SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0919-15T4
A-2793-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHANNA CASSIMORE,

Defendant-Appellant.

Submitted February 7, 2017 – Decided May 4, 2017

Before Judges Ostrer and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Municipal Appeal Nos. 15-013 and 15-033.

Kinney Lisovicz Reilly & Wolff PC, attorneys for appellant (A-0919-15) (Michael S. Chuven, of counsel and on the briefs).

Porzio, Bromberg & Newman, PC, attorneys for appellant (A-2793-15) (Lawrence A. Calli, of counsel and on the briefs).

Fredric M. Knapp, Morris County Prosecutor, attorney for respondent (Paula Jordao, Assistant Prosecutor, on the briefs).

PER CURIAM

Defendant Johanna Cassimore appeals from her two convictions after trials de novo, see R. 3:23-8, of shoplifting at the Roxbury Walmart on June 13, 2014, and at the Mount Olive Walmart on December 6, 2014. We consolidate her separate appeals[1] for the purpose of our opinion, and affirm.

I.

In brief, the two trials were credibility contests between store security personnel and defendant. We consider first the Roxbury incident.

Roxbury Walmart employee Ashley Campo testified she observed defendant conceal various items for which she did not pay. Campo began her observations promptly after defendant entered the store. Defendant utilized a Walmart motorized scooter with a basket in the front. Although not part of the shoplifting offense, Campo testified that she observed defendant remove a brand-new watch from its packaging, leave the new watch on the shelf, and use the packaging to return a watch she had brought into the store. Campo saw defendant empty the contents of a vitamin bottle into a bottle she had in her purse. Additionally, Campo observed defendant place jewelry and pet food items in a Walmart bag that defendant had removed from her purse. The bag was then concealed between

[1] Appeal No. A-2793-15 involves the Mount Olive incident. Appeal No. A-0919-15 involves the Roxbury incident.

her feet. Defendant eventually exited the store without paying for the various items she had secreted away.

After retrieving the empty vitamin bottle that defendant left on the shelf, Campo confronted defendant. In response, defendant gave a false name, but could not produce identification. Police were called. Eventually, Campo asked defendant to acknowledge receipt of a notice that she was thereafter prohibited from entering "all retail locations or subsidiaries of Wal-Mart Stores, Inc."

Defendant testified that she had previously purchased at other Walmart stores all the items that Campo alleged she shoplifted. Defendant contended she brought the items with her to compare prices with the intention of exchanging those items if she found lower prices.

Like the municipal court, the Law Division found Campo credible and defendant not. Judge William J. McGovern, III, noted that Campo observed defendant conceal merchandise on multiple occasions. Judge McGovern noted that excerpts of in-store video recordings showed defendant engage in "furtive movements and surreptitious activity." The court found defendant guilty and reimposed the municipal court sentence: fifteen days of community service as a second-offender based on a 1976 shoplifting conviction, see N.J.S.A. 2C:20-11(c); a $750 fine; and mandatory

monetary penalties and assessments.[2] A different judge stayed the sentence pending appeal.

About six months after the Roxbury incident, defendant entered the Mount Olive Walmart. Walmart employee Heather Bonnell testified that she observed defendant select ten bottles of vitamins, place them in her cart and later, while she was in the pet department, put the bottles into her coat pockets and purse. After paying for some items, defendant left the store. Bonnell then confronted her, and defendant turned over nine bottles, but insisted that one vitamin bottle was hers.[3] Bonnell testified that all of the bottles were sealed. She authenticated a video recording of defendant while in the Mount Olive store. She conceded the video did not depict defendant concealing the vitamins.

Testifying on her own behalf, defendant asserted she brought the ten bottles of vitamins from home, so she could comparison shop. She claimed she purchased the vitamins in November.

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[2] In addition, the court stated defendant was obliged to pay a $200 public defender fee.

[3] The arresting officer testified at the municipal court trial that defendant admitted to him that she "took the items." However, both the municipal court judge and the Law Division judge disregarded the statement. The Law Division judge expressed concerns that defendant may have been in custody, and no Miranda warning was administered.

Although she said she shopped at Walmart two to three times a week in early December, she did not return the vitamins then because she "thought [she] was going to keep them." Defendant brought various receipts to trial, but was unable to match any to the items she was accused of stealing. Defendant also admitted that a still photograph, taken from the video recording, depicted her cart with several vitamin bottles in the basket. Defendant insisted that she left those bottles in the pet department. Confronted with the notice she signed after the incident in June, defendant stated she believed it only barred her from the Roxbury store.

The municipal court judge found Bonnell credible and defendant's explanations unbelievable. The judge also found that the video recording supported the State's case. The judge imposed a $100 fine and other mandatory monetary penalties and assessments. Apparently unaware of the Roxbury conviction, which occurred four months earlier,[4] the court sentenced the defendant to fifteen days community service as a second offender based on the 1976 conviction.

[4] Defendant was convicted in Roxbury municipal court on March 19, 2015, and in Mount Olive municipal court on July 13, 2015.

After the trial de novo, Judge Thomas J. Critchley, Jr., found defendant guilty anew. Defense counsel argued the video recording lacked sufficient authentication and suggested that should diminish the weight the court placed on it, "if Your Honor chooses to view it at all." Judge Critchley stated in his decision that he placed no weight on the video. Rather, he found Bonnell's testimony credible, as it had "a ring of truth, a ring of logic that the defendant[']s account does not have." The court also gave deference to the municipal court judge's credibility findings.

Aware that the conviction was defendant's third, Judge Critchley imposed the mandatory sentence of ninety days' incarceration, see N.J.S.A. 2C:20-11(c), plus the same fines and monetary penalties and assessments that the municipal court imposed. Judge Critchley stayed the sentence pending appeal.

II.

Defendant presents the following points for our consideration regarding the Roxbury conviction:

I. STANDARD OF REVIEW.

II. THE LAW DIVISION IMPROPERLY RELIED ON MS. CAMPO'S TESTIMONY.

A. MS. CAMPO SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY.

B. MS. CAMPO'S TESTIMONY WAS IMPROPER.

III. THERE IS INSUFFICIENT EVIDENCE TO CONVICT MS. CASSIMORE.

And she presents the following points regarding the Mount Olive conviction:

I. THE DE NOVO COURT'S DECISION IN DISREGARDING THE VIDEO AND RELYING ON THE CREDIBILITY OF THE STATE'S WITNESS IN MAKING ITS JUDGMENT IS CLEARLY A MISTAKEN ONE AND PLAINLY UNWARRANTED THAT INTERESTS OF JUSTICE DEMAND INTERVENTION AND CORRECTION AND APPRAISE THE RECORD ANEW.

II. THE DE NOVO COURT ERRED IN MAKING A CREDIBLE DETERMINATION AS TO THE TESTIMONY OF HEATHER BONNELL NOTWITHSTANDING HER BIAS AND CONFLICTING AND INCONSISTENT STATEMENTS VIS-À-VIS THE VIDEO RECORDING.

III. BECAUSE OTHER CIRCUMSTANCES AND INCONSISTENT TESTIMONY OF HEATHER BONNELL AND DEFENDANT'S COGENT STORY, THE LAW DIVISION'S FINDING IS CLEARLY A MISTAKEN ONE AND SO PLAINLY UNWARRANTED THAT THE INTERESTS OF JUSTICE DEMAND INTERVENTION AND CORRECTION.

A. OTHER CIRCUMSTANCES AND INCONSISTENCIES OF THE STATE'S WITNESS' TESTIMONY.

B. DEFENDANT'S TESTIMONY IS COGENT AND TELLS A CREDIBLE STORY THAT PROVIDES REASONABLE DOUBT.

Our task is to determine whether sufficient credible evidence in the record supports the Law Division's decision. State v. Johnson, 42 N.J. 146, 162 (1964). Unlike the Law Division on a

trial de novo, we do not independently assess the evidence. State v. Locurto, 157 N.J. 463, 471 (1999). Furthermore, under the "two-court rule," only "a very obvious and exceptional showing of error" will support setting aside the Law Division and municipal court's "concurrent findings of facts . . . ." Id. at 474. We exercise plenary review of legal determinations. State v. Adubato, 420 N.J. Super. 167, 176 (App. Div. 2011) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)), certif. denied, 209 N.J. 430 (2012).

Applying that deferential standard of review, we find no merit to defendant's challenge to the sufficiency of the evidence and the fact-findings of Judges McGovern and Critchley. Both judges appropriately gave due deference to the municipal court judges' credibility determinations, see Johnson, supra, 42 N.J. at 157, and reached findings that were supported by sufficient credible evidence.

We also reject defendant's argument, with respect to the Roxbury case, that the Law Division should have disregarded Campo's testimony because she allegedly read from a report that she prepared, as opposed to testifying from memory after it was refreshed by the report. First, the record does not clearly reflect that Campo read from the report, and if so, when. In the middle of her direct examination, the prosecutor noted that Campo

had her report on the witness stand and requested that she state if she needed to refer to it to refresh her recollection. She did not thereafter do so.

Defendant mischaracterizes a brief exchange during cross-examination to support her contention that Campo read her testimony:

> [Q:] Can I have the exhibits?
>
> . . . .
>
> Q: So on the report that you're reading from . . .
>
> A: Yes.
>
> Q: . . . I was given a copy. And I noted that the copy has a date of June 16th, 2014. Is that the same document you're reading from at the top there?
>
> A: Yes.

By answering "yes" to defense counsel's questions, Campo did not admit that she read the document throughout her prior testimony. Rather, she merely acknowledged reading the document the moment that defense counsel drew her attention to it.

Second, even if Campo did read from her own report, her testimony could only have been challenged on hearsay grounds. But no objection was made, and unobjected hearsay is evidential and is entitled to the weight it deserves, particularly in a bench trial. State v. Ingenito, 87 N.J. 204, 224 n.1 (1981) (Schreiber,

J., concurring); N.J. Div. of Child Prot. & Permanency v. J.D., 447 N.J. Super. 337, 348-49 (App. Div. 2016). Furthermore, if a timely objection had been made, and if Campo's recollection could not be refreshed, it appears likely that the report would have been admissible as a past recollection recorded. N.J.R.E. 803(c)(5). In sum, we perceive no error, let alone plain error, warranting reversal on this ground. See R. 2:10-2.

We also find no merit to defendant's contention, regarding the Mount Olive incident, that the Law Division erred by disregarding the video recording. Defendant now asserts that the video, which does not depict her concealing vitamins, should have been considered because it undermines the State's case. The court gave no weight to the video, as defense counsel at the trial urged. Regardless of the grounds for the defense argument at trial, defendant shall not now be heard to argue the court erred by doing what her attorney requested. See N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (stating that "a defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought") (internal quotation marks and citation omitted).

Defendant's remaining points, to the extent not addressed, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed. The stays of sentence are vacated.