STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAIME SIFUENTES,

Defendant-Appellant.

UNPUBLISHED
March 16, 1999

No. 207105
Oceana Circuit Court
LC No. 97-002605 FH

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of delivery of cocaine weighing more than 225 grams and less than 650 grams, a violation of MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant was sentenced to twenty to thirty years in prison. We affirm.

Initially, defendant argues that he was denied effective assistance of counsel because his trial counsel did not raise an entrapment defense. Because defendant did not seek a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review of this issue is limited to the facts apparent in the lower court record. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the Sixth Amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). A defendant must also demonstrate prejudice, showing that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 678-679; 521 NW2d 557 (1994). A defense counsel's failure to raise a substantive defense, such an entrapment, where there is substantial evidence to support the defense, may amount to ineffectiveness of counsel. *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984).

A criminal defendant may attempt to establish entrapment by showing (1) that the police conduct would induce a person not ready and willing to commit the offense to go forward with the crime, or (2) by showing that the conduct of the police was so reprehensible that it cannot be tolerated.

People v Fabiano, 192 Mich App 523, 531-532; 482 NW2d 467 (1992). Defendant argues that he was induced to sell cocaine by a police informant, but points to no facts that demonstrate any of the coercion or pressure noted in *People v Juilliet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991). Further, although defendant claims he had no criminal history and that this indicates that he was law abiding, the facts in this case suggest that defendant was in the business of selling drugs, since the informant testified that defendant took the buy money and arranged for the pick up of this relatively large amount of cocaine shortly thereafter. Entrapment will not be found where, as it appears here, the police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted. *People v Butler*, 444 Mich 965, 966; 512 NW2d 583 (1994). Nor can defendant establish reprehensible police conduct, since in *People v Maleski*, 220 Mich App 518; 560 NW2d 71 (1996), similar facts were not found be reprehensible conduct on the part of the police. Because defendant cannot establish on this record that the defense of entrapment would have been viable, he has not established that he was denied the effective assistance of counsel when his attorney failed to raise this issue.

Defendant next argues that the trial court erred in instructing the jury on the theory of aiding and abetting and that the jury's verdict was not supported by sufficient evidence. In determining whether sufficient evidence was presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and to determine whether 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). Jury instructions are reviewed in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

A court does not err in instructing a jury on the principal offense and an aiding and abetting theory if there are facts sufficient to justify both instructions. See *People v Sammons*, 191 Mich App 351, 370-373; 478 NW2d 901 (1991). We find the reasoning of this Court's decision in *Sammons* to be on point. In that case, this Court ruled that the jury was properly instructed on both theories where the defendant was at the site of a drug sale, mentioned that the drugs were in the next room, and told the purchasers to pay with small bills. *Id*. Here, after arranging to meet in a parking lot, defendant directed the informant into a laundromat where the informant met with an individual who had been a passenger in defendant's car and they completed the cocaine transaction. Even if the jury had not believed that defendant arranged the whole transaction and was therefore guilty as a principal, it could have found him guilty as an aider and abettor based on this evidence. The instruction was therefore properly given.

Defendant also attacks the sufficiency of the evidence showing that he delivered cocaine by pointing out that no witness testified that he was seen with the drugs or that he handed the drugs to the informant. However, a person need not have actual physical possession of a controlled substance to be guilty of possession of it for the purposes of delivery. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Taken in the light most favorable to the prosecution, the facts in this matter demonstrate that defendant took money for the purchase of drugs in his home, directed the purchaser where to await delivery, drove to the laundromat with the person who actually handed the cocaine to the informant, and directed the informant to go into the laundromat for

delivery. In light of *Wolfe*, this evidence is enough to allow a rational trier of fact to find that defendant had the right to exercise control over the cocaine and that he was involved in the delivery.

Finally, defendant argues that his sentence was disproportionate. Controlled substance crimes have mandatory minimum sentences, and the crime for which defendant was convicted has a mandatory sentence of not less than twenty nor more than thirty years in prison. MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Legislatively mandated sentences are presumed to be proportionate and valid. *People v Johnson, (On Remand),* 223 Mich App 170, 175; 566 NW2d 28 (1997). However, the statute leaves some room for discretion by providing that the sentencing court may depart from the minimum term if the court finds "substantial and compelling reasons" to do so. MCL 333.7401(4); MSA 14.15(7401)(4). Although most of the factors raised by defendant to justify departure are permissible factors under *People v Fields,* 448 Mich 58, 76-77; 528 NW2d 176 (1995), namely, his lack of a criminal record, his strong work history, his long-term marriage, his large family's dependence upon him for support, and his model behavior after his arrest, these factors do not compel departure. Our Supreme Court in *Fields* clarified that a downward departure is the exception to the rule. *Id*., 68. Therefore, on this record, it cannot be said that the trial court's decision not to depart downward from the mandatory minimum sentence was an abuse of discretion.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot