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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000341-MR

CHARLES COBERLY

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 12-CR-00150

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Charles Coberly brings this appeal from a January 23, 2014, Judgment of the Greenup Circuit Court upon a jury verdict convicting him of first-degree criminal mischief and sentencing him to one-year imprisonment. We affirm.

On the evening of May 12, 2012, the tires of twelve vehicles were slashed by appellant while parked at the American Veterans Post 95 (Ammvets Post) in Greenup County. Each of the damaged vehicles was owned by a different person, and the amount of damage to each vehicle ranged from \$30.00 to \$864.53.¹ Taken together, the damage to all twelve vehicles totaled \$5,074.11.

Ultimately, appellant was indicted upon one count of first-degree criminal mischief (Kentucky Revised Statutes (KRS) 512.020). In the indictment, it was alleged that appellant intentionally damaged the tires of twelve vehicles belonging to different owners at the Amvets Post on May 12, 2012, thus causing a pecuniary loss of property exceeding \$1,000.

A jury trial ensued, and the jury found appellant guilty of first-degree criminal mischief. On January 23, 2014, the circuit court sentenced appellant to one-year imprisonment. This appeal follows.

Appellant contends that he was entitled to a directed verdict of acquittal upon first-degree criminal mischief and that the circuit court improperly instructed the jury upon first-degree criminal mischief. Appellant's contentions of error are based upon his primary assertion that the Commonwealth improperly aggregated the damage to each of the twelve vehicles to meet the \$1,000 pecuniary loss threshold necessary to support the first-degree criminal mischief charge. KRS 512.020. First-degree criminal mischief is a felony. Instead, appellant maintains that he should have been charged with twelve separate misdemeanor counts of

¹ The twelve vehicles damaged included two vans, five golf carts, and five off-road vehicles.

either second-degree criminal mischief or third-degree criminal mischief depending upon the specific damage to each vehicle.² Appellant believes that “12 different victims require 12 separate charges.” Reply Brief at 1.

Appellant concedes that this issue was not preserved for appellate review but requests the Court to review the issue under the palpable error rule under Kentucky Rules of Criminal Procedure (RCr) 10.26.³ The Kentucky Supreme Court summarized the palpable error review as follows:

Under the palpable error standard, an unpreserved error may be noticed on appeal only if the error is “palpable” and “affects the substantial rights of a party,” and even then relief is appropriate only “upon a determination that manifest injustice has resulted from the error.” RCr 10.26. [W]hat a palpable error analysis ‘boils down to’ is whether the reviewing court believes there is a ‘substantial possibility’ that the result in the case would have been different without the error.

McDaniel v. Com., 415 S.W.3d 643, 649 (Ky. 2013)(quoting *Brewer v. Com.*, 206 S.W.3d 343, 349 (Ky. 2006)). Our review proceeds accordingly.

Criminal mischief in the first-degree is codified in KRS 512.020 and provides:

² The pecuniary loss threshold amount to support a charge of second-degree criminal mischief (Kentucky Revised Statutes (KRS) 512.030) is \$500, and third-degree criminal mischief (KRS 512.040) does not contain a threshold dollar amount.

³ Kentucky Rules of Criminal Procedure 10.26 provides:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

(1) A person is guilty of criminal mischief in the first degree when, having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of \$1,000 or more.

(2) Criminal mischief in the first degree is a Class D felony.

To prove first-degree criminal mischief, it is incumbent upon the Commonwealth to demonstrate that defendant intentionally or wantonly damaged any property resulting in a pecuniary loss of \$1,000 or more. *Allen v. Com.*, 410 S.W.3d 125 (Ky. 2013). KRS 512.020 specifically encompasses damage to “any property” within its ambit. Thus, under Kentucky law, we conclude it is permissible to combine damage to multiple items of property even if the multiple items had separate owners. As in larceny and theft cases, the decisive question presented is whether the damage to the multiple items of property owned by separate individuals occurred at the “same time and the same place.” *Fair v. Com.*, 652 S.W.2d 864, 867 (Ky. 1983) (quoting *Jacobs v. Com.*, 260 Ky.142, 84 S.W.2d 1, 2 (1935)); *see also Nichols v. Com.*, 78 Ky. 180 (1879); *Wilson v. Com.*, 438 S.W.3d 345 (Ky. 2014). If so, there is but one offense of criminal mischief.

In the case at hand, the damage to the twelve vehicles occurred at the same time and the same place. Had the criminal acts occurred at twelve different times or in twelve different locations, appellant’s argument would be well taken. However, the evidence in this case demonstrates that the damage occurred at the same time, as appellant successively slashed the tires of the twelve vehicles. The

evidence also demonstrates that all twelve vehicles were in the same place or location, the parking lot of the Amvets Post. And, it can be presumptively inferred from the evidence that the successive acts of slashing tires by appellant on the evening of May 12, 2012, were motivated by a single continuing criminal scheme or enterprise. Taking the facts together, we conclude that appellant committed a single offense of criminal mischief. Having so concluded, we cannot say that the circuit court committed prejudicial error under RCr 10.26.

For the foregoing reasons the Judgment of the Greenup Circuit Court is affirmed.

ALL CONCUR.

**BRIEFS AND ORAL ARGUMENT
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**ORAL ARGUMENT FOR
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