RENDERED: FEBRUARY 17, 2017; 10:00 A.M NOT TO BE PUBLISHED

Commonwealth of Kentucky Court of Appeals

NO. 2015-CA-001154-MR

BRENTON WOMBLES

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT HONORABLE AUDRA J. ECKERLE, JUDGE ACTION NOS.12-CR-003101, 13-CR-001552, & 14-CR-000794

COMMONWEALTH OF KENTUCKY

APPELLEE

<u>OPINION</u> REVERSING AND REMANDING

** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND D. LAMBERT; JUDGES. LAMBERT, D., JUDGE: Brenton Wombles appeals the judgment of the Jefferson Circuit Court, which ordered him to pay restitution in the amount of \$100,625.79, collectively, to the seven victims of his crimes. Having reviewed the record, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Wombles faced three simultaneous indictments for similar offenses. Wombles ultimately entered a single *Alford* plea resolving all three. Wombles was convicted on the following charges: one count criminal mischief in the 1st degree; one count of theft of services in an amount over \$500, but less than \$10,000; and two counts of theft by deception in an amount over \$500, but less than \$10,000. These charges came from each of the three indictments, and the trial court ordered the sentences on the separate indictments be served consecutively, for a total of ten years to serve. However, the trial ordered the sentence probated for ten years.

As part of his plea agreement, Wombles agreed to pay restitution to the victims of his crimes. At the time he agreed to the plea, the amounts owed in restitution to six victims were known: to Payroll Network, he agreed to pay \$23,912.19; to Elite Creative Services, he agreed to pay \$3,600; to Snelling Staffing, he agreed to pay \$5,844.65; to Monte Barnett, he agreed to pay \$750; to Metro Materials, he agreed to pay \$2,930.14; to Quantum Financial Services, he agreed to pay \$200. The amounts owed in restitution to Sherry Penrod, and an eighth victim, Craig Robinson, were to be determined following a subsequent hearing.

Penrod appeared at the hearing and testified, but Robinson, however, failed to appear, forcing the Commonwealth to concede it could prove no amount in restitution as it related to him.

The hearing went forward despite Robinson's absence, and the trial court took proof as to the amount of restitution owed by Wombles to Penrod. Penrod testified that she and her sister own a tract of real property on which a residence is located. In November of 2013, Penrod received a phone call from her father about Wombles, who had been renting the home, despite never having signed a rental agreement or paying rent. Penrod understood that Wombles had agreed to finish painting the house and would not have to pay the first month's rent. Penrod contacted Wombles, who admitted he had torn out the interior walls of the home over concerns about mold.¹ After personally viewing the damage, Penrod attempted to negotiate an arrangement whereby Wombles would purchase the property. Penrod's attorney examined the contract drafted by Wombles' attorney, and found its terms offered inadequate protection to Penrod. When that transaction fell through, Penrod visited the home again and found that Wombles had completely gutted the interior of the home, removing all fixtures, the toilets, the sinks, the countertops, the knotty pine paneling, and drywall.

Penrod testified that she had sought several estimates, with quoted prices to restore the property to its original condition ranging from \$46,182 to \$100,000. However, Penrod introduced only one such estimate into the record—the lowest. This estimate was itemized, and stated the following specific costs: for electrical, \$4,875; for rough carpentry, \$4,500; for masonry, \$1,850; for sheetrock, \$12,387; for finish carpentry, \$4,880; for cabinets, \$3,350; for interior paint,

¹ Testing revealed the mold to be a harmless species.

\$3,985; for ceramic tile; \$3,980, for plumbing, \$4,800; and for debris removal/dumpster rental, \$1,575. This estimate also noted at the bottom that these expenses included "...all updated electrical wiring, and the interior plumbing lines." Penrod conceded that the property needed to be updated even before Wombles took possession.

Penrod also testified about several out-of-pocket expenditures. She testified that her father had expended \$10,000 for parts and labor relating to ceramic tile and the drywall ceiling, plus an additional \$3,500 on windows. She further testified that she had spent \$3,286.41 on painting and clean-up. However, Penrod also testified that these expenses were paid prior to Wombles involvement with the property. The trial court also took judicial notice of the mechanic's lien in the amount of \$33,000 on the property, placed by Wombles.

In its judgment granting probation, the trial court found the estimate to be "reasonable (and low)," and ordered Wombles to pay the full amount of the estimate, plus the \$10,000 for the father's work, the \$3,500 for the windows, the \$3,286.41² for the painting, and \$415 for debris removal. The total amount of restitution awarded to Penrod was calculated by the trial court at \$63,383.41³. The

² The trial court's judgment actually awarded \$3,286.81, though this appears to have been a typographical error.

³ The Commonwealth's restitution attachment originally stated the trial court awarded Penrod \$63,388.81 but that number was later corrected to the amount above. The trial court appears to have relied on the incorrect calculation for the total in its restitution order.

judgment referenced the simultaneously entered restitution order, which directed Wombles to pay \$100,625.79 in restitution.

This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

While due process at sentencing is less than that demanded prior to a determination of guilt, it still requires that sentences "not be imposed on the basis of material misinformation." Fields v. Commonwealth, 123 S.W.3d 914, 917 (Ky.App. 2003). "[T]he record must establish an adequate factual predicate for a restitution order." Id. at 918.

When the amount of restitution is in dispute, KRS⁴ 532.033(3) tasks the trial court with setting the amount of restitution. As such, the trial court becomes the fact-finder, and its findings cannot be disturbed unless clearly erroneous. Donovan v. Commonwealth, 376 S.W.3d 628 (Ky.App. 2012). "Clear error applies to a review of a trial court's findings of fact; abuse of discretion applies in other situations where, for example, a 'court is empowered to make a decision—of its choosing—that falls within a range of permissible decisions." Miller v. Eldridge, 146 S.W.3d 909, 915 (Ky. 2004) (quoting Zervos v. Verizon New York, Inc., 252 F.3d 163 (2nd Cir. 2001) (emphasis in original). Thus the trial court's factual findings are reviewed for clear error, and its legal conclusions resulting therefrom are reviewed for abuse of discretion.

⁴ Kentucky Revised Statue

B. THE TRIAL COURT EXCEEDED ITS AUTHORITY IN ORDERING RESTITUTION TO PENROD BEYOND THAT REFLECTED IN THE REPAIR ESTIMATE

Wombles argues that the trial court abused its discretion in awarding restitution for the amounts Penrod testified about expending prior to his involvement with the residence.

Kentucky statute defines "restitution" as "any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act." KRS 532.350(1)(a). The Commonwealth bears the burden of proving the amount of restitution by a preponderance of the evidence.

Jones v. Commonwealth, 382 S.W.3d 22 (Ky. 2011). In Commonwealth v.

Morseman, the Kentucky Supreme Court was tasked with determining whether a trial court has the authority to order restitution for damages not incurred as the direct result of the criminal act for which a defendant stood convicted. 379 S.W.3d 144 (Ky. 2012). The Supreme Court held that trial courts lack such authorization. Id. at 152.

Here, the trial court awarded those amounts in question, noting that the loss of the benefit of those efforts and expenditures was a direct result of Wombles' actions. We agree, and thus *Morseman* does not apply here to preclude the trial court's award for those sums.

However, we cannot agree with the trial court's award of both the full amount noted in the estimate and the extra out-of-pocket expenditures about which Penrod testified. The trial court offered its opinion that the amount stated in the repair estimate was "reasonable (but low)," and the court's opinion of the price appears to have colored its application of the law to the facts. The estimate included items related to the replacement of the tile, the drywall, interior plumbing, interior paint, electrical upgrades, and debris removal/cleanup. These were the very same items for which Penrod paid out-of-pocket, yet the trial court awarded additional restitution for these redundant claims. Even after the trial court noted the reasonableness of the estimate as putting Penrod in the same position would be if not for the criminal acts committed by Wombles, it ordered additional sums beyond that reasonable price in restitution.

The trial court's award of restitution on these sums amounted to an abuse of discretion in that the trial court exceeded the authority vested in it by KRS 532.033(3) by awarding Penrod an amount beyond the reasonable compensation necessary to put her in the same position she would have found herself in if not for the criminal intervention of Wombles. Specifically, the trial court committed reversible error in awarding Penrod restitution as follows: the \$10,000 for the father's work, the \$3,500 for the windows, the \$3,286.41 for the painting, and \$415 for the debris removal.

C. WOMBLES' ARGUMENT REGARDING KRS 533.030(3) IS MOOT

Wombles argued that KRS 533.030(3) applies to preclude the trial court from ordering greater than \$100,000 in restitution. He urged an interpretation that the limit applied to the aggregated total amount of restitution rather than the restitution awarded to each individual victim. The Commonwealth took the opposite position that the limitation applies to each victim and not the total award.

Unfortunately, in light of the conclusion we reach regarding the items of restitution awarded, the interpretation of KRS 533.030 must fall to another court. This court's conclusion brings the total amount of restitution owed below the statutory threshold of KRS 533.030, and moots the parties' arguments on interpretation of the statute. Any further analysis on the issue is obviated.

III. CONCLUSION

This Court, after a careful review of the record, finds that the trial court committed reversible error. The evidence established that the price quoted in the estimate was, in fact, the price of putting Penrod in the same position as though the crime had not occurred—notwithstanding the trial court's opinion that the estimate price was too low. Awarding restitution for the out-of-pocket expenses covering the same items as those reflected in the estimate amounted to a windfall to the victim, and an abuse of discretion by the trial court. We therefore REVERSE the trial court's restitution award and REMAND the matter for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT: BRIEF FOR APPELLEE:

Cassandra F. Kennedy Andy Beshear Louisville, Kentucky Attorney General

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