STATE OF MICHIGAN

COURT OF APPEALS

MALIKA ROBINSON, Plaintiff-Appellant,	UNPUBLISHED September 2, 2014
v	No. 315234 Wayne Circuit Court
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant-Appellee.	LC No. 11-000086-CK

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of no cause for action after five out of seven jurors found that plaintiff falsely swore to a material fact in this case involving an attempt to obtain insurance money after a house fire and alleged theft. We affirm.

I. EVIDENCE AND ARGUMENTS

Plaintiff suggests[1] that there were numerous errors in the admission of evidence and in statements and questions by defense counsel. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). In order to preserve an evidentiary issue, a party must object at trial on the same ground that it presents on appeal. *Klapp v United Ins Group Agency*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Plaintiff has preserved only some of her claims for review.

[1] We use the term "suggests" because plaintiff's appellate brief is, at times, difficult to comprehend.

"A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence." *Albro v Drayer*, 303 Mich App 758, 760; 846 NW2d 70 (2014). "The trial court has the discretion to control the questioning of witnesses, and we review its determination of the scope of cross-examination for an abuse of discretion." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). "Appellate review of claims of misconduct by counsel is de novo to determine whether a party was denied a fair trial." *Moody v Home Owners Ins Co*, 304 Mich App 415; 849 NW2d 31, 49 (2014). "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *In re Estate of Flury*, 249 Mich App 222, 228; 641 NW2d 863 (2002) (citation and internal quotation marks omitted). "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

B. LAW

"[T]he trial court has the responsibility to control the introduction of evidence and the arguments of counsel and to limit them to relevant and material matters." *Tobin v Providence Hosp*, 244 Mich App 626, 640; 624 NW2d 548 (2001).

> Only relevant evidence is admissible. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. [*Id*. at 637-638 (citations and internal quotation marks omitted).]

With regard to claims of misconduct by counsel,

> [a]nalysis of such claims requires two steps: (1) did error occur and (2) does it require reversal. A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. Stated otherwise, [r]eversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. Proper instructions to the jury will cure most, but not all, misconduct by counsel. [*Moody*, 849 NW2d at 49 (citations and internal quotation marks omitted).]

C. OPENING STATEMENT

Plaintiff cites the pages of the transcript on which defense counsel argued in his opening statement that plaintiff had a motive to intentionally cause the fire because (1) her boyfriend, Willie Pitman, had stopped paying her bills, (2) she called to change her insurance coverage just

before the fire, (3) she made inconsistent statements regarding her income and assets, (4) she was behind on her bills, (5) she wanted Pitman's interest in the house and its contents, (6) she had an opportunity to make money on the house, and (7) she concealed her expenses and cost of living. Defense counsel also argued that plaintiff made material misrepresentations and willfully concealed facts regarding her income, the circumstances of the loss, the sources of her income, and ownership of the home and its contents. He further argued that plaintiff had credibility issues based on conflicts in her testimony and statements to the Department of Human Services (DHS).

Plaintiff suggests that these statements were false or irrelevant. Plaintiff has failed to establish or even to adequately argue that defense counsel made these statements with no underlying basis. The issues raised by defense counsel during his opening statement were relevant to the defenses of arson, material misrepresentation, willful concealment, and false swearing.[2] See *Tobin*, 244 Mich App at 637-638. Such comments did not deny plaintiff a fair trial and the trial court did not abuse its discretion in allowing the argument. See *Moody*, 849 NW2d at 49.[3] Even if the statements *were* improper, the trial court instructed the jury that the lawyers' statements are not evidence. "This admonition is generally sufficient to cure the prejudice arising from improper remarks of counsel." *Tobin*, 244 Mich App at 641.

D. STATEMENTS TO DHS

Plaintiff also suggests that defense counsel engaged in improper cross-examination and impeachment of her. Plaintiff cites to the page of the transcript on which defense counsel asked plaintiff whether she told DHS that she was paying rent of $565 on the Blackstone property in September 2008 and plaintiff testified that she did. Plaintiff's inconsistent statements to DHS were relevant to her credibility. See *In re Dearmon/Haverson-Dearmon*, 303 Mich App 684, 696; 847 NW2d 514 (2014) ("[e]vidence bearing on a witness's credibility is always relevant"). Thus, plaintiff was not denied a fair trial and the trial court did not abuse its discretion in allowing such questioning. See *Persichini*, 238 Mich App at 632.

Plaintiff further refers to Defense Exhibits U and V. Defense Exhibit U was plaintiff's application with DHS. Plaintiff admitted that on the application she indicated that the total cash assets of her household and her monthly gross income were $630, she was not self-employed, no one in the household was working, her rent was $650, and she had expenses for heat, electricity, and telephone services. She admitted that some of these statements were not true. Exhibit V was plaintiff's application for the food-assistance program. It does not appear that either exhibit was admitted. Rather, defense counsel questioned plaintiff about her statements in Exhibit U. Again, this evidence was relevant to her credibility. Plaintiff was not denied a fair trial and the

[2] Plaintiff also appears to be alleging that the trial court improperly instructed the jury that defendant's statements about plaintiff's financial status were material to the defense of false swearing. However, such evidence was relevant and material.

[3] Similarly, defense counsel's questions regarding how plaintiff made money were not improper.

trial court did not abuse its discretion in allowing defense counsel to question plaintiff about her statements. See *id*. We find no basis for reversal.

E. USE OF MARIJUANA

Plaintiff cites the pages of the transcript on which defense counsel asked plaintiff about her use of marijuana and plaintiff's counsel objected. Defendant argued that plaintiff's use of marijuana was relevant to her financial motive and the cause of the fire. Plaintiff argued that the trial court should grant a mistrial. The trial court stated that plaintiff had not yet answered the question. The trial court instructed the jury that the testimony was to be considered only regarding a possible cause of the fire and plaintiff's expenses. Defense counsel read plaintiff's testimony at the Examination Under Oath (EUO), in which she stated that she had been smoking marijuana at the house the day of the fire and did not leave anything burning. This evidence was relevant to the defense of arson because it related to a possible cause of the fire and also related to plaintiff's expenses and thus a possible motive. Thus, the question did not deny plaintiff a fair trial and the trial court did not abuse its discretion in allowing the question. See *id*. The trial court also did not abuse its discretion in denying plaintiff's motion for a mistrial. *In re Estate of Flury*, 249 Mich App at 228.

F. ADDRESSES

Plaintiff further cites the page of the transcript on which defense counsel asked her whether she ever provided an accurate address for Derrell Williams or "Beez," individuals who plaintiff claimed provided her with money. Plaintiff testified that she gave defendant Williams's address. Defense counsel stated that "they were not good addresses and nobody could find out who they were." Plaintiff's counsel then objected and stated that plaintiff gave defendant the addresses and phone numbers. The trial court overruled the objection, but then told plaintiff that she did not have to answer. It is not clear what error plaintiff alleges. The question was not improper because it was relevant to defendant's willful concealment defense, which was based, in part, on plaintiff's failure to provide the names and addresses of the men she claimed were the sources of her income. Even if defense counsel's statement was improper, the trial court instructed the jury that the lawyers' statements were not evidence. This instruction cured any prejudice. *Tobin*, 244 Mich App at 641.

G. PREVIOUS INSURANCE POLICY

Plaintiff further argues that defense counsel fraudulently offered for admission plaintiff's previous insurance policy and the insurance agent, Gary Therrian, falsely testified that the policy was void.[4]

[4] Defendant claims that the insurance policy was a stipulated exhibit. However, it is unclear whether the insurance policy was admitted at trial. We note that Exhibit 1 was the declaration page. Plaintiff's counsel questioned plaintiff about it and it appears that it was shown to the jury.

During examination by plaintiff's counsel, Therrian testified that plaintiff called about "platinum protection." During the testimony, plaintiff's counsel stated that Exhibit 4F was "the policy." Therrian testified that the coverage for jewelry was $1,000. Plaintiff's counsel then asked Therrian what jewelry coverage was listed on the letter he sent plaintiff. Therrian testified that it was $5,000. Based on this testimony, it appears that Exhibit 4F was plaintiff's original policy, before she obtained platinum coverage. If this is the policy that plaintiff claims was improperly admitted, it is not clear that this exhibit was admitted and, nonetheless, plaintiff's counsel brought it up. Moreover, Therrian explained that platinum coverage is "an enhancement to your policy." He testified that "[t]he actual underpinnings of a policy, if you just had a base policy with Allstate, it would still be the same." Thus, it would not be improper to admit the original policy.

Plaintiff's claim that Therrian testified that the policy was void is also without merit. On cross-examination by defense counsel, Therrian testified that both plaintiff and Pitman were insured at the time of the fire. However, he did not have any documentation, other than the original application, that contained Pitman's name. Defense counsel asked Therrian whether he printed everything from defendant's system in preparation for trial and Therrian testified that the policy had been terminated and so he was unable to go back in the records, but he did print the history of endorsements. Defense counsel then sought admission of the claim of loss and endorsement history. Contrary to plaintiff's assertion, Therrian never testified that her policy was "void."

H. PREJUDICIAL EVIDENCE

Plaintiff cites to the page of the transcript on which the trial court instructed the jury that its responsibility was to run the trial fairly and make decisions about evidence. Plaintiff suggests that the trial court violated this instruction. However, plaintiff has failed to establish that there was a violation in the admission of any evidence or that she was denied a fair trial.[5]

I. MOTIONS IN LIMINE

Plaintiff also argues that the trial court failed to adhere to its rulings regarding a motion in limine that she filed. She fails to explain what the pertinent rulings were and how they were violated and has therefore abandoned this issue; we decline to address it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

[5] Plaintiff's claim regarding the jury verdict is not preserved and is waived because plaintiff did not list it in her statement of questions presented. See *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). MCR 2.514(A) provides that, in the absence of a stipulation, "a verdict in a civil action tried by 6 jurors will be received when 5 jurors agree." Plaintiff fails to explain why the 5-2 verdict was erroneous and also incorrectly states that the verdict was 4-2.

J. REPLY BRIEF

Plaintiff's reply brief contains 10 issues on appeal. Many of the issues and arguments are the same as in her main brief on appeal. However, plaintiff also raises several new issues and arguments. Issues first raised in a reply brief are not properly before this Court. *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012); see also MCR 7.212(G) ("[r]eply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief").

INEFFECTIVE ASSISTANCE OF COUNSEL

Plaintiff contends that her trial counsel provided ineffective assistance by failing to prepare for trial, investigate the insurance policy, interview witnesses, and object to immaterial evidence.

Although plaintiff argues that her trial counsel was ineffective, it is first necessary to determine whether a party may claim ineffective assistance of counsel in a civil case. This is a question of law; we review questions of law de novo. See *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441,451; 844 NW2d 727 (2013).

The right to effective assistance applies in criminal prosecutions, not civil proceedings such as the present one. See Const 1963, art 1, § 20, *Haller v Haller*, 168 Mich App 198, 199; 423 NW2d 617 (1988), and *United States v 100,375.00 in US Currency*, 70 F3d 438, 440 (CA 6, 1995); see also, generally, *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994) (discussing the guarantee of effective assistance of counsel for criminal defendants). Plaintiff's claim is without merit.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto