STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2008
v	No. 271754 Shiawassee Circuit Court
RAYMOND EDWARD CHARVAT, JR., Defendant-Appellant.	LC No. 06-003673-FH

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of breaking and entering with intent to commit a larceny, MCL 750.110, and conspiracy to commit breaking and entering with intent to commit a larceny, MCL 750.110 and MCL 750.157a. The trial court sentenced defendant to three concurrent sentences of 28 to 120 months' imprisonment. Defendant appeals as of right his convictions and sentences. We affirm.

Defendant claims that all three of his convictions were not supported by sufficient evidence. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When reviewing the sufficiency of the evidence to sustain a criminal conviction, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant was convicted of breaking and entering a Wendy's restaurant and Burton Corners as an aider and abettor. In order to convict a defendant as an aider and abettor, the prosecution must prove the following: (1) the charged crime was committed by the defendant or another person; (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended the commission of the crime at the time he gave assistance. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Recently, our Supreme Court in *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006), stated that "the prosecutor must prove beyond a reasonable doubt that the defendant . . . intended

to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense."

It is undisputed that Michael Frederick committed the breaking and entering of Wendy's, while Frederick and Ryan Nicholson committed the breaking and entering of Burton Corners. Regarding the Wendy's break-in, Nicholson testified that, along with acting as a lookout from his bedroom window, defendant offered Frederick suggestions concerning where to look for the safe and how to open the safe. Regarding the Burton Corners break-in, Nicholson testified that defendant agreed Burton Corners was a "prime target" for a break-in and that, after asserting that they needed to do the break-in, defendant helped Nicholson and Frederick plan the break-in. Although defendant thereafter supposedly dropped out of the plan, he instructed Nicholson and Frederick to bring him certain kinds of alcohol and cigarettes from Burton Corners. Although Frederick provided testimony to the contrary, we must make all credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Thus, viewing Nicholson's testimony in a light most favorable to the prosecution, a rational trier of fact could find that defendant performed acts or gave encouragement that assisted Frederick in breaking and entering Wendy's and that assisted Frederick and Nicholson in breaking and entering Burton Corners. Moreover, the evidence supported a finding that at the time he rendered aid, defendant intended to aid the commission of the crimes or at least had knowledge that Frederick and Nicholson intended the commission of the crimes. In sum, defendant's convictions for breaking and entering with intent to commit a larceny are supported by sufficient evidence.

Similarly, defendant's conviction for conspiracy to commit the breaking and entering of Wendy's is supported by sufficient evidence. A conspiracy is a partnership in a criminal purpose. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). Two or more individuals must voluntarily agree to effectuate the commission of a crime, and the crime of conspiracy is complete upon formation of the unlawful agreement. *Id.* To establish a conspiracy, the prosecution must prove that the defendant specifically intended to combine with others to accomplish an illegal objective. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). A defendant may become a member of an already existing conspiracy if he knowingly cooperates to further the objective of the conspiracy. *Id.* at 483-484. A conspiracy may be proven through the circumstances, acts, and conduct of the parties. *Justice, supra* at 347. From Nicholson's testimony that defendant acted as a lookout from his bedroom window and suggested to Frederick places to look for the safe and ways to open the safe, a rational trier of fact could infer that defendant, while not an original partner in the conspiracy, knowingly joined in it and agreed with Frederick and Nicholson to further the Wendy's break-in. Defendant's conviction for conspiracy to commit breaking and entering with intent to commit a felony is supported by sufficient evidence.

Defendant next claims that the prosecutor vouched for the credibility of Nicholson and Jennifer Nethaway during his closing argument. We review an unpreserved claim of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). We must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

While it is improper for a prosecutor to vouch for the credibility of his witnesses by implying some specialized knowledge of their truthfulness, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), he may argue that a witness is credible on the basis of facts presented at trial, *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). Our review of the pertinent portion of the record demonstrates that the prosecutor was arguing, based on the testimony adduced at trial, that his two witnesses, Nicholson and Nethaway, were credible witnesses. The prosecutor did not deny defendant a fair trial.

Defendant also argues that the trial court erred when it denied his motion for a new trial, which was based on his assertion that two jurors saw him in handcuffs while he was being transported from the jail to the courtroom. We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002). A trial court abuses its discretion when its decision falls outside a range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Because freedom from shackles is an important component of a fair and impartial trial, the shackling of a defendant during trial is only permitted in extraordinary circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). However, this rule does not extend to safety precautions taken by police officers when transporting a defendant between the courthouse and the jail. *People v Panko*, 34 Mich App 297, 300; 191 NW2d 75 (1971). When jurors inadvertently see a defendant in handcuffs, there must be some showing that the defendant was prejudiced. *People v Moore*, 164 Mich App 378, 385; 417 NW2d 508 (1987), mod on other grounds 433 Mich 851 (1989). In the present case, defendant's claim that two jurors saw him in handcuffs is unsubstantiated,[1] and defendant has not established the requisite prejudice. Therefore, the trial court selected a principled outcome when it denied defendant's motion for a new trial and, thus, did not abuse its discretion.

Defendant also claims that he was denied the effective assistance of counsel when counsel failed to object during the prosecutor's closing argument after the prosecutor allegedly vouched for the credibility of Nicholson and Nethaway and when counsel failed to move for a mistrial upon learning that two jurors saw him in handcuffs. As already established, the prosecutor, in his closing argument, did not vouch for the credibility of Nicholson and Nethaway. Rather, he argued that Nicholson and Nethaway were credible, a permissible argument. *McGhee, supra* at 633. Accordingly, any motion by defense counsel would have been futile. Defense counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998).

Also, as already established, defendant failed to present evidence substantiating that two jurors actually saw him in handcuffs. Accordingly, defendant has failed to carry his burden of

[1] Defendant indicates that the existing record is sufficient to review this issue, and this Court previously denied defendant's motion to remand for an evidentiary hearing on the matter for failure to demonstrate facts to be established at a hearing. *People v Charvat*, unpublished order of the Court of Appeals, entered April 23, 2007 (Docket No. 271754). We reject defendant's alternative argument that the case should be remanded for further inquiry as it is unnecessary and defendant fails to demonstrate facts to be established at a hearing.

establishing the factual predicate for his claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). On the record presented, which defendant indicates is sufficient for review, we cannot conclude that counsel's performance was deficient, nor that defendant was prejudiced. *Id.* at 5-6.

Defendant next claims that the trial court, by scoring ten points for offense variable (OV) 13, MCL 777.43, violated his Sixth Amendment right to a jury trial, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument is without merit. Our Supreme Court has definitively ruled that *Blakely, supra*, does not affect Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).[2]

Finally, defendant has abandoned his claim that the Department of Corrections failed to incorporate into his presentence investigation report (PSIR) the changes ordered by the trial court. Defendant not only failed to request that a copy of the PSIR be filed with our Court, see MCR 7.212(C)(7), but defendant failed to present our Court with the PSIR within the allotted time after this Court submitted a record request for the PSIR.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White

[2] To the extent that defendant is arguing that the evidence did not support the scoring of ten points for OV 13, we disagree. First, defendant fails to provide any analysis regarding application of OV 13. Second, there was evidence indicating that the offenses were part of a pattern of felonious criminal activity related to an organized criminal group, MCL 777.43(1)(d) (ten points), especially considering that the degree of the group's sophistication is not as important as the fact of the group's existence, which can be inferred by the facts surrounding the offenses, MCL 777.43(2)(b). There was testimony of planned break-ins at numerous establishments in the community by a small group of acquaintances that included defendant and which involved the use of lookouts and walkie-talkies. This was sufficient evidence to support the scoring, given that a scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).