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RENDERED: JANUARY 21,2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000151-MR

DATE 2/11/10 Kelly Klaber D.C.

MICHAEL BRATCHER — APPELLANT

V.

ON APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
NO. 07-CR-01123

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

Appellant, Michael Bratcher, was convicted by a Warren Circuit Court jury of two counts of second-degree burglary, two counts of first-degree criminal mischief, one count of theft by unlawful taking over $300, and one count of theft by unlawful taking under $300. Appellant received a sentence of five years for the first count of second-degree burglary, nine years for the second count of second-degree burglary, two years for the first count of first-degree criminal mischief, one year for the second count of first-degree criminal mischief, five years for the unlawful taking over $300 conviction, and one year and a fine of $500 for the theft by unlawful taking under $300 conviction. The two-year sentence for first-degree criminal mischief was ordered to be served

concurrently with the other sentences, which were ordered to be served consecutively for a total sentence of twenty years' imprisonment with a $500 fine. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts eight arguments on appeal: 1) that the trial court erred in denying his motion for a directed verdict on the two counts of first-degree criminal mischief; 2) that the trial court erred by imposing a $500 fine because he was indigent; 3) that the trial court erred by not providing a jury instruction on receiving stolen property; 4) that the introduction of evidence which appeared to refer to other crimes was error; 5) that the introduction of testimonial hearsay listing the property stolen from the victims was error; 6) that his trial on charges one week after his indictment and the day after his arraignment violated his right to due process and a fair trial; 7) that the trial court abused its discretion when he refused to accept Appellant's guilty plea on the day of trial; and 8) that the separation of the second-degree burglary charges into two counts violated double jeopardy. For the reasons set forth herein, we affirm Appellant's convictions and sentences for the two counts of second-degree burglary, and the one count of unlawful taking over $300. We affirm Appellant's conviction for the one count of unlawful taking under $300, but reverse the $500 fine imposed because Appellant was declared indigent. We reverse the convictions for the first-degree criminal mischief charges and remand this case to the Warren Circuit Court for proceedings consistent with

this opinion.

Upon returning to Bowling Green from a weekend trip in June 2006, Richard Ball discovered that his home had been burglarized and vandalized. Numerous items were stolen including televisions, jewelry, collectables, artwork, a fur coat, and his wife's Mercedes-Benz. The Mercedes-Benz was found in a nearby church parking lot with significant damage. The initial police investigation uncovered no suspects until the crimes were featured on local Crime Stoppers advertisements in September 2006. The police then received an anonymous tip that the perpetrators of the crime lived in a local apartment. The apartment was occupied by Appellant, Michael Bratcher, Rachel Bratcher, and Damien Thurman. Based on that tip, the police staked out the apartment.

On September 12, 2006, Kentucky State Police Detective Scott Skaggs obtained a warrant to search the apartment. Stolen property from the Balls' home was found inside. Appellant was subsequently arrested.

On March 7, 2007, the Warren County Grand Jury indicted Appellant on two counts of second-degree burglary and two counts of theft by unlawful taking over $300. One count of second-degree burglary was alleged to have occurred on or about June 23, 2006, and the other count was alleged to have occurred on or about June 24, 2006. Appellant's trial was set for November 27, 2007. On November 19, 2007, the Commonwealth requested a continuance to December 18, 2007, because the Balls were scheduled to be

out-of-town during the trial. Appellant agreed to the continuance.

On December 12, 2007, the Commonwealth sought, and the Warren County Grand Jury returned, a superseding indictment. This indictment included new charges: two counts of first-degree criminal mischief. Also, one of the counts of theft by unlawful taking over $300 was changed to a misdemeanor offense: theft by unlawful taking under $300. On December 17, 2007, Appellant was arraigned on the superseding indictment. Appellant moved to quash the superseding indictment as untimely. The trial judge denied the motion, but gave Appellant until the next day to decide if he wanted to sever the criminal mischief charges for trial at a later date.

On December 18, 2007, the scheduled first day of trial, Appellant attempted to plead guilty and accept an offer of a twelve-year sentence from the Commonwealth. The trial judge refused to accept the guilty plea. Appellant elected not to sever the criminal mischief charges from the original charges. Appellant was subsequently found guilty of all charges and sentenced to a twenty-year sentence and a $500 fine. Further facts will be developed as necessary.

I. THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT A DIRECTED VERDICT OF ACQUITTAL ON THE TWO COUNTS OF FIRST-DEGREE CRIMINAL MISCHIEF

Appellant raises three arguments challenging his convictions for first-degree criminal mischief. He first argues that the trial court should have

granted him a directed verdict of acquittal on the two counts of first-degree criminal mischief. A trial court's decision regarding a directed verdict motion is reviewed under the standard articulated in Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187. The crime of first-degree criminal mischief is found in KRS 512.020, which states, "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."

For both counts of first-degree criminal mischief, one dealing with the damage to the Balls' house and the other dealing with damage to the Mercedes-Benz, the jury instructions charged Appellant as the principal actor and not as an accomplice acting with his co-defendants. Therefore, Appellant argues that he should have been granted a directed verdict because while the Commonwealth produced evidence of the overall amount of damage done to the

house and Mercedez-Benz, the Commonwealth never proved that Appellant *personally* caused $1000 of damage as required by KRS 512.020. As we stated previously in Terry v. Commonwealth, 253 S.W.3d 466, 471-472 (Ky. 2007), "[t]he $1,000 minimum property damage requirement must be considered an actual element of the offense of first-degree criminal mischief because, in order to avoid a directed verdict on that charge, the Commonwealth must show that a defendant . . . caused at least $1,000 in property damage." We agree.

In regards to the first-degree criminal mischief charge relating to the Balls' house, at trial the Commonwealth presented evidence that over $5,300 worth of damage was caused. However, the only evidence presented of damage caused individually by Appellant was Seth Riffey's testimony that Appellant admitted to breaking the glass in the Balls' back door. The Commonwealth never presented to the jury the specific monetary value of that damage, as compared to the other extensive damage done to the house. Thus, based on the evidence presented, a reasonable juror could not "beyond a reasonable doubt" believe that Appellant, as the principal actor, caused over $1000 damage to the Balls' house, and the trial judge should have granted Appellant's directed verdict of acquittal on the first-degree criminal mischief charge pertaining to damage to the house. See Id.

The Commonwealth also failed to prove that Appellant, as the principal actor, caused $1000 worth of damage to the Mercedes-Benz. At trial, evidence was introduced that the Mercedes-Benz had $21,000 worth of exterior and

interior damage. However, while evidence was presented that Appellant drove the car and hit several mailboxes and traffic signs, no monetary amount of damage caused by Appellant was presented. The facts indicated that Appellant's co-defendants also drove and rode in the vehicle. No evidence was presented as to who caused the damage to the interior of the car. Thus, without specific evidence that Appellant caused over $1000 in damage to the Mercedes-Benz, a reasonable juror could not believe "beyond a reasonable doubt" that Appellant was guilty of first-degree criminal mischief and the trial judge should have granted a directed verdict of acquittal. See Id. at 471-472. Had the Commonwealth elected to charge Appellant as an accomplice, or as either principal or accomplice, and had the trial court so instructed the jury, a different result may have been appropriate. But, it is axiomatic that to sustain a conviction, the evidence must establish the offense that was actually charged and upon which the jury was actually instructed, not on one that could have been, but was not, charged. Thus, we reverse Appellant's convictions for both counts of first-degree criminal mischief and remand the matter to the Warren Circuit Court for entry of judgment accordingly.

Due to the reversal of his convictions for both counts of first-degree criminal mischief, we need not address further Appellant's remaining two arguments regarding those charges.

II. THE TRIAL COURT ERRED BY IMPOSING A $500 FINE ON APPELLANT SINCE HE WAS INDIGENT

Appellant next argues that the trial court erred by imposing a fine for his conviction for theft by unlawful taking under $300, and then minutes later finding him indigent. On February 18, 2008, Appellant appeared for final sentencing. The trial court sentenced Appellant on the theft by unlawful taking under $300 conviction to one year in prison and a $500 fine. Minutes later, the trial judge agreed to let Appellant's private counsel withdraw from the case, and other pending cases where Appellant was a party, since Appellant could no longer afford his services. The trial judge then found Appellant indigent and found him eligible for legal services provided by the Department of Public Advocacy under KRS 31.100 et. seq.

KRS 534.040 regulates the levying of fines for misdemeanor offenses such as theft by unlawful taking under $300. It states that "[f]ines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31." While Appellant was not technically declared indigent until after the fine had been levied against him, we cannot help but believe that if the trial judge had reviewed Appellant's financial situation before imposing the fine, he would have found him to be indigent, as he in fact did moments later. We thus, reverse the part of Appellant's sentence for theft by unlawful taking under $300 which ordered him to pay a $500 fine and remand the matter to the Warren Circuit Court for entry of judgment

accordingly.

III. A JURY INSTRUCTION ON RECEIVING STOLEN PROPERTY AS A LESSER INCLUDED OFFENSE OF SECOND-DEGREE BURGLARY OR THEFT BY UNLAWFUL TAKING WOULD HAVE PROVIDED APPELLANT NO DEFENSE

Appellant next argues that the trial court erred by denying his request for a jury instruction on the crime of receiving stolen property, KRS 514.110. Appellant argues that a jury may have convicted him of receiving stolen property instead of second-degree burglary and theft by unlawful taking as a "middle ground between the offense more severely punished and acquittal." Sanborn v. Commonwealth, 754 S.W.2d 534, 550 (Ky. 1988) (overruled by Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006)). Appellant believes that the stolen property in his apartment, the statements he made to Detective Skaggs which could be construed as an admission he received stolen property, and the supposed inconsistencies in Riffey's testimony are sufficient evidence to warrant a receiving stolen property instruction.

In Sanborn, we held that a trial court must instruct the jury on any uncharged crimes whenever the evidence suggests the existence of such crimes. However, in Hudson, 202 S.W.3d 17, we departed from Sanborn. Hudson states:

> [a]n instruction on a separate, uncharged, but "lesser" crime – in other words, an alternative theory of the crime – is required only when a guilty verdict as to the alternative crime would amount to a defense to the charged crime, i.e., when being guilty of both crimes is mutually exclusive.

Id. at 22. Thus, to determine if the trial court erred in not providing an instruction on receiving stolen property as an alternative theory of the crime, we must determine if being guilty of receiving stolen property is mutually exclusive of being guilty of second-degree burglary or theft by unlawful taking.

In Phillips v. Commonwealth, 679 S.W.2d 235, 236 (Ky. 1984), we held that "a person can be convicted of both burglary and retaining possession of property stolen by him in the course of the burglary." Therefore, being guilty of second-degree burglary is not "mutually exclusive" of being guilty of receiving stolen property from the same burglary because one can be convicted of both crimes simultaneously. Therefore, per Hudson, Appellant was not entitled to a receiving stolen property instruction as a defense against second-degree burglary.

On its face it appears that receiving stolen property is mutually exclusive of theft by unlawful taking. See Jackson v. Commonwealth, 670 S.W.2d 828, 833 (Ky. 1984) (overruled on other grounds by Cooley v. Commonwealth, 821 S.W.2d 90 (Ky. 1991)) (holding that a person may not "be prosecuted both for theft and knowingly receiving the same stolen article.") However, receiving stolen property is not a "lesser crime" to theft by unlawful taking and Appellant would have received no benefit from the additional instruction. Theft by unlawful taking over $300 is a Class D Felony. KRS 514.030. Conversely, the crime of receiving stolen property which is valued over $300 is also a Class D Felony. KRS 514.110. Further, the crime of receiving stolen property valued

under $300, KRS 514.110, and theft by unlawful taking under $300, KRS 514.030, are both Class A misdemeanors. Thus, while there may have been evidence to support a "receiving stolen property" instruction, the failure to provide such an instruction was not harmful to Appellant.

IV. APPELLANT WAS NOT ENTITLED TO A MISTRIAL BECAUSE OF THE INTRODUCTION OF POTENTIAL BAD ACTS EVIDENCE

Appellant next argues that he was entitled to a mistrial due to the introduction of evidence which implied he was involved in other burglaries. During trial, the following exchange occurred between Riffey and the prosecutor:

Prosecutor: Did [Appellant] give you any other information concerning where stolen property from this particular burglary would be located?

Riffey: No.

Prosecutor: Was there ever any mention concerning places where stolen property could be hidden?

Riffey: Could you repeat that?

Prosecutor: Was there ever any mention concerning where stolen property might be hidden

Riffey: Uhm, no.

[Break in questioning]

Prosecutor: And I was going to ask you this earlier, I can't

remember if I did or not. Did you provide information to Detective Skaggs regarding an RV?

Riffey: Yes.

Prosecutor: And can you tell the jury what RV you were talking about?

Riffey: The RV out at –

Defense Atty: Objection for lack of foundation Judge.

Trial Judge: Go ahead. Overruled.

Prosecutor: Go ahead.

Riffey: What did you say? What was in it?

Prosecutor: In regards to [Appellant], did you provide any information pertaining to an RV?

Riffey: Yes.

Prosecutor: Okay, tell the jury about this RV.

Riffey: Uhm, it's a RV with a bunch of stolen stuff was [sic] put in.

Prosecutor: Did, did [Appellant] tell you that some of the items from the Ball's was placed in that RV? From this burglary?

Riffey: No.

Defense Atty: May we approach?

At the bench conference, Appellant's counsel argued that he attempted to prevent this evidence from being introduced because it could potentially inform

the jury that Appellant was involved in burglaries other than those at the Balls' home. He then moved for a mistrial due to the evidence of unrelated thefts. In denying the motion, the trial judge held "[Riffey] has not made any statements about [Appellant] and any stolen property from any other [burglaries] . . . Knowing this kind of witness and what they are, I do not believe that there's anything before this jury about the RV and any stolen property from this burglary or certainly from [Appellant]."

The objectionable evidence was introduced as a result of the Commonwealth's attempt to impeach Riffey with a prior inconsistent statement he made to Detective Skaggs. KRE 613 provides the procedure for impeaching a witness based on a prior inconsistent statement:

> [b]efore other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it.

Appellant correctly points out that the prosecutor did begin to lay a foundation for impeachment, but failed to show Riffey a written copy of his prior statement, which was available. Therefore, KRE 613 was not followed and that led to the objectionable evidence's introduction. However, any error which was caused by the failure to adhere to KRE 613 was harmless, and a mistrial was not warranted.

"A non-constitutional evidentiary error may be deemed harmless, the

United States Supreme Court has explained, if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." Winstead v. Commonwealth, 283 S.W.3d 678, 688-689 (Ky. 2009) (citing Kotteakos v. United States, 328 U.S. 750 (1946)). Here, the trial judge correctly held that Riffey's testimony did not directly connect Appellant to other burglaries. Riffey's testimony was that there was an RV with stolen property from other robberies, but that Appellant did not tell him anything about it. The jury could only conclude from Riffey's testimony that Appellant told him nothing about the RV. While it is possible that a jury could infer that Appellant was connected to the RV based on the mere fact Riffey was testifying about it, such a conclusion is tenuous at best. Thus, while KRE 613 was not properly followed, we cannot say that the ultimate judgment was "substantially swayed" by the error. Winstead, 283 S.W.3d at 689. Any of Appellant's concerns about Riffey's testimony and any inference the jury could have drawn from his testimony could have been cured with an admonishment, which Appellant did not request. Johnson v. Commonwealth, 105 S.W.3d 430, 441 (Ky. 2003). Since the error was harmless, the trial judge did not abuse his discretion in denying the motion for a mistrial. Shabazz v. Commonwealth, 153 S.W.3d 806, 811 (Ky. 2005).

V. TESTIMONY REGARDING THE STOLEN ITEMS WAS HARMLESS ERROR, AND DID NOT VIOLATE APPELLANT'S CONFRONTATION CLAUSE RIGHTS

Appellant next argues that the Commonwealth introduced improper

hearsay evidence regarding the stolen items. Appellant further argues that the introduction of this hearsay evidence denied him his Sixth Amendment right of confrontation. Prior to the victims' testimony, Detective Skaggs read into evidence a list of items stolen from the Balls. Appellant's counsel objected, arguing that Detective Skaggs's testimony was inadmissible hearsay. The trial judge overruled the objection, apparently because Ms. Ball was going to testify later. Following that ruling, Detective Skaggs testified that "a fur coat that was very dear to [Ms. Ball]" was stolen in the robbery. Appellant's counsel immediately renewed his initial objection and asked to approach the bench. Appellant's counsel argued that it was impermissible to allow Detective Skaggs to characterize the items stolen from the Balls. The trial judge agreed, but no remedy was provided.

KRE 801(c) defines hearsay as an out of court statement offered into evidence to prove the truth of the matter asserted. The statement attributed to Ms. Ball in the officer's testimony had no relevance other than to prove the truth of the matter asserted, that specific items were missing from the home, and that the coat was "dear" to her. KRE 802 provides that hearsay statements are not admissible in evidence unless subject to a specific exception. We find no exception to the hearsay rule that permits the admission of hearsay simply because the declarant is present to testify. The Commonwealth offers no recognized exception to the hearsay rule to support the admission of the statement. The trial judge should have sustained

Appellant's initial objection. However, while the admission of Detective Skaggs's testimony was error, it was harmless. We cannot see how a brief statement that a fur coat which was stolen was dear to the victim could possibly "substantially sway" the jury's judgment. Winstead, 283 S.W.3d at 689. Additionally, Appellant was not denied his Sixth Amendment right of confrontation by Detective Skaggs's testimony, because the initial hearsay declarant, Ms. Ball, later testified at trial, and specifically discussed what items were stolen. See Crawford v. Washington, 541 U.S. 36, 59 (2004) ("we reiterate that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.") Appellant suffered no violation of his constitutional rights by the introduction of the statement and any violation of evidence law caused by Detective Skaggs' testimony was harmless.

VI. THE SUPERSEDING INDICTMENT RECEIVED ONE WEEK BEFORE APPELLANT'S TRIAL DID NOT VIOLATE HIS RIGHT TO DUE PROCESS

Appellant next argues that his due process rights were violated by the superseding indictment filed by the Commonwealth one week prior to his trial charging him with two new counts of first-degree criminal mischief. However, we have held that the power of the trial court to dismiss a criminal charge in advance of trial is severely limited. See Commonwealth v. Isham, 98 S.W.3d 59, 62 (Ky. 2003); Gibson v. Commonwealth, ___ S.W.3d___ (Ky. 2009). Lacking authority to dismiss the charges, the trial judge appropriately

proposed to sever the newly filed charges, and postpone the trial of those charges until a later date, an alternative declined by Appellant. [1] We see no violation of Appellant's rights.

VII. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY REFUSING TO ACCEPT APPELLANT'S GUILTY PLEA AND SENTENCE BARGAIN

Appellant next argues that the trial judge abused his discretion by refusing to accept his guilty plea tendered on the morning of trial. Appellant attempted to plead guilty in order to accept a plea agreement where the Commonwealth would recommend Appellant be sentenced to twelve-years' imprisonment. The Commonwealth initially proposed the plea offer on or about June 4, 2007. In rejecting Appellant's plea, the trial judge held that it was not timely made since the jury was already in the courtroom. Appellant argues that the trial judge should have accepted his plea because it was made only seventeen hours after the superseding indictment arraignment. Appellant also argues that he was only nineteen-years-old at the time of trial and unfamiliar with the judicial system as reasons why his plea should have been accepted.

A review of the record indicates the agreement the Commonwealth offered to Appellant was a sentence bargain. "A 'sentence bargain' is an agreement in which the prosecutor agrees to recommend or not to oppose a particular sentence in exchange for a guilty plea to the original charge." Hoskins, 150 S.W.3d at 21 (citing United States v. Miller, 722 F.2d 562, 563

[1] We note that discounting the two first-degree criminal mischief charges, the superseding indictment actually benefitted Appellant since it reduced one felony theft by unlawful taking charge to a misdemeanor.

(9th Cir. 1983)). "[A] judge's discretion to accept or reject a sentence bargain is unfettered." Hoskins, 150 S.W.3d at 21 (citing United States v. Robertson, 45 F.3d 1423, 1437 (10th Cir.1995); United States v. Adams, 634 F.2d 830, 835 (5th Cir.1981)). Additionally, RCr 8.08 states that "[t]he court may refuse to accept a plea of guilty . . . ."

Here, the Commonwealth offered Appellant the sentence bargain agreement at some point in June 2007. However, Appellant waited until the morning of trial to accept the agreement. The judge was not compelled to accept Appellant's plea due to his age or claimed lack of familiarity with the legal system. Appellant was a young adult and was represented by private counsel. We cannot say the judge abused his broad discretion by refusing to accept Appellant's guilty plea based on the sentence bargain agreement.

VIII. THERE WAS NO DOUBLE JEOPARDY VIOLATION CAUSED BY THE COMMONWEALTH'S DECISION TO CHARGE APPELANT WITH TWO COUNTS OF BURGLARY AND THEFT

Appellant finally argues that double jeopardy was violated by the Commonwealth's decision to charge him with two counts of burglary and two counts of theft based on the days the crimes were alleged to occur. Since Appellant and his co-defendants knew prior to the burglaries that the Balls were going to be gone on both June 23 and 24, 2006, he argues that the burglaries were part of a "single weekend project" and thus constituted one burglary. See Jackson, 670 S.W.2d at 832 (holding that the theft of multiple

items during a single burglary results in only one criminal act).

It is true that multiple items stolen from the same person, at the same time, and from the same place constitute a single criminal offense. See Fair v. Commonwealth, 652 S.W.2d 864, 867 (Ky. 1983) (holding that "three items of property . . . stolen from the same building on the same night" constituted a single offense). However, in this case, the evidence clearly shows that Appellant and his co-defendants entered the Balls' home two separate times, on two separate days, and stole items on both occasions. The acts constituting the criminal actions were separated by hours. Thus, the second theft was "preceded by a sufficient period of time in which [Appellant] could reflect on his conduct and formulate intent to commit a different act." See generally Welborn v. Commonwealth, 157 S.W.3d 608, 612 (Ky. 2005). As we stated in Nichols v. Commonwealth, 78 Ky. 180 (1879) in regards to two different thefts: "although there was probably only a short interval of time between the two [thefts], they are nevertheless as distinct in point of time as if one act had been committed on one night and the other on another." Double jeopardy was not violated by the Commonwealth's decision to charge Appellant with two counts of burglary and two counts of theft based on the two different nights the crimes occurred.

CONCLUSION

Thus, for the foregoing reasons, Appellant's convictions for the two counts of second-degree burglary and theft by unlawful taking over $300 are affirmed, while the $500 fine for Appellant's theft by unlawful taking under

$300 conviction, and his convictions for first-degree criminal mischief are reversed. The matter is hereby remanded to the Warren Circuit Court for proceedings consistent with this opinion.

All sitting. Minton, C.J., Abramson, Noble and Schroder, JJ., concur. Cunningham, J., concurs in part and dissents in part by separate opinion in which Scott, J., joins. Scott, J., concurs in part and dissents in part by separate opinion.

CUNNINGHAM, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART: I concur in most all of the excellent opinion by Justice Venters. I disagree only in the Court's treatment of the first-degree criminal mischief counts. I would affirm the convictions on those two counts as well.

KRS 502.020(b) states that "[a] person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he [a]ids, counsels, or attempts to aid such person in committing the offense."

There is no difference in the mens rea required of a person acting as a principal or as an accomplice. The punishment is the same. They are interchangeable from charge to instruction to conviction. It is my belief that a person can be charged either as a principal, or accomplice, or both. The instruction can state Appellant acted either as a principal, or accomplice, or both. Even though Appellant was charged as a principal for damages to both the Balls' house and the Mercedes-Benz, he is guilty of the same offense

committed by the participants if proof was sufficient for either theory.

There was sufficient evidence that one or more of the group involved in the crimes, which included Appellant, caused the aggregate amount of damages required for the offenses. I think this suffices and, at worst, the instruction on Appellant acting as a principal was harmless error. Scott, J., joins.

SCOTT, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART: I join Justice Cunningham's dissenting opinion for reasons he expressed therein, however, I further disagree with the majority's opinion that "reasonable jurors" could not have found — from the evidence at hand — that Appellant, himself, caused at least one thousand dollars ($1,000) worth of damage. Thus, I would affirm Appellant's judgment of conviction.

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