

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joshua McAlister,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 31, 2016

Court of Appeals Case No.
54A01-1507-CR-876

Appeal from the Montgomery
Superior Court

The Honorable Peggy Q. Lohorn,
Judge

Trial Court Cause No.
54D02-1405-FD-1254

Najam, Judge.

Statement of the Case

- [1] Joshua McAlister appeals his convictions for receiving stolen property, as a Class D felony, and trespass, as a Class A misdemeanor, following a jury trial.

He presents three issues for our review, which we consolidate and restate as whether the State presented sufficient evidence to support his convictions.

[2] We affirm in part and reverse in part.

Facts and Procedural History

[3] On April 30, 2014, at approximately 8:00 p.m., Lieutenant Brian Chesterson of the Crawfordsville Police Department was on patrol when he observed two motor scooters parked at the back of a private parking lot near the edge of a wooded area marked with two “No Trespassing” signs. As Lieutenant Chesterson drove through the parking lot, he saw a man exit the woods and walk towards the scooters. Lieutenant Chesterson approached the man, who identified himself as Michael Wolfe. After they were speaking for a short time, a second man exited the woods and approached the area of the scooters. That man identified himself to Lieutenant Chesterson as McAlister.

[4] Lieutenant Chesterson asked McAlister what he and Wolfe were doing in the woods, and McAlister responded that they were looking for mushrooms. When Lieutenant Chesterson questioned the men about whether they had permission to be in the woods and expressed doubt that they were looking for mushrooms, McAlister pulled a mushroom out of his jacket pocket. Lieutenant Chesterson told McAlister that if they were “hunting without permission,” they could be arrested for theft. Tr. at 150. McAlister then tossed the mushroom into the woods.

[5] Lieutenant Chesterson asked McAlister whether they had permission to be in the woods, to which McAlister replied that “the property belonged to Dave Houston and that several years ago [McAlister] had worked for [Houston] and that he was allowed to mushroom hunt on his property.” *Id.* But when Lieutenant Chesterson telephoned Houston, he stated that he did not own the property. Lieutenant Chesterson later determined that the property belonged to Oak Hill Cemetery. Accordingly, Lieutenant Chesterson arrested McAlister and Wolfe for trespass.

[6] Lieutenant Chesterson then had a conversation with McAlister about the mode of transportation he had used to get to the woods, which Lieutenant Chesterson described as follows:

[D]uring our conversation there near the scooters, he said that . . . he lived in Waveland, and I . . . said did you ride that thing all the way here from Waveland, and he said yes. . . .

. . . I was just under the assumption at the time because of Mr. Wolfe’s proximate [sic] to the other scooter and that as we were standing closest to th[e scooter later determined to have been stolen from Samantha Clarkston on February 23, 2014], and I know I had glanced at it, but I, you know I didn’t specifically, physically point or something to that specific scooter at the time. . . .

. . . [W]hen he responded that, yes, he’d ridden all the way from Waveland, I made a comment basically that’s kind of a long haul all the way up here on a scooter isn’t it, and he said yeah, it’s not that bad.

Id. at 151.

[7] As Lieutenant Chesterson prepared the two scooters to be impounded, he observed that one of the scooters, later determined to have been stolen from Clarkston, had been sloppily spray-painted and the ignition was “scratched up pretty bad and there was something . . . jammed into where the key slot would go.” *Id.* at 153-54. Wolfe indicated that he owned the other scooter, so Lieutenant Chesterson concluded that McAlister had driven the stolen scooter to the parking lot near the woods.

[8] The State charged McAlister with receiving stolen property, as a Class D felony, and trespass, as a Class A misdemeanor. Following a trial on June 16, 2015, a jury found McAlister guilty as charged. The trial court entered judgment accordingly and sentenced McAlister to concurrent sentences as follows: for receiving stolen property, two years with all but 120 days suspended to probation; and for trespass, four days. This appeal ensued.

Discussion and Decision

[9] McAlister contends that the State presented insufficient evidence to support his convictions. Our standard of review for sufficiency of the evidence claims is well-settled. *Tobar v. State*, 740 N.E.2d 109, 111 (Ind. 2000).

In reviewing the sufficiency of the evidence, we examine only the probative evidence and reasonable inferences that support the verdict. We do not assess witness credibility, nor do we reweigh the evidence to determine if it was sufficient to support a conviction. Under our appellate system, those roles are reserved for the finder of fact. Instead, we consider only the evidence most favorable to the trial court ruling and affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Pillow v. State, 986 N.E.2d 343, 344 (Ind. Ct. App. 2013) (citations omitted) (internal quotation marks omitted).

[10] We note that the State has not filed an appellee’s brief. When an appellee fails to submit a brief, we do not undertake the burden of developing appellee’s arguments. *K.L. v. E.H.*, 6 N.E.3d 1021, 1029 (Ind. Ct. App. 2014). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *Id.* “Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it.” *Falatovics v. Falatovics*, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014) (citation omitted). With this in mind, we address McAlister’s arguments on appeal.

Receiving Stolen Property

[11] To convict McAlister of receiving stolen property, as a Class D felony, the State was required to prove that he knowingly or intentionally received, retained, or disposed of the property of another person that has been the subject of theft. Ind. Code § 35-43-4-2(b) (2014). “Knowledge that the property is stolen may be established by circumstantial evidence; however, knowledge of the stolen character of the property may not be inferred solely from the unexplained possession of recently stolen property.” *Barnett v. State*, 834 N.E.2d 169, 172 (Ind. Ct. App. 2005) (quoting *Johnson v. State*, 441 N.E.2d 1015, 1017 (Ind. Ct. App. 1982)). The test of knowledge is a subjective one, asking whether the defendant knew from the circumstances surrounding the possession that the property had been the subject of a theft. *Id.* Possession of recently stolen property when joined with attempts at concealment, evasive or false statements,

or an unusual manner of acquisition may be sufficient evidence of knowledge that the property was stolen. *Id.*

[12] In *Fortson v. State*, 919 N.E.2d 1136, 1137 (Ind. 2010), our supreme court addressed the sufficiency of evidence to support a conviction for receiving stolen property where the facts were as follows:

Defendant was spotted driving a stolen pick-up truck within a few hours after the owner reported it missing. After being stopped by police officers, the defendant was belligerent and uncooperative insisting he did not steal the truck. Defendant was convicted of receiving stolen property and on appeal argued the evidence was not sufficient to sustain the conviction.

[13] Quoting *Barnett*, our supreme court reiterated that “[k]nowledge that the property is stolen may be established by circumstantial evidence; however, knowledge of the stolen character of the property may not be inferred solely from the unexplained possession of recently stolen property.” *Id.* at 1143 (quoting *Barnett*, 834 N.E.2d at 172). And our supreme court agreed with this court’s conclusion that,

in this case[,] the circumstances did not support a reasonable inference that Fortson knew the property was stolen. The court noted that there was no evidence that Fortson attempted to conceal the truck from the officers, physically resist the officers, flee, or that he provided evasive answers. The court concluded, “Although Fortson was found to be in possession of recently stolen property, the State failed to provide any other facts to support an inference of knowledge. . . . [B]ecause the State could only prove that he was in possession of recently stolen property,

that fact alone cannot support the inference that Fortson knew the truck was stolen.”

Id. at 1144.

[14] Likewise, here, “there was no evidence that [McAlister] attempted to conceal the [scooter] from the officers, physically resist the officers, flee, or that he provided evasive answers [about his possession of the scooter].” *See id.* Indeed, there is no evidence that, before the charge was filed, anyone asked McAlister to explain how he had come to possess the scooter. At trial, the State presented evidence that, on April 30, 2014, McAlister rode a scooter from Waveland to Crawfordsville that was later determined to have been stolen from Clarkston in February 2014.¹

[15] In sum, with respect to the charge of receiving stolen property, there is no evidence that the scooter was recently stolen or that McAlister made attempts at concealment, gave evasive or false statements, or came by the scooter in an unusual manner of acquisition. *See Barnett*, 834 N.E.2d at 172. We hold that, to the extent that the State presented evidence that McAlister was in possession of stolen property, that fact alone cannot support the inference that McAlister knew the scooter was stolen. *See Fortson*, 919 N.E.2d at 1144. McAlister has established prima facie error. The evidence is insufficient to prove receiving stolen property, and we reverse McAlister’s conviction on that count.

¹ Lieutenant Chesterson testified that he discovered that the scooter had been stolen after McAlister had been arrested and transported to jail.

Trespass

- [16] To prove trespass, as a Class A misdemeanor, the State was required to show that McAlister, not having a contractual interest in the property, knowingly or intentionally entered the real property of Oak Hill Cemetery after having been denied entry by Oak Hill Cemetery or its agent. I.C. § 35-43-2-2(a)(1). A person has been denied entry under the statute when the person has been denied entry by means of posting or exhibiting a notice at the main entrance in a manner that is either prescribed by law or likely to come to the attention of the public. I.C. § 35-43-2-2(b)(2).
- [17] The State presented evidence that Oak Hill Cemetery owns the woods where McAlister was hunting mushrooms. Michael Harshbarger, Superintendent of Oak Hill Cemetery, testified that he did not give McAlister permission to be in the woods owned by the cemetery and that, while visitors are permitted entry into the “gravestone portion” of the cemetery anytime, no one is permitted entry into the woods owned by the cemetery.² Tr. at 171. Harshbarger testified that there were several “No Trespassing” signs posted between the gravestone portion of the cemetery and the surrounding woods. And the State presented evidence that there were two “No Trespassing” signs posted at the edge of the woods near the parked scooters.

² Harshbarger testified that one area of the woods referred to as the “scattering garden” was open to visitors at all times, but McAlister makes no contention that he was in that part of the cemetery. Tr. at 171.

[18] Still, McAlister contends that, “[w]here a person has a good faith belief that he has a contractual right to be on premises, the *mens rea* requirement for trespass cannot be met.” Appellant’s Br. at 13 (citing *Woods v. State*, 703 N.E.2d 1115, 1118 (Ind. Ct. App. 1998)). And he maintains that he had a “good faith belief that he had a legal basis for being at the cemetery” because “members of [his] family were buried in Oak Hill Cemetery” and he “frequently visits their graves[.]” *Id.* However, McAlister was not in the gravestone portion of the cemetery, which permits visitors, but he was seen walking out of the woods where “No Trespassing” signs were clearly posted. And, after Harshbarger arrived at the scene, he told Lieutenant Chesterson that McAlister did not have permission to be in “those woods[.]” Tr. at 172. Further, when Lieutenant Chesterson asked McAlister what he had been doing in the woods, McAlister did not respond that he was visiting the cemetery. Rather, McAlister said that he was mushroom hunting on “property [that] belonged to Dave Houston[.]” Tr. at 150. McAlister’s contention on appeal that he had a contractual right to be in the woods is without merit.

[19] We hold that the State presented sufficient evidence that McAlister was in an area of the woods owned by the cemetery where he had been denied entry and in which he did not have a contractual interest. I.C. § 35-43-2-2(b)(2). We affirm McAlister’s conviction for trespass.

[20] Affirmed in part and reversed in part.

Robb, J., and Crone, J., concur.