[Cite as *State v. Fetty*, 2012-Ohio-6127.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0091**
- vs -	:	
SHANE D. FETTY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0795.

Judgment: Affirmed in part, reversed in part, and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Shubhra N. Agarwal, 3766 Fishcreek Road, Suite 289, Stow, OH 44224-4379 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Shane D. Fetty appeals from a judgment of the Portage County Court of Common Pleas, which convicted him of felonious assault after a jury trial and sentenced him to three years in prison. The court also ordered him to pay restitution to the victim and imposed court costs. We affirm his conviction, but reverse the portion of the judgment regarding restitution and court costs, and remand the matter to the trial court for further proceedings consistent with this opinion.

Substantive Facts and Procedural History

{¶2} This case involved a celebratory bonfire gone awry. A punch led to a melee, and one of the party-goers ended up in the hospital with a neck injury. After investigation, the state charged Shane Fetty with felonious assault.

{¶3} At trial, the state presented the testimony of six eyewitnesses, the victim, two police officers, and the victim's treating physician. The following facts are gleaned from the witnesses' testimony.

{¶4} On April 16, 2010, Silas Welker, recently discharged from military service in Iraq, invited friends to a bonfire at his family home in Deerfield, Ohio, where he and his sister, Purdie, resided. The Welker residence had a long driveway that continued through the back of the property. The backyard, where the bonfire was held, was well lit by a large mercury vapor light from a light pole, near which a shallow 18-inch-deep ditch is located. The bonfire was built on the other side of the ditch, and a pickup truck was parked in the driveway about 15 to 20 feet from the bonfire. A picnic table was directly behind the truck.

{¶5} Mr. Fetty and the victim, Terry Butcher, came to the party with others who had been invited by Silas Welker. As the party went on, a large quantity of beer was consumed and a verbal altercation occurred among two groups of guests. It eventually led to a punch being thrown by Mr. Fetty at Mr. Butcher, and a melee ensued. Both Mr. Fetty and Mr. Butcher fell into the ditch, where many party-goers joined in a group scuffle. Mr. Butcher ended up in the hospital with a neck injury. The eyewitnesses gave various accounts of the events leading to Mr. Butcher's injury.

Eyewitnesses' Accounts of the Events Leading to the Victim's Injury

{¶6} Silas Welker's sister, Purdie, who resided at the Welker home at the time, arrived home from work at 11:00 p.m. and joined the party. She heard there was an argument among the guests, and saw Silas going around "smoothing the ruffled feathers over." At one point, she saw Mr. Butcher walking toward the house and stumbling around the light pole. As he was walking on the left side of the pickup truck, Mr. Fetty "came flying around the right side of the pick-up * * * and, like, hit him with his shoulder, kind of like a tackle, but it wasn't, and his fist came flying down into the side of his head." "[Mr. Fetty's] shoulder went into [Mr. Butcher] and [Mr. Fetty's] hand came down on [Mr. Butcher's] head." Mr. Butcher turned to face Mr. Fetty, and they started throwing punches, with Mr. Butcher moving backward towards the ditch. Both then fell into the ditch, with Mr. Butcher on the bottom. Some guests joined the fight in the ditch, while others attempted to break it up. Her other sibling, Ryan Welker, who also attended the party, went into the ditch in an attempt to stop Mr. Fetty from continuing to fight Mr. Butcher. She heard Ryan yelling at Mr. Fetty: "Let go of his neck. Let go of his neck. If you don't let go of his neck, I'm going to break yours. Let go of his neck." After the fight was over, Ms. Welker, who had some first-aid training, went to check on Mr. Butcher. She did not see any bruising, but his face was a bloody mess and he complained his shoulders hurt.

{¶7} Ms. Welker identified Mr. Fetty in the courtroom as the attacker, who she had met on one occasion prior to the party. Ms. Welker testified that she was able to see the events clearly, as they took place under the light pole.

{¶8} On cross examination, she elaborated more about the initial punch thrown by Mr. Fetty. Mr. Fetty used his shoulder to tackle Mr. Butcher, which lifted Mr. Butcher

up off the ground, and, as he started to come back down, Mr. Fetty threw his arm and nailed him in the face. They then traded "blow for blow," until both fell into the ditch.

{¶9} Theresa Rufener, Mr. Fetty's ex-girlfriend, attended the party with Mr. Fetty. She testified there was a verbal altercation among the party guests. At one point, Mr. Fetty said to her: "this guy's running his mouth, and, you know, something could happen" and "this guy is * * * picking a fight." An individual, referred to by Ms. Rufener as "the guy who got beat up later," kept "making comments and stuff," and she was worried that he was provoking a fight. The comments were directed toward a guest, Fred Deng, a friend of Mr. Fetty's. Worried that a fight may happen, Ms. Rufener went to the host, Silas, and asked him to stop the individual who was "mouthing off." She also started to gather her friends, among them Mr. Fetty, to then leave. She headed toward her vehicle, but went back to the bonfire to get Mr. Fetty. The next thing she knew, "Shane hits the guy in the face and then there's just a bum rush of people."

{¶10} Although Ms. Welker testified she did not hear any verbal exchange before Mr. Fetty hit Mr. Butcher, Ms. Rufener testified differently regarding the moments before the attack. She heard Mr. Fetty say "if you have a problem with Fred [Deng], you should say it to his face." Mr. Deng then walked up, and Mr. Fetty looked at Mr. Butcher and said, "do you have a problem with Fred; why don't you say something to him." Mr. Butcher said nothing, and Mr. Fetty "busted him in the face."

{¶11} Ms. Rufener also testified about Ryan Welker's attempt to break the fight. Ryan stood behind Mr. Fetty and put his arms around his neck in a headlock. She yelled at Mr. Fetty to relax and not to fight back, telling him Ryan just wanted to break up the fight. When she heard Ryan said to Mr. Fetty, "I'll snap your neck," she became

concerned and rushed in herself to push Ryan off Mr. Fetty. Mr. Butcher's friends then carried Mr. Butcher to a truck, and she left with Mr. Fetty. They did not realize Mr. Butcher was badly injured until the next morning, when a friend of Silas Welker informed them. Mr. Fetty asked her to say that he "got jumped on" and Mr. Butcher "picked a fight with [him]," if questioned by the police. She also testified that she told Investigator McGonigal that Mr. Fetty had told her to lie about the case. Upon cross examination, she testified that Mr. Butcher made inappropriate remarks at Freddy Deng's girlfriend and was looking for a fight with Freddy Deng. Contrary to Ms. Welker's testimony, Ms. Rufener insisted that the two were standing face-to-face when Mr. Fetty threw the first punch on the jaw of Mr. Butcher.

{¶12} Silas Welker's older brother, Ryan, who did not know either Mr. Fetty or Mr. Butcher, testified that there was a "beer pong" game at the party and people were drinking. At one point, a verbal altercation started by the bonfire between Mr. Fetty and another individual. Ryan went to inform Silas of the verbal fight, and Silas asked the people to leave. Mr. Fetty was walking down the driveway to leave, but then returned, "came up and just hit [Mr. Butcher]," which caught everyone by surprise. Mr. Fetty "blindsided [Mr. Butcher], more or less * * *" and "[h]is hand hit his face." Mr. Fetty then "tackled [Mr. Butcher] to the ground and wasn't letting up on him and was just pounding on him." Ryan went over to try to pull Mr. Fetty off Mr. Butcher. He managed to grab Mr. Fetty and yelled at him to stop, but he would not. "I was like, Dude, if you don't let up on him – I had my legs around his head. I was, like, I'm going to snap your neck. You know? And then he stopped. Apparently he heard that. He understood what that meant. He didn't understand what stop was."

{¶13} Ryan described Mr. Fetty's punch as a "straight out sucker punch," and an "ambush." He stated that, after being hit by surprise, Mr. Butcher "just about went down after" and appeared no to know what was going on. After the fight was over, Mr. Butcher's face was bleeding, and standing "kind of weird" and complaining his back hurt. On cross examination, Ryan testified that he was sitting at the picnic table and Mr. Butcher was walking in his direction when Mr. Fetty threw the first punch at him. He also explained he did not call the police to report the incident because "[he was] a country boy and sometimes it happens around a bonfire."

{¶14} The host of the party, Silas Welker, testified that Freddy Deng became upset because of the manner in which Mr. Butcher was talking to a lady. Mr. Fetty, a friend of Mr. Deng, approached Silas about wanting to fight Mr. Butcher. Silas would not allow it. When Mr. Fetty approached him again later, Silas told him he should leave. When Mr. Butcher was walking around in front of Silas's truck, facing the bonfire, Silas saw Mr. Fetty run around the side of the truck and "clocked [Mr. Butcher] in the side of the head." No words were exchanged prior to the punch. Mr. Butcher started stumbling, and Mr. Fetty kept punching him. Mr. Butcher fell into the ditch and Mr. Fetty fell on top of him, continuing to hit him. To break up the fighting, his brother Ryan had his arm around Mr. Fetty's neck, threatening to break his neck. When Ryan finally pulled Mr. Fetty off Mr. Butcher, Mr. Fetty kicked Mr. Butcher in the face. On cross examination, Silas admitted that he never told the detective who interviewed him that Mr. Fetty had approached him about wanting to fight Mr. Butcher.

{¶15} Anthony Miller, a friend of Mr. Butcher, testified that he was sitting with Mr. Butcher on the picnic table, while the latter was talking to a woman. When she was

leaving, Mr. Butcher stood up to take his phone out, so he could put her phone number in his phone. Suddenly, Mr. Fetty came up and "coldcocked" Mr. Butcher in the side of his face. Mr. Butcher stumbled and fell backwards, and they both fell into the ditch. Others joined the fight in the ditch. Mr. Miller testified he did not drink and had a clear mind that night.

{¶16} John Eisenbarth, also a friend of Mr. Butcher, testified that he picked up Mr. Butcher about six or seven p.m. and went to the party. Mr. Butcher got into a verbal altercation with Freddy Deng. At one point, Mr. Butcher was sitting at the picnic table talking to a woman, and Mr. Eisenbarth was standing to the side of the pickup truck, parked about 15 feet from the bonfire, and the picnic table, which was directly behind the truck. He saw out of the corner of his eye someone coming from the driver's side of the truck and hit Mr. Butcher. From where he sat, it looked like Mr. Butcher was hit in the back. Mr. Butcher stumbled and fell over, and a melee broke out. Everyone then congregated in the ditch.

{¶17} Mr. Butcher testified that he had previously served a six-month prison term for vehicular assault. Before he went to the party with John Eisenbarth, he had consumed a couple of beers, and continued to consume alcohol throughout the evening and became intoxicated. When introduced to Mr. Fetty, he remarked that his name sounded like "fettuccine." Mr. Fetty later overheard him talking to a female about being in prison, and "had a problem with that," because Mr. Fetty himself had served time in prison. Mr. Butcher said, "Big deal; we're free; look around; we're in the middle of nowhere," which angered Mr. Fetty. Mr. Butcher continued to talk to the female while sitting on the picnic table. Mr. Fetty came around the truck. Mr. Butcher glanced

behind him and saw Mr. Fetty coming at him and hit him with an object. Mr. Butcher fell on his front side and continued to be punched. Several people then ran up to them. On cross examination, Mr. Butcher admitted his memory of the event was blurry, but insisted he remembered he was sitting on the picnic table when assaulted, and was hit with a pipe or similar object.

{¶18} According to the witnesses' testimony, after the fight was over, Mr. Butcher complained he was in a lot of pain. Mr. Miller and Mr. Eisenbarth took him to the hospital. Not wanting the police involved, Mr. Eisenbarth told the admitting desk that Mr. Butcher had fallen down the stairs. Mr. Butcher also initially told the medical staff he fell down the stairs, worried that his insurance may not cover the injury. He underwent a surgery to repair a fractured bone, and was released from the hospital on April 21, 2010. He filed a police report on April 26, 2010. Mr. Butcher testified that, after the surgery, he had sharp pains in his shoulder and tingling in his fingers.

{¶19} At the close of the state's case, Mr. Fetty did not present his own witnesses, but moved for acquittal pursuant to Crim.R. 29. The court denied the motion, and the jury found him guilty of felonious assault. The court sentenced him to three years in prison, and ordered him to pay $6,000 in restitution to the victim and court costs.

{¶20} Mr. Fetty now appeals, assigning the follow error for our review:

{¶21} "[1.] The trial court committed reversible error and plain error when it permitted the victim's doctor to testify and offer medical explanations and clarifications in violation of Evid.R. 702."

{¶22} "[2.] The trial court committed reversible error when it overruled Fetty's Crim.R.29(A) motion for acquittal because the evidence was insufficient to support a conviction for felonious assault."

{¶23} "[3.] Fetty's conviction for felonious assault was against the manifest weight of the evidence."

{¶24} "[4.] The trial court committed reversible error and plain error by ordering Fetty to pay restitution without holding a restitution hearing in violation of R.C. 2929.18."

{¶25} "[5.] The trial court committed reversible error and plain error when imposing court costs against Fetty without complying with R.C. 2947.23(A)."

{¶26} "[6.] The cumulative effect of the trial court's errors denied Fetty a fair trial."

The Treating Physician's Testimony

{¶27} Under the first assignment of error, Mr. Fetty contends the trial court erred in permitting the victim's treating physician to offer "medial explanations and clarifications" regarding the victim's injury. He claims the physician was permitted to testify as an expert without being first qualified as such, in violation of Evid.R. 702. Furthermore, Mr. Fetty contends that he should have been provided with a written report pursuant to Crim.R. 16(K).

{¶28} Dr. Donich, a board-certified neurosurgeon at the trauma center of the Akron City Hospital, treated Mr. Butcher's neck injury after he was transferred from Robinson Memorial Hospital. He testified at Mr. Fetty's trial as Mr. Butcher's treating physician. The prosecutor did not provide an expert's report pursuant to Crim.R. 16(K),

although our review of the record indicates that Mr. Butcher's medical records *were* provided to the defense.

{¶29} Dr. Donich testified he is a neurosurgeon and has been practicing for 14 years; he completed six years of residency at the Cleveland Clinic and is a board-certified neurological surgeon. He testified he treated Mr. Butcher for his injury. Mr. Butcher had a fractured C-7 vertebrae located at the base of the neck. The doctor further described Mr. Butcher's injury as a "burst fracture," where the bone broke into small pieces, pushing towards and pinching the spinal cord. He performed surgery to clean out the fractured area, and to repair the fracture by inserting bone from a cadaver and securing it with a titanium plate and screws. His prognosis was that Mr. Butcher will lose some range of the motion in his neck, and will likely suffer some degree of pain permanently.

{¶30} Defense counsel objected to the portion of Dr. Donich's testimony describing the nature of Mr. Butcher's injury, because he was providing an expert opinion without having provided an expert's report required by the new Crim.R. 16(K). The trial court overruled the objection.

{¶31} On cross examination, defense counsel asked Dr. Donich if falling down a flight of stairs could cause a burst fracture, and he answered affirmatively. He also answered affirmatively when defense counsel asked him if "falling in a ditch and [hitting one's neck] on an object" could cause the injury. On re-direct examination, he testified he was aware that Mr. Butcher had initially stated his injury was caused by falling down the stairs but later informed the medical staff he was assaulted. When the prosecutor asked if the injury could be caused by being struck with a blow by someone coming

from behind, either by a fist or an object, Dr. Donich answered affirmatively as well. On re-cross examination, when pressed again as to when he found out the cause of Mr. Butcher's injury, Dr. Donich emphasized that his treatment of Mr. Butcher was independent of how the injury happened.

{¶32} On appeal, Mr. Fetty maintains that Dr. Donich should not have been permitted to testify to any medical opinion or clarifications because the prosecutor had not provided an expert report pursuant to Crim.R. 16(K).

{¶33} It is clear that Dr. Donich, the victim's treating physician, testified at trial both as an expert and as a fact witness; thus, we first turn to the requirement of Crim.16(K) regarding pre-trial discovery and expert testimony.

Requirement of Crim.R. 16(K) and Its Rationale

{¶34} Crim.R. 16(K), in effect since July 1, 2010, provides :

{¶35} "An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial."

{¶36} Crim.R. 16(K) requires a written report to be filed 21 days before trial. *State v. Perry*, 11th Dist. No. 2011-L-125, 2012-Ohio-4888, ¶55. "The purpose of the rule is to avoid unfair surprise by providing notice to the defense and allowing the defense an opportunity to challenge the expert's findings, analysis, or qualifications,

possibly with the support of an adverse expert who could discredit the opinion after carefully reviewing the written report." *Id*.

{¶37} Thus, the rationale behind the application of Crim.R. 16(K) in a case like this is similar to the rationale behind the requirement in civil cases where an expert report must have been produced pursuant to the local rules before a treating physician's opinion testimony could be admitted. The policy behind these rules is to avoid ambush and thwarting of opposing counsel's ability to effectively cross-examine the expert.

{¶38} In *Cleveland Clinic v. Vaught*, 98 Ohio St.3d 485, 2003-Ohio-2181, the court upheld the exclusion of a treating physician's expert opinion testimony because of a failure to produce an expert report under the local rules. The *Vaught* court explained the importance of disclosure:

{¶39} "One of the purposes of the rules of civil procedure is to eliminate surprise. This is accomplished by way of a discovery procedure which mandates a free flow of accessible information between the parties upon request, and which imposes sanctions for failure to timely respond to reasonable inquiries." *Id.* at 488, quoting *Jones v. Murphy*, 12 Ohio St.3d 84, 86 (1984).

{¶40} Pertinent to the present case is the Eighth District's application of *Vaught* in *O'Connor v. Cleveland Clinic*, 161 Ohio App.3d 43, 2005-Ohio-2328. As that court explained, "[t]he *Vaught* court recognized that the rule inherently requires a trial court to determine if the disclosure of medical records in lieu of an expert report 'would adequately provide the requesting party with the information that it needs.' [*Vaught*] at 487-488. When a new theory is advanced that was not contained in the medical records or otherwise disclosed, fundamental principles of discovery must be

considered.'" *Id.* at ¶15. As the court in *O'Connor* stated cogently, a party has "a reasonable expectation, in the absence of an expert report or a supplement to the deposition testimony or interrogatory responses, that [the treating physician] would testify consistent with the original medical records * * *." *Id*. at ¶17.

Treating Physician Testifying as a Fact Witness

{¶41} Also pertinent to this case is the well-settled law that "treating physicians can be called at trial to testify as viewers of their patients' physical condition and not as experts retained in anticipation of litigation." *Henry v. Richardson*, 193 Ohio App.3d 375, 2011-Ohio-2098, ¶33 (12th Dist.), citing *Fischer v. Dairy Mart Convenience Stores, Inc.*, 77 Ohio App.3d 543 (8th Dist.1991). In *Henry*, the court determined that the physician testified as a fact witness and not as an expert in anticipation of litigation, when the physician described how she saw the patient three days after his accident, the symptoms he was suffering from, the treatment she devised for him, and the length and cost of the treatment. *Id*. at ¶33. When a treating physician testifies as a fact witness, obviously Crim.R. 16(K) is not applicable.

Dr. Donich Testified both as a Fact Witness and as an Expert

{¶42} Here, our review of the trial transcript reveals that Dr. Donich testified as a fact witness as the treating physician of the victim, as well as an expert. He testified as a fact witness when he described his observations and treatment of Mr. Butcher's injury as his treating physician. However, he testified as an expert when he explained his diagnosis of Mr. Butcher's injury (a burst fracture of the C-7), what a burst fracture meant, the nature of the surgery he performed on Mr. Butcher (to "unpinch" the spinal

cord and to stabilize the spine), and the symptoms the patient may suffer post-surgery (some degree of tingling and numbness in the arms and hands).

{¶43} Pursuant to *Henry* and *Fischer*, a treating physician can testify as a fact witness. Thus, the portion of Dr. Donich's testimony as a fact witness would require no Crim.R. 16(K) report.

{¶44} Regarding the portion of Dr. Donich's testimony as an expert where he explained what a burst fracture meant and its effects, because no expert report had been provided, the issue becomes whether the trial court abuse its discretion in admitting the testimony in the absence of a Crim.R. 16(K) report. *See State v. Viera*, 5th Dist. No. 11CAA020020, 2011-Ohio-5263, ¶18 (Crim.R. 16(K) does not abolish the trial court's discretion in admitting evidence).

{¶45} Because the victim's medical records, from all indications, had been provided to the defense, this appears to be a case where the disclosure of the medical records in lieu of an expert report adequately provided the requesting party with the information it needed. *See O'Connor* at ¶15. Furthermore, there was nothing in the record indicating the treating physician testified inconsistently with the victim's medical records, or that the physician testified as to the ultimate question, namely, the cause of the victim's injury.

{¶46} Thus, Mr. Fetty cannot claim he was prejudiced by a lack of Crim.R. 16(K) report, as he was not ambushed or thwarted in his ability to cross-examine the physician – a situation Crim.R.16(K) is intended to prevent. Therefore, we conclude the trial court did not abuse its discretion in admitting the testimony despite a lack of compliance with Crim.R. 16(K).

{¶47} For the foregoing reasons, the first assignment of error is without merit.

Sufficiency of Evidence

{¶48} Under the second assignment of error, Mr. Fetty claims his conviction is not supported by sufficient evidence.

{¶49} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The pertinent inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶50} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶51} Here, Mr. Fetty is convicted of felonious assault as defined in R.C. 2903.11(A)(1), which provides that no person shall "knowingly" cause "serious physical harm" to another. "Knowingly" is defined in R.C. 2901.22(B): "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶52} On appeal, Mr. Fetty argues the state failed to present sufficient evidence to prove he knowingly caused serious physical harm to Mr. Butcher.

{¶53} The evidence shows that Mr. Fetty was highly irritated by Mr. Butcher's conduct at the party. Although the eyewitnesses' reports of the events leading to Mr. Butcher's injury differed depending on their vantage point, all testified they saw Mr. Fetty throw the first punch at Mr. Butcher without provocation. Purdie Welker testified Mr. Fetty "came flying around" the right side of the pickup truck and hit Mr. Butcher on the side of his head. Ms. Rufener testified Mr. Fetty "busted" him in the face. Ryan Welker testified Mr. Fetty blindsided him and hit him in the face and described it as a "sucker punch." Silas Welker saw Mr. Fetty run around the side of the truck and watched while he "clocked" Mr. Butcher in the side of the head. Mr. Miller testified that Mr. Fetty suddenly came up and "coldcocked" Mr. Butcher in the side of his face. Mr. Eisenbarth saw an individual run and hit Mr. Butcher. The witnesses testified, in addition, that, the punch caused Mr. Butcher to stumble backward and eventually fall into the ditch, where others joined in a group fight.

{¶54} To survive a sufficiency challenge, the state need only to present evidence to show that Mr. Fetty was "aware that his conduct will probably cause a certain result," namely, causing serious physical harm. R.C. 2901.22(B). Given the testimony from the multiple eyewitnesses who uniformly testified to the initial punch thrown by Mr. Fetty, we conclude that any rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could have found, beyond a reasonable doubt, that Mr. Fetty knowingly caused serious physical harm to Mr. Butcher.

{¶55} The second assignment of error is without merit.

Manifest Weight

{¶56} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether 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.'" *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶57} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23.

{¶58} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). A fact finder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶59} "When reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. * * * This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor in weighing the credibility of the witnesses."

State v. Reeves, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶14, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 79-81 (1984).

{¶60} On appeal, Mr. Fetty maintains that the evidence does not conclusively prove his punch caused the injury to Mr. Butcher, arguing the injury could have been caused by Mr. Butcher's fall into the ditch, or by others involved in the group scuffle in the ditch.

{¶61} The trial transcript reflects that witness after witness testified Mr. Fetty struck Mr. Butcher without provocation, with a force sufficiently severe to cause Mr. Butcher to stumble backward and eventually fall into the ditch. The accounts varied regarding where Mr. Butcher was located at the time of the attack, whether he was able to fight back, and what occurred in the ditch. Mr. Butcher himself reported the event substantially differently than the eyewitnesses – stating that he was sitting on the picnic table at the time and was hit with an object. However, the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact. Significantly, no one witnessed anyone other than Mr. Fetty striking Mr. Butcher, before or after they fell into the ditch.

{¶62} Based on the evidence, we cannot say the jury, in assessing the credibility of the witnesses and resolving any conflicts in the evidence, lost its way and created such a manifest miscarriage of justice that Mr. Fetty's conviction must be reversed. This is not an exceptional case where the evidence weighs heavily against the conviction warranting an exercise of our discretionary power to grant a new trial.

{¶63} The third assignment of error is without merit.

Restitution and Court Costs

{¶64} In his fourth and fifth assignments of error, Mr. Fetty contends that the court erred in imposing restitution of $6,000 without holding a restitution hearing, and in failing to inform him at sentencing he must pay court costs. On appeal, the state concedes both errors.

{¶65} Regarding restitution, R.C. 2929.18(A)(1) provides: "If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount."

{¶66} At the sentencing hearing, the prosecutor reported that the victim had incurred $6,000 in medical bills and $8,000 in lost wages, and asked the court to impose, at a minimum, $6,000 in restitution. The defense counsel asked the court to defer ordering restitution until there is documented evidence for the amounts. The trial court then ordered $6,000 in restitution without a hearing. Pursuant to R.C. 2929.18(A)(1), a hearing is mandatory when the offender disputes the amount. Mr. Fetty is entitled to a hearing on restitution pursuant to the statute and a re-sentencing on the issue of restitution.

{¶67} Regarding court costs, R.C. 2947.23(A) provides:

{¶68} "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

{¶69} "(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.

{¶70} "(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."

{¶71} The Supreme Court of Ohio, in a recent decision, *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-78, held that 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 presents an issue ripe for review, even when 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 syllabus. Interpreting R.C. 2947.23(A)(1), the court stated that the General Assembly's language ("at the time the judge * * * imposes sentence, the judge * * * shall notify") "clearly registers an intent that this notice is mandatory and that a court is to provide this notice at sentencing." *Id.* at ¶10.

{¶72} Applying *Smith*, this court held, in *State v. Taylor*, 11th Dist. No. 2011-P-0090, 2012-Ohio-3890, that a trial court must put a criminal defendant on notice of the statutory provisions at the time of sentencing.

{¶73} In this case, the trial court imposed costs in its judgment entry, but did not provide the appropriate statutory notification at sentencing. The state concedes this error. Mr. Fetty is entitled to a re-sentencing for proper notification pursuant to R.C.

2947.23(A)(1)(a) and (b) regarding the costs associated with the case. The fifth assignment of error is sustained.

Cumulative Errors Argument

{¶74} In his sixth assignment of error, Mr. Fetty argues cumulative errors at trial denied him a fair trial. Pursuant to the doctrine of cumulative error, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64-65 (1995), citing *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. The doctrine is inapplicable to this case as we do not find *any* instances of errors regarding Mr. Fetty's conviction. The assignment of error is without merit.

{¶75} The judgment of the Portage Court of Common Pleas is affirmed in part, reversed in apart, and remanded for the limited purpose of a restitution hearing and re-sentencing on the issues of restitution and court costs.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.