[Cite as *State v. Griffin*, 2013-Ohio-411.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-11-1283
Appellee	Trial Court No. CR0201101954
v.	
Aaron P. Griffin, II	**DECISION AND JUDGMENT**
Appellant	Decided: February 8, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

HANDWORK, J.

{¶1} Defendant-appellant, Aaron P. Griffin, appeals his conviction and sentence on one count of robbery. He contends that his conviction is unsupported by and against the manifest weight of the evidence, that his trial counsel was prejudicially ineffective,

and that the trial court erred in imposing restitution, as well as the costs of prosecution, confinement, and court-appointed trial counsel. We affirm the judgment of the Lucas County Court of Common Pleas as it relates to Griffin's conviction, and reverse that portion of its sentence imposing the costs of prosecution.

{¶2} Griffin was indicted by the Lucas County Grand Jury on June 24, 2011. He was charged with one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, and one count of robbery in violation of R.C. 2911.02(A)(2), a second-degree felony. The aggravated burglary and aggravated robbery counts included firearm specifications pursuant to R.C. 2941.145.

{¶3} Griffin entered a plea of not guilty on June 29, 2011, and a two-day jury trial commenced on September 21, 2011. The state called four witnesses to the stand, and the defense presented the testimony of two witnesses. In an effort to avoid redundancy in delineating the testimony, we will begin with a general account of the facts to the extent they are undisputed.

{¶4} In the early morning hours of June 16, 2011, Griffin and his girlfriend, Tiffany Williams, were lodged at Motel 6 near the intersection of Reynolds Road and Heatherdowns Avenue in Toledo, Ohio. Tiffany's grandmother had recently passed away and Griffin and Tiffany went there for some privacy. Tiffany had $375 in her

purse, which was located on a dresser next to the television. The money was sent to Tiffany by her grandfather so that she could attend her grandmother's funeral.

{¶5} Sometime after 1:00 a.m., Griffin and Tiffany were visited by Tiffany's friend, Mandy Lynch, and a person named "Manny," who was a friend of both Mandy and Griffin. Mandy stayed for about an hour and left. Mandy came back a few hours later, stayed for 15 minutes, and left. At some point, Tiffany discovered that the $375 was missing from her purse. Later that afternoon, Griffin and Tiffany drove over to Mandy's mobile home to confront her about the missing money. Griffin exited the vehicle and walked to the front door of Mandy's residence. At the time, Mandy was home along with her three-year-old daughter, her boyfriend's putative stepbrother, Travis Harner, and Travis' girlfriend, Starla Blakey. From this point on, the testimony becomes widely divergent.

{¶6} According to the state's witnesses, Griffin broke through the front door, accused Mandy of taking Tiffany's money, which she denied, ransacked the personal belongings of the occupants, brandished a firearm, made various physical threats, and assaulted Travis in an effort to obtain the money or something of value from the residence and its occupants. Specifically, Mandy testified that she saw Griffin and Tiffany pull into her driveway and that Griffin broke through the front door before she could get there. Once inside, Griffin accused Mandy of stealing Tiffany's money, which Mandy denied. Griffin said he would not leave until he got what he came for. Griffin

then threatened to take Mandy's flat-screen TV and rummaged through her belongings looking for something of value. Meanwhile, Travis began to escort Starla and Mandy's daughter toward the back of the trailer. Griffin followed them down the hallway and knocked Travis to the ground. Griffin then returned to the living room with a gun in his hand. He threatened to pistol whip Travis in the face and have Tiffany come inside "to whop" Mandy and Starla. When Griffin left to get Tiffany, Mandy placed an emergency call to the police. Griffin then returned with Tiffany, who ultimately persuaded Griffin to leave before police arrived.

{¶7} Mandy also testified on direct examination that her boyfriend, Jason Kwapich, had "kicked in the [front] door" a week earlier, but a neighbor came over and fixed the door three days before it was broken again by Griffin. On cross-examination, Mandy could not recall the name of the neighbor who fixed her door. She could describe the gun purportedly in Griffin's hand only as "hand-size and black."

{¶8} In his testimony, Travis confirmed that Griffin gained entrance to Mandy's residence by breaking open the front door. He also testified that Griffin was complaining of stolen money and threatened to take the flat-screen, laptops, or anything of else of value. Griffin then began to search through the personal belongings of Travis and Starla, stating "I need my money or I'll trash the whole trailer." Travis then took Starla and Mandy's daughter to the back bedroom, after the child began to cry and Griffin threatened to slap Starla. According to Travis, Griffin went after him down the hallway,

hit him in the face with a pistol, and threatened to pistol whip everyone and burn down the trailer.

{¶9} On cross-examination, Travis described the gun used by Griffin as "big" and "black," and stated that it "[l]ooked like a 9 millimeter." Travis admitted that he did not suffer any chipped teeth or require sutures or other medical attention as a result of the blow. He also admitted that he testified incorrectly on direct examination when he referred to Mandy's boyfriend as his brother, as he and Jason are actually stepbrothers. When pressed further, Travis admitted that Jason is not his stepbrother either, but merely the son of his mother's boyfriend, Robert Kwapich, although he considers Jason as his stepbrother. Travis also stated that he was present in Mandy's home when the front door was being fixed three days earlier by Mandy's neighbor after it was kicked in by Jason. However, Travis was unable to identify from the state's pictures of the broken door whether the depicted damage was caused by Griffin or by Jason a week earlier. Travis also stated that the neighbor put painted trim on the door when he repaired the damage caused by Jason, but subsequent evidence revealed that the trim purportedly damaged by Griffin's break-in was unpainted.

{¶10} In her testimony, Starla confirmed that Griffin broke through the door demanding money. She also testified that Griffin "started rumbling through my stuff" and that he continued to do so after she confronted him. According to Starla, however, Griffin punched Travis with his fist, and "after that he had pulled out a pistol." She also

stated that "Travis put his fist up" and then, "when Travis turned around, that's when [Griffin] knocked Travis down to the ground."

{¶11} Finally, Toledo Police Detective James Couch was called by the state. Before his testimony, the state played a tape of four 9-1-1 calls that were made about the incident, two from Mandy and two from Jason. During his 9-1-1 calls, Jason misidentifies himself as "George," explains that he is not present at the scene, and states that he is relating the facts as they were told to him over the phone by Mandy. He also states that he is concerned because Griffin is known to carry a pistol. During her first call, Mandy relays the break-in and asks for assistance, but mentions nothing about a gun until her second call. The 9-1-1 operator questions Mandy about why she failed to mention a gun the first time she called, and Mandy explains that the intruder was in the hallway when she first called and that she did not know about the gun at that time. During her second 9-1-1 call, Mandy also states that she is afraid because she was told that Griffin threatened to return and burn down her trailer.

{¶12} Detective Couch testified that in the course of his investigation of the incident, Griffin voluntarily came to the police station and agreed to be interviewed. During his interview, Griffin admitted he was at Mandy's home seeking money that afternoon, that Mandy denied taking the money, and that he struck Travis. Further, Griffin told Detective Couch that "he believed Mandy took his money," that he merely asked Mandy "could I have a TV set instead [of the money] because you have more than

one TV," and that he struck Travis because "the kid was being aggressive with him." Detective Couch also described the damaged door trim as "a fresh piece of wood, unpainted."

{¶13} On cross-examination, Detective Couch testified that nothing was broken or smashed inside the house. The detective also stated that when he interviewed Griffin, he observed blood on the knuckle side of Griffin's right hand where he admittedly struck Travis. On redirect, Detective Couch related that during his interview, Griffin stated that when he and Tiffany first arrived at Mandy's house, they parked in the driveway on the side of the trailer from which the front door could not be seen and that he (Griffin) had to walk around the trailer in order to get to the front door.

{¶14} At the close of the state's evidence, Griffin moved for judgment of acquittal pursuant to Civ.R. 29. The trial court denied the motion and the defense presented the testimony of Tiffany Williams and Robert Kwapich.

{¶15} Tiffany testified that she first noticed the money missing from her purse at about 3:00 p.m. on June 16, 2011. Tiffany believed that Mandy stole the money because Mandy and Manny "were the only two in the room, and we didn't think it was Manny because he was Aaron's friend." About a half-hour later, after visiting a friend, Tiffany and Griffin drove over to Mandy's home. When Tiffany arrived at Mandy's trailer, she pulled into the driveway located on the side adjacent to the front door. Tiffany watched from the car as Griffin knocked on Mandy's front door and Mandy opened the door and

let him inside. Tiffany then pulled around to the driveway at the rear of the trailer, parked, and went into Mandy's home. According to Tiffany, she entered the residence just prior to the altercation between Griffin and Travis. She stated that Griffin punched Travis only in self-defense, after Travis rapidly approached him in a threatening and aggressive manner. She also testified that Griffin did not have a gun, did not threaten anyone with force, and was merely attempting to recover the money that was stolen from her purse.

{¶16} During cross-examination, Tiffany admitted that she did not see Mandy take the money from her purse and that Mandy was never left alone in the room at Motel 6. She also responded in the affirmative when asked if Griffin would be mistaken or lying "if [he] told the detective that you * * * parked actually back here [in the driveway at the back of the trailer]."

{¶17} Robert Kwapich testified that he is Jason's father and the boyfriend of Travis' mother, that both Travis and Travis' mother reside with him at his home on Airport Highway, and that "approximately a month or so after this [incident at Mandy's home] happened * * * Travis told me that he [Griffin] did not have a gun." On cross-examination, Mr. Kwapich admitted that he knew the matter was being investigated, but never contacted or shared the information with anyone at the Toledo Police Department.

{¶18} On September 22, 2011, the jury acquitted Griffin of aggravated burglary and aggravated robbery, rendering specific findings on each count that Griffin did not

have a firearm. The jury did, however, find Griffin guilty of robbery. On September 29, 2011, the trial court sentenced Griffin to four years imprisonment, ordered that he pay restitution to Mandy Lynch in the amount of $32, and further ordered that he reimburse the state and Lucas County for the costs of his prosecution, confinement, and court-appointed counsel.

{¶19} Griffin now appeals that judgment, asserting the following assignments of error:

1. The conviction for robbery is unsupported by sufficient evidence and the trial court erred in denying appellant's Crim.R. 29 motion.

2. The conviction is against the manifest weight of the evidence.

3. Trial counsel was ineffective for failing to request jury instructions on the defense of mistake of fact.

4. The trial court erred in imposing restitution.

5. The trial court erred in imposing costs.

{¶20} In his first assignment of error, Griffin contends his conviction is unsupported by any evidence that he acted "with the specific intent required to commit a theft offense." Asserting that "[i]t is not wrongful to seek to have returned what belongs to you," Griffin maintains that his undisputed purpose during the alleged offense was not to "wrongfully" take property belonging to another, but "to regain money that was taken from him."

{¶21} As an initial matter, the state argues that Griffin waived any claim involving the sufficiency of evidence by failing to renew his Crim.R. 29 motion for acquittal at the close of all the evidence. Although the state cites a number of cases in support of this proposition, there is actually a conflict among the appellate districts as to whether the failure to renew a Rule 29 motion at the close of all evidence in a jury trial results in the waiver of a sufficiency-of-the-evidence claim on appeal. *See, e.g., State v. Blake*, 2012-Ohio-3124, 974 N.E.2d 730, ¶ 45-50 (12th Dist.); *State v. Evans*, 8th Dist. No. 85396, 2005-Ohio-3847, ¶ 11; *State v. DiCarlo*, 7th Dist. No. 02 CA 228, 2004-Ohio-5118, ¶ 19; *State v. Coe*, 153 Ohio App.3d 44, 2003-Ohio-2732, 790 N.E.2d 1222, ¶ 19 (4th Dist.). We need not weigh-in on this issue, however, since we have examined the present record and find sufficient evidence to support the jury's verdict.

{¶22} A sufficiency-of-the-evidence claim raises a question of law, "that is, whether the state has met its burden of production." *State v. Cronin*, 6th Dist. No. S-09-032, 2010-Ohio-4717, ¶ 23. Our function is to construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Robinson*, 6th Dist. No. l-10-1369, 2012-Ohio-6068, ¶ 14.

{¶23} Griffin was convicted of robbery in violation of R.C. 2911.02(A)(2), which proscribes the use or threat of physical harm "in attempting or committing a theft offense." Pursuant to R.C. 2911.02(C)(2), a violation of any of the theft statutes

enumerated in R.C. 2913.01(K) can serve as the underlying "theft offense" to a charge of robbery. Here, the applicable theft statute is R.C. 2913.02(A)(1), which provides: "No person, *with purpose to deprive the owner of property* or services, shall knowingly obtain or exert control over either * * * [w]ithout the consent of the owner or person authorized to give consent." (Emphasis added.) Pursuant to R.C. 2901.22(A), "[a] person acts purposely when it is his specific intention to cause a certain result."

{¶24} The question whether the taking of property under a bona fide claim of right can negate the specific mens rea required for robbery has not received much attention in Ohio, although it is the source of great controversy among other jurisdictions. *See generally* Annotation, *Robbery, Attempted Robbery, or Assault to Commit Robbery, as Affected by Intent to Collect or Secure Debt or Claim*, 88 A.L.R.3d 1309 (1978). Among those few Ohio courts addressing the subject, some have rejected the doctrine on grounds that public policy abhors lawless reprisal as a means of redressing grievances. Thus, in *State v. Sims*, 8th Dist. No. 54278, 1988 WL 118581 (Nov. 3, 1988), the defendant, who was caught in the commission of a burglary, argued that he was actually trying to "recoup" money that had been stolen from him. Rejecting that argument, the court succinctly stated, "'Self-help' replevin is not an affirmative defense to burglary." *Id.* at *2. Similarly, in *State v. Padgett*, 2d Dist. No. 22024, 2008-Ohio-1166, the defendant, who was convicted of robbery, argued that her purpose in attempting to take money from a motel cash drawer was not to deprive the motel of property as required under R.C.

2913.02(A), but to enforce her legitimate claim to a refund. In rejecting the argument, the court explained, "In the absence of the voluntary payment of a claim, a person making a monetary claim against another is not privileged to seize the other person's property to satisfy the claim, but must use legal process to satisfy the claim." *Id*. at ¶ 12.

{¶25} On the other hand, some Ohio courts have recognized that debt collection or claim recovery is a viable defense to robbery, but only in limited circumstances. Thus, in *State v. Snowden*, 7 Ohio App.3d 358, 455 N.E.2d 1058 (10th Dist.1982), the court held that a mistake-of-fact instruction should have been given in a robbery trial where the defendant presented evidence that he reasonably believed he had a right to receive the property in question. The court reasoned that a person honestly acting upon such a belief lacks the specific intent to deprive another of property. *Id.* at 363. It is important, however, that the defendant in *Snowden* was not asserting a generalized right to self-help relief in satisfaction of an alleged claim or debt. Rather, the defendant presented evidence suggesting that the owner had agreed he could have the money in question.

{¶26} In *Tipton v. Jago*, 818 F.3d 1264, 1267 (6th Cir.1987), fn. 2, the Sixth Circuit, although finding it unnecessary to apply the claim-of-right doctrine under the facts of that case, explained:

> In *Snowden* and similar cases (Annotation, [*supra*], 88ALR 3d 1309), overbearing debt collection has generally been held not to provide a defense whenever there are indicia that more is involved than simple debt

> collection, such as taking more than the amount due, taking without acknowledgement, or taking in the face of explicit resistance. Certainly, the existence of a legitimate debt does not justify a breach of the peace in debt collection. Cf. Ohio Revised Code § 1309.46 (Page 1979). On the other hand, debt collection has been adjudicated a complete defense to robbery where the cry of theft is raised only after the fact, where the consensual nature of the delivery of money is not in dispute, and in general where the circumstances surrounding the debt collection are such as to negate the intent element of the crime.

{¶27} In this case, we need not decide whether claim-of-right is, or should be, a valid defense to robbery. Assuming the validity of the defense, as well as its availability to someone who, like Griffin, is not the actual creditor or claimant, we nevertheless find sufficient evidence in the present record to support the conviction. According to the state's evidence, there is much more involved in this case than a peaceful or unopposed attempt to recover money believed to have been stolen. Griffin broke through the front door of Mandy's home, threatened to inflict physical harm on its occupants and, despite Mandy's persistent denials that she had taken the money, continued to threaten and/or assault the occupants in an effort to obtain what he came for. In addition, Griffin did not limit his actions to the recovery of money from Mandy. Griffin also attempted to take other property from Mandy, as well as seeking money or items of value among the

personal belongings of Travis and Starla. Clearly, the evidence was sufficient to support a finding that the "consensual nature of the delivery of money" was in dispute, that Griffin attempted to take money and other property "without acknowledgement," and that he did so "in the face of explicit resistance."

{¶28} Accordingly, Griffin's first assignment of error is not well-taken.

{¶29} In his second assignment of error, Griffin challenges the jury's verdict as against the manifest weight of the evidence. In so doing, Griffin urges this court to "act as the 'thirteenth juror' and * * * infer that [he] lacked the specific intent necessary [for] robbery." Noting the inconsistencies in the testimony of the state's witnesses, Griffin argues that we should "find the State's witnesses incredible" and conclude that his "only reason in going to the trailer was to obtain money that belonged to him and/or Tiffany."

{¶30} In determining whether a conviction is against the manifest weight of the evidence, we are not obliged to view the evidence in a light most favorable to the state. Instead, we sit as the proverbial "thirteenth juror" and, in so doing, may disagree with "the factfinder's resolution of the conflicting testimony." *State v. Thomkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). However, in order to substitute its judgment for that of the jury, an appellate court must find that "'in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶31} There is certainly a plethora of evidentiary conflicts in this case, as well as inconsistencies and credibility issues, on both sides of the fence. For example, the state's witnesses disagreed as to whether Griffin hit Travis with his fist or with a gun, and on whether Travis raised his fist before Griffin struck him. They also varied in their descriptions of the gun purportedly in Griffin's possession; and Travis was somewhat less than credible in confirming the damage caused by Griffin to Mandy's front door. On the other hand, Tiffany's testimony concerning where she parked when arriving at Mandy's trailer and her ability to see whether Griffin entered peacefully through the front door appears to be diametrically opposed to what Griffin told Detective Couch. There is also some question as to why Griffin and Tiffany would first visit a friend after discovering that the $375 was missing, rather than rushing straight to Mandy's trailer. Mr. Kwapich's credibility was also placed in question when he failed to explain why he withheld from police such important information that Jason admitted to lying about Griffin's possession of a gun. But sifting through conflicting testimony and assessing witness credibility in an effort to ascertain the truth is precisely what juries are commissioned to do. "It is well-settled that a jury is free to believe or disbelieve all, part, or none of the testimony of any witness since the jury is in a much better position than a reviewing court to view the witnesses, observe their demeanor, and assess their credibility." *State v. Baker*, 6th Dist. No. L-10-1140, 2013-Ohio-45, ¶ 49.

{¶32} Having examined the record and considered the credibility of the witnesses, we are not persuaded that the evidence weighs heavily against a conviction for robbery. Indeed, we find the jury quite discerning in finding Griffin guilty of robbery but not guilty of aggravated robbery or aggravated burglary. A rational jury could certainly conclude beyond a reasonable doubt that the evidence supported the prosecution's case in regard to the elements of robbery and theft, yet supported the defense's position in regard to the presence of a gun. Specifically, we cannot say that the jury lost its way in disbelieving that Griffin merely knocked on Mandy's door and asked politely whether he could have her TV in lieu of the $375 that he allegedly believed was stolen from Tiffany's purse. Moreover, a rational jury could conclude from the evidence that Griffin's belief in this regard, even if held in fact, was unreasonable under the circumstances. We conclude, therefore, that Griffin's conviction for robbery was not against the manifest weight of the evidence.

{¶33} Accordingly, Griffin's second assignment of error is not well-taken.

{¶34} In his third assignment of error, Griffin asserts that his trial counsel was ineffective for failing to request a jury instruction on the defense of mistake of fact. Referring to the arguments raised under his first assignment of error, Griffin maintains that "the evidence at trial warranted a defense of mistake of fact on the issue of [his] specific intent to commit a theft offense, or lack thereof."

{¶35} In order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

{¶36} Griffin contends that his trial counsel should have requested a jury instruction on mistake of fact similar to the instruction proposed by the defendant in *State v. Mathias*, 10th Dist. No. 06AP-1228, 2007-Ohio-6543, ¶ 20. Griffin then argues, based on *Mathias*, that "[h]ad trial counsel requested the instructions, it would have been prejudicial error for the trial court to refuse [to give them]." We find Griffin's reliance on *Mathias* rather curious. In *Mathias*, the trial court *did refuse* to give the requested instruction, and the court of appeals held that the trial court's refusal *did not* constitute prejudicial error. In fact, the *Mathias* court concluded that appellant suffered no prejudice precisely because "the trial court's general charge to the jury [instructing that

specific intent to deprive the owner of property must be established] covered the substance of the proposed instruction." *Id*. at ¶ 22.

{¶37} Similarly, in *State v. Holden*, 8th Dist. No. 78594, 2001 WL 755827, *6 (July 5, 2001), the court held that trial counsel was not prejudicially ineffective for failing to request a mistake-of-fact instruction, since "the general charge to the jury fully embraced the mistake of fact defense by emphasizing that the property must belong to another before a defendant can be convicted of a theft offense." *See also State v. Rawson*, 7th Dist. No. 05 JE 2, 2006-Ohio-496, ¶ 15; *State v. Harrison*, 12th Dist. No. 87-11-151, 1988 WL 71625, *5 (June 30, 1988).

{¶38} Here, the trial court twice instructed the jury that "[p]urpose to deprive an owner of property is an essential element of the crime of theft." Further, the trial court charged:

> Before you can find the defendant guilty, you must find that beyond a reasonable doubt the defendant knowingly obtained or attempted to obtain property owned by another without consent and for the purpose of depriving the owner of such property.

In addition, the court instructed that in order for Griffin to be convicted of theft, the state must prove beyond a reasonable doubt that he attempted to appropriate property or money "without reasonable justification or excuse for not giving proper consideration."

{¶39} Although the trial court did not use the term "mistake of fact," the instructions it gave fully embraced that defense. Under the terms of the instructions, the jury should acquit Griffin if he acted without purpose to deprive an owner of property or had a reasonable justification or excuse for taking the property. Thus, Griffin's trial counsel was not prejudicially ineffective for failing to request a mistake-of-fact instruction.

{¶40} Accordingly, Griffin's third assignment of error is not well-taken.

{¶41} In his fourth assignment of error, Griffin contends that the trial court erred in ordering him to pay restitution to Mandy Lynch in the amount of $32. Griffin argues that "[n]othing in the record connects the award of $32.00 to damage proximately caused by appellant in the commission of the offense—or that this was the amount suffered by the victim."

{¶42} R.C. 2929.18 authorizes a sentencing court to impose certain financial sanctions on an offender convicted of a felony, including restitution to the victim of the offender's crime. R.C. 2929.18(A)(1) provides:

> If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made 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.

{¶43} In the present matter, Griffin did not object to the imposition or the amount of restitution ordered during the sentencing hearing. He has, therefore, waived all but plain error. *See, e.g., State v. Alexander*, 4th Dist. No. 10CA3402, 2012-Ohio-2041, ¶ 9. In order to constitute plain error, the error "must be so obvious that it should have been apparent to the trial court without objection." *State v. Thompson*, 10th Dist. Nos. 10AP-1004, 10AP-1173, 2011-Ohio-5169, ¶ 22.

{¶44} The propriety of a restitution order is determined by whether there is competent, credible evidence in the record to substantiate both the amount of the victim's loss and the relationship between that loss and the offender's criminal conduct. *See State v. Hipsher*, 12th Dist. No. CA2011-12-128, 2012-Ohio-3206, ¶ 13; *State v. Johnson*, 1st Dist. No. C-100702, 2011-Ohio-5913, ¶ 7; *State v. Gears*, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist.1999). In some cases, where the amount of loss referenced in a victim impact statement appears doubtful or uncertain, documentary or other corroborating evidence may be required to verify the loss or expense. *See, e.g., State v. Christy*, 3d Dist. No. 16-04-04, 2004-Ohio-6963. However, R.C. 2929.18(A)(1) explicitly permits the trial court to "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." Thus, "no absolute requirement exists that the victim demonstrate the loss through documentary evidence." *In re Hatfield*, 4th Dist. No. 03CA14, 2003-Ohio-5404, ¶ 9. Instead, the amount of economic loss suffered by the victim, and its causal connection to the defendant's conduct in committing the offense, may generally be established by the victim's testimony or other information contained in the trial or sentencing record, including the presentence investigation report. *See State v. Granderson*, 177 Ohio App.3d 424, 2008-Ohio-3757, 894 N.E.2d 1290, ¶ 97 (5th Dist.); *State v. Brumback*, 109 Ohio App.3d 65, 83, 671 N.E.2d 1064 (9th Dist.1996).

{¶45} In this case, the state introduced substantial evidence at trial that Mandy's front door was damaged as a direct and proximate result of the commission of the robbery. Moreover, Mandy reported to adult probation that she purchased materials costing approximately $32 to repair her door, although she no longer had the receipt. Considering that Mandy did not claim the incurrence of labor costs in repairing the door, reporting instead that a neighbor made the repairs, there was no obvious reason for the trial court to doubt the expense. Thus, we cannot say that the trial court committed plain error in ordering $32 in restitution.

{¶46} Accordingly, Griffin's fourth assignment of error is not well-taken.

{¶47} Griffin's fifth assignment of error pertaining to the imposition of costs is two-fold. First, he claims that the trial court "erred in imposing the costs of prosecution," arguing that the trial court failed to give him the required statutory notifications under R.C. 2947.23(A). We agree with this part of Griffin's fifth assignment of error.

{¶48} Former R.C. 2947.23(A)(1) required that the costs of prosecution be included in all criminal sentences. It further mandated that the defendant be notified in open court of the following:

> (a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.
>
> (b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.[1]

[1] The quoted version of R.C.2923.47 was in effect at the time that Griffin's sentence was imposed. Effective September 28, 2012, the statute was amended by Am.Sub.S.B.No. 337, 2012 Ohio Laws 131. The amendment did not change the above-quoted language, but added a new and renumbered provision as subsection (A)(1)(b), which provides that the failure of the judge to give the statutory notifications "does not negate or limit the

{¶49} At the time of briefing in the present matter, there was a split among the appellate districts as to whether the lack of notification under R.C. 2947.23 is reviewable on direct appeal. Some courts held that the issue was not ripe for adjudication until the defendant actually fails to pay the assessed costs and is ordered to perform community service, while other courts held that the failure to give the required notification is justiciable on direct appeal and constitutes prejudicial error. *See generally State v. Lux*, 2d Dist. No. 2010 CA 30, 2012-Ohio-112, ¶ 54-55. This court fell into the latter category, holding that a trial court's failure to give the required notification constitutes reversible error, regardless of whether the defendant moved to waive the payment of costs at sentencing. *State v. Ruby*, 6th Dist. No. S-10-028, 2011-Ohio-4864, ¶ 36-43.

{¶50} The Supreme Court of Ohio has since resolved the conflict in *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, holding:

> A sentencing court's failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or court costs presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay. *Id*. at the syllabus.

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authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment * * * or [fails] to timely make payments toward that judgment under an approved payment plan."

{¶51} The appropriate remedy for such failure is to reverse the trial court's sentence solely as it relates to the imposition of court costs, and to remand the cause for the limited purpose of allowing the trial to give proper notification pursuant to R.C. 2947.23(A) with a concomitant opportunity for the defendant to object. *See, e.g., State v. Henry*, 6th Dist. No. L-11-1157, 2012-Ohio-5552, ¶ 70; *State v. Debruce*, 9th Dist. No. 25574, 2012-Ohio-454, ¶ 38.

{¶52} Because the trial court in this case did not give the required notifications, the first part of Griffin's fifth assignment of error is well-taken.

{¶53} In the second portion of his fifth assignment of error, Griffin asserts that the trial court "erred in imposing the costs of confinement and of court-appointed counsel, by failing to find appellant had the ability to pay." In his argument, Griffin recognizes that the trial court did in fact make an affirmative finding in regard to his ability to pay those costs, but maintains that there is no evidence in the record to support that finding.

{¶54} A determination of the offender's present or future ability to pay is a necessary prerequisite to imposing the costs of confinement and court-appointed counsel. R.C. 2929.18(A)(5)(a)(ii), 2929.19(B)(5), and 2941.51(D). Further, there must be affirmative "evidence in the record supporting the trial court's finding that appellant had, or could reasonably in the future be expected to have, the ability to pay the cost of his confinement or his appointed attorney fees." *State v. Jobe*, 6th Dist. No. L-07-1413, 2009-Ohio-4066, ¶ 83.

{¶55} In *Jobe*, we found no affirmative evidence of appellant's ability to pay the costs of his confinement and court-appointed counsel where the only information contained in the sentencing record revealed that appellant, who was to be incarcerated for a minimum of 18 years, had only an eighth-grade education, did not obtain a GED, and never held a job. *Id*. at ¶ 74, 82. Similarly, in *State v. John*, 6th Dist. No. L-03-1261, 2005-Ohio-1218, ¶ 30, *reversed on other grounds, In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174, we reversed the imposition of confinement costs where the appellant was 55 years old at the time of sentencing, had no employment history, lacked a high school diploma, was in extremely poor health, and was sentenced to a prison term of 18 years. In *State v. Maloy*, 6th Dist. No. L-10-1350, 2011-Ohio-6919, ¶ 15, we found no evidence of appellant's ability to pay the costs of his confinement where the record indicated that appellant did not complete high school, had never been gainfully employed, and was sentenced to remain in prison until he is 94 years old.

{¶56} On the other hand, in *State v. Faulkner*, 6th Dist. No. L-10-1147, 2011-Ohio-2696, ¶ 11, we affirmed a sentencing order that appellant pay the costs of assigned counsel where the record indicated that appellant, who was 26 years old at the time he received his five-year sentence for burglary with a firearm specification, had a GED with a vocational degree in small engine repair. In *State v. Donaldson*, 6th Dist. No. L11-1264, 2012-Ohio-6064, ¶ 31, we held that the trial court did not err in imposing the costs

of confinement and court-appointed counsel, stating that although appellant, who received a five-year sentence for robbery, "has only a 10th grade education and a history of substance abuse, the record also reflects that he has held jobs in the past and is only 41 years old." And in *State v. Willis*, 6th Dist. No. L-11-1274, 2012-Ohio-6070, ¶ 20, we affirmed the trial court's imposition of confinement costs and appointed-counsel fees where appellant, who was sentenced to a prison term of four and one-half years for robbery, had "some college" education and a work history.

{¶57} The present sentencing record bears a far greater resemblance to the records in *Faulkner*, *Donaldson*, and *Willis*, than to the records presented in *Jobe*, *John*, and *Maloy*. In this case, the record indicates that Griffin was 24 years old at the time of sentencing, and will still be in his 20s after serving his sentence. Prior to this offense, Griffin had been enrolled and taking classes at Owens Community College. At the sentencing hearing, defense counsel explained that Griffin "began attending Owens Community College, completed seven credit hours, had reduced his case load from 12 hours to 7 hours but did complete some coursework." Although the presentence investigation report indicates that Griffin has experienced some difficulty in obtaining part-time employment while attending school, it also reveals that at least some of this difficulty is due to "issues with not being motivated to job seek." In addition, the report suggests that Griffin is "capable of improving his lifestyle" and reflects that Griffin has "acknowledged being lazy and said that he would get himself together." Based on this

evidence, and considering our prior decisions on the issue, we cannot say that the trial court erred in its assessment of Griffin's ability to pay the costs of his confinement and court-appointed counsel.

{¶58} Accordingly, the second part of Griffin's fifth assignment of error is not well-taken.

{¶59} For the foregoing reasons, the judgment of the Lucas County Court of Common pleas is affirmed in part, and reversed in part, and the cause is remanded for resentencing in regard to the costs of prosecution only, in a manner consistent with this decision. Costs of this appeal are assessed equally against the parties pursuant to App.R. 24(A)(4).

Affirmed in part, and
reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE