

[Cite as *State v. Sizemore*, 2016-Ohio-1529.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
	:	Case No. 15CA18
	:	
MATTHEW T. SIZEMORE	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2014 CR 625 D
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JUDGMENT:	REVERSED & REMANDED
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DATE OF JUDGMENT ENTRY:	April 7, 2016
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APPEARANCES:	
For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE	CASSANDRA J. M. MAYER
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Delaney, J.

{¶1} Appellant Matthew T. Sizemore appeals from the February 11, 2015 Sentencing Entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The appellate record of this case consists of the filings contained in the Common Pleas court file and a transcript of the jury verdict and sentencing only. The following facts are thus adduced from the limited appellate record.

{¶3} A police report indicates that on or around September 7, 2014, Jessica Besenti and Brionna Townsend met appellant, described as a friend, at the Red Fox Tavern in Mansfield. The three returned to appellant's residence where appellant "became belligerent and was making overt sexual advances" to both Besenti and Townsend. Besenti told appellant to "knock it off" and she and Townsend decided to leave.

{¶4} The Magistrate's Decision on Bond filed October 2, 2014 also notes in its Findings of Fact that during this interlude, appellant allegedly grabbed the breasts of a third woman and put his hand down her pants.

{¶5} The women left and were outside the residence when appellant confronted them with a "Wolverine claw," described as "3 sharp metal knives that attach to your hand." Besenti argued with appellant; appellant made another sexual comment and Besenti slapped his face. Appellant then swung the claw at Besenti's head and she ducked, but appellant struck at her again, stabbing her in the ribs under her left armpit. Besenti began bleeding heavily and collapsed into a vehicle, unconscious.

{¶6} Townsend drove Besenti to MedCentral hospital where they met police and provided taped statements.

{¶7} Police found appellant at his residence. He admitted being at the Red Fox Tavern but denied contact with Besenti and Townsend. Appellant was placed under arrest. The report further indicates the “metal wolverine claw” was located inside the residence, collected, and submitted to the crime lab. Two “plastic wolverine claws” were also collected and submitted to the crime lab.

{¶8} Appellant was charged by indictment with one count of felonious assault [serious physical harm] pursuant to R.C. 2903.11(A)(1), a felony of the second degree [Count I]; one count of felonious assault [deadly weapon or dangerous ordnance] pursuant to R.C. 2903.11(A)(2), a felony of the second degree [Count II]; and one count of gross sexual imposition pursuant to R.C. 2907.05(A)(1), a felony of the fourth degree.

{¶9} Appellant entered pleas of not guilty and the case proceeded to trial by jury. The Jury Verdict of February 11, 2015 indicates appellant was found not guilty upon Counts I and III and guilty of the lesser-included offense of negligent assault, a third degree misdemeanor, in Count II.

{¶10} The transcript of the verdict and sentencing hearing is not dated although appellant’s “Precipe for Transcript of the Proceedings from the Court Reporter” indicates the “oral hearing regarding the sentencing” took place on February 11, 2015, the same day the jury returned its verdict.

{¶11} On the record, the prosecutor noted the victims were not present for sentencing because they were not able to appear on short notice.

{¶12} During sentencing, the following conversation occurred after the trial court expressed its bewilderment at appellant's actions in attacking the victim with the claw:

[TRIAL COURT]: * * * *.

I am sentencing you, as I believe I am required in this case, to sixty (60) days in jail—you get credit for any time you have already served—a \$500 fine, and there is restitution for the victim's medical expenses and for loss of income from work.

And I would like to have those numbers before the week is out.

[PROSECUTOR]: Yes, Your Honor.

[TRIAL COURT]: I will not file the entry until I get that number.

MS. PITZER:¹ Your Honor, just to let you know, a medical card did cover all of her medical expenses; and she was reimbursed by the Victims of Crimes, compensation for her lost wages; but I can get that number for you.

[TRIAL COURT]: I think he has to reimburse Victims of Crimes—

MS. PITZER: That is correct.

[TRIAL COURT]: So you will get me that number.

MS. PITZER: I sure will, Your Honor. But there are no medical expenses. They were covered.

¹ "Ms. Pitzer" is not identified in the transcript but is identified as a victim advocate by appellant in his brief.

[TRIAL COURT]: All right. Thank you.

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{¶13} The Sentencing Entry dated February 11, 2015 indicates appellant is fined \$500 and shall pay restitution “for the victims of crime fund.” Appellant was also ordered to turn over the claws to be destroyed and to complete a jail term of 60 days.

{¶14} On February 13, 2015, a “Richland County Common Pleas Court Statement of Fact Restitution” was filed, stating “[r]ecords of the Richland County Prosecutor’s Office and Victim Impact Statement reveal defendant owes restitution to the following: Jessica Besenti, \$800.00.” Further, restitution must be paid before appellant will be terminated from “diversion;” failure to pay restitution may result in revocation of “diversion;” and the court collects a surcharge on all restitution amounts for collection and processing of payments.

{¶15} The document is signed by the trial court but the defendant’s signature line is blank.

{¶16} Appellant now appeals from the trial court’s February 11 Sentencing Entry and the February 13 “Richland County Common Pleas Court Statement of Fact Restitution.

{¶17} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶18} “I. THE TRIAL COURT ERRED WHEN IT IMPROPERLY ORDERED RESTITUTION[;] A) THE TRIAL COURT’S SENTENCING ENTRY FAILED TO SET FORTH THE AMOUNT OF RESTITUTION ORDERED TO VICTIMS OF CRIME AND NO AMOUNT WAS DETERMINED AT A HEARING PRIOR TO DEFENDANT COMPLETING HIS INCARCERATION[;] B) THE TRIAL COURT WAS WITHOUT JURISDICTION TO SIGN AND FILE THE SUBSEQUENT RESTITUTION STATEMENT NAMING A DIFFERENT VICTIM TO WHOM DEFENDANT WAS TO PAY RESTITUTION BECAUSE SAME WAS FILED AFTER DEFENDANT’S SENTENCING ENTRY.”

{¶19} “II. THE TRIAL COURT ERRED WHEN IT ORDERED PAYMENT OF COURT COSTS IN THE SENTENCING ENTRY BECAUSE IT FAILED TO ORDER PAYMENT OF SAME IN OPEN COURT, ON THE RECORD AT DEFENDANT’S SENTENCING.”

ANALYSIS

I.

{¶20} In his first assignment of error, appellant argues the trial court erred in ordering him to pay restitution. We agree to the extent that the trial court must hold an evidentiary hearing pursuant to R.C. 2929.28(A) because appellant disputes the amount of restitution.

{¶21} Throughout his argument, appellant references R.C. 2929.18 and its requirements. That statute applies to felony sentencing. R.C. 2929.18(A) and (B).

{¶22} Appellant was sentenced upon a third-degree misdemeanor conviction for negligent assault pursuant to R.C. 2903.14(A). R.C. 2929.21(A) notes restitution to the victim must be considered by the trial court as part of the overriding purposes of misdemeanor sentencing. With regard to misdemeanor financial sanctions, R.C. 2929.28(A) states in pertinent part:

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 misdemeanor, including a minor misdemeanor, may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section. If the court in its discretion imposes one or more financial sanctions, the financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) * * * [R]estitution 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 requires restitution, the court shall order that the restitution be made to the victim in open court or to the adult probation department that serves the jurisdiction or the clerk of the court on behalf of the victim.

If the court imposes restitution, the court shall determine the amount of restitution to be paid 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 an evidentiary hearing on restitution if the offender, victim, or survivor disputes the amount of restitution.** (Emphasis added). If the court holds an evidentiary hearing, at the hearing the victim or survivor has the burden to prove by a preponderance of the evidence the amount of restitution sought from the offender.

* * * *

{¶23} We note there is no evidence in the record appellant objected to restitution at the sentencing hearing or requested a hearing on the amount of restitution when it was ordered by the trial court. However, as we will explain *infra*, we vacate the restitution order and remand the matter to the trial court for a hearing establishing the amount of restitution as described in R.C. 2929.28(A).

{¶24} A sentence for a misdemeanor offense which imposes restitution is reviewed under the same standard as any other sentence for a misdemeanor; this court must review the trial court's decision for an abuse of discretion. *State v. Byrd*, 7th Dist. Belmont No. 04 BE 40, 2005-Ohio-2720, ¶ 36, citing *State v. Ballard*, 12th Dist. No. CA2001-07-176, 2002-Ohio-2314, ¶ 23. In order to find an abuse of discretion, the reviewing court must determine that the trial court's decision was unreasonable, arbitrary,

or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶25} We have previously held a trial court may determine the amount of restitution by reviewing the record, or if the evidence in the record is insufficient, the court must conduct an evidentiary hearing. *State v. Hoskinson*, 5th Dist. Tuscarawas No. 2007 AP 09-0055, 2008-Ohio-3897, ¶ 14, citing *State v. Montes*, 92 Ohio App.3d 539, 636 N.E.2d 378 (8th Dist.1993) and *State v. Brumback*, 109 Ohio App.3d 65, 83, 671 N.E.2d 1064 (9th Dist.1996). Furthermore, the amount of restitution must be established to a reasonable degree of certainty through competent, credible evidence. *Hoskinson*, supra, citing *State v. Williams*, 34 Ohio App.3d 33, 34, 516 N.E.2d 1270 (2nd Dist.1986). We note the underlying cases we relied upon involved felony convictions and the application of R.C. 2929.18; *Hoskinson*, however, involved restitution ordered upon a misdemeanor criminal damaging conviction.

{¶26} We review the trial court's award of restitution under an abuse-of-discretion standard. *Hoskinson*, supra, 2008-Ohio-3897 at ¶15, citing *State v. Myers*, 9th Dist. Wayne No. 06CA0003, 2006-Ohio-5958, at ¶ 12. Under this standard, a trial court abuses its discretion by “ordering restitution in an amount which had not been determined to bear a reasonable relationship to the actual losses suffered.” *Williams*, 34 Ohio App.3d at 35.

{¶27} In this case, the limited record before us demonstrates a lack of clarity in light of the discussion with the victim advocate at sentencing versus the restitution order to be paid to the victim directly. It is not clear whether this amount is for medical expenses or for lost wages, or why the amount is payable to the victim and not to the Victims of Crime Compensation Fund. It remains to be seen whether the order is supportable by a

preponderance of the evidence. We take no position thereon. We thus vacate the restitution order and remand the issue to the trial court for clarification of the nature and amount of restitution ordered. See, *State v. Wolfe*, 5th Dist. Licking No. 00 CA 7, 2000 WL 1370136, *5 (Sept. 20, 2000). The trial court need only determine whether the preponderance of the evidence supports a finding that the amount of restitution required bears a reasonable relationship to the actual losses suffered.

{¶28} Appellant's first assignment of error is sustained to the extent that the restitution order is vacated and the matter is remanded to the trial court for the limited purpose of holding a restitution hearing as described in 2929.28(A).

II.

{¶29} In his second assignment of error, appellant argues the trial court erred in imposing court costs in its sentencing entry when the costs were not imposed in open court on the record at the sentencing hearing. We find appellant's arguments that he should not be responsible for court costs to be premature but agree that the trial court is required to impose costs at sentencing to give appellant the opportunity to request a waiver of costs.

{¶30} The record reflects appellant filed an affidavit of indigence on October 30, 2014. It is undisputed that the trial court did not mention imposition of court costs at the sentencing hearing on the record. Court costs were imposed, however, in the sentencing entry.

{¶31} R.C. 2947.23(A)(1)(a) states, "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment

against the defendant for such costs. * * * *.” A defendant’s indigence, however, may permit the trial court to waive costs if appropriate.

{¶32} A defendant's indigency does not shield him from the payment of court costs. *State v. Threatt*, 108 Ohio St.3d 277, 2006–Ohio–905, 843 N.E.2d 164, ¶ 1. Court costs must be assessed against all defendants. *Id.*; *State v. White*, 103 Ohio St.3d 580, 2004–Ohio–5989, 817 N.E.2d 393; R.C. 2947.23. Although a judge has discretion to waive court costs assessed against an indigent defendant, such a person ordinarily “must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata.” *Threatt at* ¶ 22.

{¶33} In *State v. Joseph*, 125 Ohio St.3d 76, 2010–Ohio–954, 926 N.E.2d 278, the Supreme Court held that it is reversible error under Crim.R. 43(A) for a trial court to impose costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. *Id.* at ¶ 22. The Court reasoned that the defendant was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court because the trial court did not mention costs at the sentencing hearing. *Id.* The same is true in the instant case.

{¶34} Here, as in *Joseph*, appellant was not given an opportunity at the sentencing hearing to seek a waiver of the payment of costs because the trial court did not mention costs at the sentencing hearing. *Joseph*, 2010-Ohio-954 at ¶ 13. We thus vacate the order to pay costs and remand the matter to the trial court to permit appellant to argue for waiver of court costs.

{¶35} We note the trial court “retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution * * * at the time of sentencing or at any time thereafter.” R.C. 2947.23(C). Appellant’s argument that he is no longer subject to the jurisdiction of the trial court is thus inapposite.

{¶36} Appellant’s second assignment of error is sustained. We vacate the order to pay court costs and remand the matter to the trial court for the limited purpose of allowing appellant to move the court for a waiver of the payment of court costs. *Joseph*, supra, 2010-Ohio-954 at ¶ 23.

CONCLUSION

{¶37} Appellant’s two assignments of error are sustained to the extent described in this opinion and this matter is remanded to the trial court for the purposes of a restitution hearing as described in R.C. 2929.28(A) and to permit appellant to move the court for waiver of payment of court costs.

By: Delaney, J. and

Farmer, P.J.

Gwin, J., concur.