

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD ALEXANDER SPICE,

Defendant-Appellant.

UNPUBLISHED

July 9, 1999

No. 207163

Clinton Circuit Court

LC No. 97-006274 FH

Before: Griffin, P.J., and Wilder and Danhof,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering with intent to commit a felony therein, MCL 750.110; MSA 28.305. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to support his breaking and entering conviction because Charles Strange, defendant's accomplice, provided the only testimony that linked defendant to the crime and Strange's testimony was not credible. We disagree.

When reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Echavarria*, 233 Mich App 356, 370; ___ NW2d ___ (1999). The prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996).

To support a conviction for breaking and entering, the prosecution must show that defendant (1) broke into a building, (2) entered the building, and (3) had the intent to commit a larceny or felony

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

therein at the time of the breaking and entering. *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). See CJI2d 25.1. The credibility of an accomplice, or any other

witness, is within the sole province of the jury, *People v Crawford*, 458 Mich 376, 396; 582 NW2d 785 (1998), and a defendant may be convicted solely on the uncorroborated testimony of an accomplice. *People v Sullivan*, 97 Mich App 488, 492; 296 NW2d 81 (1980); *People v Ochko*, 88 Mich App 737, 741; 279 NW2d 294 (1979).

In this case, Strange testified that on the evening in question, he and defendant gathered tools and flashlights before leaving the house, and then drove to a Meijers store where defendant purchased a slingshot and ball bearings. Strange and defendant then drove to an outlet mall in DeWitt Township, parked the car across the street from the mall, and walked over to the Sunglass Hut. Strange shot a ball bearing into the glass door of the Sunglass Hut¹ and defendant entered the store while Strange served as a lookout. Strange testified that defendant exited the business with a cash register which Strange and defendant subsequently broke open and from which they removed \$250. Viewing this evidence in a light most favorable to the prosecution, this testimony was sufficient to establish the essential elements of breaking and entering beyond a reasonable doubt. *Jaffray, supra* at 296. This Court will generally not overturn a conviction on the basis of the credibility of a witness, *People v Hughes*, 217 Mich App 242, 248; 550 NW2d 871 (1996), and we decline to do so in this case.

Defendant next argues that he received ineffective assistance of counsel. In the absence of an evidentiary hearing, our review of an ineffective assistance of counsel claim is limited to any errors apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable likelihood that but for counsel's errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and a defendant bears the burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant raises a number of alleged deficiencies by trial counsel which he claims warrant reversal of his conviction or a new trial. However, our review of the existing record discloses that the alleged deficiencies are attributable to defense counsel's trial strategies with which we decline to interfere, see *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Bass (On Rehearing)*, 223 Mich App 241, 253; 565 NW2d 897 (1997) vacated in part on other grounds 457 Mich 866 (1998), or second guess with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Moreover, the failure of a strategy does not render it ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has failed to show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him as to deprive him of a fair trial.

All of defendant's remaining issues are raised for the first time on appeal. Thus, because defendant did not object to the alleged errors before the trial court, he has failed to preserve these

issues for appellate review, *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994), and we decline to consider the claims.

Affirmed.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

/s/ Robert J. Danhof

¹ The fact that defendant did not himself shoot out the glass does not preclude his conviction. “Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission, may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.” MCL 767.39; MSA 28.979.