

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK TROY MCDANIEL,

Defendant-Appellant.

UNPUBLISHED

April 18, 1997

No. 185964

LC No. 94-000776-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree retail fraud, MCL 750.356c; MSA 28.588(3), and sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to a term of five to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

On June 15, 1995, defendant went to ABC Warehouse in Portage. Defendant met a salesperson and discussed an amplifier for his car. The salesperson retrieved the item from the stockroom. The salesperson went to the service desk to check on the amplifier's price and defendant took the amplifier and set it down near the front of the store. When the salesperson returned, defendant told him that that he wanted to think about the purchase and defendant left the store. A few minutes later, defendant returned and met the same salesperson. Defendant told the salesperson that he wanted to purchase the amplifier. The salesperson got a second amplifier from the stockroom. Defendant purchased the second amplifier, left the store and put the second amplifier in his car. A few minutes later, defendant returned to the store with his receipt from the second amplifier, picked up the first amplifier that he had left near the doorway, and went to the service desk to return the first amplifier in exchange for a cash refund. He was arrested during the refund transaction.

On appeal, defendant's appellate attorney has filed a brief on defendant's behalf that raises three issues. Defendant has also filed a brief in propria persona that raises eight issues. We first consider the issues raised in the brief filed on defendant's behalf by his appellate attorney. Specifically, defendant initially contends that there was insufficient evidence to support his conviction for first-degree retail fraud because the conviction was based on circumstantial evidence and there was no proof of

intent. In reviewing a sufficiency of the evidence claim, 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 Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993). Intent may be inferred from the facts and the circumstances. *People v Datema*, 448 Mich 585, 601; 553 NW2d 272 (1995). In this case, there was testimony from several witnesses indicating that defendant placed the first amplifier near the door, purchased a second amplifier, and then returned to the store with his receipt to obtain a cash refund for the first amplifier that he had not purchased. We find that the evidence was sufficient for a rational trier of fact to conclude that defendant intended to defraud the store.

Second, defendant claims that he was denied the effective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996).

In this case, a post-conviction hearing on defendant's ineffective assistance of counsel claim was held below, following which the trial court found that counsel did not commit the errors complained of by defendant, and that in any event the evidence against defendant was overwhelming. After reviewing this record, we conclude that the trial court's findings that counsel did not err, which were based, in part, on the credibility of the witnesses at the hearing, are not clearly erroneous. MCR 2.613(C). To the extent that defendant raises a vague suggestion on appeal that his trial counsel was at some point suspended from the practice of law, we note that representation by a suspended attorney does not alone create a reasonable probability of ineffective assistance of counsel. *Pubrat, supra*. And finally, we agree with the trial court that the evidence of defendant's guilt was overwhelming. Accordingly, defendant cannot meet his burden of establishing that he was denied the effective assistance of counsel in any event. *People v Launsbury*, 217 Mich App 358, 362; 551 NW2d 460 (1996).

Third, defendant contends that his sentence was not proportionate because the court exceeded the maximum set forth in the sentencing guidelines and failed to explain the deviation. The guidelines do not apply to habitual offender convictions, *People v Lugo*, 214 Mich App 699, 713; 542 NW2d 921 (1995), and should not be considered as a reference, *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995). Defendant also contends that there was no evidence to show that he committed the fraud. We have found that the evidence was sufficient to support the jury's conviction.

In any event, the sentence was not disproportionate. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Lugo, supra*. Moreover, it is necessary to punish habitual criminals more severely in order to deter future criminal conduct, *Cervantes, supra* at 624, 627, and a low potential for rehabilitation is a legitimate consideration in sentencing, *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). Considering defendant's criminal history, the court did not abuse its discretion in imposing sentence.

We now turn to the issues raised by defendant in propria persona. Except with respect to defendant's last issue concerning the alleged introduction of perjured testimony at trial, all of the errors

complained of by defendant were raised and addressed by the trial court at the previously discussed post-conviction evidentiary hearing below. The court found that the errors complained of did not occur. After reviewing this record, we conclude that the trial court's findings in this regard are not clearly erroneous. MCR 2.613(C). We likewise reject defendant's contention that perjured testimony was introduced at his trial where defendant's claim in this regard is based simply on the fact that various witnesses gave conflicting or inconsistent testimony at trial.

Affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski