

[Cite as *State v. Mobley-Melbar*, 2010-Ohio-3177.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92314

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CAROL MOBLEY-MELBAR

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED;
VACATED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503089

BEFORE: Celebrezze, J., Rocco, P.J., and Sweeney, J.

RELEASED: July 8, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Carol Mobley-Melbar (“appellant”), appeals her conviction for aggravated assault. After reviewing the record and pertinent case law, we affirm appellant’s conviction, but vacate the restitution order and remand for further proceedings regarding restitution and sentencing.

{¶ 2} Appellant’s conviction resulted from an incident that occurred on September 28, 2007 at Bum’s Saloon in Cleveland, Ohio. Appellant and Christina Workman (“the victim”) were patrons at the bar, and each presents a slightly different version of the events.

{¶ 3} The victim testified that she arrived at Bum’s Saloon and had two beers before speaking with appellant. She approached appellant to say hello when appellant, who was apparently upset about rumors the victim was allegedly spreading, told her to stay away. The victim testified that she turned to walk away from appellant when appellant hit her in the head with the bar glass she was holding. The glass shattered and cut open the victim’s face, causing extensive injuries to her eye. The victim and her cousin, George McClure, who was at the bar with her that night, testified that the victim was not drunk when the incident occurred and, according to the victim,

she did nothing to provoke appellant's attack. McClure admitted, however, that he did not see what happened between appellant and the victim.

{¶ 4} Heather Williams ("Williams") testified on behalf of appellant. According to Williams, when she first arrived at the bar, she saw the victim riding "piggy-back" on another patron and being very loud. Her first reaction was to assume the victim was intoxicated. She later saw the victim approach appellant. Although she could not hear what the victim was saying, she heard appellant tell the victim to walk away numerous times. Williams testified that the victim was in appellant's face, swearing and calling her names. According to Williams, the victim never turned away from appellant. Appellant reached straight up in a defensive motion and hit the victim with the glass she was holding. Shortly after the altercation, appellant left with her husband and another friend because the victim's friends were threatening her.

{¶ 5} Appellant's version of events is substantially similar to that offered by Williams. Appellant, who was three months pregnant at the time of the incident, was holding a glass of water. When the victim approached her, she asked the victim to leave her alone because she believed the victim was spreading rumors about her. According to appellant, the victim was raising her hand and, fearing that the victim was going to hit her and hurt her or her unborn child, appellant instinctively reached up and hit the victim.

Appellant testified that she did not know how the glass in her hand broke, nor did she realize that the glass had broken until someone informed her that she was bleeding.

{¶ 6} Appellant was indicted in a two-count indictment on one count of felonious assault in violation of R.C. 2903.11(A)(1) and one count of felonious assault in violation of R.C. 2903.11(A)(2), both second-degree felonies. A jury found her guilty of the inferior offense of aggravated assault in violation of R.C. 2903.12(A)(1), but not guilty of all remaining counts. Appellant was sentenced to six months in the county jail and five years of community control sanctions. She was also ordered to pay \$81,123 in restitution to the victim. This appeal followed.

{¶ 7} Appellant presents five assignments of error for our review. For ease of discussion, they will be addressed out of order.

{¶ 8} I. “Appellant’s conviction for aggravated assault is not supported by sufficient evidence where the state failed to demonstrate that the appellant acted knowingly.”

{¶ 9} II. “The jurors’ verdict is against the manifest weight of the evidence.”

{¶ 10} III. “The trial court erred in failing to instruct the jury on the offense of negligent assault.”

{¶ 11} IV. “The trial court erred when it calculated the amount of restitution due.”

{¶ 12} V. “The trial court erred in providing the jury with additional factual evidence during deliberations that was not presented during the trial.”

Law and Analysis

Sufficiency and Manifest Weight

{¶ 13} Appellant argues that the evidence presented at trial was insufficient to show that she acted knowingly as required for a conviction of aggravated assault. She also relies on this argument to claim that her conviction is against the manifest weight of the evidence. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 486, 124 N.E.2d 148. Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236.

{¶ 14} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to

the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 15} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. *Id.* at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated that "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.* at 720.

{¶ 16} Appellant was convicted of aggravated assault in violation of R.C. 2903.12(A)(1), which states that "[n]o person, while under the influence of sudden

passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

{¶ 17} “(1) Cause serious physical harm to another or to another’s unborn[.]”

{¶ 18} Appellant argues there was insufficient evidence to prove that she acted knowingly. “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22(B). According to appellant, the evidence presented showed that she acted, at most, negligently.

{¶ 19} The testimony at trial showed that appellant hit the victim with a bar glass. Appellant did so with such force that the glass broke and the victim suffered serious injuries, including the loss of vision in her right eye. “It is not necessary that the accused be in a position to foresee the precise consequence of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct.” *State v. Losey* (1985), 23 Ohio App.3d 93, 96, 491 N.E.2d 379.

{¶ 20} The jury relied on the testimony presented in finding appellant guilty of aggravated assault. In her appellate brief, appellant makes much of the fact that she feared for her personal safety when she hit the victim with the glass. This argument is inconsequential to whether appellant acted knowingly. The jury

could infer from the testimony at trial that appellant was aware that hitting someone with a heavy bar glass could result in serious injury to that person. See, also, *State v. McClelland*, Franklin App. No. 08AP-205, 2008-Ohio-6305, ¶20. Viewing the evidence presented in a light most favorable to the prosecution, we cannot find that appellant's aggravated assault conviction was based on insufficient evidence.

{¶ 21} Appellant relies on the victim's admitted cocaine use to argue that she is unreliable and should not have been believed by the jury. She also relies on the fact that the victim's story differs from the version of events presented by appellant and Williams. The victim willingly admitted her cocaine addiction before the jury and was rigorously cross-examined. She did not contradict herself in her testimony in any significant fashion, and whether to believe her version of events was left entirely within the purview of the jury.

{¶ 22} The evidence presented unequivocally showed that appellant and the victim engaged in a verbal altercation that resulted in appellant hitting the victim in the side of the head with a bar glass, causing extensive injuries. Considering this evidence, including any inconsistencies, we cannot find that a manifest miscarriage of justice occurred in this case. Appellant's conviction is not against the manifest weight of the evidence. Appellant's first and second assignments of error are overruled.

Negligent Assault

{¶ 23} In her third assignment of error, appellant argues that the trial court erred in refusing to instruct the jury on the lesser included offense of negligent assault. We disagree.

{¶ 24} “A jury instruction on a lesser included offense ‘is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.’ The evidence must be reviewed in the light most favorable to the appellant in this situation.” (Internal citations omitted.) *State v. Dunlap*, Cuyahoga App. No. 84440, 2004-Ohio-6652, ¶35.

{¶ 25} It is undisputed that negligent assault is a lesser included offense of felonious assault. *Id.* We are left only to determine whether a negligent assault instruction was warranted given the evidence presented. The crux of appellant’s argument is that her actions were merely instinctive, and she acted negligently rather than knowingly.

{¶ 26} R.C. 2903.14(A), Ohio’s negligent assault provision, provides that “[n]o person shall negligently, by means of a deadly weapon or dangerous ordnance * * * cause physical harm to another or to another’s unborn.” “A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct *may* cause a certain result or may be of a certain nature.” (Emphasis added.) R.C. 2901.22(D). As stated above,

a person acts knowingly when she is aware that her conduct will *probably* cause a certain result. R.C. 2901.22(B).

{¶ 27} The testimony at trial showed that appellant intentionally reached up to hit the victim with a bar glass. An individual who undertakes such an action does so knowing that hitting someone with a heavy glass will probably cause a certain result. The evidence presented does not support appellant's contention that she should have been acquitted of aggravated assault and found guilty of the lesser included offense of negligent assault. As such, her argument lacks merit.

{¶ 28} Additionally, appellant's self-defense argument negates her claim that the jury should have been instructed on the lesser included offense of negligent assault. See *State v. Coleman*, Cuyahoga App. No. 80595, 2002-Ohio-4421, ¶25 ("because the claim of self-defense is inconsistent with an unintentional shooting, an instruction on negligent assault where the defendant claims self-defense would be unwarranted.").¹

{¶ 29} We also note that any error in failing to instruct the jury on the lesser included offense of negligent assault would be harmless at best. As previously stated, negligent assault requires the offender to use a deadly weapon in causing injury to the victim. R.C. 2903.14(A). The jury in this case found appellant not guilty of all charges that required the use of a deadly weapon. Namely, the jury

¹ We recognize that appellant's trial counsel hesitantly requested the self-defense instruction. We find this inconsequential to our analysis, however, because appellant argued throughout trial that her actions were merely in response to her fear that the victim was going to harm her or her unborn baby.

found appellant not guilty of felonious assault in violation of R.C. 2903.11(A)(2) and not guilty of aggravated assault in violation of R.C. 2903.12(A)(2), both of which require the use of a deadly weapon in order to find the defendant guilty.

{¶ 30} Since the jury determined that the bar glass used in this case was not a deadly weapon, appellant's argument that the jury would have found her guilty of negligent assault, which also requires a deadly weapon, lacks merit. Appellant's third assignment of error is overruled.

Additional Factual Evidence Presented to the Jury

{¶ 31} In her fifth assignment of error, appellant argues that the trial court improperly provided the jury with factual evidence in addition to that presented at trial when it provided the definition of a "ruptured eye globe." We disagree.

{¶ 32} During its deliberations, the jury posed two questions to the court. First, they asked for additional information on the phrase "knowingly," and the court advised them to refer to the definition provided in the jury charge. The jury also asked the court to provide a definition of the term "ruptured eye globe." At that point, some discussion was held on the record with regard to whether the phrase "ruptured eye globe" was used during trial. Over defense counsel's objection, the court gave the jury the following definition: "'Eye globe' refers to the globe of the eye, the spherical body of the round solid eye. The meaning of the term 'rupture' is obvious; that is a tear to the eyeball."

{¶ 33} A review of the record reveals that the phrase "ruptured eye globe" was used at least two times during the trial. The phrase was first used in the

state's opening statement when the prosecutor said, "I can tell you that she had a ruptured right globe[.]" The phrase was used again during the testimony of Williams, when she was asked to explain to the jury what it means when someone has a ruptured right globe. Finally, the phrase was contained in the victim's medical records, which were provided to the jury during its deliberations.

{¶ 34} We need not determine whether the trial court improperly provided the jury with a definition of the phrase "ruptured eye globe" because appellant conceded that the victim's injuries were serious in nature, and any error in providing such a definition would have been harmless. In his opening statement, appellant's counsel said "there's going to be no dispute that [the victim] was hurt and the injury was serious, so don't even really waste your time on that. I'm conceding that aspect, that she was hurt and hurt badly at Bum's Saloon." In his closing statement, counsel also stated: "This is a case where you have an individual that received serious physical harm. I'm not disputing that. That element in here, I'm not disputing that. So when the prosecutors, after I'm done, want to get up and talk about the serious physical harm, remember, A, I'm saying they've already proved it, there's no need to go into it further."

{¶ 35} Even if appellant had not conceded the issue of the victim's serious physical harm, ample evidence existed to find that the victim suffered serious physical harm at the hands of appellant. The victim's medical records were provided to the jury during deliberations and contained information related to the multiple surgical procedures the victim underwent as a result of the injuries she

sustained at Bum's Saloon on the night in question. The victim herself testified about her past medical treatment, how she can no longer see out of her right eye, how she is physically deformed as a result of the incident, and how she will have to undergo more medical treatment in the future in an attempt to restore her vision. Based on this evidence, the jury could easily have determined that the victim suffered serious physical harm without being provided a definition of a "ruptured eye globe." Appellant's fifth assignment of error is overruled.

Restitution

{¶ 36} In her fourth assignment of error, appellant argues that the trial court erred in calculating the amount of restitution she is required to pay the victim. Appellant's argument in this respect is threefold: 1) the trial court failed to conduct a meaningful hearing on restitution; 2) the trial court relied solely on a letter from the victim's civil attorney in determining what amount of restitution appellant should be required to pay; and 3) the trial court failed to consider how much of the victim's medical expenses were paid by her insurance carrier. In contrast, the state argues that appellant never requested a hearing on restitution and did not object at trial to the lower court's decision with regard to how much restitution appellant should be required to pay.

{¶ 37} Although a restitution award is ordinarily reviewed using an abuse of discretion standard, appellant failed to object below with regard to the restitution determination, and thus she waived all but plain error. *State v. Myrick*, Cuyahoga App. No. 91492, 2009-Ohio-2030, ¶30.

{¶ 38} R.C. 2929.18 governs financial sanctions and the procedures that must be followed in determining the appropriate amount of restitution. This statute does not, however, require a hearing on restitution in every case; it specifically states that “the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.” R.C. 2929.18(A)(1). An evidentiary hearing may be required, however, if there is not competent, credible evidence on the record to show the appropriate amount of restitution. *State v. Carrino* (May 11, 1995), Cuyahoga App. No. 67696, citing *State v. Wohlgemuth* (1990), 66 Ohio App.3d 195, 200, 583 N.E.2d 1076.

{¶ 39} In the case sub judice, appellant did not request an evidentiary hearing, nor did she dispute the amount of restitution. In fact, neither appellant nor her attorney made any comment or objection when the trial judge was determining the amount of restitution due.

{¶ 40} We are concerned, however, with appellant’s argument that the trial court awarded the victim \$81,123 based on her medical bills without considering any insurance payments the victim had received. The transcript reveals that the victim presented a “packet” prepared by her civil attorney that contained her medical bills from September 2007 through mid-October 2007. When presented with this packet, the trial court stated, “\$81,123 is the records from September through mid-October ‘07, medical bills, mainly hospital bills.” The trial judge made no indication that he considered, or that the packet contained, information

related to the amount of the victim's medical expenses that were paid by her insurance carrier.

{¶ 41} R.C. 2929.18(A)(1) unequivocally states that restitution is to be paid “in an amount based on the victim's economic loss.” Since the victim's economic loss would be her total medical expenses less any amount paid by her insurance carrier, awarding restitution without considering any insurance payments was plain error. See, also, *State v. Colon*, 185 Ohio App.3d 671, 2010-Ohio-492, 925 N.E.2d 212, ¶7 (“It is well settled that restitution may not exceed a crime victim's economic loss and, as a result, must be reduced by any insurance payment received.”).

{¶ 42} Because the trial court failed to consider any insurance payments made with regard to the victim's total medical bills, this case must be remanded for a hearing on restitution. Although the trial court must consider the insurance payments made with regard to the victim's medical bills, R.C. 2929.18(A)(1) also requires the court to consider any recovery the victim received in the civil action she filed against appellant, and R.C. 2929.19(B)(6) requires the court to consider appellant's financial ability to pay restitution.² We sustain appellant's fourth

²There is some evidence that the trial court may have considered appellant's ability to pay at her original sentencing hearing. The court is not required to hold a separate hearing in order to determine the offender's ability to pay restitution, nor does it have to make a specific finding on the record in this regard. *State v. Morris*, Cuyahoga App. No. 92080, 2009-Ohio-4711, ¶13; *State v. Lewis*, Cuyahoga App. No. 90413, 2008-Ohio-4101, ¶12. A trial court complies with this requirement when it considers a presentence investigation report that contains the offender's financial information. *Lewis*, at ¶12, citing *State v. Smith*, Ross App. No.

assignment of error. The order of restitution is vacated, and this case is remand to the trial court for a hearing on restitution in conformity with R.C. 2929.18 and R.C. 2929.19(B)(6).

Other Sentencing Issues

{¶ 43} A thorough review of the record in this case reveals other problems with appellant's sentencing hearing. Because appellant did not raise these issues below or on appeal, she waived all but plain error.

{¶ 44} R.C. 2929.19(B)(5) sets forth the procedural requirements to be followed when the trial court is imposing a term of community control sanctions. Pursuant to that statute, "[t]he court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a

06CA2893, 2007-Ohio-1884, ¶42. Although the trial court did not indicate in its sentencing entry that it had considered appellant's ability to pay restitution, nor did it make such an explicit statement when determining the amount of restitution to be paid, the judge did make the following statements during the sentencing hearing: "Her employment has been the last four years as a business owner of Bass Motors Used Car Lot on Broadway apparently. She has normal household debt, credit card. And assets of the home and miscellaneous assets for the business. Her children receive medical benefits from the Cuyahoga County Headstart Program." In either event, the trial court is required to consider appellant's ability to pay restitution when determining the proper amount of restitution to be paid.

sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.”

{¶ 45} At the sentencing hearing, the trial judge made no attempt to inform appellant what repercussions would follow a violation of her community control sanctions. The court initially imposed a one-year sentence at Marysville Correctional Institution, but suspended that sentence and imposed a 6-month term of incarceration in the county jail with appellant being enrolled in the work-release program. The court finally sentenced appellant to five years of community control sanctions. The court did address what sanctions would be imposed if appellant violated community control in its sentencing entry, which provided that “[v]iolation of the terms and conditions may result in more restrictive sanctions, or a prison term of 1 year(s) as approved by law.”

{¶ 46} In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, ¶15, the Ohio Supreme Court held that a trial court must comply with R.C. 2929.19(B)(5) at the sentencing hearing and a court’s sentencing entry is insufficient to impart the requisite notice. The *Brooks* Court specifically stated: “we hold that, pursuant to R.C. 2929.19(B)(5), a trial court sentencing an offender to a community control sanction is required to deliver the statutorily detailed notifications at the sentencing hearing.” The Court went on to say that “notification given in a court’s journal entry issued after sentencing does not comply with R.C. 2929.19(B)(5).” *Id.* at ¶18.

{¶ 47} The trial court failed to inform appellant at sentencing of the penalties she could face if she violated the terms of community control. Based on the Ohio Supreme Court's holding in *Brooks*, this was plain error. As such, we remand this case for resentencing in compliance with R.C. 2929.19(B)(5).

Conclusion

{¶ 48} Because ample evidence existed to find that appellant hit the victim with a heavy bar glass knowing that it would probably cause serious injury, her conviction for aggravated assault was not based on insufficient evidence nor was it against the manifest weight of the evidence. The trial court did not err in refusing to give the jury an instruction on negligent assault since the evidence did not support such a charge. The court did, however, err in failing to consider any payments made by the victim's insurance carrier when determining the restitution amount. The court also erred in failing to inform appellant at sentencing of the repercussions that would follow a community control violation.

{¶ 49} Conviction affirmed; cause vacated in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR