

No. 15-113923-A

**IN THE COURT OF APPEALS
OF THE STATE OF KANSAS**

STATE OF KANSAS,
Plaintiff-Appellant,

vs.

AMY JEAN ROTH,
Defendant-Appellee.

BRIEF OF APPELLEE

Appeal from the District Court of Shawnee County, Kansas
Honorable Nancy Parrish
District Court Case No. 14 CR 2711

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Nature of the Case

The State appeals the dismissal, with prejudice, of a complaint after preliminary hearing.

Issue on Appeal

Issue: The trial court did not commit reversible error when it dismissed the complaint against Amy Jean Roth with prejudice.

Statement of Facts

Amy Jean Roth is a stay-at-home mother of four, residing in Paxico, Kansas. (R. Three, 5-6). Her two oldest children, eight and seven years old in May, 2015, attend Maple Hill Elementary School, her four-year old is in preschool and her youngest child – two years old in June 2015 – is at home full time with her. (R. Three, 6).

In the fall of 2014, Ms. Roth was placed in charge of the Maple Hill Elementary School PTO book fair, to be held at the end of October, 2014. (R. Three, 7). The book fair is an event organized by parents to raise money for the school library and the PTO.

(R. Three, 8). Scholastic Books sends the school a large shipment of books, then the PTO organizes the sale, as well as a carnival for the children. The school library receives a portion of the proceeds, as does the PTO, which uses the money for items such as school yearbooks and playground equipment. (R. Three, 8). One of Ms. Roth's responsibilities was to purchase supplies for the book fair, for which she would be reimbursed by the PTO, upon submitting a receipt. (R. Three, 13).

Paxico does not have grocery store or gas station. Ms. Roth does her shopping in Topeka. (R. Three, 10-11). She frequently shops for her mother in Topeka as well. Her mother lives in Paxico, and cares for her own mother, who has dementia. (R. Three, 11).

The Thursday before the book fair, October 16, 2014, Ms. Roth left her children with her mother and went to Topeka. She was doing her monthly household shopping, she was shopping for her mother, and she was shopping for the book fair. (R. Three, 9, 11-13). She planned to keep the transactions separate, she was going to pay for the PTO items in one transaction, her mother's items in one transaction, items for her children in one transaction – as they were being paid for from her child support – and her own personal items in another transaction. (R. Three, 14-15). She spent several hours shopping at Walmart, and spent a large amount of that time in the craft department. (R. Three, 16, 18). She enlisted the assistance of a very helpful clerk, who recalled her own children and empathized with how “frazzled” she was getting. (R. Three, 16, 18). She organized her items into the separate transactions using clothes hampers and her reusable Walmart bags that she brought with her from home. (R. Three, 17).

While she was shopping she received several telephone calls, one of them was from her partner, Raymond, the father of her youngest child. (R. Three, 19). He told Ms.

Roth that her ex-husband was trying to pick up their children from school; he also need to discuss thrones and suits of armor that he was supposed to pick up from the Wamego Community Theatre for the book fair – the theme of the fair was “Sir Camelot’s Castle.” This call rendered her stressed and distraught, “freaked out,” out in her words. (R. Three, 19-21). Raymond called her twice, she was on the telephone with him for thirty to forty minutes. (R. Three, 23).

Ms. Roth was on one of the calls from Raymond, trying to hear him better, when she walked outside the store, pushing her cart. (R. Three, 24). She was pacing back and forth in front of the entrance, talking on the telephone to Raymond when she was approached by a loss prevention specialist. (R. Three, 24-25).

Ms. Roth explained to the loss prevention specialist that she was just trying to hear her telephone call. (R. Three, 25). Ms. Roth had the means to pay for the items, and it was never her intention to leave without paying. (R. Three, 24, 26). Walmart management was not interested in her explanation, she offered several times to pay, but she was arrested and taken to jail. (R. Three, 26, 28).

Ms. Roth spent the night in jail, Raymond and her children came from Paxico and picked her up the next day, around 1 p.m. (R. Three, 10, 29). She went straight to Hobby Lobby from jail, to buy supplies for the book fair and she spent the weekend working on decorations for the book fair. (R. Three, 30). (Photographs of the book fair decorations that Ms. Roth made that weekend were admitted into evidence and counsel has requested that they be added to the record on appeal. Counsel anticipates that they will be in Volume Four.) Ms. Roth kept the receipts from the craft materials that she purchased at

Hobby Lobby and turned them in to the PTO and the PTO reimbursed her for her purchases. (R. Three, 35-36).

When she walked out the doors at Walmart, it was not Ms. Roth's intention to just keep walking and not pay. She walked out the doors to speak with Raymond. (R. Three, 40). When she finished her conversation, she was going to return and pay for the items. (R. Three, 40). She had the means to pay and she planned to pay, and she would not have been reimbursed, either by the PTO, or her mother, without her receipts. (R. Three, 40-41).

Rhonda Jamison was the "asset protection officer" who asked Ms. Roth to come back inside Walmart. (R. Two, 3-4, 9-10, 22). Ms. Jamison was on-duty, on October 16, looking for shoplifters. (R. Two, 4-5). Ms. Jamison had first seen Ms. Roth in the arts and crafts section. (R. Two, 14). Ms. Roth had been in the store for a couple of hours before Ms. Jamison began watching her. (R. Two, 13). She noticed Ms. Roth because she had an "unusually large amount of merchandise" in her cart. (R. Two, 5). She had a large amount of arts and crafts supplies in two laundry baskets. These supplies were clearly visible, in non-zipped, or otherwise open bags. (R. Two, 6, 14-16). While observing her, Ms. Jamison saw Ms. Roth place a sheet set in a reusable Walmart bag, zip it shut and place it in her cart, on top of the arts and crafts supplies. (R. Two, 6).

Ms. Roth was talking on her telephone as she browsed in the store. (R. Two, 7). She eventually went into the garden center, where she selected a wreath, and rearranged the bags in the cart, including a bag on the bottom that was slipping off. (R. Two, 8, 18). Still talking on the telephone, she pushed her cart back and forth in the main aisle by the checkout stands for several minutes. (R. Two, 20). She pushed her cart, still talking on

the telephone, towards the north exit doors, then turned around and exited through the northeast doors. (R. Two, 8-9). The Walmart “greeter” attempted to wave her down, but Ms. Roth “waved them off” and exited without paying for the items in her car. (R. Two, 8-9).

Ms. Jamison followed Ms. Roth, outside the store and asked her to come back inside. (R. Two, 9-10, 22). Ms. Roth was about ten yards from the entrance to the store, and she was still talking on the telephone when Ms. Jamison approached her. (R. Two, 22-23). Ms. Roth explained that that she had been distracted by her telephone call, had gone outside for better reception, and had simply forgotten to pay for her items. (R. Two, 10, 23). She explained that the arts and crafts supplies were for a PTO event. (R. Two, 10, 24). The cart also contained some personal items, such as food, t-shirts, and first aid supplies. (R. Two, 10-11, 36).

Topeka Police Officer Rex Vickers responded to Walmart’s call regarding Ms. Roth. (R. Two, 30-31). Ms. Roth explained to him that she was putting on a PTO book fair and that she need many, many supplies. She told him that she intended to pay for the supplies and she was just distracted with the phone call, and stepped outside to get better reception. (R. Two, 32-33). Ms. Roth told him that she was actually shopping for several different people and that she had the ability to pay for the items. (R. Two, 34). Officer Vickers determined that the blue, reusable bags belonged to Ms. Roth. (R. Two, 32). Walmart management wanted to press charges against Ms. Roth, so he arrested her and took her to jail. (R. Two, 35). She was arrested, rather than ticketed, because of the reported retail price of the items in her cart. Ms. Roth was not on the police department “theft list.” (R. Two, 35).

Ms. Jamison testified that she believed that it was possible that Ms. Roth was not attempting to steal from the store. (R. Two, 28-29). From her work as a cashier, Ms. Jamison was familiar with the fact that sometimes customers divide their items into groups, as Ms. Roth had, because they want separate receipts for separate groups of items. (R. Two, 28).

Ms. Roth did not dispute any of Ms. Jamison's testimony, she simply maintained that it was not her intent to steal when she walked out the doors. (R. Three, 45).

The trial court found that there was not probable cause to believe that Ms. Roth had the intent to permanently deprive Walmart of the items in her basket and dismissed the case with prejudice. (R. Three, 51.)

Argument and Authorities

Issue: The trial court did not commit reversible error when it dismissed the complaint against Amy Jean Roth with prejudice.

Standard of Review

This Court exercises *de novo* review over a court's dismissal of a complaint after preliminary hearing, drawing all inferences in favor of the State. State v. Anderson, 270 Kan. 68, 71, 12 P.3d 883 (2000); State v. Washington, 293 Kan. 732, 733-34, 268 P.3d 475 (2012). This Court makes the same determination on appeal as the judge who heard the preliminary hearing: whether the evidence is sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. State v. Harris, 266 Kan. 610, Syl. ¶ 3, 975 P.2d 227 (1999). Despite the *de novo* standard, our Supreme Court has suggested that the appellate court should defer to the trial court's credibility determinations at the preliminary hearing, stating in State v. Berg,

270 Kan. 237, 240, 13 P.3d 914 (2000), when it affirmed the trial court's dismissal of a complaint at the preliminary hearing: "We give great deference to the trial court's determination of the quality of the evidence."

The State also appeals the district court's decision to dismiss the complaint with prejudice. This decision is reviewed for abuse of discretion. State v. Boehmer, 41 Kan.App.2d 598, 602, 203 P.3d 1274 (2009) (citing *State v. Clovis*, 248 Kan. 313, 331, 807 P.2d 127 [1991]). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. State v. Mosher, 299 Kan. 1, 3, 319 P.3d 1253 (2014). The party asserting that the district court abused its discretion bears the burden of showing such abuse of discretion. State v. Rojas–Marceleno, 295 Kan. 525, 531, 285 P.3d 361 (2012).

Discussion

The United States Supreme Court recognized in Gerstein v. Pugh, 420 U.S. 103, 112, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975) that the Fourth Amendment provides protection against unfounded invasions of liberty, by requiring probable cause for an arrest, and that once a suspect is arrested, his or her need for a neutral determination of probable cause increases significantly, even when afforded pretrial release, which "may be accompanied by burdensome conditions that effect a significant restraint of liberty." 420 U.S. 114. A preliminary examination is the method used in Kansas to satisfy the requirement of the Fourth Amendment that a person be free from an extended pretrial restraint of liberty, unless a judge has determined that probable cause exists to support it. In re D.E.R., 290 Kan. 306, 312, 225 P.3d 1187 (2010).

To bind over a defendant at a preliminary hearing, the district court must find that there is probable cause to believe a felony has been committed, and that it was committed by the defendant. K.S.A. 22–2902(3). Probable cause, in this context, is defined as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. Washington, 293 Kan. 733–34. Even if the evidence is weak, the defendant should be bound over for trial if the evidence tends to establish that the offense was committed and that the defendant committed it. 293 Kan. 734.

While inferences are drawn in favor of the State, the district court is not free to disregard the defendant's evidence:

When evaluating evidence presented at a preliminary hearing, **the judge must seriously consider the defendant's defense and pass judgment on the credibility and competency of both the State's and the defendant's witnesses.** If there is a conflict in witness testimony that creates a question of fact for the jury, the preliminary hearing judge must accept the version of the testimony which is most favorable to the State.

State v. Bell, 259 Kan. 131, Syl. ¶ 4, 910 P.2d 205 (1996)(emphasis added).

The determination of the credibility and competency of the parties' witnesses should be considered part of the trial court's determination of the quality of the evidence, which is due great deference under the Court's reasoning in Berg.

Ms. Roth was charged with felony theft, a specific intent crime. State v. Mitchell, 262 Kan. 434, Syl. ¶ 2, 939 P.2d 879 (1997). In this case, the State was required to establish probable cause to believe that she obtained or exerted unauthorized control over property of Walmart worth at least \$1000.00 with the intent to permanently deprive Walmart of the possession, use or benefit of the property. K.S.A. § 21-5801. Specific

intent for felony theft may be proved by acts, circumstances, and inferences. Mitchell, 262 Kan. 434, Syl. ¶ 2.

As stated, when there is a conflict in the testimony that creates a question of fact, the preliminary hearing judge must accept the version of the testimony which is most favorable to the State. Bell, 259 Kan. 131. But in this case, there was no conflict in the testimony regarding Ms. Roth's physical actions at Walmart, nor was there any conflict in the testimony regarding Ms. Roth's intent. In fact, the State's evidence corroborates, rather than contradicts her testimony on the issue of intent: she was pacing back and forth near the checkout lanes, in full view of Walmart employees while talking on the telephone. Had she intended to walk out of the store and not pay, she would not have drawn attention to herself in that way. All the items were in clear view in her cart, nothing was secreted on her person or concealed in any other way. No price tags had been removed or tampered with. She acknowledged the greeter who tried to stop her, as if to say, "I'll be right back." She was still near the entrance to the store, still talking on the telephone, when approached by the loss prevention specialist. Her purchases were organized into separate orders, as customers often do in order to get separate receipts. Had she intended to steal the items, there would have been no need to organize them into separate groups, as there would have been no receipts. Because there is no conflict in the testimony, there is no pro-prosecution inference to be drawn. And because the trial court is required to seriously consider the defense and pass judgement on the credibility of the witnesses, the court was within its authority when it found Ms. Roth to be credible, and believed her testimony that she did not intend to steal from Walmart. There was nothing in the State's evidence that contradicted her account that she was distracted by her

telephone call, and left the building without thinking. As she was not contradicted on that issue, the district court was not required to disbelieve her, or accept a different version of facts. (Indeed there was no different version of facts to accept). Given all the circumstances of this case, which must include Ms. Roth's testimony, this Court should also find, deferring to the trial court's credibility determination, that no crime was committed in this case, save the crime of attempted multi-tasking.

The district court also properly dismissed this case with prejudice. A district court may dismiss a criminal complaint with prejudice if the interests of justice require such an action, although such power must be exercised with great caution and only in cases where no other remedy would protect against abuse. State v. Crouch, 230 Kan. 783, 788, 641 P.2d 394 (1982).

There is no suggestion in this case that the dismissal with prejudice was ordered as a means of sanctioning the prosecutor. Rather the dismissal reflects the fact that both the State and Ms. Roth were able to present all their evidence, and after considering all the evidence, it was clear to the court that no crime occurred. As no crime occurred, the interests of justice require that the case be dismissed.

Although the current restraints on Ms. Roth's liberty might be minimal, the interests of justice require that she be freed of any restraints whatsoever associated with this prosecution, even if the only burden is the burden of stress and uncertainty. The State cannot show an abuse of discretion, as the court's ruling was not based on a mistake of law or a mistake of fact, nor was it arbitrary, unreasonable or fanciful.

Conclusion

We should not suppose, in the absence of specific words saying so, that the legislature intended to make accidents and mistakes crimes. Human actions can

hardly be considered as culpable, either in law or in morals, unless an intelligent consent of the mind goes with the actions; and to punish where there is no culpability would be the most reprehensible tyranny.

State v. Brown, 38 Kan. 390, 16 P. 259, 260 (1888).

In this case, a distracted mother, trying to prepare for a PTO book fair, made a mistake, without any criminal intent, that caused her to be arrested, jailed overnight, and charged with a felony. And in this case, an experienced district court judge, applying common sense to the facts presented to her at preliminary hearing, found she could not conscientiously entertain a reasonable belief of Ms. Roth's guilt and ended this ill-advised prosecution. That decision should be affirmed.

Conclusion

For all the foregoing reasons, this Court should affirm the decision of the trial court to dismiss the complaint in this case with prejudice.

Respectfully Submitted:

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Certificate of Service

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