STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2008
v TIMOTHY FREDERICK TALBERT, Defendant-Appellant.	No. 277620 Wayne Circuit Court LC No. 06-011769-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RACHEL LAURETTE TALBERT, Defendant-Appellant.	No. 277666 Wayne Circuit Court LC No. 06-011769-01

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant, Timothy Frederick Talbert, was convicted by a jury of insurance fraud, MCL 500.4511(1); MCL 500.4503, and false report of a felony, MCL 750.411a(1)(b). The trial court sentenced defendant Timothy to 45 days in jail and two years' probation for each of these convictions. In the same jury trial, defendant Timothy's codefendant and wife, Rachel Laurette Talbert, was convicted of insurance fraud. The trial court sentenced defendant Rachel to 30 days in jail and two years' probation for the insurance fraud conviction. The trial court also ordered both defendants to share responsibility for $11,263.36 in restitution. Defendants appealed as of right, and their appeals were consolidated. We affirm.

I. Docket No. 277620

Defendant Timothy's first argument on appeal is that the prosecutor failed to present sufficient evidence that he filed a false police report of a felony. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Therefore, this Court "must view the evidence in a light most favorable to the

prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences may be satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

MCL 750.411a(1) provides:

> [A] person who intentionally makes a false report of the commission of a crime, or intentionally causes a false report of the commission of a crime to be made, to a peace officer, police agency of this state or of a local unit of government, 9-1-1 operator, or any other governmental employee or contractor or employee of a contractor who is authorized to receive reports of a crime, knowing the report is false, is guilty of a crime as follows:
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> * * *
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> (b) If the report is a false report of a felony, the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

Effective July 1, 2004, the statute also includes false reports made to 9-1-1 operators and other governmental employees who receive reports of crimes. MCL 750.411a(1). Therefore, the elements of this offense are the making of a report, the falsity of the report, and knowledge by the defendant that the report was false.

Defendant Timothy filed a police report with Officer Diago Walker, claiming his 2003 Ford Explorer was stolen. The Explorer was recovered several months after defendants' insurance claim was processed. Because of the good condition of the Explorer, the presence of the registration plate and the Explorer's major component parts, Deputy Cole did not observe any indications that the Explorer was stolen. Instead, the facts were consistent with lease fraud. The Explorer was newer and had mileage exceeding the allotment under the lease by 23,560 miles. Such excess could have resulted in a penalty of at least $3,524. Moreover, the prosecutor argued that the mode of the alleged theft could be inferred from the evidence. Specifically, defendants received two transponder-equipped keys when they leased the Explorer. The prosecutor argued that defendants used one of the transponder-equipped keys to drive the Explorer away from the beauty salon. Then, they kept this key to drive the Explorer after the alleged theft, but copied it to provide Progressive Insurance Company with two sets of keys when making their insurance claim. Viewing these facts in a light most favorable to the prosecutor, a rational trier of fact could have found that defendant Timothy filed a false police report to avoid the mileage penalty.

There was also sufficient evidence for a rational trier of fact to find that defendant Timothy knew the report was false. Defendant Timothy reported to Officer Walker that the Explorer was stolen while he was inside a beauty salon. Nevertheless, in defendants' insurance claim, they reported that the Explorer was stolen while defendant Rachel was inside the beauty salon. Moreover, defendant Rachel claimed that defendant Timothy was not present. Given these inconsistencies regarding the circumstances surrounding the alleged theft, the jury could

have inferred that defendant Timothy knew the report was false. Consequently, we conclude that there was sufficient evidence for a jury to infer beyond a reasonable doubt that defendant Timothy filed a false police report of a felony.

Defendant Timothy's second argument on appeal is that the prosecutor failed to present sufficient evidence that he committed insurance fraud. MCL 500.4503 provides, in part:

> A fraudulent insurance act includes, but is not limited to, acts or omissions committed by any person who knowingly, and with an intent to injure, defraud, or deceive:
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> * * *
>
> (c) Presents or causes to be presented to or by any insurer, any oral or written statement including computer-generated information as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains false information concerning any fact or thing material to the claim.

Therefore, it was the prosecutor's burden to prove that defendant Timothy: 1) presented, or caused to be presented, a claim for payment with intent to injure, defraud or deceive, and 2) knew that the claim for payment contained false information.

In this case, defendants presented an insurance claim to Progressive Insurance Company following the report to Officer Walker that the Explorer was stolen. At the time of the theft, if defendants had ceased driving the Explorer and continued their monthly payments of $448.25 for the nine months remaining in the lease, they would have owed approximately $3,524 in mileage penalties. Alternatively, by claiming that the Explorer was stolen, Progressive Insurance Company paid off the Explorer, defendants leased a replacement vehicle and there is no evidence that they paid a mileage penalty after the Explorer was recovered, despite the excess miles. Given this cost savings, there was sufficient circumstantial evidence for a rational trier of fact to find that defendant Timothy intended to defraud Progressive Insurance Company when he and defendant Rachel filed their claim. As we conclude above, from the inconsistencies in the police report and defendants' insurance claim regarding the circumstances surrounding the theft, a reasonable trier of fact could have inferred that defendant Timothy knew that the insurance claim contained false information. Consequently, we conclude that there was sufficient evidence for a jury to infer beyond a reasonable doubt that defendant Timothy committed insurance fraud.[1]

[1] Defendant Timothy maintains that Sergeant David Hendrick's testimony, reporting excess mileage on an oil change sticker dated prior to the theft, is hearsay and should have been excluded. However, defendant Timothy did not include this claim in his Statement of Questions Presented. Therefore, it is not properly before this Court. See MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, admission of the hearsay evidence did not affect defendant Timothy's substantial rights. *People v Carines*, 460 Mich 750, 766-768; 597 NW2d 130 (1999).

II. Docket No. 277666

Defendant Rachel's first argument on appeal is that the prosecutor improperly shifted the burden of proof and denied her a fair trial during his closing and rebuttal arguments. We disagree. This Court reviews defendant Rachel's preserved claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair or impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Her unpreserved claims are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To find plain error, this Court must decide whether there was error, if it was plain, and if it affected the defendant's substantial rights. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

When defendants filed their insurance claim, Progressive Insurance Company requested the Explorer's two original sets of keys. A forensic locksmith, Mark Ames, testified that only one of these keys functioned. Ames opined that the key that did not function was a copy and that defendants' other original set of keys was outstanding. Consequently, the prosecutor argued that defendants copied the outstanding key so they could continue to drive the Explorer after the alleged theft. Ames also testified that there was no evidence of a remote starter in the Explorer or a remote starter fob on the sets of keys he inspected. In contrast, defendant Rachel denied copying the keys and noted that the original sets of keys had not always been in her possession. She claimed that, after she leased the Explorer, she gave both sets to Jam Sounds to install a remote starter. Between the installation and alleged theft, defendant Rachel insisted that she only used the set of keys attached to the remote starter fob and stored the unused set. She also testified that she gave both of these sets to Progressive Insurance Company.

During his closing argument, the prosecutor noted that Ames "was a very articulate, well-learned man when it came to forensic locksmithing. You heard no rebuttal with regard to his testimony." Later, in his rebuttal argument, the prosecutor repeated that Ames's testimony was not rebutted and stated that:

> defense counsel . . . in her opening statement indicated to you that she was going to call a locksmith or something on her own with regard to what she wanted to present with regard to this case. We did not hear from that witness.

This was an incorrect statement. In fact, in her opening statement, defense counsel did not promise to present any witness testimony. Finally, in his rebuttal argument, the prosecutor stated:

> Mr. and Ms. Talbert knew today was the day for trial. Both of them sat at this defense counsel table and heard testimony with regard to defense counsel's questioning as to remote starters. Nobody brought in a receipt for a remote starter. I believe that would be significant.

Generally, prosecutors are afforded great latitude in their closing arguments, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), but a prosecutor may not comment upon a defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). However, "if the prosecutor's comments do not burden a defendant's right not to testify, commenting on a defendant's failure to call a witness does not shift the burden of proof." *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). For instance, if the defendant testifies, the

prosecutor may comment on the defendant's failure to produce corroborating witnesses. *Id.* at 115.

In the instant case, defendant Rachel presented uncorroborated testimony regarding the remote starter installation to account for the missing original set of keys. *Fields, supra* at 97-98. Consequently, the prosecutor's arguments that Ames's testimony, including his statement that he saw no evidence of a remote starter in the Explorer, was not rebutted with another locksmith's testimony or a receipt from Jam Sounds, did not shift the burden of proof to defendant Rachel. *Id.; People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996) (a statement that the evidence is uncontroverted does not constitute an impermissible comment on a defendant's failure to take the stand). Moreover, the prosecutor's misstatement, arguing that defendants failed to call a locksmith as promised in opening statements, was cured by the trial court's instruction that the attorneys' closing arguments did not constitute evidence. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant Rachel's second argument on appeal is that the prosecutor improperly elicited testimony implying that defendants' cases were consistent with profile evidence for lease fraud. "'A profile is simply an investigative technique. It is nothing more than a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.'" *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995), citing *United States v McDonald*, 933 F2d 1519, 1521 (CA 10, 1991). Because it is a compilation of otherwise innocuous characteristics that many people engaged in the illegal activity exhibit, it is prejudicial and may apply equally to innocent individuals and criminals. *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Therefore, profile evidence is generally inadmissible as substantive evidence of guilt, but may be admissible as background or modus operandi evidence to provide the jury with a better understanding of the evidence. *Id.* at 53-54, 58-59.

This Court has enumerated several factors that "may be helpful in distinguishing between the appropriate and inappropriate use of drug profile evidence and thus help to determine the admissibility of such evidence." *Murray, supra* at 56. First, the prosecutor's reason for admission of the profile testimony must only be for a proper use, such as background or modus operandi. *Id.* at 56-57. Second, the prosecutor must introduce and argue facts from the case, in addition to profile evidence, that the jury can use to draw an inference of criminality. *Id*. at 57. Third, "it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony." *Id.* Fourth, the expert witness should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied. *Id.*

First, in the instant case, the prosecutor's reason for eliciting the profile testimony from Deputy Cole was merely to "explain to the jury what a lease fraud is." In response to the prosecutor's question, Deputy Cole explained his thought process during a lease fraud investigation. He noted that vehicles involved in lease fraud are usually newer vehicles, in good condition and recovered after an insurance claim is paid. Deputy Cole testified that a motive to falsely report a leased vehicle stolen is to avoid penalties for excess miles. Such background testimony is a permissible use of profile evidence. *Murray, supra* at 56-57, 59-60.

Second, the prosecutor did not argue that profile evidence was circumstantial proof of defendants' guilt in his closing or rebuttal arguments. Instead, he noted the lack of evidence that the Explorer was actually stolen, including the absence of damage to the vehicle and defendants' conflicting stories regarding who possessed it at the time of the theft. He also argued that defendants' potential mileage penalty motivated the false police report and insurance claim. Therefore, the prosecutor introduced and argued facts that the jury could use to draw an inference of criminality.

Third, the trial court did not instruct the jury regarding the limited use of profile testimony. Nevertheless, "we refuse to operate on the premise that jurors cannot comprehend the difference between substantive evidence and background testimony intended to help them understand the evidence, especially where this difference is pointed out to them." *Murray, supra* at 61. Here, the testimony clearly differentiated between the definition of lease fraud and the facts of defendants' cases. Moreover, the trial court instructed the jury to evaluate the police officers' testimony as it would any civilian witness's testimony to avoid the '"aura of special reliability and trustworthiness'" that law enforcement officers invite. *Id*. at 55, citing *Hubbard, supra* at 241. Therefore, despite the absence of a specific instruction regarding the limitations of profile testimony, the use of profile evidence was adequately limited.

Fourth, Deputy Cole did not express his opinion, based on the lease fraud profile, that defendants were guilty. However, Deputy Cole testified that vehicles involved in lease fraud are typically recovered after the insurance company has paid the claim. In the prosecutor's following question to Deputy Cole, he asked:

Q. And in this particular case, is that what occurred?

A. That is consistent with this case. It was after the pay-off.

This express comparison, however, did not necessarily imply defendant's guilt. *Id*. at 57. Deputy Cole explained that the majority of all stolen vehicles are recovered within two weeks. Nevertheless, he noted that some vehicles, either stolen or falsely reported stolen, take years to find. Therefore, even though defendants' Explorer was recovered several months after the initial report, claim and insurance payment, it was for the jury to decide whether this timing was circumstantial proof of defendant Rachel's guilt.

Based on these factors, we conclude that Deputy Cole's testimony was admissible background evidence to assist in explaining lease fraud to the jury. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor may "attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id*. at 662. Because we conclude that Deputy Cole's testimony was admissible, it follows that the prosecutor could have legitimately believed that the trial court would accept it. Therefore, it was not plain error for the prosecutor to elicit profile testimony regarding lease fraud for background purposes.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot