STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JODY L. ROTHMAN,

Defendant-Appellant.

UNPUBLISHED
February 2, 1999

No. 200287
Mason Circuit Court
LC No. 96-001354 FC

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

PER CURIAM.

Defendant appeals by right his conviction by jury of safe breaking, MCL 750.531; MSA 28.799, and breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. The trial court sentenced defendant to five to twenty-five years' imprisonment for the safe breaking conviction and three to fifteen years' imprisonment for the breaking and entering conviction. We affirm.

I

Defendant argues that there was insufficient evidence to support the jury's verdict. In assessing whether there was sufficient evidence to sustain a verdict, we examine the evidence in the 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 Kelly*, 231 Mich App 627, 641; ___ NW2d ___ (1998). The elements of safe breaking are: (1) that defendant broke into a safe; and (2) that he did so with the intent to commit larceny. MCL 750.531; MSA 28.799. These elements were supported at trial by the following testimony: (1) paper money, including a large amount of $2 bills, as well as Susan B. Anthony dollars, Kennedy half-dollars, and wheat pennies, were taken from the victims' safe around the same time that their house key disappeared; (2) Robin Smith knew that the victims kept a house key in their garage, knew where the safe was located, knew the safe's combination, and wanted to steal from the victims because he felt cheated by them; (3) Smith asked defendant to steal from the safe and defendant agreed to do so; (4) defendant bought a portable scanner so that he would know if the police had been notified while he was inside the residence; (5)

defendant admitted to Smith and to Lisa Mears that he committed the safe breaking, and he gave some of the proceeds to Smith; (6) some coins in defendant's own safe were the same type as coins missing from the victims' safe; and (7) defendant gave Thomas Coffman $40 worth of $2 bills. This testimony taken as a whole was sufficient for the jury to find that the essential elements of safe breaking were proven beyond a reasonable doubt. Although some of this testimony was contradicted at trial, we do not disrupt the jury's resolution of credibility disputes when deciding whether there was sufficient evidence to sustain a verdict. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993).

The elements of breaking and entering an occupied dwelling with intent to commit larceny are: (1) a breaking and entering; 2) of an occupied dwelling; and (3) with the intent to commit larceny within the dwelling. See *People v Brownfield*, 216 Mich App 429, 431; 548 NW2d 248 (1996); MCL 750.110; MSA 28.305. These elements were established at trial by the testimony summarized above, as well as the testimony that the victims occupied the house in which the safe was located and that defendant used a key to enter the house. We conclude that the evidence was sufficient for the jury to have found that the essential elements of breaking and entering were proven beyond a reasonable doubt.

II

Next, defendant argues that the amount of restitution the trial court ordered was arbitrary and that the trial court erred by failing to consider defendant's financial circumstances when ordering restitution. We review a trial court's findings of fact regarding a restitution order for clear error. *People v Guajardo*, 213 Mich App 198, 201-202; 539 NW2d 570 (1995).

The trial court based the restitution amount on the evidence presented at trial. The amount was adequately supported by the evidence and the court's explanation of the amount demonstrates that it was not arbitrary.

Defendant did not contest his ability to pay when restitution was considered and imposed. The court was therefore not required to hold a separate hearing or to make express findings on the record respecting defendant's ability to pay. *People v Grant*, 455 Mich 221, 243-244; 565 NW2d 389 (1997). Further, while defendant correctly observes that the presentence report revealed that defendant had limited assets and a meager income, the report also revealed that defendant was in good health and able to work. Additionally, defendant's position at sentencing was that the court should fix restitution at $9360. Thus defendant effectively admitted an ability to pay.

III

Next, defendant argues that prosecutorial misconduct denied him a fair trial. We review claims of alleged prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

We conclude that the prosecutor did not file the habitual offender enhancement in retaliation for defendant's derogatory remark to and about the prosecutor at a prior hearing. Rather, one of the legal assistants responsible for routinely filing enhancements based on criminal history records did so. In any event, defendant was not prejudiced because the enhancement did not take effect.[1] Defendant has not established that he was denied a fair trial due to prosecutorial misconduct. Although the mere appearance of impropriety can be sufficient to warrant disqualification of a prosecutor, "[t]here is no

appearance of impropriety unless there are facts

demonstrating an emotional or personal stake in the litigation which warrants recusal." *People v Doyle*, 159 Mich App 632, 644, 646; (1987), reversed on other grounds 161 Mich App 743; 411 NW2d 730 (1987). Here, the prosecutor's statement responding to an inflammatory remark by defendant does not evidence an emotional stake in the case such that recusal was necessary.

IV

Next, defendant argues that the trial court abused its discretion in admitting Thomas Coffman's testimony that he returned some $2 bills defendant had given him because he had heard rumors that defendant had broken in and taken money from the victims, and he wanted nothing to do with it. Defendant argues that Coffman's testimony, to which he objected, constituted prejudicial hearsay requiring reversal. We review a trial court's decision to admit evidence for abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

We reject the prosecution's claim that Coffman's out-of-court statements were admissible not to prove that defendant committed the crime, but to show why Coffman did not keep the $2 bills defendant had given him. Although Coffman's receipt of the money was relevant to show that defendant possessed money consistent with that taken from the victims' safe, that Coffman did not keep the $2 bills had no relevance to the case. The statements were relevant only in that they helped to prove the truth of the matters asserted -- that defendant had broken in and stolen money from the victims. The statements constituted inadmissible hearsay.

The test to determine whether this evidentiary error was harmless is whether it is highly probable that the challenged evidence did not contribute to the verdict. *People v Gearns*, 457 Mich 170, 203-205 (Brickley, J., with whom J. Mallett concurred), 207 (Cavanagh, J. concurring in relevant part, with whom J. Kelly concurred); 577 NW2d 422 (1998). The untainted evidence connecting defendant to the crimes was circumstantial but ample, in view of the strength and extent of the testimony of Robin Smith and Lisa Mears. We thus conclude that the erroneous admission of the challenged testimony was harmless in light of the strength of the untainted evidence.

V

Finally, defendant argues that the trial court misscored an offense variable of the sentencing guidelines and that his resulting sentence was disproportionate. Application of the sentencing guidelines states a cognizable claim on appeal only where 1) a factual predicate is wholly unsupported; 2) a factual predicate is materially false, and 3) the sentence is disproportionate. *People v Winters*, 225 Mich App 718, 729-730; 571 NW2d 764 (1997); see also *People v Mitchell*, 454 Mich 145, 174-177; 560 NW2d 600 (1997). Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. *Mitchell, supra* at 178. We review sentencing decisions for abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993), overruled on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). Sentences must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Odendahl, supra* at 540; *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Defendant's challenge regarding the guidelines is not directed to the accuracy of the factual basis for his score, but rather to application of PRV 7, and thus does not state a cognizable claim. *Mitchell, supra* at 176-177. Defendant's argument that his sentences are disproportionate is unpersuasive, as it hinges on his argument that PRV 7 was misscored. We conclude that defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Odendahl, supra.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White

[1] The prosecution subsequently learned that the convictions were based on events that occurred after the safe breaking and stated at the hearing on defendant's motion to disqualify the prosecutor that the enhancement was inappropriate.