

T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH PAUL WITT,

Defendant-Appellant.

UNPUBLISHED

November 14, 1997

No. 192588

Macomb Circuit Court

LC No. 95-002392-FC

Before: Saad, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property valued over \$100, MCL 750.535; MSA 28.803. As an habitual offender, third offense, MCL 769.11; MSA 28.1083, defendant was sentenced to serve two to ten years in prison. He appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion in denying his motion for a continuance in order to ascertain the identity of the prosecution's expert witness and to obtain an expert witness to testify for the defense. We disagree with defendant's contention that he was entitled to a continuance in order for counsel to adequately prepare this case. Unlike the case cited by defendant, *People v Storch*, 176 Mich App 414, 426; 440 NW2d 14 (1989), which was a complicated case that lasted four days and involved over twenty witnesses, this case involved only three witnesses and lasted only one day. Counsel had adequate time to prepare defendant's case.

Considering all of the factors set forth in *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972), we find that the trial court did not abuse its discretion in denying defendant's motion for a continuance on the morning of trial. Moreover, we find that reversal is not warranted because defendant has not established prejudice from the denial of his motion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). Despite the fact that counsel was unaware of the identity of the prosecution's expert witness until trial, he was able to adequately cross-examine the witness on his lack of experience with the particular machine at issue in this case. Furthermore, we refuse to speculate that

there was an expert who held the opinion that the stolen machine was worth less than \$100 in order to find that defendant was prejudiced by the lack of expert testimony on behalf of the defense.

Next, defendant argues that he was denied the effective assistance of counsel because counsel did not ascertain the identity of the prosecution's expert witness prior to trial and because he did not attempt to procure expert testimony on behalf of the defense. Defendant's motion in this Court to remand the matter to the trial court for an evidentiary hearing was denied, as was a rehearing on the motion. This Court denied defendant's remand motion because he failed to demonstrate by affidavit or offer of proof the necessary facts to support his claim of ineffective assistance of counsel. MCR 7.211(C)(1)(a)(ii).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that, but for the deficient performance, the outcome of the trial would have been different. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). Counsel is presumed to be effective, and a defendant bears a heavy burden to prove otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Here, while we agree that, had counsel procured an expert to testify that the blower was valued at less than \$100, the outcome of defendant's trial might have been different, we will not speculate that such a witness was available to so testify. Defendant has failed to provide this Court with factual support for his claim. Accordingly, defendant has failed to overcome the presumption that trial counsel was constitutionally effective, and has failed to establish in this Court a right to remand for an evidentiary hearing. See *People v White*, 411 Mich 366; 308 NW2d 128 (1981); *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant next argues that the trial court abused its discretion in determining that Patrick Brown was qualified to render an expert opinion on the value of the stolen machine in this case. We disagree. In exercising its discretion as to whether a witness should be considered an expert, the trial court should not utilize an overly narrow test of qualifications. *Id.*; *People v Whitfield*, 425 Mich 116, 123; 388 NW2d 206 (1986). Defendant's argument that Brown was not qualified as an expert because he admitted that he had never worked with the specific type of gas blower involved in this case urges us to find that the trial court should have used an overly narrow test of his qualifications. In light of Brown's experience selling other types of used blowers and his testimony regarding the procedures he followed to determine an unfamiliar machine's fair market value, the trial court did not abuse its discretion in determining that he was qualified to give an opinion on the machine's value.

Finally, defendant argues that his arrest was illegal because there was no probable cause to support his detention and arrest. This argument is without merit. At the time of the detention and arrest, Officer Teolis had probable cause to believe that defendant had committed an offense. Upon seeing Officer Teolis, defendant quickly abandoned the bicycle he was riding and the blower he was carrying on his back and climbed over a fence. He also took his shirt off, which could have been interpreted as an attempt to change his appearance. Moreover, when Officer Teolis questioned defendant about why he had left his bike and blower at the corner, defendant lied by denying having knowledge of what the officer was talking about. Observing this unusual and suspicious behavior would warrant a reasonable person to conclude that defendant had committed an offense involving the abandoned items. Therefore,

there was probable cause to support

defendant's detention and arrest. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); MCL 764.15; MSA 28.874.¹

Affirmed.

/s/ Henry W. Saad

/s/ Donald E. Holbrook, Jr.

/s/ Martin M. Doctoroff

¹ We also note that, even if we had found defendant's detention or arrest illegal, there would be no remedy to impose in this case, because no evidence was obtained as a result of the arrest. *City of Lansing v Hartsuff*, 213 Mich App 338, 352; 539 NW2d 781 (1995). Defendant had abandoned the blower in the street.