

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

|                      |   |                             |
|----------------------|---|-----------------------------|
| STATE OF OHIO,       | : | Case Nos. 13CA2             |
|                      |   | 13CA3                       |
| Plaintiff-Appellee,  | : |                             |
| v.                   | : | <u>DECISION AND</u>         |
|                      |   | <u>JUDGMENT ENTRY</u>       |
| BRIAN E. DURHAM,     | : |                             |
| Defendant-Appellant. | : | <b>RELEASED: 10/15/2014</b> |

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Francisco E. Lüttecke, Ohio Assistant Public Defender, Columbus, Ohio, for appellant.

Colleen S. Williams, Meigs County Prosecuting Attorney, and Jeremy L. Fisher, Meigs County Assistant Prosecuting Attorney, Pomeroy, Ohio, for appellee.

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Harsha, J.

{¶ 1} Brian E. Durham appeals from judgments entered in separate criminal cases, but confines his argument to contesting a restitution order in his conviction for a misdemeanor charge of misconduct at an emergency. In his sole assignment of error Durham contends that the trial court erred when it ordered him to pay restitution to a third-party, non-victim when damages were attributed to an arson charge upon which he was not convicted. We agree. The trial court based its restitution order on R.C. Chapter 2930, but that chapter does not apply to victims of the crime for which he was convicted, a misdemeanor offense of misconduct at an emergency; moreover, the alleged victim did not constitute a victim under that chapter. R.C. 2930.01(A) and (H).

{¶ 2} Although R.C. 2929.28(A)(1) authorizes a trial court to order restitution for misdemeanor offenses, a trial court is only authorized to order restitution when there is

evidence that the alleged victim is in fact a victim of the offense that underlies the conviction. Because there was no evidence in the record to support the trial court's conclusion that Durham's misconduct at an emergency caused the claimed economic loss to the alleged victim, the trial court erred in ordering restitution. Instead, it appears that the trial court ordered restitution based on arson, the offense that caused the loss to Ms. Collins and upon which Durham was indicted, but was not convicted. The trial court thus committed plain error in ordering Durham to pay restitution to a person who was not established to be a victim of his misdemeanor offense of misconduct at an emergency.

{¶ 3} Therefore, we sustain Durham's assignment of error and reverse the portion of the judgment of the trial court ordering him to pay restitution for the crime of misconduct at an emergency. We affirm the remainder of the trial court's judgments.

### I. FACTS

{¶ 4} These consolidated appeals arise from the two criminal cases. In Meigs C.P. Case No. 11-CR-106, a Meigs County grand jury returned an indictment charging Durham with one count of aggravated arson in violation of R.C. 2909.02(A)(2), a felony of the second degree, and one count of insurance fraud in violation of R.C. 2913.47(B)(1), a felony of the fifth degree. The Meigs County Court of Common Pleas granted Durham's motion and severed the counts because the alleged offenses were unrelated. The second count was tried first, and after a jury trial, the trial court convicted Durham of insurance fraud and sentenced him to six months in prison with a \$500 fine.

{¶ 5} On the remaining charge of aggravated arson, Durham agreed to plead guilty to an amended misdemeanor charge of misconduct at an emergency in return for the state's recommendation that he receive community control at sentencing. At the plea hearing the trial court observed that "[i]t would appear that law enforcement was the only victim" in the amended misdemeanor charge, and the state agreed, but noted that JoAnn Collins, who was present, was the alleged victim of the original aggravated arson charge. Collins stated that Durham was in the process of buying a house from her through a land contract, but that as a result of his actions, the house caught fire "someway" and was damaged. The victim's advocate stated that she would make a victim-impact statement part of the record prior to sentencing.

{¶ 6} When the trial court suggested that the plea agreement included Durham's consent to pay any restitution the court might order, Durham's counsel noted that the parties had never talked about restitution. The parties stipulated that for purposes of the plea hearing the amended misdemeanor charge was a lesser included offense of the original aggravated arson charge.

{¶ 7} Before sentencing the victim-impact statement was filed under seal. The statement listed two victims of the original aggravated arson charge—Collins and Grange Mutual Casualty Company. Collins claimed damages of \$41,363.16 "[t]o repair arson damage" caused to the house Durham "was accused of catching on fire." Grange contended that it had incurred lost expenses on a homeowners insurance claim that Durham filed but which the insurance company had denied.

{¶ 8} At sentencing Collins accused Durham of tearing up the house and suggested that he, “someone,” or “somebody caught it on fire. Collins had not received any restitution from any insurance company. The following exchange then occurred:

THE COURT: Well, here’s my problem, Ms. Collins. If I understand the conviction correctly, whatever charge he was convicted with with regard to you, the case that you’re actually the victim in, that case was dismissed. Is that where we are? Ms. Petrasko, is that where we are?

VICTIM’S ADVOCATE PETRASKO: From what... Uh...

THE COURT: He’s only charged with... He’s not charged with the insurance or the arson. He got misconduct in an emergency, a misdemeanor of the first degree. Misconduct in an emergency, the misconduct would be against the people of the State of Ohio or the responding agency. By statute, there would not be a victim named. So I can’t do what she wants even if she asked me, can I?

VICTIM’S ADVOCATE PETRASKO: Correct, Your Honor.

\* \* \*

THE COURT: \* \* \* [A]s a result of th[is] plea agreement or what the State thought they could prove, your case got disposed of short of the conviction that affects your property. So the only thing that’s available to you is a civil sanction, you could sue him. \* \* \* [Y]ou’re no longer a victim in the case that he’s convicted of here.

{¶ 9} The trial court then changed its mind because it did not “think it’s right that Ms. Collins is not made whole at least in part.” The court found that “pursuant to 2930 of the Revised Code that it’s the direct actions as a result of the conviction on the misdemeanor of the first degree that the actions of the defendant at this emergency, which resulted in his conviction, resulted in a substantial financial hardship to the Collins family” and determined that the sum stated in Collins’s victim-impact statement was the appropriate amount.

{¶ 10} The trial court convicted Durham of misconduct at an emergency in violation of R.C. 2917.13, a misdemeanor of the first degree, sentenced him to six months incarceration, suspended the sentence and placed him on community control for five years, and ordered that he pay restitution to Collins in the amount of \$41,363.16. In its sentencing entry, the trial court stated that “pursuant to Revised Code Section 2930.13 this Court finds that the actions of the Defendant in committing the offense caused significant financial hardship to the victim.” In Case No. 13CA2, Durham appealed from this sentence.

{¶ 11} In Meigs C.P. Case No. 11-CR-153 the trial court convicted Durham of two felony counts of aggravated trafficking in drugs upon his guilty plea and sentenced him to a five-year term of community control with underlying consecutive 18-month sentences. In Case No. 13CA3, Durham appealed from this sentence.

{¶ 12} We granted Durham’s motion to consolidate these appeals.

## II. ASSIGNMENT OF ERROR

{¶ 13} Durham assigns the following error for our review:

1. The trial court erred when it ordered Mr. Durham to pay restitution to JoAnn Collins.

## III. STANDARD OF REVIEW

{¶ 14} Durham did not object to the trial court’s restitution order at sentencing. Therefore, we review his argument on appeal under the plain-error standard of review. See *State v. Leslie*, 4th Dist. Hocking Nos. 10CA17 and 10CA18, 2011-Ohio-2727, ¶ 27 (applying this standard of review to a restitution order that the defendant did not object to at trial). “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B).

{¶ 15} For a reviewing court to find plain error, there must be (1) an error, i.e., a deviation from a legal rule, (2) the error must be plain, and (3) the error must have affected substantial rights, i.e., it must have affected the outcome of the proceeding. See *State v. Osie*, \_\_ Ohio St.3d \_\_, 2014-Ohio-2966, \_\_ N.E.3d \_\_, ¶ 81, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Notice of plain error is taken “ ‘with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice.’ ” *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 16} Although we generally review a decision to award restitution under an abuse of discretion standard, we review the question of who constitutes a crime victim for purposes of awarding restitution as a matter of law, i.e. de novo. See generally *State v. Stump*, 4th Dist. Athens No. 13CA10, 2014-Ohio-1487, ¶ 11.

#### IV. LAW AND ANALYSIS

##### Case No. 13CA3

{¶ 17} Although Durham appealed the trial court’s sentence relating to his convictions for aggravated trafficking in drugs in Meigs C.P. Case No. 11-CR-153, his brief does not contest that judgment. Therefore, we affirm the trial court’s judgment in that case.

##### Case No. 13CA2

{¶ 18} Instead, Durham’s sole assignment of error is related to the restitution order in his sentence on his conviction for misconduct at an emergency in Meigs C.P. Case No. 11-CR-106. Durham contends that the trial court committed plain error

because it lacked statutory authority to order him to pay Collins, a third-party non-victim, for damages related to an offense for which he was not convicted—aggravated arson.

{¶ 19} The trial court based its restitution order on its authority under R.C. 2930.13. The trial court erred in doing so because that section does not authorize a trial court to order restitution. Instead, it refers to the preparation of a victim-impact statement, which may include the victim’s opinion concerning the need for restitution for the harm caused by the defendant as a result of a crime. R.C. 2930.13(B)(4).

{¶ 20} Moreover, under R.C. 2930.01, the trial court erred in relying on R.C. 2930.13 and R.C. Chapter 2930 to support its restitution order because the crime upon which Durham was convicted—the R.C. 2917.13 misdemeanor crime of misconduct at an emergency—does not qualify as a “crime” for purposes of that chapter. See R.C. 2930.01(A) (defining “crime” for purposes of the chapter to include felonies and certain specified misdemeanors involving vehicular accidents, and not including R.C. 2917.13). Nor is Collins a “victim” as defined by R.C. 2930.01(H) because she was not identified as a victim of the crime of misconduct at an emergency in a police report, complaint, indictment, or information.

{¶ 21} Although not mentioned by the trial court at either the sentencing hearing or in its sentencing entry, R.C. 2929.28(A)(1) authorizes a trial court to award “[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.” Therefore, if the restitution order was proper under this statute, no reversible error occurred. See *State v. Gwen*, 134 Ohio St.3d 284, 2012-Ohio-5046, 982 N.E.2d 626, ¶ 24 (reviewing court will not reverse correct judgment merely because the reasoning is flawed).

{¶ 22} For purposes of R.C. 2929.28(A)(1), “[e]conomic loss” means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense \* \* \*.” R.C. 2929.01(L). “Victim” as used in R.C. 2929.28(A)(1) is not defined by statute, so it must be construed in context according to the rules of grammar and common usage. See *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 2014-Ohio-1417, 8 N.E.3d 940, ¶ 22; R.C. 1.42. In this context, a victim is generally defined as the person who was the object of the crime, e.g., the victim of a robbery is the person who was robbed. See *Leslie*, 4th Dist. Hocking Nos. 10CA17 and 10CA18, 2011-Ohio-2727, ¶ 32; *Black’s Law Dictionary* 1598 (8th Ed.2004) (defining “victim” as “[a] person harmed by a crime”).

{¶ 23} The crime for which Durham was convicted was misconduct at an emergency in violation of R.C. 2907.13, which prohibits a person from, among other things, “[h]amper[ing] the lawful operations of any law enforcement officer, firefighter, rescuer, medical person, emergency medical services person, or other authorized person, engaged in the person’s duties at the scene of a fire, accident, disaster, riot, or emergency of any kind.”

{¶ 24} Durham claims that a person like Collins, whose house was damaged in a fire, cannot be a victim of this offense because the victim is—as the trial court initially stated during the proceedings below—the official whose duties are being hampered by the offender’s misconduct. But as the state counters, Durham was convicted of the first-degree misdemeanor version of the crime, which specifies that the misconduct “creates a risk of physical harm to persons or property.” R.C. 2917.13(C). It is possible that a person’s misconduct at an emergency can cause physical harm to persons or property



that the official is trying to help. For example, a person could interfere with firefighters to such an extent that the interference prevents them from limiting the damage caused by a fire.

{¶ 25} Nevertheless, there is no evidence in the record that supports the trial court's finding that Collins incurred damage to her house directly or proximately due to Durham's interference with firefighters or police officers responding to the scene. At best, the evidence specified at the plea and sentencing hearings and the victim-impact statement instead indicated in ambiguous terms that Collins believed that her property was damaged because Durham, or "somebody" or "someone" else "caught it on fire" and caused the arson.

{¶ 26} Consequently, the sole evidence in the record that supports that Collins was a victim is related to the original charge of aggravated arson, not the amended charge of misconduct at an emergency. A trial court errs when it orders a defendant to pay restitution for damages attributable to an offense for which he was charged, but not convicted. *State v. Ellis*, 4th Dist. Washington No. 02CA48, 2003-Ohio-2243, ¶ 8-9, citing *State v. Hafer*, 144 Ohio App.3d 345, 348-349, 760 N.E.2d 56 (4th Dist.2001); *State v. Stiles*, 12th Dist. Butler No. CA2011-01-003, 2011-Ohio-4173, ¶ 7. Because Collins was not a victim of the charge for which Durham was convicted, the trial court committed plain error by ordering Durham to pay restitution to her. See *Leslie*, 4th Dist. Hocking Nos. 10CA17 and 10CA18, 2011-Ohio-2727, at ¶ 33 (reversing restitution order to a non-victim of a crime as plain error).

{¶ 27} Therefore, we sustain Durham's assignment of error.

## V. CONCLUSION

{¶ 28} We affirm the entire judgment in Case No. 13CA3. In Case No. 13CA2 we reverse that part of the judgment ordering him to pay restitution to Ms. Collins and remand the cause to the trial court to impose the appropriate order. We affirm the judgment in Case No. 13CA2 in all other regards.

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

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, 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.**