

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MITCHELL DEWAYNE BAKER,)
)
 Appellant,)
 v.)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2008-1087

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 27 2010

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Mitchell Dewayne Baker was tried by jury and convicted of First Degree Rape (Count I) (21 O.S.2001, §1114(A)(3)) and Domestic Assault and Battery by Strangulation (Count II) (21 O.S.Supp.2006, §644(H)), both After Former Conviction of a Felony, Case No. CF-2008-221, in the District Court of McCurtain County. The jury recommended as punishment ten (10) years imprisonment in each count. The trial court sentenced accordingly, ordering the sentences to run consecutively and suspending the sentence in Count II.¹ The court also ordered Appellant to pay \$3,301.00 in restitution. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

- I. The trial court erred by imposing restitution when there was no factual basis to support it.
- II. The prosecutor deprived Appellant of a fair trial by using evidence of other crimes and a prior felony conviction for

¹ Count I, First Degree Rape is an 85% crime. 21 O.S.Supp.2008, § 13.1.

the purpose of showing Appellant acted in conformity with his character.

- III. The prosecutor injected the trial with improper irrelevant evidence designed to secure a conviction by appealing to the emotions of the jurors.
- IV. The prosecutor incorrectly stated the burden of the State's proof, thereby depriving Appellant of a fair trial.

After thorough consideration of this proposition and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined under the law and evidence that reversal is not warranted but the case should be remanded to the District Court for a proper determination of restitution.

In Proposition I, the decision to order restitution is within the trial judge's discretion. 22 O.S.2001, § 991a(A)(1). The guidelines for determining the amount of restitution are set forth in *Honeycutt v. State*, 1992 OK CR 36, 834 P.2d 993, 1000. First, the judge must determine whether the restitution can be paid without imposing manifest hardship on the defendant or his immediate family. Second, the extent of the damage to the victim must be determinable with reasonable certainty. The record must reflect a basis for the trial judge's determination of a victim's loss or the decision is arbitrary and violative of Section 991a. *Id* This Court can remand a matter to the district court for a proper determination on the issue of restitution. *Taylor v. State*, 2002 OK CR 13, ¶ 5, 45 P.3d 103, 105.

The record before us is insufficient for this Court to review the trial court's determination on the issue of restitution. Therefore, the order of

restitution is vacated and the issue of the amount of the victim's loss is remanded to the trial court for proper determination pursuant to the guidelines set forth above.

In Proposition II, we find evidence of Appellant's 2005 assault on a former girlfriend and his 2003 conviction for Assault and Battery with a Dangerous Weapon were properly admitted to impeach Appellant's testimony and rebut his defense that the victim's injuries in this case were the result of an accidental fall while she was intoxicated and not the result his physical assault on her. *See Dodd v. State*, 2004 OK CR 31, ¶ 73, 100 P.3d 1017, 1039-40 (“[a] witness who offers one-sided versions of his own past conduct subjects himself to cross-examination aimed at showing the jury that he is not telling the whole truth about that conduct, and therefore, cannot be trusted to tell the truth about other matters either”). *See also Turner v. State*, 1990 OK CR 79, ¶¶ 4-5, 803 P.2d 1152, 1153 (evidence of a prior felony conviction is admissible to impeach a defendant's credibility once he testifies); *Hodge v. State*, 1988 OK CR 202, ¶¶ 9-11, 761 P.2d 492, 495 (evidence of a defendant's past conduct is admissible to rebut defense theory of accident or mistake). That evidence of the 2005 assault incidentally suggests the commission of another crime does not make the evidence inadmissible. Even if we consider that evidence under the other crimes standard, the evidence was admissible to prove the absence of an accident.

Further, any similarities between the 2003 conviction and the crimes on trial is not grounds for automatically excluding the prior conviction. *See*

Turner, 1990 OK CR 79, ¶¶ 5-7, 803 P.2d at 1155-56. Appellant's prior conviction was relevant to the credibility of his defense to the charges on trial. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice as the trial court limited the jury's consideration of the evidence in the cautionary instruction given at the close of the evidence.

In Proposition III, we find no plain error in the prosecutor's questioning of the victim regarding how she felt while being raped and of her son regarding his feelings upon seeing his mother's physical injuries. The elicited testimony was relevant to prove the statutory elements regarding the use of force or violence to have sexual intercourse, and the victim's lack of consent. *See* 21 O.S.2001, §1114(A)(3). *See also Casady v. State*, 1986 OK CR 114, ¶ 3, 721 P.2d 1342, 1344 (testimony concerning the rape victim's physical and emotional condition after the rape held admissible as probative of the issue of consent). Consent was a highly contested issue in the case and the prosecutor's questioning was not so repetitive as to induce the jurors to decide the case on emotional grounds.

Additionally, we find the victim's testimony was not victim impact evidence as contemplated by 22 O.S.2001, § 984. The State did not file a Notice of Intent to Offer Victim Impact Evidence. Further, the testimony concerned the physical and emotional effects of the rape on the victim herself. Testimony of the victim's injuries and resulting physical and emotional effects was relevant in establishing the elements of the charged rape. This evidence was necessary to the State's burden of proof and its probative value was not substantially outweighed by the danger of unfair prejudice. *See McElmurry v. State*, 2002 OK CR 40, ¶ 63,

60 P.3d 4, 21-22, (it is not the duty of the trial court to “anesthetize a crime in order to protect a defendant from the natural consequence of his own intentional acts.”)

In Proposition IV, we find any misstatements by the prosecutor during *voir dire* concerning the State’s burden of proof did not deny Appellant a fair trial. Reading the comments in context, the prosecutor appropriately set forth the State’s burden of proof at another time during *voir dire*. Additionally, during *voir dire* and in the written instructions given at the close of evidence, trial court informed the jury of the appropriate burden of proof.

DECISION

The Judgment is **AFFIRMED**, the order of restitution is **VACATED** and the issue of the amount of the victim's loss is **REMANDED** to the trial court for proper determination in accordance with this opinion. The State’s *Motion to Supplement* the Record is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF MCCURTAIN COUNTY
THE HONORABLE LOWELL BURGESS, ASSOCIATE DISTRICT JUDGE²

APPEARANCES AT TRIAL

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² The Honorable Willard Driesel, District Judge, presided over the first day of trial, which included jury selection and the testimony of one witness. As Judge Driesel became ill and could not continue the trial, the Honorable Lowell Burgess from Pushmataha County, presided over the remainder of the trial.

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OPINION BY: LUMPKIN, J.
C. JOHNSON, P.J.: CONCUR
A. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
LEWIS, J.: CONCUR IN RESULT

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