

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHERL D. BATISE,
Appellant,
v.
STATE OF OKLAHOMA
Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 20 2002
JAMES W. PATTERSON
CLERK

NOT FOR PUBLICATION

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) Case No. F-2001-211
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SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant Sherl D. Batise was tried by jury and convicted of Assault and Battery with a Dangerous Weapon (21 O.S.1991, § 645), After Former Conviction of Two or More Felonies, in Case No. CF-00-292, in the District Court of Carter County. The jury left the issue of punishment to the trial court's discretion. The trial court sentenced Appellant to thirty-five (35) years imprisonment. It is from this judgment and sentence that Appellant appeals.

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

- I. Appellant received ineffective assistance of counsel at his trial.
- II. The sentence imposed was excessive.
- III. The trial court erred by failing to determine whether Appellant could pay restitution without imposing manifest hardship, and the evidence was insufficient to allow the trial court to determine restitution with reasonable certainty.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the

parties, we have determined that reversal is not warranted under the law and the evidence.

In Proposition I, we find Appellant has failed to show a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674, 700 (1984).

In Proposition II, we find the thirty-five year sentence imposed was not excessive. Appellant offers no legal authority to support his argument that an excessive sentence was levied because “the jury failed in its duty to recommend a sentence.” Further, we reject Appellant’s request for a proportionality analysis. *Rea v. State*, 2001 OK CR 28 ¶ 5, ___ P.3d ___; *Applegate v. State*, 904 P.2d 130, 135 (Okl.Cr.1995); *Maxwell v. State*, 775 P.2d 818, 820 (Okl.Cr.1989). This Court’s review of the appropriateness of a sentence imposed in a case has been limited to the facts and circumstances of that individual case. *See Applegate*, 904 P.2d at 135. In the present case, the evidence of guilt was overwhelming. This was Appellant’s 5th felony conviction. Two of those prior convictions were for the violent felonies of assault and battery on a police officer and robbery by force. Thirty-five years in prison for an assault with a machete on an unharmed man is not excessive.

In Proposition III, we find the trial court failed to comply with the guidelines set forth in *Honeycutt v. State*, 834 P.2d 993 (Okl.Cr.1992) for determining the amount of restitution. Under 22 O.S.Supp.1986, Sec. 991a(A)(1), the decision to order restitution is within the trial judge's total discretion. 834

P.2d at 1000. However, this discretion is not without limits. 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. Inherent in the definition of reasonable certainty is the requirement of proof of a victim's loss. 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.*

Here, the record does not reflect a basis for the trial judge's order for restitution. Therefore, the order of restitution is vacated and the issue of the amount of the victim's loss remanded to the trial court for proper determination.

DECISION

The Judgment and Sentence 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.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
THE HONORABLE THOMAS S. WALKER, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR IN RESULT
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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