

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES LEONARD BENNETT, III,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2014-1019

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

FEB 26 2016

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

JOHNSON, JUDGE:

Appellant Charles Leonard Bennett, III was convicted of Assault and Battery with a Deadly Weapon in violation of 21 O.S.2011, § 652(C) in the District Court of Oklahoma County, Case No. CF-2012-7254, after a bench trial before the Honorable Timothy R. Henderson.¹ Judge Henderson sentenced Bennett to fifteen years imprisonment.² Bennett appeals raising the following issues:

- (1) whether the evidence failed to prove beyond a reasonable doubt that he did not act in self-defense;
- (2) whether he was prejudiced by the trial court's failure to consider lesser included offenses that were supported by the evidence;
- (3) whether he was denied his right to the effective assistance of counsel;
- (4) whether there was sufficient evidence of the victim's actual losses to support the restitution order; and

¹ Judge Henderson sustained Bennett's demurrer to a charge of Shooting with Intent to Kill.

² Under 21 O.S.Supp.2011, § 13.1, Bennett must serve 85% of the sentence imposed before he is eligible for parole.

- (5) whether cumulative errors deprived him of a fair proceeding and reliable outcome.

We find reversal is not required and affirm the Judgment of the district court. The order of restitution is vacated and the case is remanded to the district court for a hearing on restitution.

1.

After reviewing the evidence in the light most favorable to the State, we find that any rational trier of fact could find beyond a reasonable doubt that Bennett was guilty of Assault and Battery with a Deadly Weapon based on the evidence presented at trial and that he did not act in self-defense. *See Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Bennett's challenge to the sufficiency of the evidence is rejected.

2. & 3.

Bennett filed a "Motion to Waive Certain Issues for Consideration on Appeal" with appropriate affidavit. Bennett has elected to withdraw claims raised in propositions 2 and 3 that could result in a new trial and to pursue claims warranting either dismissal or sentence modification. He has attached an affidavit acknowledging the waiver of issues is knowing, intelligent and voluntary, and that he is waiving all right to appeal those issues in the future. *See Rule 3.12(B)(2), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2016)*. Bennett's Motion is hereby **GRANTED**.

4.

Bennett argues the district court's restitution order must be vacated because the district court failed to follow the governing statutory procedures.³ Because Bennett did not object to the manner or amount of the restitution award below, he has waived appellate review of the instant challenge for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 694.

Under 22 O.S.2011, § 991f(C), a district court shall order a convicted defendant to pay restitution if the crime victim suffered compensable injury, such as incurred medical expenses and loss of wages. The amount may be up to three times the amount of economic loss suffered as a direct result of the defendant's criminal act. 22 O.S.2011, § 991f(A)(1). Although a defendant may be ordered to pay restitution for economic loss as defined by Section 991f, an order of restitution may only include those losses which are determinable with "reasonable certainty." 22 O.S.2011, 991a(A)(1)(a). "A 'reasonable certainty' must be more than an approximation, estimate, or guess. Inherent in the definition of reasonable certainty is the requirement of proof of the loss to the victim." *Logsdon v. State*, 2010 OK CR 7, ¶ 9, 231 P.3d 1156, 1162 (internal citations omitted). The record must reflect a basis for the trial judge's determination of a victim's loss or the decision will be deemed arbitrary and found to violate Section 991a. *Honeycutt v. State*, 1992 OK CR 36, ¶ 33, 834 P.2d 993, 1000.

³ At sentencing, the district court ordered Bennett to pay restitution in the amount of \$6,931.00 to the Oklahoma Health Care Authority, at a rate of \$289.00 per month, beginning the second month after his release.

Title 22 O.S.2011, § 991f (E)(3) requires the district attorney to provide the court an official request for restitution form, completed and signed by the victim, which includes “all invoices, bills, receipts, and other evidence of injury, loss of earnings and out-of-pocket loss. This form shall be filed with any victim impact statement to be included in the judgment and sentence.” The victim in this case did not testify to his financial losses during trial or at sentencing and the record does not reflect that the restitution request form, along with required supporting documentation, was presented to the court. While defense counsel stated he and Bennett understood restitution was involved in this case and the district court set restitution at a specific amount, the basis for the award is not in the record before us. We therefore cannot conclude that the restitution amount ordered by the district court was determined with reasonable certainty and must consider the order of restitution to be arbitrary. This is plain error which requires the restitution order be vacated and the case remanded to the district court for a proper determination on the issue of the victim’s loss.⁴

5.

Other than the need for a restitution hearing, there are no errors, considered individually or cumulatively, that merit relief in this case. *Jones v.*

⁴ Bennett also argues the district court erred in providing restitution payments to the Oklahoma Health Care Authority because it was not a victim. This argument was not presented below. Because this matter must be remanded for a proper restitution hearing, that argument may be presented to the district court for resolution.

State, 2009 OK CR 1, ¶ 104, 201 P.3d 869, 894; *DeRosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. This claim is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. The district court's restitution order is **VACATED** and the case is **REMANDED** to the district court for a proper determination on the issue of loss in accordance with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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OPINION BY: JOHNSON, J.
SMITH, P.J.: Concur
LUMPKIN, V.P.J.: Concur in Results
LEWIS, J.: Concur
HUDSON, J.: Concur

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