standard of proof for fraud. However, TCCS does not explain how the district court lowered the standard of proof for fraud or for intent to commit fraud. Therefore, we do not find TCCS’s public-policy argument persuasive.

C. TCCS’s other challenges to the district court’s findings and conclusions are without merit.

TCCS makes several additional challenges to the district court’s findings and conclusions. First, it asserts that the district court’s findings and conclusions are erroneous because they represent the “wholesale adoption” of the state’s proposed findings of fact

and conclusions of law. This court has stated that, while “the verbatim adoption of a party’s proposed findings and conclusions of law is not reversible error per se,” the “wholesale adoption of one party’s findings and conclusions raises the question of whether the [district] court independently evaluated each party’s testimony and evidence.” *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). No such question is raised here. Not only are the district court’s thorough findings supported by the record, but the court acquitted TCCS of count two—obviously not adopting the state’s proposed findings and conclusions wholesale.

Second, TCCS argues that the overpayments were due to billers’ errors. But the district court, in finding that TCCS was guilty of counts three through six, clearly did not accept this theory or believe any evidence suggesting it. Because we view the evidence in a light most favorable to the conviction, we reject this argument.

Third, TCCS argues that the district court did not give proper weight to certain witnesses’ testimony and that some witnesses lacked credibility. These assertions fail because weighing the credibility of witnesses is a function that belongs to the district court acting as the fact-finder. *See State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997) (recognizing that the fact-finder “is in the best position to evaluate the credibility of witnesses and the weight given to the testimony of those witnesses”).³

³ In its brief to this court, TCCS also lists a number of instances in which the district court overruled several of defense counsel’s objections at trial. However, TCCS makes no argument as to how the rulings undermine the sufficiency of the evidence to support its convictions. “Arguments are forfeited if they are presented in a summary and conclusory form, do not cite to applicable law, and fail to analyze the law when claiming that errors of law occurred.” *State v. Bursch*, 905 N.W.2d 884, 889 (Minn. App. 2017).

II. TCCS's trial counsel's performance does not constitute ineffective assistance of counsel.

To prevail on an ineffective-assistance-of-counsel claim, “[t]he defendant must affirmatively prove that his counsel’s representation ‘fell below an objective standard of reasonableness’ and ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Appellate courts “need not analyze both prongs if either one is determinative.” *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014). The “objective standard is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). “There is a strong presumption that a counsel’s performance falls within the wide range of reasonable professional assistance.” *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

TCCS provides two reasons to support its ineffective-assistance-of-counsel claim. First, TCCS challenges counsel’s performance before and during trial, arguing that counsel, among other things, did not properly bring, write, or argue motions; did not call witnesses who had been subpoenaed; did not submit sufficient exhibits; and did not view the state’s exhibits. Appellate courts “will generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Whether to object, what evidence to present, what witnesses to call, and the

level of investigation are matters of trial strategy. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009); *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001). TCCS's challenges clearly fall within the scope of trial strategy. In addition, trial counsel did make numerous objections during the trial, several of which were sustained. Trial counsel also achieved acquittals on two counts and helped to substantially reduce the overpayment amount in counts three through six. Therefore, we reject TCCS's argument that counsel's performance before and during trial was ineffective.

Second, TCCS argues that trial counsel's posttrial performance was unprofessional because counsel failed to appear at TCCS's sentencing hearing, failed to hand over files for appeal, and did not timely inform Dahir that he was leaving the United States. However, this conduct, assuming it is true, occurred after the trial had concluded. Therefore, it could not have caused TCCS to suffer prejudice at trial.⁴ This argument provides no basis for reversing TCCS's convictions.

We conclude that trial counsel's performance does not amount to ineffective assistance of counsel.

Affirmed.

⁴ TCCS also claims that trial counsel "lost interest in the case" and intended to withdraw. However, because these claims were not part of the record, we decline to consider them. See *State v. Morse*, 878 N.W.2d 499, 501-02 (Minn. 2016) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)).