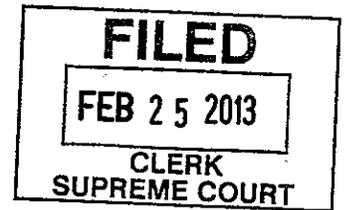


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2012-SC-000116-D  
(2010-CA-001492)



R.S., A CHILD UNDER EIGHTEEN

APPELLANT

VS. On Discretionary Review From the Kentucky Court of Appeals

COMMONWEALTH OF KENTUCKY

APPELLEE

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# REPLY BRIEF FOR APPELLANT

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Wampler".

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### CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2013, the foregoing "Reply 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.

A handwritten signature in black ink, appearing to read "John Wampler".  
John Wampler

## INTRODUCTION

Comes the Appellant, Ray Savage, through counsel, and pursuant to KRS 610.130, KRS 610.150, RCr 12.04, and CR 72.10 replies the Commonwealth's Counterstatement of Appeal.

## PURPOSE OF REPLY

The purpose of this Reply Brief is to clarify where there are discrepancies as to fact between Appellant's and Appellee's briefs and to respond to argumentation, analysis, and legal authorities contained in Appellee's brief. If Appellant chooses not to respond to a particular point or argument, this means that Appellant reasserts the arguments made in his Statement of Appeal.

## ARGUMENT

### I.

#### **CULPABILITY FOR COMPLICITY DOES NOT EXTEND PAST THE COMPLETION OF A MUTUALLY AGREED-UPON ACT**

The liability for complicity is broken when links in the chain of causality are cut. KRS 502.020 requires that there be an accord, a meeting of the minds, as to the conduct to be engaged in, in order for complicity to attach. Once the agreed-upon conduct has been completed, an individual cannot be held liable for damages caused by another completely separate course of conduct, even if the two happen to be close in time.

To the extent that R.S. "solicit[ed]" or "enagag[ed]" (*see* KRS 5020.020) in any activity, it was in the painting of a car with harmless, *washable* window paint. This is the same sort of paint used to write "Go Mustangs!" on the side windows of an SUV at a soccer tournament, or "Just Married" on the rear window of a newly-wed couple's sedan. The companies that manufacture this paint would be quickly out of business if their

product caused any lasting damage to the cars of the American public at large. The best explanation the Commonwealth could give as to how the car got scratched was testimony from one eye-witness that a boy slid across the hood of the vehicle. (CD; 1/20/10; 10:30, 6:18.) (Although this would *still* not explain the scratches found along the rest of the car; this discrepancy was apparently overlooked at trial, however.) R.S. was never identified as the boy who slid across the car's hood. (CD 1/20/10; 15:47.) It is important to note that the hood-sliding was a spontaneous, unplanned activity that in no way can be connected with a separate decision to window-paint a vehicle. To permit liability for complicity to stretch so far is to invite a flood of criminal sanctions where none are appropriate. If any member of a group can be held liable for the spontaneous actions of another, which are unconnected to whatever common course of conduct *had* been agreed upon, an "absurd or unreasonable result" (*see, Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, S.W. 2d 493, 500 (Ky. 1998.)) is inevitable.

## II.

### **THERE IS NO "RECKLESS" INTENT STANDARD IN KRS 512.030.**

There is no "reckless" standard of intent contained within KRS 512.030. The statute requires one to act either "intentionally" or "wantonly." *Id.* Whether or not the child acted "recklessly" in this case (Appellee's Brief at 6) is not relevant to the issues at hand, and should not be considered by this court.

As Criminal Mischief is a "result offense," (Appellee's Brief at 6), there is a very clear standard to be applied before the child can be found guilty under a theory of complicity. In order to be found guilty of complicity to commit an offense, the child "must act with respect to that result with the 'kind of culpability,' meaning the *mens rea*,

required for the offense charged, i.e., intent, wantonness, recklessness.” *Hudson v. Commonwealth*, 385 S.W.3d 411, 415 (Ky. 2012.) The child did not act with the required *mens rea*, as his actions were completely divorced from the actions that allegedly damaged the car. There is no causal link between deciding to use harmless washable paint to draw on a vehicle’s windows, and the sliding across the hood of the vehicle by a separate actor.

There is no reckless standard for KRS512.030, but R.S. did not act “wantonly” either. (Appellee’s Brief at 6.) To act wantonly, R.S. would have had to have “been aware of and consciously disregard[ed] a substantial and unjustifiable risk that the result will occur.” KRS 501.020(3.) It cannot be said that there is a “substantial and unjustifiable risk” that painting one’s car, or in this case, someone else’s car, with washable window paint will result in hundreds of dollars’ worth of damage to the car. Nor can it be said that there is a foreseeable “substantial and unjustifiable risk” that in the course of engaging with others to paint a vehicle, someone else in the group would then slide across the hood of the vehicle and thereby damage it.

### **III. THE ISSUE OF JUVENILE RESTITUTION MAY STILL BE REVIEWED UNDER PALPABLE ERROR**

The issue of restitution in this case is a critical matter, and one which the Court of Appeals, specifically noted “most warrants our review.” (Opinion at 7.) Under RCr 10.26, even if an issue is not properly preserved at the trial level, it may be reviewed by the higher Court if it rises to the level of “palpable error which affects the substantial rights of a party.” *Id.*

A restitution order requiring a teenager to pay \$1600 in damages that were caused by others clearly affects a substantial right, and clearly constitutes a “manifest injustice.” (See, RCr 10.26.) The trial court even noted in finding R.S. guilty that all those who took steps to damage the vehicle were responsible, and that maybe others should be in court. (CD; 1/20/10; 24:56.) Yet despite the fact that the court only found R.S. guilty of *complicity* to criminal mischief (which R.S. maintains was *still* erroneous), and spoke of other people being responsible for the damages, R.S. was still ordered to pay the *full amount* of restitution. In addition to the other arguments raised in his original brief, R.S. contends that this fact alone constitutes a manifest injustice. The Commonwealth should not be permitted to evade review on this critically important issue simply due to trial counsel’s failure to object.

Finally, it should be noted that in a juvenile case, apportionment when there are *known* codefendants, even if they are uncharged, *is* appropriate. The Juvenile Code clearly states that *all* decisions made by the trial court “shall” be made with the “best interests of the child” in mind. KRS 600.010 (2)(e.) To the extent that it is ever permissible for a court to order restitution<sup>1</sup>, it should be done so with the express interest of allowing the child to learn from his mistake and accept some level of personal financial responsibility for the monetary harm caused by his actions. However, in the current case, if R.S. has any culpability *at all*, it is clear that he is the *least* culpable. He did not slide across the hood of the car. (CD; 1/20/10; 10:30, 6:18.) He only wrote on one window. (CD; 1/20/10; 17:24). He was only one of four separate individuals involved. (CD; 1/20/10; 9:45.) Requiring this one child to pay the entire amount of restitution,

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<sup>1</sup> KRS 635.060 (1) says the court “may,” order restitution, signifying that the ordering of restitution is not mandatory in juvenile cases.

when it was *known* to the court that there were three at-large un-named co-defendants, does not comply with the higher principles of the Juvenile Code. It unfairly places the entire burden for the whole group on one single child.

**WHEREFORE**, for the foregoing reasons, and the reasons previously stated in his original brief, appellant requests that this Court Order that the charges against him be **DISMISSED**, with prejudice, and that the trial court's previous order of restitution be **VACATED**.

Respectfully submitted,



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