

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT ANTHONY KELLY,	:	
	:	
Appellant	:	No. 2636 EDA 2012

Appeal from the Judgment of Sentence Entered August 31, 2011
In the Court of Common Pleas of Monroe County
Criminal Division No(s).: CP-45-CR-0001291-2010

BEFORE: LAZARUS, OLSON, and FITZGERALD,* JJ.

DISSENTING STATEMENT BY FITZGERALD, J.: **FILED DECEMBER 10, 2013**

While I agree with the majority that Appellant’s conviction depended on a determination that he hid the property when codefendant Johnson was allegedly away from the home, I respectfully dissent from its conclusion that the evidence was sufficient to establish that fact. Instantly, there was no direct evidence that Appellant physically touched any of the stolen property. Moreover, the evidence showed that it was Johnson who arranged for the minors to be present in the home and who, along with D.M., played games on the stolen console. The circumstantial evidence, even when viewed in a light most favorable to the Commonwealth, established only that D.M.—the

* Former Justice specially assigned to the Superior Court.

juvenile who was implicated in the initial theft of the property—or Appellant had the opportunity to hide the property when Johnson allegedly left the home for thirty to forty-five minutes, but did not establish who hid the property.

Having reviewed the record, I would conclude that the circumstantial evidence presented at trial was not of such quantity or quality as to establish, beyond a reasonable doubt, the material facts of Appellant's guilt and overcome his presumption of innocence. **See generally Commonwealth v. Smith**, 956 A.2d 1029, 1035-36 (Pa. Super. 2008) (citation omitted) (noting "inferences must flow from facts and circumstances . . . and be of such volume and quality as to overcome [defendant's] presumption of innocence. . ."). Thus, I am of the view that Appellant's conviction rested on speculation—based on his presence in the home and status as a roommate to Johnson—that he was responsible for hiding the property. **See Commonwealth v. Brady**, 560 A.2d 802, 807 (Pa. Super. 1989).

Therefore, I dissent.