

[Cite as *State v. Guade*, 2012-Ohio-1423.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-718
v.	:	(M.C. No. 2011 CR B 012598)
	:	
Baye Guade,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 30, 2012

Richard C. Pfeiffer, Jr., City Attorney, and Orly Ahroni, for appellee.

Steven Mathless, for appellant.

APPEAL from the Franklin County Municipal Court.

FRENCH, J.

{¶ 1} Defendant-appellant, Baye Guade ("appellant"), appeals the judgment of the Franklin County Municipal Court, which convicted him of criminal mischief and awarded restitution to the victim, Morgan Wright. For the following reasons, we (1) affirm the part of the judgment convicting appellant of criminal mischief and ordering him to pay restitution for expenses related to the conviction, (2) reverse the part of the judgment ordering restitution for expenses not related to the conviction, and (3) remand the matter to the trial court for it to revise the restitution order.

I. BACKGROUND

{¶ 2} Appellant was charged with assault and disorderly conduct for attacking Wright, and he was charged with criminal mischief for taking Wright's purse and damaging it. Appellant pleaded not guilty, and a jury trial ensued. At trial, Wright testified as follows. Wright and Carrie Horsky hired appellant, a cab driver, to give them a ride after a night out drinking. He drove them to Wright's apartment, but they did not have enough cash to pay the fare. They offered to pay with a check or debit card, however appellant insisted on cash and became upset. He threw Wright to the ground and yanked her purse off her arm. The purse ripped apart, and appellant drove away with it. Wright got her purse back when appellant returned to the scene.

{¶ 3} Horsky also testified that appellant snatched Wright's purse after throwing her to the ground. In addition, she testified to the following. She got into appellant's cab before he drove off with Wright's purse. She reached for the purse, but appellant grabbed her arm and refused to let go until she threatened to call the police. She had appellant take her to an ATM so she could get money for the cab fare, and he drove her to Wright's apartment afterward.

{¶ 4} Appellant testified that he did not assault Wright, but instead, she struck him several times. He claimed that her purse twisted into his hand when he tried to thwart her attacks, however he admitted that Wright did not get her purse back until Horsky retrieved it from him in his cab. He also admitted that he was upset when Wright and Horsky did not have enough cash to pay the cab fare.

{¶ 5} During closing argument, the prosecutor noted that there were no photographs to corroborate appellant's testimony that Wright attacked him. Appellant objected, and the trial court overruled the objection. Before the jury deliberated, appellant asked the trial court for an accident defense instruction, and the court denied the request. The jury found appellant not guilty of assault and disorderly conduct, but guilty of criminal mischief. At sentencing, appellant argued that he should not have to pay for medical treatment Wright received after the incident because he was acquitted of

assault and disorderly conduct. He also claimed that the court should not order him to pay for the value of Wright's purse because she got it back. He said, however, that the court could order him to pay for repairing the purse. The prosecutor asked that appellant pay \$79.56 for Wright's medical bills and \$115 for the purse. The court awarded restitution for \$190.

II. ASSIGNMENTS OF ERROR

{¶ 6} Appellant filed a timely notice of appeal and now assigns the following as error:

1. The trial court erred when it refused to give a jury instruction on accident on the charge of criminal mischief when Appellant testified in the course of his struggle to get away from the alleged victim who attacked him, the alleged victim's purse accidentally got wrapped in his hand, that he did not intentionally break the snap on the alleged victim's purse, or take it.
2. The trial court erred when it imposed a financial sanction on acquitted conduct when the court ordered restitution for payment of the alleged victim's medical bills when Appellant was acquitted on the charges of assault and disorderly conduct and in ordering an economic windfall to the victim by ordering the value for replacement of her purse when only a snap was broken on the purse, and the State offered no evidence concerning whether the snap on the purse could be repaired or the cost to repair the snap.
3. Appellant's conviction for criminal mischief was against the manifest weight of the evidence.
4. The trial court erred in allowing the prosecutor to make a misleading argument in rebuttal closing argument that Appellant had a burden to produce pictures of Appellant's neck injury when the only evidence was that the police took no pictures of Appellant's neck injury, and in refusing to give a limiting instruction that only the Prosecutor had the burden of proof.

III. DISCUSSION

A. First Assignment of Error: Accident Defense Instruction

{¶ 7} In his first assignment of error, appellant contends that the trial court improperly refused to give an accident defense instruction. We disagree.

{¶ 8} We will not disturb the trial court's refusal to give the instruction absent an abuse of discretion. *See State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} A court has discretion to give a jury instruction if it is "applicable to the facts in the case * * * and reasonable minds might reach the conclusion sought by the specific instruction." *State v. Smith*, 10th Dist. No. 01AP-848 (Apr. 2, 2002), citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). Here, we conclude that an accident defense was not pertinent to the facts and that, likewise, it was not a defense that reasonable jurors might have accepted had they been instructed on it. Specifically, although appellant claimed at trial that Wright's purse accidentally twisted into his hand, the record failed to show how that result was possible. In fact, Wright and Horsky's corroborating testimony established that appellant grabbed the purse, broke it from the force he used to take it, and drove away with it. In addition, appellant's own testimony undermined his defense. For instance, he revealed his motive to snatch the purse when he admitted to being upset because Wright and Horsky did not have enough cash to pay the cab fare. Also demonstrating his culpability is his admission to keeping the purse until Horsky retrieved it. *See State v. Henry*, 10th Dist. No. 04AP-1061, 2005-Ohio-3931, ¶ 38.

{¶ 10} For all these reasons, we conclude that the trial court did not abuse its discretion by refusing to give an accident defense instruction. We overrule appellant's first assignment of error.

B. Second Assignment of Error: Restitution

{¶ 11} In his second assignment of error, appellant challenges the trial court's restitution order. R.C. 2929.28(A)(1) authorized the court to order restitution for the economic loss Wright suffered from appellant's criminal conduct. We apply an abuse of discretion standard to the court's order. *See State v. Thompson*, 10th Dist. No. 10AP-1004, 2011-Ohio-5169, ¶ 25.

{¶ 12} Appellant first contends that the trial court abused its discretion by ordering restitution for Wright's medical expenses because they are based on the assault and disorderly conduct charges for which he was acquitted. Plaintiff-appellee, the state of Ohio, concedes that the trial court abused its discretion, and we agree. *See State v. Hooks*, 135 Ohio App.3d 746, 749 (10th Dist.2000) (holding that it was improper for a court to order restitution for damages attributed to offenses for which a defendant was charged, but not convicted).

{¶ 13} Next, appellant contests the amount of restitution that the trial court ordered for Wright's purse. The trial court based the amount on the recommendation the prosecutor made for Wright. The court was permitted to do so pursuant to R.C. 2929.28(A)(1). Therefore, we discern no abuse of discretion in the court's restitution order for Wright's purse.

{¶ 14} We overrule appellant's second assignment of error, in part, as it relates to restitution for Wright's purse. We sustain the assignment of error, in part, as it relates to restitution for Wright's medical expenses.

C. Third Assignment of Error: Manifest Weight of the Evidence

{¶ 15} In his third assignment of error, appellant asserts that his criminal mischief conviction is against the manifest weight of the evidence. We disagree.

{¶ 16} When presented with a manifest weight challenge, we weigh the evidence to determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 220. The trier of fact is afforded

great deference in our review. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 26. And we reverse a conviction on manifest weight grounds for only the most exceptional case in which the evidence weighs heavily against a conviction. *Lang* at ¶ 220.

{¶ 17} The jury concluded that appellant committed criminal mischief, in violation of R.C. 2909.07(A)(1), by knowingly snatching and damaging Wright's purse. Appellant contends that his conviction is against the manifest weight of the evidence because he testified that Wright's purse accidentally twisted into his hand. For the reasons we have discussed, however, it was within the province of the jury to reject that defense. Appellant also argues that the jury lost its way when it convicted him because he had no motive to commit criminal mischief. But we have already concluded that the evidence revealed appellant's motive.

{¶ 18} In the final analysis, the trier of fact is in the best position to determine witness credibility. *State v. Cameron*, 10th Dist. No. 10AP-240, 2010-Ohio-6042, ¶ 43. The jury accepted evidence proving that appellant committed criminal mischief, and appellant has not demonstrated a basis for disturbing the jury's conclusion. Accordingly, we hold that appellant's conviction is not against the manifest weight of the evidence. We overrule appellant's third assignment of error.

D. Fourth Assignment of Error: Prosecutorial Misconduct

{¶ 19} In his fourth assignment of error, appellant argues that we must reverse his conviction because the prosecutor committed misconduct during closing argument. We disagree.

{¶ 20} The test for prosecutorial misconduct is, first, whether the conduct is improper, and second, whether the conduct prejudicially affected the substantial rights of the accused. *State v. White*, 82 Ohio St.3d 16, 22 (1998). The prosecutor noted during closing argument that there were no photographs to corroborate appellant's testimony that Wright attacked him. Appellant contends that the statement was improper because it shifted the burden of proof to him. We find no prejudice from the statement, however, because it was related to the assault and disorderly conduct charges

for which appellant was acquitted. Therefore, we need not reverse appellant's conviction for prosecutorial misconduct. We overrule appellant's fourth assignment of error.

IV. CONCLUSION

{¶ 21} In summary, we overrule in part and sustain in part appellant's second assignment of error and overrule his first, third, and fourth assignments of error. We (1) affirm the part of the Franklin County Municipal Court's judgment convicting him of criminal mischief and ordering him to pay restitution for Wright's purse, (2) reverse the part of the judgment ordering restitution for Wright's medical expenses, and (3) remand the matter to the trial court with instructions to remove Wright's medical expenses from its restitution order.

*Judgment affirmed in part, reversed in part;
cause remanded with instructions.*

BROWN, P.J., and KLATT, J., concur.
