

RENDERED: SEPTEMBER 17, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001204-MR

SHAWN N. SIMMONS

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 02-CR-00328

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of complicity to receiving stolen property over \$300. Appellant argues there was insufficient evidence to sustain the conviction. Upon review of the record we agree there was insufficient evidence and therefore reverse the conviction.

Sometime in 2002, a four-wheel all-terrain vehicle (ATV) was stolen from the Alliance Corporation in Barren County. About six to eight weeks after the theft, on June 21, 2002, Deputy Kinslow of the Barren County Sheriff's Office received word that the ATV had been seen parked in some bushes in a field near the Alliance plant. On that day, Deputy Kinslow drove to where the ATV had been spotted and the ATV was not there. Deputy Kinslow decided to look for the ATV and drove off the main road onto a dirt path in the field. When Deputy Kinslow reached the end of the dirt path and began turning around, he heard an engine start up nearby. About fifty yards away, he saw an ATV riding close behind a gray truck. Kinslow then pulled up behind the ATV and activated his blue lights and his siren. According to Kinslow, the driver of the ATV did not stop at that point, but instead shouted and signaled to the truck, "Go! Go!" The truck and the ATV then took off very fast. The chase continued up the dirt path onto a gravel road. After traveling on the gravel road for a short time, the truck pulled over and allowed the ATV and Kinslow's cruiser to pass. The ATV then turned left, proceeded up a hill about 100 yards, and finally stopped. As Kinslow was apprehending the ATV driver, Dustin Moss, Kinslow could see the gray truck heading towards Glasgow. Kinslow radioed the Glasgow Police and asked for assistance in stopping the truck.

The Glasgow Police stopped the truck and detained the driver, Shawn Simmons, and the two passengers, Jason Simmons (Shawn's brother) and Dawn Ganley. Ultimately, Shawn Simmons, appellant herein, was arrested by Kinslow and charged with complicity to receiving stolen property over \$300 and second-degree fleeing and evading police, as were the other two passengers in the truck. Moss was indicted for receiving stolen property over \$300 and fleeing and evading police in the second degree. On the morning of trial, Moss pled guilty to receiving stolen property over \$300.

Moss testified at the joint trial of Shawn Simmons, Jason Simmons, and Ganley. Moss testified that as he walking to go fishing, he found the ATV in a field by the road, about a mile from where he lived with his grandmother. He stated that he saw the ATV with the keys in the ignition, got on it, and rode off in it. He stated that he acted alone in obtaining the ATV and specifically denied that Shawn Simmons or any of the passengers in the truck knew that he had the ATV before he drove up behind the truck. Moss also denied yelling "Go!" to the truck when he saw the police cruiser behind him. On cross-examination, Moss admitted that he was Shawn Simmons's cousin.

Dawn Ganley testified that she had been walking to her brother's house on the day in question when Shawn and Jason pulled up and offered her a ride, which she accepted. She

stated that Shawn Simmons, with whom she lived at the time, and Jason Simmons were driving to their grandmother's house that day, but their grandmother called them en route and told them not to come because she was not home at the time. According to Ganley, neither she nor anybody else in the truck knew anything about the ATV until they saw Moss riding behind them.

Jason Simmons testified that on the day of the chase, he was on his way to his grandmother's house which was about a half mile from the site where they first encountered Moss on the ATV. He likewise testified that the first time he saw the ATV was when it came up behind the truck that day. Jason stated that as soon as they heard the sirens behind them, Shawn pulled over to let the police and the ATV through.

The jury found Shawn Simmons and his co-defendants guilty of second-degree fleeing and evading police and complicity to receiving stolen property over \$300 and recommended a sentence of one year in prison. Appellant was sentenced to one year in prison, probated for three years. Shawn Simmons now appeals his complicity to receiving stolen property conviction.

Simmons's first argument is that there was insufficient evidence of complicity to receiving stolen property to sustain the conviction. Complicity is defined in KRS 502.020 which provides in pertinent part:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense;

The offense of receiving stolen property is set out in KRS 514.110 which provides in part:

(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 property was stolen.

"On 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." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Under the above statutes, the Commonwealth was required to prove that with the knowledge that the ATV was stolen and the intent of facilitating

the acquisition of stolen property, Shawn Simmons helped or attempted to help Moss obtain or retain the stolen ATV.

Officer Kinslow testified that, although the truck was traveling in front of the ATV, the truck did not appear to do anything to aid Moss in evading the police. Kinslow admitted that by continuing to ride in front of the ATV, the truck was actually slowing the ATV down during the chase. Jason Simmons, Moss, and Ganley all testified that no one in the truck knew that Moss had the ATV until he appeared behind the truck on it, and there was no direct evidence to dispute this claim. There was no direct evidence that Shawn Simmons or anyone in the truck saw or had any contact with the ATV prior to Moss riding behind them, let alone knew the ATV was stolen pursuant to KRS 514.110(1). Nor was there any evidence that Moss had been in the truck or had been with Shawn Simmons or any of the passengers in the truck prior to the chase. We acknowledge that circumstantial evidence can be sufficient to sustain a conviction, Commonwealth v. Preese, Ky., 844 S.W.2d 385 (1992), cert. denied, 510 U.S. 816, 114 S. Ct. 66, 126 L. Ed. 2d 36 (1993), and that evasive behavior is a factor that can be considered in determining whether criminal activity is afoot. Commonwealth v. Banks, Ky., 68 S.W.3d 347 (2001). However, in the present case, the only evidence of a connection between the ATV and any of the individuals in the truck was that the truck

was riding in front of the ATV and when Moss signaled for the truck to "Go!" when the police car appeared, the truck took off. While that was certainly sufficient evidence to support the convictions for fleeing and evading the police, we do not believe that was sufficient evidence that Shawn Simmons helped Moss obtain or get away with the ATV. Accordingly, the trial court erred in failing to direct a verdict on the complicity to receiving stolen property over \$300 charge.

For the reasons stated above, the judgment convicting Shawn Simmons of complicity to receiving stolen property over \$300 is reversed and the cause remanded for further proceedings.

ALL CONCUR.

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