

ORIGINAL

TIMOTHY M. NASH

APPELLANT,

v.

STATE OF OHIO

APPELLEE,

:
:
:
:
:

13-0719

On Appeal from the
Eighth District Court
Of Appeals, Cuyahoga
County, Appellate

Court Of Appeals
Case No. 98658

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT TIMOTHY M. NASH

TIMOTHY M. NASH 631040 (COUNSEL PRO SE)
P.O. BOX 8107
MANSFIELD OHIO 44901

COUNSEL FOR APPELLANT, TIMOTHY M. NASH

ERICA D BARNHILL(0079309
Assistant prosecuting Attorney
Justice Center 9th Floor
Cleveland Ohio 44113

COUNSEL FOR APPELLEE, STATE OF OHIO

FILED
MAY 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
MAY 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENT

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT IMPORTANCE AND INVOLVES A SUBSTANTIAL QUESTION.....(1-2)

STATEMENT OF CASE AND FACTS.....(2-3)

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....(3-5)

Proposition Of Law No. 1(a)

(a) The lack of evidence or evidence that does not exist warrant an evidence investigation by the courts to confirm the essential elements of a crime as established through State v. Iynell Tell 2011 Ohio 2661, State v. Jenks 61 Ohio St3d 259.....(3,5)

Proposition Of Law No. 1(b)

(b) An affidavit/complaint based upon fabricated evidence and witness statements that is created to mislead courts and jurors in the indictment process is infact and law a sham as explained by State v. Dibble 2012 Ohio 4630, citing U.S. v. Williams 737 F2d 594, U.S. v. Colkley 899 F2d 297, with Mooney v. Holohan 55 S Ct 340.....(5)

Proposition Of Law No. 2

Per U.S. Amend 6, O Const Art I sec 10, Faretta v. California 95 S Ct 2525, Snyder v. Masschusetts 291 U.S. 97, Price v. Johnston 334 U.S. 266, U.S. v. Plattner 330 F2d 271, State v. Dean 2010 Ohio 5070, State v. Kovach 2009 Ohio 2829, State v. Martin (2004) 816 Ne2d 227, State v. Reed 1996 Ohio 21, with State v. Williams 6 Ohio St 2d 281, and Crim. R. 43, the appellant has a constitutional right to self defense and to be present at all proceedings: Appellant, as my own defense attorney, has the constitutional right to be present and defend in person and with stand-by counsel at each and every stage of proceedings; thus, it is mandatory law to reverse this conviction when appellant is infact being illegally restrained through a sham process by the trial court making an order for appellant, at the time of my being my own defense counsel, since October 17,2011, to remain incarcerated during trial dates from December 14,2011 to March 1,2012.....(4-6)

CONCLUSION.....(6)

CERTIFICATE OF SERVICE.....(7)

APPENDIX

Judgment of the Eighth District Court Of Appeals.....(8)

EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT IMPORTANCE AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents several critical issues of constitutional rights of an accused and whether *Mooney v. Holohan* 55 S Ct 340, applies:

(1) When appellant has complained to the appellate court that the mandatory evidence (bolt cutters) to validate arrest, trial, and conviction for an offense per 2911.13(B), does not exist as written in police arrest records does the appellate court have a duty to investigate the entire arrest record and its evidence to confirm the police report and evidence meets the offense statutory requisites or elements when it is mandatory that such evidence (bolt cutters) are to exist as ordered by this court through case of *State v. Lynell Tell* 2011 Ohio 2661; citing *State v. Jenks*;

Is it the obligation of the appellate judges to seek out the yellow and black bolt cutters claimed by police in their records to be next the stolen C.E.I. property or transformer, and bag of tools which are photographed and exhibited as evidence without the bolt cutters being seen as written in police records; Notwithstanding, can the appellate court use such record when it was created by perjured testimony and constitutes a sham legal process?

(2) Can the appellate court overlook the fact of records and transcript that shows that police also committed perjury when it is written in the arrest report that business owner Micheal Nicholas gave them a statement August 13, 2011, that conflicts with Mr. Nicholas testimony at trial concerning the stolen object when Mr. Nicholas stated in the trial that the fence was already cut and transformer laying on its side long before August 13, 2011?

(3) If appellant is his own defense attorney can the trial court make an order for appellant as my own defense attorney to remain incarcerated

while open court proceedings were being held for a trial date and then continue those proceedings at my request without my appearance or even my authority and does such actions of a trial court and two prosecutors constitute the entire process to become void or a sham through abrogation of Ohio Constitutions Article I section 10;

Appellant was not in open court for the trial date of December 14, 2011, after being acknowledged by the trial court as my own defense counsel with stand-by counsel of Jason Haller; thus, after appellant has given the appellate court the evidence of total abrogation of O Const Art I sec 10, can such court refuse to enforce and/or protect appellant rights as ordered by the U.S. Supreme Court through *Mooney v. Holohan* 55 S Ct 340, and *Faretta v. California* 95 S CT 2525, and reverse the illegal conviction when based upon perjured testimony and total abrogation of all trial process;

STATEMENT OF THE CASE AND FACTS

It was August 13, 2011, that police came to 88th and Union Avenue in Cleveland Ohio and arrested appellant for an offense per 2911.13(B), which had transpired at 9200 George Avenue which is four (4) blocks away from the scene of arrest:

Police wrote in their arrest report that appellant was standing over a C.E.I. transformer when they came around the corner of 88th and Union Avenue; Police stated or testified in their arrest report that direct evidence to the offense per 2913.11(B) had been a pair of Yellow and black bolt cutters located next to the stolen transformer and bag of tools which have been shown in photograph's of evidence taken by the police but in such photo's as evidence the bolt cutters can not be found; Nor were the bolt cutters found as physical evidence in trial;

It was March 1, 2012, that the trial court stated in court to the record that I refused to appear and defend in person as defense counsel from an oral motion towards discharge for deprivation of the right to self representation and thus March 26, 2012, a trial by jury began and ended with a verdict of guilty and appellant appealed;

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

When the mandatory evidence to validate the arrest, trial and conviction does not exist, is it the obligation of the appellate court to investigate the sufficiency of the evidence to confirm that the elements of the statute of offense have been met?

This Supreme Court has ordered that all state court must investigate the entire ~~Record~~ and it's evidence for it's sufficiency to meet the elements of the statutory provision: State v. Lynell Tell 2011 Ohio 2661 Jackson v. Virginia;

Police filed an affidavit/complaint based upon fabricated evidence and witness statements with a total disregard for law and whether it would mislead jurors of the indictment process or the courts and the prosecuting authorities went along with it from grand jury process unto trial and the verdict of conviction as can be seen through their discovery and bill of particulars packets under rules of procedure which constitute a conspiracy to commit perjury and tampering in records and evidence and by the following legal authorities this conviction must be reversed: State v. Dibble 2012 Ohio 4630, Citing U.S. v. Williams 737 F2d 594, with U.S. v Colkley 899 F2d 297, Mooney Supra:

The bottom line is that the yellow and black bolt cutters and crow bar do not exist as police and state prosecutors said they did and by such bolt cutters and crow bar being mandatory for the arrest and offense per 2913.11(B), makes the entire process of arrest, trial, and conviction be based upon a sham legal document of police and per U.S. Supreme Court order

through **Mooney v. Holohan**, all courts of any state shall reverse a conviction when based upon such actions of police and/or prosecuting authorities;

Furthermore, appellate court has missed ~~addressing~~ the fact that Micheal Nicholas was not even at 9200 George Avenue, August 13, 2011, as written in ~~Police~~ reports where Micheal Nicholas testified in trial March 27, 2012, that the transformer was not alive but dead long before August 13, 2011 and the theft of the C.E.I. property; Appellant filed a motion for new trial predicated upon trial courts lack of investigating the record and made it an issue on appeal which has been overruled though no means can be found for doing so by the appellate court;

- (2) If appellant was defense attorney since October 17, 2011, as of rights per U.S. Amend 6 like Ohio Constitutions Article I section 10, State v. Dean 2012 Ohio 5070 State v. Kovach 2009 Ohio 2829 State v. Martin 816 Ne2d 227 State v. Reed 1996 Ohio 21, with Faretta V. California Supra, is it mandatory law to reverse the conviction when it is based upon appellant as my own defense attorney, being restrained by trial court order from trial date December 14, 2011, to March 1, 2012, without ever making an appearance in person and have those proceedings continued at my expense?

It was October 17, 2011, that appellant became my own defense attorney through motion filed September 14, 2011, by the trial court; It was from November 2011, til March 1, 2012, that the appellant repeatedly motion the court for the right to defend in person as my own defense attorney but the motion went unanswered or opposed while the court of common pleas and two prosecutors held open court proceedings and continued those proceedings without appellant ever appearing in person and defending as defense attorney to request continuances as shall be seen by documented evidence attach to the appeals brief, motion for new trial, complaint to administrative justice of Cuyahoga County, to the governor, the senator, and disciplinary counsel when it is mandatory for the courts to enforce and/or protect the rights of an accused per U.S. Supreme Court through **Mooney v. Holohan** 55 S Ct 340, and **Faretta v. California** 95 S Ct 2525, like **State v. Dean** 2012

Ohio 5070, State v. Kovach 2009 Ohio 2829, State v. Martin 816 Ne2d 227, State v. Reed 1996 Ohio 21;

May it be recognized that any and all proceedings had after November of 2011, without appellant as my own defense attorney is void for lack of due process of defense or total abrogation of constitutional rights as expressed by O Const Art I sec 10, U.S. Amend 6, which constitutes a sham process based upon tampering with state witnesses, records and evidence; Also see Mooney Supra

CONCLUSION

(1) When appellant complains of a lack of evidence the appellate court must by law investigate the evidence and find the essential elements of the crime have been proven beyond a reasonable doubt by the state prosecuting authority as well settled by State v. Lynell Tell 2011 Ohio 2661 citing State v. Jenks 61 Ohio St3d 259, with In Re Winship:

"Lest there be any doubt about the constitutional stature of the reasonable doubt standard it is explicitly held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which appellant has been charged." (Emphasis)

The police and prosecuting authorities have gone beyond sufficient evidence and applied for charges based upon absolutely no evidence at all and even went further and committed perjury by lying on a state witness thereby making arrest, trial, and verdict totally predicated upon the sham legal document or police arrest report: Again Mooney Supra.

Per U.S. Supreme Court through Mooney v. Holohan it is ordered the following:

"Upon all courts rest the obligation to guard and enforce every right of an accused;"

Thus, initially the police did not have proper authorization of law to arrest appellant and the conviction shall be vacated;

(2) Per U.S. Amend 6, O Const Art I sec 10, State v. Dean 2010 Ohio 5070 State v. Kovach 2009 Ohio 2829, State v. Martin (2004) 816 Ne2d 227, State v. Reed 1996 Ohio 21, the appellant has an absolute right under law to be my own defense counsel:

When appellant remained incarcerated by the judges order December 14, 2011, which is a trial date, while still holding court proceedings and continuing those proceedings without my presence and authorization by law, the trial court and two prosecuting authorities have involved themselves in a conspiracy to commit perjury by stating that appellant was in trial proceedings when I was not, and tampering with state witnesses records and evidence multiple times when in light of the fact that the court dates without me went on for months;

O Const Art I sec 10-"In any trial, in any court, the accused shall be allowed to appear and defend in person and with counsel against the accusation;"

Bottom line is that appellant has a constitutional and statutory right to be in court for any and all stages of proceedings when appellant is the one suffering physical illness from unjust incarceration and penalty: Synder v. Masschusetts 291 U.S. 97, Price v. Johnston 334 U.S. 266, U.S. v. Plattner 330 F2d 271, as is State v. Williams 6 Ohio St2d 281, Crim. Rule 43, Ultimately, O Const Art I sec 10 with Faretta Supra.

Wherefore, may the court by legal authorities presented vacate this conviction forthwith.

RESPECTFULLY SUBMITTED


TIMOTHY M. NASH 631040
P.O. BOX 8107
Mansfield Ohio 44901

CERTIFICATE OF SERVICE

A COPY OF THIS APPELLANT MOTION FOR APPEAL AND MEMORANDUM FOR JURIS-
DICTION HAS WENT TO ERICA D. BARNHILL (0079309) THIS 15 DAY OF APRIL
2013, BY REGULAR U.S. MAIL SERVICE.

RESPECTFULLY SUBMITTED



Timothy M. Nash 631040
P.O. BOX 8107
Mansfield Ohio 44901

APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98658

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TIMOTHY NASH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART
AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-553521

BEFORE: Jones, J., Boyle, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: April 4, 2013

LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, Timothy Nash, appeals his convictions for breaking and entering, grand theft, vandalism, and possessing criminal tools. We affirm his convictions but remand the case for a hearing on restitution.

{¶2} In 2011, Nash was charged with one count each of the above-mentioned crimes. The case proceeded to a jury trial in March 2012, at which Nash represented himself. The following pertinent evidence was adduced at trial.

{¶3} On August 13, 2011, Cleveland Police responded to a call for a possible break-in on George Avenue. The police discovered that a large electrical transformer was missing from a fenced-in area owned by the Cleveland Electric Illuminating Company ("CEI") and noted tire marks, "drag marks," and a trail of oil leading out of the area toward the road. The police followed the trail of oil for approximately two blocks and saw Nash and another man, Terry Victor, standing over the transformer. A bag of tools and a dolly lay nearby. Victor's truck was parked across the street. As the police approached the two men and ordered them to stop, Nash started walking away from the transformer and dropped his gloves. Upon arrest, the police officer noted that Nash smelled like oil.

{¶4} CEI supervisor Chet Pfiester testified that the transformer belonged to CEI, weighed about 3500 pounds, and contained approximately 120 pounds

of copper wire. Pfister testified that the theft of the transformer cost CEI a total of \$24,656.11, which included repairs to the transformer and hazardous material cleanup. He further testified that the transformer was necessary for CEI to conduct its business.

{¶5} The jury convicted Nash of all four counts. The trial court sentenced him to 18 months in prison and ordered him to pay restitution to CEI in the amount of \$24,656.11.

{¶6} Nash filed a pro se appeal, raising the following assignments of error for our review, as quoted:

[I.] The police records are a falsification of information when the evidence which being the bolt cutters and series of electrical power lines are missing as evidence to validate police records: the yellow bolt cutters and electrical power lines were not presented to jurors during trial.

[II.] Appellant was illegally restrained for months by the trial courts order through cancellation of proceedings for the appellant while he and two prosecutors held open court proceedings at appellant request though appellant as defense counsel or defendant pro se was not present and did not give authorization for continuances which suspends O Const Art I Section 10 as is Crim.R. 43 and 44.

[III.] Trial court and prosecutors conspired and committed multiple acts of tampering with court records through unauthorized continuances which caused a loss of jurisdiction and/or a misuse of authority and office.

[IV.] Trial court did not use trial transcript to determine the new trial motion filed April 10, 2012, when the transcript was mandatory to make any determination of judgment.

[V.] Trial court imposed an illegal amount of restitution June 19, 2012, while knowing that James Foster, a CEI representative, had stated in court that same date that the amount was an accumulation of thefts of CEI property.

[VI.] Trial court did not grant an investigator to investigate the crime scene on behalf of appellant when the evidence was ambiguous and not an accurate reflection of the allegations in the indictment.

Appellate Rules

{¶7} As an initial matter, Nash's brief fails to comply with the appellate rules. We are cognizant that Nash filed his appeal pro se, and appellate courts afford pro se litigants considerable leniency, but we are not required to root out legal arguments for him. *State v. Watson*, 126 Ohio St.3d 316, 321, 710 N.E.2d 340 (1998). Nash lists a third and sixth assignment of error in his table of contents but fails to argue either assignment of error in his brief. Thus, we summarily reject the third and sixth assignments of error under the provisions of App.R. 12(A)(2) and 16(A)(7). Accordingly, the third and sixth assignments of error are overruled.

{¶8} Nash further fails to cite any authority in support of his position in the first, fourth, and fifth assignments of error, as required by App.R. 16. Although the appellate rules were not complied with here, we recognize that cases are best decided on their merits; therefore, we will briefly consider those assignments of error.

Manifest Weight of the Evidence

{¶9} Although not phrased as such, Nash essentially argues in his first assignment of error that his convictions were against the manifest weight of the evidence.

{¶10} In reviewing a challenge to the manifest weight of the evidence, the Ohio Supreme Court has held that:

[t]he question to be answered is whether there is substantial evidence upon which [the triers-of-fact] could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the [triers-of-fact] clearly lost [their] way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

(Quotes and citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.

State v. Thompkins, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

To determine whether a case is an exceptional case where the evidence weighs heavily against conviction, an appellate court must review the record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses.

Thompkins at id., citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d

717 (1st Dist.1983). An appellate court should reverse the conviction and order a new trial only if it concludes that the trier of fact clearly lost its way in resolving conflicts in evidence and created a manifest miscarriage of justice. *Thompkins at id.*

{¶11} Nash claims that witness testimony contradicted statements the police made in their report. But it is well-settled that the weight of the evidence and resolution of issues of credibility are matters primarily for the factfinder to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. A thorough review of the record shows that Nash's convictions are not against the manifest weight of the evidence.

{¶12} When police arrived at the scene, they noted that the fenced-in area that housed the transformer had been broken into and a large electrical transformer was missing. The police followed a trail of oil and drag marks for two blocks and found Nash and his accomplice standing over the transformer with a bag of tools and a dolly nearby. Nash dropped a pair of work gloves when the police approached him and the police also noted that he smelled strongly of the oil that had been leaking from the transformer. There was testimony that the transformer was necessary for CEI to conduct its business and the repairs and cleanup totaled \$24,656.11. Based on these facts, we cannot say that the jury lost its way in convicting Nash.

{¶13} The first assignment of error is overruled.

Speedy Trial

{¶14} In the second assignment of error, Nash argues that the trial court granted continuances that he did not authorize and his speedy trial rights were violated.

{¶15} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I, of the Ohio Constitution. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 32. These speedy trial rights are essentially equivalent. *State v. Butler*, 19 Ohio St.2d 55, 57, 249 N.E.2d 818 (1969). Ohio's speedy trial statutes, found in R.C. 2945.71 et seq., were implemented to enforce those constitutional guarantees. *Brecksville v. Cook*, 75 Ohio St.3d 53, 55, 1996-Ohio-171, 661 N.E.2d 706; *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 10.

{¶16} R.C. 2945.71(C)(2) requires a criminal defendant against whom a felony charge is pending to be brought to trial within 270 days from his arrest. Pursuant to R.C. 2945.72, the time within which an accused must be brought to trial is extended by:

* * *

(E) [a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

* * *

(H) [t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion.

{¶17} Although Nash argues that the trial court granted continuances he did not authorize, Nash was represented by counsel during most of the pretrial process. The trial court noted in October 2011 that Nash wished to represent himself, but Nash did not actually waive his right to counsel until March 1, 2012.

{¶18} Nash was arrested on August 13, 2011, and was released from jail on bond on October 25, 2011. He was arrested on a different case on November 8, 2011, and his bond was revoked. Nash was granted numerous continuances between August 2011 and March 2012 and filed over 20 pro se motions from August 14, 2011 to March 20, 2012. Only one of the motions was served upon the state; when the state discovered the other filed motions on March 1, 2012, it asked for a continuance to respond to the motions. Nash subsequently filed six more pro se motions, which he did not serve on the state. The state filed an omnibus response to Nash's motions on March 26. Based on these facts, Nash's statutory speedy trial rights were not violated because the speedy trial time was tolled due to his numerous filings. *See State v. Jones*, 8th Dist. No. 90903, 2009-Ohio-3371.

{¶19} We also find that Nash's constitutional speedy trial rights were not violated. In *State v. O'Brien*, 34 Ohio St.3d 7, 516 N.E.2d 218 (1987), the

Supreme Court of Ohio stated that statutory and constitutional speedy trial provisions are co-extensive, but that the constitutional guarantees may be broader than statutory provisions in some circumstances. Therefore, a defendant's Sixth Amendment rights to a speedy trial can be violated even though the state has complied with the statutory provisions implementing that right. *Id.* at 9.

{¶20} Because we find no statutory speedy-trial violation here, Nash must demonstrate that the trial court and prosecution violated his constitutional speedy trial rights. *State v. Gaines*, 9th Dist. No. 00CA008298, 2004-Ohio-3407, ¶ 16.

{¶21} In order to determine whether a defendant sustained constitutional speedy trial violations, we balance four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). But first, the defendant must make a threshold showing of a "presumptively prejudicial" delay to trigger application of the *Barker* analysis. *Doggett v. United States*, 505 U.S. 647, 650, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), citing *Barker* at 530-531; *State v. Miller*, 10th Dist. No. 04AP-285, 2005-Ohio-518, ¶ 11. Courts have generally found that a delay approaching one year becomes "presumptively prejudicial." *Doggett* at 652, fn. 1.

{¶22} The case at bar was pending for seven months and, during that

time, Nash requested and was granted numerous continuances and filed over 20 motions. Therefore, Nash does not make the threshold showing that the delay was presumptively prejudicial. We find no constitutional violation of Nash's speedy trial rights.

{¶23} The second assignment of error is overruled.

Motion for New Trial

{¶24} In the fourth assignment of error, Nash claims the trial court erred in denying his motion for a new trial without considering the trial transcript.

{¶25} A reviewing court will not reverse a trial court's denial of a motion for a new trial absent some clear abuse of discretion. *State v. Braun*, 8th Dist. No. 95271, 2011-Ohio-1688, ¶ 34, citing *State v. Schiebel*, 55 Ohio St.3d 71, 76, 564 N.E.2d 54 (1991). We will not reverse a lower court's refusal to grant a new trial unless there has been an abuse of that discretion and unless it appears that the matter asserted as a ground for a new trial materially affects the substantial rights of the defendant. Crim.R. 33.

{¶26} Crim.R. 33 governs the granting or denying of a defendant's motion for a new trial and provides in part:

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

* * *

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. * * *

(5) Error of law occurring at the trial.

{¶27} In his pro se motion for a new trial, Nash claimed the indictment was defective, misconduct by the prosecutor, false testimony, and missing or withheld evidence. On appeal, Nash merely argues that the trial court erred in granting the motion without first reviewing the trial transcript.

{¶28} Upon review, we find that Nash provided no credible evidence or argument to warrant a new trial. Thus, having considered the appropriate law and facts, we find no abuse of discretion.

{¶29} The fourth assignment of error is overruled.

Restitution

{¶30} In the fifth assignment of error, Nash argues the trial court erred in granting restitution to CEI in the amount of \$24,656.11. Nash contends that the amount imposed by the court was unlawful because CEI based the amount on previous damage and thefts of the transformer. We find some merit to this argument.

{¶31} Although a restitution award is ordinarily reviewed using an abuse of discretion standard, appellant failed to object below with regard to the

restitution determination, and thus he waived all but plain error. *State v. Myrick*, 8th Dist. No. 91492, 2009-Ohio-2030, ¶ 30.

{¶32} R.C. 2929.18 governs financial sanctions and the procedures that must be followed in determining the appropriate amount of restitution. This statute provides that the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction, including:

[(A)](1) Restitution 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. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. 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.

{¶33} R.C. 2929.19(B)(5) provides that "[b]efore imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine."

{¶34} In this case, CEI representative Pfister testified at trial and at the sentencing hearing regarding the amount of restitution. At trial, he testified

that "because of the ongoing thefts, we had to have the forester department out there to clear some trees out for better visibility. We had to put up spotlights.

* * * We had to have the fence repaired several times."

{¶35} The state entered into evidence as Exhibit 8 a handwritten "cheat sheet" that Pfiester prepared detailing CEI's expenses. Pfiester stated at the sentencing hearing that "a number of transformers were vandalized and entered into for purposes of removing copper. The total list are of record in Exhibit 8."

{¶36} There are a number of concerns with the amount of restitution the trial court ordered Nash to pay. According to Exhibit 8, CEI paid \$550 to "make a clear view of transformers from street" and \$500 for installation of a flood light. Neither of these costs may be assessed in the restitution award; they were security measures CEI put in place after the crime occurred and cannot be considered economic losses. CEI also paid \$539 for fence repair, but Exhibit 8 states that the cost was for fence repair the "1st time (2nd time figured in a job)." Thus, there is at least some likelihood that the \$539 fee is for a fence repair from a break-in that occurred before August 13, 2011.

{¶37} Exhibit 8 also lists charges in the amount of \$240 for "troublemans time," \$7,509.61 for hazardous cleanup, \$49 for copper wire, \$148.50 for crane operator, and \$90 for a crane truck. But Pfiester stated at the sentencing hearing that Exhibit 8 contained a "total list" from "a number of transformers," thus, it is unclear if those charges relate solely to the crimes that occurred on

August 13, 2011. Finally, most concerning to this court, is a notation of \$15,030.00, without any explanation of what the charge relates to, and the state offered no evidence on this amount at trial or sentencing.

{¶38} Pursuant to R.C. 2929.18, the amount of restitution the court orders “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.” While the replacement of the transformer, the fence repair, the hazardous waste cleanup, and associated labor costs from the theft that occurred on August 13, 2011, may certainly be a direct and proximate result of Nash’s crimes, it is abundantly clear that CEI sought damages that far exceeded its economic loss from that single event.

{¶39} Therefore, the trial court must hold a hearing to determine the correct amount of restitution owed and must also consider Nash’s present and future ability to pay.

{¶40} The fifth assignment of error is sustained.

{¶41} Accordingly, Nash’s convictions are affirmed but the order of restitution is vacated, and this case is remanded to the trial court for a hearing on restitution in conformity with R.C. 2929.18 and 2929.19(B)(5).

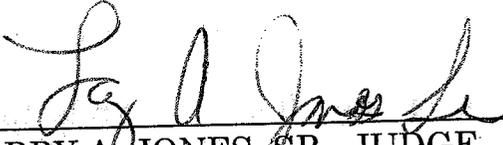
It is ordered that appellant and appellee split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the

common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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



LARRY A. JONES, SR., JUDGE

MARY J. BOYLE, P.J., and
KENNETH A. ROCCO, J., CONCUR