IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

MARCELLUS VARNES,

Appellant,

vs

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. CJAP 09-16
County Court Case No. 48-2008-MM-124120

Appeal from the County Court
of Orange County, Florida

Honorable Nancy L. Clark,
County Judge

Scott D. Bishop, Assistant Public Defender
for Appellant

No appearance for Appellee

Before Powell, Munyon, and S. Kest, J. J.

FINAL ORDER AFFIRMING LOWER COURT

Appellant Varnes appeals from a conviction of petty theft of merchandise from an Albertsons' store after a jury trial, contending that the trial judge erred in denying his motion for judgment of acquittal at the close of the state's case and as renewed at the close of all the evidence. We dispense with oral argument pursuant to *Fla. App. R. 3.920.* We have carefully reviewed appellant's brief, the record on appeal and the transcript of the trial. The State did not favor us with an answer brief. Finding no error, we affirm.

The facts as shown by the evidence are as follows: Appellant, an unemployed former employee of the Albertson's store, came twice through a checkout line operated by his fiancé

Natalie Jova.[1] It was forbidden by store policy for an employee to check out merchandise for a family member, relative or friend. Each time appellant came through, Jova would ring up some of the items and then delete them, and fail to ring up other items remaining in the bottom of Varne's basket. The two receipt tapes showed a total of 34 and 43 cents due. Later that day, Jova and Varnes were arrested. Susan Howard, one of the store managers, reviewed a store security video tape of the two incidents in light of copies of the two receipts. Howard recovered Albertson's merchandise Varnes had placed in the trunk of Jova's car parked in the store lot which totaled approximately $200 in retail value.

Jova was called as a witness by the defense, and testified that both times Varnes would talk with her and not look at the customer monitor or receipts. She testified that she told Varnes the cost of the merchandise was $40, and that she put some of the money he handed her in her pocket. She admitted that she did not charge Varnes the full price for the merchandise, that she voided out some of the items and did not ring up others, and that Varnes "did not know what was going on" until she told him what she had done while in the police car on the way to the county jail. Appellant did not testify.

Varnes' attorney argued at trial as he does in his brief that the motions for judgment of acquittal should have been granted because the state did not present legally sufficient evidence of an essential element of the crime, namely criminal intent, and that the state did not produce sufficient competent evidence to rebut the defense theory of innocence that Varnes did not knowingly and intentionally steal the merchandise or aid and abet Jova in doing so. We disagree.

The standard of review of a denial of a motion for judgment of acquittal is *de novo. See Jones v. State,* 35 Fla. L. Weekly D1286 (Fla. 4th DCA June 9, 2010). The motion admits all

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2 Jova was charged jointly with appellant and entered a plea of nolo contendere prior to Varnes' trial.

facts in evidence adduced, but also every conclusion favorable to the state that a rational jury might fairly and reasonably infer from the evidence. *Id.* An appellate court must apply the substantial competent evidence standard and consider all reasonable inferences from the evidence most favorable to the state. *Slack v. State,* 30 So. 3d 684, 686 (Fla. 1st DCA 2010). In a circumstantial evidence case in which there is an inconsistency between the defendant's theory of innocence and the competent substantial evidence viewed most favorably to the state, the question of criminal intent is for the jury to resolve, and a motion for judgment of acquittal must be denied. *Floyd v. State*, 850 So. 2d 383, 397 (Fla. 2003).

In reviewing the evidence, we first point out that merely because Jova testified that Varnes lacked criminal intent does not carry the day for him. It is well settled that a juror may believe or disbelieve all or any part of a witness' testimony. Next it is our view that a rational jury could (and in this case did) reasonably infer that Varnes left the store knowing that some items of the merchandise were not rung up and paid for, and that the $40 dollars he handed Jova was not enough to cover the total cost of the items he took out of the store.

Consequently, we conclude the trial judge did not err in denying the motions for judgment of acquittal. The judgment appealed from is, therefore

AFFIRMED.

DONE and ORDERED this 4th day of August, 2010.

/S/
Rom W. Powell, Senior Judge

/S/
Lisa T. Munyon, Circuit Judge

/S/
Sally D. M. Kest, Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Scott D. Bishop, Assistant Public Defender, attorney for appellant, 435 N. Orange Ave., Suite 400, Orlando FL 32801, and to the Office of the State Attorney,415 N. Orange Ave., Orlando FL 32801, by mail, this 4th day of August, 2010.

____/S/_____
Judicial Assistant