

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH T. SOULE,

Defendant-Appellant.

UNPUBLISHED

September 24, 1999

No. 211669

Kent Circuit Court

LC No. 97-08927 FH

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property over \$100, MCL 750.535; MSA 28.803. Although defendant also was charged with first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), deliberations resulted in a hung jury and he was acquitted on that charge. Defendant was sentenced as a fourth habitual offender¹ to 1 to 7½years' imprisonment, to be served consecutively to the time remaining for the offense for which he was on parole at the time of the instant offense, and to pay \$200 restitution. Defendant appeals as of right. We affirm.

This case arose from the taking of a safe from a house on Bemis Street in Grand Rapids by relatives of the complainant homeowner, Mary Mason. Later that same morning, the safe was returned, but according to Mason, money from inside the safe was missing.

Defendant argues on appeal that the prosecutor failed to present sufficient evidence to support his conviction of receiving and concealing stolen property. Specifically, defendant focuses on the money allegedly stolen, claiming there is no evidence that defendant received, concealed, or possessed such money, nor that defendant knew the money was stolen, nor that he possessed money identified as the same money that was stolen. When reviewing a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from such may be sufficient to prove the elements of the charged offense. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). It is the jury's role to

determine the weight of the evidence and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *Terry, supra* at 452.

With regard to receiving and concealing stolen property, the version of MCL 750.535(1); MSA 28.803(1) in effect at the time of the instant offense provided in relevant part:

A person who buys, receives, possesses, conceals, or aids in the concealment of stolen, embezzled, or converted money, goods, or property knowing the money, goods, or property to be stolen, embezzled, or converted, if the property purchased, received, possessed, or concealed exceeds the value of \$100.00, is guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than \$2,500.00, or both.²

In other words, the elements of receiving and concealing stolen property with a value exceeding \$100 include: “(1) the property was stolen, (2) the property has a fair market value of over \$100, (3) the defendant bought, received, possessed, or concealed the property with knowledge that the property was stolen, and (4) the property was identified as being previously stolen.” *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993).

Although defendant focuses on the money, the charges against him identified the stolen property as a safe and contents, including the money to which defendant refers. Here, plaintiff presented evidence that Mason owned the safe which was purchased approximately four years before the trial for more than \$300 and contained \$300 to \$400 of money at the time it was taken from her house without permission. Mason’s granddaughter testified that she let defendant and his wife, the granddaughter’s mother, into Mason’s house through the side door and they went into the basement, which is where Mason kept the safe. A neighbor testified that she saw defendant and his wife near Mason’s house and walking down the street, pushing a baby-stroller with something square in it covered by a coat. The granddaughter, who directed her cab driver to pick up defendant and his wife, testified that they got into the cab and were dropped off at a friend’s house where defendant took the safe to the basement, turned it upside down, and tried to open it with his wife’s assistance. Mason’s grandson testified that it was difficult, but possible to remove items from the safe by turning it upside down and maneuvering the items through the hole in the top of the safe. Although the safe was returned to Mason, the money in it was gone. Defendant himself testified that his wife told him that she had taken the safe, and he took the safe out of the cab at the friend’s house. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could determine that the safe and its contents were stolen, that their value was greater than \$100, and that defendant received and concealed the property knowing that it was stolen.

Defendant next argues that he was denied his constitutional right to effective assistance of counsel where defense trial counsel failed to object to the jury instructions on receiving and concealing stolen property. Specifically, defendant contends that although no objection was made at trial, manifest injustice exists here, where the instructions did not sufficiently advise the jury of what kinds of facts and circumstances shown by the evidence would justify an inference beyond a reasonable doubt that

defendant knew the property was stolen when he received, possessed, or concealed it, i.e., the element of guilty knowledge, and therefore the jury was left to speculate on that element.

Effective assistance of counsel is presumed, and it is the defendant's heavy burden to prove otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). In addition, the defendant must establish that his counsel's deficient representation prejudiced him to the extent of depriving him of a fair trial. *Id.* A defendant must also overcome the presumption that the challenged action was trial strategy, and establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 6, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). However, in reviewing claims of ineffective assistance of counsel, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; ___ NW2d ___ (1999). Because defendant failed to move for an evidentiary hearing or a new trial based on ineffective assistance of counsel, our review is limited to mistakes apparent from the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

We conclude that defendant's argument is without merit. Although defendant suggests that the misdirection on an element of a charged crime may result in manifest injustice, he does not assert that the instruction here was incorrect; rather, he asserts that counsel failed to include further explanation of what kinds of circumstances and other facts could demonstrate knowledge that the property was stolen. Defendant suggests that counsel's representation was deficient because the jury should have received an instruction that defendant's recent exclusive possession of the property may allow an inference of guilty knowledge. We disagree. Here, defendant testified that his wife told him that she took the safe from Mason's house. Generally, instructions concerning circumstantial evidence serve to rehabilitate such evidence in the face of a popular inclination to discredit it; however, given defendant's admission, he may have had more to lose than to gain from further instruction on circumstantial evidence. Given these considerations, defendant's counsel may well have decided not to request additional jury instructions regarding the circumstantial evidence in this case. Because defendant has failed to overcome the presumption that counsel's inaction with regard to the jury instructions was trial strategy and because defendant has failed to show both that he was prejudiced by counsel's representation to the extent that he was denied a fair trial and that a reasonable probability exists that the trial results would have been different but for counsel's inaction, his claim of ineffective assistance of counsel is without merit.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

¹ MCL 769.12; MSA 28.1084.

² MCL 750.535; MSA 38.803 has been amended since defendant was charged. See 1998 PA 311.