

RENDERED: OCTOBER 25, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000617-MR

QUANDARIOUS M. TAYLOR

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 17-CR-00328-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Quandarious Taylor appeals from a judgment of conviction by the Fayette Circuit Court. He argues that he was entitled to a directed verdict on the charge of first-degree robbery and that the trial court erred by ordering him to pay restitution without conducting an evidentiary hearing. We find that there was sufficient evidence to submit the robbery charge to the jury, but also find that the

trial court was required to hold an evidentiary hearing prior to imposing restitution. Hence, we affirm in part, reverse in part, and remand for a restitution hearing.

On March 28, 2017, a Fayette County grand jury returned indictments charging brothers Quandarious and Jevontaye Taylor on charges of first-degree robbery. At trial, the Commonwealth's primary witness was Chaka Hausley, who is Quandarious's and Jevontaye's aunt. Chaka testified that, on the night of the robbery, she and the victim, Myrna Curtis, got into an argument at Myrna's apartment. After the argument, Myrna gave Chaka a ride home. Ten to fifteen minutes after she returned to her apartment, Myrna heard a knock on her front door. Myrna opened the door and saw Chaka, who said she left her headphones in the apartment. Myrna left the screen door locked and went to retrieve the headphones from her bedroom.

When Myrna opened the screen door to give the headphones to Chaka, two men rushed the door, and one put a gun to Myrna's forehead. The gunman told Myrna to shut up and backed her up against a wall. While Myrna was being held at gunpoint, the second man took Myrna's wallet with about \$60 dollars in it, her cell phone, and a small Bluetooth speaker.

The robbers then ran out of the apartment and left the scene. Chaka started to leave, too, but Myrna followed her and asked why Chaka had someone rob her. Chaka replied, "What was I supposed to do, protect you over somebody

with a gun?” At that point Myrna went to a nearby friend’s house and called the police. Chaka left the scene before the police arrived. Chaka later identified Quandarious and Jevontaye as the persons who robbed Myrna.

Following a jury trial, Quandarious and Jevontaye were convicted of first-degree robbery. In accord with the jury’s verdict, the trial court imposed a sentence of ten years’ imprisonment and also ordered Quandarious and Jevontaye to pay restitution to Chaka in the amount of \$300.¹ This appeal followed.

Quandarious primarily argues that the trial court erred by denying his motion for a directed verdict. On appellate review, a trial court’s denial of a motion for directed verdict should only be reversed “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]” *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d. 3 (Ky. 1983)). In determining whether to grant a motion for directed verdict, the trial court must consider the evidence as a whole, presume the Commonwealth’s proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. *Id.* To

¹ Jevontaye was also convicted of being a persistent felony offender in the second degree and received a sentence of twenty years’ imprisonment. Based upon the length of the sentence, Jevontaye’s appeal proceeded directly to the Kentucky Supreme Court. The Supreme Court recently affirmed the conviction and sentence of imprisonment but reversed the restitution order for the reasons set forth below. *Taylor v. Commonwealth*, No. 2018-SC-000178-MR, 2019 WL 2462780 (Ky. June 13, 2019) (finality entered July 5, 2019).

sustain a motion for a directed verdict, the Commonwealth must produce less than a “mere scintilla of evidence.” *Id.* at 188.

Quandarious focuses on Myrna’s inability to identify the robbers and the inconsistencies in Chaka’s testimony. However, such matters go merely to the weight and credibility of the evidence, which is a matter for the jury to decide. *Id.* Considering the proof as a whole, there was more than a scintilla of evidence supporting the jury’s finding that Quandarious was one of the two robbers. Therefore, the trial court did not err by denying his motion for a directed verdict.

Quandarious next argues that the trial court erred by ordering him to pay \$300 in restitution to Myrna. The Kentucky Supreme Court addressed this issue in Javontaye’s appeal and the facts and reasoning are equally applicable to this appeal.

Taylor concedes this issue was not preserved, and has requested palpable error review in accordance with RCr² 10.26:

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

(emphasis added).

² Kentucky Rules of Criminal Procedure [footnote in original].

At the end of Taylor’s final sentencing hearing the following exchange took place between the trial court and the Commonwealth:

CW: Your honor we have also submitted the same restitution form for him as his brother, \$300 joint and several.

Court: Okay, thank you.

Thereafter the trial court ordered Taylor to pay \$300 in restitution to Myrna jointly and severally with Quandarious. Taylor remained silent during and after this exchange, and the Commonwealth argues this amounted to acquiescence. Taylor on the other hand argues that it was palpable error and violated the procedure for establishing restitution set forth in *Jones v. Commonwealth*[, 382 S.W.3d 22 (Ky. 2011)].

In *Jones*, we noted that “[i]n directing the courts to include restitution as part of the sentence in a criminal case, the legislature did not detail the sort of hearing it contemplated for making that determination,” [*Id.* at 31.] Therefore, the goal of *Jones* was to set forth the due process protections that must be provided in a restitution hearing, holding:

When the issue of restitution under KRS³ 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

³ Kentucky Revised Statutes [footnote in original].

nature of the expenses for which restitution is claimed; and

- a hearing before a disinterested 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 on 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.

In this case, no indication appears in the record that the Commonwealth and defense had a prior agreement about the amount of restitution to be paid, and the Commonwealth has not argued otherwise. Further, while restitution may be established by evidence presented at trial, *Id.* at 31, the only evidence presented at trial regarding the proper amount of restitution was Myrna's testimony that she had about \$60 in her wallet. There was no evidence about the monetary value of her cell phone or Bluetooth speaker. And, the exchange between the trial court and Commonwealth, *supra*, could in no way be construed as the kind of adversarial hearing envisioned by *Jones*.

Taylor, 2019 WL 2462780, at *3-4.

Although the Commonwealth contends that Quandarious acquiesced to the imposition of restitution without a hearing, we find nothing in the record to distinguish his claim of palpable error from the analysis in the Supreme Court’s opinion in Jevontaye’s appeal. We recognize that this opinion is not binding precedent. CR⁴ 76.28(4)(c). Given the identical legal and factual issues presented, we have no basis to reach a different result.

Accordingly, we affirm Quandarious Taylor’s conviction for first-degree robbery but reverse and remand for a hearing to determine restitution.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Erin Hoffman Yang
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky

⁴ Kentucky Rules of Civil Procedure.