

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CR-000479-MR

ANTHONY L. GREEN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 01-CR-00816

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, MINTON, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Anthony L. Green appeals from a judgment of the Fayette Circuit Court wherein he was convicted of receiving stolen property over \$300 and of being a first-degree persistent felony offender and was sentenced to ten years in prison. We affirm.

On February 28, 2001, Charles Humphrey, Green's uncle, was awakened at his residence by Green who informed him that he had hit Humphrey's car that was parked on the street with his truck. Green pleaded with Humphrey to not call the police, but

Humphrey did so. Sergeant David Marcum and Officer Lawrence Savile of the Metro Police responded to the call.

Green admitted having consumed approximately six beers and having smoked marijuana and crack cocaine. In response to questions from the officers, Green related that the truck belonged to his company but that he could not remember the company name. Green had the keys to the truck in his possession, and the officers located it a couple of blocks away. The next day the officers discovered that the truck had been stolen within the previous week.

Green was indicted by a Fayette Circuit Court grand jury on a charge of receiving stolen property over \$100 in violation of KRS¹ 514.110 and of being a first-degree persistent felony offender (PFO) in violation of KRS 532.080. A jury trial was held in January 2002, and Green did not testify or offer any evidence on his behalf. The jury found him guilty of the charges and sentenced him to one year in prison on the receiving stolen property charge, enhanced to ten years as a result of his PFO status. This appeal followed.

Green's first argument is that the trial court abused its discretion when it denied his motion for a directed verdict on the receiving stolen property charge. He asserts that the

¹ Kentucky Revised Statutes.

evidence was insufficient to support the charge. The relevant portions of the applicable statute are:

- (1) A person is guilty of receiving stolen property when he receives, retains, or disposes of movable property of another knowing that it has been stolen, or having reason to believe that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.
- (2) The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.

KRS 514.110(1) and (2).

The directed verdict rule has been stated as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

Furthermore, "[o]n appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Id.

Green argues that there was no proof that he knew the truck was stolen or that he did not intend to restore it to the proper owner if he did know. See KRS 514.110(1). He contends that in the absence of such proof, he was entitled to a directed verdict of acquittal on the charge. The Commonwealth argues in response that the fact Green was in possession of the recently stolen truck was *prima facie* evidence that he knew it was stolen. See KRS 514.110(2). Furthermore, the Commonwealth asserts that knowledge that the truck was stolen may be established by the surrounding circumstances. See Caudill v. Commonwealth, Ky., 256 S.W.2d 8, 9-10 (1953).

We agree that there was sufficient evidence to overcome Green's directed verdict motion. First, as noted by the Commonwealth, the fact that Green was in possession of the recently stolen truck was *prima facie* evidence that he knew it was stolen. KRS 514.110(2). Second, the circumstances surrounding Green's arrest supported an inference that he knew it was stolen. Green attempted to leave the scene when the police arrived, he requested that his uncle not notify the police in connection with the accident, he gave misleading information to the police concerning the ownership of the truck, he thanked the officer when he was first notified that he was only charged with DUI, and he offered no explanation as to how the truck came into his possession and control. In light of the

statute and these circumstances, we conclude that the court properly denied Green's motion for a directed verdict.

Green's second argument is that the trial court erred when it failed to give the jury an instruction on a lesser included offense of unauthorized use of an automobile in violation of KRS 514.100. That statute provides that "[a] person is guilty of the unauthorized use of an automobile or other propelled vehicle when he knowingly operates, exercises control over, or otherwise uses such vehicle without consent of the owner or person having legal possession thereof." KRS 514.100(1). In order for a person to be guilty of receiving stolen property, it must be proved that he or she "receives, retains, or disposes of movable property of another knowing that it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner." KRS 514.110(1). While receiving stolen property over \$300 is a Class D felony, unauthorized use of an automobile is a Class A misdemeanor. Green argues that "there was no clear evidence of intent presented by the Commonwealth, or that Green knew of the status of the truck." Further, he asserts that the jury did not know how he got the truck or what he intended to do with it.

"[A] defendant is entitled to have his theory of the case submitted to the jury." Davis v. Commonwealth, Ky., 252 S.W.2d 9, 10 (1952). "Where the defendant's theory is that his

actions amounted to a lesser offense than the one charged, this essentially constitutes a defense to the higher charge." Logan v. Commonwealth, Ky. App., 785 S.W.2d 497, 498 (1990). However, there must be substantial evidence to support the theory of a lesser included offense in order for the defendant to be entitled to such an instruction. Id.; Lawson v. Commonwealth, Ky., 85 S.W.3d 571, 578 (2002).

In the case *sub judice* we do not see any evidence, much less substantial evidence, to warrant giving an instruction for unauthorized use of an automobile. Green neither testified nor presented any evidence on his behalf. Furthermore, the evidence of the Commonwealth did not warrant the giving of such an instruction. Rather, the evidence of the Commonwealth was that Green was in possession of the truck several days after its theft and approximately 80 miles from where it was stolen. In short, there was no evidence to support a theory that Green was simply "joyriding" or that he had any intent to restore the truck to its owner. Under these circumstances we conclude the trial court did not err in refusing to instruct the jury in the manner requested by Green.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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