RENDERED: April 2, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002054-MR

ANTHONY MARK JORDAN — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 96-CR-0022

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GARDNER, JOHNSON, AND MILLER, JUDGES.

JOHNSON, JUDGE: Anthony Mark Jordan (Jordan) appeals from a final judgment and sentence of imprisonment entered in the Madison Circuit Court on July 18, 1996, which convicted him of the felony offense of receiving stolen property, in violation of Kentucky Revised Statutes (KRS) 514.110. Jordan received a one-year prison sentence. We reverse and remand for a new trial.

Jordan was indicted in April 1996, on one count of receiving stolen property having a value over $300. Jordan pled not guilty and his case went to trial on June 28, 1996. City of Richmond police officer Bradley Jones (Officer Jones) testified that he stopped a vehicle driven by Jordan which contained two passengers, Johnny Moore (Moore) and Oliver Tipton (Tipton).

Officer Jones testified that he stopped the vehicle after he observed Jordan retrieving from the vehicle's trunk a purple Crown Royal bag which appeared to contain a bottle. Officer Jones stated that Jordan looked at him, put the bag and bottle back into the trunk, got into the driver's seat and drove away. Officer Jones testified that he stopped the vehicle based on his suspicion that Jordan was a minor in possession of an alcoholic beverage. He testified that he discovered that Jordan had no driver's license and arrested him. Officer Jones testified that when he questioned Jordan about the vehicle, Jordan told him that he did not know who owned it, but he believed it belonged to a friend of one of the passengers. Officer Jones stated that he radioed the police dispatcher and learned that the car had been reported stolen. All of the young men were charged with receiving stolen property valued over $300. Officer Jones testified that when they arrived at the police station, he questioned Jordan further, and that Jordan stated that he had been walking down a road when Moore drove up in the car and asked him if he wanted a ride.

Moore testified that he and Jordan walked to the trailer of a friend named Jesse Rice. While they found no one at home, they noticed a vehicle in the driveway with the keys inside of it. Moore testified that while they at first left the residence, Jordan persuaded him to return and take the car. Moore testified that he drove a short distance and picked up Jordan who was waiting for him on the side of the road. Moore

testified that he drove toward Winchester, saw Tipton walking down the road, offered him a ride and he accepted. Moore testified that somewhere on the interstate highway going to Lexington Jordan began driving. Moreover, Moore testified that he had never been issued a driver's license.

Tipton testified that he was picked up by Moore and Jordan. He stated that Moore was driving and that when he asked them where they had gotten the car, both Jordan and Moore stated that they had borrowed the car from a friend. Tipton testified that Moore drove the vehicle until Jordan took over just outside of Richmond.

Jordan testified in his own behalf. He stated that as he was walking down the road about a mile from his house he was picked up by Moore. Jordan denied walking to the Rice trailer, searching the car, finding the keys or convincing Moore to take the car. He testified that he had never been issued a driver's license, and that he was unaware that Moore did not have a driver's license. Jordan claimed that he asked Moore where he had gotten the car and that Moore told him that the car was borrowed but he would not say to whom the vehicle belonged. Jordan testified that he "didn't think [Moore] should have had the car" but that he did not think the car was stolen. He admitted walking on the road between his home and the Rice residence when Moore picked him up and he admitted stopping in Richmond to look in the trunk of the car.

The trial court instructed the jury on both the misdemeanor and felony offenses of receiving stolen property. Jordan's request for an instruction on the unauthorized use of a motor vehicle pursuant to KRS 514.100 was denied by the trial court. Jordan was convicted of the felony offense of receiving stolen property and sentenced to one year in prison. This appeal followed.

Jordan argues that the trial court erred when it refused to instruct the jury on the lesser-included offense of unauthorized use of a vehicle. "The law . . . requires the court to give instructions when they are 'applicable to every state of [the] case covered by the indictment and deducible from or supported to any extent by the testimony. The determination of what issues to submit to the jury should be based upon the totality of the evidence.'" Perry v. Commonwealth, Ky., 839 S.W.2d 268, 273 (1992) citing Reed v. Commonwealth, Ky., 738 S.W.2d 818, 822 (1987). "It is also the duty of the trial court by instructions to give the accused the opportunity for the jury to determine the merits of any lawful defense which he or she has." Cheser v. Commonwealth, Ky.App., 904 S.W.2d 239, 242 (1994) citing Cannon v. Commonwealth, Ky., 777 S.W.2d 591, 593 (1989), and Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 550 (1988). Thus, we review the trial court's giving or failing to give a jury instruction as a matter of law.

The Commonwealth argues that based on Logan v. Commonwealth, Ky.App., 785 S.W.2d 497, 498 (1989), we should

affirm. Logan allegedly stole a van and was charged with receiving stolen property over $300. At trial, Logan requested an instruction on the unauthorized use of a motor vehicle because he claimed that he did not know the van was stolen, but believed it belonged to a friend. This Court summarized the law regarding lesser-included offenses as follows:

> A defendant is of course 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. Thus, if "there is any substantial evidence to support this theory, the appellant will be entitled upon request to instructions accordingly, rather than the jury being left with no alternative except to convict or acquit of the principal charges." Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 550 (1988).
>
> Nevertheless, the instructions must follow the evidence actually presented. Johnson v. Commonwealth, Ky.App., 721 S.W.2d 721 (1986).

The trial court's refusal to give the instruction on the unauthorized use of a vehicle was affirmed because the trial evidence, including Logan's testimony, tended to either convict him of receiving stolen property or to exonerate him of any crime rather than to convict him of the unauthorized use of a vehicle.

The unauthorized use of a motor vehicle is defined at KRS 514.100 as follows:

> (1) 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.

Receiving stolen property is defined at KRS 514.110 as follows:

> (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, unless the property is received, retained, or disposed of with intent to restore it to the owner.

We believe Logan is distinguishable from the case sub judice because Logan's defense was that he never drove the car on the day in question and that he had not known it was stolen but had believed it belonged to his friend who was driving the car. If Logan's testimony and the other evidence favorable to him were believed, then Logan would have been exonerated of any crime. Jordan, on the other hand, testified that he did drive the car on the day in question and that while he did not think the car had been stolen, he "didn't think [his friend] should have had the car." Additionally, Moore's testimony supports the argument that the young men were merely using the car for "joy riding" as opposed to having stolen the car. To constitute theft by unlawful taking under KRS 514.030(1)(a), a person must "take[] or exercise[] control over movable property of another with intent to deprive him thereof[.]" Based upon the total evidence at trial, Jordan, unlike Logan, could have been properly convicted of the lesser offense of unauthorized use of an automobile. The Supreme Court in Luttrell v Commonwealth, Ky., 554 S.W.2d 75, 78 (1977), stated:

> An instruction on a lesser included offense should not be given unless the evidence is such that a reasonable juror could doubt that the Defendant is guilty of the crime charged but conclude that he is guilty of the lesser included offense. Muse v Commonwealth, Ky., 551 S.W.2d 564 (decided April 1, 1977).

Since there was sufficient evidence to convict Jordan of the lesser offense, the jury instruction should have been given. Accordingly, the judgment of the Madison Circuit Court is reversed and this matter is remanded to the trial court for a new trial consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Michael C. Lemke
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BRIEF FOR APPELLEE:

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