

RENDERED: JANUARY 27, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001492-DG

R.S., A CHILD UNDER EIGHTEEN

APPELLANT

ON DISCRETIONARY REVIEW FROM BOONE CIRCUIT COURT
v. HONORABLE JAMES R. SCHRAND, JUDGE
ACTION NO. 10-XX-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Following an adjudication hearing in the Boone District Court (juvenile session), R.S., a child under 18 years of age, was adjudicated guilty of complicity¹ to criminal mischief in the second degree² and ordered to pay restitution. On appeal, the Boone Circuit Court affirmed his conviction and the

¹ Kentucky Revised Statutes (KRS) 502.020.

² KRS 512.030, a Class A misdemeanor.

restitution order. The matter is now before us upon an order granting discretionary review. CR³ 76.20. After a careful review of the record, the briefs and the pertinent law, we affirm the adjudication and restitution order.

The facts of this matter are undisputed and were related during the adjudication hearing convened on January 20, 2010. On April 24, 2009, Deputy Burcham⁴ of the Boone County Sheriff's Office was dispatched to a residence to take a report on damage to a vehicle. The officer observed numerous scratches across the hood, quarter panels and three of the four doors of a vehicle owned by Theresa Mitchell. The officer was also informed that prior to his arrival the vehicle had been washed to remove several lewd and vulgar writings and drawings from the vehicle windows. Deputy Burcham did not personally observe the paint or drawings, but the victim had taken photographs prior to removing them.

During the course of his follow-up investigation, Deputy Burcham learned of another criminal mischief incident which occurred on the same date and at the same location where Mitchell's vehicle was damaged. A witness to the vandalism had given other investigators the names of several juveniles who were involved in this second incident. Deputy Burcham learned that those individuals had named R.S. as being involved in damaging Mitchell's vehicle. Upon contacting R.S., he admitted to the officer that he and other juveniles had painted

³ Kentucky Rules of Civil Procedure.

⁴ The record does not reveal the full name of the officer. Although the parties refer to this officer as "Detective Burcham" in their briefs, he stated his name was "Deputy Burcham" at the beginning of his testimony at the adjudication hearing.

on several vehicles but he denied personally scratching the vehicles. He would not tell the officer who was responsible for causing those damages. R.S. subsequently gave a written statement consistent with his earlier admission.

Patricia Hunter testified that she observed a vehicle parked in front of her home and two boys exit the car. The pair walked toward a memorial party down the street from her home. She later saw two boys and two girls writing on the windows of the vehicle parked in front of her home and saw one of the boys slide across the hood. She was unable to identify by name any of the juveniles she saw that evening, but stated that R.S. looked familiar and that the driver of the parked vehicle was definitely not one of those involved as he was substantially taller than any of the others she saw.

Mitchell testified that on April 30, 2009, she had let her son take her car to a memorial party for a young man from his school who had committed suicide. Upon his return, the car had lewd comments and drawings on the windows which she and her son washed off. After washing the car she noticed the scratches and contacted the police to investigate. She produced two estimates for the damage and stated the total repairs would cost \$1,687.16.

R.S. testified on his own behalf. He admitted that he and Mitchell's son were at the same gathering. He stated the two were acquaintances and had never had any problems. He admitted that on the night of the incident he had gone to a friend's car to get window paint to write "rest in peace, John Lassiter." He said he and some friends then began to draw "wieners" on the windows of other

vehicles. He said he drew only one and then left the area. He denied seeing anyone jump on Mitchell's car or seeing any scratches on it. Upon reviewing the pictures of the vehicle, R.S. could not identify the picture he had drawn. He denied scratching the car but implied that perhaps the car had been damaged by going through a car wash.

The trial court found R.S. was guilty of complicity to criminal mischief based on the evidence that he was around the vehicle on the night in question and his admission to painting on the windows. While the trial court doubted the Commonwealth had met its burden of proof if it had to prove R.S. had personally damaged the vehicle, it believed sufficient evidence had been presented to show he was complicit in the activities of the group giving rise to the damage. The trial court indicated that perhaps others should have also been in court with R.S. but the fact that others may have been involved did not eliminate his individual responsibility for the damages. At a subsequent disposition hearing, the trial court noted that the Department of Juvenile Justice had recommended only that R.S. make restitution to Mitchell in an amount to be determined by the court at a minimum rate of \$50.00 per month until paid in full. Based on the recommendation, the court ordered him to pay a total of \$1,600.00. No objections were lodged by either party.

R.S. timely appealed the adjudication of guilt to the Boone Circuit Court alleging the Commonwealth had failed to present sufficient evidence of his guilt. He further argued the amount of restitution ordered was improper because

other individuals were involved in the criminal mischief, and thus his personal liability should be less than the full amount of the damage to the vehicle. In its July 6, 2010, order affirming the adjudication, the circuit court found no error in the trial court's finding of guilt and specifically ruled that the evidence presented was sufficient to support a conviction for complicity to criminal mischief. Finally, the circuit court noted that no objection had been made to the amount of restitution at the disposition hearing, and that it believed the disposition was appropriate under the applicable statutes. A motions panel of this Court granted discretionary review and this appeal followed.

On appeal, R.S. again presents the same arguments posed to the circuit court relating to the sufficiency of the evidence of his guilt and the soundness of the decision that he alone be responsible for the whole of the damage to Mitchell's vehicle when others were involved in the crime. The parties spend the majority of their briefs and center their arguments on the propriety of the underlying conviction and the sufficiency of the evidence presented. However, we are convinced the real issue to be decided by this Court concerns the order for restitution. There appears to be no published opinion discussing the issue presented in this appeal, an issue we believe trial courts face on a regular basis.

We first comment briefly on the sufficiency of the evidence elicited regarding the underlying conviction. It is well-settled that trial courts are in a superior position to judge the credibility of witnesses and weigh the evidence presented. *Kotas v. Commonwealth*, 565 S.W.2d 445 (Ky. 1978); *see also Moore*

v. Asente, 110 S.W.3d 336, 354 (Ky. 2003). Reviewing courts are not to reevaluate the proof given but are to consider the trial court's decision in light of the evidence presented. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

[T]he standard of review required by the Due Process Clause with respect to the sufficiency of evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Potts v. Commonwealth, 172 S.W.3d 345, 349 (Ky. 2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Applying this standard, the evidence here is sufficient to establish R.S.'s guilt of complicity to criminal mischief. He admitted being part of the group that painted on Mitchell's car, and that he personally engaged in that activity. It was uncontroverted that the vehicle was scratched during the course of the mischief that evening. Although R.S. claimed to have taken no part in scratching the car, we cannot say it was wholly unreasonable for the trial court to find that R.S. was personally responsible for his complicity in the activities culminating in the damage to Mitchell's vehicle.

We now turn to the issue which we believe most warrants our review. The crux of the issue presented is whether a single defendant can properly be ordered to make full restitution to the victim of a crime when other uncharged actors may have also been involved in causing the victim's loss. We hold they can.

As an initial matter, our review of the record reveals R.S did not timely object to any issues relating to restitution and any error relating thereto is thus wholly unpreserved for our review. He requests we undertake review of the issue under the “palpable error” standard set forth in RCr⁵ 10.26, arguing that ordering him to pay the full amount of the restitution owed to Mitchell clearly constitutes manifest injustice. However, because of the lack of guidance on the matter, we have chosen to fully review the issue as if it were properly preserved. As we believe much of the jurisprudence regarding restitution in the adult criminal system is equally applicable to the juvenile system, we borrow heavily from it in making our decision today.

Under KRS 532.350(1), the definition of “restitution” includes “compensation paid by a convicted person to a victim . . . for property damage and other expenses suffered by a victim because of a criminal act.” The purpose of restitution is not an “additional punishment exacted by the criminal justice system. . . . It is merely a system designed to restore property or the value thereof to the victim.” *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986). Under our current statutory scheme, one specific purpose of restitution is ensuring crime victims are fully compensated for their losses. *Hearn v. Commonwealth*, 80 S.W.3d 432, 435-36 (Ky. 2002). Trial courts are “in the best position to make the appropriate and well-informed decision in a fair and impartial manner.” *Id.*, at 436. The issue of restitution lies solely within the discretion of the trial court.

⁵ Kentucky Rules of Criminal Procedure.

KRS 635.060. Because the trial court is charged with setting the amount of restitution owed, the statutes contemplate that the trial court will be the fact-finder. As such, appellate review of the trial court's findings of fact is governed by the clearly erroneous standard set forth in CR 52.01. Thus, if the finding is supported by substantial evidence it will not be disturbed on appeal. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

KRS 635.060 provides that in a juvenile proceeding the trial court may order the child "to make restitution or reparation to any injured person to the extent, in the sum and upon the conditions as the court determines. . . ." In criminal cases prosecuted against adult defendants, the trial court is permitted to apportion the responsibility for restitution if there is more than one defendant or victim. KRS 533.030. No similar provision appears within the juvenile code. Nevertheless, such apportionment is consistent with the legislative intent of ensuring that crime victims are fully compensated for their losses, as doing so serves to increase the pool of available funds from which a victim may recover.⁶ However, in the case *sub judice*, we have been asked to determine whether such apportionment is required when other responsible parties possibly exist but are not before the court as defendants. Finding no support within our statutes or judicial decisions for placing financial responsibility on uncharged actors, we are

⁶ KRS 446.080 provides that all statutes should be liberally construed in an effort to carry out the legislative intent and promote the object of the statute. Kentucky's system of restitution, when read as a whole, is designed to make victims whole, not to punish criminals. Allotting liability among multiple offenders clearly furthers this purpose.

convinced the courts of this Commonwealth are not authorized to order such a disposition, and we therefore reject R.S.'s argument to the contrary.

The trial court had before it uncontroverted evidence that Mitchell's vehicle was damaged and the amount to repair those damages. It found that R.S. was one of the actors involved in the mischief. R.S. does not dispute any of these findings, but rather alleges that he did not scratch the car and therefore he should not be held liable for payment to fix the damage caused by his cohorts. Although R.S. named others he claimed were involved, none of them were co-defendants in this case and the trial court did not otherwise have jurisdiction over those persons. Thus, as the sole responsible party before it, the trial court determined in its discretion that R.S. should be liable for the whole of the damages. In seeking reversal, R.S. now essentially seeks to limit his liability by gaining a "credit" of sorts based on the culpability of others, claiming he was—at most—complicit in their actions. He argues that the adult sentencing statutes require restitution be apportioned among all actors and urges such application to the case at bar.

We are unpersuaded by R.S.'s argument that since he was only found guilty of complicity, it would not be "in the best interests of the child" to find him solely liable for covering the costs of the damage. It is well-settled in this Commonwealth that "one who is found guilty of complicity to a crime occupies the same status as one being guilty of the principal offense." *Wilson v.*

Commonwealth, 601 S.W.2d 280, 286 (Ky. 1980). Whatever his role in the illicit activities, R.S. is responsible for the end result of the group's actions, including all

of the damage to Mitchell's vehicle. Furthermore, were we to accept R.S.'s argument and rule that a defendant's liability must be reduced when he claims additional parties may be responsible for damages arising from a criminal act, we would be countenancing a rule that would effectively limit a defendant's liability—and a victim's right to be compensated for his losses—based solely on the unsupported or unproven assertions of a criminal. This we cannot and will not do. Just as a trial court cannot order a defendant to pay restitution for crimes for which he is neither charged nor convicted, we are likewise convinced that the courts cannot reduce a defendant's liability based on the supposed actions of uncharged actors. Allowing such speculative dispositions would defy logic and contravene the jurisprudence of this Commonwealth.

Finally, contrary to R.S.'s contention, the adult statutes concerning apportionment of liability among multiple defendants are not mandatory. KRS 533.030(3) uses the permissive "may." Thus, even if some or all of the other actors who caused the damage to Mitchell's car had properly been before the trial court, it would not have been bound to allot the costs of repairs among them, but could have done so in its discretion. Nevertheless, R.S.'s argument is without merit as the plain language of KRS 533.030(3) clearly envisions more than one defendant being charged with the crime for which restitution is mandated to permit apportionment, and here there were not multiple defendants upon whom the trial court could impose joint, several, or split liability for the damage.

We cannot conclude that the trial court erred in ordering R.S. to pay an amount sufficient to make the victim whole. Doing so is a proper function of our statutory scheme of restitution. The trial court's decision was clearly supported by substantial evidence and will not be disturbed on appeal.

For the foregoing reasons, the adjudication of the Boone Circuit Court is affirmed.

ALL CONCUR.

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