

Following a jury trial, Appellant-Defendant Joshua Arthur was convicted of Class D felony Receiving Stolen Property,¹ for which he received a sentence of three years in the Elkhart County Community Correction Facility (“ECCC”) and was ordered to pay \$1359 in restitution. Upon appeal, Arthur challenges the sufficiency of the evidence to support his conviction and the trial court’s restitution order. We reverse.

FACTS AND PROCEDURAL HISTORY

Randy Meert’s residence is located in Elkhart on the St. Joseph River. At approximately 6:00 p.m. on July 14, 2008, Meert discovered that his red, white, and black Yamaha jet ski was missing. The night before, Meert had seen that the jet ski was sitting out of the water on top of—but not locked to—a shore station.² Meert had not given anyone permission to take the jet ski, and no one outside his family had access to it. Meert drove up and down the river to see if it had floated off the shore station.

Bradley Haines also lives along the St. Joseph River in Elkhart and owns two jet skis which he stores in boat lifts on his dock. In the late morning hours of July 14, 2008, Haines saw a teenage male checking Haines’s jet skis to see if they were locked to the lifts. Haines recognized this male as a customer who had formerly visited Haines’s store. As Haines approached, he saw a second male, whom he also recognized and later identified to be Arthur, sitting on a red and white Yamaha jet ski in the water by the seawall in back of his house.³ Arthur shielded his face and tried to look away and avoid

¹ Ind. Code § 35-43-4-2(b) (2008).

² A shore station is a type of boat lift for a jet ski and serves as a storage place on the water for a jet ski.

³ Haines identified Arthur in a photographic array and at trial.

eye contact with Haines. The letters “MC” on the side of the jet ski indicated to Haines that it had a Michigan registration. Haines spoke to the first male, who told him that he and Arthur were about out of gas and that somebody was supposed to be bringing them gasoline. According to Haines, the nearest public access point was approximately one-half mile away. The first male asked to borrow a phone, so Haines gave him his cell phone. The first male appeared to make a phone call, then handed the phone back to Haines claiming that no one had answered. He and Arthur left on the jet ski.

Approximately two hours later, Haines received word of a jet ski floating in the river. Upon recovering the jet ski, which was a red and white Yamaha with Michigan numbers, he recognized it “with a hundred percent certainty” as the one Arthur had previously been riding. Tr. p. 77.

That evening, Elkhart Police Officer Andrew Chrobot responded to a report of a recovered jet ski which had been found floating on the river. This floating jet ski was subsequently determined to belong to Meert.⁴ Upon recovering his jet ski, Meert discovered that it had been damaged.

On October 27, 2008, the State charged Arthur with Class D felony receiving stolen property. Following an April 20, 2009 jury trial, Arthur was found guilty as charged, and the trial court entered judgment of conviction. Following a May 20, 2009

⁴ The exhibits, which included pictures of the jet ski, were not included in the record on appeal. The transcript reveals that the registration number for the recovered jet ski was “MC00661SM.” Tr. p. 67. The registration number on State’s Exhibit 3, which Meert identified as a picture of his jet ski, is described in the transcript to be “NC0661SM.” Tr. p. 59. Without the exhibits, we cannot verify whether these numbers are actually compatible and the discrepancy between them the result of a mistranscription. For purposes of this appeal, we will assume that the recovered jet ski was Meert’s.

sentencing hearing, the trial court sentenced Arthur to three years in the ECCC. In addition, the trial court ordered Arthur to pay restitution in the amount of \$1359. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Arthur claims that there is insufficient evidence to support his conviction for receiving stolen property. According to Arthur, the record lacks evidence that he knew the jet ski was stolen. In evaluating the sufficiency of the evidence to support Arthur's conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

In order to convict Arthur of receiving stolen property, the State was required to prove that he knowingly or intentionally received, retained, or disposed of the property of another person that had been the subject of a theft. *See* Ind. Code § 35-43-4-2(b). In addition to proving the explicit elements of the crime as set out in the statute, the State had also to prove beyond a reasonable doubt that Arthur knew that the jet ski was the subject of a theft. *See Gibson v. State*, 643 N.E.2d 885, 887 (Ind. 1994).

Here, there was no direct evidence that Arthur knew that the jet ski was stolen. A defendant's knowledge that the property he possesses is stolen, however, may be proven by the facts and circumstances surrounding his possession of the property. *See Gibson*, 643 N.E.2d at 887. The test of knowledge is not whether a reasonable person would have known that the jet ski had been the subject of theft but whether, from the circumstances surrounding the possession of the jet ski, Arthur knew that it had been the subject of theft. *See id.* at 888. Possession of recently stolen property when joined with attempts at concealment, evasive or false statements, or an unusual manner of acquisition may be sufficient to support a conviction for receiving stolen property. *Purifoy v. State*, 821 N.E.2d 409, 414 (Ind. Ct. App. 2005) (citing *Gibson*, 643 N.E.2d at 888), *trans. denied*.

In challenging the sufficiency of the evidence, Arthur focuses upon what he claims are multiple distinctions between his case and *Gibson*. In *Gibson*, the defendant was found in possession of a stolen wallet and convicted of receiving stolen property. 643 N.E.2d at 887. In affirming the defendant's conviction, the *Gibson* court concluded that, while there was no direct evidence of the defendant's knowledge, the facts and circumstances surrounding his possession of the wallet supported a reasonable inference that he knew it was stolen. *Id.* at 888. Among those facts and circumstances were that the defendant was found in possession of the wallet and its contents, which were in fact stolen; he lied about the possession; and he went to considerable lengths, including physical resistance, to conceal the wallet's contents. *Id.* The *Gibson* court further considered the factors of the defendant's presence in the vicinity of the theft at the approximate time of the theft and his flight from authorities in connection with another

crime. *Id.* The *Gibson* court concluded, however, that under the facts of that case, those factors were largely irrelevant with respect to the defendant's guilty knowledge regarding the wallet. *Id.*

In support of his challenge, Arthur claims that he was merely seen in possession of the jet ski but was not found in possession of it at the time of his arrest;⁵ that there was a lack of evidence explaining when or how the jet ski was removed from Meert's residence or how it temporarily came into Arthur's possession, such that it was never demonstrably "stolen"; and that he did not lie about or attempt to conceal the jet ski. While not relevant in *Gibson*, Arthur further points out that he was not seen in the vicinity of the jet ski at the time it was allegedly stolen and did not flee from authorities or resist arrest.

The State responds by pointing to certain facts which it claims permit the reasonable inference that Arthur knew the jet ski was stolen, namely that Arthur's companion was seen on Haines's dock inspecting the locks on Haines's jet skis; and that Arthur, who was sitting by the seawall on the jet ski, shielded his face, looked down, and avoided eye contact with Haines. At trial, the prosecutor similarly relied upon Arthur's attempts to shield his face as evidence that he knew his jet ski was stolen.

While these are perhaps suspicious facts, their suspect nature arguably relates more to the parties' intentions with respect to Haines's jet skis than to Arthur's mental state regarding the jet ski he was possessing at the time. In any event, evidence which

⁵ Arthur claims that, in addition, he was merely the passenger on the jet ski rather than the driver. Nothing in the record supports this claim. Arthur was the sole person sitting on the jet ski when Haines initially approached Arthur and the other male, and the record does not suggest that the other male assumed the driver's position when he and Arthur left Haines's dock.

merely raises a suspicion that the defendant knew the property was stolen is insufficient to support a conviction for receiving stolen property. See *Mattingly v. State*, 421 N.E.2d 18, 19 (Ind. Ct. App. 1981).

Here, the facts and circumstances simply do not support a reasonable inference that Arthur, who was seen temporarily possessing a missing jet ski, knew that the jet ski was stolen. Unlike in *Gibson*, the facts do not demonstrate that the jet ski was in fact stolen. Indeed, Meerts testified that the jet ski was not locked to the shore station at the time of its disappearance, and he initially wondered whether it had floated away. Unlike more stationary objects like cars, or, as in *Gibson*, a wallet inside a car, whose absence supports a more obvious inference of theft, here the disappearance of a jet ski which was sitting, unlocked, along the water could just as easily be explained by natural forces.

Other *Gibson* factors, including concealment of the object at issue and false or evasive statements regarding its possession similarly do not support such an inference. Arthur was found sitting on top of the jet ski, so he cannot be said to have been concealing it; and neither he nor his companion made demonstrably false or evasive statements. Arthur apparently said nothing, and his companion claimed that he was about out of gas, which was not contradicted in the record. The two additional *Gibson* factors of presence in the vicinity of theft and flight from police, which were deemed irrelevant in *Gibson*, similarly fail to support an inference of knowledge of theft in the instant case. There was simply no evidence regarding when or how the jet ski was removed from Meerts's property or who was present at the time, nor was there evidence that Arthur fled from or resisted police at the time of his arrest which occurred, not incidentally, after he

was no longer in possession of the jet ski. Lastly, the factor of unusual manner of acquisition, which the *Gibson* court cited but did not rely upon, cannot be said to be operative here. There was simply no evidence indicating the manner by which Arthur either acquired or disposed of the jet ski.

While the State argues, and we agree, that the *Gibson* factors are not an exhaustive list, the State points to no other factors—apart from the facts of Arthur’s shielding his face and his companion’s examination of Haines’s jet skis—which might support an inference of Arthur’s knowledge of theft in the instant case. We have already concluded that these vaguely suspicious factors are inadequate to support a reasonable inference that Arthur knew the jet ski was stolen.

The stark contrast between the facts in this case and the facts in other cases where such an inference has been upheld reinforces this conclusion. In *Purifoy*, the property at issue was demonstrably stolen because it was missing after a home burglary. 821 N.E.2d at 411. Further, the defendant’s acquisition of the property in *Purifoy* was suspect: he had purchased it at a greatly reduced price—for purposes of pawning it later for double the purchase price—from a street salesperson known in the neighborhood to sell stolen goods. *Id.* at 411, 414.

In *Butcher v. State*, 597 N.E.2d 357, 358 (Ind. Ct. App. 1992), *trans. denied*, the property at issue was a large coin collection stolen from a mini storage warehouse. The defendant, who was found in possession of a large number of coins and other property belonging to the owner of the coin collection, lied about cashing in and possessing the coins, and he changed his story about the manner by which he acquired them. *Id.* at 359.

In *Driver v. State*, 725 N.E.2d 465, 471 (Ind. Ct. App. 2000), the defendant was found driving a car with a license plate registered to a different vehicle owned by a different person who had not authorized removal of the plate, he was evasive about the ownership of his car, and he gave vague information regarding the means by which he acquired the license plate. *Id.*

In contrast with the above cases, here Arthur made no false or evasive statements; the record is silent regarding the manner by which he acquired the jet ski; and perhaps most significantly, the removal of the jet ski from Meert's possession was not demonstrably attributable to suspect means. The facts and circumstances therefore cannot be said to support the reasonable inference that Arthur knew the jet ski was stolen. Accordingly, we conclude that there was insufficient evidence to support Arthur's conviction for receiving stolen property.

Having concluded that Arthur's conviction must be reversed, we find it unnecessary to consider Arthur's challenge to the restitution order.

The judgment of the trial court is reversed.

NAJAM, J., and FRIEDLANDER, J., concur.