

MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

STATE OF MISSOURI,  
RESPONDENT

vs.

ROBERT SIMMONS,  
APPELLANT

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WD68948

DATE: DECEMBER 16, 2008

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Appeal from:  
THE CIRCUIT COURT OF HOWARD COUNTY, MISSOURI  
THE HONORABLE MICHAEL LYONS MIDYETT, JUDGE

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Appellate Judges:  
Division Three: Howard, P.J., Ellis and Ahuja, JJ.

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Attorneys:  
Shaun Mackelprang, Esq., Jefferson City, MO, **for Respondent.**

Nancy McKerrow, Esq., Columbia, MO, **for Appellant.**

**MISSOURI APPELLATE COURT OPINION SUMMARY**

**COURT OF APPEALS, WESTERN DISTRICT**

**STATE OF MISSOURI,**

**Respondent**

**v.**

**ROBERT SIMMONS,**

**Appellant**

WD 68948

Howard County, Missouri

Before Division Three Judges:        Howard, P.J., Ellis and Ahuja, JJ.

Robert Simmons was tried on two counts of unlawful merchandising practices in violation of the Missouri Merchandising Practices Act arising from misrepresentations he allegedly made in connection with the sale of cattle to Randy Kell and Don Collins. A jury convicted Simmons on the count involving the sale to Kell, but acquitted him on the count relating to Collins. Simmons appeals.

**AFFIRMED.**

**Division Three holds:**

(1) Where Simmons failed to inform Kell that he was relying on the representations of the true owner of the cattle and created circumstances that prevented Kell from viewing the cattle before delivery, there was sufficient evidence from which a reasonable jury could find that when Simmons told Kell the cows had raised at least one generation of calves while on the farm, Simmons willfully and knowingly made a misrepresentation with the intent to defraud Kell.

(2) Where the evidence on each count was distinct and uncomplicated, the trial court instructed the jury to consider each count separately, and the jury demonstrated its ability to distinguish the evidence by convicting Simmons of one count but acquitting him on the other count, the trial court did not abuse its discretion in denying Simmons's motion for severance.

(3) Although the State should have included the original affidavits with its exhibits, the original affidavits were filed with the trial court and copies of the affidavits were attached to the exhibits. Because the original affidavits were in the court's possession and the court found that they matched the copies attached to the exhibits, the court did not abuse its discretion in admitting the exhibits into evidence.

(4) In the context of a sales transaction between two individuals in the cattle business, because the MMPA does not include the terms "consumer" or "end consumer" or distinguish between "private" and "public" transactions, the MMPA was properly applied to the facts of the case.

**Opinion by: Howard, J.**

December 16, 2008

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