STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2010
v	No. 290689 Monroe Circuit Court
RANDALL LEE MCDANIEL, Defendant-Appellant.	LC No. 07-036304-FH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of conducting a criminal enterprise, MCL 750.159i(1), and operating a motor vehicle chop shop, MCL 750.535a. The trial court sentenced him, as a second-offense habitual offender, MCL 769.10, to 51 months' to 30 years' imprisonment for the criminal-enterprise conviction and to 24 months' to 15 years' imprisonment for the chop-shop conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction for conducting a criminal enterprise because there was no evidence of an "enterprise" involving anyone but himself. In analyzing this issue, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). We are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*. at 400. The prosecution is not obligated to "negate every reasonable theory consistent with innocence[;]" rather, it must persuade the jury despite the contradictory evidence that a defendant puts forth. *Id*. We defer to the jury's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In construing a statute, we begin with the language of the statute itself to determine if any ambiguity is present; if the statute is unambiguous, no construction is permitted and it must be enforced as written. *People v Martin*, 271 Mich App 280, 320; 721 NW2d 815 (2006).

MCL 750.159i(1) provides: "A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." A "pattern of racketeering activity" is defined as "not less than 2 incidents of racketeering to which all of the following characteristics apply:"

(*i*) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.

(*ii*) The incidents amount to or pose a threat of continued criminal activity.

(*iii*) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity. [MCL 750.159f(c).]

Further, "racketeering" is defined as

committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain, involving any of the following

* * *

(gg) A felony violation of section 535 or 535a, concerning stolen, embezzled, or converted property. [MCL 750.159g.]

Moreover,

"enterprise" includes an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity. Enterprise includes illicit as well as licit enterprises. [MCL 750.159f(a).]

A "person" is defined as "an individual, sole proprietorship, partnership, cooperative, association, corporation, limited liability company, personal representative, receiver, trustee, assignee, or other legal or illegal entity." MCL 750.159f(d).

In *Martin*, 271 Mich App at 321, this Court summarized the elements of conducting a criminal enterprise:

(1) an enterprise existed, (2) defendant was employed by or associated with the enterprise, (3) defendant knowingly conducted or participated, directly or indirectly, in the affairs of the enterprise, (4) through a pattern of racketeering activity that consisted of the commission of at least two racketeering offenses that (a) had the same or substantially similar purpose, result, participant, victim, or method of commission, or were otherwise interrelated by distinguishing

characteristics and are not isolated acts, (b) amounted to or posed a threat of continued criminal activity, and (c) were committed for financial gain.[1]

Although defendant relies on the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1961 *et seq*., and federal case law interpreting RICO, the Michigan Supreme Court, in *People v Guerra*, 469 Mich 966; 671 NW2d 535 (2003), specifically rejected using federal RICO authority to construe MCL 750.159i(1), and concluded that the statute was unambiguous and should be enforced as written. Thus, defendant's reliance on such authorities on appeal is unavailing.

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence presented to enable a rational trier of fact to conclude, beyond a reasonable doubt, that defendant conducted a criminal enterprise under MCL 750.159i(1). Defendant was a person associated with an enterprise engaged in a pattern of racketeering activity. The plain language of the criminal enterprise statute, MCL 750.159i(1), requires that the "person," defined to include an individual or sole proprietorship, MCL 750.159f(d), be "employed by[] or associated with" an enterprise. Further, "enterprise" is defined in MCL 750.159f(a) to include an individual or sole proprietorship, and the entity need not be a legal, formally organized entity.

The evidence in the present case reflects that defendant possessed numerous motorcycles and motorcycle parts that appeared to be stolen and had altered or obliterated identification numbers; he possessed tools that could be used to alter the identification numbers of vehicles and vehicle parts; defendant previously sold Jose Valle a motorcycle that had no vehicle identification number (VIN); he then offered to sell Jerod Beuther stolen "stuff" in 2006; and police found a motorcycle during the search in 2006 that had the same VIN as a different motorcycle that was seized during the October 2000 search of defendant's residence. Drawing all reasonable inferences in favor of the prosecution, the jury could determine, beyond a reasonable doubt, that defendant was involved in a criminal enterprise of altering identification numbers and selling stolen motor vehicles and parts. The plain language of MCL 750.159f(a) contemplates that defendant may be liable for conducting a criminal enterprise alone; indeed, an "individual" and a "sole proprietorship" are expressly included in the plain language of the definition of "enterprise." Defendant has offered no countervailing Michigan case law to support his arguments.[2]

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[1] In the present case, defendant was charged with conducting a criminal enterprise based on the following alleged predicate incidents: (1) a 2001 conviction for receiving and concealing stolen property over $20,000; (2) violating MCL 750.535a by operating a chop shop on or about October 16, 2006; (3) violating MCL 750.535(7) by buying, receiving, possessing, concealing or aiding in the concealment of a Yamaha four-wheeler, Vehicle Identification Number (VIN) JY411007H0004823, for financial gain, knowing or having reason to know it was stolen; (4) violating MCL 750.535(7) by buying, receiving, possessing, concealing or aiding in the concealment of a Harley-Davidson Screaming Eagle motorcycle, VIN ULT6891ST00002849, for financial gain, knowing or having reason to know that it was stolen.

[2] Although defendant relies on two unpublished cases of this Court, we find those cases distinguishable because they involved multiple defendants or other individuals, and the question

(continued…)

Defendant also asserts that the prosecution failed to establish that the property at issue was stolen because it did not produce a witness who testified to that effect.

Generally, a piece of property is considered stolen if it was taken without permission or right. *People v Pratt*, 254 Mich App 425, 428; 656 NW2d 866 (2002). Although defendant contends that, based on *People v Martinovich*, 18 Mich App 253, 257-258; 170 NW2d 899 (1969), the prosecutor must prove conclusively that the goods seized were stolen and produce a witness who testifies to that effect, we disagree. In *Martinovich*, this Court indicated that mere probable cause to believe goods were stolen was insufficient to bind over a defendant for receiving and concealing stolen property. *Id*. In *People v Whalen*, 80 Mich App 133, 135; 263 NW2d 34 (1977), this Court rejected the defendant's argument that *Martinovich* required the prosecutor to present "conclusive proof" of identity at the preliminary examination stage or that *Martinovich* abrogated the probable-cause standard. We reject defendant's reliance on *Martinovich* and instead note that every element of an offense may be proven at trial by direct *or circumstantial* evidence. *People v Toodle*, 155 Mich App 539, 551; 400 NW2d 670 (1986).

Moreover, we find that, viewed in the light most favorable to the prosecution and drawing all reasonable inferences in favor of the prosecution, there was sufficient evidence presented to establish that the vehicles at issue were stolen. With respect to the Yamaha four-wheeler, the record reflects that the serial number on the engine was hammered and obliterated. Also, the VIN was irregularly stamped; some numbers were double stamped, the numbers were not in a straight line or evenly spaced, the frame was dented in, the paint was chipped, and there was evidence of grinding. Detective Sergeant Jeff Hart indicated that this led him to believe that the original VIN was ground off and the new number stamped there. Connecticut State Police Sergeant Robert Kenney testified that the VIN on the Yamaha four-wheeler was altered, and from his experience, there was no way that the VIN would have been double-stamped or concave if it was machine-stamped at the factory. He noted that, in his experience, when he finds an altered VIN, the vehicle is stolen. With respect to the black Harley-Davidson motorcycle, VIN number ULT6891ST00002849, the record reflects that this motorcycle's VIN was the same as the VIN found on a different motorcycle seized from defendant in 2000 in connection with defendant's prior conviction. Kenney testified that each vehicle has a unique VIN, and if two different vehicles have the same VIN, this would indicate that at least one was stolen. Kenney testified that the vehicle was really a "Dyna" model with the VIN obliterated. In addition, police found letters and die-stamp tools, two engines seized in 2006 had the same serial number as an engine seized in 2000, and police found numerous other motorcycle components that were missing VINs or identification numbers or whose identifications numbers were altered, leading police to believe that they were stolen. Additionally, Hart indicated that Valle's motorcycle, which was purchased from defendant, did not have a VIN when it was seized. As noted, defendant offered to sell Beuther stolen property. Defendant's proposition to Beuther indicates that defendant knew he possessed stolen goods and that the goods were stolen.

Although Kenney was not familiar with what happened to motorcycles that are seized in Michigan and Hart indicated that stolen motorcycles are sold at auction in Michigan, we must

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of whether one individual may conduct a criminal enterprise was not at issue. Moreover, those cases are not binding on this Court. MCR 7.215(C)(1).

view the evidence in the light most favorable to the prosecution. *Nowack*, 462 Mich at 399. The prosecution only needed to prove its case "in the face of whatever contradictory evidence the defendant may provide." *Id*. at 400 (internal citation and quotation marks omitted). We note that there was no evidence that defendant purchased the items at auction.

The evidence was also sufficient on the charge of operating a chop shop, which requires that a defendant "knowingly owns, operates, or conducts a chop shop or . . . knowingly aids and abets another person in owning, operating, or conducting a chop shop . . . ." MCL 750.535a(2).

> The purpose behind enactment of [the chop-shop statute] was twofold: (1) to facilitate convictions of chop shop operators, i.e., to relieve the prosecutor of the evidentiary burden of proving under the receiving or concealing statute that the defendant had knowledge that the particular vehicle or vehicle component was stolen or that the vehicle be identified as property previously stolen; and (2) to enhance the punishment. [*People v Allay*, 171 Mich App 602, 609; 430 NW2d 794 (1988).]

To prove this charge, the prosecutor was not required to present evidence that defendant knew a particular vehicle or part was stolen or that the vehicle was identified as previously stolen. See *id*. Again, the presence of the die stamping tools, Yamaha four-wheeler, Harley-Davidson with the duplicate VIN, and numerous other motorcycles and component parts with obliterated, altered, or duplicate identification numbers, in addition to defendant's offer to sell stolen goods, supports a finding that defendant was operating a chop shop.

Defendant also argues that there was insufficient evidence that the predicate racketeering offenses were done for financial gain. MCL 750.159g. Drawing all reasonable inferences in support of the jury's verdict, we conclude that there was sufficient evidence to support a finding that defendant committed the predicate acts for the purpose of financial gain. Although defendant contends that he may have merely intended to keep the seized items, that he may not have sold anything for a profit, or that he may have sold something as a favor to a friend, we must view the evidence in the light most favorable to the prosecution. *Nowack*, 462 Mich at 399. Further, the statute does not require that defendant actually turn a profit from the sale; we enforce the plain terms of the statute. *Martin*, 271 Mich App at 320. Additionally, although the sale to Beuther was not consummated, the prosecutor may establish a racketeering violation by proving an attempt to commit a racketeering offense. MCL 750.159g. Moreover, the record belies defendant's purported "innocent" intentions; as noted, defendant offered to sell Beuther, a stranger, stolen property. Necessarily, this would entail Beuther paying defendant money for the stolen goods. Defendant previously sold Valle a motorcycle without a VIN for about $9,000. The sheer quantity of motorcycles and component parts that defendant possessed that contained identification numbers that were missing, ground out, altered, or obviously hand-stamped; the fact that some items contained the same identification number; the presence of stamping tools; and defendant's prior sale to Valle and attempted sale to Beuther tend to indicate that defendant was not merely keeping these items for personal use or for a hobby. In addition, defendant stipulated that he pleaded guilty in 2001 to one count of receiving and concealing stolen property worth over $20,000, stemming from an incident in October 2000. Under the circumstances, there was evidence that financial gain was involved. The evidence supports an inference that defendant was continuing to engage in selling stolen motorcycles and parts after his 2000 conviction, and we conclude that there was sufficient circumstantial evidence presented

regarding financial gain. Also, the information alleged four predicate offenses, and only two were required to support a conviction for conducting a criminal enterprise. "Where more than two predicate acts are listed, the jury could convict the defendant of a racketeering violation on the basis of any two predicate offenses." *Martin*, 271 Mich App at 290 n 4.

Defendant also argues that the prosecutor failed to establish a pattern of racketeering activity because three of the predicate acts arose out of the same 2006 police search. However, the plain language of MCL 750.159f(c) does not require that the predicate incidents be "separate units," as defendant argues. The statute requires that the incidents be related by having a similar "purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts." MCL 750.159f(c)(*i*). MCL 750.159g(gg) defines racketeering as committing "an offense . . . involving" a violation of MCL 750.535 or MCL 750.535a. The plain language of this statute does not define racketeering in terms of separate temporal incidents, or prohibit charging a racketeering offense for each violation of MCL 750.535 or MCL 750.535a. Although defendant again resorts to federal authority to support his analysis, as noted, our Supreme Court has rejected such an approach to construing Michigan's racketeering laws. *Guerra*, 469 Mich at 966. The evidence demonstrated that defendant participated in all of the predicate incidents and they all related to dealing with stolen motorcycles and component parts on defendant's premises. MCL 750.159f(c)(*i*). The evidence also established a threat of continued criminal activity. MCL 750.159f(c)(*ii*). The incidents all occurred in Michigan, and the 2006 incidents occurred within 10 years of the commission of the 2000 incident. MCL 750.159f(c)(*iii*).

Defendant next argues that the trial court erred in admitting Kenney's expert testimony. Defendant argues that the foundation for the testimony was not based on facts in evidence pursuant to MRE 702 and 703 because law enforcement manuals written by Kenney regarding vehicle theft were not provided to the defense or admitted into evidence. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). A preserved claim of nonconstitutional evidentiary error warrants reversal only if the defendant overcomes the presumption that any error was harmless; in other words, the defendant must show that it is more probable than not that the error affected the outcome of the proceedings. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).[3] Defendant also objected that his Confrontation Clause rights were violated. This presents a question of law that we review de novo. *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2009), cert gtd ___ US ___; 130 S Ct 1685; 176 L Ed 2d 179 (2010).

The admissibility of expert testimony is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if

[3] Evidentiary error constitutes nonconstitutional error. *People v Herndon*, 246 Mich App 371, 402 n 71; 633 NW2d 376 (2001).

> (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court is obligated "to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). MRE 703 requires that

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

Non-scientific expert testimony that relies on the expert's personal knowledge or experience instead of on scientific foundations is subject to the trial court's assessment of its reliability. See, e.g., *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 150-155; 119 S Ct 1167; 143 L Ed 2d 238 (1999). "MRE 703 does not preclude an expert from basing an opinion on the expert's personal knowledge." *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 735; 761 NW2d 454 (2008).

We find that the trial court did not abuse its discretion in determining that Kenney was qualified as an expert in the identification of Harley-Davidson motorcycles, after-market motorcycles, and component parts, based on his extensive experience in studying motorcycles, attending and providing auto-theft training, supervising motor-vehicle-fraud task forces, working with identification departments of Harley-Davidson, continually studying and compiling information about motorcycles and their parts for 30 years, physically inspecting hundreds of models and VINs; personally seizing at least 500 motorcycles; and studying after-market motorcycles and parts since the early 1990s. Kenney was qualified by his knowledge, experience, and training to testify regarding identification of motorcycles and parts. MRE 702. His testimony would assist the trier of fact in determining whether the motorcycles and parts seized from defendant were what they purported to be and whether their identities had been altered. MRE 702. The record supports that Kenney's non-scientific expert testimony was based on sufficient facts and was reliable, given his extensive knowledge and experience regarding the identification of motorcycles and their component parts; he could testify about the identity of a particular motorcycle or part based on his personal experience in inspecting hundreds of the same type of model or part in the past. *Gilbert*, 470 Mich at 780; *Morales*, 279 Mich App at 735; see also, generally, *People v Unger*, 278 Mich App 210, 217-218; 749 NW2d 272 (2008).

Although defendant argues that the facts or data upon which Kenney relied were not in evidence, the trial court held that Kenney could testify based on his experience and what he had personally observed in inspecting hundreds of motorcycles, but he could not testify about any information he would derive from the confidential number on a motorcycle or part, because this involved resorting to facts not in evidence, i.e., information gained from the manufacturer and compiled in the undisclosed manuals. Kenney affirmed that he could base his testimony on the hundreds of models he had personally observed and the fact that they had a certain characteristic and the seized items in question had that same characteristic. Thus, the facts supporting Kenney's testimony were in evidence; Kenney was not permitted to testify about the confidential markings contained in his manuals, or information he knew because of those markings.

Moreover, defendant's contention that Kenney's testimony lacked a foundation in light of the facts that Michigan allows selling stolen vehicles at public auctions, and Kenney had only been involved in criminal investigations outside of Michigan, is unavailing because it relates to only the weight of his testimony, not its admissibility. See *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991) ("It is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility.").

Defendant also argues that his confrontation rights were violated because the reference materials and testimony from manufacturers were not in evidence. However, as discussed, Kenney was not permitted to testify regarding what was told to him by third parties; he was to testify only from his personal knowledge and experiences. Defendant was not denied the right to confront the witnesses against him, because this third-party information was not allowed.

Defendant additionally asserts that the trial court's error was exacerbated when it allowed Kenney to testify that in prior cases where he found obliterated VINs, the vehicles were stolen. However, Kenney's testimony in that regard was based on his experience of viewing numerous stolen vehicles with obliterated and altered VINs and being involved in numerous investigations into stolen vehicles and parts. The trial court did not abuse its discretion in allowing this testimony. *Dobek*, 274 Mich App at 93.

Defendant further maintains that error requiring reversal occurred regardless of whether the trial court abused its discretion in permitting Kenney's testimony, because Kenney repeatedly ignored the trial court's limitations on his testimony. Defendant points to five instances. We have reviewed each instance, and we conclude that there was no error requiring reversal. In each instance, defense counsel promptly objected, Kenney did not provide significantly damaging testimony before the objection, and the trial court issued an instruction and admonished Kenney. "The Michigan Supreme Court has held that the trial court must exercise the power to declare a mistrial with great caution and employ less drastic alternatives which would be revealed by the 'scrupulous exercise' of judicial discretion." *People v Little*, 180 Mich App 19, 23; 446 NW2d 566 (1989).

To the extent that defendant may be challenging the trial court's denial of his motion to produce the law enforcement manuals, defendant did not raise this issue in the statement of questions presented for appeal and it is therefore not properly presented. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). Nevertheless, although defendant claims that the manuals were material in that they may have contained impeachment or substantive evidence, this was not supported by the record, particularly in light of the limitation placed on Kenney's testimony prohibiting him from testifying about information he gained from the manuals. See *People v Brown*, 126 Mich App 282, 290-291; 336 NW2d 908 (1983). Moreover, the trial court properly recognized law enforcement's strong interest in not disclosing information regarding the placement of confidential VINs and regarding other theft-deterrent aspects of motorcycles and motorcycle parts, in order to prevent thieves from obtaining better knowledge regarding how to conceal theft. *Id*. at 290.

In defendant's final claim of error on appeal, he complains that the prosecutor's rebuttal closing argument improperly shifted the burden of proof and asserted that defendant was trying to mislead the jury. We review preserved claims of prosecutorial misconduct de novo to

determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

We conclude that the prosecutor's argument that "you didn't see anybody from Great Lakes Choppers sitting in that chair, so according to [defense counsel's] statement Great Lakes Choppers does not exist" did not deny defendant a fair trial. *Dobek*, 274 Mich App at 63. The prosecutor was fairly responding to defense counsel's repeated assertions that the prosecution's case was based only on assumptions, and that the documents or witnesses that the prosecutor did not produce were evidence that defendant was innocent. The prosecutor attempted to turn defense counsel's logic against the defense, and the prosecutor did not state that defendant had the burden of proof. The prosecution's remarks may not require reversal where they are responsive to matters raised by the defendant, even though, standing alone, they may be improper. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Moreover, the trial court believed that the prosecutor misspoke, and the prosecutor, after hearing the trial court's thoughts, stated in the presence of the jury that he did not mean to shift the burden of proof onto defendant. Under the particular facts presented, defendant was not denied a fair trial by the prosecutor's remark.

Defendant also argues that error occurred when the prosecutor argued during rebuttal that defendant was trying to fool the jury:

> The question that's been put to you several times is assumptions. Mr. Shulman says you shouldn't make assumptions, and I would agree with him. You shouldn't make assumptions. You know, there's that old saying, fool me once, shame on you. Fool me twice, shame on me.
>
> Mr. McDaniel is trying to fool you in excess of 12 times. I mean, is it a coincidence, it is assumption [sic]—is it an assumption that I receive unknowingly one transmission? Is that possible; yes. Okay, fine. Let's say it's just one transmission with a changed number. All right, fine. That can happen.
>
> What about the other 13 times? Everything's an accident. One—go right down the line. Just like Mr. Shulman said, the—the—you can look at all of them, line 'em up, all of them, and then he wants you to conclude that it's all accidental. Everything is an accident; everything is unknowing. I didn't know. I didn't know that this was stolen; I didn't know number 2 was stolen; I didn't know number 3--

The prosecution is not permitted to suggest that the defense was trying to mislead the jury. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001) (finding that reversal was not required where the prosecutor commented that defense counsel was intentionally trying to mislead the jury, but the comment was in response to defense counsel's argument and defendant did not object). Although the prosecutor's assertion that defendant was trying to "fool" the jury numerous times was arguably improper, under the circumstances, the error did not deprive defendant of a fair trial. The prosecutor was responding to defense counsel's argument that the prosecutor wanted the jury to find defendant guilty based on merely assumptions and no proof. The prosecutor responded that counsel was essentially asking the jury to make the unreasonable assumption that the many items found on defendant's premises that contained obliterated or altered VIN or identification numbers, along with defendant's offer to

Beuther to buy "stolen stuff," did not amount to circumstantial evidence that the items were stolen and that defendant was aware of that fact. The prosecutor's comments must be considered in light of defense counsel's arguments. *Id*. Additionally, the trial court immediately issued a lengthy curative instruction, instructed the jury during the final instructions that defendant was presumed innocent and that his guilt must be proven beyond a reasonable doubt, and informed the jury that defendant had "the absolute right not to testify" and it could not consider that defendant did not testify. Viewed in context, the prosecutor's statements did not deprive defendant of a fair trial. *Dobek*, 274 Mich App at 63.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens