

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES MARVIN CARTY,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2013-619

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 11 2014

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

SMITH, VICE PRESIDING JUDGE:

James M. Carty was tried by a jury and convicted of one count of Robbery with a Dangerous Weapon in violation of 21 O.S.2011 § 801 in the District Court of Bryan County, Case No. CF-2012-368. In accordance with the recommendation of the jury, the Honorable Mark R. Campbell sentenced Carty to ten years imprisonment. In addition, the court ordered Carty to pay restitution in the amount of \$625.00. The sentence is subject to the 85% Rule under 21 O.S.2011, § 13.1.

Carty appeals from the Judgment and Sentence and raises one proposition of error in support of his appeal.

- I. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING RESTITUTION WITHOUT FOLLOWING STATUTORY PROCEDURES GOVERNING RESTITUTION ORDERS.

After thorough consideration of the entire record before us, including the original record, transcripts, and briefs, we find that the trial court erred in determining the amount of restitution to be awarded.

Section 991a of Title 22 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. 22 O.S.2011, § 991a(A)(1)(a). “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. No other elements of damage shall be included as an economic loss for purposes of this section.” 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).

We have recognized that a victim’s loss should be shown by a preponderance of the evidence; however, we have not required such loss to be proven by a certain type of evidence or that the evidence be corroborated. *Honeycutt v. State*, 1992 OK CR 36, ¶ 34, 834 P.2d 993, 1000. We review a trial court’s restitution award for an abuse of discretion. *Logsdon*, 2010 OK CR 7, ¶ 8, 231 P.3d at 1162. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous

conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

We find that the trial court abused its discretion in determining the restitution award. The record before this Court does not establish that any evidence was presented to the trial judge to establish the victim's economic loss. The victim did not testify to his financial loss at the time of sentencing and the record does not reflect that the restitution request form, along with its supporting documentation, was presented to the court as mandated by Section 991f of Title 22. 22 O.S.2011, § 991f(E)(1),(3),(4). Had evidence in either of these forms been presented to the trial court the result might be different, as there would be a factual basis supporting the court's determination that the amount ordered represented the out-of-pocket loss to the victim after reimbursement under an insurance policy. However, the prosecutor's unsupported representation of the total amount of restitution owed the victim is insufficient to establish the victim's financial loss with "reasonable certainty" as required by 22 O.S.2011, § 991a(A)(1)(a). *Logsdon*, 2010 OK CR 7, ¶ 9, 231 P.3d at 1162; *see also e.g., Taylor v. State*, 2002 OK CR 13, ¶ 5, 45 P.3d 103, 105 (concluding that victim's claim for lost wages taken from a presentence investigation report without supporting evidence to be insufficient to determine restitution with a reasonable certainty).

Because the victim's loss was not established with reasonable certainty and does not specify to whom the restitution should be paid, we cannot conclude that the restitution amount ordered by the district court was determined with reasonable certainty.

DECISION

The Judgment and Sentence of the District Court of Bryan County 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 the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY
THE HONORABLE MARK R. CAMPBELL, DISTRICT JUDGE**

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OPINION BY: SMITH, V.P.J.

LEWIS, P.J.: CONCUR
LUMPKIN, J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR