

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

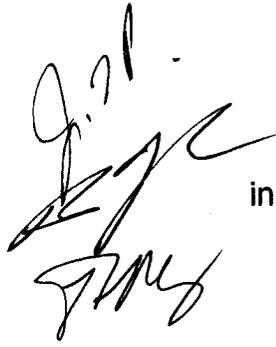
NO. 2009 KA 1206

STATE OF LOUISIANA

VERSUS

ARTHUR COPES

Judgment rendered December 23, 2009.



* * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 06-06-0183
Honorable Anthony J. Marabella, Jr., Judge

* * * * *

HON. JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL
TERRI R. LACY
JAMES "DAVID" CALDWELL, JR.
HARRELL "BUTCH" WILSON
ASSISTANT ATTORNEYS GENERAL
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

FREDERICK KROENKE
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
ARTHUR COPES

* * * * *

BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

PETTIGREW, J.

The defendant, Arthur Copes, was charged by grand jury indictment with nine counts of insurance fraud, in violation of former La. R.S. 22:1243. The defendant pled not guilty. He waived his right to a jury trial and, following a bench trial, was found not guilty on count 2 and guilty on all the other counts. On counts 1, 3, and 4, the defendant was sentenced to five years at hard labor on each count, with two years of the sentences suspended. He was also ordered to pay a \$5,000.00 fine. Upon his release from custody, he was placed on active supervised probation for five years with various conditions of probation, including restitution to the victims and the insurance company. The sentences were ordered to run concurrently with each other. On counts 5 through 9, the defendant was sentenced to three years at hard labor on each count. The sentences were suspended, and on each of these counts he was ordered to pay a \$5,000.00 fine. Each of these sentences was ordered to run consecutively to every other sentence. The defendant now appeals, designating four assignments of error. For the reasons that follow, we affirm the convictions, but vacate the sentences and remand for resentencing.

FACTS

The defendant was an orthotist who specialized in making back braces for people with scoliosis. He owned and operated the STRS (Scoliosis Treatment and Recovery System) Clinic in Baton Rouge. The name of the business was later changed to STARS (Scoliosis Treatment Advanced Recovery System). The defendant also set up Chiropractic U.S.A., a STARS clinic franchise in San Diego, California. The defendant saw patients at both clinics.

The defendant employed and supervised several chiropractors, including Drs. James Sonnier, Duane Santilli, Robert Ritchie, Joel Alcantara, Josh Bailey, and Ron Zecha. Dr. Zecha was the clinical director at the San Diego clinic. The defendant was neither a medical doctor nor a chiropractor. According to his vitae and trial testimony, he had a B.S. and a Ph.D. from the discredited and now-defunct Columbia Pacific University. According to the defendant, he received a B.S. in orthotics on August 1, 1989 and, five months later, a Ph.D. in orthotics on January 1, 1990. The defendant's vitae also

indicated he attended Tulane Medical School, which he conceded under cross-examination was not true.

STARS and Chiropractic U.S.A. filed their medical claims with Blue Cross Blue Shield of Louisiana (Blue Cross). Latisha Fleming, a manager in the Financial Investigations Office of Blue Cross, testified at trial. According to Fleming, in December 1995, a case was opened on the defendant because Blue Cross began receiving claims for physician-type services. The Louisiana State Board of Medical Examiners informed Blue Cross that the defendant did not have a license to perform such services; e.g., office visits, evaluations, and taking and reviewing x-rays. A settlement agreement was reached between the defendant and Blue Cross in 1997, whereby the defendant agreed to pay Blue Cross money he owed it for overpayment, and to amend and refile all unpaid claims with the proper billing codes (CPT codes). In 2002, Blue Cross again became aware the defendant was providing services for which he lacked a license. Blue Cross placed a block on the defendant's provider number. As a result, before a claim would go through Blue Cross's processing system, it would be sent to the Financial Investigations Office for review to determine whether the claim was payable. Blue Cross representatives went to the defendant's clinic in Baton Rouge to meet with the defendant. Dr. Sonnier and the STARS business administrator attended the meeting. The defendant did not attend the meeting. After some discussion, the STARS representatives agreed the defendant should only bill for his brace and for supplies related to the brace. Blue Cross would pay for services such as office visits, x-rays, and the 97000 series (therapy-type services) of CPT codes provided the services were rendered by a licensed provider. However, Blue Cross would not pay for laboratory procedures since they were considered investigational or experimental.

Fleming explained at trial that an orthotist could not bill for an office visit the way that a doctor or chiropractor would. The codes on the billing, which indicate an office visit, meant that a licensed medical professional met with a patient and some level of care was rendered. For example, a 99215 CPT indicated a face-to-face forty-minute office visit between a physician and an established patient. The defendant could not bill for such a

service. Regarding x-rays, Blue Cross would pay a provider who is licensed to take x-rays or licensed to direct someone to provide that service. The defendant did not have qualifications to take x-rays or diagnose them.

Dr. Sonnier testified at trial that he worked for the defendant at STARS as Clinic Director from 1999 until March 2004, when he was fired. Dr. Sonnier treated some of the patients. In the last year of his employment with the defendant, Dr. Sonnier noticed the defendant became more heavily involved in seeing patients alone in the treatment rooms. After he had left the employ of the defendant, Dr. Sonnier received a letter from Blue Cross that stated claims for services for a patient had been denied because there was a problem with the provided number on the insurance form. Dr. Sonnier discovered the claim form was from the STARS clinic for services rendered July 2004 and had his signature on the form. Accordingly, Dr. Sonnier, through his attorney, sent the defendant a cease and desist letter informing the defendant he was not authorized to use Dr. Sonnier's name on insurance claim forms for patients he did not treat.

Dr. Santilli testified at trial that he was hired by the defendant as Clinic Director of the Baton Rouge clinic in late 2004. Dr. Santilli quit on March 4, 2005. On one occasion, Dr. Santilli was told to be in the casting room to brace six-month-old Logan Harris, one of the listed patients in the indictment. Dr. Santilli felt the procedure was inappropriate and refused to have anything to do with the procedure. He stated the defendant overruled him and everyone else who worked for him in every single facet of their practice. When asked on direct examination if he could do anything without getting the approval of the defendant, Dr. Santilli responded:

Art Copes signed the SOAP notes. The SOAP notes ... are not only signed but written by him, so I could only do a certain amount of treatment on my own without verifying and running everything past him. I couldn't alter treatment protocol. I couldn't change anything. I couldn't even really see someone. Most of the time we went in to see patients together because he had to have such control over everything that went on.

One STARS patient was treated in California and, according to the claim form, Dr. Santilli was the treating doctor. However, Dr. Santilli testified he had never been to California. Several other claim forms for STARS patients were submitted with Dr. Santilli's

signature on those forms. However, the dates of service on all of the forms were subsequent to the time Dr. Santilli was working for the defendant. Dr. Santilli testified that he never gave the defendant or anyone working for him permission to use his signature stamp on claim forms for patients he never treated on particular dates. Dr. Santilli testified that he signed his name to certain documents because he was ordered to do so by the defendant, who Dr. Santilli thought was, not only his employer, but a senior physician.

Dr. Zecha testified at trial that, while he was the clinical director for the San Diego clinic, he only took x-rays of patients. The defendant came to the San Diego clinic every six weeks with his assistant to consult with his patients. During these visits by the defendant, aside from Dr. Zecha, there were no other chiropractors or medical doctors at the clinic. Dr. Zecha did not treat any of the defendant's patients for scoliosis. On one occasion, Dr. Zecha received a phone call from a Baton Rouge clinic employee requesting to use his provider number to bill for chiropractic procedures in California. Dr. Zecha did not allow his number to be used because he was not treating those patients. Both Tiana Mihalich's and Brandon Price's (two patients listed in the indictment) claim forms had a CPT code on them indicating a face-to-face office visit with a doctor at the San Diego clinic. Dr. Zecha testified he never sat down to discuss treatment with either of these patients. Dr. Zecha never authorized the defendant or anyone from the clinic to use his name as the treating physician for the defendant's patients.

Kim Martinez testified at trial that she was the defendant's clinical assistant at the Baton Rouge clinic. She traveled with the defendant when he went to the San Diego clinic. At both clinics, she would go into the patient room with the defendant and the patient. While Martinez was licensed to take x-rays in Louisiana, she was not licensed to take them in California. Under the direction of the defendant, she nevertheless took x-rays in California. When she expressed her concern to the defendant about not being licensed, he told her not to worry about it because the patients were not going to ask about licensure. The defendant would read the x-rays and discuss them with a patient. On occasion, the defendant would add his own markings to the x-rays. At the San Diego

clinic, a patient was treated over a five-day period, Monday through Friday. During the San Diego trips, Dr. Alcantara was the chiropractor on staff. However, Dr. Alcantara was not at the clinic on Mondays or Fridays when the defendant and Martinez were at the San Diego clinic. According to Martinez, Dr. Alcantara was hardly ever in the patient room with her and the defendant. Dr. Alcantara never actively treated the defendant's patients. Instead, Dr. Alcantara spent most of his time at the front desk of the clinic doing paperwork and surfing the internet. Dr. Alcantara visited the Baton Rouge clinic on occasion, but never treated patients there. It was common practice, according to Martinez, to use a staff chiropractor's name on patient claim forms for patients who had been treated by the defendant. Martinez had seen, for example, claim forms with Dr. Sonnier's name on them for patients seen only by the defendant. At one point at the Baton Rouge clinic, there was no chiropractor on staff. Dr. Cleveland would stop by the clinic a few times a month to meet with the defendant, but Dr. Cleveland was not treating any patients at the clinic. Despite this, the clinic used Dr. Cleveland's signature stamp for billing purposes. A staff meeting, in which the defendant was present, was held regarding the issue of using Dr. Cleveland's stamp. It was made known to the staff that Dr. Cleveland's name would be used on the office bills.

Donna Rushing testified that she worked for the defendant about six months in 2005 as the Administrative Office Manager. She handled accounts payable and receivable. She had frequent discussions with the defendant about patient billing. The defendant directed meetings as the treating physician. He specifically indicated he was the person spending time with the patients in those rooms. Since the defendant would meet with a patient sometimes for an hour or longer, but was billing only for a fifteen-minute office visit, the defendant asked Rushing and the insurance biller to come up with CPT codes that would allow the defendant to bill to a higher level of reimbursement. At one point, Rushing received a letter from an attorney who was handling a lawsuit for a former STARS patient. The attorney had SOAP notes of the patient, and was requesting physician certification from the defendant as the treating doctor for this patient. Rushing could not find any reference to a treating physician, so she pulled the chart. She met

with the defendant and Rodney Rodrigue, the STARS C.F.O., to determine how to proceed with the matter. After the defendant and Rodrigue discussed the issue, Rodrigue told her to inform the attorney that the defendant was treating the patient for orthotics and that the treatment protocol would have been determined by the referring physician. However, the treating physician was no longer with STARS and could not be located. Concerned about this and other questionable practices by the defendant, Rushing contacted the Attorney General's Office.

Dr. Cleveland testified at trial that he was a close friend of the defendant. He was hired by the defendant for administrative duties. He was not hired to treat and diagnose patients with scoliosis. He treated some patients as a chiropractor at the Baton Rouge clinic. His encounters with patients were brief, however, because he would only do an adjustment. He did not know his name was being used on claim forms, and he did not authorize the use of his signature stamp. He traveled sometimes to San Diego with the defendant, but he never treated any patients there.

Kathy Phenald testified that she worked for the defendant at the Baton Rouge clinic as the insurance coordinator for about two months. She became suspicious about the billing practices on an occasion when the defendant returned from seeing patients in California. Phenald knew that Dr. Zecha was the staff chiropractor in San Diego. When she asked for Dr. Zecha's provider number to bill the San Diego claims, the defendant told her to use Dr. Josh Bailey. When Phenald told the defendant that Dr. Bailey did not see patients in California, the defendant told her that they had always billed that way. Phenald nevertheless called Dr. Zecha to get his provider number. Dr. Zecha told her she did not need his provider number because he had never seen any of those patients. Phenald resigned and indicated in her resignation letter that she was "not able to work under conditions of insurance fraud and misleading the patients."

Defense witness Aletha Britton testified that she worked for the defendant at the Baton Rouge clinic as the insurance coordinator for about two months. On some of the patient claim forms, she handwrote Dr. Cleveland's signature. She also put Dr. Santilli's name on claim forms. Rodrigue was the C.F.O. and her supervisor. She prepared bills

the way Rodrigue told her to, which included putting the names of doctors on claims. The defendant did not train her on billing or tell her what doctor's name to put on a bill. On cross-examination, she indicated that she stopped working in May 2005 and that Rodrigue was fired shortly thereafter on May 31, 2005. She was shown a bill with Dr. Santilli's name on it for services on June 3, 2005. Britton indicated she could not have prepared the bill since she was no longer working there at that time. She added that Rodrigue was no longer working there at the time either. Britton agreed that someone was still putting Dr. Santilli's name on bills at STARS.

The defendant testified that he performed orthotics on his patients. This entailed measuring and reading x-rays, determining how his brace would fit to correct the spine, and teaching the patients how to make corrections themselves. He testified that reading x-rays did not involve a diagnosis. The chiropractors working for him were trained to understand what the brace would do. They would read tests and make brace corrections. They took x-rays and made evaluations. They also looked at the patients "chiropractically" to accelerate the correction of the curvature. The chiropractors talked to patients and did routine chiropractic work for them. The defendant fired Rodrigue because he had embezzled quite a bit of money from the defendant. The defendant never told any of his employees responsible for billing what doctor's name to put on claim forms. It was usual for the defendant to be with a patient with just an assistant and not a chiropractor because the defendant would do just an x-ray review and an orthotic overview to make corrections and analyze tests. Sometimes he would spend up to two hours with patients. Several claim forms shown to the defendant during his testimony had questionable billing codes or doctor's names on them. The defendant testified that he was not responsible for any of the misinformation.

Each of the patients with scoliosis listed on the indictment testified at trial. The patients were Tiana Mihalich, Brandon Price, Sarafina Gerling, Cheryl Bouchard, Vonnie White, and Logan Harris. In the case of Logan, a small child, his father testified for him at trial. All the patients similarly stated that the defendant was the only one who met

with them, and reviewed and marked the x-rays. Also, the doctors listed on their claim forms were not the doctors who treated them.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to prove all the elements of insurance fraud beyond a reasonable doubt. Specifically, the defendant contends there is no evidence to indicate that he was aware of what was being done by his staff and, to the extent he may have known, he had no intent to defraud the insurance company.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, 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. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

At the times of the offenses, former La. R.S. 22:1243 provided, in pertinent part:

A. Any person who, with the intent to injure, defraud, or deceive any insurance company, or the Department of Insurance, or any insured or other party in interest, or any third party claimant:

(1) Commits any fraudulent insurance act as defined in R.S. 22:1242;

(2) Presents or causes to be presented any written or oral statement including computer-generated documents as part of or in support of or denial of a claim for payment or other benefit pursuant to an insurance policy, knowing that such statement contains any false, incomplete, or fraudulent information concerning any fact or thing material to such claim[.]

Former Louisiana Revised Statutes 22:1242 provided in pertinent part:

(1) "Fraudulent insurance act" shall include but not be limited to acts or omissions committed by any person who, knowingly and with intent to defraud:

(a) Presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, reinsurer, purported insurer or reinsurer, broker, or any agent thereof, any oral or written statement which he knows to contain materially false information as part of, or in support of, or denial of, or concerning any fact material to or conceals any information concerning any fact material to the following:

....

(iii) A claim for payment or benefit pursuant to any insurance policy.

....

(2) "Statement" includes but is not limited to any notice, statement, proof of loss, bill of lading, receipt for payment, invoice, account, estimate of property damages, bill for services, diagnosis, prescription, hospital or doctor records, test results, x-rays, or other evidence of loss, injury, or expense.^[1]

In its ruling, the trial court gave, in pertinent part, the following thorough treatment of the case:

In reviewing the evidence in this case there has been a long history of disagreements over the billing practices of the defendant[] and his company as it relates to Blue Cross, Blue Shield. November 21, of 1997 apparently there was some discussions that culminated in a signed agreement and release regarding insurance issues. September 5th of 2002, a letter clearly outlining the types of CPT codes that was supposed to be used in the presentation of these cases. The court has listened very attentively to the evidence and has had the opportunity to observe the witness' testimony, their demeanor, especially focusing in on their demeanor and believability.

....

The court has reviewed the testimony ... [and] every bit of written evidence, and I have gone through the evidence. And I would like to go over just very briefly some of the issues that I consider to be very important. The testimony of Latisha [Fleming], this court found to be a very credible witness. She identified the documents that formed the basis of this indictment, and she talked about the issues of 1997 and 2002 involving Mr. Arthur Copes. The next witnesses the court believes were important were the three chiropractors who testified, Dr. Sonnier, Dr. Santilli, and Dr. Zecha. ... And this court believed Dr. Sonnier, I believed Dr. Santilli, although I honestly say I didn't have a lot of respect for him, I did believe him, and I believed Dr. Zecha to be honest in their [sic] testimony. And

¹ Louisiana Revised Statutes 22:1242 and 1243 were amended and reenacted as La. R.S. 22:1923 and 1924, respectively, by 2008 La. Acts No. 415, § 1, effective January 1, 2009.

each of them testified basically that they never diagnosed or treated anyone involving scoliosis patients. Kim Martinez ... worked for Dr. Copes from August 2001 to September 2004. This court finds her to be a very credible witness. She indicated and she testified that she was present when the billing was discussed with Dr. Copes[.] ... She indicated that she discussed billing practices with the defendant in this case, and indicated that she was concerned about the authority of them to do that, and it was clearly discussed with Mr. Copes in that regard. The next witnesses that were called were the witnesses who specifically are listed in the indictment, the victims in this case. Shanni [sic] Mihalich was called. She is the mother of Tiana Mihalich. She indicated that she came to the Copes Clinic because she found it through a web [s]ite. Dr. Copes clearly is the only person who ever talked to them about the x-rays. She never discussed or consulted with anyone other than Dr. Copes. She did not know any of the other chiropractors. She never consulted with Dr. Ritchie, she never consulted with Dr. Santilli, and the only person who ever treated her daughter was Mr. Copes. Tiana Mihalich testified basically to the same, as did her father, [Otto] Mihalich. Sarafina Gerling testified. She indicated that she was diagnosed with scoliosis and that she visited with the Copes -- with Mr. Copes and the Copes Clinic in July and in October. She said she never met Dr. Ritchie. The results of her exams were discussed with Dr. Copes and Dr. Copes only. Dr. Copes is the only person who ever wrote on the x-rays, or explained the x-rays. There were no other chiropractors or medical doctors in the room. She did not know nor had she ever seen Dr. Zecha. Cheryl Bouchard testified that in February of 2004 she went to the Baton Rouge office of Dr. Copes. Dr. Copes was the only person who ever talked with her, who ever discussed the x-rays. She never consulted with or saw any other chiropractor or any other MD. She never had a face to face conversation or discussion with anyone besides Dr. Copes. Vonnie White testified that she said she first saw Arthur Copes in March of 2005. ... The x-rays were only discussed by Arthur Copes. No one else held themselves out to be a chiropractor or medical doctor. She never consulted with, talked to, or saw any other doctor of chiropractic medicine or medical doctor. She thought Dr. Copes was a doctor. Brandon Price testified. ... He indicated that the only x-rays that were taken were discussed by Dr. Copes. Dr. Copes indicated to him and gave him the degrees. ... At no time did he ever see a chiropractor or talk to anyone about his case except Mr. Copes. He never discussed his case with Dr. Zecha, he never met Dr. Ritchie, and he never met Dr. Santilli. Michelle Price [Brandon's mother] ... only talked to Dr. Copes. Dr. Copes put the x-rays on a light wall, measured the curves and talked about the x-rays. There were no other chiropractors or medical doctors in the room or ever when she was there. Donald Price, who was the father of Brandon Price, indicated vehemently that he never saw or spoke with anyone besides Mr. Copes in referencing treatment or diagnosis. John Harris who is the father of Logan Harris testified. He indicated that the x-rays were discussed only with Mr. Copes. He never consulted nor did he ever see any other doctor of chiropractic medicine or medical doctor. He never saw Dr. Santilli. Dr. Cleveland testified. ... I think Dr. Cleveland was a very credible witness. He got up here and he said he was a good friend of [defendant]. ... He appeared to be very loose, very casual, and he appeared to be very, very honest. He indicated that he was never hired to treat or diagnose scoliosis patients. It appeared to me, frankly, that his testimony was very difficult because Arthur Copes is a friend of his, and he said that he was a friend of his. He was never aware that his name was put on any claim forms. He never authorized anyone to use his name. ... He indicated that he never treated Tiana Mihalich. He never treated Brandon Price. He never treated Cheryl Bouchard, and he never treated Sarafina

Gerling. He said on occasions he did treat people in the Baton Rouge clinic. ... Kathy Phenald ... a [billing] supervisor ... began to question how they could bill for doctors and those doctors provider numbers when those doctors were never treating the patients. She testified and I believe her, and she was very credible. She said that Mr. Copes told her, this is the way we do it, it has always been done that way and that is the way it will be done. She quit. She resigned. She wrote a letter and in her letter of resignation she indicated she was quitting because she thought insurance fraud was going on and she was not willing to continue to participate in that. We heard from Dr. David Corbin who ... indicated that he was called, I assume, as an expert witness to testify on behalf of Mr. Copes. ... He indicated that there was a declaration statement from chiropractor examiners that allowed chiropractors to treat people when -- or people from their office to treat people. But ... he explained that that was primarily for when chiropractors were practicing alone, were out of town on vacation and that kind of thing, and that is why that was allowed. He did not ... testify specifically about this case. He testified very generally about chiropractic practices. ... Aletha Smith Britton testified. The court found her to be very credible, and I believed her. She said she never talked to Dr. Copes about any of these things. I believe that is true. ... She was there for a very short period of time and she was the one who filled out all of this paperwork, and this court found her testimony to be pretty credible. The last witness who was called by the defense was Arthur Copes. ... The court found his testimony to be very manipulative, found that during the course of his testimony and things that were introduced during the trial that he shades the truth on more than one occasion. He pushes the envelope, and he does not tell the whole truth. This court formed an impression of the witness as he was testifying that he does believe he has got a good product, and I think that he does. ... This court got the impression from his demeanor and from his testimony that he blames everyone but himself for what was going on here. He claims he was not familiar with the CPT codes or the changing of the CPT codes. This court believes that the majority of the evidence in this case clearly outweighs that testimony. The court found very simply his testimony to be not credible and not believable.

We agree with the findings of the trial court. Documentary and testimonial evidence clearly established fraudulent billing by the defendant. The defendant testified at trial that, in essence, he was unaware of the illegal billing practices at his clinic. As such, he contends on appeal he did not have the intent to defraud.

In this matter, the intent to defraud an insurance company is a specific intent crime. See **State v. Landry**, 2008-1553, p. 17 (La. App. 1 Cir. 5/8/09), 15 So.3d 138, 149; **State v. Dudley**, 2006-1087, pp. 18-19 (La. App. 1 Cir. 9/19/07), 984 So.2d 11, 23-24. Specific criminal intent is "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction.

Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **Dudley**, 2006-1087 at 18-19, 984 So.2d at 24.

The trial court heard the testimony of the witnesses and chose, in light of very convincing countervailing testimony, to discount the defendant's testimony as manipulative and not credible. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1 Cir. 1985).

Patient claim forms for Tiana, Sarafina, Cheryl, and Brandon suggest they all had x-rays taken (CPT code 72010) and all had a forty-minute face-to-face office visit (CPT code 99215) with Dr. Cleveland, except for Brandon, who had a sixty-minute face-to-face office visit (CPT code 99244) with Dr. Cleveland. However, each of these patients denied having had an office visit with Dr. Cleveland.

Tiana testified the only person who recommended treatment was the defendant. Shani Mihalich, Tiana's mother, testified that the defendant discussed and marked the x-rays, and that they saw only the defendant at the San Diego clinic. Otto Mihalich, Tiana's father, similarly testified that they spoke only to the defendant and they met no other doctors. Dr. Cleveland corroborated the testimony of the Mihaliches when he testified

that, although he traveled with the defendant to San Diego on occasion, he never saw any patients in San Diego.

Sarafina testified that she saw only the defendant in the San Diego clinic. The defendant explained to her what her x-rays showed and marked on them. She also testified she had never met Dr. Cleveland before. When asked if it would be correct that her claim form indicated she had a forty-minute office visit with Dr. Cleveland, she responded, "No." Dr. Cleveland testified that while his signature stamp was on her claim form, he had no recollection of treating Sarafina. Moreover, Sarafina was treated in San Diego, and Dr. Cleveland did not treat anyone in California.

Cheryl testified that the defendant discussed her x-rays with her. She had never come into contact with Dr. Cleveland, or spoke to any other licensed chiropractor during her visit. Her only face-to-face visit was with the defendant. Dr. Cleveland testified that while his signature stamp was on her claim form, he had no recollection of treating Cheryl.

Brandon testified that he went to the San Diego clinic. The defendant discussed his x-rays with him, and Brandon spoke only to the defendant about his treatment. Dr. Cleveland testified that while Brandon's claim form had a signature on it (of Dr. Lance E. Cleveland), it was neither his signature nor his signature stamp. Moreover, as discussed, Dr. Cleveland did not treat any patients in California.

Patient claim forms for Vonnie and Logan suggest they had x-rays taken (CPT code 72010) and had a sixty-minute face-to-face office visit (CPT code 99244) with Dr. Santilli. However, Vonnie and Logan's father denied having had an office visit with Dr. Santilli when Dr. Santilli was working for the defendant.

Vonnie testified that while being treated at the Baton Rouge clinic, the defendant explained to her what her x-rays showed and marked on them. Vonnie never met with a doctor or a chiropractor at the clinic. Dr. Santilli opened up his own clinic shortly after terminating his employment with the defendant on March 4, 2005. Vonnie testified that she met Dr. Santilli for the first time after the defendant's clinic was shut down. Vonnie's claim form had a service date of March 9, 2005, with Dr. Santilli's signature. Dr. Santilli

testified that he could not have treated her on that date because he was not employed at STARS.

John Harris, Logan's father, testified that the defendant discussed Logan's x-rays with him. He also testified that he did not know Dr. Santilli and never met him and that Dr. Santilli did not treat his child. As discussed earlier, Dr. Santilli testified that he had nothing to do with fitting Logan, who was six months old at the time, for a brace.

The defendant had been twice warned in the past to cease his improper billing methods. The evidence at trial clearly established that the defendant continued to file fraudulent claims with Blue Cross and that he was not only well aware of, but instigated, the deceptive practices of his clinics.

After a thorough review of the record, we find the evidence supports the trial court's judgment. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of eight counts of insurance fraud. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2 AND 3

In his second assignment of error, the defendant argues that his sentences are excessive. Specifically, the defendant contends that the total amount of the fines, restitution to the victims and insurance company, and the costs of prosecution that he was ordered to pay is unconstitutionally excessive. In his third assignment of error, the defendant argues defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel. Because we must vacate the sentences and remand for resentencing, we pretermitt discussion of the merits of these assignments of error.

The defendant asserts that he is indigent and that the amount of fines, restitution, and costs of prosecution "will almost certainly prevent him from successfully completing probation." The defendant contends the amount of fines totals \$40,000.00, and the amount of restitution to the patients is at least \$42,000.00 since the fee charged for each brace was in excess of \$7,000.00. Finally, the State requested that the defendant pay the

costs of prosecution, which, according to the State, totaled \$38,317.00. Thus, according to the defendant, the total amount that the trial court assessed against him appears to be in excess of \$100,000.00.

This court has no way of determining the amount of money the defendant is required to pay. In ordering restitution as a condition of probation, the trial court stated:

[The defendant] is to make full restitution in the amount to each victim in this case, and I include in victims Blue Cross Blue Shield, and the five [sic] named persons in the bills of information for all of the payments that they have actually made to him. The probation office outlines amounts of money. I am not going to specify that particular amount, but if whatever the victims can show the probation office they actually spent out of pocket on, and paid to Mr. Copes as a result of the charges in this indictment they will be reimbursed for.

The trial court's making restitution in an amount to be determined by the probation office was illegal. Under La. Code Crim. P. art. 895(A)(7), the amount of restitution is to be determined by the court. **State v. Hardy**, 432 So.2d 865, 866 (La. 1983) (per curiam). See State v. Wilson, 613 So.2d 234, 240 (La. App. 1 Cir. 1992), writ denied, 93-0533 (La. 3/25/94), 635 So.2d 238. Following sentencing, the State requested the defendant pay the costs of prosecution in the amount of \$38,317.00. The trial court ordered the defendant to pay the costs of prosecution, but stated it was "not going to set an amount," but asked the State to submit invoices to the court. Accordingly, the costs of prosecution at this point are unknown. We note, as well, that it is not clear from the record how much the defendant is required to pay in fines. For each of the eight counts, the defendant was ordered to pay a \$5,000.00 fine. Counts 1, 3, and 4 were ordered to run concurrently, while counts 5 through 9 were ordered to run consecutively. It is unclear if the fines for counts 1, 3, and 4 were to run concurrently, as well. If so, the total amount in fines owed for those three counts would be \$5,000.00. Accordingly, the defendant would owe either \$30,000.00 or \$40,000.00 in fines. Furthermore, in suspending the entire sentences for counts 5 through 9, it is not clear if the trial court also intended to suspend the fines for these counts.

Because the trial court failed to specify an amount owed by the defendant in making restitution as a condition of probation, we must vacate the sentences. The matter

is remanded for the trial court to establish the amount owed and a payment schedule for restitution awarded as a condition of the defendant's probation. The trial court is further instructed to clarify the amount of fines and prosecution costs owed. Any issues regarding the defendant's alleged indigency and his ability to pay fines, costs, and/or restitution can be addressed at the resentencing hearing.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues the record does not reflect a valid waiver of the right to a jury trial.

This argument is baseless. On April 26, 2007, over a year prior to trial, the defendant filed a Notice of Request For Bench Trial, which stated, "The defendant, Arthur Copes, hereby gives notice pursuant to C. Cr. P. Art. 780 of his waiver of a jury trial and election to be tried by the judge." At a **Prieur** hearing over nine months prior to trial, defense counsel, in making an argument to the court, noted that it was a bench trial. Later in the same hearing, the trial court indicated that it was the trier of fact. Also, during the trial, the trial court (for various reasons) would remind the parties that it was a judge trial, not a jury trial. It is clear from the record the defendant expressly waived his right to a jury trial and was aware at all stages of the proceedings that his was a bench trial.

The defendant states in his brief that while the minutes reflect the defendant's right to a jury trial was waived, the transcript fails to reflect any waiver; and that in the event there is a conflict between the transcript and the minutes, the transcript prevails. The transcript is silent as to any waiver of jury trial. Because nothing in the transcript contravenes the indication of waiver found in the minutes, there cannot be any conflict between the minutes and the transcript. This assignment of error is without merit.

CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.