

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN D. YERKEY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0044

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case Nos. 2018 CR 263; 2018 CR 307

BEFORE:

Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Reversed.
Order Modified.

Atty. Robert Herron, Columbiana County Prosecutor and *Atty. Tammie M. Jones*,
Assistant Prosecuting Attorney, 105 South Market Street, Lisbon, Ohio 44432, for
Plaintiff-Appellee

Atty. Gregg A. Rossi and Atty. James N. Melfi, Rossi & Rossi Co., 26 Market Street, 8th Floor, Huntington Bank Building, P.O. Box 6045, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: September 28, 2020

WAITE, P.J.

{¶1} Appellant John D. Yerkey appeals the judgment of the Columbiana County Common Pleas Court ordering him to pay restitution to his victim, J.D., after Yerkey was convicted of two counts of violating a protective order. Based on the following, the judgment of the trial court is reversed and the sentencing order of the trial court is modified to strike the order of restitution.

Factual and Procedural History

{¶2} Appellant and J.D. had been in a tumultuous, short-term marriage. There were no children born of the marriage. J.D. filed a divorce action in October of 2017 in Mahoning County where both parties resided. While that matter was pending, J.D. obtained a civil protection order (“CPO”) against Appellant sometime in early 2018. The CPO prohibited Appellant from contacting J.D. in any manner including in person, by telephone, or by means of any electronic communication either directly or through another person. After the CPO went into effect, J.D. subsequently relocated to Columbiana County. The parties’ divorce was finalized on December 6, 2018.

{¶3} The underlying offenses in this matter are based on Appellant’s violation of this CPO on three occasions within a five-week period from June 30, 2018 to August 7, 2018 while their contested divorce was pending in Mahoning County. It should be noted

that although Appellant discusses only two CPO violations in his brief in this matter, the record reflects there are actually three instances of violation of the order.

{¶14} Appellant's first violation occurred on June 30, 2018, when he arrived at J.D.'s home while she was outside mowing her lawn. J.D. reminded Appellant of the CPO and asked Appellant to leave several times. Appellant ultimately fled when J.D. called 911. A complaint was filed in Columbiana County Municipal Court. In case number 18 CRA 876, Appellant was charged with one count of violation of a protection order. Appellant was released on \$25,000 bond with standard bond conditions again specifically prohibiting contact with the victim. After waiver of preliminary hearing on July 12, 2018, the bond was decreased to \$15,000 and additional conditions were applied, including: an order prohibiting contact with J.D. through social media; prohibition against entering the township in Columbiana County where J.D. resided; and a prohibition on the possession and use of alcohol by Appellant.

{¶15} On July 31, 2018, while the first matter was pending, Appellant violated the CPO a second time when he was spotted by J.D. driving past her home. J.D. filed a report with the Columbiana Police Department. Appellant was again charged in Columbiana County Municipal Court in case number 18 CR 1018 with one count of violation of a protection order.

{¶16} Finally, one week later, on August 7, 2018, Appellant violated the CPO a third time when he sent J.D. a friend request through social media and indicated he was sharing his location with her through the social media application, Pinterest. J.D. once again filed a police report with the Columbiana Police Department, and again Appellant

was charged in Columbiana County Municipal Court in case number 18 CRA 1060 with one count of violation of a protection order.

{¶7} While all three matters were pending, it was discovered that Appellant had been convicted twice previously of violating a protection order issued pursuant to R.C. 3113.31 for domestic violence. These convictions occurred on July 29, 2016 and on January 27, 2017, both in Mahoning County Court No. 5. Therefore, the pending matters were subject to an enhancement and all three misdemeanor cases were transferred from the municipal court to the Columbiana County Common Pleas Court.

{¶8} Appellant was charged with one count of violation of a protection order pursuant to R.C. 2919.27(A)(1), a felony of the fifth degree, in Columbiana County Common Pleas Court case number 18 CR 263 for the first incident. Appellant was also charged with two counts of violation of a protection order pursuant to R.C. 2919.27(A)(1), felonies of the fifth degree, in common pleas court case number 18 CR 307, for the second and third incidents.

{¶9} On March 25, 2019, Appellant pleaded guilty to one count of violation of a protection order in case number 18 CR 263, relative to the June 30, 2018 incident. Also on that date, Appellant pleaded guilty, in the form of an *Alford* plea, to one count of violation of a protection order in case number 18 CR 307.

{¶10} Appellant was sentenced in both cases on May 20, 2019. In case number 18 CR 263, Appellant was sentenced to “a Community Control Sanction of probation for a term of **four (4)** years. That probation shall be under **INTENSIVE** supervision[.]” (5/21/19 J.E.) In case number 18 CR 307, Appellant received the identical sentence of four years of probation, to be served concurrently with his sentence in 18 CR 263.

{¶11} A restitution hearing in both cases was held on September 27, 2019. Present were Appellant and his counsel, the assistant prosecutor on behalf of the state, and the victim, J.D., who appeared without counsel. Although not present at the hearing, counsel for J.D. had submitted documentation to the state on J.D.'s behalf as to the restitution being sought.

{¶12} At the outset of the hearing, the state presented to the court copies of the documents submitted by J.D.'s counsel outlining the restitution J.D. was seeking. The state informed the court that J.D.'s counsel was attending another hearing and had not requested a continuance in the matter to allow him to be present, although he continued to represent J.D. The state proceeded to elicit testimony from J.D. regarding restitution. J.D.'s request for compensation included attorney's fees for court appearances related to both cases, counseling bills for her therapy, and other medical bills J.D. contended were related to the incidents. The state also noted that it had met with J.D. previously, where she indicated she had lost wages as a result of court appearances relating to both matters. The state asked to approach J.D. and the following exchange occurred:

[PROSECUTOR:] [J.D.], I'm going to hand you a notebook -- a notebook paper. I have marked it for purposes of the record here today as Exhibit 1.

Do you recognize that piece of paper, that document?

[J.D.:] Yes.

[PROSECUTOR:] Do you recall that being the document that you presented to the State with regard to times that you had appeared in court and perhaps had missed work?

[J.D.:] Yes.

[PROSECUTOR:] Okay. Does it accurately reflect what you believe to have been your losses relative to missed wages in conjunction with these proceedings?

[J.D.:] Yes.

[PROSECUTOR:] Can you tell us, [J.D.], where you are employed and what your hourly rate is?

[J.D.:] Big Lots in Calcutta, and it's 29 dollars and, like, 14 cents, I believe.

[PROSECUTOR:] Your hourly rate is \$29.14?

J.D. Yes. I'm salary --

[PROSECUTOR:] Oh.

[J.D.:] -- so -- but broken down that is what it --

[PROSECUTOR:] Okay. And the dates that you have indicated that you have missed on that document there, were those full dates of work?

[J.D.:] No. I do not believe so. I think a couple of them were like half-days.

[PROSECUTOR:] Have you in any way on that document you presented totaled the total amount of loss of wages?

[J.D.:] Yes.

[PROSECUTOR:] And what was the total that you had calculated?

[J.D.:] \$1,615.

(9/27/19 Tr., pp.6-7.)

{¶13} J.D. also testified about the other restitution sought, including a discussion of the medical and counseling bills submitted to the state by her counsel. Although the record reveals the documents were marked for identification as exhibits 1 and 2, the state never submitted these documents from J.D. and her counsel to be admitted into evidence. Counsel for Appellant also questioned J.D. extensively regarding her medical bills, therapy bills, and attorney fees. Counsel for Appellant did not question J.D. about her claim for lost wages during cross-examination. The court allowed closing argument, at which time the prosecutor stated, “Your Honor, I have no follow-up comments, short of allowing and affording the victim an opportunity to make her request to the Court, which, I guess, in some fashion has been done through her counsel in written format.” (9/27/19 Tr., p. 22.) In his closing, counsel for Appellant argued that no restitution should be granted, because the medical bills, therapy bills, and attorney fees were not directly and proximately related to Appellant’s conduct. Certain of the medical and therapy bills predated the incidents in question, and counsel urged that an attorney fee award would be improper, because J.D. had elected to hire her own counsel in the matter voluntarily. Regarding J.D.’s lost wages, the following exchange occurred:

[DEFENSE COUNSEL]: With respect to her lost-wage claim. She is the complaining witness. She did appear, but it’s because – that is with respect

to the prosecution of the matter, not because of the facts serving the basis for the actual offense.

THE COURT: Well, [Defense Counsel], I believe Marcy's [sic] Law permits her to be present at every hearing --

[DEFENSE COUNSEL]: Sure. Sure.

THE COURT: --relating to these. I don't think whether she chooses to come or not is a decision that can be -- if she is present, she's present.

[DEFENSE COUNSEL]: No, I didn't mean that.

THE COURT: Okay.

[DEFENSE COUNSEL]: I just meant her claiming lost wages for being present doesn't flow from the --

THE COURT: Well, she was at a hearing on this exact case and lost wages as a result of that. I think there is an argument to be made that that can be a direct and proximate result of the case.

(9/27/19 Tr., p. 27.)

{¶14} On October 1, 2018, the trial court issued a judgment entry stating: The Court had previously received documentation from Attorney David Engler, on behalf of the victim as to restitution being requested. The Court heard testimony of the victim.

* * *

After the testimony of the victim and review of the documentation provided to the Court, the Defendant is order [sic] to pay the victim restitution in the amount of \$1,615.00, the amount of lost wages of the victim.

(10/1/18 J.E.)

{¶15} It is from that restitution order that Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED RESTITUTION UPON APPELLANT IN THE AMOUNT OF ONE THOUSAND SIX HUNDRED FIFTEEN DOLLARS (\$1,615.00) FOR CLAIMED LOST WAGES OF THE COMPLAINANT FOR VOLUNTARY COURT APPEARANCES NOT DIRECTLY AND PROXIMATELY CAUSED BY THE CRIMINAL CONDUCT.

{¶16} In his first assignment of error Appellant contends the trial court abused its discretion in awarding the victim \$1,615 in lost wages because the victim's court appearances were not directly or proximately caused by Appellant's criminal conduct.

{¶17} We review the trial court's order of restitution for abuse of discretion. *State v. Downie*, 7th Dist. Mahoning No. 07 MA 214, 2009-Ohio-4643, ¶ 30. An abuse of discretion implies more than an error of judgment; it connotes that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶18} R.C. 2929.18(A)(1) authorizes the trial court to order restitution for felonies:

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the

offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments.

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate.

{¶19} “To establish the amount of restitution within a reasonable certainty, there must be some competent, credible evidence.” *State v Carrino*, 8th Dist. Cuyahoga No. 67696, 1995 WL 277103, *1 citing *State v. Warner*, 55 Ohio St.3d 31, 52, 564 N.E.2d 18 (1990). R.C. 2929.01(L).

{¶20} The amount of restitution ordered by the trial court must be reasonably related to the loss suffered and can take the form of testimony or documentary evidence. *State v. Holt*, 8th Dist. Cuyahoga No. 95520, 2011-Ohio-1582.

[A] [t]rial court has discretion to order restitution in an appropriate case and may base the amount it orders on a recommendation of the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information,

but the amount ordered cannot be greater than the amount of economic loss suffered as a direct and proximate result of the commission of the offense.

State v. Lalain, 136 Ohio St.3d 248, 2013-Ohio-3093, paragraph one of the syllabus. The amount of restitution ordered must be supported by competent, credible evidence from which the trial court can calculate restitution to a reasonable degree of certainty. *State v. Johnson*, 8th Dist. Cuyahoga No. 106450, 2018-Ohio-3670, 119 N.E.3d 914, ¶ 55.

{¶21} In the context of restitution, however, “economic loss” is defined as: any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. “Economic loss” does not include non-economic loss or any punitive or exemplary damages.

R.C. 2929.01(L).

{¶22} Appellant’s primary argument is that under Ohio law, even after the expansion of victim’s rights following adoption of Marsy’s Law, the victim is not a party in a criminal case. Therefore, a victim is not required to be present at hearings in the matter. Appellant argues that as J.D.’s appearance at the court hearings for which she claims lost wages was completely voluntary, her lost wages were not suffered as a direct and proximate result of Appellant’s criminal conduct. Appellant relies on *State v. Roach*, 6th Dist. Lucas No. L-16-1303, 2017-Ohio-8511 in arguing that J.D. is not a party in

Appellant’s criminal case, and so any restitution cannot include lost wages for time away from work to attend court hearings in the criminal matter by a nonparty. In *Roach*, the defendant pleaded guilty to two counts of telephone harassment. At the subsequent restitution hearing the victim sought lost wages for time taken from work while attending court hearings in the matter after being subpoenaed by the state as a witness. The trial court concluded that her lost wages represented economic loss and ordered the defendant to pay \$324 in restitution. On appeal, the Sixth District reversed, concluding that the statutes restricted restitution to loss of income due to an injury suffered by a victim that occurred as a direct and proximate result of the commission of the crime, and not for court appearances related to the criminal case. *Roach*, ¶ 12. The court further reasoned that because only the state and the offender are parties in the criminal case and not the victim, a victim could not unilaterally assert a claim for restitution. *Roach*, ¶ 13.

{¶23} In its response, the state concedes the medical and counseling bills predated Appellant’s criminal offenses at issue. The state argues that the court properly limited restitution to J.D.’s lost wages. The state argues that the Sixth District’s decision in *Roach* is not binding on this Court and that the holding in *Roach* predates Marsy’s Law, which expanded the rights of crime victims and provides victims with the constitutional right to attend and be heard in the related criminal proceedings, and to restitution from offenders. Because J.D. was exercising her constitutional right to be present at hearings, she should be entitled to lost wages as restitution in the instant case.

{¶24} On February 5, 2018, the amendment to Article I. Section 10(a) of the Ohio Constitution, known as Marsy’s Law, became effective. This amendment expands the rights afforded to crime victims:

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

(1) to be treated with fairness and respect for the victim's safety, dignity and privacy;

(2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;

(3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated;

(4) to reasonable protection from the accused or any person acting on behalf of the accused;

(5) upon request, to reasonable notice of any release or escape of the accused;

(6) except as authorized by section 10 of Article I of this constitution, to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;

(7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;

(8) to proceedings free from unreasonable delay and a prompt conclusion of the case;

(9) upon request, to confer with the attorney for the government; and

(10) to be informed, in writing, of all rights enumerated in this section.

{¶25} In addressing this issue, we recognize it is long-settled that a crime victim is not a party in the offender’s criminal proceedings. *State v. Williams*, 7th Dist. Mahoning No. 09 MA 11, 2010-Ohio-3279. It is also clear that one of the basic constitutional tenets under Marsy’s Law is that a crime victim is entitled to be present and to be heard at court hearings, and is entitled to “full and timely restitution” from the offender for the criminal act. Appellant argues that the constitutional right to restitution for victims described in Marsy’s Law is not implicated where the restitution is for lost wages for attending court hearings because, as a nonparty, court appearance is not mandatory. She has the right to be present for hearings but no duty to be present. The state argues that the constitutional right to be present and heard during all relevant portions of the criminal hearings provides the foundation for restitution for lost wages due to those court appearances by the victim.

{¶26} The state is correct that the holding by the Sixth District is not binding on this Court and that it predates the constitutional rights guaranteed in Marsy’s Law. However, the rights provided under Marsy’s Law do not exist in a vacuum and still must be construed within the valid and unchanged statutory framework for restitution set forth by the General Assembly. We look to the plain language of the statute and apply it as written if the meaning is unambiguous. *Beckett v. Warren*, 124 Ohio St.3d 526, 921

N.E.2d 624, 2010-Ohio-4, ¶ 15. R.C. 2929.32, governing restitution, and R.C. 2929.01(L), defining economic loss, both state that in order to qualify for restitution, any economic loss suffered must have occurred “as a direct and proximate result of the commission of an offense”. The word “commission” is used in the definition, not the word “prosecution.” Losses from the commission of a crime, such as property damage or even lost wages incurred because of physical injury suffered by the victim, clearly fit the definition of economic loss for purposes of restitution. However, where the losses incurred arise solely from the prosecution of the offense, and not from its commission, these losses do not meet the definition of economic loss pursuant to statute. Had the General Assembly intended for crime victims to be remunerated for economic loss suffered as a direct and proximate result of the prosecution of an offense, the statutory language could and should have been amended accordingly. It was not, and in reviewing the unambiguous statutory language, lost wages due to attendance at court proceedings furthering prosecution of the offense are not incurred as a direct and proximate result of the commission of the offense. Thus, the trial court abused its discretion in issuing a restitution order for losses sustained from the prosecution of this offense. The victim was not entitled to this restitution and the trial court erred in granting lost wages to the victim in the restitution order.

{¶27} Appellant’s first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED
RESTITUTION UPON APPELLANT IN THE AMOUNT OF ONE
THOUSAND SIX HUNDRED FIFTEEN DOLLARS (\$1,615.00) FOR

CLAIMED LOST WAGES OF COMPLAINANT BECAUSE OF
INADEQUATE AND INSUFFICIENT PROOF OF DAMAGES.

{¶28} In his second assignment of error Appellant argues the state failed to present sufficient proof of her damages. Appellant argues that the state failed to introduce a written calculation of J.D.'s lost wages into evidence and J.D.'s testimony was insufficient to establish her economic loss.

{¶29} Based on our decision in assignment number one that the trial court erred in awarding wages lost as a result of attendance at court proceedings in this matter, Appellant's second assignment is moot.

{¶30} Based on the foregoing, the trial court erred in ordering Appellant to pay restitution to the victim in this matter, as the award was sought for wages lost in prosecution of the crime, and not as a direct and proximate result of its commission. The judgment of the trial court is reversed and the order is modified to strike the order of restitution from the sentencing order.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his second assignment is moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed and the sentencing order is modified to strike the restitution order. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.