

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

APPELLATE CASE NO: 2010-AP-17  
LOWER COURT CASE NO: 48-2009-MM-979

**KEMERLA E. MAXWELL,**

Appellant,

vs.

**STATE OF FLORIDA,**

Appellee.

\_\_\_\_\_ /

Appeal from the County Court  
for Orange County, Florida,  
Faye Allen, County Court Judge

Robert Wesley, Public Defender, and  
Justin Bleakley, Assistant Public Defender,  
for Appellant

No Appearance for Appellee

Before LAUTEN, O’KANE, and ARNOLD, J.J.

**PER CURIAM.**

**FINAL ORDER REVERSING TRIAL COURT**

Appellant, Kemerla E. Maxwell (herein “Appellant”), appeals the final judgment and sentence as well as the denial of the Motions for Mistrial. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). We conclude the trial judge erred in denying the Motion for Mistrial, and reverse.

The facts can be summarized as follows. On November 15, 2009, Officer Reyes of the Apopka Police Department responded to 1700 S. Orange Blossom Trail (Wal-Mart). Upon his arrival, he met with Asset Protection Associates, Glenn Jones (“Jones”) and Jared Cheatham

(“Cheatham”). Jones stated that he had observed Appellant and another female, (Candice Stewart, “Stewart”), walk into different cosmetic isles and place various cosmetic items in a shopping cart next to a purse. He testified that the purse was then covered with a roll of paper towels concealing the items contained therein. Stewart paid for select items in the cart, but not the items concealed in the purse. Appellant and Stewart left the store, passing all points of sale, failing to pay for the concealed items.

Jones and Cheatham approached Appellant and Stewart outside of the store, identified themselves, and attempted to escort the two women back into the store. After a short verbal exchange, Jones testified that Appellant grabbed her purse and attempted to flee. Appellant and Stewart were quickly detained by Jones and Cheatham and escorted to the asset protection office. The concealed items were recovered, photographed, and returned to Wal-Mart. The total amount of the concealed merchandise was \$261.91.

On March 3, 2010, Appellant underwent a jury trial and was unanimously convicted of Petit Theft of \$100 or more. Appellant was granted a Motion for Judgment of Acquittal as to Count 2: Resisting Merchandise Recovery. The judge suspended 20 days in jail on the condition Appellant successfully complete 270 days of supervised probation. Appellant appeals the final judgment and sentence alleging prejudice based on voir dire and denial of multiple mistrial motions.

At trial, prior to voir dire, a jointly stipulated Wal-Mart surveillance video was entered into evidence as Joint Exhibit Number 1. During opening arguments defense counsel made reference to the surveillance video. At that moment the trial judge asked attorneys to approach, and remarked that the video was too long; about twenty to thirty minutes. The judge ordered that the video would not be admissible in its entirety as jointly stipulated because it contained too

much irrelevant data. The judge further ordered the video be edited over lunch to show “something that might look like something relevant to resisting merchandise recovery”; about two to three minutes of footage. Defense counsel moved for a mistrial alleging only the “bad parts” of the video would be played, omitting the “exculpatory parts.” The Court denied the motion and directed the State to edit the video with defense present.

The video was not edited due to time constraints and formatting issues. Defense counsel moved for a continuance which was denied. The judge subsequently reversed her previous ruling and removed the video from admitted evidence. Defense counsel renewed the Motion for Mistrial which was denied as premature. Throughout trial, defense counsel made a total of five Motions for Mistrial based on prejudice resulting from removal of the jointly stipulated video from evidence; all five motions were denied. Defense also made a request for a curative jury instruction as defense counsel made an unfulfilled promise to the jury in opening statements to show the video. The trial court denied the motion.

On appeal, Appellant raises two separate issues. First, she asserts the trial court erred when it refused to grant a challenge for cause against the jury foreperson. Second, Appellant argues that the trial court abused its discretion by denying Appellant’s Motion for Mistrial because the trial court prevented defense counsel from introducing an exculpatory video into evidence. She claims the video would have shown she was doing nothing wrong, specifically, not stealing the merchandise. Appellant further asserts that withdrawing the video from evidence denied Appellant her constitutional right to a complete defense.

The trial court has broad discretion concerning the admissibility of evidence, and its rulings will not be disturbed absent a clear abuse of discretion. *Hendry v. Zelaya*, 841 So. 2d 572 (Fla. 3d DCA 2003). The trial judge’s decision with regard to the admission of evidence must be

evaluated on appeal in the context of the entire trial because “[a] trial court's error in admitting or rejecting evidence does not necessarily constitute harmful error.” *Forester v. Norman Roger Jewell & Brooks Intern., Inc.*, 610 So. 2d 1369, 1372 (Fla. 1st DCA 1992). “Only when it appears that such errors injuriously affect the substantial rights of the complaining party will a judgment be reversed.” *Id.*

In *Masaka v. State*, 4 So. 3d 1274 (Fla. 2d DCA 2009), the Second District Court of Appeal held exclusion of admissible interview statements made to a detective was not harmless error. Given the lack of other evidence, the court reasoned the exclusion was a violation of due process and the fundamental right to present evidence on one’s own behalf. *Id.* at 1284. In *Jacobs v. State*, 962 So. 2d 934 (Fla. 4th DCA 2007), the Fourth District Court of Appeal held exclusion of admissible evidence of phone calls, a handwritten note, and other evidence was not harmless because the evidence was central to defendant’s theory of defense.

In the instant case, Appellant was denied the right to present admissible evidence on her own behalf central to the theory of defense that she did not steal the merchandise. Having considered the entire context of the trial, the Court finds Appellant’s rights were substantially affected by the withdrawal of the video from evidence.

Defense counsel mentioned the video during opening statements only to have the trial court *sua sponte* remove the video although it was previously admitted by stipulation. Once the video had been removed from evidence by the trial court, it was not necessary for defense counsel to again attempt to re-enter the video into evidence to warrant consideration by the trial judge of a Motion for Mistrial or to preserve the issue for purposes of appeal. Therefore, the trial court erred by withdrawing admissible evidence relevant to Appellant’s defense and by denying Appellant’s multiple Motions for Mistrial.

The trial court abused its discretion and as a result, the final judgment and sentence must be reversed. In light of our holding, we find it unnecessary to address the voir dire issue.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's Order denying Appellant's Motion for Mistrial and the final judgment and sentence is **REVERSED** and the case is **REMANDED** for a new trial on Count I, Petit Theft.

**DONE AND ORDERED** on this   24th   day of   January   2012.

  /S/    
**FREDERICK J. LAUTEN**  
Circuit Court Judge

  /S/    
**JULIE H. O'KANE**  
Circuit Judge

  /S/    
**C. JEFFERY ARNOLD**  
Circuit Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Final Order Reversing Trial Court has been provided to **Justin Bleakley, Assistant Public Defender**, 435 N. Orange Avenue, Suite 400, Orlando Florida 32801 and **Lawson Lamar, State Attorney**, 415 North Orange Avenue, Orlando, Florida 32801 this   24th   day of   January   2012.

  /S/    
Judicial Assistant