

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-003089-MR

RICKY RANDOLPH

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DANIEL J. VENTERS, JUDGE  
ACTION NO. 99-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, GUIDUGLI, and MILLER, Judges.

COMBS, JUDGE: Ricky Randolph brings this appeal from a judgment of conviction entered December 3, 1999, by the Pulaski Circuit Court. We affirm.

On February 11, 1999, the car in which Randolph was riding was stopped by police. Occupying the vehicle were the driver, three passengers (including Randolph), and two boxes of merchandise stolen from Meece's Hardware. The appellant had more than \$300 in cash in his pocket.

On February 24, 1999, the Pulaski County Grand Jury indicted appellant for third-degree burglary, unlawful transaction with a minor, and receiving stolen property valued at

more than \$300. A jury trial resulted in appellant's conviction of receiving stolen property valued at more than \$300. The court sentenced appellant to five-years' imprisonment. This appeal followed.

Appellant contends that the circuit court committed reversible error by failing to instruct the jury as to the misdemeanor offense of receiving stolen property under \$300. He admits that the issue was not properly preserved for appellate review but asserts that the mistake amounts to palpable error resulting in manifest injustice. Rule of Criminal Procedure (RCr) 10.26. The Commonwealth counters that defense counsel withdrew his objection to the trial court's decision not to instruct the jury with respect to the misdemeanor offense. Thus, it contends that we are precluded from considering this issue pursuant to RCr 10.26. See Taylor v. Commonwealth Ky., 995 S.W.2d 355 (1999).

The trial court has a duty to prepare and to give instructions on the whole law of the case, including any lesser included offenses which are supported by the evidence. Swain v. Commonwealth, Ky., 887 S.W.2d 346 (1994). In weighing the totality of the evidence, if the jury might have a reasonable doubt as to the defendant's guilt of a greater offense while believing beyond a reasonable doubt that he is guilty of the lesser offense, an instruction on the lesser included offense must be given. Wombles v. Commonwealth, Ky., 831 S.W.2d 172 (1992). It is axiomatic that "one's mere presence at the scene

of a crime is not evidence that such one committed it or aided in its commission." Rose v. Commonwealth, Ky., 385 S.W.2d 202 (1964).

In the absence of any evidence that appellant received a "cut" of the stolen goods and/or cash valued at less than \$300, his mere presence at the scene would not have supported such a conviction. The Commonwealth's case indicated that the stolen goods received by Randolph were valued at more than \$300. The appellant's evidence supported his contention that he did not receive any portion of the stolen goods or cash. Consequently, the jury could not have believed beyond a reasonable doubt that Randolph received stolen property under \$300 as that lesser offense was never at issue. Since appellant was not entitled to an instruction on the misdemeanor offense of receiving stolen property under \$300, there was no error in the trial court's failure to give one.

Based upon the foregoing, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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