

RENDERED: JANUARY 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002559-MR

NANCY BUNTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 06-CR-00922

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND
REMANDING

** ** * * * * *

BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

DIXON, JUDGE: Nancy Bunton appeals from the final judgment of the Fayette Circuit Court, alleging errors in the court's order of restitution and jury instructions. Based upon our review, we affirm the judgment in part, vacate the

judgment in part, and remand the matter for the court to correct a clerical error in its order of restitution.

In May 2006, Bunton stabbed her husband with a knife, and he died a short time later. Thereafter, in July 2006, a grand jury indicted Bunton on one count of murder. In August 2007, a jury trial was held, and Bunton relied on a self-protection defense. Bunton was ultimately convicted of reckless homicide, and the jury recommended a sentence of five years' imprisonment.

Following a hearing on September 14, 2007, the trial court sentenced Bunton according to the jury's recommendation and ordered that she pay restitution of \$4879.00 to the Crime Victims' Compensation Fund, for the victim's funeral expenses.¹ This appeal followed.

Bunton raises two points of error on appeal. First, she contends the amount of restitution was not supported by sufficient evidence; alternatively, she argues the court failed to follow the statutory guideline in awarding restitution. Second, although not properly preserved, Bunton claims the court erred by failing to instruct the jury to acquit her if they believed she was entitled to self-protection.

As to the sufficiency of the evidence regarding the amount of restitution, a review of the sentencing hearing indicates this issue was not properly preserved for review. The Commonwealth submitted a final order from the Crime Victims' Compensation Board approving a claim by the victim's mother for

¹ As the sufficiency of the court's written final judgment is in dispute, we note the court stated on the record that restitution was owed to the Crime Victims' Compensation Fund.

\$4879.00 in funeral expenses. Bunton objected to restitution, contending it was unduly harsh, based on the defense's theory that the crime was committed in self-defense. However, on appeal, Bunton takes issue with the sufficiency of the evidence provided to the trial court to support the restitution order.

It is well settled, “[a]n appellate court will not consider a theory unless it has been raised before the trial court and that court has been given an opportunity to consider the merits of the theory.” *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998), citing *Hopewell v. Commonwealth*, 641 S.W.2d 744, 745 (Ky. 1982). At the hearing, Bunton did not question the sufficiency of the evidence; rather, she acknowledged that the claim for restitution was included in the pre-sentence investigation report and advised the court that she had no questions about the report. As different grounds for the objection were raised below, we decline to further address this issue. *Id.*

Next, we address Bunton's alternative argument regarding the final judgment ordering restitution.

Kentucky Revised Statutes (KRS) 532.033 states in relevant part:

When a judge orders restitution, the judge shall:

- (1) Order the restitution to be paid to a specific person or organization through the circuit clerk, who shall disburse the moneys as ordered by the court;
- (2) Be responsible for overseeing the collection of restitution;
- (3) Set the amount of restitution to be paid;

(4) Set the amount and frequency of each restitution payment or require the payment to be made in a lump sum[.] * * *

In the case at bar, the trial court's final judgment states: "IT IS ORDERED, that Restitution is set at \$4,879.00." Bunton opines that the court's order does not comply with the mandate of KRS 532.033(1) and (4), and she cites the recent case of *Rollins v. Commonwealth*, 294 S.W.3d 463 (Ky. App. 2009), to support her theory. *Rollins* involved an open-ended restitution order, which left "the amount of full restitution to be determined" at a future date. *Id.* at 464. On appeal, a panel of this Court noted, since the order did not comply with the requirements of KRS 532.033(3), "the final judgment did not succeed in creating a valid restitution order." *Id.* at 465.

Pursuant to *Rollins*, Bunton argues the final judgment is invalid, and she is entitled to a new sentencing hearing. While we agree that the final judgment should be corrected, we do not find that Bunton is entitled to a new sentencing hearing.²

Unlike *Rollins*, the final judgment in the case at bar specifically set forth the full amount of restitution owed. The final judgment, however, was silent as to whom restitution was owed and the payment terms. KRS 532.033(1) and (4). Accordingly, we must vacate the final judgment and remand to the trial court for

² Although Bunton raises this argument for the first time on appeal, we acknowledge that KRS 532.033 clearly sets forth specific requirements for an order of restitution. After thorough consideration, we believe the judgment can be corrected by the trial court pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.10 ("[c]lerical mistakes in judgments . . . and errors therein arising from oversight or omission may be corrected by the court . . . [.]"); consequently, we believe a new hearing is not warranted.

the limited purpose of correcting the order of restitution to comply with KRS 532.033.³

For her second alleged error, Bunton contends the court erred by failing to instruct the jury that they were to find her not guilty if they determined she was entitled to self-protection. Bunton contends we should review this issue under the palpable error standard of RCr 10.26; however, she concedes that the jury instructions “closely” followed the model instructions regarding self-protection set forth by the Kentucky Supreme Court in *Commonwealth v. Hager*, 41 S.W.3d 828, 844-47 (Ky. 2001). Nevertheless, Bunton opines that both her instructions, and the *Hager* model instructions, “failed to instruct the jury about the consequences of finding that defendant *was* privileged to act in self-protection.” Our review of the record reveals that the trial court properly utilized the *Hager* model instructions to instruct the jury on self-protection. As *Hager* is the authority on this issue, we decline to further address Bunton’s palpable error claim. See Rules of the Kentucky Supreme Court, Rule 1.030(8)(a).

For the reasons stated herein, we affirm, in part, the judgment of the Fayette Circuit Court, we vacate the portion of the judgment regarding restitution,

³ Although not mentioned by Bunton, we must note that the *Rollins* Court considered the error in that case to be judicial rather than clerical, thereby precluding correction pursuant to RCr 10.10. *Rollins*, 294 S.W.3d at 467. Based upon our review, we conclude the omission in the case at bar was the result of an inadvertent clerical error, rather than a judicial error, as it was not “the deliberate result of judicial reasoning and determination.” *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2000), quoting *Buchanan v. West Ky. Coal Co.*, 218 Ky. 259, 291 S.W. 32, 35 (Ky. 1927). Consequently, we believe remand for correction of a clerical error is permissible under the circumstances presented here. RCr 10.10.

and we remand this matter for correction of the judgment consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jamesa J. Drake
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Matthew R. Krygiel
Assistant Attorney General
Frankfort, Kentucky