FILED
FEB 13 2013
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000116-D
(2010-CA-001492)

R.S., A CHILD UNDER EIGHTEEN **APPELLANT**

VS. **On Discretionary Review From the Kentucky Court Of Appeals**

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLEE

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2013, the foregoing Brief for Appellee has been served by first class mail upon the following: Sam Givens, Court of Appeals Clerk 360 Democrat Drive, Frankfort, Ky. 40601, Hon. James R. Schrand, Circuit Court Judge 6025 Rogers Lane, Burlington, Ky. 41005, Hon. Charles T. Moore, Chief District Judge, 6025 Rogers Lane, Suite 276, Burlington, Ky. 41005, Hon. John Wampler, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601, Hon. Linda Tally Smith, Boone County Commonwealth Attorney, P.O. Box 168, Burlington, Ky. 41005, Hon. Jack Conway, Attorney General Capital Center Complex, 1024 Capital Center Drive, Frankfort, Ky. 40601.

Jack Conway
By: Marcia L. Thomas

INTRODUCTION

This is a case involving a juvenile who was charged with Criminal Mischief Second Degree, for damage to a vehicle. It was alleged that other unnamed juveniles were involved that evening in the criminal mischief, however they were never named nor charged with any criminal offense. After a trial, the trial court found him guilty of complicity to criminal mischief and ordered restitution in the amount proven by the victim for the cost of repair to the vehicle.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee states that oral argument is not necessary in this case, as all issues have been addressed and settled in the Court of Appeals Opinion and there is no new issue for the Court to address.

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COUNTERSTATEMENT OF THE CASE

Facts of the Case Adjudication and Disposition

Appellant was at a gathering with some other juveniles when several of the people gathered decided to deface vehicles that were parked on the street. (CD ; 1/20/10; 12:07 and 17:24.) The Appellant admitted that he was part of this group and admitted to drawing graffiti on the victim's car. (CD ; 1/20/10; 17:24.)

The victim later took the car to the car wash to remove the graffiti when he and his mother found numerous scratches that were not present before the mischief occurred. (CD ; 1/20/10; 13:00.) The victim then had two estimates prepared for the cost of the repairs. The total amount for the repair of the vehicle came to $1,687.16. (CD; 1/20/10; 13:37.)

Deputy Burcham, a Boone County Deputy, was called to take a damage report. Upon his investigation he was given the Appellant's name as being one of the juveniles involved in the mischief. (CD; 1/20/10; 2:12 and 3:38.) The Appellant admitted to the graffiti on the vehicle but denied being involved in the scratching of the vehicle. (CD; 1/20/10; 3:38) During the investigation by Deputy Burcham the Appellant did not disclose any information about the other juveniles involved in the graffiti and/or mischief to the vehicles that evening.

The Appellant was charged with Criminal Mischief Second Degree for the damage caused to the vehicle. Adjudication was held on January 20, 2010 where Deputy Burcham, the victim's mother and a third party Patricia Hunter testified. At the close of the Commonwealth's case, Appellant's counsel moved for directed verdict, which was denied (CD; 1/20/10; 15:47). Appellant also testified at trial and stated that he was there and that he participated. (CD ;1/20/10; 19:14).

The trial judge found the Appellant guilty of complicity to criminal mischief finding that all who were involved with the defacing of the vehicle were responsible. (CD; 1/20/10; 24:56.) The case was set for separate disposition hearing with a predisposition report to be prepared by the Department of Juvenile Justice (DJJ). Disposition was held on February 24, 2010 and the report prepared by DJJ recommended sole payment of the restitution by the Appellant. The court accepted the report and ordered the Appellant to pay restitution in the amount of $1,600.00. (CD ;2/24/10; 1:50.) There were no objections made to the predisposition report submitted by DJJ by the Appellant and there were no objections to the dollar amount ordered to be paid. At disposition the Appellant asked no questions with regard to any of the restitution orders.

An appeal followed in which the Boone County Circuit Court affirmed the decision of the trial court. Appellant then filed a Motion for Discretionary Review to the Kentucky Court of Appeals, which was granted.

Decision of the Court of Appeals

The Kentucky Court of Appeals affirmed both the adjudication and restitution order. The Court stated that "after careful review of the record, the briefs and the pertinent law, we affirm the adjudication and restitution order. " (Opinion at 2.)

With regard to the sufficiency of the evidence for a finding of guilt, the Court applied the standards of *Commonwealth v. Benham,* 816 S.W.2d 186 (Ky. 1991) and *Potts v. Commonwealth,* 172 S.W.3 d 345 (Ky. 2005) and found that there was enough evidence to establish the defendant's guilt to complicity to criminal mischief. (Opinion at 6.)

Regarding restitution, the Court of Appeals stated that the review of the record revealed that the Appellant did not timely object to any issues relating to the restitution and found the issue to be "wholly unpreserved." (Opinion at 7.) The Court found that the issue of restitution lies solely within the discretion of the trial court and as such any appellate review of those findings is governed by the clearly erroneous standard set forth in CR. 52.01. (Opinion at 8.) The Court was not persuaded by the Appellant's "best interest" argument and held that the Appellant, whatever his role in the "illicit" activities, Appellant was responsible for the end result of the actions taken by the group, including all the damage to the victim's car. (Opinion at 10.) The Court upheld the conviction and the order of restitution.

ARGUMENT

I.
THE LOWER COURTS RULING PROPERLY FOUND THE APPELLANT GUILY OF COMPLICITY UNDER THE KENTUCKY REVISED STATUTE 502.020(2).

The Appellant was involved with a group of individuals defacing vehicles on a street in a residential neighborhood. The victim's vehicle was damaged during this incident. The Appellant was implicated as one of the individuals involved and was later charged with Criminal Mischief Second Degree.

KRS 512.030 defines criminal mischief second degree as occurring 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 $500 or more." In this case, the Appellant admitted that he did deface the vehicle by drawing graffiti on the car. (CD ;1/20/10; 19:14) There is a

pecuniary loss in excess of $500 with estimates presented in excess of $1,600.00. (CD;1/20/10; 13:37). Clearly there was enough evidence for the Appellant to be charged with the offense of criminal mischief second degree and enough evidence presented to the trial judge to establish guilt beyond a reasonable doubt to complicity to criminal mischief second degree.

Appellant argues the lower court was incorrect in the application of the mischief and the complicity statutes when holding the Appellant responsible for the damage to the vehicle. The Appellant maintains he did not have the requisite intent needed to be held responsible for the damages to the victim's vehicle. What the Appellant has failed to recognize is the second theory of complicity under KRS 502.020, section (2), in which a person can be found guilty of complicity to the result.

> KRS 502.020(2) states:
> When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:
> (a) Solicits or engages in a conspiracy with another person to engage in the conduct causing the result; or
> (b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or
> (c) Having a legal duty to prevent the conduct causing the result, fails to make proper effort to do so.

"Complicity to act" under KRS 502.020 (1) applies when the principal actor's conduct constitutes the criminal offense and "complicity to the result" under subsection (2) of the statute, applies when the result of the principal's conduct constitutes the criminal offense. *Tharp v. Commonwealth* 40 S.W.3d 356, 360 (Ky. 2000). The damage to the victim in excess of $500 is a particular result of the conduct of the individuals involved in the defacing of that vehicle. Appellant, by his own admission, was part of that group . He engaged in conduct , although with others the conduct as a whole resulted in the damage to the

vehicle. Although the Appellant argues he did not personally damage the car, the result of the actions of the group is enough to hold him responsible under subsection (2) of the statute.

The primary distinction between the two statutory theories of accomplice liability is that a person can be found guilty of complicity to act under KRS 502.020(1), only if they possess the intent that the principal actor commits the criminal act. However, a person can be found guilty under KRS 502.020(2) without the intent that the principals' act caused the criminal result, but with a state of mind that would equate to the "kind of culpability with respect to the result that is sufficient for the commission of the offense," whether intent, recklessness, wantonness or aggravated wantonness. *Id.* at 360, citing KRS. 502.020, 1974 Official Commentary. The Appellant admitted to the investigating officer and to the trial court that he was not only present with the others involved but was an active participant in the defacing of the vehicle. It is important to mention that under subsection (2) of KRS 502.020, an accomplice's liability and the principal actor's liability can be on different levels. Under subsection (2) proof of the principal actor's mental state is not even necessary, proof that another caused the prohibited result and the accomplices' culpability toward that result is all that is required. *Harper v. Commonwealth,* 43 S.W. 3d 261, 267 (Ky. 2001). Appellant's own testimony is enough to establish his culpability toward the resulting damage to the victim.

Criminal mischief is a result offense. This would trigger the application of KRS 502.020(2) by the trial court judge when determining guilt or innocence of the defendant under complicity. *Tharp v. Commonwealth,* 40 S.W. 3d 356, 360 (Ky. 2000). In the present case for Appellant to be found guilty pursuant to KRS 502.020(2) it would require proof: (1) that another damaged the vehicle of the victim; (2) that Appellant actively participated in the other person's actions which resulted in the damages; and

(3) that Appellant acted wantonly or recklessly. The estimates presented to the court show proof of damages in excess of $500. The investigation of the officer and Appellant's own testimony indicated that the Appellant participated in the mischief to the vehicle and acted at the very least in a reckless manner as to the result of those actions.

Appellant also contends that the Commonwealth had nothing more than a suspicion that the Appellant was involved in the damage. Quite the contrary, the Commonwealth had the investigation of the Deputy and the testimony of the Appellant who testified to his presence at the scene and his participation in the graffiti on the vehicle. (CD 1/20/10; 16:32 and 19:14). The trial court heard all the evidence and viewed each witness during their testimony. The trial Judge is in the best position to determine guilt or innocence based on the facts and evidence presented. It has long been settled that the trial court is in the best position to judge the credibility of the witness and weigh the evidence presented. *Kotas v. Commonwealth*, 565 S.W.2d 445 (Ky. 1978). It is further stated in *Kotas* at 447, that recognition must be given to the superior position of the trial judge to determine the credibility and place weight on the testimony of the witnesses.

The Appellant would have this court reevaluate the evidence presented at trial. The reviewing courts are not to be used to reevaluate the proof given at trial, but to consider the trial courts decision in light of the evidence presented. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The Court of Appeals stated that the evidence was "uncontroverted" that the vehicle was scratched during the course of the mischief that evening and that it cannot be "wholly unreasonable" for the trial court to find Appellant responsible for his complicity. (Opinion at 7). The evidence presented to the trial court was sufficient and substantial. The finding of guilt pursuant to KRS 502.020(2) must be affirmed.

II

THE ISSUE OF RESTITUTION WAS NOT PROPERLY PRESERVED FOR APPEAL AND DOES NOT MERIT REVIEW UNDER RCr 10.26.

Appellant failed to preserve the issue of restitution for any appellate review. The Court of Appeals stated that the record revealed the Appellant did not timely object to any issues relating to restitution. (Opinion at 7). The Court went on to state that the issue was "wholly unpreserved" for review. (Opinion at 7). RCr9.22 requires a party to render a timely and appropriate objection to preserve an issue for review. *Olden v. Commonwealth*, 203 S.W.3d 672 (Ky. 2006), citing *Collet v. Commonwealth*, 686 S.W.2d 822, 823 (Ky. App. 1984). When a timely objection is raised the complaining party makes their position known to the court and makes their desired result known to that court. *Blanton v. Commonwealth*, 429 S.W.2d 407,410 (Ky. 1968). The court in *Salisbury v. Commonwealth*, 556 S.W.2d 922, 926 (Ky. App. 1977), citing *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed2d 126 (1976) went further and stated that the reason for RCr 9.22 was clear, "if the defendant has an objection, there is an obligation to call the matter to the court's attention so that the trial judge will have the opportunity to remedy the situation." *Id.* at 508 n.3.

The record, in this case, is empty for any objections raised by the Appellant to any issue regarding restitution. The Appellant did not object to the estimate of damages, Appellant did not object to the order to pay those damages and finally, Appellant did not object to the amount of restitution ordered to be paid to the victim. The Appellant did not object at trial or at the final disposition of the case. The issue of restitution was not preserved for appeal. The general rule is a party must make a proper objection

to the trial court and request a ruling on that objection, or the issue is waived. *Commonwealth v. Pace*, 82 S.W3d 894, 895 (Ky. 2002). See *Bell v. Commonwealth*, 473 S.W.2d 820 (Ky.1971). Appellant has waived the issue of restitution for any further review.

The Appellant then requested the Court to review the issue of restitution under RCr 10.26, the palpable error rule. RCr 10.26 states:

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

This Court in *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002) held that RCr 10.26 is not a substitute for the requirement that a litigant must contemporaneously object to preserve an error for review. In that same decision, the Court went on to state that when "determining whether an error is palpable, an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been different." *Id.* at 895. To prevail under RCr 10.26 one must show that the error resulted in "manifest injustice." *Martin v. Commonwealth*, 207 S.W.3d 1(Ky. 2006).

When an appellate court engages in a palpable error review the focus is on what happened and whether the defect is so manifest and fundamental that it threatens the integrity of the judicial process. *Id.* at 5. The Appellant was found guilty of complicity to criminal mischief and ordered to pay restitution to the victim of that mischief for the damage done to the vehicle, the issue of restitution in this case does not rise to the level of palpable error . The ordering of a participant in criminal mischief to pay for the

damage done to property does not present a defect so great that the integrity of the judicial process is threatened. Any objection to the issue of restitution by the Appellant should be deemed waived.

If the Court rejects the idea of waiver, Appellee urges this Court to affirm the restitution ordered in the case as provided juvenile proceedings under KRS 635.060. Pursuant to that statute, the trial court may order a child to " make restitution to any injured person to the extent, in the sum and upon the conditions as the court determines..." The language in the statute is clear; restitution is a part of the juvenile system and is left to be determined by the trial judge.

Under the current statutory scheme, the purpose of restitution is to ensure that the victims of crime are fully compensated for their losses. *Hearn v. Commonwealth*, 80 S.W.3d 432,435-435 (Ky. 2002). The trial court is in the best position to make the appropriate decision in a fair and impartial manner. *Id., at* 436. The issue of restitution rest solely within the discretion of the trial judge pursuant to KRS 635.060. With that said, any appellate review is governed by the standard set out in CR 52.01, the clearly erroneous standard. 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). The trial court reviewed the evidence submitted by the victim and ordered the restitution paid by the Appellant after a finding of guilt. Based on CR 52.01 the order must stand.

The Appellate argues restitution is this case is "not in the best interest" of the Appellant in standing with the meaning of the juvenile code. Appellant contends that the restitution should have been apportioned among all individuals who were there on the evening the car was damaged. Appellant is the

only party before the court, Appellant was the only named defendant and the only individual who can be held accountable. *Tharp v. Commonwealth,* 40 S.W.3d 356, 365 (Ky. 2000), addressed a similar issue concerning accountability and found that in a prosecution for an offense in which the criminal liability of an accused is based upon the conduct of another person pursuant to KRS 502.020, it is not a defense that the other person has not been prosecuted for or convicted of any offense based on the conduct in question. In this case it is not a valid argument that Appellant should not have to pay the restitution for damages as a result of his conduct just because no one else who may have been part of the mischief has been ordered to pay.

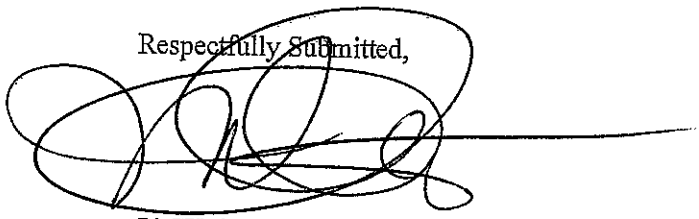
When reviewing the restitution issue, the Court of Appeals determined that the intent of the legislature when drafting the statutes for restitution was to ensure crime victims that they are fully compensated for their losses. (Opinion 9). Appellant argues that the imposition of "joint and several" liability is "rarely appropriate" and does not appear within the juvenile statutes. Appellant further argues that if it is not in the statutory scheme it is not intended to be included in the law. Yet pursuant to KRS 600.010(2)(e), the Appellant urges the Court for apportionment to individuals not charged with any criminal activity. The statutes should not be interpreted as to bring about an absurd result. *Cf. Wade v. Comm. Dept. of Treasury,* 840 S. W.2d 215 (Ky. App. 1992). It would be absurd for the court to apportion liability to individuals not before it. The fundamental rule in statutory interpretation is to give effect to the legislative intent. *Wesley v. Bd. of Education of Nicholas County,* 403 S.W.2d 28 (Ky. 1966). Appellant lacks any support of their argument for apportionment. Judicial opinion, as well as, statutory authority is silent for placing financial responsibility on uncharged individuals. If a finding by

the court is supported by substantial evidence it will not be disturbed on appeal. *Owens-Corning Fiberglass Corp. V. Golightly,*976 S.W.2d 409, 414 (Ky. 1998). The trial court order must be affirmed.

CONCLUSION

For the foregoing reasons, appellee requests that the Opinion of the Court of Appeals be **AFFIRMED.**

Respectfully Submitted,



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APPENDIX

Tab	Item Description
A.	Court Of Appeals Opinion
B.	Boone Circuit Court Order Affirming