

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

HORACE JOE BIGMEDICINE,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2013-994

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 01 2014

SUMMARY OPINION

A. JOHNSON, JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant Horace Joe Bigmedicine was tried by jury in the District Court of Blaine County, Case No. CF-2012-94, and convicted of First Degree Burglary, After Former Conviction of Two or More Felonies, in violation of 21 O.S.2011, § 1431. The jury assessed punishment at thirty years imprisonment. The Honorable Paul Woodward, who presided at trial, sentenced Bigmedicine accordingly. From this Judgment and Sentence Bigmedicine appeals, raising the following issues:

- (1) whether prosecutorial misconduct deprived him of a fair trial; and
- (2) whether the trial court erred when it imposed restitution of \$2,000.00 without following the statutory procedure for doing so.

We find reversal is not required and affirm the Judgment and Sentence of the district court. We also find, however, that the order of restitution must be vacated and the case remanded to the district court for a proper determination on the issue of the victim's loss.

1.

Bigmedicine complains prosecutorial misconduct deprived him of his right to a fair trial. “This Court will not grant relief based on prosecutorial misconduct unless the State’s argument is so flagrant and that it so infected the defendant’s trial that it was rendered fundamentally unfair.” *Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230. The prosecutor’s argument was fair comment on the evidence and was not improper. His use of language was well within the bounds of proper advocacy. This Court does “not require counsel in such serious cases to address the jury with lifeless and timid recitations void of moral reflection or persuasive power.” *Sanchez v. State*, 2009 OK CR 31, ¶ 75, 223 P.3d 980, 1005. Because there was no actual error, there was no plain error. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Relief is not warranted.

2.

Bigmedicine argues that the trial court’s order of restitution must be vacated because the trial court failed to follow the governing statutory procedures. Because Bigmedicine did not object to the manner or amount of the restitution assessment before the trial court 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.

Title 22 O.S.2011, § 991a (A)(1)(a) authorizes a trial court to order a defendant to pay restitution to the victim of a crime for any economic loss the

victim has suffered. "Economic loss' means actual financial detriment suffered by the victim consisting of medical expenses actually incurred, damage to or loss of real and personal property and any other out-of-pocket expenses, including loss of earnings, reasonably incurred as the direct result of the criminal act of the defendant." 22 O.S.2011, § 991f (A)(3). 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.

As acknowledged by the State, 22 O.S.2011, § 991f (E)(3) requires the district attorney 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 loss 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 the court did reference a “victim statement” at sentencing, the contents of this are not in the record. We cannot conclude on the record before this Court that the restitution amount ordered by the district court was determined with reasonable certainty. We must therefore 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.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. The district court’s restitution order is **VACATED**, and the case **REMANDED** on the issue of the victim’s loss, for a proper determination in accordance with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BLAINE COUNTY
THE HONORABLE PAUL K. WOODWARD, DISTRICT JUDGE

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

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