STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DAVID SKOVERA,

Defendant-Appellant.

UNPUBLISHED
October 25, 1996

No. 184968
LC No. 94-001724-FH

Before: Gribbs, P.J., MacKenzie and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction of larceny in a building, MCL 750.360; MSA 28.592. We affirm.

On appeal, defendant claims that he was erroneously convicted of larceny in a building, MCL 750.360; MSA 28.592, because the facts support a conviction for retail fraud, MCL 750.356c; MSA 28.588(3), and a retail fraud conviction precludes a larceny conviction, MCL 750.356c(3). However, because there exists no extraordinary or compelling circumstances to review this unpreserved issue for the first time on appeal, we consider it waived. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996).

Further, even if the issue were preserved, we conclude that the present facts would not support a retail fraud conviction. Michigan's retail fraud statute, MCL 750.356c; MSA 28.588(3), defines first-degree retail fraud as follows:

> (1) A person who does any of the following in a store or in its immediate vicinity is guilty of retail fraud in the first degree,
>
> * * *
>
> (b) While a store is open to the public, steals property of the store that is *offered for sale* at a price of more than $100.00. [Emphasis added.]

The standard criminal jury instruction, CJI 23.13, is consistent with the clear statutory language that retail fraud applies only where the defendant steals property that is "offered for sale."

In the present case, defendant stole a satellite decoder from a back storage room that was closed to the public. Additionally, the decoder had already been purchased by another customer and was awaiting delivery. Thus, the property defendant stole was not "offered for sale" at the time defendant stole it. Accordingly, a retail fraud change was not warranted and defendant was properly convicted of larceny in a building.

Next, defendant claims that he was denied a fair trial because the prosecutor allegedly extracted prejudicial testimony regarding defendant's unemployment and made improper remarks during closing argument. However, defendant failed to object to the conduct that he now claims to be improper. Accordingly, appellate review of this unpreserved issue is foreclosed unless the failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994); *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994); *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990); *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). After reviewing the prosecutor's questions and comments in context, we find no miscarriage of justice. *Gonzalez, supra* at 535; see *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990); see also *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989) overruled in part on other grounds 450 Mich 94; 538 NW2d 356 (1995) (reversal is not required unless a timely objection could not have cured the error). Even if the prosecutor's comments were improper, the evidence against defendant was so overwhelming that error, if any, was harmless. MCR 2.613; MCL 769.26; MSA 28.1096; *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992); *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995).

Finally, defendant contends that the trial court abused its discretion in denying his motion for a new trial based on the claim of ineffective assistance of counsel. We disagree. In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), our Supreme Court adopted the federal standard for determining whether a defendant has been denied effective assistance of counsel as set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Pickens, supra* at 312, citing *Strickland, supra*, 691-692; see *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Eloby, supra*, 476; see *Unites States v Chronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

After a thorough review, we agree with the trial court that defendant did not sustain his burden of proving that counsel made a serious error that affected the result of trial. *People v LaVearn*, 448

Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994). Therefore, we conclude that the trial court did not abuse its discretion in ruling that defendant received effective assistance of counsel.

Affirmed.

/s/ Roman S. Gribbs
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin