NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DONTE LEE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 170 EDA 2012

Appeal from the Judgment of Sentence entered December 15, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006415-2011

BEFORE: OLSON, WECHT AND COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.: **FILED MAY 07, 2013**

Appellant, Donte Lee, appeals from the judgment of sentence entered on December 15, 2011 following his bench trial convictions for retail theft and possessing an instrument of crime (PIC).[1] We affirm.

On February 1, 2011, police arrested Appellant inside a Target store located at 7400 Bustleton Avenue in Philadelphia. The arrest occurred after Target's loss prevention officer, Jennifer Fleming, witnessed Appellant take a pair of utility scissors from his sweatshirt pocket and cut two pre-paid cellular phone packages from a locked security rack in the electronics department. Fleming watched Appellant, via live video surveillance, place one of the telephones into a cart. According to Fleming, Appellant was

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[1] 18 Pa.C.S.A. §§ 3929 and 907, respectively.

*Retired Senior Judge assigned to the Superior Court.

detained before he left the building per store policy because Fleming considered the scissors to be a potential weapon. Police recovered the scissors in Appellant's pocket in a search incident to his arrest.

The Commonwealth charged Appellant with the aforementioned crimes. On October 21, 2011, the trial court held a bench trial. The Commonwealth presented the surveillance video as evidence, as well as the testimony of Target's loss prevention officer and the arresting police officer; Appellant testified in his own defense that he intended to pay for the items in his cart. At the conclusion of the trial, the trial court found Appellant guilty of both offenses. On December 15, 2011, Appellant appeared for sentencing and orally moved for extraordinary relief, challenging the sufficiency of the evidence supporting both convictions. The trial court denied relief and sentenced Appellant to concurrent terms of six months of non-reporting probation. This timely appeal followed.[2]

On appeal, Appellant presents one issue for our review:

> Was not the evidence insufficient as a matter of law to sustain [A]ppellant's conviction for retail theft and possessing an instrument of crime, where; [A]ppellant, while shopping at Target and unable to get the assistance of an employee, used his scissors to cut the very top of a cell phone's plastic packaging to remove it from the rack, placed the unopened cell phone in his cart with other items and did

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[2] Appellant filed a notice of appeal on January 6, 2012. On June 15, 2012, defense counsel for Appellant sent this Court's Prothonotary a letter indicating the trial court judge was no longer sitting on the bench and, hence, no trial court opinion was forthcoming.

> not attempt to conceal the phone, leave the store or otherwise demonstrate an intent to take the cell phone without paying?

Appellant's Brief at 3.

Appellant argues that there was insufficient evidence to support both of his convictions. With regard to the retail theft conviction, Appellant posits that it is unclear as to whether the trial court convicted him under subsection (a)(1) or (a)(5) of the retail theft statute. ***Id.*** at 13, n.2. He claims that the Commonwealth failed to produce evidence that Appellant intended to take the phones without paying for them. ***Id.*** at 13. More specifically, he asserts:

> [T]he [surveillance] videotape itself established that [A]ppellant looked at the phones, spoke to a Target employee who failed to return, and proceeded to do his other shopping before returning to the electronics aisle. After assisting another customer, [Appellant] cut the phone lose [sic], not to steal it, but simply to put it in his cart so he could make his purchases at the front of the store. However, he never had that opportunity, because the police arrested him before he could even leave the electronics department. Here, the security officer simply 'jumped the gun' and arrested [A]ppellant before he had a chance to pay for his items.

Id. at 14. Appellant also claims that there was no evidence that he attempted to conceal the telephones. ***Id.*** at 13. With regard to the PIC conviction, Appellant contends that because he had no intent to steal, "there is likewise no evidence that he intended to use the scissors criminally[.]" ***Id.*** at 15. Finally, citing ***Commonwealth v. Neely***, 561 A.2d 1 (Pa. 1989), Appellant asserts that character evidence, more specifically, "a stipulation

that [A]ppellant had the reputation for being a peaceful and honest citizen" was enough to create reasonable doubt in this case.[3] ***Id.***

Our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the finder of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Snyder, 60 A.3d 165, 175 (Pa. Super. 2013)(citation and brackets omitted).

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[3] We reject Appellant's reliance on ***Neely***. In ***Neely***, the Pennsylvania Supreme Court determined that "[a] criminal defendant must receive a jury charge that evidence of good character (reputation) may, in and of itself, (by itself or alone) create a reasonable doubt of guilt and, thus, require a verdict of not guilty." ***Neely***, 561 A.2d at 3. This case was a bench trial so no jury instruction was required. Furthermore, as stated **infra**, the trial court was free to believe all, part, or none of the character evidence presented.

A person is guilty of a retail theft if he:

> [(a)](1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof;
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> (5) destroys, removes, renders inoperative or deactivates any inventory control tag, security strip or any other mechanism designed or employed to prevent an offense under this section with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof.
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> **(c) Presumptions.**--Any person intentionally concealing unpurchased property of any store or other mercantile establishment, either on the premises or outside the premises of such store, shall be prima facie presumed to have so concealed such property with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof within the meaning of subsection (a), and the finding of such unpurchased property concealed, upon the person or among the belongings of such person, shall be prima facie evidence of intentional concealment, and, if such person conceals, or causes to be concealed, such unpurchased property, upon the person or among the belongings of another, such fact shall also be prima facie evidence of intentional concealment on the part of the person so concealing such property.

18 Pa.C.S.A. § 3929.

Based upon our standard of review and an examination of the certified record including, most significantly, review of the surveillance footage presented at trial, we conclude that the trial court did not abuse its discretion in finding sufficient evidence to support Appellant's conviction for retail theft. At the beginning of the surveillance video, Appellant is seen standing in the electronics department looking around nervously. The camera zooms in on Appellant and shows him making two snipping motions with an object on cellular phones that are hanging on locked anti-theft hooks. Appellant steps aside when a customer comes to the area. Appellant barely makes contact with a Target employee who then walks away. The video shows Appellant nervously pacing the aisles around the cellular phones. Four minutes after making the cutting motions, Appellant goes to the nearby baby clothes aisle and puts various infant items into a cart. Two minutes later, Appellant returns to the cellular phone aisle and talks to a different customer. After that customer left the area, Appellant makes additional cutting motions with an object and takes a locked cellular phone off a rack. Appellant places the cellular phone in his cart. Although Appellant blocks the view of the security camera, when police detain and move him, it is apparent that the cellular phone is not in view; only the baby clothes can be seen. Heavy-duty scissors were recovered from Appellant after he was searched incident to his arrest.

Initially, we note that the trial court made clear that it based Appellant's conviction on 18 Pa.C.S.A. § 3929(a)(5). ***See*** N.T., 10/21/2011,

at 57 ("This statute says very clearly you cannot destroy or remove property with a control tag."). Moreover, we reject Appellant's argument that the Commonwealth was required to prove that Appellant concealed one of the cellular phones in order to meet the presumption of intent to deprive Target of possession under 18 Pa.C.S.A. § 3929(c). Here, Appellant cut cellular phones from a **locked** rack. Jennifer Fleming testified that a customer cannot remove the particular cellular phones at issue without employee assistance. ***Id.*** at 22-23. Hence, the trial court could infer from Appellant's actions that cutting the phones free from the rack affirmatively showed his intent to deprive the store of the property. If Appellant had smashed the glass to a locked display case with a hammer, the result would be no different. Appellant simply helped himself to otherwise safeguarded merchandise.

Moreover, we find additional support from the totality of the circumstances presented. Appellant appeared nervous, concealed the utility scissors when utilizing them, paced the aisles, waited until customers left the area, and made little to no contact with Target employees before cutting two phones off the rack and placing one into his cart. Further, it appears that Appellant cut the phones and then went to the baby department only to return later for them. These facts belie Appellant's that he simply got tired of waiting for someone to assist him. Based upon all of the foregoing, the Commonwealth proved each element of subsection (a)(5) of the retail theft statute. The evidence was sufficient to establish that Appellant purposefully

circumvented an anti-theft device with the intent to deprive Target of possession of cellular telephones.

Next, "[a] person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally." 18 Pa.C.S.A. § 907(a). An instrument of crime is defined as "[a]nything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have." 18 Pa.C.S.A. § 907(d). In this case, while scissors certainly have many appropriate and lawful uses, Appellant used them in his endeavors to commit retail theft. Based upon our standard of review, Appellant's conviction for PIC was proper.

Judgment of sentence affirmed.

Colville, J., concurs in the result.

Judgment Entered.

Prothonotary

Date: 5/7/2013