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**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-000482-MR

LIQUESHA DICKERSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 13-CR-002514-001

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2015-CA-000486-MR

MARK HICKS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 13-CR-002514-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART  
AND REMANDING

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BEFORE: DIXON, JONES, AND J. LAMBERT, JUDGES.

JONES, JUDGE: Appellants, Liquesha R. Dickerson and Mark Hicks, appeal from the Jefferson Circuit Court’s order finding them jointly and severally liable for \$3,463.82 in restitution. After careful consideration, we affirm in part, reverse in part, and remand for additional proceedings consistent with the opinions stated herein.

**I. BACKGROUND**

Liquesha Dickerson (“Dickerson”) was indicted for second-degree burglary under KRS<sup>1</sup> 511.030. Her boyfriend and co-defendant, Mark Hicks (“Hicks”), was indicted under KRS 514.110 for receiving stolen property. The basis for both indictments arose out of Dickerson’s burglary of several thousand dollars’ worth of electronic goods from Terry Gentry. When questioned by the Louisville Metro Police Department, Dickerson admitted to breaking into Gentry’s home and stealing the electronics. While Hicks was not involved in the burglary, he did admit to helping Dickerson transport the stolen goods to a “holding spot.”

Both Dickerson and Hicks reached tentative plea agreements on amended charges, leaving the amount of restitution as the only remaining issue. The circuit court held a prospective restitution hearing where the Commonwealth

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<sup>1</sup> Kentucky Revised Statute.

called Gentry to testify to the losses he suffered as a result of the burglary. Gentry supplemented his testimony with two spreadsheets that he prepared prior to the hearing – a Kentucky Farm Bureau Insurance Inventory and Payout sheet and a spreadsheet calculating Gentry’s losses after insurance reimbursement. Gentry’s stated remaining losses were comprised of his \$500 deductible, the difference between replacement cost of the items and the depreciated amount the insurer paid, sales tax paid when repurchasing the items, and the repurchase cost of extended warranties for the goods stolen and replaced. In total, these losses equaled \$3,463.82. The parties stipulated that the police had recovered two televisions, a laptop computer, and an Xbox 360 (the “Recovered Property”) and were holding them in the property room. Of the Recovered Property, all but the laptop computer were confirmed to be missing power cords or remote controls.

Following the hearing, the court gave Gentry the choice of either taking the Recovered Property or receiving restitution for it. Gentry opted for payment of restitution. Thus, the circuit court ordered Appellants to pay \$3,436.82, plus 5% interest, in restitution. While Appellants acknowledge their responsibility for paying restitution, they contend that this responsibility should be fulfilled by paying the \$500 deductible. Additionally, Hicks argues that if Gentry is indeed entitled to the \$3,436.82 payment, he and Dickerson should not be held jointly and severally liable, but should have liability apportioned to their guilt. This appeal followed.

## **II. STANDARD OF REVIEW**

When the amount of restitution a defendant is ordered to pay in a criminal matter is challenged on appeal, we must determine whether the trial court abused its discretion. *Fields v. Commonwealth*, 123 S.W.3d 914, 917 (Ky. App. 2003). The test for abuse of discretion is whether the trial court’s decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). As the trial court is the fact-finder charged with determining the amount of restitution, our 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.” *Donovan v. Commonwealth*, 376 S.W.3d 628, 631 (Ky. App. 2012) (citing CR<sup>2</sup> 59.01)). We will only deem a factual finding clearly erroneous if it is unsupported by substantial evidence. *Id.* (citing *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)).

### III. ANALYSIS

#### A. AMOUNT OF RESTITUTION

KRS 533.030(3) provides for victim restitution in criminal cases. In relevant part, it states:

(3) When imposing a sentence of probation or conditional discharge in a case where a victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, stolen, or unlawfully obtained, or its value substantially decreased as a result of the crime, or where the victim suffered actual medical expenses, direct out-of-pocket losses, or loss of earning as a direct result of the crime . . . the court shall order the defendant to make restitution in addition to any other penalty provided for the commission of the

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<sup>2</sup> Kentucky Rules of Civil Procedure.

offense. Payment of restitution to the victim shall have priority over payment of restitution to any government agency. Restitution shall be ordered in the full amount of the damages, unless the damages exceed one hundred thousand dollars (\$100,000) or twice the amount of the gain from the commission of the offense, whichever is greater, in which case the higher of these two (2) amounts shall be awarded. . . . Where there is more than one (1) defendant or more than one (1) victim, restitution may be apportioned. Restitution shall be subject to the following additional terms and conditions:

(a) Where property which is unlawfully in the possession of the defendant is in substantially undamaged condition from its condition at the time of the taking, return of the property shall be ordered in lieu of monetary restitution;

(b) The circuit clerk shall assess an additional fee of five percent (5%) to defray the administrative costs of collection of payments or property. This fee shall be paid by the defendant and shall inure to a trust and agency account which shall not lapse and which shall be used to hire additional deputy clerks and office personnel or increase deputy clerk or office personnel salaries, or combination thereof;

(c) When a defendant fails to make restitution ordered to be paid through the circuit clerk or a court-authorized program run by the county attorney or the Commonwealth's attorney, the circuit clerk or court-authorized program shall notify the court; and

(d) An order of restitution shall not preclude the owner of property or the victim who suffered personal physical or mental injury or out-of-pocket loss of earnings or support or other damages from proceeding in a civil action to recover damages from the defendant. A civil verdict shall be reduced by the amount paid under the criminal restitution order.

KRS 533.030(3). Restitution “means any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to

injury, or property damage and other expenses suffered by a victim because of a criminal act.” KRS 532.350(1). The restitution statutes are “a system designed to restore property or the value thereof to the victim.” *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986). “Because restitution provisions are remedial in nature, they ‘should be liberally construed in favor of their remedial purpose.’” *Commonwealth v. Morseman*, 379 S.W.3d 144, 148 (Ky. 2012) (quoting *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789, 794 (Ky. 2008)).

“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.” *Jones v. Commonwealth*, 382 S.W.3d 22, 32 (Ky. 2011). Additionally, constitutional due process requires an adversarial hearing that includes the following protections: (1) 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; (2) 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 (3) 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.” *Id.*

Appellants first contend that the trial court failed to comply with the plain wording of KRS 533.030 by giving Gentry the option to receive the Recovered Property or its value in restitution. We agree *only* with respect to the laptop computer. Since it was undisputed that the laptop was recovered, we believe the burden was on the Commonwealth to present some evidence of damage before awarding monetary compensation to Gentry. In the absence of such evidence, the trial court was required to order return of the laptop in lieu of monetary restitution. *See* KRS 530.030(a) (“Where property which is unlawfully in the possession of the defendant is in substantially undamaged condition from its condition at the time of the taking, return of the property *shall* be ordered in lieu of monetary restitution.”) (emphasis added).

In its Appellee briefs, the Commonwealth appears to concede that there was no testimony or evidence that the recovered laptop computer was damaged or missing any of its parts. *See* Appellee’s Brief at 4 (“In this case, there was testimony and argument that the recovered items were lacking power cords and remote controls, with the possible exception of the Toshiba laptop.”). Furthermore, having reviewed the record, we can find no evidence to support the trial court’s conclusions that the laptop was not “intact” when it was recovered. Since the Commonwealth failed to meet its burden of establishing that the recovered laptop was damaged, the trial court abused its discretion when it allowed Gentry to choose between return and monetary restitution.

The same cannot be said for the other Recovered Property. The hearing with respect to the other recovered items showed that they were missing various component parts such as remote controls and power cords. While the statute does not define the term “substantially undamaged,” it is hard to fathom that the General Assembly meant the term to include property returned in an altered state without all original parts in working order. Therefore, with the exception of the laptop computer, the trial court did not err in ordering monetary restitution in lieu of return.

Appellants next allege that the trial court awarded Gentry damages that were not a “result of the crime,” in contravention of KRS 533.030. Specifically, Appellants point to the losses Gentry suffered due to depreciation of certain items and the expenses incurred when purchasing replacement items (including extended warranties and taxes on those items). Appellants argue that the court should disregard these costs in calculating Gentry’s damages, as “damages that resulted from the crime” must be calculated by looking to the fair market value of the items at the time they were stolen.

Fair market value of stolen property is indeed one way to calculate damages. *See Herman v. Jackson*, 405 S.W.2d 9, 13 (Ky. 1966). However, there is no rigid and precise formula a trial court judge must use when calculating restitution damages. KRS 533.030 confers a great deal of discretion to trial court judges when determining restitution amounts. “If restitution is appropriate in a case, the trial judge is required to set the amount of restitution to be paid.”



*Donovan v. Commonwealth*, 376 S.W.3d 628, 631 (Ky. App. 2012). In exercising this discretion, the trial court should bear in mind that “restitution is intended to *fully* compensate for the loss incurred.” *Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002).

In this case, given the evidence presented, it was entirely appropriate for the trial court to conclude that using fair market would not *fully* compensate Gentry. While the trial court could have used fair market value, we do not believe it was compelled to do so in this instance since there was competent testimony presented regarding how much it would actually cost Gentry to replace the stolen items. *See, e.g., K.B. v. Commonwealth*, No. 10-CA-559-DG, 2012 WL 28679, at \*2 (Ky. App. Jan. 6, 2012) (finding that replacement cost of a door damaged during a burglary was an appropriate measure of restitution damages, despite the fact that the old door had been completely depreciated).<sup>3</sup>

This interpretation is also in accord with the statutory language. KRS 533.030(3) states that restitution should be imposed: “where a victim of a crime has suffered monetary damage as a result of the crime due to his property having been converted, *stolen*, or unlawfully obtained . . . or where the victim suffered . . . *direct out-of-pocket losses*.” (Emphasis added). Further, restitution is defined to include compensation paid to a victim for: “counseling, medical expenses, lost wages due to injury, or property damage *and other expenses* suffered by a victim because of a criminal act.” KRS 532.650(1)(a) (emphasis added). While

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<sup>3</sup>We do not cite opinion as binding precedent. However, its factual similarity makes it appropriate for discussion and consideration. *See* CR 76.28(4)(c).

Appellants are correct in their assertion that the actual depreciation of Gentry's property was not caused by the crime, there is a direct causal link between the burglary and Gentry's need to replace his property. The undisputed testimony and evidence given at the restitution hearing was sufficient to support such a finding.

Alternatively, Appellants argue that the trial court's order of restitution violated their due process rights, in that it was not supported by sufficient evidence. At a minimum, a defendant in a restitution hearing is entitled to an adversarial hearing before a disinterested and impartial judge, and a reasonable opportunity to be heard. *See Dillard v. Commonwealth*, 475 S.W.3d 594, 599 (Ky. 2015). As noted above, the Commonwealth bears the burden of persuasion and evidence supporting the restitution order must meet a "minimal indicium of reliability." *Wiley v. Commonwealth*, 348 S.W.3d 570, 575 (Ky. 2010) (citing *United States v. Silverman*, 976 F.2d 1502, 1504 (6th Cir. 1992)).

The Appellants agreed as part of their pleas to provide restitution, the amount being the only issue left open. The trial court held an adversarial hearing where evidence was presented concerning the amount owed, the defendants had the opportunity to cross-examine the witness, and the court heard arguments from both sides before determining the amount owed to Gentry in restitution. Appellants claim that the trial court "arbitrarily assign[ed]" a restitution amount; the record, however, indicates otherwise. With the exception of the laptop computer, we cannot find any violation of the Appellants' due process rights.

## **B. JOINT & SEVERAL LIABILITY**

Hicks contends that the trial court abused its discretion in finding him and Dickerson jointly and severally liable for the full amount of restitution. This contention is based on the fact that Dickerson was charged with, and ultimately entered a guilty plea to, more serious criminal conduct than Hicks. While Hicks may have been less culpable than Dickerson, and while trial courts certainly have the option of apportioning liability, “[a]pportionment among defendants is *not* mandatory.” *R.S. v. Commonwealth*, 423 S.W.3d 178, 188 (Ky. 2014).

When there are multiple defendants trial courts have discretion as to whether restitution should be apportioned. *See* KRS 533.030(3); *R.S.*, 423 S.W.3d at 189. Further, “ordering a defendant to pay full restitution despite awareness of others’ involvement does not frustrate the purpose of restitution because the purpose is to restore to the victim what was lost as a result of criminal activity.” *R.S.*, 423 S.W.3d at 188. Based on the plain wording of KRS 533.030(3) and the fact that joint and several liability is consistent with the legislative intent of ensuring victims are fully restored, we cannot find that the trial court abused its discretion in holding Appellants jointly and severally liable.

## **IV. CONCLUSION**

For the reasons set forth above, we affirm the Jefferson Circuit Court’s restitution order with the exception of the laptop. On remand, the circuit court should direct the laptop to be returned to Gentry and enter a new restitution

order that does not include monetary restitution for this that item, unless the Commonwealth provides proof of damage.

ALL CONCUR.

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