

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	<b>:</b>	<b>CR-760-2013</b>
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	<b>CRIMINAL DIVISION</b>
<b>SHERRY E. LEE,</b>	<b>:</b>	
<b>Defendant</b>	<b>:</b>	<b>1925(a) Opinion</b>

**OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)**  
**OF THE RULES OF APPELLATE PROCEDURE**

**I. Background**

On September 24, 2012, Sherry Lee (Defendant) entered the K-Mart store at the Loyal Plaza, Williamsport, Lycoming County. Kelly Hooker (Hooker), a K-Mart loss prevention associate who was on video surveillance, first observed the Defendant by the perfume display. Hooker saw that there was an unzipped purse and a young child in the seat of the Defendant's shopping cart. Hooker testified that she watched the Defendant place two boxes of perfume in the seat of the cart. Hooker then told Jamie Wagner (Wagner), another loss prevention associate, to begin surveilling the Defendant on the store floor. Hooker watched the Defendant turn the cart, and for a period of time, Hooker could no longer see the cart on video surveillance. Wagner testified that when he got to the Defendant, he did not see perfume boxes in her cart.

The Defendant continued to move around the store, so Hooker was once again able to see the Defendant's cart. Hooker testified that she watched the Defendant pick up a box of artificial nails and then go to the electronics department where the Defendant pulled the security strip off the box. Hooker testified that she then watched the Defendant put the box of nails under her purse, which was still in the seat of the cart. Wagner testified that through a surveillance mirror, it appeared that the Defendant placed a package under her purse.

Next, Hooker watched the Defendant go towards the front of the store. Hooker testified that on her way to the front, the Defendant picked up a jewelry box. Hooker testified that she

watched the Defendant put the box in her cart's seat and then rip plastic ties out of the box.

Hooker testified that the Defendant put the box on a shelf in the cosmetics aisle and then put her hand in her pocket. Hooker then watched the Defendant go to checkout.

At this point, Hooker stopped watching the Defendant on video surveillance and went to the checkout area. Hooker found the Defendant in line and got behind her. Hooker testified that she could not see the Defendant's pocket, but she could see the box of nails under the Defendant's purse. The Defendant paid for some items, but Hooker testified that she made no attempt to pay for the nails or jewelry. The Defendant then pushed her cart out of the door and onto the store's front sidewalk. At this time, Hooker and Wagner approached the Defendant.

Hooker and Wagner told the Defendant that they were store security. They asked her to go back inside the store because she had unpaid items. The Defendant responded, "No, we don't have to do this in front of my grandchild" or "Do we have to do this in front of my granddaughter?" Hooker and Wagner then asked her to go back inside the store where it was private. The Defendant then lifted her purse and said, "Here take your sh--." She picked up the child and went into parking lot. The Defendant left the items that she paid for in her cart. Both Hooker and Wagner testified that after the Defendant picked up her purse, they saw the box of nails in the cart's seat.

During his surveillance, Wagner did not see the Defendant discard any perfume items. In addition, Wagner did not see the Defendant put anything that was in her cart back on a shelf. Wagner also did not see any jewelry in the Defendant's pocket.

Hooker did not go back through the store to look for security strips from the perfume boxes. In addition, Hooker did not look in the electronics department for the security strip from the box of nails, but Wagner testified that he knew the strip was recovered. Hooker found the jewelry box on a shelf in the cosmetics aisle and testified that there was no jewelry in it. Hooker

did not look for plastic ties from the jewelry box, but Wagner testified that he knew plastic ties for jewelry were found on the floor.

Later that same day, Pennsylvania State Police Trooper James Doane (Doane) went to the Defendant's residence. The Defendant told Doane that she was upset that K-Mart security stopped her. She told Doane that she considered taking a pair of sneakers from K-Mart but did not take them. The Defendant also told Doane that she forgot the artificial nails were in the cart. She said the jewelry box was empty when she picked it up.

The Defendant was charged with Retail Theft (taking the artificial nails),<sup>1</sup> Retail Theft (removing security strip),<sup>2</sup> and Criminal Trespass.<sup>3</sup> The Defendant was not charged with retail theft regarding perfume or jewelry. On January 16, 2014, a jury found the Defendant guilty of the two counts of Retail Theft and not guilty of Criminal Trespass. On March 25, 2014, this Court sentenced the Defendant to a minimum of two years and a maximum of seven years in a state correctional institution.

On March 25, 2014, the Defendant filed a Notice of Appeal with this Court. On May 16, 2014, this Court directed the Defendant to file a concise statement of matters complained of on appeal. On July 28, 2014, this Court obtained the concise statement. In the concise statement, the Defendant argues that the evidence is insufficient to prove the Defendant was guilty of Retail Theft, as the Commonwealth failed to present sufficient evidence that the Defendant intended to take the artificial nails without paying for them. In addition, the Defendant argues that this Court

---

<sup>1</sup> 18 Pa. C.S. § 3929(a)(1). “A person is guilty of a retail theft if he 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 . . .” 18 Pa. C.S. § 3929(a)(1). The Defendant had at least two prior convictions for retail theft. Therefore, the offense was a felony of the third degree. 18 Pa. C.S. § 3929(b)(1)(iv).

<sup>2</sup> 18 Pa. C.S. § 3929(a)(5).

<sup>3</sup> 18 Pa. C.S. § 3503(b)(1)(i).

abused its discretion in sentencing the Defendant to an aggravated range sentence, as the sentence is excessive.

## **II. Discussion**

### **A. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Defendant Intended to Deprive the Store of Merchandise Without Paying for It.**

Evidence is sufficient if the evidence “when viewed in the light most favorable to the Commonwealth as verdict winner, is adequate to enable a reasonable jury to find every element of the crime beyond a reasonable doubt.” Commonwealth v. Markman, 916 A.2d 586, 597 (Pa. 2007).

“Any person intentionally concealing unpurchased property of any store . . . 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 . . . 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 . . . .” 18 Pa. C.S. § 3929(c); *see also* Commonwealth v. Martin, 446 A.2d 965 (Pa. Super. 1982) (discussing statutory presumption).

Here, the Commonwealth presented evidence that the Defendant concealed the box of artificial nails. Hooker testified that she watched the Defendant put the box under her purse. Hooker’s testimony was supported by Wagner, who testified that through a surveillance mirror, he observed what he thought was the Defendant putting a package under her purse. Additionally, Hooker testified that in the checkout line, she could see the box under the Defendant’s purse. Hooker’s ability to see the box does not weaken the evidence of concealment because from the video surveillance, Hooker knew to look at a specific area; the box would have still been concealed from a person who did not have Hooker’s knowledge. Finally, Hooker and

Wagner were able to fully see the box after the Defendant removed her purse from the cart seat. The evidence of concealment supports the jury's conclusion that the Defendant did not intend to pay for the item.

The Defendant's statements and the Defendant's quick exit from K-Mart's property is additional evidence of the Defendant's intent to deprive K-Mart of the artificial nails without paying for them. The Defendant's first statement to Hooker and Wagner was that she did not want to talk with them in front of the child. After Hooker and Wagner asked her to go back inside the store, the Defendant said, "Here, take your sh--." She then left. The Defendant's behavior exhibited a consciousness of guilt. A person who is unaware that he or she has an unpaid item would not respond that way.

#### **B. This Court did not Abuse Its Discretion in Sentencing the Defendant**

When sentencing a defendant, "the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa. C.S. § 9721(b). "At least two factors are crucial to such determination – the particular circumstances of the offense and the character of the defendant." Commonwealth v. Martin, 351 A.2d 650, 658 (Pa. 1976). A trial court must "state, on the record, the reasons for the sentence imposed." Commonwealth v. Riggins, 377 A.2d 140, 149 (Pa. 1977).

This Court considered the protection of the public in the reference to the Defendant's history of retail theft. During the sentencing hearing, this Court stated, "I don't know what it is going to take to get you to understand that you can't continue to engage in this kind of behavior." N.T., March 25, 2014, p. 8. This Court also considered the impact of the offense on the victim and the community. This Court noted that there is a victim in Retail Theft. Id. at 4. This Court

also referenced the large amount of community resources that have been expended in supervising the Defendant, who has been in therapy for drug abuse and on probation and parole. Id. at 3 and

4. This Court stated:

I'm just looking at this little bit of supervision history that I received, and all of the violations that you had when you were on supervision. . . . But just prohibitive offensive weapon, written warning; positive urine, written warning; obtain treatment evaluation. They increase your reporting requirements, but there was a problem with that for which you received a written warning; positive urine, written warning.

Id. at 7.

Finally, this Court considered the rehabilitative needs of the Defendant. As mentioned above, this Court noted the Defendant's unresponsiveness to supervision. This Court stated:

[I]f anybody from their behavior expresses the idea that they don't get it and they have no desire to get, that's what this looks like to me . . . . I don't see a person who realizes they have a problem and needs to do something about it. It's same old same old.

Id. at 8. In addition, this Court ordered that the Defendant be evaluated for mental health issues, assessed for drug and alcohol issues, and placed in a therapeutic community if necessary. Id. at

9. Because this Court considered the factors in 42 Pa. C.S. § 9721(b), this Court did not abuse its discretion in sentencing the Defendant.

### **III. Conclusion**

The evidence was sufficient to enable the jury to find beyond a reasonable doubt that the Defendant intended to deprive K-Mart of merchandise without paying for it. Moreover, this Court did not abuse its discretion as the Court considered the relevant sentencing factors in fashioning its sentence.

DATE: \_\_\_\_\_

By the Court,

Nancy L. Butts, President Judge