

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-001477-MR

DAVID LYDIAN

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT,  
HONORABLE CHARLES C. SIMMS III, JUDGE  
ACTION NO. 18-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\*

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: David Lydian appeals his criminal conviction after a jury trial in Nelson Circuit Court, arguing palpable error. We affirm.

In February 2018, Brittany Lawson's vehicle was stolen from the parking lot of her apartment complex. The morning of the theft Lawson started her

car to heat it and then headed back to her apartment building. At that time, she observed Lydian in the parking lot behaving in a belligerent manor. The next time Lawson looked outside both the vehicle and Lydian were gone. Shortly after, Lydian called the police to report he had been in an accident in the subject vehicle. When officers arrived at the scene, they observed the vehicle had run off the road, destroyed a fence, and ultimately crashed into a cluster of trees. Officers further observed Lydian sitting on the side of the road with an injured leg. At this time, Lydian admitted he had been consuming alcohol, but reported that someone else had been driving the vehicle. Following the wreck, Lydian was taken to the hospital to care for his injuries. A blood screening yielded results that Lydian was positive for cocaine and opioids and had a blood alcohol level of at least .27.

Lydian was subsequently charged, indicted and tried by a jury for criminal conduct stemming from these events.

At trial, the Commonwealth introduced testimony from several individuals. The court heard testimony from Lawson, the responding police officers, Lawson's father (who was the actual owner of the subject vehicle), and the owner of the fence. Lawson and the police officers testified to what they observed the morning the vehicle was stolen. The other two witnesses primarily testified regarding the value of the property that was destroyed. Lydian testified on his own behalf. He again denied ever driving the subject vehicle. Instead, Lydian

asserted that an acquaintance was driving the vehicle, offered him a ride, and fled the scene after the accident. Law enforcement and EMS arrived shortly thereafter.

At the close of the Commonwealth's case-in-chief, Lydian moved for directed verdict, which was denied. Of particular note, Lydian only argued that the Commonwealth did not prove beyond a reasonable doubt that he was driving the vehicle. The jury convicted Lydian as follows: (1) one count of receiving stolen property over \$500.00 in violation of KRS<sup>1</sup> 514.110, for which he was sentenced to five years in prison; (2) one count of criminal mischief in the first degree (for the damage to the vehicle) in violation of KRS 512.020, for which he was sentenced to five years in prison; (3) one count of criminal mischief in the third degree (for the damage to the fence) in violation of KRS 512.040, for which he was sentenced to ninety days in county jail; (4) one count of operating a motor vehicle under the influence, second offense, in violation of KRS 189A.010, for which he was sentenced to six months in county jail; (5) one count of operating a motor vehicle while license suspended, in violation of KRS 186.620, for which he was sentenced to ninety days in county jail; and (6) being a first-degree persistent felony offender, in violation of KRS 532.080, for which he was sentenced to twelve years in prison. All sentences were to run concurrently. Lydian thereafter filed a timely notice of appeal.

---

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

On appeal, Lydian makes two arguments. He argues: (1) that the Commonwealth failed to prove the value of the vehicle beyond a reasonable doubt; and (2) that his convictions for first-degree criminal mischief and third-degree criminal mischief violate double jeopardy principles.

At the outset, however, we must address the preservation of Lydian's arguments at the trial court level. Regarding his first argument, Lydian asserts he moved for a directed verdict, but admits he did not argue whether the Commonwealth proved the value of the vehicle beyond a reasonable doubt. CR<sup>2</sup> 50.01, which is applicable in criminal cases,<sup>3</sup> states that "[a] motion for a directed verdict *shall* state the specific grounds therefor." (Emphasis added.) For this reason, this argument is not properly preserved in the trial court. Regarding Lydian's second argument, he admits it was not properly preserved. Therefore, Lydian asks this Court to review these issues under the palpable error standard of review pursuant to RCr 10.26.<sup>4</sup>

Whether to undertake palpable error review is within the sole discretion of the appellate court. *See* [RCr 10.26].

---

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

<sup>3</sup> Kentucky Rule of Criminal Procedure (RCr) 13.04 ("The Rules of Civil Procedure shall be applicable in criminal proceedings to the extent not superseded by or inconsistent with these Rules of Criminal Procedure.").

<sup>4</sup> RCr 10.26 states: "A palpable error which affects the substantial rights of a party may be considered . . . 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."

(“A palpable error . . . *may* be considered . . . by an appellate court on appeal[.]”) (emphasis added); *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002) (“An appellate court *may* consider an issue that was not preserved[.]”). “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).

*Brank v. Commonwealth*, 566 S.W.3d 560, 566 (Ky. App. 2018), *disc. review denied* (Ky. Feb. 7, 2019).

Turning to our analysis under a palpable error review, Lydian first argues that that Commonwealth did not prove beyond a reasonable doubt the value of the vehicle. Lydian’s conviction for receiving stolen property required the Commonwealth to prove the value of the vehicle was at least \$500. KRS 514.110. Similarly, his conviction for first-degree criminal mischief required the Commonwealth to prove the value of the vehicle was at least \$1,000. KRS 512.020. In his view, the evidence was not sufficient for a reasonable juror to conclude that the value of the vehicle met either threshold. We disagree.

The measure of loss in determining criminal liability is the fair market value of the loss, not the actual monetary cost borne by the victim. *Crain v. Commonwealth*, 257 S.W.3d 924, 926 (Ky. 2008). At trial, the Commonwealth offered testimony of Lawson and her father. Her father testified that he purchased the vehicle for \$2,500 the previous summer. Lawson and her father both testified

that immediately prior the vehicle's theft, it was in good condition. Collectively, they testified that the vehicle was not damaged, had a "newer" motor, and performed well. In a criminal case, "an owner may offer an opinion regarding the value of merchandise." *Commonwealth v. Reed*, 57 S.W.3d 269, 271 (Ky. 2001). The recent purchase price, along with testimony regarding the vehicle's recent condition, is sufficient detail for the jury to make a value determination. *Id.* Because a reasonable juror could conclude the value of the vehicle was at least \$1,000, there was simply no error, especially not error that was clear or plain under existing law.

Lydian's second argument is that his convictions for first-degree criminal mischief and third-degree criminal mischief violated his right against double jeopardy. In support of this argument, Lydian cites section thirteen of the Kentucky Constitution, and KRS 505.020(1)(a) for the proposition that a person may not be convicted of more than one offense when one offense is included in the other.<sup>5</sup> Using this authority, Lydian argues that the prosecution of both criminal

---

<sup>5</sup> The pertinent portion of KRS 505.020 reads as follows:

- (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:

- (a) One offense is included in the other, as defined in subsection (2) . . . .

. . . .

mischief charges from the same course of conduct is violative of KRS Chapter 505 and his constitutional right against double jeopardy. This argument lacks merit.

In *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996), the Kentucky Supreme Court acknowledged the *Blockburger*<sup>6</sup> analysis as to claims of double jeopardy. The *Burge* Court noted that *Blockburger* required the court to determine “whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not.” *Id.* at 811. With that analysis in mind, we now turn to the two statutes.

First-degree criminal mischief occurs when, “[a] person . . . having no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property causing pecuniary loss of \$1,000 or more.” KRS 512.020(1). Third-degree criminal mischief, on the other hand, occurs when, “[a] person . . . [h]aving no right to do so or any reasonable ground to believe that he has such right, he intentionally or wantonly defaces, destroys or damages any property[.]” KRS 512.040(1)(a). To be sure, the only difference in the two quoted statutes is the “loss of \$1,000 or

---

(2) . . . An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]

<sup>6</sup> *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

more” found in first-degree criminal mischief. Here, the operative difference is found in the facts required to prove the offenses.

Lydian was convicted of both charges because he violated two statutes, and each charge required proof of a *fact* the other did not. Lydian’s first-degree criminal mischief conviction required proof that he destroyed, or damaged, Lawson’s vehicle such that it resulted in a loss of at least \$1,000. Lydian’s third-degree criminal mischief charge required proof that he damaged the property owner’s fence. Lawson’s father and the owner of the fence testified to the damage done to the vehicle and fence, respectively. The convictions originate from Lydian’s damage to two separate pieces of property, with two separate monetary values, owned by two separate victims, one after the other. Therefore, two separate convictions for the two crimes were proper and the circuit court did not err in accepting the jury’s verdict. Therefore, this argument also fails.

In light of the foregoing, the judgment of the Nelson Circuit Court is  
AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear  
Attorney General of Kentucky

Lauren R. Massie  
Assistant Attorney General  
Frankfort, Kentucky