

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS ANTHONY GLOVER,

Defendant-Appellant.

UNPUBLISHED

September 26, 2006

No. 261605

Macomb Circuit Court

LC No. 04-003551-FC

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of conspiracy to commit armed robbery, MCL 750.529; 750.157a. Defendant was sentenced, as a second-offense habitual offender, MCL 769.10, to eight to forty years' imprisonment. We affirm.

Defendant first argues that the prosecution presented insufficient evidence to sustain his conviction for conspiracy to commit armed robbery. We disagree. We review an insufficiency of the evidence claim by examining the evidence "in the light most favorable to the prosecutor and determin[ing] whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003).

A "person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy[.]" MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). "Conspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *Mass, supra*, p 629. The crime of conspiracy is complete upon formation of the agreement. *People v Hunter*, 466 Mich 1, 4; 643 NW2d 218 (2002). Under MCL 750.529, it is unlawful for a person to commit armed robbery.

The prosecution presented sufficient evidence to find defendant guilty of conspiracy to commit armed robbery. Donnell Thompson testified that he and defendant robbed Gerald Przybylinski at the Speedway store and that they agreed to do so beforehand. Although Thompson initially testified that he and defendant did not have an agreement to rob the store, Thompson subsequently admitted that he and defendant agreed to rob the store before the robbery took place. Defendant and Thompson agreed that Thompson would serve as the lookout man while defendant robbed the store. Although Przybylinski was unable to identify the men

who robbed him, he was certain that the men acted together and that a lookout man remained near the door during the robbery, while another man with a gun carried out the robbery.

Defendant argues that because Thompson was allegedly unaware that defendant had a weapon before the robbery, there was no conspiracy to commit *armed* robbery. Defendant's claim is without merit. Thompson clearly testified that he agreed to commit a robbery with defendant, and he also testified that he saw defendant putting a gun to Przybylinski's side at the start of the robbery. Despite seeing this, Thompson apparently did nothing to "back out" of the conspiracy or the robbery. Under all these circumstances, the evidence was sufficient for the jury to infer that defendant conspired with Thompson to commit armed robbery.

Defendant next argues on appeal that prosecutorial misconduct denied him a fair trial. Defendant argues that he was denied a fair trial when the prosecutor asked Sergeant Leonard Celletti to comment on the credibility of other witnesses. Because defendant did not preserve his allegation of prosecutorial misconduct by objection below, we review defendant's claim for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

A prosecutor may not ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *Ackerman*, *supra*, p 449. The prosecutor asked Sergeant Celletti if Przybylinski's testimony was consistent with what he saw on the video surveillance tape of the robbery. The prosecutor also asked Sergeant Celletti if Thompson's confession regarding the robbery was consistent with what he witnessed on the video surveillance tape. The prosecutor's questions were not improper and did not improperly force Sergeant Celletti to comment on the credibility of the prosecution's witnesses. At no time did the prosecutor ask Sergeant Celletti to comment on the credibility of Thompson's and Przybylinski's testimony; rather, she only asked Sergeant Celletti to comment on the evidence presented based on his own observations. It is not improper for the prosecutor to attempt to ascertain the facts of the case. *Ackerman*, *supra*, p 449. Defendant has failed to show prosecutorial misconduct, and, therefore, defendant's claim is without merit.

Defendant's final argument is that he was denied the effective assistance of counsel because trial counsel refused to enter a stipulation for his felon in possession of a firearm charge. Because the trial court did not hold an evidentiary hearing below with respect to this issue, review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error or errors, the result of the proceedings would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). Defendant argues that his trial counsel was ineffective because the location of his prior conviction and the length of his sentence was revealed to the jury, thus prejudicing him, despite the fact that he was acquitted of the felon in possession charge.

To prove the offense of being a felon in possession of a firearm, the prosecution must show that a defendant possessed a firearm when ineligible to do so because of a prior felony conviction. MCL 750.224f. The record shows that the defense refused, for reasons unspecified on the record, the prosecution's request to stipulate to certain elements of the felon in possession charge. However, the record shows that defendant was consulted regarding this charge and agreed with trial counsel that the "proper way to handle this would be that a certified copy of the record be entered, that the record indicate that [defendant] was convicted of a felony, contain the statutory site, but redact the language that it's an armed robbery."

When discussing defendant's prior conviction, the prosecution did as requested by the defense. A certified copy of the record was entered, and the jury was informed that defendant had been convicted of a felony. The jury was also informed that defendant received a sentence of one to twenty years' imprisonment for that conviction and that defendant was convicted in Wayne Circuit Court. Defendant now argues that his trial counsel was ineffective because the location of his prior conviction and length of his sentence was revealed to the jury. We conclude that defendant has failed to show that trial counsel was ineffective. Although the record does not reveal why counsel refused to stipulate that defendant was a felon who was ineligible to possess a firearm, the record shows that defendant approved of the course of action taken by counsel regarding this charge.

Moreover, even if trial counsel's failure to stipulate "fell below an objective standard of reasonableness," defendant has failed to show that he was denied a fair trial because of his attorney's action. *Walker, supra*, p 545. We find that the mere mention of the length of the sentence imposed and the location where the conviction was rendered did not affect the outcome of the case, given the testimony presented in favor of guilt and given that the nature of defendant's prior conviction was never revealed to the jury.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter