

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 109270
 v. :
 :
 ROBERT FITZ, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 29, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-639547-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Katherine E. Mullin, Assistant Prosecuting Attorney, *for appellee*.

Waldheger Coyne L.L.P., and Brian A. Cook, *for appellant*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Defendant-appellant Robert Fitz appeals the judgment of the Cuyahoga County Court of Common Pleas ordering him to pay \$965,235.28 in

restitution after he pled guilty to committing workers' compensation fraud in violation of R.C. 2913.48(A)(7). We affirm.

Background

{¶ 2} Fitz was initially indicted for three counts of workers' compensation fraud with each count pertaining to a portion of a more than two-year period. In exchange for his guilty plea to one count, the state agreed that the remaining two counts would be dismissed. As part of his plea Fitz agreed that he would pay restitution in an amount to be later determined.

{¶ 3} At sentencing, present with the prosecutor was a special investigator from the Ohio Bureau of Workers' Compensation. The following exchange occurred:

The Court: So what's the total restitution on this?

Prosecutor: The total restitution he has with the Attorney General's Office is at \$961,955.59.

The Court: And 59 cents. Okay.

Special Investigator: It's 965,235.

Prosecutor: I'm sorry. 965,235.

* * *

Prosecutor: 965,235.28.

The Court: 28 cents. Okay.

The prosecutor explained, "That's just relating to the — so that is fees, fines, what he owes, and the money that the bureau has paid out to his workers that claimed Worker's Comp [sic] in the time he was not in compliance with his insurance.

{¶ 4} The court ordered \$965,235.28 in restitution. Fitz did not object.

Assignments of Error

{¶ 5} Fitz asserts four assignments of error:

[1] The trial court abused its discretion when it ordered Appellant Fitz (“Fitz”) to make restitution in the amount of \$965,235.28.

[2] The trial court abused its discretion by ordering an amount of restitution greater than the damages caused by the offense for which Fitz was convicted.

[3] The trial court abused its discretion and violated Fitz’s right to due process by not conducting a hearing to determine the amount of restitution.

[4] The trial court abused its discretion by ordering restitution that was not supported by competent credible evidence.

Law and Analysis

{¶ 6} As stated, Fitz did not object to the restitution order at the sentencing hearing. In light of this failure to object, our review is not for abuse of discretion, but rather is limited to plain error. *State v. Roberts*, 8th Dist. Cuyahoga No. 99755, 2014-Ohio-115, ¶ 5; *see also* Crim.R. 52(B) (“Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”). A plain error is “an ‘obvious’ defect in the trial proceedings.” *State v. Kirkland*, 160 Ohio St.3d 389, 2020-Ohio-4079, 157 N.E.3d 716, ¶ 72, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240 (2002).

{¶ 7} To establish plain error, a defendant must show “that an error occurred, that it was plain, and that it affected his substantial rights.” *Kirkland* at ¶ 71. In so doing, the defendant “bears the burden of proof to demonstrate plain error on the record.” *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38

N.E.3d 860, ¶ 22, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16.

{¶ 8} In his appellate brief, Fitz has failed to claim, let alone demonstrate, the existence of plain error and, as such, has not met his burden.¹ *State v. Sims*, 10th Dist. Franklin No. 14AP-1025, 2016-Ohio-4763, ¶ 11; *see also State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 25, citing *Quarterman* at ¶ 17-20 (“appellate court need not consider plain error where appellant fails to timely raise plain-error claim”). “An appellate court may disregard an assignment of error pursuant to App.R. 12(A)(2) if an appellant fails to cite to any legal authority in support of an argument as required by App.R. 16(A)(7).” *In re N.P.*, 8th Dist. Cuyahoga Nos. 97846, 97847, 97848, 97849, 97850, 97851, 97852, 97853, 97854 and 97855, 2012-Ohio-4298, ¶ 43, citing *State v. Martin*, 12th Dist. Warren No. CA99-01-003, 1999 Ohio App. LEXIS 3266 (July 19, 1999). “We are not obligated to search the record or formulate legal arguments on behalf of the parties, because ‘appellate courts do not sit as self-directed boards of legal inquiry and research, but preside essentially as arbiters of legal questions presented and argued by the parties before them.’” *Quarterman* at ¶ 19, quoting *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 78 (O’Donnell, J., concurring in part and dissenting in part).

¹ We note that in his reply brief, Fitz for the first time claimed that “[t]he trial court committed plain error when it ordered restitution without hearing evidence as to the amount of restitution owed to the Ohio Bureau of Workers’ Compensation.” *But see Quarterman* at ¶ 18 (“Appellate courts generally will not consider a new issue presented for the first time in a reply brief.”).

{¶ 9} Based on this procedural deficiency, we overrule Fitz’s assignments of error.

{¶ 10} Nevertheless, we observe that Fitz’s arguments are otherwise meritless. Although Fitz raises four assignments of error, his arguments pertain to two issues: (1) the amount of restitution ordered and (2) the procedure establishing the amount of restitution.

Amount of Restitution

{¶ 11} Fitz argues that R.C. 2929.18(A)(1) limits the amount of restitution that the trial court could order to “the premiums owed on Count 1 of the indictment,” the count to which he pleaded guilty.

{¶ 12} A sentencing court has discretion to order a defendant to pay restitution so long as it does not “exceed the amount of economic loss suffered by the victim as a direct and proximate result of the commission of the offense.” R.C. 2929.18(A)(1); *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, 994 N.E.2d 423, ¶ 3. The Supreme Court has recognized that “the amount of restitution is not correlated to the degree of the theft offense.” *Lalain* at ¶ 24. Instead, R.C. 2929.18(A)(1) permits the court to order restitution for the “amount of economic loss suffered by the victim as a direct and proximate result of the commission of the offense.” *Id.* at ¶ 23.

{¶ 13} Accordingly, the trial court could permissibly order restitution in an amount greater than the dollar amount of Fitz’s fraud so long as the restitution order did not exceed the economic loss suffered by the victim as a direct and proximate

result of that fraud. Nevertheless, Fitz fails to identify an error in this amount and we decline to infer any in that absence.

{¶ 14} Fitz also challenges the amount of restitution by claiming that a court may generally not order restitution for damages resulting from crimes for which a defendant was not convicted and that it was therefore improper for the restitution order to include economic losses pertaining to the two dismissed counts.

{¶ 15} This court has found that “restitution for damages relating to dismissed charges where the restitution is part of a defendant’s negotiated plea agreement is permissible.” *See, e.g., State v. Welch*, 8th Dist. Cuyahoga No. 105158, 2017-Ohio-7887, ¶ 29, citing *State v. Strickland*, 10th Dist. Franklin No. 08AP-164, 2008-Ohio-5968, ¶ 12.

{¶ 16} Fitz does not claim or show that restitution was not part of his negotiated plea agreement. To the contrary, the transcript reflects that restitution was discussed as being an explicit component of his plea agreement.

Procedure Establishing the Amount of Restitution

{¶ 17} Fitz argues that the trial court erred by ordering restitution without first conducting a hearing.

{¶ 18} R.C. 2929.18(A)(1) requires the trial court to hold a hearing if “the offender, victim, or survivor disputes the amount.” However, absent objection, the court is not required to hold a hearing. *State v. Keslar*, 8th Dist. Cuyahoga No. 107088, 2019-Ohio-540, ¶ 20. Because there was no objection by Fitz or anybody else, the court was not obligated to conduct a hearing.

{¶ 19} Fitz also claims that the restitution amount is not supported by competent, credible evidence.

{¶ 20} In determining the amount of restitution to order, R.C. 2929.18(A)(1) permits the court to consider sources including “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.” *Lalain* at ¶ 3. That amount must also be supported by “competent, credible evidence from which the court can discern the amount of restitution to a reasonable degree of certainty.” *State v. Miller*, 2017-Ohio-961, 86 N.E.3d 695, ¶ 10 (8th Dist.), quoting *State v. Roberts*, 8th Dist. Cuyahoga No. 99755, 2014-Ohio-115, ¶ 8.

{¶ 21} As stated, before the trial court imposed the restitution order, the special investigator confirmed that \$965,235.28 was the economic loss involved in the case. Fitz did not dispute this amount or challenge the special investigator’s calculation of it. Moreover, Fitz did not dispute that this amount was the direct and proximate result of his crime. Accordingly, the court was within its discretion to order this amount of restitution.

{¶ 22} Fitz has articulated no basis by which we can conclude that the special investigator’s recitation of the amount of economic loss suffered is not competent, credible evidence and that from it, the court could reasonably determine restitution to a reasonable degree of certainty. *See State v. Wilson*, 8th Dist. Cuyahoga No. 102645, 2015-Ohio-5143, ¶ 17, quoting *State v. Jones*, 10th Dist. Franklin No. 15AP-

45, 2015-Ohio-3983, ¶ 14 (“A victim’s testimony alone is sufficient to establish economic loss for a restitution order.”).

{¶ 23} Judgment affirmed.

It is ordered that appellee recover from appellant 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 out this judgment into execution. The defendant’s conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

EILEEN A. GALLAGHER, JUDGE

MARY J. BOYLE, A.J., and
EILEEN T. GALLAGHER, J., CONCUR