

RENDERED: JULY 3, 2014; 10:00 A.M.  
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky  
Court of Appeals**

NO. 2013-CA-001238-MR

JUSTIN R. DAVIS APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE ROBERT COSTANZO, JUDGE  
ACTION NO. 12-CR-00313

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: JONES, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Justin Davis appeals from his conviction of second-degree burglary. He argues that the trial court erred when it ordered him to pay \$600 in restitution and \$151 in court costs. He also argues that the trial court erred in denying his motion for directed verdict on the second-degree burglary charge. We

reverse the trial court's imposition of restitution and court costs and remand for a hearing on these issues. In all other respects, we affirm.

On September 13, 2012, Appellant was arrested and in possession of stolen property belonging to Kristin and Jesse Murray while trying to pawn them in Tennessee. The Murrays' house had been burglarized that same day. Appellant was in possession of all the items missing from the Murrays' home and backyard storage building except for a computer. Appellant claimed he was selling the items for someone named Michelle Foster. Five days later, during another interview by the police, Appellant claimed he was selling them for a woman named Danielle Blevins. Further facts will be discussed as they become relevant.

On December 10, 2012, Appellant was indicted on the charge of second-degree burglary. A trial was held on May 30, 2013. Appellant was convicted of the charge and sentenced to ten years' imprisonment. This appeal followed.

Appellant's first argument on appeal concerns the trial court's order of restitution. At sentencing, the Commonwealth sought \$600 in restitution because the Murrays' computer was not recovered. The trial court ordered said restitution. Appellant argues that the trial court erred in imposing restitution because he was not given prior notice of the Commonwealth's intent to seek restitution, the Commonwealth presented no evidence of the computer's value, and he was not

given the opportunity to rebut any evidence presented on this issue. This error was unpreserved and is reviewed for palpable error.

Unpreserved errors “may be reviewed on appeal only if the error is ‘palpable’ and ‘affects the substantial rights of a party.’ Even then, however, relief is appropriate only ‘upon a determination that manifest injustice has resulted from the error.’ RCr 10.26; *Wiley v. Commonwealth*, 348 S.W.3d 570, 574 (Ky. 2010).” *Jones v. Commonwealth*, 382 S.W.3d 22, 29 (Ky. 2011). We believe that the court erred in ordering restitution in this case for the reasons set forth by Appellant.

[W]hen the issue of restitution under KRS 532.032 has not been resolved by an agreement between the Commonwealth and the defendant, constitutional due process requires an adversarial hearing that includes the following protections:

- reasonable notice to the defendant in advance of the sentencing hearing of the amount of restitution claimed and of the nature of the expenses for which restitution is claimed; and
- a hearing before a disinterested and impartial judge that includes a reasonable opportunity for the defendant, with assistance of counsel, to examine the evidence or other information presented in support of an order of restitution; and
- a reasonable opportunity for the defendant with assistance of counsel to present evidence or other information to rebut the claim of restitution and the amount thereof; and
- the burden shall be upon the Commonwealth to establish the validity of the claim for restitution and the

amount of restitution by a preponderance of the evidence, and findings with regard to the imposition of restitution must be supported by substantial evidence.

*Id.* at 32; *see also Fields v. Commonwealth*, 123 S.W.3d 914 (Ky. App. 2003).

In the case at hand, the sentencing hearing only lasted two minutes. The Commonwealth sought \$600 in restitution, which the trial court then ordered. The Commonwealth did not state what the restitution was in reference to, although it is presumed it was due to the missing computer. The Commonwealth presented no evidence as to how it arrived at the \$600 figure. In addition, Appellant was not given prior notice of the restitution claim. It was palpable error for the trial court to rely on the Commonwealth's \$600 restitution claim without any evidence. Furthermore, Appellant was given no opportunity to defend against this claim because he was not notified of it prior to sentencing. We reverse the order of restitution and remand for a hearing which includes the protections discussed *supra*.

Appellant also requests that his restitution hearing be heard by a jury. This is not warranted. The restitution statute in question, KRS 532.032, contemplates restitution being determined by the trial judge during sentencing. *Fields* at 916. No jury is necessary to determine the amount of restitution, if any, Appellant will be required to pay.

Appellant also argues the trial court erred in imposing \$151 in court costs because he is indigent.

The taxation of court costs against a defendant, upon conviction in a case, shall be mandatory and shall not be subject to probation, suspension, proration, deduction, or other form of nonimposition in the terms of a plea bargain or otherwise, unless the court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future.

KRS 23A.205(2). “A ‘poor person’ means a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing.” KRS 453.190(2).

The Commonwealth does not contest this argument and requests that we reverse the costs and remand for a hearing to determine if Appellant is a poor person. We believe this is the correct course of action under the circumstances. A hearing is especially necessary in this case because Appellant’s ability to pay the court costs could be hindered if he is again ordered to pay some amount in restitution.

Appellant’s final argument on appeal is that the trial court erred in not granting him a directed verdict. Appellant claims that the Commonwealth presented no evidence that he was the one to burglarize, or enter unlawfully, the

Murrays' residence, only that he was in possession of the stolen items. We find no error.

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.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). “A reviewing court does not reevaluate the proof because its only function is to consider the decision of the trial judge in light of the proof presented.” *Id.* “Circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt.” *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994) (*citing Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977); *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)).

[W]here there is substantial evidence showing a breaking and entering of a dwelling and a taking of property therefrom, which is supported by proof that the stolen property was found in the possession of the defendant,

. . . that such showing is sufficient to make out a prima facie case of house breaking[.]

*Allen v. Commonwealth*, 410 S.W.3d 125, 131 (Ky. 2013)(citing *Conover v. Commonwealth*, 473 S.W.2d 825, 827 (Ky. 1971)). Here, the fact that Appellant was found with almost all of the stolen property is sufficient to withstand a motion for directed verdict. However, the Commonwealth presented even more evidence that would support the trial court's denial of the motion for directed verdict. The evidence consisted of: Jesse Murray's testimony that the only item recovered from Appellant that did not belong to him and his wife was a pair of bolt cutters; Mr. Murray's testimony that the lock to the storage building had been cut; Appellant being in possession of family photographs taken from the Murray residence; and testimony the residence was burglarized between 2:15 p.m. and 3:15 p.m. and Appellant was at the pawn shop with the items between 3:00 p.m. and 3:30 p.m.<sup>1</sup> the same day. The trial court did not err in denying Appellant's motion.

For the foregoing reasons, we affirm Appellant's conviction in part, reverse in part, and remand for a hearing to determine the restitution and court costs issues.

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<sup>1</sup> These are estimated times.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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