STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2002
v	No. 224532 Oakland Circuit Court
ROY MCKINDLEY HINES, Defendant-Appellant.	LC No. 99-167270-FH

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of receiving and concealing stolen property valued at over $1,000 but less than $20,000, MCL 750.535(3)(a). Defendant, a fourth habitual offender, was sentenced to an enhanced term of 2 to 10 years' imprisonment. We affirm.

Defendant argues that there was insufficient evidence to support his conviction.[1] In reviewing the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Our review is de novo. See *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

Defendant was convicted of receiving and concealing stolen property valued at more than $1,000 but less than $20,000. MCL 750.535, the statute pertaining to this offense, provides in part:

> (1) A person shall not buy, receive, possess, conceal, or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing the money, goods, or property is stolen, embezzled, or converted.
>
> * * *

[1] Defendant only argues that plaintiff did not satisfy the element dealing with the value of the stolen property. Therefore, we confine our discussion of this issue to that element.

> (3) If any of the following apply, a person who violates subsection (1) is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00 or 3 times the value of the property purchased, received, possessed, or concealed, whichever is greater, or both imprisonment and a fine:
>
> (a) The property purchased, received, possessed, or concealed has a value of $1000.00 or more but less than $20,000.00.

Therefore, in order to demonstrate that defendant was guilty of receiving and concealing stolen property, plaintiff must prove beyond a reasonable doubt (1) that the property was stolen; (2) the value of the property; (3) the receiving, possession or concealment of the property by the defendant; (4) the identity of the property as being stolen; and (5) the constructive or actual knowledge of the defendant that the property received or concealed had been stolen. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996).

In determining the value of stolen property, courts may use fair market value as the relevant standard when such a value exists. *People v Johnson*, 133 Mich App 150, 153; 348 NW2d 716 (1984). Proof of value is determined by reference to the time and place of the offense. *Id*. Value means the price that the item will bring on an open market between a willing buyer and seller. *Id*. An owner of personal property is qualified to testify regarding the value of the property only if the testimony does not relate to sentimental or personal value. *People v Dyer*, 157 Mich App 606, 611; 403 NW2d 84 (1986). "Personal value" means subjective value to the owner or a value that cannot be objectively substantiated. *Dyer, supra* at 611.

In this case, plaintiff presented sufficient evidence for a rational trier of fact to conclude that the value of the stolen Chrysler Lebaron was greater than $1,000 but less than $20,000. Specifically, Helen Weingarden, one of the owners of the automobile, testified that the condition of the automobile was "absolutely perfect." The automobile had less than 37,000 miles on it. The automobile was a convertible and was "loaded." Helen also testified that the minimum amount of money she would have accepted for the automobile, before it was stolen, was $4,000. We find that this testimony allowed a rational trier of fact to conclude that the value of the automobile was greater than $1,000 but less than $20,000.[2]

Next, defendant argues that the trial court abused its discretion in qualifying Lester Monger as an expert witness, in failing to make a formal ruling on this issue, and by denying defendant an opportunity to voir dire Monger on his qualifications.

The qualification of a witness as an expert and the admissibility of expert testimony are in the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id*.

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[2] Defendant also argues that the jury could not rely on an appraisal or the testimony of the prosecution's expert witness to determine the value of the automobile. We have already concluded that the value of the automobile could be readily ascertained from the testimony of Weingarden. Thus, we decline to address these additional arguments raised by defendant.

MRE 702 governs the admission of expert testimony and provides:

> If the court determines that recognized 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.

Expert testimony will be admissible if (1) the expert is qualified, (2) the testimony gives the trier of fact a better understanding of the evidence or assists in determining a fact in issue, and (3) the testimony is from a recognized discipline. *People v Peebles*, 216 Mich App 661, 667-668; 550 NW2d 589 (1996).

Defendant argues that Monger could not satisfy the first prong of this test because he was not qualified as an expert. We disagree. Monger testified that he had been employed in the automobile business for twenty years and was a used car manager at Ed Smith Ford for the last eight years. Monger's responsibilities included appraising "trade in's," preparing vehicles for marketing, wholesaling vehicles he did not want, and buying vehicles at auctions. Monger appraised thousands of automobiles over the last eight years. We note that Monger admitted that he only occasionally works with Chrysler vehicles, he did not examine the stolen automobile before estimating its value, and he has not testified as an expert in other court cases. Although these considerations could be used by the jury to weigh Monger's testimony, they do not prevent him from being qualified as an expert. We conclude that Monger's qualifications were sufficient, and he was competent to testify as an expert witness.

Defendant also argues that the trial court failed to rule that Monger was qualified as an expert witness and that this error requires a new trial. Again, we disagree.

The prosecutor elicited testimony concerning the qualifications of Monger. The prosecutor inquired about Monger's opinion of the value of the stolen automobile. However, defendant objected to Monger's testimony as an expert witness as follows:

> Mr. Escobedo [defense counsel]: Your Honor, if I may interpose an objection at this point. I don't know if we've qualified this witness as an expert at this point, but it sounds –
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> The Court: Do you have an objection?
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> Mr. Escobedo: I do.
>
> The Court: What?
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> Mr. Escobedo: If I may voir dire the witness.
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> The Court: What is the objection?
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> Mr. Escobedo: My objection is, number one, this witness has testified that he occasionally appraises Chrysler products. Number two, there's been no foundation established that in fact he is qualified, if you will, to conduct an

> appraisal of a used vehicle other than he does so in the context of his job. And I'd like an opportunity to voir dire here with respect to his alleged expertise in evaluating or valuating vehicles.
>
> The Court: Objection is overruled. *Go ahead and I'll take it under advisement if I find he's not qualified*. [Emphasis added.]

The prosecutor finished questioning Monger and defendant then cross-examined Monger. Defendant renewed his objection at the end of his cross-examination and before Monger was excused. The trial court excused Monger and instructed the prosecutor to call the next witness.

The trial court's actions imply that the court, at the conclusion of the testimony, found Monger qualified. If the trial court had not made such a conclusion, the jury would have been instructed to disregard the testimony of Monger. In fact, the trial court instructed the jury on how to evaluate the expert testimony of Monger before the jury retired to deliberate. This is further evidence that the trial court found Monger qualified to testify as an expert. Moreover, even defense counsel understood that Monger had been qualified as an expert. On at least two occasions, during closing argument, defense counsel referred to Monger testifying as an expert. Therefore, we do not agree with defendant's claim that the trial court did not rule on the admissibility of Monger's testimony.

Defendant also argues that the trial court abused its discretion by admitting the testimony of Monger without allowing defendant an opportunity to voir dire the witness. We disagree. Our Supreme Court in *People v Kimbrough*, 193 Mich 330, 335; 159 NW 533 (1916), held that preliminary cross-examination of expert witnesses is within the trial court's discretion and is not a matter of right. The Court further explained:

> While it is the usual practice for such a privilege to be granted to opposing counsel before the witness expresses his opinion, we are not prepared to hold that it is error to refuse it. [*Id*.]

We agree with the rule of *Kimbrough*. While it is unusual for an attorney to be denied the opportunity to voir dire an expert witness, that denial was not problematic in this case. Defendant cross-examined Monger on his qualifications and the basis of his opinion. This cross-examination revealed nothing that would warrant the conclusion that Monger was not qualified to testify as an expert. Indeed, we have already concluded that Monger was qualified to testify as an expert witness, and defendant's argument on this matter fails.

Finally, defendant argues that the prosecutor engaged in misconduct during closing argument. However, defendant did not object to the claimed incident of prosecutorial misconduct. Therefore, we review defendant's claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We decide issues of prosecutorial misconduct case by case through examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor may argue the evidence and all reasonable inferences arising from that evidence. *Schutte*, *supra* at 721.

Here, defendant complains that the following statement made by the prosecutor during closing argument was improper. The prosecutor stated:

> But, ladies and gentlemen, all the evidence that you've heard, the only evidence that you've heard is that, that vehicle is valued somewhere between $3,000 and $4,000.

Defendant argues that this statement was impermissible for two reasons. First, it improperly shifted the burden of proof to defendant. Second, it indirectly reminded the jury that defendant did not testify.

Defendant is correct that a prosecutor cannot comment on a defendant's failure to testify or shift the burden of proof to defendant. *Reid, supra* at 477; *People v Fields*, 450 Mich 94, 104-118; 538 NW2d 356 (1995). However, after reviewing the prosecutor's comments in context, we do not agree that the prosecutor did either of these things. Defense counsel devoted a significant portion of his closing argument to discussing the fact that the prosecutor failed to prove the value of the automobile. The prosecutor, during rebuttal closing argument, simply responded to that argument by reviewing the evidence that had been presented, during the trial, of the value of the automobile. The prosecutor explained to the jury that the fair market value could be used to determine the value of the automobile. The prosecutor also indicated that the testimony of Weingarden indicated the value of the automobile. The prosecutor pointed out that Monger, an expert in appraising cars, also estimated the value of the automobile for the jury. The statement at issue was made after the prosecutor reviewed all of this testimony with the jury and was simply the prosecutor's attempt to summarize the testimony on this point and remind the jury that this element of the crime had been proven. We find no error plain or otherwise[3].

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen

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[3] We also note that the trial court instructed the jury that defendant has an absolute right not to testify and that the arguments and statements of the attorneys were not evidence. Juries are presumed to follow the instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).