

1998

The City of Orem v. Kristy R. Jensen : Brief of Appellee

Utah Court of Appeals

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Michael G. Barker; Orem City Prosecutor; attorney for appellee.

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IN THE UTAH COURT OF APPEALS

CITY OF OREM,)

Plaintiff/Appellee,)

v.)

KRISTY R. JENSEN,)

Defendant/Appellant.)

APPELLEE'S BRIEF

Case No. 981868-CA

Priority No. 2

ON APPEAL FROM JUDGMENT IN THE FOURTH DISTRICT COURT
THE HONORABLE JOHN C. BACKLUND PRESIDING

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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| CITY OF OREM, |) | |
| |) | |
| Plaintiff/Appellee, |) | APPELLEE'S BRIEF |
| |) | |
| v. |) | |
| |) | Case No. 981868-CA |
| KRISTY R. JENSEN, |) | Priority No. 2 |
| |) | |
| Defendant/Appellant. |) | |

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LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of all the parties in the proceedings before the
Fourth District Court, State of Utah, Utah County, Orem Department:

The Honorable John C. Backlund, Judge, Presiding.

The City of Orem, Plaintiff, represented by Michael G. Barker..

The defendant, Kristy R. Jensen, represented by Randy Lish

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DETERMINATIVE STATUTES AND RULES:

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Utah Code Ann. § 78-2a-3(2)(e) (1953, as amended) 1

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1953, as amended)

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Issue: Should the Court overturn the jury's guilty verdict because the Prosecution failed to show beyond a reasonable doubt that the Defendant committed the crime of retail theft?

Standard of review: "To demonstrate that the evidence is insufficient to support [a] jury verdict, the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." *State v. Hopkins*, 380 Utah Adv. Rep. 15 (Utah 1999). Once the defendant has met the marshaling requirement, the defendant must show "the evidence and its inferences are so 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.'" *State v. Gallegos*, 851 P.2d 1185, 1190 (Utah Ct. App. 1993) (quoting *State v. Petree*, 659 P.2d 443, 444 (Utah 1983)).

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 76-6-602. Retail theft, acts constituting.

STATEMENT OF THE CASE

On April 28, 1998, Defendant was cited for the crime of Retail Theft. R. at 2. She

was subsequently charged by information with one count of Retail Theft. R. at 1. On October 13, 1998, a jury found Defendant guilty of retail theft. R. at 28.

Defendant and her daughter entered the Albertson's store at 1600 North State Street in Orem at approximately 10:00 a.m. on April 28, 1998. Tr. at 20-21, 78. Defendant proceeded to the customer service booth where she spoke with an Albertson's employee by the name of Susan Olsen (hereinafter "Olsen"). Tr. at 21. Their conversation centered on Defendant's desire to exchange a mascara that she thought she had purchased at this particular Albertson's. Olsen told Defendant to go select the item for which she wished to exchange the mascara. Olsen did so and returned with a Bonnebelle Liplight (hereinafter "Liplight"), as well as a few grocery items in her cart. Tr. at 22-24, 41.

Olsen was not sure about the exchange, so she requested assistance from an assistant manager, Josh Quarnberg (hereinafter "Quarnberg"). Tr. at 25. Quarnberg approached the customer service booth. He noticed Defendant was there and had a cart with a few groceries in it. Tr. at 41. Quarnberg spoke with Defendant about the exchange. He indicated to Defendant she didn't purchase the mascara at that particular Albertson's because that store did not stock Revlon products. Defendant was pretty sure she had purchased the mascara at that particular Albertson's but then suggested she may have purchased it Allen's, which is located a short distance up State Street. Tr. at 43-44.

Quarnberg indicated to Defendant that he could not authorize the exchange

because the mascara was not purchased at that particular Albertson's. Tr. at 43.

Quarnberg testified that Defendant was not happy Quarnberg would not authorize the exchange and requested Quarnberg authorize that exchange anyway. The conversation between Quarnberg and Defendant lasted a few minutes. T. at 48.

Unable to make the exchange, Defendant put the mascara in her purse and put the Liplight in the bottom of her cart. She left the customer service booth and walked over to the magazine stand. Quarnberg followed her from behind and to the left. Defendant stopped at the magazine stand so that the magazines were between her and the customer service booth. She then walked to the side of her cart so that she was facing the customer service booth. Quarnberg was in a position to see her and observe her actions. Tr. at 49-50, 67. Defendant was unaware that Quarnberg was watching her. Tr. at 68.

Quarnberg observed Defendant reach into her cart, pick up the Liplight, place it in her purse and then pull out her wallet. These actions took only a couple of seconds. Defendant then proceeded to one of the checkstands. Tr. at 50-51. Quarnberg then moved to the customer service booth so he could see whether Defendant would pay for the Liplight. Tr. at 53-54. Seeing that Defendant failed to pay for the Liplight in her purse, Quarnberg and Olsen stopped Defendant as she was leaving the store. Tr. at 57.

At that point, Quarnberg told Defendant he was stopping her because she had failed to pay for the Liplight concealed in her purse. Without saying a word, Defendant pulled the Liplight out of her purse and handed it to Quarnberg. Tr. at 57-58. Quarnberg

and Olsen escorted Defendant to an office in the store. Tr. at 59. Quarnberg testified Defendant never denied she intended to steal the Liplight. Tr. at 69-71.

At the close of the evidence Judge Backlund instructed the jury. R. at 12-27, Tr. at 102-103. Both parties presented closing arguments and the jury retired to deliberate. Tr. at 105. The jury returned after deliberating and the verdict of guilty was read. Tr. at 106. Judge Backlund then polled the jury and all affirmed their verdict remained guilty. Tr. at 106-107.

SUMMARY OF THE ARGUMENT

Defendant has failed to properly marshal the evidence. Defendant has only presented those facts most favorable to defendant's position without citations to the record. Alternatively, there was sufficient evidence on which to convict defendant of retail theft.

ARGUMENT

I. DEFENDANT HAS FAILED TO MARSHAL THE EVIDENCE AND HAS, THEREBY, WAIVED HER RIGHT TO CLAIM THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HER AT TRIAL.

In making a claim of insufficiency of evidence to support the jury's verdict, the Defendant has the burden of marshaling the evidence to support her claim. Case law is clear that the Defendant "must marshal all the evidence supporting the jury's verdict and then must show this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict." *State v. Vessey*, 967 P.2d 960, 966

(Utah Ct. App. 1998) (quoting *State v. Lemons*, 844 P.2d 378, 381 (Utah Ct. App. 1992)). Furthermore, the defendant's failure to properly marshal the evidence acts as a waiver of the insufficiency of evidence claim. *Gallegos* at 1189. See *State v. Moore*, 802 P.2d 732, 738 (Utah Ct. App. 1990).

In *State v. Scheel*, 823 P.2d 470 (Utah Ct. App. 1991) the Court refused to consider defendant's claim of insufficient evidence because defendant had failed to properly marshal the evidence. As in *Scheel*, Defendant's brief is "devoid of any mention of the evidence supporting the verdict." *Id* at 473. Rather, Defendant's brief recounts a version of the facts most favorable to Defendant while ignoring the evidence that supports the jury's verdict.

II. THERE WAS SUFFICIENT EVIDENCE FOR A JURY TO CONVICT DEFENDANT.

Assuming, *arguendo*, Defendant has properly marshaled the evidence, the evidence and the reasonable inferences drawn therefrom support the verdict. According to U.C.A. §76-6-602:

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

....

Defendant claims there was insufficient evidence for the jury to find her guilty. In support of her argument, Defendant relies on comments made by the judge regarding the difficulty one encounters in sitting in judgment and concludes the Court was uncomfortable with the verdict. Judge Backlund's comments are not evidence and this Court should disregard them. Parenthetically, whether or not Judge Backlund felt the verdict was wrong, he did deny Defendant's Motion to Amend Judgment Or In The Alternative For A New Trial.

Defendant then cites facts from the record and draws inferences therefrom supporting her position but clearly ignore the other evidence that supports the verdict. In other words, Defendant wants this Court to "sort out what evidence actually support[s] the findings. *Scheel* at 473.

On the other hand, the City presented evidence to prove each element beyond a reasonable doubt. It remains undisputed that Defendant concealed some merchandise held out for sale by Albertson's. Defendant entered the store to exchange a defective mascara. She met with two store employees, including an assistant manager. The assistant manager told Defendant she could not exchange items because she had not purchased the mascara at that particular Albertson's. Upset, she then proceeded to the magazine stand and stopped her cart in a position where she could not easily be seen by the employee at the customer service desk. Unbeknownst to Defendant, the assistant manager was in a position to see her actions. While stopped at the magazine, Defendant

put the Liplight in her purse.

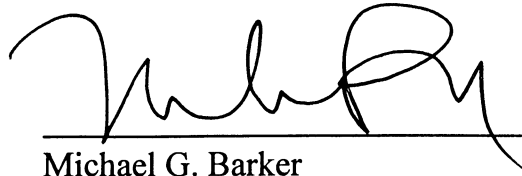
The real issue before the jury was intent. The evidence was sufficient for the jury to conclude beyond a reasonable doubt that Defendant knowingly concealed and carried away the Liplight with the intent to permanently deprive Albertson's of the item. Intent can be inferred from the Defendant's actions. She positioned her cart near the magazine stand so that her actions could not easily be seen. She only took a moment to conceal the item and then proceed to the checkstand so a jury could reasonably conclude she did not forget she had the Liplight. Her hands were not full when she retrieved her wallet from her purse, thereby necessitating her placing the Liplight down. Finally, she never denied stealing the item even though she had ample opportunity to explain her actions. The jury inferring intent from her actions was reasonable.

CONCLUSION

Defendant has failed to properly marshal the evidence. Instead of citing the evidence supporting the jury's verdict and then showing the marshaled evidence is insufficient to support the verdict, Defendant only cites facts and draws inferences therefrom supporting her conclusion there was insufficient evidence to convict her.

Even if the Court holds Defendant did marshal the evidence, the evidence before the jury was not sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that Defendant committed the crime of which she was convicted. *See Scheel* at 472.

RESPECTFULLY SUBMITTED this 13th day of December, 1999.



Michael G. Barker
Orem City Prosecutor

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing
Appellee's Brief, postage prepaid, this 13th day of October, 1999, to the following:

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