STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTON BUCAJ,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 190923
Macomb Circuit Court
LC No. 94-001517 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PJETER BUSHATI,

Defendant-Appellant.

No. 190924
Macomb Circuit Court
LC No. 94-001519 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD DUSHI,

Defendant-Appellant.

No. 190925
Macomb Circuit Court
LC No. 94-001525 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAQSOR GJOKA,

Defendant-Appellant.

No. 190926
Macomb Circuit Court
LC No. 94-001530 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GJON BUCAJ,

Defendant-Appellant.

No. 191595
Macomb Circuit Court
LC No. 94-001655 FH

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

The five defendants in these cases were jointly tried by a jury on charges of breaking and entering with intent to commit larceny (hereinafter "breaking and entering"), MCL 750.110; MSA 28.305, and conspiracy to commit breaking and entering, MCL 750.157a; MSA 28.354(1) and MCL 750.110; MSA 28.305, in connection with a rooftop break-in of a party store. Defendants were convicted as charged. Defendants Pjeter Bushati and Paqsor Gjoka each received two concurrent terms of two to ten years' imprisonment. Defendants Anton Bucaj, Leonard Dushi, and Gjon Bucaj each received two concurrent terms of three to ten years' imprisonment. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm.

People v Anton Bucaj: Docket No. 190923

Defendant Anton Bucaj first argues that his convictions of conspiracy to commit breaking and entering, and aiding and abetting the B&E constituted double jeopardy. We disagree.

In *People v Robideau*, 419 Mich 458, 486; 355 NW2d 592 (1984), the Supreme Court observed that "[s]tatutes prohibiting conduct that is violative of distinct social norms can generally be viewed as separate and amenable to permitting multiple punishments." *Id.* at 487. Citing from *Robideau*, the Supreme Court in *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997), observed that "the crimes of conspiracy and drug possession violate distinct social norms. The crime of conspiracy is a continuing offense; it 'is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy.'" *Denio*, *supra* at 710, quoting *United States v Castro*, 972 F2d 1107, 1112 (CA 9, 1992). We believe the same reasoning applies in the instant case. The crimes of conspiracy and breaking and entering address violations of distinct social norms. Moreover, convictions for conspiracy and aiding and abetting in the underlying offense do not violate double jeopardy principles, *People v Carter*, 415 Mich 558, 577-589; 330 NW2d 314 (1982). Accordingly, we conclude that defendant's convictions of both conspiracy and breaking and entering on an aiding and abetting theory did not constitute a double jeopardy violation.

Defendant acknowledges that no objection was raised to the jury instructions he now claims to be improper. "Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice." *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997). There is no manifest injustice here. The jury instruction with regard to aiding and abetting properly conveyed the prosecution's theory of the case: that while not all five defendants actually broke into the party store, all were actively involved in the crime, either in actually breaking into the store, or by facilitating the crime by acting as lookouts and getaway drivers.

Defendant next argues that his trial counsel was ineffective for not raising a double jeopardy objection to the jury instructions. Again, we disagree. In order for this Court to reverse a valid conviction based on ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Accord *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Because any objection would have been futile, defendant was not prejudiced by his attorney's conduct. Accordingly, he was not deprived of effective assistance of counsel.

Defendant further argues that the trial court erred when it denied his motion for directed verdict. He asserts there was insufficient evidence to convict him of both of these crimes because, at most, the evidence established his presence at the scene. "When reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational factfinder could have found the essential elements of the crime proved beyond a reasonable doubt." *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997), lv grtd 456 Mich 899 (1997).

Viewing the evidence in this manner, we find no error in the court's denial of defendant's motion. More than one officer was able to identify defendant as the driver of the Nissan Maxima that acted as a lookout by making multiple passes by the party store, that dropped off three individuals at the

party store, and in which all five defendants were found after the car was stopped by the police. We believe that a rational factfinder could reasonably infer from this evidence that defendant was acting both as a lookout and a getaway driver.

Finally, we conclude that defendant's argument that the sentence imposed for his breaking and entering conviction is disproportionate does not state a cognizable appellate issue. Defendant's sole argument is that offense variables 8 and 9 were improperly scored by the trial court. However, as the *Mitchell* Court observed: "Appellate courts are not to interpret the guidelines or to score and rescore the variables." *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997). Accordingly, defendant has failed to overcome the presumption that his sentence, which fell within the sentencing guidelines' range, is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

People v Pjeter Bushati: Docket No. 190924

Defendant Pjeter Bushati first argues that the trial court should have granted his motion for new trial because the jury's verdicts were against the great weight of the evidence. "'An objection going to the weight of the evidence can be raised only by a motion for a new trial. On appeal, this Court reviews such a denial for an abuse of discretion.'" *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988), quoting *People v Strong*, 143 Mich App 442, 450; 372 NW2d 335 (1985).

Our review of the record leads us to conclude that the circumstantial evidence presented at trial and the reasonable inferences drawn therefrom support the finding that defendant was involved in both the breaking and entering and the conspiracy to commit the crime. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Next, defendant contends that his trial counsel was ineffective in cross-examining the party store's owner. We disagree. During cross-examination, defense counsel repeatedly asked the owner whether he had any personal knowledge that defendant and co-defendants had broken into the store. At one point, the witness responded: "They broke into my other store also. They are the same gang. But I can't prove it." Following defense counsel's objection, the trial court instructed the jury to disregard the response. This, in our opinion, effectively negated any prejudice defendant might have sustained. Nor are we persuaded that if the store owner had not given this response "there is a reasonable probability that . . . the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

People v Leonard Dushi: Docket No. 190925

Defendant Leonard Dushi raises a two-pronged attack on the evidence. First, he argues that the evidence was insufficient to support both of his convictions. We disagree. As was the case with defendant Pjeter Bushati, we believe it is reasonable to infer from the testimony of officers who had been watching the party store on the night in question that defendant was one of three men who approached the party store at approximately 4:22 a.m. wearing dark clothing and gloves. It is also

reasonable to assume that defendant was one of the three men who were later observed placing a duffel bag containing two tin snips, a black-handled saw, and three screw drivers in the back of a blue Ford van. Finally, it is reasonable to infer that these tools were used to cut a hole in the party store roof. Viewing this evidence in a light most favorable to the prosecution, *Reeves, supra,* 222 Mich App at 34, we determine that "a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Defendant also maintains that his convictions were against the great weight of the evidence. Given that this Court previously denied his motion to remand, we are precluded from reviewing the claim. *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983). In any event, we conclude defendant's convictions were not against the great weight of the evidence.

Next, defendant cites error with the trial court's decision not to instruct the jury that it was required to reach a unanimous decision on whether he was a principal in the crime or an aider and abettor. The record shows, however, that defendant failed to either request such an instruction or to raise an objection to the instructions given. Defendant's failure to properly preserve this issue means we will not grant relief unless necessary to avoid manifest injustice. See *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); see also MCR 2.516(C).[1] Finding no manifest injustice, we do not reach the issue. *Van Dorsten, supra* at 544.

Defendant further argues that the trial court erred when it refused to dismiss the case after it was discovered that the prosecution failed to turn over the working notes of two witnesses who testified on behalf of the prosecution. Again, we disagree. In both cited incidents, defendant was provided with the witness' official report. However, in one instance defendant was not given nine pages of rough notes from which the witness' two-page report was compiled, while in the other instance defendant was not given eleven pages of rough scientific graphs. Instead of dismissing the case, the trial court ruled that defendants would be allowed to recall the two witnesses after they had been provided with the time to review the cited material. Under the circumstances, we find that the trial court's denial of the motion to dismiss was not an abuse of discretion. See *People v Gary Johnson*, 206 Mich App 122, 126; 520 NW2d 672 (1994).

Defendant also argues that the conduct of his codefendant's counsel during cross-examination of the store's owner denied him the right to a fair trial and that the trial court erred in not declaring a mistrial. We conclude that the trial court did not abuse its discretion when denying defendant's motion for a mistrial. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). As we previously observed, the trial court effectively negated any prejudice defendant might have sustained when it instructed the jury to disregard the cited testimony. Moreover, we are not convinced that if the store owner had not given this response "there is a reasonable probability that . . . the result of the proceeding would have been different." *Stanaway, supra*, 446 Mich at 687-688.

Additionally, defendant argues that the trial court should have granted a mistrial when two police officers made comments about defendant's silence when asked for his name. We disagree. Generally, a defendant's silence cannot be used as evidence against him. *People v Sholl*, 453 Mich 730, 734,

736-737; 556 NW2d 851 (1996). However, defendant has failed to show that the officers' comments involved defendant's refusal to talk after being advised of his *Miranda*[2] rights. *People v Dixon*, 217 Mich App 400, 405-406; 552 NW2d 663 (1996). Furthermore, we note that when denying defendant 's motion for a mistrial, the trial court stated that it would be willing to give a curative jury instruction. Accordingly, there is no abuse of discretion.

Finally, defendant argues that given the cumulative errors that occurred, he is entitled to a new trial. Since we have found no merit in any of defendant's claims, we conclude this argument to be without merit. See *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988).

People v Paqsor Gjoka: Docket No. 190926

Defendant Paqsor Gjoka argues that there was insufficient evidence presented by the prosecution to support his convictions. We disagree. The evidence adduced at trial and the reasonable inference drawn therefrom showed that defendant was not merely present at the scene of the crime, but that he acted in concert with his codefendants to break into the store or assisted in breaking into the store. Viewing this evidence in a light most favorable to the prosecution, *Reeves, supra*, 222 Mich App at 34, we determine that "a rational trier of fact could have found that the essential elements of the crime[s] were proven beyond a reasonable doubt." *Jaffray, supra*, 445 Mich at 296.

Defendant also argues that the verdict was against the great weight of the evidence. However, because defendant has not provided this Court with a copy of the transcript of the hearing on his motion for new trial, we conclude that the issue has been waived. *People v Robert Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995); MCR 7210(B)(1).[3] Nonetheless, because we do not believe the jury's verdict was against the great weight of the evidence, we conclude that the trial court did not abuse its discretion in denying the motion for a new trial. *Bradshaw, supra*, 165 Mich App at 565.

We also reject defendant's assertion that the trial court erred in not granting his motion to quash the information. The evidence presented at the preliminary examination demonstrated that a crime had been committed and that there was probable cause to believe defendant was involved in its commission. Accordingly, the circuit court did not abuse its discretion in denying defendant's motion to quash the information. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996).

The trial court also did not abuse its discretion when it denied defendant's motion for a separate trial. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). Defendant failed to demonstrate by an offer of proof or an affidavit that his substantial rights would be prejudiced by a joint trial and that severance was necessary to remedy the prejudice. *Id.*

Defendant further argues that his right to a speedy trial was violated. "To determine whether a defendant has been denied his right to a speedy trial, this Court considers (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant." *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Because the delay in this case was less than eighteen months, "the burden is on

defendant to prove prejudice resulting from the delay." *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). This defendant has failed to do. Nor has he persuaded this Court that he sustained prejudice to either his person or his defense as a result of the thirteen-month delay. See *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

Defendant next argues that the trial court erred when it gave to the jury an instruction on "reasonable doubt" that did not include language impressing on the jury that it had to be convinced of defendant's guilt to a "moral certainty". Addressing this very point, this Court in *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996), observed that "[t]he failure to include 'moral certainty' language in the definition of reasonable doubt does not give rise to error warranting reversal." We believe that the trial court's instruction, based on CJI2d 3.2(3), adequately conveyed to the jury the concept of "reasonable doubt." See *id.*

For the reasons previously discussed, we also reject defendant's arguments concerning: (1) the discovery matter surrounding the reports of two prosecution witnesses; (2) the police testimony about defendant's silence; and (3) the testimony of the party store owner that he believed defendants had been involved in a robbery of another of the owner's businesses. We also reject defendant's argument that the trial court abused its discretion in denying his motion for a mistrial due to certain questions posed by the prosecution to Sergeant Krueger. We note that the trial court quickly cut off the line of questioning and then instructed the jury to disregard the previous question and answer. Accordingly, we conclude that defendant has failed to establish that he was prejudiced.

We also find that defendant's objection to his sentence for the breaking and entering conviction does not state a cognizable appellate issue. His sole argument is that two offense variables were improperly scored. However, as the *Mitchell* Court observed: "Appellate courts are not to interpret the guidelines or to score and rescore the variables." *Mitchell, supra*, 454 Mich at 178. Accordingly, we find that defendant has failed to overcome the presumption that his sentence, which fell within the sentencing guidelines' range, is presumptively proportionate. *Broden, supra*, 428 Mich at 354-355.

Finally, defendant argues that his convictions should be set aside because, as an Albanian citizen, he will probably be deported and sent back to Albania where he is likely to face persecution and oppression. He argues that the trial court should have made a recommendation that he not be deported, as provided in 8 USC 1251(b)(2). However, we note that this section was repealed in the Immigration Act of 1990.[4] See *United States v Bodre*, 948 F2d 28, 30 (CA 1, 1991). Defendant's argument, therefore, is without merit.

People v Gjon Bucaj: Docket No. 191595

Defendant, Gjon Bucaj, argues that there was insufficient evidence to support his convictions. We disagree. As we found with respect to defendant's brother, Anton Bucaj, we believe that a rational factfinder could reasonably conclude that defendant was acting as a lookout and also facilitated the getaway from the party store. Hence, a reasonable factfinder could conclude that defendant had:

(1) aided and abetted the breaking and entering, and (2) been actively involved in the conspiracy to break and enter.

As for defendant's remaining issues, we have reviewed them in their entirety and find them to be without merit. Moreover, we find that his sentence was proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).[5]

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad

[1] The court rule reads, in pertinent part: "A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict . . . , stating specifically the matter to which the party objects and the grounds for the objection."

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] The court rule reads, in pertinent part: "The appellant is responsible for securing the filing of the transcript as provided in this rule."

[4] Pub L No 101-649.

[5] An observation that applies with equal force to all challenged sentences considered in this consolidated appeal.