

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 27, 2002

v

THOMAS ROOT,

Defendant-Appellant.

No. 236211
Monroe Circuit Court
LC No. 00-030779-FH

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for receiving and concealing stolen property with a value of \$1,000 or more, but less than \$20,000, MCL 750.535(3)(a). Defendant was sentenced to five years' probation for his conviction. We affirm.

Defendant first argues that the trial court abused its discretion in admitting the testimony of Carl Gooden as expert testimony regarding the market value of the goods confiscated from defendant's residence. We disagree. The determination regarding the qualification of an expert and the admissibility of expert testimony is within the trial court's discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). "An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made." *Id.*

MRE 702 governs the admission of expert testimony and provides as follows:

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 opinion or otherwise.

For testimony to be admissible under MRE 702, it must meet the following criteria: (1) the witness is an expert; (2) the facts in evidence are subject to analysis by a competent expert; and (3) the knowledge in that particular field belongs more to an expert than to the common man. *People v Beckley*, 161 Mich App 120, 125; 409 NW2d 759 (1987).

Defendant argues that Gooden's testimony was not the best evidence and that Gooden did not have even a basic knowledge of the value of the grocery-related goods at issue. However, Gooden testified that he was familiar with the current value of scales, printers, wrappers, and equipment of this type. Gooden had purchased this type of equipment for a store he owned in the past, and became knowledgeable of the value of this type of equipment while working for Kroger. While working for Kroger, Gooden would determine when scales and equipment of this type were needed, would deal with salesmen regularly, and would recommend to corporate headquarters what should be purchased. Gooden further testified that he remained in touch with people in the industry, and that such contact has kept him familiar with the current value of scales, printers, and wrappers.

The test for qualification of an expert witness is a broad one, and a witness may be qualified as an expert by knowledge, skill, experience, training or education. *People v Moye*, 194 Mich App 373, 378; 487 NW2d 777, rev'd on other grounds 441 Mich 864 (1992). Moreover, whether a witness' expertise is as great as that of others in the field is relevant to the weight, rather than the admissibility, of the testimony and is a question for the jury. *People v Whitfield*, 425 Mich 116, 123-124; 388 NW2d 206 (1986).

Contrary to defendant's assertion, Gooden clearly had some knowledge and experience with respect to pricing equipment such as scales, printers, and wrapping devices. Although Gooden may not have been the most knowledgeable expert in the area, whether his testimony was the best evidence as to the value of the goods at issue goes to his credibility and was, therefore, a question for the trier of fact and not the trial court. *Id.* Accordingly, the trial court did not abuse its discretion in admitting Gooden's testimony as expert testimony regarding the market value of the goods at issue.¹

Defendant next argues that he was denied the effective assistance of counsel. Again, we disagree. Because defendant did not move for a new trial or seek an evidentiary hearing before

¹ The trial court made clear the different functions of the trial judge and the jury in stating the following:

Members of the jury, as I told you, basically, I decide what the law is but your very important function is to decide what the facts of the case are. In relation to expert witnesses, I usually make an initial determination if I think the person has sufficient expertise for you to hear their testimony or I do not. If I decide they have sufficient expertise for you to hear it, I'm not invading your function because you still decide who you believe. Whether you believe - - I think I told you that yesterday, you can believe all of what someone says, some of what someone says or nothing of what someone says, that's a part of your facts determination. So without me invading your function, I'm deciding the witness has sufficient expertise so that you may hear his testimony. But, I don't vouch for him, don't vouch against him, that's your function as the fact finders. Objection is noted and you may hear the testimony, but again, you'll decide what significance it has for you as a fact finder.

the trial court, this issue is not preserved for appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, we review this issue on the basis of the existing record. *Id.*; see also *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). “To establish a claim of ineffective assistance of counsel, the defendant must show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact finder would not have convicted the defendant.” *Snider, supra* at 423-424. In doing so, the defendant must overcome the strong presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

In challenging the adequacy of counsel’s performance at trial, defendant first alleges that trial counsel should have demanded Foodtown’s corporate records of the purchase price and book value of the equipment confiscated from defendant’s residence. However, on the basis of the record currently before us, there is nothing to indicate that such evidence would have been helpful to defendant’s case. Indeed, it may have been defense counsel’s strategy not to gather such evidence, which may have been harmful to defendant’s case, and we will not second-guess such a decision on appeal. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant further alleges that he was denied the effective assistance of counsel because trial counsel failed to call an expert witness to rebut Gooden’s testimony concerning the value of the goods at issue. However, decisions regarding what evidence to present and whether to call or question witnesses are similarly presumed to be matters of trial strategy about which this Court will not substitute its judgment for that of trial counsel. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *Rice, supra*. Here, in lieu of calling an expert to rebut Gooden’s testimony, counsel for defendant attempted to discredit Gooden during voir dire and on cross-examination. During voir dire trial counsel brought out that Gooden’s expertise was limited, and made an effort to attack his credibility. On cross-examination, defendant’s trial counsel also attacked Gooden’s credibility by bringing to light a falling out between defendant and Gooden in the past. Counsel for defendant further attempted to rebut Gooden’s claims concerning the value of the goods at issue by presenting testimony from defendant, who also had experience dealing with such goods. It may have been defense counsel’s strategy not to admit further evidence, which may have been considered cumulative, and such action will not be second-guessed on appeal. *Rice, supra*.

Moreover, the failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprived the defendant of a substantial defense, i.e., one that might have made a difference in the trial. *Daniel, supra*. Defendant’s failure to seek an evidentiary hearing below has left the record devoid of any evidence to indicate that Gooden’s testimony concerning the value of the goods at issue could have been successfully rebutted. Accordingly, on the basis of the record currently before us we cannot conclude that defense counsel’s failure to present an expert to rebut Gooden’s testimony deprived defendant of a substantial defense.

Finally, defendant contends that even if the errors alleged would not individually require this Court to reverse his conviction and remand for a new trial, the cumulative effect of the errors requires this result. However, because no errors have been found with regard to any of defendant's challenges, there can be no cumulative effect. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

We affirm.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Patrick M. Meter