

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

STATE OF OHIO, : Case No. 15CA1
Plaintiff-Appellee, :
v. : DECISION AND
 : JUDGMENT ENTRY
HARLEY B. SMALLWOOD, :
Defendant-Appellant. : **RELEASED: 6/26/2015**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Peter Galyardt, 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.

Harsha, J.

{¶1} Harley Smallwood, who was represented by counsel, pleaded guilty to having a weapon while under a disability in exchange for the dismissal of several other charges, including felonious assault. At the sentencing hearing the trial court determined that Peter Stone was wounded and incurred \$31,000 in hospital bills as a result of Smallwood shooting him with a gun. The court convicted Smallwood of the charged offense, sentenced him to prison, and ordered him to pay restitution of \$31,000 to the victim of the crime.

{¶2} Smallwood contends that the trial court erred in ordering restitution because it was based on the dismissed felonious assault charges. Smallwood did not object to the trial court's imposition of restitution at sentencing so he forfeited all but plain error. The trial court did not commit error, much less plain error, in ordering restitution. The parties' and counsel's statements at sentencing established that Stone

was a victim harmed by Smallwood's offense of having a weapon while under a disability. The elements of that crime include use of the gun, so when Smallwood shot Stone, Stone became a victim of the crime. We reject Smallwood's first contention.

{¶3} Smallwood also contends that his trial counsel was ineffective for failing to object to the restitution order at sentencing. Based on our disposition of his first contention, we conclude that Smallwood cannot establish that his trial counsel provided ineffective assistance of counsel by failing to raise a meritless objection.

I. FACTS

{¶4} The Meigs County Grand Jury returned an indictment charging Smallwood with two counts of felonious assault, one count a having a weapon while under disability, and one count of improperly handling a firearm in a motor vehicle. The third count specified that the having a weapon while under disability charge included use of a firearm:

On or about the 12th day of October, 2014, in Meigs County, Ohio, one, Harley B. Smallwood, did knowingly acquire, have, carry, or use any firearm or dangerous ordnance and the person has been convicted of any felony offense of violence, being commonly known as HAVING WEAPONS WHILE UNDER DISABILITY in violation of Ohio Revised Code Section 2923.13(A)(2), A FELONY OF THE THIRD DEGREE, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

{¶5} After the trial court appointed counsel for Smallwood, he entered a plea of not guilty to the charges. The state subsequently filed a bill of particulars that reiterated the charges in the indictment. Subsequently, Smallwood entered a plea of guilty to the charge of having a weapon while under disability in exchange for the state's dismissal of

the remaining charges. The parties' plea agreement acknowledged that "restitution * * * may also be imposed."

{¶6} The trial court held a hearing on Smallwood's plea and after conducting a detailed colloquy to determine that his guilty plea was knowingly, intelligently, and voluntarily made, accepted his plea. The parties stipulated that there was a factual basis for the charge of having a weapon while under a disability.

{¶7} The trial court then proceeded to sentencing. The state noted that the basis of the crime was that Smallwood was attempting to shoot another person with his gun, but he ended up shooting his friend instead. Smallwood was under a disability that prevented him from having a firearm because of a Vinton County offense. Smallwood's trial counsel claimed that when one person threatened to harm Smallwood with a knife, Smallwood "retrieved a hand gun from his car" and after the knife was taken away from the other person, there was a "wrestling match * * * over the weapon," and the gun "was fired and it struck Mr. Stone." Smallwood stated that he obtained the gun to protect himself, that they got into a scuffle, and that his gun "accidentally went off." A victim's representative stated that Stone incurred \$31,000 in hospital bills as a result of the crime and the bullet went through his back close to his spinal cord. The trial court stated that it would order that Smallwood pay Stone \$31,000 in restitution, and Smallwood did not object.

{¶8} The trial court sentenced Smallwood to prison on the having a weapon while under a disability charge, dismissed the remaining charges, and ordered that he pay restitution of \$31,000 to the victim of the crime—Robert Stone. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶9} Smallwood assigns the following errors for our review:

I. The trial court committed reversible error when it ordered Harley Smallwood to pay restitution related to dismissed counts. R.C. 2929.18(A)(1).

II. Harley Smallwood was deprived of his constitutional right to the effective assistance of counsel.

III. Law and Analysis

A. Restitution

{¶10} In his first assignment of error Smallwood asserts that the trial court committed reversible error when it ordered him to pay restitution based upon dismissed counts. Smallwood 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).

{¶11} 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*, 140 Ohio St.3d 131, 2014–Ohio–2966, 16 N.E.3d 588, ¶ 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.

{¶12} 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.

{¶13} Smallwood claims that the trial court committed plain error by ordering restitution to Stone because Stone was the victim of the dismissed felonious assault counts, rather than the weapon-under-disability charge upon which he was convicted.

{¶14} R.C. 2929.18(A)(1) authorizes a trial court that imposes a felony sentence to award “[r]estitution by the offender to the victim of the offender’s crime * * * in an amount based on the victim’s economic loss.” “Victim” is not defined in the statute, so we construe it 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. Based on the rules of grammar and common usage, 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”).

{¶15} As Smallwood asserts, it is well-settled that “[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” and that this constitutes plain error. See *State v. Durham*, 4th Dist. Meigs Nos. 13CA2 and 13CA3, 2014-Ohio-4915, ¶ 26, citing *State v.*

Ellis, 4th Dist. Washington No. 02CA48, 2003-Ohio-2243, ¶ 8-9 and the cases cited therein; see also *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). In *Durham* at ¶ 25, we reversed a restitution order because “the sole evidence in the record that supports that [a person whose house was damaged by a fire] was a victim is related to the original charge of aggravated arson, not the amended charge of misconduct at an emergency.”

{¶16} Nevertheless, the statements made at Smallwood’s plea and sentencing hearing support the trial court’s restitution order to Robert Stone. In R.C. 2923.13(A)(2), which formed the basis for the indictment, and in the bill of particulars, the crime of having a weapon while under a disability includes the “use” of any firearm and not simply having or carrying the firearm. See R.C. 2923.13(A)(2) (“no person shall knowingly acquire, have, carry, or use any firearm, if * * *[t]he person is under indictment or has been convicted of any felony offense of violence”). Smallwood specifically pleaded guilty to the offense as charged. Likewise, the statements of the parties and counsel established that Stone was harmed by Smallwood’s use of the gun while under a disability. Smallwood’s counsel readily concedes in his reply brief that “[t]he State’s highlight of the ‘use’ element in the weapons-under-disability statute is well founded.” Smallwood does not contend on appeal that he did not use the gun or that Stone was not harmed by his use of the gun.

{¶17} The trial court thus properly ordered that Smallwood pay restitution to Stone and the record contains a sufficient basis for the court to conclude that Stone was a victim of the crime for which Smallwood was convicted, i.e. Stone was harmed by

Smallwood's use of the gun, which he had while under a disability. Consequently, Smallwood's reliance on our holding in *Durham* to support his assignment of error is misplaced.

{¶18} Smallwood's contention that the weapons-under-disability offense is a victimless, no-harm crime fails where a person is harmed by the offender's use of a firearm or dangerous ordnance. In rejecting a similar contention, the Second District Court of Appeals in *State v. Beverly*, 2d Dist. Clark No. 2612, 1990 WL 34813, at *8 (Mar. 29, 1990), upheld a restitution order on a weapons-under-disability conviction, notwithstanding the defendant's acquittal on a related felonious assault charge:

In its judgment entry of conviction, the trial court unconditionally ordered Beverly "to make restitution for the victim's medical and hospital expenses." No amount or restitution was specified.

Because Beverly was convicted of having used a weapon while under a disability, we cannot follow his argument that the restitution ordered does not relate to the crime of which he was convicted. Admittedly, there is an apparent inconsistency in the jury's having acquitted Beverly of Felonious Assault, while having found him guilty of having used a weapon while under a disability. Nevertheless, there is evidence in the record to support the conviction. It is clear that the victim, Taylor, was injured as a result of Beverly's use of the weapon.

{¶19} Similarly, Smallwood's abstract contention that the weapons-under-disability violation was complete before he fired his gun overlooks the facts. This argument does not alter the evidence before the trial court that he used the gun to injure Stone while he was under the statutory disability.

{¶20} Therefore, the trial court did not commit error, much less plain error, in ordering Smallwood to pay restitution to Stone. We overrule Smallwood's first assignment of error.

B. Ineffective Assistance of Counsel

{¶21} In his second assignment of error Smallwood asserts that his trial counsel was constitutionally ineffective for failing to object to the restitution order at sentencing.

{¶22} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to establish either part of the test is fatal to an ineffective-assistance claim. *Strickland* at 697, 104 S.Ct. 2052; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶23} Based on our disposition of his first assignment of error, Smallwood cannot establish that his trial counsel was ineffective for failing to raise a meritless objection to the properly made restitution order. See, e.g., *State v. Johnson*, 4th Dist. No. 14CA10, 2015-Ohio-1373, ¶ 30 (trial counsel was not ineffective for failing to raise a meritless objection). We overrule his second assignment of error.

IV. CONCLUSION

{¶24} The trial court did not err in ordering Smallwood to pay restitution to the victim of his crime, and his trial counsel did not provide ineffective assistance of counsel by failing to object to the restitution order. Having overruled Smallwood's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay 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.

Hoover, P.J. & Abele, 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.