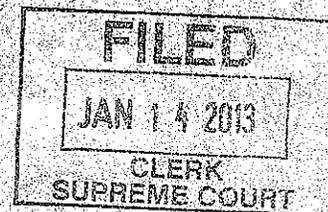


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000116-D
(2010-CA-001492)



R.S., A CHILD UNDER EIGHTEEN

APPELLANT

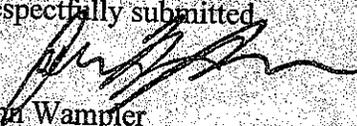
VS. On Discretionary Review From the Kentucky Court of Appeals

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLANT

Respectfully submitted



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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2012, the foregoing "Brief for Appellant" was 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 Judge, 447 Justice Center, 6025 Rogers Lane, Burlington, Kentucky 41005; Hon. Charles T. Moore, Chief District Judge, 6025 Rogers Lane, Suite 276, Burlington, KY 41005; Hon. Marcia Thomas, Assistant Boone County Attorney, 2988 Washington Square, P.O. Box 169, Burlington, Kentucky 41005-0169; Hon. Linda Tally Smith, Boone County Commonwealth Attorney, P.O. Box 168, Burlington, Kentucky 41005-0168; and to Hon. Jack Conway, Attorney General, Capital Center Complex, 1024 Capital Center Drive, Frankfort, KY 40601.



John Wampler

INTRODUCTION

This is a case involving a juvenile who was charged with Criminal Mischief, Second Degree, for actions committed by numerous unnamed codefendants. The trial court found him guilty on a theory of complicity, yet held him to be solely liable and responsible for the entire amount of restitution ordered to be paid for the damages caused.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument, as he believes it would be helpful in addressing the issues raised in this case.

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STATEMENT OF THE CASE

Facts of the Case Adjudication and Disposition

On April 24, 2009, R.S. attended a memorial party for a friend who had committed suicide. (CD; 1/20/10; 12:07.) R.S. and several of his friends had decided to memorialize their friend by writing "Rest in Peace [J.L.]"¹, using window paint (a water soluble paint that can later be easily washed off.) (CD; 1/20/10; 17:24.) However, they also ended up using the window paint to draw "wieners" on several of the cars parked outside, R.S. said. (CD; 1/20/10; 17:24.) R.S. said he drew on only one window and then left. (CD; 1/20/10; 17:24.) This one spontaneous act of childish immaturity would prove to be a very expensive one for R.S., as he would later be found to be criminally responsible for all the actions of his friends that night, as well as solely financially responsible for the damages allegedly caused by those actions.

One of the cars that received the window paint graffiti had been driven to the party by J.M.², a boy whom R.S. knew, and said he didn't have any problems with. (CD; 1/20/10; 16:32.) After J.M. took the car through the car wash and also did some hand-washing to get rid of the window paint, he and his mother noticed scratches on it. (CD; 1/20/10; 13:00.) The scratches were on three of the car's doors, three of the quarter panels, and the hood of the car. (See, Juvenile Complaint, attached.) Two estimates were later taken for repairs of the scratches and the total amount came to \$1687.16 (CD; 1/20/10; 13:37).

¹ The record is unclear as to whether the friend was a juvenile or not; regardless, counsel has elected to identify him only by initials.

² Not his full name. As counsel is unsure if this individual is a juvenile or not, counsel has elected to identify him only by initials.

Deputy Burcham³ was called to take a damage report for the car on April 24, 2009. (CD; 1/20/10; 2:12). Witnesses to a separate incident gave R.S.'s name to Burcham as being one of the perpetrators in this incident, and when confronted, R.S. admitted to painting one of the cars, but denied being involved with any scratching of J.M.'s car. (CD; 1/20/10; 3:38)

Ultimately, R.S. would be charged with Criminal Mischief, Second Degree, and be found guilty at his adjudication on January 20, 2010. In addition to testimony from Burcham and J.M. and his mother, the Commonwealth also called Patricia Hunter, a neighbor from across the street from the party, to testify. She said she saw two boys park a car, then later two boys and two girls came out and wrote on the car windows and one boy slid across the hood. (CD; 1/20/10; 9:45.) However, she was unable to identify R.S. as being the one who had slid across the hood. (CD; 1/20/10; 10:30, 6:18.)

At the close of the Commonwealth's case, R.S.'s trial counsel moved for a directed verdict, which was denied (CD; 1/20/10; 15:47). The only witness for the defense was R.S., who denied sliding on the car and said he did not know how the scratches got there but noted the car went through a car wash (CD; 1/20/10; 20:12, 21:32.) The defense rested and argued there was reasonable doubt (CD; 1/20/10; 22:37.) The Commonwealth urged that there was sufficient evidence movant was responsible since he was around the car (CD; 1/20/10; 24:00). The trial judge stated that there would not be sufficient evidence to sustain guilt if he had to find that appellant personally damaged the vehicle (CD; 1/20/10; 24:50) However, the court instead found R.S. guilty of complicity to criminal mischief, stating that all who took steps to do stuff to the vehicle were responsible and maybe others should be in court (CD; 1/20/10; 24:56.)

³ The record does not indicate a first name.

Disposition in the case was set for February 24, 2010. The report prepared by the Department of Juvenile Justice (“DJJ”) recommended solely payment of restitution for this first offense and the court accepted that recommendation. (CD; 2/24/10; 1:45.) The court ordered \$1600.00 restitution to be paid at the rate of \$50 per month beginning March 1, 2010. (CD; 2/24/10; 1:50.) That order was stayed pending appeal. There was no restitution hearing held before the amount of restitution to be paid was set by the court. No evidence was presented as to whether insurance on the car would pay for any portion of the damages incurred.

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

Decision of the Court of Appeals

The Kentucky Court of Appeals spent little time addressing the issue of sufficiency of the evidence, noting that while both parties “spend the majority of their briefs” on that issue, it was convinced the “real issue to be decided by this Court concerns the order for restitution.” (Opinion at 5,6.) It found that R.S.’s involvement in “the mischief that evening” was enough to find him personally responsible for complicity in the actions that damaged J.M.’s car.

Regarding restitution, the Court of Appeals noted: “[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 also have been involved in causing the victim’s loss. We hold that they can.” (Opinion at 7.) It rejected R.S.’s argument that restitution should be apportioned amongst him and the other uncharged

actors involved in the crime. The Court expressed a belief that if it did, it “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.” (Opinion at 11.) Ultimately, the Court held that the trial court’s restitution order was not in error. (*Id.*) Additional facts will be developed as necessary.

ARGUMENT

I.

THE LOWER COURTS’ RULINGS IMPROPERLY EXPAND COMPLICITY TO AN UNREASONABLE EXTENT

This argument was preserved by counsel’s motion for directed verdict at trial.

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 the current case, the only eye witness called by the Commonwealth was *unable* to identify R.S. as being the individual who slid across J.M.’s car. (CD; 1/20/10; 10:30, 6:18.) (The sliding across the hood being the only action testified to at trial that the Commonwealth presented as being how the car was scratched; how the car doors and quarter panels were scratched was never explained.) There was no proof that R.S. was the one that committed the act that allegedly caused the damage to the car. So in order for R.S. to be found guilty, it had to proceed under a theory of complicity. Yet complicity cannot and should not be permitted to be stretched to the unreasonable limits encountered in the current case.

The trial court and the Court of Appeals have both improperly permitted the Commonwealth and the trial court to rely on a perilously tenuous connection between an

immature, childish, yet non-damaging act by R.S., and a subsequent, *unconnected* act by someone else that *did* prove to be damaging. At the core of the problem lies the issue of intent, which is an essential element to a complicity conviction. *Harper v.*

Commonwealth, 43 S.W.3d 261,263-264 (Ky. 2001).

KRS 502.020(1) defines liability for conduct of another as follows:

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) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

This Court in *Harper*, citing to the Commentary to KRS 502.020(1), held that “to be guilty under subsection (1) for a crime committed by another, a defendant must have *specifically intended* to promote or facilitate the commission of *that* offense. This means that the statute is not applicable to a person acting with a culpable mental state other than ‘intentionally.’ ” *Harper* at 264, emphasis added in the original. This Court further held that the “[i]ntention to promote or facilitate the *charged* offense is what must be proved for conviction under KRS 502.020(1)....” *Id.*, citing to Robert G. Lawson and William H. Fortune, *Kentucky Criminal Law* § 3–3(b)(3) (Lexis 1998) (emphasis in original).

In the current case, there was absolutely NO proof that R.S. had the necessary intent to support a finding of complicity under the above-stated standards. The trial court found appellant guilty of complicity to an offense committed by an unknown other.

While the trial court did not specify which subsection of KRS 502.020(1) it was relying

on, there was no evidence to support guilt of complicity under any of the three subsections.

- (a) Solicits, commands, or engages in a conspiracy with another to commit an offense

The evidence in this case clearly shows a group of teenagers who had been at a memorial service for a friend, decided to window paint a farewell to him and then ended up window painting some lewd pictures and words on J.M.'s car. (CD; 1/20/10; 12:07, 17:24.) Although there is some dispute as to whether anyone slid on the hood of the car, or if this did indeed cause the damage to the car, there is no disagreement that R.S. did not solicit or command anyone to slide across the hood of a car. And as such an action is by its very nature impulsive and unplanned, he cannot be considered to have engaged in any sort of conspiracy to damage the car. There was no agreement between R.S. and the other unknown person(s) that the other person(s) would damage the car. (See KRS 506.040(1).)

- (b) Aids, counsels, or attempts to aid such person in planning or committing the offense

Again, there is no evidence of any assistance rendered by appellant to whoever scratched the vehicle.

- (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Appellant had no legal duty to prevent the unknown person from scratching the car.

Yet what is most important, even more than the fact that none of R.S.'s behaviors that evening meet any of the three prongs of KRS 502.020(1), is that that the *intent* was

lacking. There is nothing in the record to support that R.S. had the *specific intent* to aid in damaging the car. (See, *Harper* at 264.)

To permit the trial court to find that by engaging in one act of mischief (the painting of a car window with washable paint) that resulted in no damage, R.S. was personally responsible and solely liable for all the damaging actions of other youths present is to take complicity too far. Scratching a car is not a foreseeable result of using washable window paint. If it were, every single company that manufactures such a product would be buried under piles of product liability litigation. At most, R.S. made a decision to write on a car with window paint with some other teenagers. He did not engage in a conspiracy with them to scratch or damage the car in any way, or to engage in behavior that could reasonably be foreseen to result in such damage. To interpret the statute to allow complicity for damages to nevertheless attach to R.S. under such circumstances leads to an impermissibly “absurd or unreasonable result.” (See *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998.))

The most the Commonwealth had was a suspicion that appellant was involved as a complicitor in what someone else did – scratching the car by sliding across its hood. Suspicion does not equal proof beyond a reasonable doubt. *Brown v. Palmer*, 441 F.3d 347, 351-53 (6th Cir. 2006.) The United States and Kentucky Constitutions require that the Commonwealth prove every element of an offense beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358 (1970); 14th Amendment, United States Constitution; Sections 11 and 14, Kentucky Constitution. See KRS 610.080(2). If the Commonwealth fails in this burden, this Court must reverse the conviction or adjudication of guilt and dismiss the

charge. See *Burks v. United States*, 437 U.S. 1 (1978). The Supreme Court of Kentucky has stated in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) that “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”. Finding appellant guilty of this charge was “clearly unreasonable”. Moreover, the *Benham* Court cited *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983) and affirmed “there must be evidence of substance” and that a directed verdict is appropriate if the Commonwealth “produces no more than a mere scintilla of evidence.” *Id.* at 187-188. In this case there is not “evidence of substance” to support a finding that appellant was guilty of complicity to criminal mischief second degree.

The constitutional standard of review which is applicable when an appellate court is faced with a challenge to the sufficiency of the evidence to support a criminal conviction has been articulated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979):

[T]he relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt.

What the Commonwealth introduced in this case was not “evidence of substance.”

Appellant cooperated with the police and admitted he had drawn a “wiener” on one window of the vehicle. (CD; 1/20/10; 3:38, 17:24.) Since everyone agreed that the window paint washed off (CD; 1/20/10; 13:00), that conduct could not have been the basis for a finding of criminal mischief. There was no actual proof that appellant scratched the vehicle. In fact, the trial judge stated that there would not be sufficient

evidence to sustain guilt if he had to find that appellant personally damaged the vehicle (CD; 1/20/10; 24:50). Therefore, if the trial court was to find R.S. guilty under a complicity theory, it had to properly address the issue of intent. This it failed to do.

In cases involving juries, failure to instruct on intent is prejudicial error. See, *Carpenter v. Commonwealth*, Ky., 771 S.W.2d 822, 825 (1989), citing *Watkins v. Commonwealth*, Ky., 298 S.W.2d 306 (1957). In the current juvenile case, where the trial court serves as both judge and jury, the trial court's failure to address the issue of intent in a complicity case equally rises to the level of prejudicial error.

II.

THE DISTRICT COURT VIOLATED THE PURPOSES OF THE JUVENILE CODE AND R.S.'S DUE PROCESS RIGHTS BY ORDERING THAT R.S. ALONE OWED \$1600.00 WHEN OTHERS WERE ALSO RESPONSIBLE FOR DAMAGE TO THE VEHICLE.

This issue was not preserved on the trial level, but can and should be addressed for palpable error under RCr. 10.26, as it involves a substantial amount of money that R.S. was ordered to pay as part of the trial court's dispositional order in his case. This issue was addressed by the Court of Appeals in its Opinion, and in fact was the issue that the court said it believed "most warrants our review." (Opinion at 7.)

R.S. has already asserted that he should have been found not guilty of complicity to criminal mischief second degree and the charge should have been dismissed. However, if this Court rejects that claim, he urges that the trial court's restitution order was also flawed. The order was erroneous and must be vacated because it required that the entire amount of restitution must be paid by R.S. in spite of other(s) being responsible for the damage.

KRS 635.060 provides in relevant part:

If in its decree the juvenile court finds that the child comes within the purview of this chapter, the court, at the dispositional hearing may:

(1) Order the child or his parents, guardian, or person exercising custodial control to make restitution or reparation to any injured person to the extent, in the sum and upon the conditions as the court determines. ...

The statute itself provides little guidance concerning how an issue of possible juvenile restitution is to be resolved or how the amount owed is to be calculated.

Despite the vagueness statute's language, it does make certain things clear. First, that the ordering of restitution is not mandatory. (The language of "may" instead of "shall" is used.) Secondly, if a court chooses to order restitution, the ordering of partial restitution is an option. (The "to the extent and sum" language in the statute clearly contemplates the court ordering restitution in an amount less than that requested by the victim.) What is NOT as clear is when and how a court is to determine when to order restitution at all, and when it should order only partial restitution as opposed to full restitution. However, there can be no question that in the current case, a Judge's order that essentially amounted to holding R.S. jointly and severally liable for the actions of other more culpable unnamed codefendants, was improper.

There is no question that other individuals had been involved in the actions that damaged J.M's car. Not only the principal actor that slid across the hood of the car, but also all the other individuals who also drew on the car with window paint. If R.S. was complicit, then so were they. Yet despite having the option to order R.S. to only pay *partial* restitution, the trial court entered an order that R.S. *solely* liable for the *full*

restitution for the damage to J.M.'s vehicle. Practically speaking, this had the same effect as a "joint and several liability" restitution order.

Therein lies the problem. Joint and several liability is rarely an appropriate resolution to a case. Its use has been abolished in civil cases Kentucky for more than a quarter-century, with the enactment of KRS 411.182, the Comparative Fault Statute, in 1987. Even in *intentional* tort cases, including ones where the tortfeasor has been found guilty of serious criminal offenses, joint and several liability will not apply. (See, *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998) in which the court declined to apply joint and several liability to a man criminally convicted of twenty-eight (28) counts of Sex Abuse in the First Degree, and instead held that the liability must be *apportioned* between he and his employer.) In the criminal context, although apportionment is not mandatory in adult cases, it is permitted. See KRS 533.030(3). the court "may" apportion" liability between different defendants. *Id.* The legislature did not and could not draft the Juvenile Code to afford less protections to children charged with public offenses is given to adults charged with crimes. Indeed, it has been a long-standing tradition in this Commonwealth, even decades before the adoption of the Juvenile Code, that the child is to be afforded "every reasonable protection" under the law, with a tendency to "resolve every doubt in his favor." *Elmore v. Commonwealth*, 282 Ky. 443, 138 S.W.2d 956, 961 (Ky. App. 1940). Accordingly the provisions of KRS 635.060(1) must be read to permit, and even *encourage* apportionment. And as there is no mention in 635.060 (1) or anywhere else in the Juvenile Code of the term "joint and several liability," it makes no sense for courts to apply it to juveniles. If a word, phrase, or concept does not appear in the statutory scheme, the conclusion is that the General

Assembly did not intend to include the terms in the laws of our Commonwealth.

Commonwealth v. Garnett, 8 S.W. 3d 573, 576 (Ky. App. 1999).

Furthermore, when one considers the mandate “shall” in KRS 600.010(2)(e), requiring decisions by trial courts in juvenile matters be made in the “best interests of the child,” all the authority certainly points to a prohibition on making a child who was *at most* complicit in damage to a car *solely* liable for restitution pursuant to the Kentucky Juvenile Code.

The Kentucky Court of Appeals disagreement with this position is based on a concern that not permitting the trial court to place the full burden of restitution on the least-culpable party in this case would “countenance[e] a rule that would effectively limit a defendant’s liability ... based solely on the unsupported or unproven assertions of a criminal.” (Opinion at 11.) The court’s refusal to do so (*id*) is unfounded. In the current case, there are no “unsupported or unproven assertions” that there were other individuals involved. The Commonwealth’s *own witness* established that there *were* multiple actors in this event. (CD; 1/20/10; 9:45.) R.S.’s argument does not contemplate or support situations where a defendant creates imaginary “co-defendants” so as to avoid full liability. It contemplates a limited set of circumstances, one where other uncharged, yet more culpable, parties are known to exist, yet for one reason or another are not before the court.

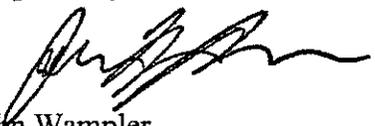
KRS 600.010(2) (e), which requires that decisions “shall” be made in the “best interests of the child,” is not concerned with whether apportionment of liability is discretionary as opposed to mandatory (Opinion at 11), or whether the law says that a complicitor has the same status as a principal actor. (Opinion at 11, citing *Wilson v.*

Commonwealth, 601 S.W. 2d 280, 286 (Ky. 1980). What this section of the law is concerned with is exactly what it states: “the best interests of the child.” The questions remain: Is it in the best interests of this child to be ordered to pay \$1600 for damages that he did not cause? Is it in his best interests to pay an extraordinary sum of money when the truly guilty parties are allowed to escape punishment? Is it in R.S.’s best interests to be ordered to pay \$1600 in damages when there was no hearing to determine if the victim’s insurance covered any portion of it? Put another way, it cannot be stated that bearing the full financial brunt of others’ criminal actions will serve any helpful rehabilitative purpose for R.S. or otherwise aid in furthering his best interests as required under the Juvenile Code.

CONCLUSION

For the foregoing reasons, appellant requests that the charges against him be DISMISSED, with prejudice, and that the previous court order of restitution be VACATED.

Respectfully submitted,


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APPENDIX

Tab	Item Description
A	Court of Appeals Opinion
B	Boone Circuit Court Order Affirming
C	District Court Opinion