STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 2004
v	No. 248956 Oakland Circuit Court
BRUCE ROBERT HIGBEE, Defendant-Appellant.	LC No. 02-187625-FH

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree retail fraud, MCL 750.356c, for which the trial court sentenced him to eighteen months to ten years in prison. We affirm.

Defendant first alleges that the prosecution presented insufficient evidence to support his first-degree retail fraud conviction. We disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Defendant's conviction arises from the theft of approximately $800 worth of golf clubs that normally would have constituted second-degree retail fraud, MCL 750.356d. However, MCL 750.356c(2) provides that if a defendant previously has been convicted of one of the offenses under the statute, conduct that would otherwise constitute second-degree retail fraud is elevated to first-degree retail fraud. *People v Johnson*, 195 Mich App 571, 572, 575; 491 NW2d 622 (1992). Defendant herein does not dispute that he has a prior conviction of second-degree retail fraud.

To establish the charged offense, the prosecution was required to prove that (1) defendant took property that the store offered for sale, (2) moved the property, (3) intended to steal the property, (4) the incident happened either inside the store or in the immediate vicinity of the store, when the store was open to the public, and (5) the property taken was offered for sale at a price of $200 or more, but less than $1000. MCL 750.356d(1)(b); MCL 750.356c(2); CJI2D 23.13.

In the present case, there was no direct evidence that defendant took two "Big Bertha" drivers, which retailed for $399 each, from the *Nevada Bob's* golf retail store in Rochester Hills ("the Rochester Hills store"). However, it is well settled that circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *Fennell, supra*. Defendant's intent to commit first-degree retail fraud may be inferred from all the facts and circumstances. See *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

Viewing the evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. On the day of the incident, during the time in which the Rochester Hills store was open to the public, a salesman observed defendant walking around the partitions that held the golf clubs while defendant's female companion occupied the salesman with questions regarding a potential gift for her father. The evidence showed that defendant was wearing a bulky coat and baggy sweatpants, that there were only ten customers that day, that none of the other customers were couples, that none purchased golf clubs, and that none spent more than a casual amount of time looking at clubs. Among all the customers, only defendant was not assisted by the salesman because the salesman was assisting defendant's female companion. Defendant and his female companion spent about ten minutes in the store and left together without purchasing anything. Approximately forty-five minutes thereafter, a check of inventory revealed that the two Big Bertha drivers were missing from the golf club partitions. Between the time that defendant left the store and the time that the two Big Bertha drivers were found missing from the store, there had been no other customers in the store. The evidence also established that shortly after defendant and his female companion left the Rochester Hills store, they went to a *Nevada Bob's* store in Sterling Heights. Defendant's female companion asked a salesman to show her a pair of shoes for her father while defendant walked the opposite way, toward the golf clubs. As the salesman assisted the woman, he could not observe defendant. After a short period of time, the salesman heard the bell on the door, which signaled that defendant had left the store. Shortly thereafter, defendant reentered the store and told the woman that they should get going. The salesman became suspicious about the couple and wrote down the license plate number of their vehicle. After defendant and the woman left, a check of the store inventory revealed that two Callaway woods were missing. The store manager then called the Rochester Hills store to notify them that clubs were stolen from the Sterling Heights store and "to be on the lookout" with regard to the couple, who actually had already been in the Rochester Hills store. At the Sterling Heights store, there was only one other customer that day who was still hitting golf balls in the back of the store when the two golf clubs were taken. From this evidence, a rational trier of fact could infer that the defendant employed the same scheme of using his female companion as a diversion to create an opportunity to steal the two Big Bertha drivers from the golf store and find that the essential elements of retail fraud were proven beyond a reasonable doubt.

Defendant also contends that his silence or unresponsiveness to the police officer's request to come down to the police station for questioning was protected by his constitutional privilege against self-incrimination, and thus, the trial court erred in admitting his silence or non-responsive conduct as substantive evidence at trial. We disagree.

The applicability of the constitutional protections depends on whether a defendant's silence occurred when he was in a position to have his testimony compelled and then asserted his privilege. The privilege applies when a defendant was subjected to police interrogation while in custody or deprived of his freedom in any significant way and when a defendant's silence follows *Miranda*[1] warnings. *People v Schollaert*, 194 Mich App 158, 164-165; 486 NW2d 312 (1992). In this case, defendant's silence or non-responsive conduct did not occur during custodial interrogation or in reliance on *Miranda* warnings.[2] Therefore, defendant cannot assert the privilege against self-incrimination and his pre-custodial, pre-*Miranda* silence or non-responsive conduct was properly admitted as substantive evidence. *Id*. at 165-167. Moreover, as the trial court noted, defendant opened the door to the introduction of the challenged evidence when defense counsel elicited testimony from a detective that in a phone conversation defendant denied taking any golf clubs. Thus, it was permissible for the prosecutor to then inquire during redirect-examination about the rest of the conversation and defendant's conduct. See MRE 401 *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994). The trial court did not abuse its discretion in admitting the evidence of defendant's pre-custodial, pre-*Miranda* silence or non-responsive conduct. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998) (a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion).

In the alternative, defendant claims ineffective assistance of counsel if this Court deems defense counsel's "belated objection" insufficient to preserve this issue for appeal. We need not address this argument because we find counsel's objection timely, and therefore this issue is preserved. Regardless, counsel is not ineffective for failing to object to properly admitted evidence. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Although defendant relies on *Combs v Coyle*, 205 F3d 269, 283 (CA 6, 2000), the facts are distinguishable. There, the defendant was in custody when he said "talk to my lawyer." *Id.* at 284-285. Here, defendant was not in custody and did not tell the detective to contact his lawyer.