

RENDERED: AUGUST 23, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001397-MR

PAULA K. WHEELER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 08-CR-003134

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Paula K. Wheeler appeals from a Jefferson Circuit Court order, directing payment of restitution in the amount of \$18,162.01. She argues that the trial court lacked jurisdiction to adjudicate restitution; that she was denied the right to have a jury determine the amount of restitution; that in computing restitution, the trial court improperly considered transactions not identified in the

indictment and plea agreement; and finally, that its findings of fact were clearly erroneous.

In October 2008, Wheeler was indicted on the following charges: one count of knowing exploitation of an adult over \$300; one count of fraudulent use of a credit card; nine counts of theft by unlawful taking over \$300; and two counts of criminal possession of a forged instrument. The charges stemmed from allegations that Wheeler, while serving as power of attorney for her elderly mother, Agnes Sheldon,¹ abused her position for her own financial gain. Sheldon later passed away.

In August 2009, the administratrix of Sheldon's estate filed a civil action against Wheeler seeking recovery of the funds that Wheeler had taken, and to set aside a deed whereby Sheldon had transferred legal title of her residence from sole ownership to joint survivorship with Wheeler.

On March 30, 2010, Wheeler entered a guilty plea in the criminal action pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1977)² to one amended count of wanton exploitation of an adult over \$300 and to all the other counts in the indictment. In its plea offer, the Commonwealth agreed to recommend concurrent one-year sentences on each count, and pretrial diversion

¹ The name is spelled "Shelden" in various documents in the record; we have adopted the spelling used by the appellant and the trial court for purposes of this appeal.

² A defendant entering a plea of guilty under *Alford* refuses to admit guilt but acknowledges that the Commonwealth can present sufficient evidence to support a conviction. An *Alford* plea "is a guilty plea in all material respects." *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995).

on all counts for a period of two years. The offer also contained the following recommendation regarding restitution:

Restitution to be determined in the civil case and shall be incorporated as part of this court's order. The defendant waives the 90 day period after sentencing to request restitution. If restitution is not ordered on the civil case, the Commonwealth can file a motion for restitution on this case within 90 days.

The trial court accepted Wheeler's plea and placed her on diversion in accordance with the terms of the plea agreement. As a condition of diversion, the court ordered that restitution would be paid as ordered in the civil case, or in the criminal matter depending on the outcome of the civil case.

On February 27, 2012, the trial court ordered the parties to appear for the purpose of scheduling a restitution hearing. The court explained that it had received information that the amount of restitution had not been determined or ordered in the civil action, and that it appeared it would not be within the foreseeable future. Although the record in the civil case is not before us, the court in those proceedings had apparently entered an order on February 22, 2012, stating that it would not address restitution.

The parties appeared for the restitution hearing on May 21, 2012. Defense counsel moved to dismiss on the grounds that the trial court lacked authority to hold the hearing, arguing that the plea agreement required any restitution to be determined in the civil case. After hearing from the parties and from the attorney representing the estate in the civil action, the trial court denied the motion to

dismiss, noting that restitution had been ordered as a condition of diversion, and that while the parties intended restitution to be determined in the civil case, the civil judge's refusal to hear that aspect of the suit was an unforeseen frustration of the parties' intent. The court also declined to find that the Commonwealth waived the right to seek restitution by not filing a motion within ninety days of the date of the civil court's ruling.

Thereafter, a restitution hearing was held over the course of three days. Testimony was heard from Detective John Fogle of the Louisville Metro Police Department's Crimes Against Seniors Unit. Sheldon's granddaughter Stephanie Schmidt and Wheeler's sister, Loyce First, also testified for the Commonwealth.

In her testimony, Wheeler denied any wrongdoing whatsoever, explaining that the majority of the transactions were meant to reimburse her for cash she had advanced to Sheldon. Wheeler's boyfriend, Leon Williams, also testified for the defense.

On July 5, 2012, the Commonwealth filed a motion seeking to recover restitution in the amount of \$19,010.22.

On July 19, 2012, the trial court entered a restitution order in the amount of \$18,162.01 to be paid to Sheldon's estate. This appeal followed.

Wheeler argues that, under Kentucky Revised Statutes (KRS) 413.200, the trial court lacked jurisdiction to order restitution because the Commonwealth failed to file a restitution petition in a timely manner. KRS 413.200 provides in pertinent part as follows:

Any person convicted of a misdemeanor or felony for taking, injuring or destroying property shall restore the property or make reparation in damages if not ordered as a condition of probation. The court in which the conviction is had, if applied to by verified petition made within ninety (90) days of the date the sentence was pronounced, may order restitution or give judgment against the defendant for reparation in damages, and enforce collection by execution or other process.

Wheeler contends that the Commonwealth was required to file a verified petition within ninety days of the February 22, 2012, decision of the trial court in the civil proceedings that it would not address restitution. Because the Commonwealth failed to do so, Wheeler argues that the trial court lost jurisdiction. Wheeler acknowledges that she failed to raise this argument before the trial court, but correctly argues that subject matter jurisdiction can be raised at any point in a proceeding, including on appeal. “The question of subject matter jurisdiction may be raised at any time and is open for the consideration of the reviewing court whenever it is raised by any party.” *Gullett v. Gullett*, 992 S.W.2d 866, 869 (Ky. App. 1999).

The Commonwealth argues that the trial court retained jurisdiction over the case because Wheeler had been placed on pretrial diversion. We agree. KRS 413.200 is not applicable to these proceedings because Wheeler had not been sentenced. “An order of diversion . . . does not fully dispose of any criminal charges. Rather, it simply memorializes an agreement that exists between the Commonwealth and the defendant and halts prosecution between admission of guilt and imposition of sentence.” *Ballard v. Commonwealth*, 320 S.W.3d 69, 73

(Ky. 2010). A trial court's jurisdiction over a diverted case is extinguished under two circumstances, neither of which occurred here: "(1) upon the imposition of sentence in an unsuccessful diversion; or (2) upon entry of an order listing the charges as 'dismissed-diverted' as required by KRS 533.258(1) after successful completion of the diversion agreement." *Id.* Thus, the trial court retained jurisdiction to schedule a restitution hearing and to impose restitution.

Next, Wheeler argues that she was deprived of her constitutional right to a jury trial in the underlying civil action with respect to her restitution obligation, and that the error was compounded when no jury trial was held in the criminal proceeding. She contends that the trial court should have compelled the determination of the restitution in the underlying civil case. Wheeler does not cite to any authority holding that a division of the Jefferson Circuit Court may compel another division to act in such a matter. In any event, she was free to appeal from the decision in the civil proceedings.

Wheeler further contends that she was entitled to a jury trial in the criminal proceedings under KRS 431.200, which provides in pertinent part:

In a petition for restitution or reparation, the court shall cause the defendant, if in custody, to be brought into court, and demand of him if he has any defense to make to the petition. If he consents to the restitution or to reparation in damages in an agreed sum, the court shall give judgment accordingly. Otherwise a jury shall be impaneled to try the facts and ascertain the amount and the value of the property, or assess the damage, as the case may be.

As we have already determined, KRS 431.200 is not applicable to this case because Wheeler was placed on pretrial diversion. Under these circumstances, restitution proceedings are governed by KRS 532.032.

[T]he General Assembly contemplated ordinary sentencing procedures as the foundation for restitutionary sentences, not the jury procedure referred to in KRS 431.200. In the cases where KRS 431.200 applies, that statute continues to provide an alternative procedure for a post-sentencing restitution order, but KRS 532.032 (and the statutes incorporated therein) is now the generally applicable criminal restitution statute.

Fields v. Commonwealth, 123 S.W.3d 914, 916 (Ky. App. 2003).

KRS 532.033(3) provides that the judge is to “[s]et the amount of restitution to be paid[.]” “The trial court has the statutory authority to establish restitution and is in the best position to make the appropriate and well-informed decision in a fair and impartial manner.” *Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002). “Specific procedures . . . such as discovery, cross-examination of adverse witnesses, and fact-finding by a jury, as are required at trial, ‘are simply not constitutionally mandated.’” *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky. App. 2003) (internal citation omitted). Thus, a jury trial to determine the amount of Wheeler’s restitution was not required, either statutorily or constitutionally.

Third, Wheeler contends that the trial court erred in determining that the first count of the indictment, the charge of exploitation of an adult, represented multiple transactions, which she states is erroneous as a matter of law because the amalgamation of multiple transactions into a single charge is not permitted.

The indictment states that the offense of exploitation occurred between December 31, 2005 and April 21, 2008. Detective Fogle testified that any improper transactions he identified which fell within that period could be included as part of the exploitation offense. Wheeler argues that it was legally impermissible for that count of the indictment to encompass numerous transactions in which Wheeler improperly utilized Sheldon's property. In some respects, this argument is a challenge to the sufficiency of the evidence, which has been waived by the entry of Wheeler's guilty plea. "[A]n unconditional guilty plea waives the right to appeal many constitutional protections as well as the right to appeal a finding of guilt on the sufficiency of the evidence[.]" *Windsor v. Commonwealth*, 250 S.W.3d 306, 307 (Ky. 2008).

Furthermore, it is well-established that a course of conduct may be treated as a single offense. "The question of when an act, transaction or course of conduct shall be considered to constitute multiple offenses rather than a single offense is one on which the law is unclear, and the answer to which may vary according to a varying legislative intent." *Queen v. Commonwealth*, 434 S.W.2d 318, 322-23 (Ky. 1968). KRS 209.990(5) provides that "Any person who knowingly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars (\$300) in financial or other resources, or both, is guilty of a Class C felony." Thus the statute does not expressly limit the exploitation to one occurrence. In *Commonwealth v. Caudill*, 812 S.W.2d 158, 159 (Ky. App. 1991), a panel of this Court held that a deputy clerk who kept the \$8 fee charged for license renewals

over an eleven-month period, resulting in a total theft of \$2,700, could be charged with one count of felony theft, rather than with a series of misdemeanors, because she acted with a “single continuous criminal intent.” As the Court explained:

If the taking was at one time, then the value of all articles taken at that time could be added together in estimating the degree of the offense. Or if the articles were taken by appellant [defendant] as the result of a single purpose or impulse, though the asportation was at intervals to better suit his convenience, the degree of the offense will not be lessened by the fact that he could not or did not carry away all the articles at one load.

Caudill, 812 S.W.2d at 159 (Ky. App. 1991) (citing *Weaver v. Commonwealth*, 27

Ky.L.Rptr. 743, 86 S.W. 551 (1905)). This reasoning is applicable to

Wheeler’s case, in which the offense would not be diminished by the fact that the financial loss occurred over a period of several months, as opposed to one occasion.

Fourth, Wheeler argues that the trial court miscalculated the amount of restitution, contrary to the evidence presented at the hearing. Our standard of review requires us to respect the discretion of the trial court, and its role as the finder of fact.

KRS Chapter 532 places the issue of restitution solely within the discretion of the trial court. The test for abuse of discretion is whether the trial court’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Because KRS 532.033(3) charges the trial court with setting the amount of restitution, the statute contemplates that the trial court is the fact-finder in the matter. Accordingly, appellate review of the trial court’s findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous.

A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.

Donovan v. Commonwealth, 376 S.W.3d 628, 631 (Ky.App. 2012) (internal citations and quotation marks omitted.)

Wheeler argues that the trial court's calculation of the restitution amounts was not consistent with the indictment. She has provided a chart with three columns listing the thirteen counts of the indictment, the alleged date(s) of the offense and the amount of the transaction. Essentially, this appears to be a restatement of the earlier argument challenging the sufficiency of the evidence and the propriety of including multiple transactions under one count of the indictment. As we have already held that such an aggregation was appropriate in this case, we cannot say that the trial court abused its discretion in computing the amount of restitution.

In its restitution order, the trial court stated that Wheeler had failed sufficiently to explain twenty-seven different transactions. Wheeler argues that she testified that all but one of these transactions were one of the following: (1) reimbursement from her own funds for Sheldon's groceries, prescriptions or other household items; (2) reimbursement for cash which she or her "significant other" had advanced to Sheldon to pay for family Christmas gifts; (3) reimbursement for cash advanced by Wheeler to Sheldon to pay her caregiver, Debra Wilkerson; or (4) cash withdrawals from Sheldon's bank to pay Wilkerson. As to the remaining

transaction, a payment of \$2,224.00, Wheeler testified that it represented compensation to her for 202.5 hours of work at a rate of \$11 per hour (the same rate paid to Wilkerson). Wheeler testified that she paid herself this sum upon the advice of Guardiacare³ about the propriety of such payments. We are required to give “due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rules of Civil Procedure (CR) 52.01. The trial court as the finder of fact was not obliged to believe or to accept Wheeler’s explanations of these transactions.

Wheeler further argues that the trial court erred in imposing restitution for transactions which did not involve Wheeler’s use of her mother’s power of attorney. She claims that twelve of the forty-one transactions identified in Detective Fogle’s report were simply instances in which Sheldon signed checks made payable to Wheeler, and that no evidence was presented that the checks were forgeries or inauthentic. She contends that she could not have misused her power of attorney to misappropriate Sheldon’s funds in the absence of proof that Sheldon’s signature had been forged. But Detective Fogle testified that Wheeler used undue influence to pressure Sheldon into signing the checks. The trial court, in its role as the finder of fact, did not err in accepting Fogle’s interpretation of these transactions.

Finally, Wheeler argues that the trial court erred in imposing restitution for nineteen transactions involving checks written by Wheeler, or withdrawals by

³ According to Wheeler, Guardiacare was the entity which assumed control of Sheldon’s financial affairs upon the determination of her legal disability.

Wheeler, from bank accounts held jointly with Sheldon. She contends that she could not commit theft of property to which she had a legal, unfettered ownership interest. Wheeler has provided absolutely no references to the record to show where this argument is preserved. CR 76.12(4)(c)(v) requires:

[a]n “ARGUMENT” conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

The purpose of this rule is

so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Wheeler has not requested palpable error review. “Absent extreme circumstances amounting to a substantial miscarriage of justice, an appellate court will not engage in palpable error review pursuant to RCr 10.26 unless such a request is made and briefed by the appellant.” *Shepherd v. Commonwealth*, 251 S.W.3d 309, 316 (Ky. 2008). “A new theory of error cannot be raised for the first time on appeal.” *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999).

The restitution hearing lasted over four hours and the report prepared by Detective Fogle is over forty pages long. “It is not the job of the appellate courts

to scour the record in support of an appellant's argument." *Dennis v. Fulkerson*, 343 S.W.3d 633, 637 (Ky. App. 2011). In any event, a cursory review of the record shows that the dates of the checks which she argues were drawn on the joint account and therefore not evidence of theft, correspond exactly to the dates provided in the indictment under several counts of theft by unlawful taking. Wheeler entered a valid guilty plea to these charges, thus acknowledging that the Commonwealth had sufficient evidence to secure a conviction.

The restitution order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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