

2008

Layton City v. Michelle Lee Spurgers : Brief of Appellee

Utah Court of Appeals

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DISTRICT COURT

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, by and through
LAYTON CITY, a municipal corporation

Plaintiff and Appellee,

v.

MICHELLE LEE SPURGERS,

Defendant and Appellant.

20081019-CA

BRIEF OF PLAINTIFF AND APPELLEE

Appeal from a conviction for one count of retail theft, a class B misdemeanor, in the Second District Court, State of Utah, Davis County, Layton Department, the Honorable David M. Connors presiding.
District Court Case # 081600406-

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, by and through
LAYTON CITY, a municipal corporation,

Plaintiff-Appellee,
vs.

RONALD CHARLES BARTON,

Defendant-Appellant.

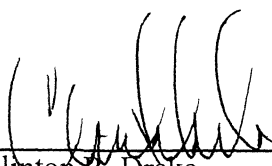
CERTIFICATE OF SERVICE

Appellate Case No: 20081019

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Case No. 20081019-CA
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STATEMENT OF ISSUE

Is the evidence sufficient to support Defendant's conviction for retail theft?

Standard of Review. The present appeal is from a criminal bench trial.

Accordingly this Court reviews the District Court's factual determinations under a clearly erroneous standard. *See State v. Galli*, 967 P.2d 930,933 (Utah 1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

76-6-602. Retail theft, acts constituting.

A person commits the offense of retail theft when he knowingly:

(1) Takes possession of, conceals, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the retail value of such merchandise; or

(2) Alters, transfers, or removes any label, price tag, marking, indicia of value or any other markings which aid in determining value of any merchandise displayed, held, stored or offered for sale, in a retail mercantile establishment and attempts to purchase such merchandise personally or in consort with another at less than the retail value with the intention of depriving the merchant of the retail value of such merchandise; or

(3) Transfers any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment from the container in or on which such merchandise is displayed to any other container with the intention of depriving the merchant of the retail value of such merchandise; or

(4) Under-rings with the intention of depriving the merchant of the retail value of the merchandise; or

(5) Removes a shopping cart from the premises of a retail mercantile establishment with the intent of depriving the merchant of the possession, use or benefit of such cart.

STATEMENT OF THE CASE

As more fully detailed in Argument 3 of the Argument section of this Brief, Defendant's Statement of the Case suggests facts and makes assumptions that are not in the record.

Charge. Defendant was charged with one count of retail theft, a class B misdemeanor, in violation of Utah Code Annotated §76-6-602. *Appellant's Brief* Addendum A.

Conviction. Following a bench trial that lasted approximately one hour, Defendant was convicted as charged. R52.

Sentence. A sentencing hearing was set for January 6, 2009 and a presentence investigation report was ordered. R54-55. At sentencing the trial court sentenced Defendant to 180 days in the Davis County Jail with 180 days suspended and was placed on supervised probation for eighteen months. Defendant was also ordered to pay a \$350 fine, to pay restitution to Mervyn's in the amount of \$124, to take a cognitive restructuring class and to obtain a GED or high school diploma before the end of Defendant's probation. *Appellant's Brief* Addendum C.

Timely Appeal. Defendant filed a timely notice of appeal.

STATEMENT OF THE FACTS

Defendant's brief summarizes the evidence in the light most favorable to her case and not the verdict of the trial court. It is well established appellate practice

that this brief should recite the facts in the light most favorable to the verdict of the trial court. *See State v. Pinder*, 2005 UT 15 ¶ 2. 114 P.3d 551.

On March 14, 2008, Defendant and her mother visited the Mervyn's department store in the Layton Hills Mall, Layton Utah. R40. While in Mervyn's Defendant was observed viewing articles of clothing in a "High-Theft Storage Area" of the store. R8. Closed circuit cameras are placed throughout Mervyn's. R9. Loss Prevention Supervisor Anderson observed Defendant through the closed circuit cameras, and at times, in person. R9 and 12. The area of the store in which Defendant was observed is an area of focus for Mervyn's loss prevention officers because it is an area in which retail thefts occur frequently. R8. Loss Prevention Supervisor Anderson noted that Defendant was a high frequency retail theft area in the store and that Defendant displayed behaviors and mannerisms that shoplifters often display. R8-9. Notably, Defendant took items displayed for sale and draped them over her arm and ripped at least one tag from the clothing. R9-10. While doing this, she did a "look-around", or looked up at the ceiling. R8. Defendant then took the items she had draped over her arm, including the item she had removed the tag from, into the dressing room. R11. Loss Prevention Supervisor Anderson exited the camera room and went into the dressing room where she observed Defendant and another person, her mother, within the same changing stall in the dressing room. R12-13. When Defendant exited the dressing room the items in her possession were not visible however, she appeared to be wearing more than one

shirt and her bag was larger than when she entered the dressing room. R14 and 16. Before Loss Prevention Supervisor Anderson could stop Defendant she was required, per Mervyn's policy, to check the dressing room. R29-31. When Loss Prevention Supervisor Anderson inspected the stall Defendant and her mother were in she found only one item of clothing, some pants. R16-18. In the pocket of the pants were numerous tags that had been removed from clothing that matched the clothing that was taken into the dressing room by Defendant. R16-18. Because Loss Prevention Supervisor Anderson was required to follow company policy and check the dressing room before stopping a shoplifter, Defendant was able to abruptly leave the store, enter her vehicle and leave. R17. By the time Loss Prevention Supervisor Anderson caught up to Defendant in the parking lot, Defendant had already got in her car and was driving away. *Id.* Loss Prevention Supervisor Anderson noted the make, model and license plate of the vehicle Defendant drove away in and relayed the information to the Layton Police Department. R17-18. After some investigation, Layton City Police were able to determine the identity of Defendant as Michelle Lee Spurgers. R36. Defendant was contacted by Layton Police and questioned regarding the theft at Mervyn's. R36-37. Defendant denied any involvement. R37.

On April 16, 2008 the Defendant was charged by criminal information in the Second District Court, Layton Department with "Retail Theft", Utah Code §76-6-602.

Appellant's Brief Addendum A. On October 16, 2008 a bench trial was conducted in which the Defendant was found guilty of violating §76-6-602 UCA. R52.

SUMMARY OF THE ARGUMENTS

Defendant's challenge to the sufficiency of the evidence supporting her conviction for retail theft should be rejected for a number of reasons. First, Defendant's brief is inadequate because she has not marshaled the evidence and has failed to present the facts in a light most favorable to the verdict. Second, the evidence presented at trial was sufficient to support a guilty verdict. And finally, Defendant's brief asserts facts that are unsupported by the record.

Argument 1

THE DEFENDANT HAS NOT MARSHALED THE EVIDENCE AND HAS FAILED TO PRESENT THE FACTS IN A LIGHT MOST FAVORABLE TO THE VERDICT.

Defendant's brief is inadequate because she has failed to marshal the evidence. To succeed on an insufficiency claim, Defendant must marshal all the evidence and demonstrate that it fails to establish the elements of retail theft. Utah Rule of Appellate Procedure 24 requires "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." The marshaling process "serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial." *State v. Moore*, 802 P.2d 732, 739 (Utah App. 1990). Marshaling is an "arduous and painstaking" process. *West Valley v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991).

"To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. '" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)).

In the instant case, Defendant claims to have met her burden of marshaling the evidence. Defendant's marshaling of the evidence simply consists of a list of witnesses called and the physical evidence admitted at trial. *See Appellant's Brief* Pg.

11. It completely neglects to recite specific evidence presented at trial. *Id.* The following is Defendant's attempt to marshal the evidence:

"The following is the marshaled evidence that supports the trial court's finding that Ms. Spurgers was guilty of retail theft: (1) The testimony of Teanna Anderson, Loss Prevention Supervisor for Mervyn's, concerning her observation of Ms. Spurgers during the incident in question; (*See* 10/16/08 Tr. Trans. 6-33; [sic] (2) The testimony of Layton City Police Officer Chad Jones, concerning his investigation of the case, including his telephone contact with Ms. Spurgers (*See* 10/16/08 Tr. Trans. 34-39); (3) The testimony of Ms. Spurgers regarding the incident and her denial of taking anything (*See* 10/16/08 Tr. Trans. 39-45); (4) The trial exhibits admitted at trial, which included a photo of similar items (*See* Plaintiff's Exhibit 1 - 10/16/08 Tr. Trans. 34-39), a photo of tags allegedly found from missing items (*See* Plaintiff's Exhibit 2 - 10/16/08 Tr. Trans. 20-21); a bag of actual tags allegedly from missing items (*See* Plaintiff's Exhibit 3 - 10/16/08 Tr. Trans. 21-22); and (5) The store's video surveillance camera recording of the alleged incident (*See* Plaintiff's Exhibit 4 - 10/16/08 Tr. Trans. 1-22)" *Id.*

Again, marshaling is an arduous and painstaking process in which “the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, at 1052-53. By simply listing those who testified at trial and listing the trial exhibits, Defendant has not undergone this “arduous and painstaking” process. *See West Valley City v. Majestic Inv. Co.* at 1315.

Even if the Court were to consider Defendant’s Statement of Facts in her Brief as her marshaling of the evidence it still inadequately recites the evidence submitted at trial, particularly the testimonial evidence. The trial court relied upon the testimony of all the witnesses in making reasonable inferences regarding Defendant’s behavior on the date in question. It was this testimonial evidence upon which the trial court rendered a guilty verdict. For example, Defendant failed to marshal any of Loss Prevention Supervisor Anderson’s testimony that while shopping, Defendant did a “look-around” R8. That Defendant ripped the tag off of at least one item of clothing. R5-6. That Mervyn’s employees cleared the dressing room of all clothing and other items immediately prior to Defendant entering the dressing room. R10. That Loss Prevention Supervisor Anderson viewed Defendant enter the dressing room with several items of clothing. R11. That Loss Prevention Supervisor Anderson confirmed that Defendant was in the dressing room and that there was another person, her mother, in the dressing room stall with Defendant.

R12. That Defendant left dressing room with no items visibly her possession and she and her mother's bags were larger than when they entered the dressing room and that a second shirt was now visible under Defendant's shirt. R14 . That after Defendant left the dressing room Loss Prevention Supervisor Anderson checked the dressing room and confirmed that only one of the numerous items were left in the dressing room and the rest of the numerous items Defendant took into the dressing room could not be located. R16-17. That Defendant left the dressing room quickly and went straight for the door leading to the parking lot. *Id.* That Loss Prevention Supervisor Anderson wanted to stop Defendant but couldn't until she checked the dressing room per company policy. R32. And by the time she checked the dressing room Defendant was already entering her car in the parking lot and she was not able to stop Defendant for safety reasons and due to company policy. R32.

Accompanied with and corroborating Loss Prevention Supervisor's testimony was a video confirming the events detailed in her testimony. *See Plaintiff's Exhibit 4 – 10/16/08 Tr. Trans. 19:1-22*). It is also important to note that instead of reciting the facts and inferences in the light most favorable to the trial court's verdict, Defendant argues the evidence in light most favorable to her acquittal.

Instead of marshaling the evidence, Defendant merely lists the witnesses who testified at trial and the exhibits admitted at trial. This is not marshaling the evidence.

Argument 2

THE EVIDENCE IS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR RETAIL THEFT.

Notwithstanding Defendant's failure to marshal the evidence, the evidence presented at trial was more than sufficient to support a guilty verdict. As noted by the Trial Court, there was no issue regarding identity, date, or location in the instant case. R52. The only question in the present case is whether Defendant took possession of, concealed or carried away or caused to be carried away or transferred some merchandise for Mervyn's, the value of which was less than \$300 was proven beyond a reasonable doubt. The trial court correctly found beyond a reasonable doubt that Defendant "did in fact take possession of, conceal, carry away or cause to be carried away or transferred some merchandise from Mervyn's, at least one item. And that value is less than \$300." *Id.* In considering a sufficiency of the evidence claim, this Court's inquiry is limited. *See State v. Boss*, 127 P.3d 1236. (Utah App. 2005). "So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops." *Id.* at 1238 (quoting *State v. Mead*, 27 P.3d 1115).

The trial court considered the following evidence at trial. The testimony of Loss Prevention Supervisor Anderson, the testimony of Layton Police Detective Chad Jones, the testimony of Defendant, the surveillance video, some photos of tags and clothing similar to the clothing taken, and the actual tags found in the dressing room.

The uncontroverted evidence demonstrates that the trial courts findings were not clearly erroneous and that the inferences made were reasonable. Defendant removed clothing from the display shelves and removed hangers from the clothing. R8-16. Defendant did a “look-around”. R8. Defendant removed a tag from at least one item of clothing which is corroborated by the surveillance video and was admitted by Defendant. R41, Plaintiff’s Exhibit 4. Defendant entered the dressing room with a substantial amount of clothing. R11. Defendant was observed with another person, her mother, inside a dressing room stall. R12-13. When Defendant left the dressing room her bag was larger than when Defendant entered. R13-14 and 16. When Loss Prevention Supervisor Anderson checked the dressing room stall only one item of clothing was left in the stall and there were numerous tags left behind that had been removed from the unaccounted for clothing items that Defendant brought into the dressing room. R17-18. Defendant left the dressing room with an additional shirt now protruding from the bottom of her shirt. R18. Defendant admitted to having an additional “second” shirt on underneath her shirt but claimed she wore it the whole time. R44. When Defendant left the dressing room she immediately left the store, walked straight to her vehicle and drove away. R17.

Viewing the evidence in a light most favorable to the verdict, it is clear that the trial court’s inferences were reasonable. As detailed in *State v. Boss*, there is “some evidence” upon which inferences were reasonably made and the evidence is

not "completely lacking or . . . so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *State v. Heaps*, 2000 UT 5, P 19, 999 P.2d 565, *See also State v. Boss*. The trial court correctly found Defendant guilty of retail theft.

Argument 3

DEFENDANT'S BRIEF CONTAINS ASSERTIONS THAT ARE NOT SUPPORTED BY THE RECORD.

In considering Defendant's defects in marshaling the evidence and presenting facts in a light most favorable to the verdict, it is important to note that Defendant also makes assertions regarding Loss Prevention Supervisor Anderson's testimony and actions that are unsupported by the record. Defendant attempts to make inferences that are clearly lacking and even contradicted in the record. For example, in her brief, Defendant attempts to argue that the Loss Prevention Supervisor Anderson was "unsure" of the theft and "refused" to detain Defendant. *Appellant's Brief Pg. 13*. This is untrue and unsupported by the record. In her testimony Loss Prevention Supervisor Anderson testified that she wanted to stop them but she had to follow company policy before doing so. R17. This resulted in the loss of value time to stop Defendant before she exited the store. *Id.* She stated, "I wanted to stop them and ask them about the merchandise, if I could get it back." *Id.* She further testified that she followed Defendant into the parking lot but couldn't stop her because, "they weren't still walking. As I looked over they were getting in a car, and so I got the license plate of the car." *Id.* Defendant further attempts to argue that Loss Prevention Supervisor Anderson had several opportunities to stop Defendant.

Appellant's Brief Pg. 13. At trial the loss prevention officer Anderson was asked if there was a reason she did not immediately stop Defendant. R31. Loss Prevention Supervisor Anderson replied that she could not because she had to follow Mervyn's policy before making a stop. *Id.* She responded, "Yes, there is. My company policy states that I need to verify all of my steps. We had to have certain criteria and certain steps before we go out on a stop, and one of them is checking the fitting room." *Id.*

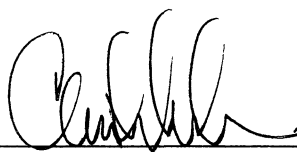
Another example of arguments asserted as facts not supported in the record is Defendant's Statement of the Case and Statement of Facts which suggest that Loss Prevention Supervisor Anderson "allowed" Defendant to leave and that "Ms. Spurgers and her mother *were allowed* to leave the premises without being detained in any manner by the merchant". *Appellant's Brief* Pgs. 2 and 4 (emphasis added). The loss prevention officer clearly intended to stop Defendant but never had the opportunity as Defendant left the store quickly and went directly to her vehicle. R32.

In Defendant's Summary of the Arguments she again alleges that Loss Prevention Supervisor Anderson "refused" to detain Defendant despite having "several opportunities". *Appellant's Brief* Pg. 7. And again this is contrary to the testimony of Loss Prevention Supervisor Anderson who clearly stated she was simply following company policy by checking the dressing room before stopping Defendant. R17.

CONCLUSION

For the reasons more fully set forth above, Plaintiff and Appellee respectfully requests that this Court affirm the conviction of Defendant.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Clinton R. Drake', is written over a horizontal line.

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