STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 284746 Saginaw Circuit Court
WILMER JONES-HAM, Defendant-Appellant.	LC No. 07-028972-FH

Before: Whitbeck, P.J., and O'Connell and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of insurance fraud, MCL 500.4511(1); MCL 500.4503, which arose out of her communications with her insurance company concerning a fire in her 1986 Mercedes.[1] We affirm.

I. Basic Facts

On the evening of March 9, 2006, defendant discovered the vehicle, parked in her driveway, engulfed in flames. The next day, defendant contacted her insurance company. She told the claims representative that she had put $18,000 into restoring the car and that she had planned to have the car in an antique show the following Sunday. At the end of the conversation, the insurance representative provided defendant with a claim number. The insurance company's claims adjuster then contacted defendant. Defendant told the claims adjuster that the car was in excellent condition and was going to be in an antique show that following weekend. Defendant indicated to the claims adjuster that she drove the vehicle on weekends only. As a result of this conversation, the claims adjuster valued the car on the "high end," at approximately $15,525.

Subsequently, the insurance company sent an investigator to speak with defendant. In their conversation, defendant stated that the vehicle was mechanically sound and in good condition. She indicated again that she drove the vehicle sparingly, but that she had driven it within the preceding month. At the insurance company's request, a master mechanic then assessed the vehicle. He observed pine needles and cobwebs in the car's engine, as well as

[1] The prosecutor also charged defendant with burning insured property. MCL 750.75. The jury acquitted defendant of this charge.

permanent creases in the car's flat tires, indicating that the vehicle had not been driven in a long period of time. After the inspection, the mechanic concluded that the car was not drivable. Defendant ultimately requested to withdraw her insurance claim, stating that she was under a lot of stress. Defendant was charged and convicted of insurance fraud. This appeal followed.

II. Motion to Suppress

Defendant argues that her right to counsel under the Fifth and Sixth Amendments was violated by the admission of statements she made to police during a non-custodial interview on March 29, 2006. US Const, Ams V, VI. According to defendant, the trial court erred when it denied her motion to suppress the statements. We disagree.[2] We review this constitutional challenge de novo, *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003), while the court's factual findings are reviewed for clear error, *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001).

A. Fifth Amendment Right to Counsel

On appeal, defendant does not argue that her right against self-incrimination was violated because she was not given *Miranda*[3] warnings. Rather, defendant argues that her right to counsel under the Fifth Amendment was violated because her statements were not voluntary, specifically because she "indicated that she wished to speak to an attorney." We agree that that the facts of the instant case do not implicate a *Miranda* violation, as defendant was not in custody during the interview, as defendant now concedes on appeal. However, we disagree with defendant that the continuation of the interview after her alleged request for counsel violated the Fifth Amendment's prohibition against involuntary statements.

"[T]he Fifth Amendment right to counsel is a corollary to the amendment's stated right against self-incrimination and to due process." *People v Marsack*, 231 Mich App 364, 372-373; 586 NW2d 234 (1998). "The right to counsel found in the Fifth Amendment is designed to counteract the inherently compelling pressures of custodial interrogation . . . and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse with the police only through counsel." *People v Williams*, 244 Mich App 533, 539; 624 NW2d 575 (2001) (citations and quotation marks omitted). As such, the safeguards adopted in *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), require the police to cease questioning a suspect once a request for counsel has been made. *Marsack*, *supra* at 374; *Edwards* v *Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981). However, this procedural requirement adopted by *Miranda* applies only when the suspect is in custody. *Marsack*, *supra* at 374. Thus, because defendant was not in custody, her Fifth Amendment right to counsel did not attach.

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[2] In our view, to the extent that the statements related to the charge of burning insured property, any alleged error was harmless because defendant was acquitted of that charge. However, we consider defendant's argument because some of the statements admitted concerned defendant's knowledge of the car's condition, when repairs had been made, and when she had driven it last.

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Nonetheless, as defendant's argument suggests, even noncustodial interviews may require a determination of whether a defendant's statement was voluntary, consistent with Fifth Amendment protections. *Beckwith v United States*, 425 US 341, 347-348; 96 S Ct 1612; 48 L Ed 2d 1 (1976). In such situations, our focus must be on whether defendant's statements were freely and voluntarily given. *Id.* Here, the trial court, after viewing the taped interview, concluded that the statements were voluntarily made and we reach the same conclusion based on our review of the record. Defendant agreed to the police interview and agreed to meet an officer at the local police post for that purpose. The interview took place in an interview room, with the door closed "for privacy" but not locked, and without a lawyer present. Defendant was not given a *Miranda* warning before the interview, but before questioning defendant the officer informed defendant that she was not under arrest, she was free to leave at any time, and she was free to answer or not answer any of the questions. Near the beginning of the interview, defendant, according to the officer, "made some reference to an attorney. [She] did not indicate she wanted an attorney, but made some reference to talking with an attorney." Specifically, defendant stated, "I'm leaving. I'm going to my attorney." In response, the officer indicated that he "wish[ed]" defendant would continue to talk with him. Defendant, who is a mature woman who was once a mayor of a major city in Michigan, decided not to leave and continued with the interview.

Viewing the totality of the circumstances, we fail to see how defendant's equivocal reference to an attorney somehow tainted all subsequent statements by transforming them into involuntary ones; her statements were voluntary. Defendant's Fifth Amendment rights were not violated.

B. Sixth Amendment Right to Counsel

Defendant raises substantially the same arguments as to her Sixth Amendment rights. However, it is well established that a defendant's right to counsel under the Sixth Amendment attaches only at or after adversarial judicial proceedings begin. *Montejo v Louisiana*, ___ US ___ ; 129 S Ct 2079, 2085; 173 L Ed 2d 955 (2009); *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004). Here, the interview in question occurred well before the initiation of adversarial proceedings against defendant. Thus, there is no Sixth Amendment violation of defendant's rights.

Given the foregoing we cannot conclude that a mistake has been made. Accordingly, the trial court's denial of defendant's motion to suppress was not error.

III. Sufficiency of the Evidence

Defendant next contends that the evidence was insufficient to support her conviction and the trial court should have granted her judgment notwithstanding the verdict, or alternatively, a new trial. On this same basis, defendant urges this court to overturn her conviction because it is allegedly against the great weight of the evidence. We cannot agree. We review sufficiency challenges de novo, viewing the evidence in a light most favorable to the prosecution to determine whether a rationale jury could have found all the elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). To establish insurance fraud, the prosecutor had to establish beyond a reasonable doubt that defendant "knowingly, and with an intent to injure, defraud, or deceive" presented to an insurer an "oral or written statement . . . 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." MCL 500.4503.

After our review of the record, we conclude that the evidence sufficiently established defendant's guilt. After defendant's car was burned, she contacted her insurance company and made statements to at least three different insurance representatives in support of payment for the damage. Defendant told her insurer that her car was in excellent condition, mechanically sound, and was to be a part of an antique show the following weekend. She also indicated to the insurance investigator that she had driven the car within the month preceding the fire. As a result, the insurance company valued her car at the higher end of its value. However, the insurance agency's mechanic examined the car and determined that not only was it not operable, but it had been parked for a considerable time period. Subsequently, defendant contacted her insurance company to specifically withdraw her claim. Based on this evidence a reasonable jury could find that defendant knowingly submitted a false claim to her insurance company.

Further, given this evidence, there is no merit to defendant's contrary contentions that the evidence fails to support that she initiated a claim or that her statements contained false information. These arguments are based on factual conflicts in the record evidence. However, where there are challenges to the credibility or weight of the evidence, we must defer to the jury's determinations on witness credibility and the weight to be afforded certain evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). Accordingly, and deferring to the jury's reasoned credibility determinations, we conclude that sufficient evidence supported defendant's conviction. And, because defendant's arguments that the trial court erred by denying her motion for judgment notwithstanding the verdict, or alternatively for a new trial, as well as her argument that her conviction is against the great weight of the evidence, are all premised on her allegation that the evidence was insufficient to support her conviction, we also conclude that the relief requested on those other grounds is also not appropriate.[4]

IV. Preliminary Examination

Defendant also contends that the district court erred in finding the preliminary examination evidence sufficient to bind her over for trial. We disagree. Because we have already concluded that the trial evidence was sufficient to convict defendant of insurance fraud, any alleged error regarding the sufficiency of the evidence at the preliminary examination is harmless. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

[4] Defendant also argues that the jury's verdict was inconsistent, i.e., because it found that defendant was not guilty of arson, she could not be guilty of insurance fraud. However, defendant failed to raise this issue in her questions presented to this Court on appeal. An issue not raised in a party's questions presented is not properly presented for appeal. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; ___ NW2d ___ (2009). Moreover, the verdict in this case is not necessarily inconsistent; evidence was presented to support a conclusion that the fire was accidental.

V. Jury Instructions

Defendant next asserts that the trial court erred by failing to instruct the jury that the prosecutor had to prove the insurance company relied on her representations. We disagree. We review claims of instructional error de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). To the extent that defendant's claim requires us to engage in statutory interpretation, our review is also de novo. *People v Maynor*, 470 Mich 289, 294; 683 NW2d 565 (2004). Our goal in interpreting the meaning of a statutory provision is to discern the Legislature's intent. *Id*. at 295. Our first step in doing so is to look to the language used. *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). We give each term its plain and ordinary meaning, unless otherwise specifically defined. *People v Smith*, 282 Mich App 191, 202; 772 NW2d 428 (2009). If the language is plain and unambiguous, then judicial construction is neither necessary nor permitted, and we apply the words as written. *Green v Ziegelman*, 282 Mich App 292, 302; 767 NW2d 660 (2009).

MCL 500.4503 provides, in relevant 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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> * * *
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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.

The langue of MCL 500.4503 is plain and unambiguous. The statute is silent as to whether the insurer must rely on a defendant's material misrepresentation in order to obtain a conviction. Thus, it clearly does not require proof that an insurer subjectively, or actually, relied on the false material representation; proof of reliance is not required to obtain a conviction.

Defendant's argument incorporating the meaning of "material fact" and "fraud" from the civil context, to require that the insurer must rely on the material fact under MCL 500.4503 is unavailing. Nothing in the statute explicitly indicates that the Legislature intended to graft the definition of "material fact" or "fraud," as commonly used in the civil context, into the statute at issue. To do so would require this Court to read additional elements into the statute. This we will not do. See *Herald Co v Bay City*, 463 Mich 111, 121; 614 NW2d 873 (2000). Accordingly, we conclude that the trial court's jury instructions, which made no reference to reliance, were proper. Relief is not warranted on this basis.

VI. Polygraph Examination

Lastly, defendant argues that the trial court erred by excluding the results of her polygraph examination. We disagree. "It is well established that testimony concerning a defendant's polygraph examination is not admissible in a criminal prosecution." *People v*

Kahley, 277 Mich App 182, 183; 744 NW2d 194 (2007). Accordingly, the trial court did not abuse its discretion by excluding the evidence.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly