[Cite as *State v. McClurkin*, 2009-Ohio-4545.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-781 (C.P.C. No. 07CR-198)
v.	:	(REGULAR CALENDAR)
Gloria McClurkin,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 3, 2009

Ron O'Brien, Prosecuting Attorney, and *Richard Termuhlen, II*, for appellee.

Clark Law Office, and *Toki Michelle Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In this delayed appeal, defendant-appellant, Gloria McClurkin, appeals from the judgment of the Franklin County Court of Common Pleas following a jury trial in which the jury found appellant guilty of insurance fraud. For the reasons that follow, we affirm appellant's conviction.

{¶2} On January 8, 2007, appellant was indicted on one count of insurance fraud in violation of R.C. 2913.47. The indictment alleged that the monetary value of appellant's false and deceptive insurance claim was more than $500, but less than

$5,000; accordingly, the charge was enhanced, pursuant to R.C. 2913.47(C), to a fifth-degree felony.

{¶3} At trial, the state presented the following evidence. On February 7, 2006, a tractor-trailer struck appellant's automobile, causing extensive damage. In addition, appellant suffered personal injuries as a result of the accident. At the time of the accident, the tortfeasor's insurer, Lincoln General Insurance Company ("Lincoln General"), had a practice of reimbursing a claim for any services performed on a vehicle within 30 days of a covered accident. An independent appraiser for Lincoln General deemed appellant's vehicle a total loss and valued it at $14,037.63.

{¶4} On February 17, 2006, Yumeka Anderson, claims representative for Lincoln General, received a fax from appellant's attorney. The fax included documents from Trueperformance, an automobile body shop, purporting to establish it had made upgrades to appellant's vehicle on February 2, 2006. One of the documents included a "final" amount of $1,110.58; another included a "final" amount of $1,749.29. (State's Exhibit 2.) Anderson noted that the documentation did not indicate proof of payment; as such, she considered the documentation to be merely estimates.

{¶5} By letter dated March 3, 2006, Anderson offered to settle appellant's claim for the appraised value of $14,037.63. (State's Exhibit 3.) On April 20, 2006, Anderson received a fax from appellant's attorney which included documents from Trueperformance purporting to demonstrate "proof of improvements" of $1,749.29 made to appellant's vehicle on February 2, 2006. The fax also included an undated document from E.T. Paul, a tire company, purporting to establish it had installed two new tires on appellant's vehicle at a cost of $351.10. Including an $85.20 storage fee from Trueperformance and an Avis

car rental fee of $1,231.24, the property damage demand from appellant's attorney was $17,454.26. (State's Exhibit 5.)

{¶6} Anderson informed appellant's attorney that the Trueperformance and E.T. Paul documentation appeared to be estimates and that appellant would need to submit dated receipts verifying that the upgrades had been completed and paid for and that the new tires had been installed and paid for. On May 1, 2006, Anderson received a fax from appellant's attorney which included a document from E.T. Paul identical to the one faxed on April 20 with the addition of a January 27, 2006 date. (State's Exhibit 6.)

{¶7} On May 3, 2006, Anderson received another fax from appellant's attorney. This fax included several Trueperformance documents, most of which were identical to those previously submitted. However, the document setting forth a "final" amount of $1,110.58 now included a "paid" stamp, notations of "2-2-06" and "cash," and the initials "RB." The document setting forth a "final" amount of $1,749.29 was also marked "paid." The fax also included the dated E.T. Paul document. (State's Exhibit 7.)

{¶8} Appellant contacted Anderson several times while the claim was still pending. Appellant told Anderson the tires E.T. Paul put on her vehicle were new; however, Anderson verified through the Lincoln General appraiser that appellant's vehicle did not have new tires at the time of the accident. Anderson also called Trueperformance and was informed that it had not made any improvements to appellant's vehicle. Anderson informed appellant she could not accept the documentation she had provided and that appellant needed to provide proof of payment for the upgrades and tires. In response, appellant sent Anderson a copy of a February 2, 2006 check she wrote to Trueperformance for $10.58. The copy is marked "Cust. Paid Cash $1100.00 – Ck

$10.58 for total of $1100.58." (Defendant's Exhibit G.) Still unsatisfied with the documentation provided by appellant, Anderson turned appellant's claim over to Lincoln General's special investigations unit to determine whether the upgrades to appellant's vehicle had actually been completed and whether the documentation submitted by appellant was authentic.

{¶9} The special investigations unit contacted Barbara Cannon, an investigator for the National Insurance Crime Bureau ("NICB"), a non-profit organization that investigates allegations of insurance fraud at the behest of its member insurance companies. Cannon reviewed the documentation provided by Lincoln General, Trueperformance, and E.T. Paul. She also interviewed Michael Cremeans, the manager of E.T. Paul, Randy Burt, a mechanic employed by Trueperformance, and obtained copies of the original invoices from Trueperformance and E.T. Paul.

{¶10} Cannon also interviewed appellant. Cannon asked appellant why she submitted a document purporting to establish that she had purchased two new tires at a cost of $351.10 when she had actually purchased two used tires at a cost of only $25 each. Appellant responded that the estimate provided by E.T. Paul was for the type of tires she originally had on her vehicle and that she wanted to be reimbursed for that type of tire. She further stated that she did not have the receipt for the used tires. Appellant also told Cannon that Trueperformance had completed the upgrades on her vehicle.

{¶11} Cannon believed appellant was being "less than truthful" with her. (Tr. 119.) She confronted appellant with the documentation she had gathered and told her that a representative from Trueperformance averred that it had completed only $1,110.58 worth of work on her vehicle, not $1,749.29 as set forth in the documentation provided by

appellant. When Cannon asked appellant why she had submitted false documentation, appellant refused to answer. Cannon then left appellant's home.

{¶12} At trial, Michael Cremeans identified the E.T. Paul document included in State's Exhibit 5 as an estimate he prepared for appellant outlining the cost of two new tires. Cremeans averred that appellant never purchased the tires referenced in the estimate; rather, appellant purchased two used tires of an unknown brand and model. Cremeans identified the E.T. Paul document included in State's Exhibit 6 as a dated version of the document in State's Exhibit 5. Cremeans testified that appellant asked him to date the estimate he had already provided; he could not, however, remember when appellant made that request.

{¶13} Randy Burt testified that appellant brought her car to Trueperformance on February 2, 2006, for installation of a new front bumper cover following a minor accident. Burt identified one of the documents in State's Exhibit 2 as an estimate of the "final" cost of installing the new bumper cover ($1,110.58) and another document in State's Exhibit 2 as an estimate of the "final" cost of installing the new bumper cover and certain accessories, such as fog lights and grill ($1,749.29). According to Burt, Trueperformance installed the front bumper cover; however, appellant had the instant accident prior to installation of the accessories. Burt testified that appellant paid $1,110.58 by cash and check for the front bumper cover. He further testified that he assumed he put the "paid" stamp and wrote the date and his initials on the document included in State's Exhibit 7 showing a "final" cost of $1,110.58 after the fact. He further testified that he assumed he put the "paid" stamp on the document included in State's Exhibit 7 showing a "final" cost of $1,749.29 at either appellant's request or at the request of her attorney. He also

testified that that invoice should not have been marked "paid" because the work was not completed. He agreed it was possible that someone from his office could have inadvertently sent the $1,749.29 estimate with the paid stamp to appellant's attorney.

{¶14} Upon this evidence, the jury found appellant guilty of insurance fraud. The jury further found that the amount of the fraud was more than $500, but less than $5,000. The trial court sentenced appellant to one year of community control.

{¶15} On appeal, appellant sets forth the following eight assignments of error:

> ASSIGNMENT OF ERROR NO. 1:
>
> A TRIAL COURT ERRS AND VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 14 OF THE OHIO CONSTITUTION, WHEN IT FAILS TO SUPPRESS EVIDENCE THAT DERIVES FROM A FAILURE ON THE PART OF THE GOVERNMENT TO ADVISE A CITIZEN OF THEIR RIGHT TO REMAIN SILENT AND RIGHT TO LEGAL REPRESENTATION.
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> ASSIGNMENT OF ERROR NO. 2:
>
> A TRIAL COURT ERRS WHEN IT DECLARES A DEFENDANT COMPETENT TO STAND TRIAL, BUT FAILS TO BASE ITS DETERMINATION ON COMPETENT INFORMATION.
>
> ASSIGNMENT OF ERROR NO. 3:
>
> A CRIMINAL DEFENDANT IN AN INSURANCE FRAUD CASE FAILS TO GET A FAIR TRIAL WHERE THE PROSECUTOR NEVER PROVIDES THE EXACT AMOUNT OF MONETARY FRAUD.
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> ASSIGNMENT OF ERROR NO. 4:
>
> A CRIMINAL DEFENDANT FAILS TO GET A FAIR TRIAL WHERE THE PROSECUTION FAILS TO SUBMIT EXCULPATORY EVIDENCE TO THE DEFENSE.

ASSIGNMENT OF ERROR NO. 5:

A CRIMINAL DEFENDANT FAILS TO GET EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER LEGAL REPRESENTATION FAILS TO MOVE TO STRIKE OBJECTIONABLE STATEMENTS, FAILS TO OBTAIN RELEVANT RECORDS, AND FAILS TO OBJECT TO A COMPETENCY DETERMINATION BASED UPON FLAWED INFORMATION.

ASSIGNMENT OF ERROR NO. 6:

THE CONVICTION OF APPELLANT FOR INSURANCE FRAUD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 7:

THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT'S MOTION FOR ACQUITTAL.

ASSIGNMENT OF ERROR NO. 8:

THE PROSECUTION ENGAGES IN MISCONDUCT WHERE IT MISSTATES FACTS DURING CLOSING ARGUMENT AND IT COMMENTS ON THE DEFENDANT'S FAILURE TO PUT ON A DEFENSE.

{¶16} Appellant's first assignment of error challenges the trial court's denial of her motion to suppress. Appellant sought to suppress statements she made during the interview with Cannon. Appellant contends Cannon failed to apprise her of her rights under *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, prior to the interview; thus, any statements appellant may have made during the interview were obtained in derogation of *Miranda* and must therefore be suppressed.

{¶17} Initially, we note that appellant's motion to suppress improperly identifies Cannon as an investigator for the Ohio Department of Insurance ("ODI"). As noted previously, Cannon is employed as an investigator for NICB. In her brief, appellant

appears to concede this fact, as well as the fact that NICB is not a government agency subject to *Miranda* constraints. Appellant nonetheless contends that Cannon, in her role as an NICB investigator, acted as an arm of the state subject to *Miranda* restrictions because ODI, in conducting a parallel investigation which ultimately led to the criminal charges filed against appellant, essentially adopted Cannon's report in its entirety.

{¶18} At the March 27, 2008 suppression hearing, Cannon testified that her employer, the NICB, is not a government agency; rather, it is a non-profit organization that receives funding and work assignments through a consortium of member insurance agencies. Cannon further testified that, as an NICB investigator, she does not have arrest authority, does not wear a badge, and does not carry a gun or any type of physical restraints.

{¶19} Cannon averred that, when she called appellant to arrange the interview, appellant suggested the two meet at appellant's home. Cannon agreed and, in accordance with appellant's suggestion, interviewed appellant at her home on June 6, 2006. According to Cannon, the interview was strictly voluntary; appellant was free to leave at any time and, had appellant indicated that she did not wish to speak to Cannon, Cannon would have left appellant's house. Cannon averred that she did not utilize coercive techniques during the interview or otherwise create an impression that appellant's freedom was restrained in any way. Cannon did not inform appellant of her rights under *Miranda,* because, according to Cannon, she is "not law enforcement [and does not] do *Miranda.*" (Tr. 37.)

{¶20} While Cannon conceded that ODI and NICB often conduct parallel investigations, share information and investigative conclusions, and that ODI often adopts

reports prepared by NICB investigators, she denied that NICB and ODI are dependent entities. Indeed, she testified that the two are "independent" and that NICB does not "fall under [ODI's] guidelines or their requirements or even [their] laws." (Tr. 33.) She further testified that, at the time of the NICB investigation, ODI was conducting a separate investigation into appellant's activities; however, she could not recall at what point she became aware of the ODI investigation. Following argument by counsel, the trial court denied appellant's motion to suppress.[1]

{¶21} As this court held in *State v. Robertson,* 10th Dist. No. 03AP-277, 2004-Ohio-556, ¶4:

> There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; and *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172; and *State v. Claytor* (1993), 85 Ohio App.3d 623, 620 N.E.2d 906.

[1] Although the trial court orally denied appellant's motion to suppress at the close of the hearing, the record does not contain a journal entry denying the motion. It is axiomatic that a trial court speaks only through its journal entries, not by oral pronouncement. *In re P.S.,* 10th Dist. No. 07AP-516, 2007-Ohio-6644, ¶12. However, it is also axiomatic that, when a trial court fails to rule on a motion, the motion is considered denied. *Georgeoff v. O'Brien* (1995), 105 Ohio App.3d 373, 378.

{¶22} Appellant contends the trial court erroneously decided the ultimate issue raised in her motion to suppress. Accordingly, we must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard. Id.

{¶23} *Miranda* warnings are required only when a suspect is subjected to custodial interrogation. The *Miranda* court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612. "A person is considered in custody for purposes of *Miranda* when he is placed under formal arrest or his freedom of action is restrained to a degree associated with a formal arrest." *State v. Simpson,* 10th Dist. No. 01AP-757, 2002-Ohio-3717, ¶33, citing *Minnesota v. Murphy* (1984), 465 U.S. 420, 104 S.Ct. 1136. "In judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a 'reasonable person would have believed that he was not free to leave.' " *State v. Gumm*, 73 Ohio St.3d 413, 429, 1995-Ohio-24, quoting *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 1877.

{¶24} In *In re Gruesbeck* (Mar. 27, 1998), 2d Dist. No. 97-CA-59, the court held that a private security guard at a high school was not required to provide *Miranda* warnings before questioning a student. In so holding, the court noted, as pertinent here, that "courts * * * have rather consistently held that such persons as * * * insurance investigators * * * are not required to comply with *Miranda.*" Id. In *State v. Archuleta* (1971), 82 N.M. 378, 482 P.2d 242, the court rejected the argument that insurance company employees directed by their superior to investigate claims were agents of or

acting on behalf of the district attorney and were thus required to provide *Miranda* warnings. Similarly, in *People v. Vleck* (1969), 114 Ill.App.2d 74, 252 N.E.2d 377, the court held that a representative of a fire insurance carrier was not required to provide the admonitions required by *Miranda* where there was no evidence that the representative was a law enforcement official or that he was acting upon the direction or with the approval of such officials. Id. at 80. In *State v. Ferrette* (1985), 18 Ohio St.3d 106, the Supreme Court of Ohio held that security personnel of the State Lottery Commission had no statutory duty to enforce the laws of Ohio nor were they vested with the powers to arrest. Accordingly, they were not law enforcement officers required to provide *Miranda* warnings. Similarly, in *State v. Thoman,* 10th Dist. No. 04AP-787, 2005-Ohio-898, ¶7, this court observed that social workers, generally, have no duty to provide *Miranda* warnings "because they are private individuals without the power to arrest."

{¶25} In the instant case, Cannon is not a law enforcement officer required to give *Miranda* warnings. She testified that she is employed by a non-profit private entity funded by an insurance consortium. She does not have arrest authority, does not wear a badge, and does not carry a gun or any type of physical restraint. Moreover, appellant has provided no evidence that Cannon was acting upon the direction or with the approval of any law enforcement officer. In addition, the evidence belies appellant's contention that Cannon acted as an arm of the state in conducting the interview. As noted, Cannon testified that NICB acts under the direction and control of its member insurance companies, not ODI. Indeed, Cannon testified that, although ODI conducted a parallel investigation of appellant and ultimately adopted Cannon's report, ODI and NICB are independent entities.

{¶26} Furthermore, even if this court were to concede that Cannon was a law enforcement officer or otherwise acting in some capacity as an arm of the state, *Miranda* warnings need only be given to those individuals in custody, and not to those who voluntarily make statements regardless of custody. See *Miranda.* The determination of whether or not an individual is in custody does not depend upon the individual's subjective belief about the interrogation, but how a reasonable person would have understood the situation given the totality of the circumstances. *Thoman* at ¶11, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138.

{¶27} Here, Cannon conducted the interview in appellant's own home. Cannon did not secure appellant in her home in any way. Indeed, Cannon testified that the interview was strictly voluntary and that appellant was free to leave at any time and, had appellant indicated that she did not wish to speak to Cannon, Cannon would have left appellant's house. Cannon averred that she did not utilize coercive techniques during the interview or otherwise create an impression that appellant's freedom was restrained in any way. Based on the totality of the circumstances, we cannot find that appellant could have reasonably believed that she was not free to leave the interview. Accordingly, we conclude that appellant was not in custody during the interview with Cannon; thus, there was no custodial interrogation and *Miranda* warnings were not required. The first assignment of error is overruled.

{¶28} Appellant's second assignment of error contends the trial court erred in finding her competent to stand trial. More specifically, appellant argues the trial court based its determination upon insufficient information. We disagree.

{¶29} At a pretrial hearing on February 14, 2008, appellant asserted she had reservations about proceeding with a competency evaluation the court had previously ordered. Appellant expressed her fear that a finding of incompetency would negate any opportunity she had to "defend myself and clear my name." (Tr. 4.) The court responded that it had ordered Netcare Forensic Services ("Netcare") to conduct a competency evaluation based upon appellant's counsel's on-the-record suggestion that appellant was not competent to stand trial. The court then admonished appellant that she was obligated to undergo that evaluation. Appellant agreed to submit to the evaluation and the trial court set a trial date.

{¶30} On March 27, 2008, the day trial was to commence, counsel for appellant stipulated to the February 26, 2008 report of Netcare forensic psychologist Daniel Hrinko, Psy.D., in which he found appellant competent. Counsel asserted that he and appellant were "satisfied with the finding of the doctor that she is competent." (Tr. 12.) Counsel further asserted he had "nothing else to submit on the question about [appellant's] competency" and averred that appellant was in fact competent. (Tr. 12.) After admitting Hrinko's report, the court stated that "based upon the report, the assertions of counsel, and the court's own observations of Ms. McClurkin, I will find Ms. McClurkin is competent to stand trial." (Tr. 13.)

{¶31} On April 8, 2008, the court convened for the purpose of accepting appellant's no contest plea to the misdemeanor offense of attempted tampering with records. However, during the plea colloquy, appellant stated that she was experiencing difficulty understanding the proceedings. During the ensuing discussion, appellant informed the court she was being treated by both a psychologist and a psychiatrist.

Defense counsel reported that neither the psychologist nor the psychiatrist had provided reports to Netcare for evaluation. The prosecutor averred that the Netcare report indicated that appellant refused to allow the physicians' reports to be provided to Netcare. The court then stated that it would refer appellant back to Netcare and requested that appellant provide consent to permit a Netcare evaluator to review information from her treating psychologist and psychiatrist. Appellant agreed; the court averred it would request that appellant be evaluated by a different Netcare evaluator.

{¶32} Following the hearing, the court, on April 9, 2008, filed a written disposition stating that "Netcare Assessment should be performed by different evaluator than last assessment and shall include a review of defendant's psychiatrist and psychologist's records." On April 22, 2008, the court filed a journal entry ordering appellant to submit to an evaluation by a Netcare evaluator, that the evaluation be conducted by a different evaluator, and that the evaluator review appellant's mental health records.

{¶33} At a hearing on June 9, 2008, the trial court noted that Netcare clinical and forensic psychologist Jaime Lai, Psy.D., had conducted a second evaluation pertaining to appellant's competency and had prepared a report of her findings on May 21, 2008. Both counsel indicated that they had reviewed the report. Defense counsel objected to Lai's report and indicated that, although he was "not prepared at this point to contest the findings," he wanted to make a record of his objections to "the methodology and the findings." (Tr. 48-49.) Following a brief discussion, defense counsel ultimately withdrew the objections. Both appellant and the prosecution stipulated to Lai's report. (Tr. 55.) Defense counsel indicated he had nothing additional to submit on the subject of

appellant's competence. Accordingly, the trial court admitted Lai's report, accepted the findings made therein, and found appellant competent.

{¶34} Appellant argues the trial court ordered that the second evaluation be conducted by an independent, non-Netcare evaluator who was to perform an in-home evaluation and consult appellant's treating physicians. Appellant contends that these orders were not followed; accordingly, because the trial court did not have the benefit of the information it sought, the court's reasoning and conclusion as to appellant's competency was necessarily flawed.

{¶35} Initially, we note that the record belies appellant's claims regarding the trial court's orders related to the competency evaluation. As noted, the trial court's April 9, 2008 disposition sheet and its April 22, 2008 journal entry ordered that appellant's second evaluation be conducted by a different *Netcare* evaluator, not an independent evaluator. Further, there is no indication in the record that the trial court ordered an in-home evaluation. Moreover, neither the written disposition nor the journal entry order that appellant's treating physicians be consulted; both order only that the second evaluation include a *review* of appellant's mental health records.

{¶36} In addition, as noted by the state, appellant stipulated to the admission of both reports and never suggested that either was flawed. See *State v. Mink,* 101 Ohio St.3d 350, 2004-Ohio-1580, ¶29 (failure to object to any aspect of competency evaluations waives all but plain error).

{¶37} Finally, appellant does not indicate how having a different evaluator who conducted an in-home evaluation and consulted with her treating physicians would have changed the trial court's finding of competency. It is purely speculative whether a

different examiner, additional information, or both, would have made any difference in the outcome of her competency evaluation. See *State v. Ferguson,* 108 Ohio St.3d 451, 2006-Ohio-1502, ¶55, citing *Mink* at ¶94. The second assignment of error is overruled.

{¶38} As appellant's third, sixth, and seventh assignments of error are interrelated, we shall address them jointly. Under the third assignment of error, appellant argues the prosecution failed to establish the exact dollar amount of the fraud. In essence, appellant challenges the sufficiency of the evidence that the monetary value of the fraud was more than $500, but less than $5,000. Appellant's sixth assignment of error argues her conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Appellant's seventh assignment of error urges that the trial court erred in failing to grant her Crim.R. 29 motion for judgment of acquittal.

{¶39} Preliminarily, we note that a motion for judgment of acquittal pursuant to Crim.R. 29 tests the sufficiency of the evidence. *State v. Darrington,* 10th Dist. No. 06AP-160, 2006-Ohio-5042, ¶15, citing *State v. Knipp,* 4th Dist. No. 06CA641, 2006-Ohio-4704, ¶11. Accordingly, an appellate court reviews a trial court's denial of a Crim.R. 29 motion utilizing the same standard for reviewing a sufficiency of the evidence claim. *Darrington* at ¶15, citing *State v. Barron,* 5th Dist. No. 05 CA 4, 2005-Ohio-6108, ¶38.

{¶40} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, paragraph two of the syllabus. Accordingly, we shall separately discuss the standard of review applicable to each.

{¶41} In *State v. Jenks* (1991), 61 Ohio St.3d 259, the Supreme Court of Ohio held that "[a]n appellate court's function when reviewing the sufficiency of the evidence to

support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." Id., paragraph two of the syllabus. The court further held that "[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶42} Whether the evidence is legally sufficient to sustain a verdict is a question of law, not fact. *Thompkins* at 386. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Accordingly, evaluation of witness credibility is not proper on review for evidentiary sufficiency. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79. An appellate court may not disturb a jury verdict unless, after viewing the evidence in a light most favorable to the prosecution, the court finds that reasonable minds could not reach the conclusion reached by the jury. *State v. Treesh,* 90 Ohio St.3d 460, 484, 2001-Ohio-4.

{¶43} With these parameters in mind, we shall first examine whether the prosecution presented sufficient evidence to support appellant's conviction for fifth-degree felony insurance fraud.

{¶44} Insurance fraud is proscribed by R.C. 2913.47, which provides, in pertinent part:

> (B) No person, with purpose to defraud or knowing that the person is facilitating a fraud, shall do either of the following:
>
> (1) Present to, or cause to be presented to, an insurer any written or oral statement that is part of, or in support of, * * * a claim for payment pursuant to a policy * * * knowing that the statement, or any part of the statement, is false or deceptive;
>
> (2) Assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement that is intended to be presented to an insurer as part of, or in support of * * * a claim for payment pursuant to a policy * * * knowing that the statement, or any part of the statement, is false or deceptive.

{¶45} R.C. 2913.47(A)(2) defines "deceptive" as a statement that "in whole or in part, would cause another to be deceived because it contains a misleading representation, * * * or by any other conduct, at, or omission creates, confirms, or perpetuates a false impression, including, but not limited to, a false impression as to law, value, state of mind, or other objective or subjective fact." The definition of "statement" includes, but is not limited to, "any notice, letter, or memorandum; proof of loss; * * * receipt for payment; invoice, account, or other financial statement; estimate of property damage; bill for services * * * other evidence of loss, injury, or expense; computer-generated document; and data in any form." R.C. 2913.47(A)(5). In turn, "data" includes, among other things, any other representation of facts that "have been prepared in a formalized manner." R.C. 2913.47(A)(1).

{¶46} Although the monetary value of the fraud is not an element of the crime of insurance fraud as defined by R.C. 2913.47(B), such value relates to the degree of penalty to be imposed for the particular fraud offense. R.C. 2913.47(C) elevates the crime of insurance fraud from a first-degree misdemeanor to a fifth-degree felony "[i]f the

amount of the claim that is false or deceptive is five hundred dollars or more and is less than five thousand dollars."

{¶47} R.C. 2913.61(A) directs that the jury or court trying the accused must determine the value of the property or services involved in a "theft offense," including insurance fraud,[2] and must return the finding of value as part of the verdict. The fact finder need not determine the exact value when it determines that the property's value is $500 or more. As relevant here, it is sufficient to determine that the value falls within the range of $500 to $4,999.99. Here, the jury determined that the monetary value of the insurance fraud was more than $500, but less than $5,000 and returned that finding as part of its verdict.

{¶48} Proof of guilt may be established by circumstantial evidence, real evidence, and direct or testimonial evidence, or any combination of the three, and all three have equal probative value. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151. "Indeed, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence." *State v. Richey,* 64 Ohio St.3d 353, 363, 1992-Ohio-44, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 167.

{¶49} Here, appellant presented Lincoln General with written statements in support of her claim for payment purporting to establish that, within 30 days of the accident, E.T. Paul installed two tires on her vehicle at a cost of $351.10. Appellant reported to Anderson that the tires E.T. Paul put on her vehicle were new. However, she admitted to Cannon that E.T. Paul actually installed two used tires at a cost of only $50.

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[2] R.C. 2903.01(K) defines a "theft offense" as any of the following: "(1) A violation of section * * * 2913.47 * * * of the Revised Code."

She told Cannon she wanted to be reimbursed for the $351.10 cost of two new tires because those were the type of tires that were on the vehicle originally. Cremeans testified that the document he prepared for appellant setting forth a cost of $351.10 for two new tires was merely an estimate and that appellant never purchased the tires referenced therein.

{¶50} Appellant also presented Lincoln General with written statements in support of her claim purporting to establish that Trueperformance completed upgrades to her vehicle at a cost of $1,749.29. Appellant told Cannon that Trueperformance completed the upgrades to her vehicle. However, other statements submitted by appellant suggest that she paid only $1,110.58 for the upgrades that were actually completed. Burt testified that appellant paid $1,110.58 for the work actually completed by Trueperformance. Further, both Cremeans and Burt testified that appellant or her attorney requested that they post-date the documentation submitted with her claim.

{¶51} We find that the direct and circumstantial evidence in this case, and the reasonable inferences that may be drawn therefrom, were more than sufficient to establish appellant's guilt. The jury could have reasonably concluded that the state's evidence sufficiently established that appellant knew that the statements she provided Lincoln General were deceptive in that they created a false impression as to the value of the services provided by E.T. Paul and Trueperformance. In addition, the jury could have reasonably concluded that the value of appellant's deceptive claim was more than $500, but less than $5,000. Appellant submitted a claim for $351.10 for tires which cost $50, a difference of $301.10. She also submitted a claim for $1,749.29 for upgrades which cost $1,110.58, a difference of $638.71. The total monetary value of appellant's deceptive

claim was thus $939.81. Viewing the evidence in a light most favorable to the state, we find there was sufficient evidence upon which the jury could reasonably conclude that appellant committed insurance fraud with a monetary value of more than $500, but less than $5,000.

{¶52} Having determined that appellant's conviction is supported by sufficient evidence, we shall next examine appellant's claim that her conviction is against the manifest weight of the evidence. An appellate court evaluates a manifest weight argument under a different standard than that employed in a sufficiency analysis. " 'The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other.' " *State v. Gray* (Mar. 28, 2000), 10th Dist. No. 99AP-666, quoting *State v. Buterbaugh* (Sept. 16, 1999), 10th Dist. No. 98AP-1093. In order for an appellate court to reverse the judgment of a trial court on manifest weight grounds, the appellate court must unanimously disagree with the jury's resolution of the conflicting evidence. *Thompkins* at 387. In a manifest weight review, the court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. The discretionary power to reverse on manifest weight grounds should be exercised only in the exceptional case in which " 'the evidence weighs heavily against the conviction.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶53} Appellant's argument with regard to her manifest weight claim is identical to that asserted in her sufficiency claim. As noted above, the jury heard evidence that

appellant submitted written statements to Lincoln General seeking reimbursement for services performed on her vehicle totaling $2,100.39, when, in fact, appellant paid a total of $1,160.58 for the services that were actually performed. Thus, the jury did not clearly lose its way in finding that, in submitting her claim, appellant knowingly made false or deceptive statements to an insurer with regard to an amount between $500 and $5,000. Appellant's third, sixth, and seventh assignments of error are overruled.

{¶54} Appellant's fourth assignment of error contends the state withheld exculpatory evidence in violation of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194. In particular, appellant maintains the state failed to turn over audio recordings pertinent to appellant's claim. Although appellant does not expressly so state, we assume the audio recordings to which appellant refers pertain to Cannon's interviews of appellant, Cremeans, and Burt.

{¶55} *Brady* holds that the prosecution's suppression of evidence favorable to the accused upon his or her request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87. Thus, in order to establish a *Brady* violation, appellant must demonstrate that the prosecution failed to disclose evidence upon request, that the evidence was favorable to the defense, and that the evidence was material to appellant's guilt.

{¶56} At the March 27, 2008 pretrial hearing, Angel Bowers, an investigator with ODI, submitted all files pertaining to its investigation for the court's review. Bowers stated that, if ODI had been provided any audio recordings, they would be part of the ODI file. She further stated that, if the recordings were not in the ODI file, Lincoln General might have them. The trial court indicated it would review the ODI files in chambers for *Brady*

material. Defense counsel acknowledged that, if the recordings were not in the ODI file, he would need to subpoena them from Lincoln General. At the pretrial hearing on April 8, 2008, the trial court averred, without elaboration, that it had reviewed the ODI file and returned it to Bowers. The trial court's silence as to its review of the ODI file strongly suggests that the file did not contain any audio recordings.

{¶57} There is no indication in the record that either ODI or the prosecution ever possessed these recordings, if they even existed. As noted by Bowers, if the recordings were not part of the ODI file, they may have remained in the possession of Lincoln General. The state cannot be faulted for failing to disclose evidence it did not have. " '*Brady* and its progeny apply to evidence possessed either by the prosecutor or by someone over whom he has control. * * * Materials not possessed by the government cannot be suppressed within the meaning of *Brady.*' " *State v. Zirkle* (Aug. 27, 1997), 4th Dist. No. 95 CA 21, quoting *United States v. Rodriguez* (C.A.11, 1990), 917 F.2d 1286, 1291. The fact that a defendant wishes to have materials that may or may not exist, and may or may not be in the prosecutor's custody or control, does not demonstrate that such materials are *Brady* materials that the prosecutor has a duty to disclose. Appellant has not substantiated her claim that the state withheld the audio recordings containing evidence favorable to her and material either to her guilt or punishment. Appellant merely speculates that the audio recordings would have changed the outcome of the trial. A *Brady* violation may not rest upon a claim that is "purely speculative." *State v. Hanna,* 95 Ohio St.3d 285, 2002-Ohio-2221, ¶60. The fourth assignment of error is overruled.

{¶58} Appellant's fifth assignment of error asserts she was denied the effective assistance of counsel at trial under the standard set forth in *Strickland v. Washington*

(1984), 466 U.S. 668, 104 S.Ct. 2052. Appellant claims her trial counsel was ineffective in several respects: (1) failing to recover the audio recordings of Cannon's interviews; (2) failing to object to "improper statements" made by the prosecution; (3) failing to object to the trial court's finding of competency when such finding was not based upon information requested by the court; and (4) conceding that the interview with Cannon was non-custodial.

{¶59} In order to prevail on her claim of ineffective assistance of counsel under *Strickland,* appellant must demonstrate that "counsel's representation fell below an objective standard of reasonableness" and that prejudice arose from counsel's performance. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064. "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064. Thus, a two-part test is necessary to examine such claims. First, appellant must demonstrate that counsel's performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith*, 79 Ohio St.3d 514, 534, 1997-Ohio-367. Second, appellant must show that, but for counsel's errors, there is a reasonable probability that the results of the trial would be different. Id.

{¶60} The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343. Applying the

foregoing standards, we find that appellant has failed to demonstrate that her trial counsel was ineffective.

{¶61} As noted previously, it is unclear whether the audio recordings appellant claims counsel should have discovered even existed. Moreover, appellant merely speculates that the audio recordings would have aided her defense. An appellate court's direct review of an ineffective assistance claim "is strictly limited to the record that was before the trial court" and cannot be based upon speculation. *State v. Lewis*, 10th Dist. No. 04AP-1112, 2005-Ohio-6955, ¶35-36.

{¶62} Appellant does not identify the allegedly "improper statements" made by the prosecution; as such, it is impossible for this court to evaluate this claim. Further, counsel's failure to object may have been a tactical or strategic decision. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558 " '[A] failure to object, in and of itself, does not rise to the level of ineffective assistance of counsel.' " *State v. Ryan,* 10th Dist. No. 08AP-481, 2009-Ohio-3235, ¶77, quoting *State v. Jackson*, 8th Dist. No. 86105, 2006-Ohio-174, ¶88.

{¶63} Appellant's complaint regarding defense counsel's handling of the competency issue is similarly unavailing. As noted, the record belies appellant's claims regarding the trial court's orders related to the competency evaluation. Further, as noted previously, appellant's claim that a different evaluator or additional information, or both, would have made any difference in the outcome of her competency evaluation is speculative.

{¶64} Finally, the record does not support appellant's contention that defense counsel conceded that appellant's interview with Cannon was non-custodial. At the suppression hearing, counsel averred that "[w]hether or not this is custodial, I am not - - - the defense isn't willing to concede this was a noncustodial issue." (Tr. 44.) Although counsel candidly acknowledged the difficulty in arguing that the interview was custodial, he nonetheless fully developed his argument and cited case law in support thereof. The fifth assignment of error is overruled.

{¶65} Appellant's eighth assignment of error contends the prosecutor engaged in misconduct during closing argument. In particular, appellant contends that: (1) no evidence or reasonable inference supported the prosecutor's statement that appellant marked "paid" on one of the documents she provided to Lincoln General; and (2) the prosecutor improperly commented upon appellant's decision not to testify at trial.

{¶66} When reviewing allegations of prosecutorial misconduct, appellate courts must consider that " 'the touchstone of due-process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Hill* (1996), 75 Ohio St.3d 195, 203, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947. Accordingly, prosecutorial misconduct will not be grounds for reversal unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. In order to reverse a conviction for prosecutorial misconduct, the defendant must demonstrate both that the comments were improper and that they prejudicially affected the defendant's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. A prosecutor is afforded wide latitude in closing argument, which must be

reviewed in its entirety to determine whether the challenged remarks prejudiced the defendant. *Hill* at 204.

{¶67} "Prosecutors are entitled to latitude as to what the evidence has shown and what inferences can reasonably be drawn from the evidence." *State v. Smith* (1997), 80 Ohio St.3d 89, 111, citing *Lott* at 165. However, a prosecutor may not express his personal belief or opinion as to the credibility of a witness, the guilt of an accused, or allude to matters that are not supported by admissible evidence. *Smith*, 14 Ohio St.3d at 14.

{¶68} The record reveals that, in his rebuttal argument, the prosecutor asserted that appellant caused someone from Trueperformance to place a "paid" stamp on the document showing a "final cost" of $1,749.29. Defense counsel objected, asserting that this comment lacked evidentiary support. The trial court sustained defense counsel's objection and later instructed the jury that "[s]tatements or answers that were stricken by the court or that you were instructed to disregard are not evidence and must be treated as though you never heard them." (Tr. 315.) We presume the jury followed these instructions. *State v. Coleman*, 85 Ohio St.3d 129, 135, 1999-Ohio-258. Thus, no prosecutorial misconduct occurred.

{¶69} As to appellant's second contention, we note that a prosecutor may not comment on an accused's failure to testify at trial. *State v. Fears* (1999), 86 Ohio St.3d 329, 336, citing *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229. The test for prosecutorial misconduct in commenting upon a defendant's failure to testify is " 'whether the language used was *manifestly* intended or was of such character that the jury would naturally and *necessarily* take it to be a comment on the failure of the accused to testify.' "

State v. Webb (1994), 70 Ohio St.3d 325, 328, quoting *Knowles v. United States* (C.A.10, 1955), 224 F.2d 168, 170, quoted in *State v. Cooper* (1977), 52 Ohio St.2d 163, 173 (emphasis sic).

{¶70} A prosecutor may, however, properly comment upon the defense's failure to present evidence in support of its case. *State v. McKnight,* 107 Ohio St.3d 101, 2005-Ohio-6046, ¶293. In *McKnight,* the court rejected a challenge to the prosecutor's closing argument in which he asked the jury, "[w]hy didn't [the defense] present any witnesses?" The court concluded that "[s]uch comments do not imply that the burden of proof has shifted to the defense, nor do they necessarily constitute a penalty on the defendant's exercise of his Fifth Amendment right to remain silent." Id., quoting *State v. Collins,* 89 Ohio St.3d 524, 2000-Ohio-231.

{¶71} Although appellant does not specifically identify the challenged statements, we presume she is referring to remarks made during the prosecutor's rebuttal argument pertaining to Cannon's objective in interviewing appellant and the conclusions derived from her investigation. The comments were made in response to the defense's contention that Cannon felt she had to find that appellant committed fraud in order to justify Cannon's existence as a fraud investigator. Defense counsel had argued that Cannon did not meet with appellant to "investigate" the case, but, rather, "get a confession or an admission," and that she needed to resolve the case in favor of her client (Lincoln General). (Tr. 293.) In response, the prosecutor averred:

> Did Ms. Cannon need a conviction in this case? No. There was no evidence to that. Now, I want to comment on this, the fact that there was no evidence to something that the defense argued about something in their closing here.

> The defense – and you have heard this throughout this trial. The burden is on the state to prove beyond a reasonable doubt that there was a fraud in this case. All right. The defense is not compelled to present a defense, but they chose to do that. They chose to do cross-examination, and they chose not to present anything in their own case after that. You are limited in this case to what was presented in the state's case in chief and the cross-examination of that. That is it.
>
> Now, the defense suggested to you ultimately in their closing arguments by suggesting that Ms. Anderson just wanted to get this claim off her desk and passed it on and Ms. Cannon needed this conviction. What is the defense suggesting to you? That there is a conspiracy. Was there any evidence by the defense presented to support the claim that there is some sort of conspiracy by the insurance companies to go after Ms. McClurkin? No. There wasn't. What they are asking you to do is speculate now.
>
> That is the nature of the defense here. They are asking for mere speculation. The state presented clear facts in this matter.

(Tr. 307-08.)

{¶72} We cannot conclude that the prosecutor's comments were manifestly intended or were of such character that the jury would naturally and necessarily take them as a comment on appellant's failure to testify. To the contrary, the comments were properly directed toward appellant's failure to present evidence to support its theory that Cannon's conclusions resulted from her desire to justify her existence as a fraud investigator.

{¶73} Finally, we note that the trial court instructed the jury on the presumption of innocence, the state's burden of proof, and that counsel's closing arguments were not evidence. In addition, the trial court instructed the jury that appellant had a constitutional right not to testify and that her decision not to testify could not be considered for any

purpose. As noted, the jury is presumed to follow the court's instructions. *Coleman.* Based upon the foregoing, we conclude that the prosecutor did not commit prosecutorial misconduct in closing argument. The eighth assignment of error is overruled.

{¶74} Having overruled appellant's eight assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.

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