

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002121-MR

ADNAN HASAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 08-CR-01490

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; HARRIS,¹ SENIOR JUDGE

NICKELL, JUDGE: Following a one-day jury trial, Adnan Hasan appeals from a judgment of the Fayette Circuit Court finding him guilty of theft by unlawful

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

taking over \$500.00² and sentencing him to a one-year sentence which was probated for four years. Hasan claims the trial court erred in denying his request for a directed verdict because there was no proof he intended to deprive Dillard's department store of men's clothing valued at \$3,205.50. Having reviewed the briefs, the record and the law, we affirm.

Jurors heard two versions of events occurring in the Dillard's store in Fayette Mall in Lexington, Kentucky, on August 31, 2008. According to the Commonwealth's proof, Hasan entered the store with his three children, ages seven, five and three. His seven-year-old daughter was carrying a folded, empty Macy's bag. As Hasan and his children visited several men's apparel departments within the store, Hasan picked up a white polo-type shirt and placed it across his arm concealing several ties. Store clerks found this suspicious because ties are usually laid atop, not under, a shirt when attempting to find a match. Their suspicions aroused, the Dillard's Loss Prevention team observed Hasan select two expensive suits of the same size, in addition to the ties and the polo-type shirt, and enter a dressing room with his children. A few minutes later, the quartet emerged from the dressing room with Hasan carrying only one suit and his daughter carrying the Macy's bag. When a clerk familiar with Hasan checked all six

² KRS 514.030, a Class D felony because the value of the property taken was \$500.00 or more. The indictment originally alleged the value of the property was \$300.00 or more. However, during the midst of trial, the Commonwealth moved to amend the indictment to reflect that the value of the stolen merchandise exceeded \$500.00 rather than \$300.00. After hearing argument, the trial court allowed the amendment.

dressing rooms, he found neither the second suit nor a hanger for the suit. When Hasan left the dressing room, he told his children to go outside and wait while he chatted with a store employee about holding merchandise for his brother.

An off-duty police officer working with the Dillard's Loss Prevention team testified Hasan had control of the Macy's bag for a brief time when he left the dressing room, turned to the children, gave them the Macy's bag and either told them or motioned for them to go outside. Once outside, Hasan became defensive when the officer approached him and asked him to return to the store. When Hasan resisted, the officer handcuffed him, took control of the Macy's bag, and took Hasan and the children back inside Dillard's to discuss the matter. In checking the contents of the Macy's bag, the officer found no receipts and no yellow "proof of purchase" or "POP" labels used by Dillard's to document each sale. The officer also found no receipts on Hasan's person. However, the Macy's bag contained sixteen ties valued at \$120.00 each; four ties valued at \$89.50 each; one polo-type shirt valued at \$32.50; and one Hart Schaffner Marx suit valued at \$895.00. The total of the merchandise found in the Macy's bag was \$3,205.50. The bag also contained a broken wooden hanger.

In contrast to the Commonwealth's explanation of events, Hasan testified he went to Dillard's to return a polo-type shirt that was too big and several ties (maybe seven or eight) that his wife did not like. He acknowledged handing a suit to his daughter while inside this store which she put in the Macy's bag. Hasan said he became frantic when he discovered his three-year-old son was missing.

The boy was ultimately found in the men's restroom. Hasan said he then told the children to sit in the shoe department while he spoke to the store manager. Hasan testified he did not tell the children to go outside but went after them when he saw the children in the vestibule near the store's exterior doors. Hasan testified he had spent more than \$20,000.00 in Dillard's and he had no intention of stealing anything from the store. Hasan did not produce receipts for the ties, shirt or suit.

At the close of all the evidence, Hasan moved for a directed verdict. The prosecutor opposed the motion, arguing that viewing the evidence in the light most favorable to the Commonwealth, jurors could reasonably believe Hasan intended to deprive Dillard's of its merchandise because there were no POP labels on the items and at least one Dillard's employee had heard Hasan tell his children to leave the store while his daughter was carrying the Macy's bag containing twenty ties, a shirt and a suit with a total value of well over \$500.00. The trial court agreed with the Commonwealth and denied the directed verdict. Hasan was convicted. This appeals follows.

Both parties agreed at trial that the only disputed issue was Hasan's intent. On appeal, Hasan contends the circuit court committed error by denying his motion for a directed verdict of acquittal on the single charge of theft by unlawful taking over \$500.00. We disagree and affirm.

A directed verdict is proper if under the evidence as a whole it would be clearly unreasonable for a jury to find guilt. *Commonwealth v. Benham*, 816

S.W.2d 186 (Ky. 1991). Theft by unlawful taking is codified in KRS 514.030 and states, in relevant part:

(1) . . . a person is guilty of theft by unlawful taking or disposition when he unlawfully:

(a) Takes or exercises control over movable property of another with intent to deprive him thereof; or

(b) Obtains immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

KRS 514.010(1) defines the term “deprive” as:

(a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only upon payment of reward or other compensation; or

(b) To dispose of the property so as to make it unlikely that the owner will recover it.

Against this backdrop, Hasan argues the Commonwealth failed to prove he intended to deprive Dillard’s of its merchandise. He suggests his seven-year-old daughter mistakenly placed the items in the Macy’s bag she had brought to the store and the mistake was simply overlooked when his three-year-old son went missing.

It is axiomatic that an accused’s intent to deprive may be proved by circumstantial evidence. *Carver v. Commonwealth*, 303 S.W.3d 110, 119 (Ky. 2010) (citing *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988)); *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004). Here, there was evidence that Hasan selected several items of men’s clothing (twenty ties, a shirt and two suits)

and took them into a dressing room with his three children. When he and his children emerged from the dressing room, he was carrying only one suit, but the Macy's bag his daughter was carrying contained twenty ties, one shirt and one suit, for which Hasan produced no receipt, and for which there were no POP labels. Even if jurors believed Hasan's testimony that he went to the store just before closing time on a Sunday afternoon to return items, that would explain only seven or eight of the ties and one shirt. There was no explanation for how the additional eleven or twelve ties and the suit ended up inside the bag. Based upon this evidence, we are of the opinion that it was not clearly unreasonable for the jury to find Hasan intended to deprive Dillard's of its merchandise. Thus, we reject Hasan's contention that the circuit court erred by denying his motion for a directed verdict upon the offense of theft by unlawful taking over \$500.00.

For the foregoing reasons, the judgment of the Fayette Circuit Court is
AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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