

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
September 30, 2014

v

RICHARD JAMES KING,  
  
Defendant-Appellant.

No. 316175  
Macomb Circuit Court  
LC No. 2012-003225-FH

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Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of malicious destruction of personal property valued at \$1,000 or more but less than \$20,000, MCL 750.377a(1)(b)(i), and assault and battery, MCL 750.81, for which the court sentenced him to 23 months' to 5 years' imprisonment and 93 days in jail, respectively. Defendant argues that his trial counsel was ineffective for failing to object to certain testimony regarding the value of the damaged property at issue. We affirm.

Rebecca Filiccia testified that defendant assaulted her and her son in her apartment, hitting her and throwing a jar of peanut butter at her son. She testified that defendant also damaged and destroyed numerous items of property over the course of the incident. Filiccia stated that she compiled a list of the personal property that defendant damaged or destroyed, noting what she thought certain items originally cost and how long she had owned them, and she used this list to refresh her memory at trial.<sup>1</sup> On cross-examination, defendant's counsel asked plaintiff if she knew how much the damaged property could have been sold for, and she said she did not know what she could have sold it for on the open market, but that "it was well over a thousand dollars in damage . . . ."

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<sup>1</sup> According to Filiccia, the damaged items included couch cushions, a kitchen table, a 10-year-old bunk bed purchased for \$1,500, dishes, glasses, picture frames, light bulbs, bedding, a carpet, a stereo, an air purifier, a recliner purchased for \$400, an antique chair, two lamps, a cellular telephone, an area rug, a vacuum, two mattresses, and doors.

New Baltimore Police Department Officer Stephen Dominick testified that he and another officer were dispatched to Filiccia's apartment to investigate the altercation. According to Dominick, "the entire apartment was trashed from . . . the doorway, which opens into the small living, the main living area, through the hallway into the main bedroom and also [Filiccia's son's] bedroom." He further stated that there was "glass, porcelain shattered, family pictures broken on the ground, [and] furniture turned over." Dominick said that he was a "patrolman," as opposed to an "evidence technician," but that he had taken photographs of other apartments when there were allegations of property destruction. The following exchange then occurred between the prosecutor and Dominick:

Q. And, based on your experience of these other apartments or homes that you've been where you've seen destruction and you photographed it and your observations made on the scene there, would have an opinion as to whether or not the damage done inside that apartment would exceed \$1,000.00?

A. Oh, it would have easily exceeded \$1,000.00.

Defendant's counsel did not object this line of questioning.

Later, on cross-examination, Dominick identified his basis for estimating Filiccia's property damage: "being a consumer, seeing the items that were broken, the picture frames, the porcelain items, the furniture that appeared to broken [sic] without me taking it apart and picking everything up and inspecting it, the amount of damage inside the apartment was simply vast." Dominick reiterated that he did not inspect the furniture and that he "could not tell you" the quality of the items. When asked if he had any other basis for valuing the property in excess of \$1,000, Dominick answered, "Just my observations."

Defendant challenges his malicious-destruction conviction, arguing that his trial counsel was ineffective for failing to object to Dominick's valuation testimony under MRE 702. "In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing." *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant did not move in the trial court for a new trial or an evidentiary hearing regarding assistance of counsel, and this Court denied his motion to remand for an evidentiary hearing on the question.<sup>2</sup>

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its rulings on questions of constitutional law are reviewed de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d

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<sup>2</sup> The Court denied defendant's motion for failure to demonstrate that the issue must be addressed by the trial court or that further factual development of the record was required for appellate review. *People v King*, unpublished order of the Court of Appeals, entered December 12, 2013 (Docket No. 316175).

136 (2012). “Where claims of ineffective assistance of counsel have not been preserved, [this Court’s] review is limited to errors apparent on the record.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

“Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense.” *Trakhtenberg*, 493 Mich at 51, citing Const 1963, art 1, § 20, and US Const, Am VI. To establish ineffective assistance of counsel, “a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *Trakhtenberg*, 493 Mich at 51. “In examining whether defense counsel’s performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel’s performance was born from a sound trial strategy.” *Id.* at 52.

MRE 702 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 (1) the testimony is based upon 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.

Defendant argues that Dominick was never qualified as an expert in the area of property valuation, yet he testified as an expert in opining that Filiccia’s property damage exceeded \$1,000. Defendant further argues that this case is similar to *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 785-788; 685 NW2d 391 (2004), in which the Michigan Supreme Court held that a social worker was not permitted to give an opinion based on information in medical records, characterizing the testimony as a “medical opinion.”

Here, however, Dominick did not testify regarding “scientific, technical, or other specialized knowledge” as contemplated by MRE 702, such that the prosecutor was required to qualify him as an expert witness. To the contrary, Dominick testified that he personally observed property damage in Filiccia’s apartment, and that based on his observations, it was his opinion that the amount of property damage exceeded \$1,000. Notably, Dominick never testified that he based his estimation on any *specialized knowledge* derived from his previous inspections of property. The prosecutor asked Dominick if he had an opinion of the property damage based on his experience inspecting other incidents of property destruction and his observations in this case, and Dominick simply answered, “Oh, it would have easily exceeded \$1,000.00.” On cross-examination, Dominick clarified that his estimation was based on his observations in this case and experience as a consumer.

In this respect, Dominick’s lay-opinion testimony was admissible under MRE 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Dominick's testimony was rationally related to his perception of property he observed at Filiccia's apartment and common sense, and it was helpful to the jury's determination of the value of the damaged property. See *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003) (discussing opinions "largely based on common sense"). Accordingly, trial counsel's representation did not fall below an objective standard of reasonableness when he declined to object to Dominick's testimony under MRE 702. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("[t]rial counsel is not required to advocate a meritless position").

Further, defendant has failed to show that there was a reasonable probability that the outcome would have been different in the absence of Dominick's valuation testimony, because there was ample evidence, even aside from Dominick's opinion, from which the jury could conclude beyond a reasonable doubt that the property damage exceeded \$1,000. First, Dominick testified that the property damage was "simply vast," and several pictures taken from Filiccia's apartment after the altercation were admitted for the jury to inspect. Second, Filiccia gave a description of the items of personal property that defendant damaged or destroyed. See footnote 1, *supra*. She estimated that there was "well over a thousand dollars in damage." See *People v Clemons*, 91 Mich App 68, 75; 282 NW2d 838, remanded on other grounds 407 Mich 939 (1979) ("[a]n owner of personal property is qualified to testify regarding the value of such property . . . provided it does not relate to sentimental or personal value").

Defendant argues that jury could not have found Filiccia's testimony credible because, in acquitting defendant of assault with a dangerous weapon, the jury discounted her testimony that defendant held a knife to her throat. However, as the finder of fact, "[a] jury has the right to disregard all or part of the testimony of a witness," *People v Goodchild*, 68 Mich App 226, 235; 242 NW2d 465 (1976), and may "believe or disbelieve, in whole or in part, any of the evidence presented," *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Thus, the mere fact that the jury did not convict defendant of assault with a dangerous weapon does not automatically mean that it discounted her testimony regarding the amount of property damage. Indeed, the jury was able to compare her statements regarding property damage with photographs of the apartment taken after the altercation, and Dominick consistently testified that the property damage was "vast" and that the apartment was "a complete wreck," "trashed" from the front door to the bedrooms, such that he had difficulty making his way into one of the bedrooms.

Affirmed.

/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly  
/s/ Michael J. Kelly