

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

SANTOS RAMON CRUZ, )  
 )  
 Appellant, )  
 vs. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

No. F-2011-671

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

FEB 20 2013

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**SMITH, VICE PRESIDING JUDGE:**

Santos Ramon Cruz was tried by jury and convicted of Assault and Battery with a Dangerous Weapon in violation of 21 O.S.Supp.2006, § 645, in the District Court of Custer County, Case No. CF-2010-99. In accordance with the jury's recommendation the Honorable F. Doug Haught sentenced Cruz to five (5) years imprisonment. Cruz appeals from this conviction and sentence.

Cruz raises six propositions of error in support of his appeal:

- I. The evidence was insufficient to convict Mr. Cruz of assault and battery with a dangerous weapon;
- II. Mr. Cruz's conviction should be reversed because the trial court's jury procedure produced an invalid verdict and denied Appellant his right to trial by jury;
- III. This Court should remand Mr. Cruz's case to the District Court with instructions to correct his judgment and sentence to reflect credit for time served by an order *nunc pro tunc*;
- IV. The trial court failed to require proof of the recipient's actual loss to support a restitution order, therefore this Court must vacate or remand the matter to the District Court for a proper hearing on restitution;
- V. Mr. Cruz's sentence and the assessment of attorney fees are excessive; and
- VI. The cumulative effect of all the errors addressed above deprived Mr. Cruz of a fair trial.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the law and evidence do not require relief.

We find in Proposition I that, taking the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Cruz did not act in self-defense, but committed assault and battery with a dangerous weapon. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. The State must show Cruz committed an assault and battery on the victim, with a dangerous weapon, without justifiable or excusable cause, intending to do bodily harm. 21 O.S.Supp.2006, § 645; OUJI-CR 2d 4-12. Cruz claimed he stabbed the victim in self-defense. A person is justified in using force, including deadly force, in self-defense if he reasonably believes that the use of force was necessary to protect himself from imminent danger of death or great bodily harm. *Robinson v. State*, 2011 OK CR 15, ¶ 17, 255 P.3d 425, 432. Self-defense is not available to an aggressor. *Id.* Once a defendant presents sufficient evidence of self-defense, the State must show beyond a reasonable doubt that the defendant did not act in self-defense. *Id.* Cruz's story contradicted that of the victim's, who testified that he was unarmed when Cruz attacked him with a knife. Where evidence sharply conflicts, we will not interfere with a verdict supported by the evidence. *Robinson*, 2011 OK CR 15, ¶ 17, 255 P.3d at 432. We presume that the jury resolved conflicting evidence in the State's favor. *McDaniel v. Brown*, 558 U.S. 120, \_\_\_, 130 S.Ct. 665, 673, 175 L.Ed.2d 582 (2010).

We find in Proposition II that there was no error, and thus no plain error, when the trial court told jurors that the parties expected the trial would be finished in a day. “The trial court may inform the jury how long the trial is expected to last, and should continue to inform the jury of any schedule changes as the trial progresses.” *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211, 213, Attachment I, Guideline 1(A). The trial court was trying to ensure that any jurors who could not commit to the entire day, and potentially the evening hours, were identified and excused for cause. Not only is the manner and scope of the voir dire within the trial court’s discretion, the purpose of voir dire is to discover whether there are grounds to challenge potential jurors. *Young v. State*, 2000 OK CR 17, ¶ 19, 12 P.3d 20, 31-32. Cruz appears to argue that the trial court should have given jurors an *Allen* charge.<sup>1</sup> Such a charge should only be given when a jury announces it is unable to reach a verdict, usually only after lengthy deliberations. OUJI-CR 2d 10-11; *Gilbert v. State*, 1997 OK CR 71, ¶ 57, 951 P.2d 98, 114. Cruz’s jury deliberated for approximately ninety minutes. The record does not support any conclusion that the jury was deadlocked or had trouble agreeing on a unanimous verdict. It would have been error to give any component of an *Allen* instruction in this case.

We find in Proposition III that Cruz’s Judgment and Sentence should be corrected. At the July 18, 2011, sentencing hearing, the trial court sentenced Cruz to five years in DOC custody. The Judgment and Sentence reflects this sentence. No mention was made of credit for time served. However, a post-sentencing hearing was held on July 26, 2011, before the trial judge, with a prosecutor present. Twice,

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<sup>1</sup> *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 157, 41 L.Ed.2d 528 (1896).

Cruz asked whether he was to get credit for time served in the county jail awaiting trial. Twice, defense counsel told Cruz that the trial judge had ordered credit for time served, and he would have credit for that time. Neither the prosecutor nor the trial court corrected defense counsel, and Cruz was left with the apparently official information that his sentence included credit for time served. Whether to impose credit for time served is within a trial court's discretion. *Holloway v. State*, 2008 OK CR 14, ¶ 8, 182 P.3d 845, 847. The State correctly notes that oral pronouncement of sentence controls over conflicting written orders. *LeMay v. Rahhal*, 1996 OK CR 21, ¶ 19, 917 P.2d 18, 22. However, this record contains, in effect, two oral pronouncements. The latest oral pronouncement in the record, uncontradicted by the trial court, is the information that Cruz was to receive credit for time served. In the interests of justice and fairness, and in keeping with the precedent regarding oral pronouncements, the case should be remanded for an Order *Nunc Pro Tunc* correcting Cruz's Judgment and Sentence to reflect credit for time served. *Neloms v. State*, 2012 OK CR 7, ¶ 45, 274 P.3d 161, 172.

We find in Proposition IV that the trial court did not order restitution without first holding a hearing to determine the amount. We agree such an order would be in error. *Logsdon v. State*, 2010 OK CR 7, ¶ 13, 231 P.3d 1156, 1163-64; *Honeycutt v. State*, 1992 OK CR 36, ¶¶ 31-35, 834 P.2d 993, 1000. In accordance with statute, the trial court ordered that Cruz appear in court for a restitution hearing thirty days after his release from custody; restitution would be determined at that time. 22 O.S.2011, § 991f(C)(1),(J). As the trial court did not improperly order

restitution without a hearing, there is no error. Cruz's suggestion that counsel was ineffective for failing to object to this nonexistent order must fail.

We find in Proposition V that, considering all the facts and circumstances, his sentence is not excessive. *Burgess v. State*, 2010 OK CR 25, ¶ 22, 243 P.3d 461, 465. We further find no error in the trial court's assessment of the statutorily mandated indigent attorney fee. 22 O.S.2011, § 1355.14(E)(4). Cruz was ordered to appear in court for a hearing on payment of all assessed costs and fees thirty days after his release from custody. This will offer Cruz an opportunity, at the appropriate time, to show good cause, as an indigent, that the fee should be waived. 22 O.S.2011, § 1355.14(E); Rule 8.1, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012). Until that hearing is held and Cruz's indigent status is determined, this issue is premature. *Williams v. State*, 1988 OK CR 221, ¶ 13, 762 P.2d 983, 986.

We find in Proposition VI that no accumulated error requires relief. Where there is no error, there is no cumulative error. *Parker v. State*, 2009 OK CR 23, ¶ 28, 216 P.3d 841, 849.

### **DECISION**

The Judgment and Sentence of the District Court of Custer County is **AFFIRMED**. The case is **REMANDED** to the District Court for an Order *Nunc Pro Tunc* correcting the Judgment and Sentence to reflect that Cruz will receive credit for time served. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CUSTER COUNTY  
THE HONORABLE F. DOUG HAUGHT, DISTRICT JUDGE

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**OPINION BY: SMITH, V.P.J.**

LEWIS, P.J.: CONCUR  
LUMPKIN, J.: CONCUR IN RESULTS  
C. JOHNSON, J.: CONCUR  
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