[Cite as *State v. Noble*, 2017-Ohio-1440.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA20
v.	:	DECISION AND JUDGMENT ENTRY
JERRY L. NOBLE,	:	
Defendant-Appellant.	:	RELEASED 04/10/2017

APPEARANCES:

Timothy Young, Ohio Public Defender and Nikki Trautman Baszynski, Assistant State Public Defender, Columbus, Ohio for appellant.

Keller Blackburn, Athens County Prosecutor and Merry M. Saunders, Athens County Assistant Prosecuting Attorney, Athens, Ohio for appellee.

Hoover, J.

{¶ 1} This is an appeal of a judgment of conviction and sentence from the Athens County Common Pleas Court, following a jury trial at which Jerry L. Noble ("Noble"), defendant-appellant herein, was found guilty of two counts of felonious assault. Following the jury verdicts, the trial court sentenced Noble to eight years in prison. The trial court also ordered Noble to pay restitution in the amount of $3,000 to the victim in this case, Donald Cusic ("Cusic").

{¶ 2} Here on appeal, Noble presents two assignments of error. In his first assignment of error, Noble contends that the trial court erred when it did not give the jury an instruction on the inferior degree offense of aggravated assault. After a review of the evidence, we do not agree.

We find that the trial court did not abuse its discretion in refusing to give a jury instruction on the offense of aggravated assault.

{¶ 3} In his second assignment of error, Noble asserts various arguments that we should reverse the trial court's order of restitution. Although we find most of Noble's arguments without merit, we do find that a portion of the trial court's restitution order is contrary to law. The restitution order was based, in part, on damages to Cusic's automobile. However, because Noble was never charged with any offense relating to the destruction or damage of Cusic's personal property, the amount of restitution is based, in part, upon loss not relating to the offense for which Nobel was convicted, i.e. felonious assault. Accordingly, we find that the trial court's restitution order with respect to the damages on Cusic's automobile to be contrary to law.

{¶ 4} For these reasons, and the reasons discussed more fully below, we overrule Noble's first assignment error; but we partially sustain Noble's second assignment of error. Accordingly, we affirm the judgment of the trial court in part and reverse the judgment of the trial court in part. We remand this matter to the trial court for proceedings consistent with this opinion.

I. Facts and Procedural History

{¶ 5} In January 2015, the Athens County Grand Jury indicted Noble on two counts of felonious assault, both felonies of the second degree, one count in violation of R.C. 2903.11(A)(2) and one count in violation of R.C. 2903.11(A)(1). These charges arose as a result of a physical confrontation that occurred between Noble and Cusic on July 10, 2014. At that time, Noble and his girlfriend, April Huml ("Huml") had been living together in a trailer located at 17111 Millschool Road. Cusic was also living in a trailer located on that same property. Huml is Cusic's daughter. The case proceeded to trial in April 2015. The testimony at trial revealed the following facts relevant to this appeal.

{¶ 6} On the morning of July 10, 2014, Noble and Huml had an argument; and Noble left the property on which his trailer was located. Noble returned later that afternoon and the argument between Noble and Huml continued. As the argument grew more intense, Noble called Cusic on the phone and told him to come get his daughter. Noble no longer wanted her at his trailer. Leigha Bryant ("Bryant"), who testified for the State, was present at Noble's trailer at this time.

{¶ 7} After speaking with Noble on the phone, Cusic drove his truck to Noble's trailer. Cusic told Bryant, who was outside, to have Huml come out of the trailer. Bryant went back inside the trailer to get Huml. Bryant and Huml tried to prevent Noble from walking outside. They hoped to prevent a potential fight between Noble and Cusic. Eventually, Cusic exited his truck and walked to the bottom of the trailer's porch stairs. Noble pushed Huml through a porch window, shattering the window's glass. Then, Noble went down the porch stairs and confronted Cusic. Noble punched Cusic; and the two men began fighting. Huml and Bryant ultimately broke the two men apart.

{¶ 8} Cusic then got in his truck and drove back to his trailer. Cusic's trailer is approximately 100 yards from Noble's trailer. At trial, there was conflicting testimony on what transpired next. Cusic testified that as he was driving back to his trailer, he could see individuals walking after him in his rearview mirror. After Cusic returned to his trailer, he retrieved a pump action rifle. Cusic's brother, Charles Cusic was present at Cusic's trailer at this time. Charles Cusic testified during the State's case in chief.

{¶ 9} Jamie Linley, Dustin Linley, and Daniel Huffman came to Noble's trailer in response to the commotion created by the first confrontation between Noble and Cusic. Dustin and Jamie Linley are brothers. Noble is the Linleys' uncle. Dustin Linley resides at a

neighboring property. At trial, the defense presented Dustin Linley and Daniel Huffman as its witnesses.

{¶ 10} Noble, along with Jamie Linley, Dustin Linley, and Daniel Huffman walked to Cusic's trailer. According to Cusic, he stood on his porch and fired his rifle three times in the air in order to ward off the men from approaching his property. Charles Cusic also testified that the shots were fired upwards, in the air. In contrast, Dustin Linley and Daniel Huffman testified that at least some of the shots were fired at Noble and in the direction of Noble's trailer.

{¶ 11} Testimony at the trial was clear that after Noble neared Cusic's trailer, Noble positioned himself behind Cusic's truck. While Cusic was still on his porch, Noble crouched behind Cusic's truck. According to Cusic, he feared that Noble was going to vandalize his truck. Then, Cusic came down from his porch, walked around the truck, and attempted to hit Noble with the barrel of the gun. A second altercation between the two ensued. Cusic testified that Jamie Linley took the gun away from him, while Daniel Huffman held him. Cusic testified that Noble stabbed him while the other two held him. Dustin Linley and Daniel Huffman indicated that they only intervened after Noble and Cusic began fighting again.

{¶ 12} Eventually, the altercation ended. Noble and the three men left Cusic's trailer. Cusic had sustained two wounds in his lower abdomen. Cusic's brother Charles called 911 emergency services. Cusic was flown to Grant Medical Center in Columbus, Ohio via a medical flight helicopter where he underwent emergency surgery. Cusic remained in the hospital for four days. Dr. Joshua Hill, a surgeon at Grant Memorial Hospital testified that the wounds were consistent with a stabbing.

{¶ 13} Korisa Black ("Black") also testified during the State's case in chief. Black testified that she and Mark Schall picked Noble up in her vehicle. According to Black, when she

arrived at Millschool Road, there were cops "everywhere". Black and Schall took Noble back to Black's house. Black testified that Noble told Schall and her that he had stabbed Cusic.

{¶ 14} Emergency medical personnel and law enforcement who responded to the scene that night also testified at trial. Law enforcement recovered Cusic's rifle from Dustin Linley. Law enforcement did not recover any shell casings from the rifle. Law enforcement also did not recover a knife. The State introduced into evidence the transcribed 911 call following the second confrontation, Cusic's medical records from Grant Medical Hospital, and pictures of the property where the pertinent events occurred.

{¶ 15} Before closing arguments, Noble requested that the trial court give a jury instruction on the inferior degree offense of aggravated assault. Noble argued that because Cusic shot at Noble and hit him with the butt of the gun, sufficient evidence existed of provocation to a point of sudden passion. The trial court denied Noble's request and did not give the jury instruction on aggravated assault. At the conclusion of the trial, the jury found Noble guilty on both counts of felonious assault.

{¶ 16} The case proceeded immediately to sentencing. The trial court sentenced Noble to eight years in prison. The State requested that the trial court order Noble to pay $3,000 in restitution. Initially, the trial court stated that it "[did] not believe there [had] been sufficient evidence to support a finding of restitution* * *[.]" The trial court also indicated that it was going to allow the State thirty days to present evidence concerning restitution. However, the State then suggested that all sentencing should take place at that time. Thus, the trial court began asking Cusic questions relating to restitution. The trial court placed Cusic under oath.

{¶ 17} Cusic testified about an unpaid anesthesiologist bill, the costs of replacing tires, a side mirror on his truck, and the cost of gas for trips to Columbus, Ohio for pain management

related to the injuries he sustained from the assault. The trial court ordered $3,000 in restitution consisting of $1,733 for the outstanding anesthesiologist bill, $417 for the costs of new tires and a new side mirror for Cusic's truck, and $800 for the costs of Cusic's trips to Columbus, Ohio. The trial court ordered that the restitution be paid at a minimum of $3.00 per month and paid in full within five years.

{¶ 18} Noble presents this timely appeal of his convictions and the trial court's order of restitution.

II. Assignments of Error

{¶ 19} Appellant Noble sets forth two assignments of error for our review:

Assignment of Error I:

> The trial court erred in refusing to give an instruction to the jury on the inferior degree offense of aggravated assault. * * *[1]

Assignment of Error II:

> The trial court erred in sentencing Mr. Noble by ordering him to pay $3,000.00 in restitution to Donald Cusic. * * *

III. Law and Analysis

A. The Trial Court Did Not Abuse Its Discretion by Refusing to Give the Jury Instruction on Aggravated Assault.

{¶ 20} In his first assignment of error, Noble asserts that the trial court erred by not instructing the jury on the inferior degree offense of aggravated assault. Noble argues that sufficient evidence of serious provocation was presented at trial to warrant the instruction. Noble relies on the testimony of Dustin Linley and Daniel Huffman, the two defense witnesses.

[1] We have omitted Noble's citations to law and the record.

Specifically, Noble cites Dustin Linley's testimony describing the events leading up to the second confrontation between Noble and Cusic at Cusic's trailer.

{¶ 21} Noble contends that this testimony demonstrated that in the ensuing fight he was acting under the influence of sudden passion or a fit of rage. Accordingly, Noble argues that sufficient evidence was presented for the jury to find that he had committed the assault because of serious provocation.

{¶ 22} The State contends that there was not sufficient evidence of serious provocation to warrant an instruction on the offense of aggravated assault. The State asserts that Noble brought the entire incident upon himself by walking down to Cusic's trailer after the first confrontation. The State cites the testimony that Noble was the one who "sucker punched" Cusic at the first confrontation at Noble's trailer. The State also cites the testimony that it took five minutes for Noble, Jamie Linley, Dustin Linley, and Daniel Huffman to walk to Cusic's trailer after that first confrontation. The State argues that Noble was not under the influence of sudden passion or a sudden fit of rage, but under the influence of alcohol. Accordingly, the State argues that the trial court's decision to not give the jury an instruction on aggravated assault should be affirmed.

1. Standard of Review- Refusing to Give a Requested Jury Instruction

{¶ 23} A trial court generally has broad discretion in deciding how to fashion jury instructions. *State v. Hamilton*, 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, ¶ 69. However, "a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. "Additionally, a trial court may not omit a requested instruction, if such instruction is 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.' " *Hamilton* at ¶ 69,

quoting *State v. Lessin*, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993). "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Ellis*, 5th Dist. Fairfield No. 02 CA 96, 2004-Ohio-610, ¶ 19.

2. Legal Analysis

{¶ 24} Aggravated assault is an inferior degree of felonious assault. *State v. Deem*, 40 Ohio St.3d 205, 210–211, 533 N.E.2d 294, 299 (1988). The two offenses are identical, except aggravated assault contains serious provocation as a mitigating factor. *Id*. R.C. 2903.11(A) provides:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

R.C. 2903.12(A) defines aggravated assault as follows:

> "(A) No 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:
>
> (1) Cause serious physical harm to another * * *."

(Emphasis Added.)

{¶ 25} Thus, in a trial for felonious assault, a trial court must give the jury an aggravated assault instruction if the defendant presents sufficient evidence of serious provocation such that a

jury could both reasonably acquit the defendant of felonious assault and convict the defendant of aggravated assault. *State v. Mack*, 82 Ohio St.3d 198, 200, 694 N.E.2d 1328 (1998); *Deem* at 211; *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992).

> Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time.

Deem, at paragraph five of the syllabus; *accord Mack* at 200.

{¶ 26} Determining whether sufficient evidence of serious provocation exists so as to warrant an aggravated assault instruction involves an objective and subjective inquiry. *Mack* at 201. A court must (1) objectively determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage, and (2) determine whether the defendant in the particular case actually was under the influence of sudden passion or in a sudden fit of rage. *Id*.

{¶ 27} Under the objective part of the inquiry, provocation is reasonably sufficient to bring on a sudden passion or fit of rage if it would "arouse the passions of an ordinary person beyond the power of his or her control." *Shane* at 635. "If insufficient evidence of provocation is presented, so that no reasonable jury would decide that an actor was reasonably provoked by the victim, the trial judge must, as a matter of law, refuse to give an aggravated assault instruction." *Id*. at 634.

{¶ 28} If the evidence shows that the defendant was sufficiently provoked under the objective standard, the inquiry then shifts to whether the defendant actually was under the influence of sudden passion or a sudden fit of rage. *Id*. at 634. When a court determines whether the defendant actually was under the influence of sudden passion or a sudden fit of rage, the court must consider the defendant's emotional and mental state at the time of the incident. *Id*.

{¶ 29} A defendant is not, however, entitled to an aggravated assault instruction simply because "some evidence" shows that the defendant may have acted under serious provocation. *Id*. at 633. "To require an instruction * * * every time 'some evidence,' however minute, is presented going to [serious provocation] would mean that no trial judge could ever refuse to give" the jury an aggravated assault instruction as an inferior degree to felonious assault. *Id*. Instead, "the quality of the evidence offered * * * determines whether a[n aggravated assault] charge should be given to a jury." *State v. Wine*, 140 Ohio St.3d 409, 18 N.E.3d 1207, 2014–Ohio–3948, 18 N.E.3d 1207, ¶ 26.

{¶ 30} Before closing arguments, Noble requested a jury instruction on aggravated assault as an inferior degree offense of felonious assault. The State objected to the inclusion of the instruction. The trial court heard the parties' arguments, then stated the following:

> Okay. Thank you. Uh, well the Court notes that neither of the defense witnesses that they saw Mr. Noble stabbed, as far as the Court recalls, uh, State presented, the State evidence that he was stabbed. The State also presented evidence that uh, Mr. Or [sic] the victim in this matter was being restrained at the time he was stabbed. And which is supported by somewhat what the other individuals has testified as well. Further as defense counsel as [sic] indicated there was allegation that he was attempted to be hit with the butt of the rifle. The Court finds that there

> is a lack of provocation in that Mr. Noble came onto the property uh, crossed from what the Court recollects, about a hundred yards in order to get to where the uh, event, main event, not the pre-event but the main event and that uh, according to the testimony of the witnesses, defense witnesses, those shots had occurred and Mr. Noble chose to walk towards this area and therefore there is a lack of provocation that's been shown. Nor is there any evidence of extreme emotional stress or serious provocation that's in the Court's view. The only testimony was is [sic] that he had been drinking. Further that it doesn't appear that agg assault is a lesser included. It's an inferior degree of felonious assault as well. It appears to the Court that uh, Mr. Noble had choices leading up to that portion of the event and doesn't fit or comport with sudden passion or fit of rage. Some evidence is not sufficient based on what the Court's reviewed and therefore doesn't believe aggravated assault, finds that aggravated assault is not indicated here and based on the State's objection, finds the objection well taken and will sustain that and that's not included in the standard jury instructions.

{¶ 31} After a review of the evidence in this case, we do not believe the trial court abused its discretion by not giving the jury an instruction on the offense of aggravated assault. The altercation between Noble and Cusic involved two separate incidents. At the first encounter, the evidence suggested that Noble initiated a fight with Cusic by walking down his trailer's stairs and punching Cusic. Afterwards, Cusic got into his truck and returned to his trailer. The parties' assessment of the facts after this point differs.

{¶ 32} Noble argues, based on the testimony of Dustin Linley and Daniel Huffman that Cusic stood on his front porch and fired a gun at him. Dustin Linley testified that after the

confrontation at Noble's trailer, Cusic returned to his trailer, stood on his porch with a gun and provoked Noble. Dustin Linley stated that Cusic yelled, "[C]ome on hillbilly I got something for you." Dustin Linley also testified that Cusic fired several shots from the porch, with the barrel of the gun "pointed in a horizontal level at us." According to Dustin Linley, it was at this point that Noble walked to Cusic's trailer. Dustin Linley stated that Noble walked into Cusic's yard and stood behind Cusic's truck. Cusic's truck was parked directly in front of Cusic's porch. According to Dustin Linley, Noble and Cusic exchanged words; and then Cusic aimed the gun at Noble and fired three shots. Next, Dustin Linley testified that Cusic walked down off the porch, and drew the gun again. Dustin Linley stated that he did not know if the gun misfired at that point or not. Dustin Linley testified that Cusic then struck Noble in the chest and sternum with the barrel of the gun.

{¶ 33} Daniel Huffman similarly testified that Cusic had fired shots from his porch. According to Daniel Huffman, after Noble reached Cusic's truck, Cusic and Noble exchanged words; and then Cusic fired a shot at Noble. Daniel Huffman testified that Cusic then left his porch to confront Noble. According to Daniel Huffman, Cusic had a "surprised look on his face." Daniel Huffman testified that the gun "must have misfired or something but I could swear he [Cusic] pulled the trigger. Daniel Huffman testified that then Cusic hit Noble with the gun. Both Dustin Linley and Daniel Huffman testified that Noble was "upset" and "mad."

{¶ 34} Cusic testified that as he was driving his truck back to his trailer he could see individuals walking towards him in his rearview mirror. Cusic testified that once he arrived at his trailer, he retrieved his oxygen tank. Then, Cusic retrieved his gun and went outside. Cusic testified that the people he saw in his rearview mirror, Dustin Linley, Jamie Linley, and Noble, were approaching his property. Cusic testified that he fired the gun in the air to deter Noble and

the individuals with him. According to Cusic, he thought Noble was going to "tear" his truck up with a hammer. Cusic testified that he came off his porch and attempted to hit Noble with the butt of the gun but Noble blocked him. Cusic testified that then Daniel Huffman and Jamie Linley intervened, took his gun away, and held him while Noble stabbed him. Charles Cusic also testified that Cusic pointed the gun in the air as he fired it from the porch.

{¶ 35} This Court has summarized what behavior does not constitute serious provocation to warrant an aggravated assault jury instruction:

> Neither a push nor a punch constitutes sufficient provocation to warrant an aggravated assault instruction. *See State v. Howard*, 9th Dist. Summit No. 26897, 2014–Ohio–1334, ¶ 25 (concluding that "being grabbed on the arm and experiencing a cut in the process would not arouse the passions of an ordinary man beyond the power of his control such that he would be aroused to use deadly force"); *State v. Evans*, 4th Dist. Scioto No. 05CA3002, 2006–Ohio–2564, ¶ 64 (stating that "[a]s a matter of law, hitting another person does not constitute sufficient provocation to bring about a sudden passion or fit of rage"); *State v. Bryan*, 4th Dist. Gallia No. 03CA3, 2004–Ohio–2066 (concluding that victim grabbing defendant and attempting to hit him is not, as a matter of law, serious provocation); *State v. Parker*, 4th Dist. Washington No. 03CA43, 2004–Ohio–1739, ¶ 23 (stating that victim throwing plate of spaghetti on defendant did not constitute serious provocation so as to warrant aggravated assault instruction); *State v. Koballa*, Cuyahoga App. No. 82013, 2003–Ohio–3535 (concluding that sufficient provocation did not exist when the victim grabbed the defendant by the testicles and the arm); *State v. Poe*, Pike App. No. 00CA9 (Oct. 6, 2000)

> (concluding that the victim's conduct in approaching the defendant with a hammer and stating "come on" did not constitute sufficient provocation); *State v. Pack* (June 20, 1994), Pike App. No. 93CA525 ("We find that a mere shove and a swing (which appellant by his own testimony ducked) are insufficient as a matter of law to constitute serious provocation reasonably sufficient to incite or arouse appellant into using deadly force.").

State v. Moore, 4th Dist. Scioto No. 15CA3717, 2016-Ohio-8274, ¶ 22.

{¶ 36} In the case sub judice, conflicting evidence existed regarding the aim of Cusic's rifle when he fired several shots from his porch and whether Cusic fired his weapon at Noble after he came down from his porch. However, what is not in dispute is that Noble, Jamie Linley, Dustin Linley, and Daniel Huffman walked to Cusic's trailer following the first confrontation. Noble cites the testimony that he was "upset" and "mad" during the whole incident, which he argues demonstrates that he was acting under the influence of sudden passion or a fit of rage. Noble further argues that the decision to walk to Cusic's house was a result of Cusic's provocation. According to Dustin Linley, it took them five minutes to walk to Cusic's trailer after Cusic had provoked them from his porch.

{¶ 37} Considering these facts, we are not persuaded that the trial court abused its discretion by refusing to give the jury an instruction on aggravated assault. By all accounts of that night in question, Cusic returned to his trailer following the first fight between Noble and himself. It was the act of Noble and the others walking the 100 yards in five minutes to Cusic's trailer that allowed the second confrontation to take place. This is true even if we were to accept the defense witnesses' testimony that Cusic's gunfire was aimed at them. Noble's decision to

walk to Cusic's trailer does not demonstrate that he was experiencing sudden passion or a fit of rage.

{¶ 38} Furthermore, Noble cites Dustin Linley's testimony that Cusic shouted, "Come on hillbilly I got something for you." However, a victim's verbal threats do not constitute sufficient provocation. *Shane*, 63 Ohio St.3d at 637, 590 N.E.2d 272 (1992) (where the Ohio Supreme Court explained that words, "no matter how insulting or inciteful" do not constitute legally sufficient provocation to incite the use of physical force). Additionally, Cusic striking Noble with the butt of the rifle would also not constitute a sufficient provocation. Striking someone with the butt of a rifle is arguably similar to someone spraying another with mace or someone punching or pushing another. *See Moore*, 2014-Ohio-1334 at ¶ 22

{¶ 39} Our legal standard is clear that the quality of the evidence must be considered, not only that "some" evidence exists showing that the defendant may have acted under serious provocation. *Id.* Therefore, based on the foregoing, it is our conclusion that the trial court did not abuse its discretion in refusing to give the jury an instruction on aggravated assault. Accordingly, we overrule Noble's first assignment of error.

B. A Portion of the Trial Court's Order of Restitution is Contrary to Law.

{¶ 40} In his second assignment of error, Noble argues that the trial court erred by ordering him to pay restitution to Cusic in the amount of $3,000. Noble asserts the following arguments as to why we should overturn the trial court's restitution order: (1) Cusic's alleged gas expenses are not supported by competent, credible evidence; (2) Cusic's automobile damages were not reasonably related to the charged offense; (3) the amount based on the alleged unpaid anesthesiologist bill was not supported by competent, credible evidence; (4) the trial court did

not have the authority to order the restitution to be paid within a specific time frame; and (5) the trial court's assessment of his ability to pay restitution was unreasonable.

{¶ 41} The State argues to the contrary. The State contends that the trial court did not err because the restitution order was based upon the testimony of Cusic, who was subject to cross-examination by Noble's counsel. The State further asserts that the $3,000 was directly related to Noble's convictions.

1. Standard of Review- Restitution Orders

{¶ 42} This Court, in *State v. Anderson*, 4th Dist. Scioto No. 15CA3696, 2016-Ohio-7252, stated that we review a trial court's order of restitution under the standard of review set forth in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. *Anderson* at ¶¶ 29-33. We noted that this court had previously used an abuse of discretion standard when reviewing restitution orders. *State v. Newman*, 2015–Ohio–4283, 45, 45 N.E.3d 624 N.E.3d 624, ¶ 42 (4th Dist.); *State v. Durham*, 4th Dist. Meigs Nos. 13CA2 and 13CA3, 2014–Ohio–4915 ¶ 16; *State v. Stump*, 4th Dist. Athens No. 13CA10, 2014–Ohio–1487, ¶ 11; *State v. Dennis*, 4th Dist. Highland No. 13CA6, 2013–Ohio–5633, ¶ 7.

{¶ 43} However, in March 2016, the Ohio Supreme Court set forth the standard of review that appellate courts must apply when reviewing felony sentences in *Marcum*:

> Applying the plain language of R.C. 2953.08(G)(2), we hold that an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law. In other words, an appellate court need not apply the test set out by the plurality in *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124.

Id. at ¶ 1.

{¶ 44} In turn, our sister appellate court in the Twelfth District recently stated the following:

> As this court recently stated, instead of applying an abuse of discretion standard, "the proper standard of review for analyzing the imposition of restitution as a part of a felony sentence is whether the sentence complies with R.C. 2953.08(G)(2)(b)." *State v. Collins*, 12th Dist. Warren No. CA2014–11–135, 2015–Ohio–3710, ¶ 31. Pursuant to R.C. 2953.08(G)(2)(b), this court may increase, reduce, or otherwise modify a sentence that is appealed, or vacate the sentence and remand the matter for resentencing, if we clearly and convincingly find the sentence is contrary to law. The term "sentence" as utilized in R.C. 2953.08(G)(2)(b) encompasses an order of restitution. *Collins*, at ¶ 31, fn.1. This is an "extremely deferential" standard of review for the restriction is on the appellate court, not the trial judge. *State v. Durham*, 12th Dist. Warren No. CA2013–03–023, 2013–Ohio–4764, ¶ 43.

State v. Geldrich, 12th Dist. Warren No. CA2015–11–103, 2016–Ohio–3400, ¶ 6.

{¶ 45} Similarly, the Sixth District appellate court has also addressed this issue setting forth that "[o]ur standard of review on this issue is whether the imposition of costs and financial sanctions was contrary to law. R.C. 2953.08(A)(4) and (G)(2)(b)." *State v. Farless*, 6th Dist. Lucas Nos. L–15–1060 and L–15–1061, 2016–Ohio–1571, ¶ 4; *contra State v. Nitsche*, 8th Dist. Cuyahoga No. 103174, 2016–Ohio–3170, ¶ 73 (continuing to use an abuse of discretion standard to review a restitution order).

{¶ 46} Therefore, as we determined in *Anderson*, 2016-Ohio-7252, when reviewing restitution orders, we will apply the extremely deferential standard used by the Twelfth and Sixth Districts. Prior to increasing, reducing, or otherwise modifying a sentence that is appealed, or vacating the sentence and remanding the matter for resentencing, we will seek to determine whether the trial court's restitution order is clearly and convincingly contrary to law.

2. Legal Analysis

{¶ 47} R.C. 2929.18(A)(1) authorizes a trial court to impose restitution as part of a sentence in order to compensate the victim for economic loss. A trial court may base the amount of restitution 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, 994 N.E.2d 423, paragraph one of the syllabus; R.C. 2929.18(A)(1). As relevant here, "[e]conomic loss" is defined in R.C. 2929.01(L) as "any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any * * * any property loss [or] medical cost* * * incurred as a result of the commission of the offense."

{¶ 48} The amount of restitution the trial court orders must bear a reasonable relationship to the actual loss suffered as a result of the defendant's offense. *State v. Alexander*, 4th Dist. Scioto No. 10CA3402, 2012-Ohio-2041, ¶ 12, quoting *State v. Johnson*, 4th Dist. Washington No. 03CA11, 2004-Ohio-2236, ¶ 11. "[T]he amount of the restitution must be supported by competent, credible evidence in the record from which the court can discern the amount of the restitution to a reasonable degree of certainty." (Other citations omitted.) *Id*., quoting *Johnson* at

¶ 10. An award of restitution is limited to the actual loss caused by the defendant's criminal conduct for which he was convicted. *State v. Jones,* 10th Dist. Franklin No. 14AP-80, 2014-Ohio-3740, ¶ 21

{¶ 49} "A trial court is under no duty to itemize or otherwise explain how it arrived at the amount of restitution it orders, so long as the trial court can discern the amount of restitution to a reasonable degree of certainty from competent credible evidence in the record." (Other citations omitted.) *State v. Shifflet,* 4th Dist. Athens No. 13CA23, 2015-Ohio-4250, ¶ 58. "The court is free to accept or reject all, part, or none of the testimony of each witness." (Other quotations omitted.) *Id.*

{¶ 50} The trial court ordered Noble to pay restitution to Cusic in the amount of $3,000. At sentencing, the trial court placed Cusic under oath to testify about his economic loss associated with this case. First, Cusic testified that he made eight trips to Columbus, for medical attention that cost him $100 in gas per trip. Then, Cusic testified that he paid $417 for two new tires and a new side mirror on his truck to replace the ones that Noble had destroyed during their second confrontation. Cusic testified that he owed an anesthesiologist bill of $1,733.

{¶ 51} Noble's trial counsel was given an opportunity to cross-examine Cusic. During that cross-examination, Cusic testified to the following:

[Defense counsel]: What kind of medical insurance did you have at the time?

[Cusic]: I'm on SSI. Disability.

[Defense counsel]: Okay. And why is it that the anesthesiologist wouldn't accept your? [sic]

[Cusic]: I have no clue.

[Defense counsel]: Medicare. Did you submit it to them?

[Cusic]: All I do is get the bill. And I keep calling and telling them.

[Defense counsel]: Okay. So you don't know if you are going to have to pay it, you haven't paid it yet?

[Cusic]: Well no, I don't know anything.

[Defense counsel]: Okay.

[Cusic]: Until they settle something.

[Defense counsel]: So at the current time you don't owe them nothing?

[Cusic]: Well yea. Well I do because they keep calling and telling me I do.

[Defense counsel]: Now uh, you think it costs you a $100 in gas to get back and forth to Columbus do you?

[Cusic]: I know it does in my truck.

[Defense counsel]: Yea. How many miles is it to Columbus?

[Cusic]: About ninety-eight mile. [sic]

[Defense counsel]: How many miles to the gallon does your truck get?

[Cusic]: I don't know

[Defense counsel]: I have no further questions.

{¶ 52} The trial court's restitution order was based solely upon Cusic's testimony during sentencing. "The evidence to support a restitution order can take the form of either documentary evidence or testimony." (Other citations omitted.) *Jones*, 2014-Ohio-3740 at ¶ 23. "A victim's testimony alone is sufficient to establish economic loss for the purpose of a trial court's restitution order." *Id*. at ¶ 24; *see In re Hatfield*, 4th Dist. Lawrence No. 03CA14, 2003-Ohio-5404, ¶ 9 ("However, [*State v. Marbury*, 104 Ohio App.3d 179, 661 N.E.2d 271 (8th Dist.1995)] Subsequent cases have stated that the victim may establish the loss through documentary

evidence *or testimony.* No absolute requirement exists that the victim demonstrate the loss through documentary evidence, and we see no valid reason for imposing such a requirement.") (Emphasis sic.)

{¶ 53} We will now examine each of Noble's arguments supporting his second assignment of error. First, Noble challenges the amount of restitution represented by Cusic's trips to Columbus, Ohio for medical attention associated with the injuries he suffered in this case and the amount of restitution represented by Cusic's unpaid anesthesiologist bill. Regarding the trips to Columbus, Noble contends that "[e]ven if gas cost, on average, $3.50 per gallon at the time Mr. Cusic was traveling to Columbus, his estimates would mean that he was using 28 gallons of gas to drive the 196 miles he testified each trip required. This usage would mean his truck averaged seven miles per gallon on the highway." Similarly, Noble argues that Cusic's testimony about the unpaid anesthesiologist bill does not constitute competent, credible evidence that he suffered an economic loss of $1,733. Noble asserts that Cusic's testimony did not confirm if he actually owed that amount of money or Cusic's insurance would pay it.

{¶ 54} As we have cited, an order for restitution can be based solely upon the testimony of the victim. Here, Cusic testified to the costs he incurred traveling to Columbus, Ohio for medical attention and the cost of an outstanding anesthesiologist bill. As Noble's calculations point out, Cusic's testimony regarding the cost of gasoline for his trips to Columbus, Ohio may be exaggerated. Regarding the anesthesiologist bill, Cusic insisted that he owed the outstanding amount even when he was asked whether the bill had been submitted to his insurance.

{¶ 55} The trial court obviously found Cusic's testimony to be somewhat credible. We should not second-guess the trial court's credibility determination. *See, e.g., State v. Williams,* 99 Ohio St.3d 435, 2003–Ohio–4164, 793 N.E.2d 449, at ¶ 36. Accordingly, the record contains

some competent, credible evidence to support the trial court's restitution order for Noble to reimburse Cusic for costs of his trips to Columbus, Ohio for medical treatment and for his outstanding anesthesiologist bill. We do not find that the trial court's order for restitution relating to these costs is contrary to law.

{¶ 56} Next, Noble contends that the trial court exceeded its authority in ordering the restitution to be paid within a designated time frame. Here, the trial court ordered the $3,000 in restitution to be paid at a rate of $3.00 per month and paid in full in five years. Noble relies solely on the fact that R.C. 2929.19 does not explicitly state that a trial court may order the restitution amount to be paid within a specific time frame. However, Noble does not cite to any authority in support of his position. Accordingly, we do not find Noble's argument persuasive.

{¶ 57} Noble also contends the trial court's assessment of his ability to pay the restitution order was unreasonable. Noble asserts that trial court knew he was indigent and either did not take his indigency into consideration or arbitrarily ignored it. Before imposing a financial sanction under R.C. 2929.18, the court "shall consider the offender's present and future ability to pay the amount of the sanction * * *." *State v. Dennis*, 4th Dist. Highland No. 13CA6, 2013-Ohio-5633, ¶ 14; R.C. 2929.19(B)(5). When the trial court has imposed a financial sanction, it is required to make at least a cursory inquiry into the offender's present and future means to pay the amount imposed. *Id*. "Although preferable for appellate review, a trial court need not explicitly state in its judgment entry that it considered a defendant's ability to pay a financial sanction. Rather, courts look to the totality of the record to see if this requirement has been satisfied." (Other quotations omitted.) *Id.* at ¶ 15.

{¶ 58} Here, the trial court's final judgment entry does not state that it considered Noble's ability to pay the restitution order. However, during the trial court's pronouncement of

its sentence, it stated the following: "Restitution within five years. Mr. Noble [sic] income obviously is going to be very limited during those year [sic] so the Court will order that he make payments of a minimum of $4.00 a month which I think is half his wages. Or, let's make it $3.00 a month uh, for the time he's in towards restitution." Moreover, the fact that the trial court found Noble indigent and appointed counsel for him did not preclude the court from finding that he had the ability to pay the sanction in the future. *See State v. Bulstrom*, 4th Dist. Athens No. 12CA19, 2013-Ohio-3582, ¶ 17; *see also State v. Williams*, 4th Dist. No. 08CA3, 2009-Ohio-657, ¶ 25.

{¶ 59} Accordingly we find that the trial court, in fact, complied with R.C. 2929.19(B)(5), as it did consider Noble's ability to pay the restitution order. Therefore, we do not find Noble's argument persuasive.

{¶ 60} Lastly, we will address Noble's challenge to the part of the restitution order regarding damages to Cusic's truck. Noble contends that the damage to Cusic's truck does not reasonably relate to the offense for which he was convicted. Further, Noble argues that there was no testimony at trial that he was responsible for the damages to the truck.

{¶ 61} As we noted above, R.C. 2929.18(A)(1) permits the trial court to order restitution in an amount that "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." Here, the trial court ordered Noble to pay $417 for damages to Cusic's truck, which was comprised of $367 for two tires and $50 for a new side mirror. Cusic asserted then, as the State does here, that Noble slashed his truck's tires and broke the truck's mirror just prior to the second confrontation that ultimately led to the felonious assault. However, while Noble was convicted of felonious assault, he was never charged with an offense related to the destruction of Cusic's personal property.

{¶ 62} A similar situation exists when a defendant, who is not charged with the offense of theft, is ordered to pay restitution in the amount representing items that were stolen from the victim. *See State v. Hume*, 9th Dist. No. 26201, 2013-Ohio-2668, ¶ 6. In *Hume*, the defendant, Hume, pleaded guilty to one count of felonious assault, one count of failure to comply with order or signal of a police officer, one count of falsification, and one count of unauthorized use of a vehicle. *Id.* at ¶ 1. The trial court ordered Hume to pay restitution to the victim in the amount of $1,842, the value of the items stolen. *Id.* at ¶ 6. The Ninth District Court of Appeals stated, "While Hume was convicted of felonious assault, however, he was never charged with, or convicted of, a theft offense. Thus, the amount of restitution was not a direct and proximate result of the commission of the offense for which Hume was convicted. It follows that the trial court erred in ordering restitution."

{¶ 63} As the court in *Hume* found, we find that the $417 restitution order for the damages to Cusic's truck is not related to Noble's commission of the felonious assault. Noble was never charged or found guilty of an offense relating to the destruction of Cusic's personal property. Again, citing R.C. 2903.11(A), the statute states:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

The harm contemplated by R.C. 2903.11(A) is to a person or a person's unborn, not to a person's personal property. Therefore, $417 of the trial court's $3,000 restitution order was not an economic loss suffered by Cusic as a direct and proximate result of the commission of the felonious assault. Accordingly, we find that the restitution order with respect to Cusic's claimed

damages to his truck, is contrary to law. Noble's second assignment of error is partially sustained. The trial court shall reduce the amount of restitution by $417, the amount representing the damages to Cusic's truck.

IV. Conclusion

{¶ 64} Based on the forgoing, we overrule Noble's first assignment of error; and we partially sustain Noble's second assignment of error. Accordingly, we affirm Noble's convictions. However, the trial court's restitution order is, in part, contrary to law. This matter shall be remanded for proceedings consistent with this decision.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART, REVERSED IN PART, AND CAUSE IS REMANDED. Appellant and appellee shall split 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 Athens County Common Pleas Court to carry this judgment into execution.

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

Abele, J., and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.