

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000007-MR

JENNIFER DUNLAP

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 16-CR-01001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

COMBS, JUDGE: Jennifer Dunlap appeals from a judgment of the Fayette Circuit Court convicting her of theft by unlawful taking and evidence tampering. She was sentenced to serve prison terms of twelve months and of two years, respectively -- to run concurrently. The sentence was probated for a period of two years. After our review, we affirm.

On July 6, 2016, loss prevention officers at the Bryan Station Kroger in Lexington detained Jennifer Dunlap for suspected shoplifting. Dunlap showed the officers a receipt, but the receipt was from the Beaumont Centre Kroger in Lexington and did not list any of the items that Dunlap was accused of stealing. The officers escorted Dunlap to the supermarket's loss prevention office.

Elizabeth Kanis, then a patrol officer with the Lexington Police Department, responded to the scene. Officer Kanis promptly gave Dunlap the *Miranda* warnings. Officer Kanis placed the receipt that Dunlap had presented to the loss prevention officers on the desk next to her citation book.

Dunlap asked to speak with her attorney. She provided Officer Kanis with a gentleman's name and telephone number. Officer Kanis dialed the number and asked for the man by name. Shortly after Dunlap spoke with the man on the telephone, Gormley arrived at the supermarket. Officer Kanis gave Dunlap the *Miranda* warnings again -- this time in Gormley's presence. Dunlap and Gormley then asked to confer in private. Believing that Gormley was Dunlap's attorney, Officer Kanis allowed them to talk together in the loss prevention office.

Through a window in the office door, Officer Kanis observed Gormley pick up the receipt and hand it to Dunlap. Dunlap folded the receipt and slipped it into her shirt. After Dunlap and Gormley indicated that they had finished their conversation, Officer Kanis asked that they return the receipt to her. Both

Gormley and Dunlap denied having the receipt or having touched it in the loss prevention office.

Officer Kanis cited Dunlap for theft by unlawful taking under \$500. She was also charged with evidence tampering for taking the receipt. A jury convicted Dunlap of both charges. This appeal followed.

On appeal, Dunlap contends that the trial court erred by failing to grant her motions for directed verdict with respect to the charges. We may reverse the trial court's denial of a motion for directed verdict only "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, 187 (Ky. 1991)

(citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983) (emphasis added)).

When ruling on a motion for a directed verdict, the trial court must assume that the Commonwealth's evidence is true. *Benham*, 816 S.W.2d at 187. Our review is confined to the proof at trial and the statutory elements of the alleged offense. *Lawton v. Commonwealth*, 354 S.W.3d 565 (Ky. 2011).

Upon the close of the Commonwealth's case, Dunlap moved for a directed verdict with respect to the charge of theft by unlawful taking. She maintained that there was no evidence presented to indicate that she intended to commit a theft because she never walked outside the supermarket with the items that she had loaded into her cart. The trial court denied this motion. The question

on appeal is whether Dunlap exercised unlawful control over the supermarket's property when she avoided the cash register and entered the market's vestibule with items in her shopping cart.

KRS¹ 514.030 provides that a person is guilty of theft by unlawful taking when it is shown that she "takes or exercises control over moveable property of another" with an intent to deprive the owner thereof. Dunlap argues that she was entitled to a directed verdict on the charge of theft by unlawful taking because the Commonwealth failed to prove that she ever intended to deprive Kroger of the items in her cart.

The trial testimony indicated that Dunlap had placed a variety of items into her cart before pushing it into the vestibule. After she bypassed the point of sale and crossed a security sensor, an alarm sounded and the wheels of the cart became immovable. Unable to move the cart, Dunlap had begun to switch the items to another cart when the loss prevention team approached.

Under the provisions of KRS 514.030(1)(a), the actual taking of an item is not required in order for a theft by unlawful taking to occur. Instead, the statute "defines the crime in terms of one who unlawfully takes property *or who unlawfully exercises control over property*" with the intent to deprive another of that property. *Commonwealth v. Day*, 599 S.W.2d 166, 168 (Ky. 1980)

¹ Kentucky Revised Statutes (KRS).

(emphasis added). Thus, the crime can be committed by two different types of acts. In this case, the evidence was sufficient to permit the jury to conclude that Dunlap unlawfully exercised control of the items in her cart when she removed them from the aisles where the store had stocked them, bypassed the point of sale with the items, and entered the vestibule with them.

Dunlap also moved for a directed verdict with respect to the charge of tampering with physical evidence. The charge was premised on Dunlap's actions in the loss prevention office in removing and hiding the receipt that she had offered as proof of her purchase of the disputed items.

A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, she destroys, mutilates, conceals, removes or alters physical evidence which she believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding. KRS 524.100. Dunlap argues that the trial court erred by refusing to direct a verdict because the Commonwealth failed to prove that she intended to impair the availability of the receipt in an official proceeding. As noted above, a directed verdict can be granted only when under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty. *Allen v. Commonwealth*, 395 S.W.3d 451 (Ky. 2013).

Dunlap contends that she was not acting with the intent to impair the availability of the receipt by putting it into her shirt because she had no idea that the receipt was going to be used as evidence of her shoplifting. Dunlap tried to convince the jury of this explanation. However, the Commonwealth's evidence showed that Dunlap was being detained in the market's loss prevention office after an alarm had sounded upon her exit from the store and her cart had been disabled. She was being questioned not only by Kroger employees but by a local police officer as well. She had been given her *Miranda* warnings and was conferring with a man (whom she represented to be her attorney) concerning the necessary elements of a shoplifting charge. Dunlap then retrieved the receipt she had tried to use as proof of her purchase and placed it inside her shirt. From this circumstantial evidence, there arises a reasonable inference that Dunlap was attempting to conceal the physical evidence to prevent it from being used in an official proceeding.

Dunlap's citation to language included in *Commonwealth v. Henderson*, 85 S.W.3d 618 (Ky. 2002), is misleading. In *Henderson*, the Kentucky Supreme Court observed that "[t]ampering does not arise by the mere act of hiding property on one's person to avoid detection of shoplifting The statute requires more. The concealment must be to prevent the evidence from being used in an official proceeding, a fact that is lacking in the typical shoplifting situation." *Id.* at 620. The evidence with which Dunlap tampered was not the property that

belonged to Kroger that was being shoplifted. Indeed, she never attempted to conceal the items she sought to take from the market, which is the scenario involved in *Henderson*. Instead, Dunlap was charged with tampering with the *receipt* – concealing the physical evidence which the jury could reasonably conclude that Dunlap believed would be used against her in her prosecution for shoplifting. The evidence was indeed sufficient to support a conviction for tampering with physical evidence. The trial court did not err by refusing to grant a directed verdict with respect to the charge.

We affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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