

- II. The State failed to present sufficient evidence to disprove self-defense, in violation of Mr. Broomhall's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and article II, § 7 of the Oklahoma Constitution.
- III. Prosecutorial misconduct deprived Mr. Broomhall of his rights to due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, and article II, §§ 7 & 20 of the Oklahoma Constitution.
- IV. The trial court erred by failing to properly instruct the jury, violating Mr. Broomhall's right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and article II, § 7 of the Oklahoma Constitution.
- V. The trial court abused its discretion by failing to follow the proper procedure for ordering restitution, especially where the complainant's loss was not determined with reasonable certainty.
- VI. Mr. Broomhall received ineffective assistance of counsel.
- VII. Cumulative errors deprived Mr. Broomhall of a fair trial.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we affirm the conviction and sentence. The order of restitution is vacated, and the case remanded for a restitution hearing.

We find in Proposition I that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Appellant committed assault and battery with intent to do bodily harm. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. The State had to show that Appellant committed assault and battery upon another with a dangerous weapon, without justifiable

cause and with intent to do bodily harm. 21 O.S.2011, § 645; OUJI-CR 2d 4-12. Appellant admits the State proved the victim was assaulted and battered with a baseball bat, but argues that the State did not prove he acted with intent to do bodily harm. The State was not required to present medical or forensic evidence as long as evidence supported the allegations. Although Appellant argues there were no witnesses, the victim himself was an eyewitness to the assault. Intent to do bodily harm may be proved through circumstantial evidence. *Gregory v. State*, 1981 OK CR 56, ¶ 3, 628 P.2d 384, 386. Sufficient circumstantial evidence supported the jury's determination of guilt. This proposition is denied.

We find in Proposition II that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Appellant did not act in self-defense. *Easlick*, 2004 OK CR 21, ¶ 15, 90 P.3d at 559. Appellant had the burden to show that he attacked the victim while attempting to prevent an offense against himself, that he reasonably believed the force was necessary to protect himself from imminent danger of bodily harm, and that the force he used was no more than that sufficient to prevent the offense.

21 O.S.2011, § 643(3); OUJI-CR 2d 8-48.¹ Once a defendant presents enough evidence to raise the claim of self-defense, the State must disprove it beyond a reasonable doubt. *Robinson v. State*, 2011 OK CR 15, ¶ 17, 255 P.3d 425, 432. We presume that the trier of fact resolved any conflicts in the evidence in favor of the prosecution. *Id.*, 255 P.3d at 432; *McDaniel v. Brown*, 558 U.S. 120, 132-33, 130 S.Ct. 665, 673, 175 L.Ed.2d 582 (2010). Jurors here were properly instructed that an aggressor in a situation may not invoke self-defense. *Mack v. State*, 2018 OK CR 30, ¶ 3, 428 P.3d 326, 328. The jury heard the evidence Appellant cites in support of this claim, and this Court will not substitute its judgment for that of the jury's. *Id.* This proposition is denied.

We find in Proposition III that no prosecutorial comment, statement, or question affected the fairness of the trial. *Brewer v. State*, 2006 OK CR 16, ¶ 14, 133 P.3d 892, 895. Appellant did not object to most of these statements or comments, and we review those claims for plain error. *Mathis v. State*, 2012 OK CR 1, ¶ 24, 271 P.3d 67, 76. Plain error is an actual error, that is plain or obvious, and that affects a

¹ Appellant refers to cases discussing the justifiable homicide statute, 21 O.S.2011, § 733. However, there was no homicide committed here, and the appropriate statute is § 643.

defendant's substantial rights, affecting the outcome of the trial. *Thompson v. State*, 2018 OK CR 5, ¶ 7, 419 P.3d 261, 263. Where Appellant raised objection, he was sustained by the trial court, curing any error. *Johnson v. State*, 2013 OK CR 12, ¶ 16, 308 P.3d 1053, 1057. Appellant first complains the prosecutor improperly conducted *voir dire*. *Voir dire* allows the parties and the court to determine whether jurors are eligible to serve, and gives parties a chance to gather information about potential jurors in order to intelligently exercise peremptory challenges. *Robinson v. State*, 2011 OK CR 15, ¶ 16, 255 P.3d 425, 431-32. The prosecutor's questions were appropriately focused to fulfill these purposes.

Appellant also complains that the prosecutor misstated the evidence during opening statement. In opening statement, the parties tell the jury what they expect the evidence will show. *Howell v. State*, 2006 OK CR 28, ¶ 7, 138 P.3d 549, 556. Of course, at the time of opening statement, no evidence had been presented, and it would not have been possible for the prosecutor to misstate it. The record does not support Appellant's claim that the opening statement was made in bad faith. In addition, the prosecutor engaged in unremarkable and appropriate cross-examination.

Finally, Appellant claims the prosecutor misstated evidence and law in closing argument. Both parties have wide latitude to argue the evidence and its inferences, and we will not grant relief unless improper argument affects the fairness of the trial. *Barnes v. State*, 2017 OK CR 26, ¶ 6, 408 P.3d 209, 213. We will not grant relief unless errors in argument render a trial so fundamentally unfair that we cannot rely on the jury's verdict. *Webster v. State*, 2011 OK CR 14, ¶ 81, 252 P.3d 259, 281. Appellant wholly fails to show how any minor misstatements prejudiced him, and there is no plain error. Jurors were properly instructed on the intent requirement and the burden of proof, and we presume they followed those instructions. *Sanders v. State*, 2015 OK CR 11, ¶ 15, 358 P.3d 280, 285. There was no plain error, and this proposition is denied.

We find in Proposition IV that the jury instructions on aiding and abetting were proper. Appellant did not object to the instructions, and we review for plain error. *Watts v. State*, 2008 OK CR 27, ¶ 9, 194 P.3d 133, 136-37. The uniform jury instruction on aiding and abetting, OUJI-CR 2d 2-5, offers trial courts three alternatives in defining the term "principal". Given the evidence presented, Appellant's jury was properly instructed on aiding and abetting in the first and third

alternatives, but not the second alternative. According to the Notes on Use, when the second alternative is given, trial courts must also give OUJI-CR 2d 2-9 and 2-6. Appellant claims the failure to give these instructions was error. However, as the jury was not instructed on the second alternative, Instructions 2-6 and 2-9 were not required, and the trial court did not err in omitting them. Where there is no error, there is no plain error. *Sonnier v. State*, 2014 OK CR 13, ¶ 14, 334 P.3d 948, 952-53. This proposition is denied.

We find in Proposition V that the restitution order must be vacated and the case remanded for new restitution proceedings. At sentencing, the trial court ordered Appellant to pay \$386.66 in restitution. Appellant did not object to this assessment and has waived all but plain error. *White v. State*, 2019 OK CR 2, ¶ 22, 437 P.3d 1061, 1070. Before ordering restitution, a trial court must hold a hearing and the record must show some indication that the losses were determined with reasonable certainty. *Id.*; *Honeycutt v. State*, 1992 OK CR 36, ¶ 31, 834 P.2d 993, 1000. Restitution may be determined during a sentencing hearing, as happened here. *White*, ¶ 22, 437 P.3d at 1070. The district attorney must prepare and present an official restitution form in support of a restitution claim, and support this official report

with documentation justifying the requested amount. 22 O.S.2011, § 991f(E). While we have not held the statutory procedure is mandatory, the record must contain some memorialization of what the State actually presents to the district court in support of the amount sought. *Logsdon v. State*, 2010 OK CR 7, ¶¶ 11-12, 231 P.3d 1156, 1163. The procedures in § 991f were not followed; there is no official restitution form in the record, and no documentation supporting the State's oral request. As in *White* and *Logsdon*, this record shows a grand total restitution amount, but there is no way for this Court to determine whether, or how, that amount was determined with a reasonable certainty. *White*, ¶ 22, 437 P.3d at 1069; *Logsdon*, ¶ 13, 231 P.3d at 1163-64. This proposition is granted.

We find in Proposition VI that trial counsel was not ineffective. Appellant must show that counsel's performance was deficient, and that the deficient performance was prejudicial. *Tucker v. State*, 2016 OK CR 29, ¶ 12, 395 P.3d 1, 5; *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel's deficient performance must constitute objectively unreasonable decisions which undermine confidence in the trial's

outcome. *White*, ¶ 23, 437 P.3d at 1070. Appellant must show he was actually prejudiced by counsel's acts or omissions. *Marshall v. State*, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481; *Williams v. Taylor*, 529 U.S. 362, 394, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000); *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Appellant argues that defense counsel erred in failing to object to prosecutorial misconduct. We found in Proposition III that no misconduct affected Appellant's trial. He claims that defense counsel should have objected to the jury instruction on aiding and abetting. We found in Proposition IV that the instructions were appropriate. Given these findings, counsel cannot be ineffective for failing to object to argument or instructions. Appellant claims that counsel should have objected to the improper restitution determination. We found in Proposition V that the restitution must be vacated, and the case remanded for a hearing to determine restitution. That finding resolves this claim.

Appellant also claims defense counsel failed to investigate or present available evidence to support his claim of self-defense, and failed to impeach the victim with inconsistent statements. He relies wholly on extra-record evidence attached to his accompanying Rule 3.11(B) motion. We do not consider that material in deciding these

claims of ineffective assistance. As nothing in the record supports these claims, they are denied. Trial counsel was not ineffective, and this proposition is denied.

In connection with this claim Appellant filed a Rule 3.11(B) application for an evidentiary hearing. Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). There is a strong presumption of regularity in trial proceedings and counsel's conduct, and the application and affidavits must contain sufficient information to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2018). We "thoroughly review and consider Appellant's application and affidavits along with other attached non-record evidence." *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905. The Rule 3.11 standard set out above is easier for a defendant to meet than the *Strickland* standard, as a defendant must only provide clear and convincing evidence that there is a strong possibility counsel was ineffective. *Id.* at ¶ 53, 230 P.3d at 905-06. A Rule 3.11(B) motion must be accompanied by affidavits supporting the

allegation of ineffective assistance of counsel. *Simpson*, 2010 OK CR 6, ¶ 53, 230 P.3d at 905.

Appellant first argues that defense counsel failed to investigate and present evidence. He claims that his medical records, showing he sustained injuries to his head and face, would have supported his claim of self-defense. Appellant fails to show how, if it had been introduced, this evidence could have affected the jury's determination regarding self-defense. There was no dispute that Appellant suffered serious head injuries. Jurors heard testimony that the victim began the fight by hitting Appellant in the head with a garden tool, causing the injuries. The medical records confirm the injury, but not its cause. Appellant also argues defense counsel should have interviewed the responding sheriff's deputy as well as the deputy who turned the garden tool and baseball bat into the property room, and apparently argues defense counsel should have inspected the physical evidence. Appellant does not explicitly claim that defense counsel should have called either deputy to testify, or should have introduced either weapon into evidence. However, he implies that defense counsel should have both investigated and used this evidence. He fails to show how this

evidence could have added anything material on the issue of self-defense, given the evidence of self-defense presented at trial.

Appellant also argues that defense counsel failed to impeach the victim with an inconsistent statement. The day after the fight, the victim applied for a protective order against Appellant. Appellant claims defense counsel should have brought out a slight inconsistency between this statement and the victim's consistent preliminary hearing and trial testimony.² It is clear that the statement as a whole would have been more damaging to Appellant than the victim's trial testimony. It includes information that Appellant choked the victim and threatened to kill him if he returned. This would have significantly undermined Appellant's claim of self-defense. Appellant has failed to show by clear and convincing evidence the strong possibility that trial counsel was ineffective for failing to investigate and use these materials. The Rule 3.11(B) motion is denied.

We find in Proposition VII that no accumulated error requires relief. We found in Proposition V that restitution was improperly ordered, and granted relief on that issue. We found no other error.

² The State suggests defense counsel's decision not to use this was strategic. However, nothing in the record suggests counsel knew about this application for protective order. Absent some evidence that counsel knew of it and chose not to use it, we cannot find this was a strategic decision.

Where there is no error, there is no cumulative error. *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315. This proposition is denied.

DECISION

The Judgment and Sentence of the District Court of Creek County is **AFFIRMED**. The Order of Restitution is **VACATED** and the case **REMANDED** for a hearing on restitution. Appellant's Application to Supplement the Appeal Record; In the Alternative, Request for Evidentiary Hearing is **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE DOUGLAS W. GOLDEN, DISTRICT JUDGE

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OPINION BY KUEHN, V.P.J.

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LUMPKIN, J.: CONCUR IN RESULTS
HUDSON, J.: CONCUR
ROWLAND, J.: CONCUR