

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA \* NO. 2004-KA-1140  
VERSUS \* COURT OF APPEAL  
ARTHUR WITTENBERG \* FOURTH CIRCUIT  
\* STATE OF LOUISIANA  
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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 419-770, SECTION "F"  
Honorable Dennis J. Waldron, Judge  
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**Judge Terri F. Love**  
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(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Roland L. Belsome)

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**AFFIRMED**

Plaintiff, Arthur Wittenburg appeals his conviction on two counts of insurance fraud and two counts of fraudulent filing of public records. He received a four-year sentence. For the reasons stated below, the conviction and sentence are affirmed.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

On February 12, 2001, the State filed a bill of information charging Arthur Wittenberg with two counts of insurance fraud, violations of La. R.S. 22:1243, and two counts of filing false public records, violations of La. R.S. 14:133. The defendant entered a not guilty plea and elected a judge trial, which occurred over a five-day period. The trial judge found the defendant guilty on all four counts. He was sentenced to serve four years of hard labor on each count; the sentences are to be served concurrently. The State filed a multiple bill, and after a hearing the trial judge denied the multiple bill. His

motion for an appeal was granted.

Arthur Wittenberg, the defendant, testified that between 1997 and 1999 he owned three used Mercedes 450SL. He purchased a white Mercedes with a tan top in May of 1997 and insured it with Windsor Court Insurance Company. In August of that year, he loaned his sister the Mercedes, while in her possession the engine became inoperable as a result of failure to add oil. Mr. Wittenberg took the vehicle to German Auto Repair, where he received an estimate of \$7,400 to \$8,000 for repairs. He agreed to have the vehicle repaired, but informed the owner that he would be out of town and would call when he returned. Mr. Wittenberg located another white Mercedes 450SL in Baton Rouge with a workable transmission and engine. He then contacted German Auto Repair to inform the owner that he was taking the vehicle, and requested that they place the vehicle in front of the building. His friend, Stefan Thierry then helped him return the vehicle to his home. The next morning the defendant and his brother transported the vehicle by a flatbed truck to Baton Rouge. Another transmission and motor were placed in the vehicle, and Mr. Wittenberg drove the vehicle home. He had a tow truck pick up the body of the Mercedes in Baton Rouge and take it to German Auto Repair.

In October, he loaned his brother the Mercedes, and while he was

driving it “everything shut down.” Mr. Wittenberg went to Almonaster Avenue to meet his brother and found that the vehicle had an electrical problem. Together they pushed the vehicle to the intersection of Almonaster and Florida Avenues, and Mr. Wittenberg covered the vehicle. The next day Mr. Wittenberg received a telephone call informing him that the police had found his vehicle and wanted him to retrieve the vehicle. He found the vehicle had been stripped; the engine, transmission and radio were missing. He made a claim with Windsor Insurance and reported the theft to the police. The claim was paid and he kept the frame of the vehicle.

Several months later, Mr. Wittenberg purchased another 450 SL Mercedes, a 1976 model. He had the motor and transmission from that vehicle placed into the body of the vehicle that had been stripped. The vehicle was completely restored at R. & E. Repair in November of 1998, and insured by Progressive Insurance Company. On January 4, 1999, that vehicle was stolen from in front of the Mirabeau Apartments. Mr. Wittenberg notified the police and his insurance company. His claim was subsequently denied.

Mr. Tom Miskatovic, owner of German Auto Repair, testified that the defendant had his 1978 Mercedes 450SL towed into his shop on September 27, 1997, and Mr. Miskatovic estimated that the cost of repairs to the vehicle

would be between \$7,400 and \$8,000. Mr. Miskatovic removed the engine and transmission from the vehicle, but because he could not reach the defendant, he did not begin work on the vehicle. Mr. Miskatovic testified that he never saw the defendant again, but a tow truck came for the vehicle in April of 1999. A week later, the police and a representative from an insurance company came to the shop to inspect the vehicle.

Mr. Miskatovic stated that he was certain that the vehicle remained in his possession between September of 1997 and April of 1999. After the vehicle had been in his shop a year, Mr. Miskatovic moved the vehicle outside into a back fenced-in parking lot. Mr. Miskatovic prepared an estimate of the cost of the repair work; it was dated June 24, 1998, and the vehicle identification number (VIN) was 10704412048584. The engine and transmission were inside his shop until May 3, 1999, when the police informed him he could discard the items. Mr. Miskatovic denied that the body of the vehicle could have been removed from the fenced parking lot behind his shop.

On cross-examination, Mr. Wittenberg acknowledged he had no receipts for any of the repair work or towing that he had ordered, and he could not provide the telephone number of the individual who purchased one of the vehicle frames. He also acknowledged he never transferred the title of

the vehicle out of his name. All of his transactions were in cash, and he had no records to offer in support of his claims.

Mr. Wittenberg's story was supported by two witnesses, his friend, Stefan Thierry, and Mr. Ronald Ellis. Mr. Thierry testified he was with the defendant in September of 1997, when he assisted the defendant in towing the Mercedes from German Auto Repair to his home. Mr. Thierry stated that the vehicle was parked in front of the repair shop and he used a towrope to hook the vehicle to his pickup truck. He pulled the vehicle as far as the tollbooth on the Crescent City Connection but then the rear brakes locked and the vehicle began smoking. At that point a wrecker was called, and the vehicle was transported to the defendant's home on a flatbed wrecker. The defendant put a new motor and transmission in the vehicle, and Mr. Thierry drove the vehicle.

Mr. Ronald Ellis, an employee of R. & E. Auto Repair, testified that in November of 1998 his company changed the engine out of the defendant's 1978 Mercedes. Another technician did the work, but Mr. Ellis remembered seeing the defendant with the vehicle. A used engine was placed in the Mercedes. There was no warranty on the engine, and the vehicle was operational when the defendant retrieved the vehicle.

Several witnesses testified as to the events occurring in October of

1997, when the vehicle was allegedly stripped. Officer Arthur Harrison testified that on October 10, 1997, Arthur Wittenberg reported the theft of the engine, transmission, and radio of his 1978 Mercedes 450SL which was parked at the intersection of Almonaster and Florida Avenue. The VIN number was 10704412048584, the same as the number of the vehicle at German Auto Repair. The officer stated that normal police procedure would require that he observe the stripped auto. He acknowledged, however, that he could have made the report without viewing the vehicle, and he had no recollection of what occurred in this case. He could have obtained the VIN number from the vehicle's dashboard or from ownership documents that were presented to him. Officer Harrison indicated he was never dispatched to the German Auto Repair Shop.

Ms. Gail Wilson of the Windsor Group Insurance Company testified that Arthur Wittenberg insured his Mercedes through Windsor Insurance. His application for insurance was dated September 22, 1997. He made a claim on October 27, 1997. A payment was forwarded to him for \$7,749.50 on December 18, 1997. Under cross-examination, Ms. Wilson admitted there was no indication on the insurance documents that anyone had actually inspected the vehicle, which was reported as being stripped. Ms. Wilson further stated that she was not the author of the documents regarding the

claim.

Four witnesses testified regarding the incident when the defendant's vehicle was allegedly stolen from in front of the Mirabeau Apartments. Ms. Juanita S. Flanagan, a police technician, testified she prepared the initial report when the defendant called in his vehicle as stolen. She explained that the police no longer conduct on site investigations regarding property losses.

Ms. Donna Swanson, of the Swanson Insurance Agency, testified she writes insurance for Progressive Insurance Company. She wrote a policy for Mr. Wittenberg on December 8, 1998, insuring a 1978 Mercedes 450SL. Company policy requires that an inspection of a vehicle be made prior to the issuance of the insurance, and she found no indication that the policy was not followed in this case. However, she could not verify whether the agent examined the vehicle. Ms. Swanson testified she had no personal knowledge of the defendant's claim on the Progressive policy.

Mr. Mitchell Butler, special investigator for Progressive Insurance Company, testified the defendant reported his vehicle stolen on February 10, 1999. The VIN number of the vehicle was 10704412048584. Mr. Wittenberg refused to be examined under oath regarding his claim. Mr. Butler then referred the claim to the National Insurance Crime Bureau.

Mr. David McCann, a special agent with the National Insurance Crime



Bureau, testified that a representative from Progressive Insurance Company called him regarding Arthur Wittenberg's 1978 Mercedes. Mr. McCann cross-referenced the vehicle and found that it had been reported stolen previously through the Windsor Insurance Company. Mr. McCann prepared a summary of the case and forwarded it to the police department for an investigation of possible insurance fraud.

## **DISCUSSION**

### **Assignment of Error**

In a single assignment of error, the defendant argues that the evidence is insufficient to support his convictions for two counts of insurance fraud and two counts of filing false public records

The defendant was found guilty of knowingly filing reports containing false, incomplete or fraudulent information with Progressive Property and Casualty Insurance Company and Windsor Insurance Group. The defendant was also convicted of filing false public records with the City of New Orleans police department concerning the loss of his vehicle.

When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the

crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Jacobs*, 504 So.2d 817 (La. 1987).

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Shapiro*, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. *See* La. R.S. 15:438. All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs*, 504 So.2d 817 (La. 1987).

The insurance fraud statute, La. R.S. 22:1243, lists prohibited activities and refers to definitions given in La. R.S. 22:1242; under the latter statute, a “fraudulent insurance act” is defined as an act or omission by someone who knowingly and with intent to defraud:

(a) [p]resents ... any oral or written statement which he knows to contain materially false information ... concerning ... the following:

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

La. R.S. 14:133 prohibits filing or maintaining false public records in any public office; a false public record is one containing a false statement or false representation of a material fact. La. R. S. 14:133 (A)(3).

In the case *sub judice*, the owner of the German Auto Repair Shop testified that the defendant's 1978 white Mercedes 450SL was parked in his shop or on his business property in a fenced-in back lot between September 27, 1997 and April 1999. The engine and transmission had been removed from the vehicle. During that period, the defendant made two claims with two different insurance companies for losses on the vehicle and filed two police reports. He claimed the vehicle was stripped of its engine, transmission and radio on October 10, 1997, while it was insured by Windsor Group Insurance Company. He filed a claim on October 27<sup>th</sup> and received a payment of \$7,749 on December 18, 1997. He applied for insurance with the Progressive Company on December 8, 1998, and reported a theft on February 10, 1999.

The defense counters that there was evidence to back up the defendant's version of events. For instance, as to the first incident in 1997, Officer Harrison testified that the defendant reported a theft of parts of his vehicle on October 10, 1997. The officer recorded that he "noted" the vehicle was stripped of its motor, transmission and radio, and that implies he observed the vehicle. We note that he also testified that he could not remember whether he saw the vehicle.

Additionally, the defense maintains that the testimony of Ms. Gail

Wilson of the Windsor Group supports the defendant's position because she stated that the company would not have paid him more than \$7,000 without first inspecting the vehicle. However, Ms. Wilson admitted that she did not prepare the documents submitted into evidence and nothing in the documents indicated that an investigation of the incident was made.

The defense also cites the testimony of Roland Ellis of R. & E. Auto Repair who testified that in November of 1998 he saw the defendant in his shop having a used engine put into his 1978 Mercedes. Mr. Ellis did not work on the vehicle, but he offered the invoice that another technician prepared when the work was completed. However, the defendant testified that he owned three used Mercedes 450SL during this time period, and switching out engines does not seem to have been unusual for him; thus, the testimony of Mr. Ellis is not conclusive.

As to the second insurance claim, the defense argues that Ms. Swanson, who insured the vehicle through the Progressive Agency, would not have issued a policy without inspecting the vehicle. When she testified she stated that the company procedure required inspecting vehicles prior to writing a policy; however, in this case she could not say whether the agent did or did not inspect the auto. She did not write the policy nor see the vehicle.

Additionally, Mitchell Butler, the investigator for Progressive Insurance Company, testified that after the Mr. Wittenberg reported the vehicle stolen, he found that the defendant had recently reported a vehicle with the same VIN number stolen to the Windsor Group Insurance Company. He then spoke with Tom Miskatovic and learned that the auto had been at the German Auto Repair Shop for eighteen months. Mr. Miskatovic informed Mr. Butler that a week prior to their conversation, the defendant had arrived at the repair shop with a tow truck and taken the Mercedes frame. Mr. Butler asked the defendant to take an examination under oath concerning his claim, but the defendant refused to submit to such an examination. Mr. Butler then notified him that the case was closed because of his refusal to cooperate.

As the State contends, the defendant's story is simply incredible. He maintains that he had the frame of a vehicle towed to Baton Rouge where he bought another vehicle, transferred the engine and transmission to the first vehicle, and towed the frame of the second vehicle from Baton Rouge back to German Auto Repair without informing Mr. Miskatovic of the substitution. Furthermore, the defendant left his vehicle at German Auto Repair on September 27<sup>th</sup> and reported a theft of parts on October 10<sup>th</sup>. He testified that he and his friend, Stefan Thierry, towed the vehicle from the

German Auto Repair Shop three to four weeks after September 27<sup>th</sup>. The alleged theft occurred less than two weeks after the vehicle was left at the German Auto Repair Shop. Thus, according to the defendant's timetable, the vehicle was still in the shop when he reported the theft. Moreover, none of the insurance agents or police officers could testify they actually inspected the vehicle.

The judge chose to accept the testimony of Mr. Miskatovic over that of the defendant. Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the trier of fact. *State v. Brumfield*, 93-2404 (La. App. 4 Cir. 6/15/94), 639 So.2d 312, 316. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. *State v. Silman*, 95-0154 (La. 11/27/95), 663 So.2d 27,35.

## **CONCLUSION**

Viewing the facts and circumstances of this case in the light most favorable to the prosecution, we find the evidence was sufficient to convince the trier of fact beyond a reasonable doubt that the defendant committed two counts of insurance fraud and filed two false public records.

Accordingly, the convictions and sentences are affirmed.

**AFFIRMED**