

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW DARNELL CAIN,

Defendant-Appellant.

UNPUBLISHED

October 3, 1997

No. 193257

Recorder's Court

LC No. 95-006318

Before: O'Connell, P.J., and White and C. F. Youngblood*, JJ.

MEMORANDUM.

Defendant appeals by right his bench trial conviction for retail fraud, MCL 750.356c; MSA 28.588(3), and adjudication as a fourth offender, MCL 769.12; MSA 28.1084, resulting in a probationary sentence.

Defendant first contends that the trial court infringed his constitutional right to be present at all critical stages of the proceedings by reviewing a surveillance video tape, admitted into evidence as a prosecution exhibit, in the presence of defense counsel and the prosecutor but in the absence of defendant. The transcript reflects that the trial court's review of the video tape occurred during the deliberative phase of the proceeding; closing arguments had been completed, and immediately after viewing the video tape the trial court announced its findings of fact and conclusions of law. The trier of fact could properly have reviewed the video tape in isolation. *People v Benberry*, 24 Mich App 188; 180 NW2d 391 (1970). Defendant was not deprived of the right to be present at any critical stage of the proceedings. *People v Donaldson*, 102 Mich App 552; 302 NW2d 229 (1980).

Second, defendant asserts that he was deprived of the effective assistance of counsel because trial counsel failed to review the surveillance video tape with him before trial. Assuming, *arguendo*, that this represents a deficiency in counsel's quality of representation which falls below a minimally acceptable level of professional performance, defendant has failed to show how such collaborative review would have altered the outcome of the proceeding or led to the presentation of significantly

* Circuit judge, sitting on the Court of Appeals by assignment.

different evidence. Accordingly, defendant has failed to establish the prejudice prerequisite to appellate relief on this claim. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Finally, defendant's sentence is challenged as disproportionate to the offense and to the offender. As an habitual offender, defendant's sentence is reviewed for abuse of sentencing discretion. *People v Hansford (After Remand)*, 454 Mich 320; ___ NW2d ___ (1997). Where as here defendant could have been sentenced to up to fifteen years' imprisonment as a fourth offender and was instead sentenced to only three years' probation, no abuse of the trial court's sentencing discretion has been established. The tether provision does not render the sentence disproportionate.

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Carole F. Youngblood