STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2010
v	No. 289522 Wayne Circuit Court
FADIA MOHAMAD KLAIT, Defendant-Appellant.	LC No. 06-000399-FH

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted of arson of a dwelling house, MCL 750.72. She was sentenced to 15 months to 20 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's first argument on appeal is that her statement[1] to the police should not have been admitted because she was in custody and not read her *Miranda*[2] rights. Defendant's claim is precluded as a result of the law of the case doctrine. Under the law of the case doctrine, this Court's determination of a legal issue will not be decided differently on a subsequent appeal in the same case if the facts remain materially the same. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). "If a litigant claims error in the first pronouncement, the right of redress rests in a higher tribunal." *Id.*

Back in March 2006, the trial court ruled that defendant's confession was inadmissible because she was subject to a custodial interrogation but not informed of her rights. The prosecution appealed to this Court. This Court reversed, finding that defendant was not in custody and, therefore, need not have been advised of her rights before being questioned. *People v Klait*, unpublished memorandum opinion of the Court of Appeals, issued September 13, 2007

[1] The written statement provided in part, "I sprayed the couch w/lighter fluid and lit it with a lighter. I sprayed the small pillow and lit it. I made sure the kids weren't nearby. I thought the fire would keep Nada away from me. I only wanted to burn it a little bit." (Original in all caps.) The statement indicated that it had been read to defendant in Arabic. Defendant printed her name next to an "x" at the end of the incriminating language in the statement.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

(Docket No. 271887), slip op at 2. Because the facts have not materially changed, we need not again reach the question presented by defendant regarding whether she was in custody and entitled to being informed of her *Miranda* rights.

Defendant next argues that her statement should not have been admitted because it was not made voluntarily. This Court performs its own independent review of an issue concerning the voluntariness of a confession. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). However, we give deference to the trial court's findings unless they are clearly erroneous. *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994).

Pursuant to the Fifth Amendment's protection against self-incrimination and the Due Process Clauses of the Fifth and Fourteenth Amendments, and absent contemplation of *Miranda* rights, confessions must be voluntary. *People v Daoud*, 462 Mich 621, 630-632; 614 NW2d 152 (2000). The test for admissibility under these constitutional provisions requires confessions to be made freely, voluntarily, and without compulsion or inducement of any sort. *Id.* at 631. The *Daoud* Court also indicated that the rule set forth in *Miranda* developed because of the compulsion inherent in custodial surroundings, which called into question whether a defendant's statements could truly be deemed the product of free choice. *Id.* at 632. Given the prior unpublished opinion in this case and the law of the case doctrine, we shall not address defendant's claim that her statements were rendered involuntary because she was not read her *Miranda* rights.

At this juncture, it is necessary for us to first address a procedural matter as to the issue of voluntariness. Defendant argues that the trial court ruled, after holding an evidentiary hearing in March 2006 on defendant's motion to suppress her statement, that the statement was not admissible because defendant was not read her *Miranda* rights *and* because the statement was not voluntary; two separate grounds for suppression. Defendant maintains that this Court's previous ruling, alluded to above, only addressed the *Miranda* aspect of the trial court's ruling, not the independent ground that the statement was involuntary. Therefore, part of defendant's argument here is that the trial court's findings and ruling on the issue of whether the statement was voluntarily made, untouched by this Court's earlier ruling, did not constitute error. In essence, defendant is asserting that the trial court did not err in suppressing the statement based on lack of voluntariness; however, error ultimately occurred because the statement was indeed admitted into evidence.[3] Thus, defendant is asking us to affirm the court's alleged ruling that the statement was involuntary, yet reverse the verdict because the statement was admitted.

On review of the record, defendant's motion to suppress alleged that her statement to police was not given voluntarily and that she was not read her *Miranda* rights. An evidentiary hearing was conducted. At the end of the hearing, defense counsel focused his argument on the

[3] The record reflects that, at trial, defense counsel expressly indicated that he had no objection to the admission of the statement into evidence. However, counsel did aggressively cross-examine police witnesses concerning the circumstances of the confession in an effort to convince the jury that little or no weight should be given to the statement because it was coerced. The trial court instructed the jury that it could give the statement whatever weight it deemed proper under the facts presented at trial.

claim that defendant had been subject to a custodial interrogation without the benefit of *Miranda* warnings. A week after the hearing, the trial court, in open court, rendered its decision to suppress the statement. Ruling from the bench, the trial court first reviewed and summarized the testimony of the witnesses. The court then ruled that defendant had been in custody and subject to a custodial interrogation; therefore, she should have been advised of her *Miranda* rights, but they were never given. The trial court then immediately concluded her ruling by stating, "This was not voluntary. The defendant's statement is suppressed and not admissible in any court proceedings."[4] Woven into the ruling were the court's findings that defendant was not provided with an adequate translator and that "she also could not read the contents of the paper she signed and it was not properly translated so that she could make an informed decision as to its contents." Our review of the transcript indicates that the court's discussion was predominantly couched in the context of determining whether defendant was in custody and denied her *Miranda* rights, although defendant's motion did go beyond the *Miranda* issue.

The discussion in this Court's earlier opinion focused solely on the *Miranda* issue and whether defendant was subject to a custodial interrogation; however, because the Court ultimately reversed the order of suppression, the ruling effectively encompassed all grounds given by the trial court in support of suppression. Following remand, defendant made no claim to the trial court that the statement should still be suppressed on the basis that this Court failed to address the separate issue of whether the statement was given voluntarily. Assuming that the trial court's ruling included a finding that the confession was involuntary, the law of the case doctrine would preclude us from considering the issue of voluntariness, where this Court's previous opinion reversing the suppression order necessarily rejected the trial court's ruling in its entirety. On the other hand, assuming that the trial court's ruling did not encompass a determination that the statement needed to be suppressed because, aside from any *Miranda* analysis, it was involuntary, and that, therefore, this Court's opinion did not speak to the issue, the whole matter of whether the statement was admissible was waived when defense counsel expressly voiced that he had no objection to the statement's admission at trial. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

The quirky nature of this issue leads us to the conclusion that it would be best to additionally rule substantively on the issue of voluntariness. On careful scrutiny of the testimony given at the evidentiary hearing on the motion to suppress, we find that, under the factors set forth in *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988),[5] defendant's

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[4] The court later ruled that its decision also precluded any testimony by the police regarding verbal statements made by defendant during the interview. This led to the prosecutor's decision to dismiss the case at that point in time.

> [5] The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired . . . ." The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

(continued…)

confession or statement was voluntary. Defendant herself testified that she was not physically threatened, nor told that she could not leave. Although she testified that she felt nervous, stressed, and pressured under the circumstances and that she did not believe that she was free to leave, defendant never expressly stated that she signed the statement only because the police pressured her into doing so. On being asked why she confessed to starting the fire, defendant testified:

> Okay. The fire marshal when he first started the interview, he was telling me about the kids. First of all, he told me that he had spoke with my daughter . . . and he tried to ask her some question to figure out how the fire started. Then when he told me I spoke with your daughter and if your kids did start the fire just go ahead, tell me and we can send them to a special school. And then we can send them to a special school that they can, you know, teach them about fires and other things.
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> And then I told him I don't know if my daughter start the fire because I don't know. Maybe they were playing with fireworks because we did have fireworks in the garage.

We fail to see how this explanation provides a valid basis to find that defendant's confession was not the product of an essentially free and unconstrained choice by defendant or that her will had been overborne and her capacity for self-determination critically impaired. *Cipriano*, 431 Mich at 334. Reversal is unwarranted.

Defendant next argues that the prosecution presented insufficient evidence for the jury to find beyond a reasonable doubt that she committed arson. We disagree. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

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> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
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> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [Citations omitted; omission in original.]

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id*. at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Arson is statutorily defined as the willful or malicious burning of "any dwelling house, either occupied or unoccupied, or the contents thereof, whether owned by himself or another, or any building within the curtilage of such dwelling house, or the contents thereof[.]" MCL 750.72. Following CJI2d 31.2(4) nearly word for word, the trial court instructed the jury that the prosecution was required to prove, in part,

> that when the defendant burned the building or any of its contents, she intended to burn the building or contents or intentionally committed an act that created a very high risk of burning the building or its contents, and that while committing the act the defendant knew of that risk and disregarded it.

We find that there was sufficient evidence to support the arson conviction. First and foremost, defendant confessed to setting the fire. As reflected in the instruction, it does not matter that defendant did not intend to cause the damage resulting from the fire so long as she intended to start the fire, which she admitted. The confession alone would be sufficient for a jury to find defendant guilty of statutory arson beyond a reasonable doubt. In addition, despite finding no traces of accelerant in the area, a fire investigator and the fire marshal both testified on the basis of their experience as fire investigators that the nature of the fire – hot and fast – indicated that the fire was intentionally set. They testified that the fire likely began on a couch or near the couch. Moreover, a police officer testified that defendant had the opportunity to set the fire because she was in the vicinity of the fire when it began. In addition, defendant's accusations that another woman set the fire were suspicious given that the woman was confirmed to have been at work at the time the fire was set. Taken together and viewed in the light most favorable to the prosecution, sufficient evidence existed for the jury to find defendant guilty of statutory arson beyond a reasonable doubt.

Defendant also argues that the verdict was against the great weight of the evidence. We again disagree. In a post-trial motion for a directed verdict of acquittal, defendant argued that there was insufficient evidence to support the verdict and that "the great weight of the evidence would reflect that [defendant] should not have been convicted." Defendant did not specifically move for a new trial, and the argument at the motion hearing focused on the sufficiency of the evidence. A claim that a conviction is against the great weight of the evidence must be preserved in a motion for new trial, and an unpreserved claim is reviewed for plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Regardless of whether we review this argument under the plain-error test or treat the argument as having been properly preserved, reversal is unwarranted.

A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

The evidence in this case does not preponderate so heavily against the verdict as to amount to a miscarriage of justice if the verdict were permitted to stand. The prosecution presented evidence that defendant confessed to setting the fire. In addition, there was expert testimony that the fire was likely intentionally set, and defendant had the opportunity to set the fire. Moreover, defendant led the police to believe that someone else who could not have set the fire committed the crime. Therefore, defendant's conviction was not against the great weight of the evidence, and she is not entitled to a new trial.

Finally, defendant argues that a statement by the prosecutor during closing argument, that it was impossible for the fire to have been accidentally set, amounted to prosecutorial misconduct. We disagree. Claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). As this issue was not preserved in the trial court, we review the issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

As indicated above, defendant argues that the evidence did not support the prosecutor's statement that it was impossible for the fire to have been accidentally set. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). He or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

While it is true that neither of the fire investigators stated that it was impossible for the fire to have been accidentally caused, they both testified that they believed, based on the fast and hot nature of the fire, that it was set intentionally. They both indicated that the fire was likely caused by an accelerant. The prosecution is allowed to argue all reasonable inferences. Based on the expert testimony, it could reasonably be inferred that the fire was no accident and that it was intentionally set. To the extent that the prosecutor's comment went beyond the testimony and any reasonable inferences, we cannot conclude, given the strong evidence of guilt, that defendant's substantial rights were affected, that defendant was actually innocent, or that the integrity of the proceedings was compromised. *Carines*, 460 Mich at 763.ss

Furthermore, the trial court remedied any potential prejudice by indicating to members of the jury that they and they alone had to decide the facts and determine what occurred. Moreover, the trial court instructed that "[t]he lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." These jury

instructions remedied any potential problems caused by the prosecution's statement in closing argument. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens