

- (2) whether the trial court committed plain error by modifying the uniform voluntary intoxication jury instruction to apply to the self-defense facts of this case;
- (3) whether he received effective assistance of counsel; and
- (4) whether the trial court erred in imposing a \$5,000.00 victim's compensation assessment without holding a proper hearing in which each of the required factors was considered.

We find reversal is not required and affirm the judgment and sentence of the district court. For the reasons set forth below, however, we vacate the victim compensation assessment set by the district court and remand for further proceedings to determine a new assessment amount.

1.

Dorsey claims the trial court abused its discretion by denying his request that jurors be instructed that the self-defense instruction given for the homicide charges (Count 1) also applied to the charge of shooting with intent to kill (Count 2). "The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court and absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law." *Jones v. State*, 2006 OK CR 5, ¶ 40, 128 P.3d 521, 539. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225, or alternatively, an abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against

the logic and effect of the facts presented." *Stouffer*, 2006 OK CR 46, ¶ 60, 147 P.3d at 263 (internal citation and quotation marks omitted). Here, the instructions as a whole accurately stated the law in accord with the evidence presented. The trial judge did not abuse his discretion by refusing to instruct the jury that the homicide self-defense instruction also applied to the charge of shooting with intent to kill. See *Kinsey v. State*, 1990 OK CR 64, ¶ 8, 798 P.2d 630, 632-633 ("it is not error to refuse to give an instruction on the defendant's theory of defense if there is insufficient evidence to support it").

2.

Dorsey claims that the trial court judge committed plain error by instructing jurors in Instruction 34 that

It is the burden of the State to prove beyond a reasonable doubt that the defendant formed the specific criminal intent of Malice Aforethought. If you find that the State has failed to sustain that burden, by reason of self-defense . . . then MICHAEL WAYNE DORSEY must be found not guilty of MURDER IN THE FIRST DEGREE. You may find MICHAEL WAYNE DORSEY guilty of MURDER IN THE SECOND DEGREE or MANSLAUGHTER IN THE FIRST DEGREE, if the State has proved beyond a reasonable doubt each element of the crime of MURDER IN THE SECOND DEGREE or MANSLAUGHTER IN THE FIRST DEGREE.

(O.R. 139). According to Dorsey, this instruction, a modified version of the voluntary intoxication instruction, No. 8-46, OUJI-CR(2d), in which the trial judge substituted the words "by reason of self-defense" for "by reason of the intoxication," improperly advised the jury that self-defense is a defense only to

first-degree murder, but not to the lesser included offenses of second-degree murder and first-degree manslaughter.

When read in conjunction with the first-degree manslaughter instruction, the lesser included offense for which Dorsey was found guilty, and the self-defense instruction, it is apparent that the jury was not limited by Instruction No. 34 to considering self-defense only with regard to the first degree murder charge. Specifically, the lesser included manslaughter instruction, Instruction No. 35, told jurors:

If you have a reasonable doubt of the defendant's guilt on the charges of MURDER IN THE FIRST DEGREE and MURDER IN THE SECOND DEGREE, you must then consider the charge of MANSLAUGHTER IN THE FIRST DEGREE. No person may be convicted of MANSLAUGHTER IN THE FIRST DEGREE unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, caused by the defendant

Third, the death was not excusable or justifiable;

Fourth, the death was inflicted by means of a dangerous weapon;

Fifth, when performing the conduct which caused the death, defendant was in the heat of passion.

(O.R. 141)(emphasis added). The third element of this instruction explicitly told jurors that in order to find Dorsey guilty of first-degree manslaughter they must find that "the death was **not** excusable or justifiable." This element gave jurors the option to find the manslaughter homicide excusable or justifiable,

and complementing this option, the self-defense instruction, Instruction No. 28, informed jurors as to when the use of deadly force was justified. Thus, when the manslaughter and self-defense instructions are read together with Instruction 34, it is obvious that the instructions did not limit the defense of self-defense to the first-degree murder count. In light of these instructions taken as a whole, the trial judge did not err by using Instruction No. 34. Dorsey is not entitled to relief for plain error. See *Hogan v. State*, 2006 OK CR 19, ¶ 39139 P.3d 907, 923 (“The first step in plain error analysis is to determine whether error occurred.”); *Cannon v. State*, 1998 OK CR 28, ¶ 38, 961 P.2d 838, 849 (finding no plain error where jury instructions taken as a whole fairly and accurately state applicable law).

3.

Dorsey claims he did not receive effective assistance of counsel. Specifically, Dorsey contends that defense counsel should have objected to Jury Instruction No. 34, the instruction he alleges improperly advised the jury that self-defense is a defense only to first-degree murder, but not the lesser included offenses of second-degree murder and first-degree manslaughter. Having found no error in the trial judge’s use of Instruction No. 34, there is no basis for finding counsel ineffective. Trial counsel was not ineffective for not objecting to the instruction. See *Frederick v. State*, 2001 OK CR 34, ¶ 189, 37 P.3d 908, 955 (“[i]t is well established that where there is no error, one cannot

predicate a claim of ineffective assistance of counsel upon counsel's failure to object").

4.

Dorsey claims the trial judge erred by imposing a \$5,000.00 victim compensation assessment because the judge failed to consider the factors prescribed by the victim compensation statute at 21 O.S.Supp.2009, § 142.18.

At the conclusion of Dorsey's sentencing hearing, the trial judge heard brief argument from counsel on whether to levy the assessment and then summarily announced an assessment amount of \$5,000.00. The trial judge gave no explanation for the amount ordered, and made no reference to any evidence supporting the assessment.

Title 21 O.S.Supp.2009, § 142.18(A) requires a trial court to charge a victim compensation assessment between \$50.00 and \$10,000.00 against any person convicted of a felony involving criminally injurious conduct. When calculating the assessment, the trial court must consider "the severity of the crime, the [defendant's] prior criminal record, the expenses of the victim of the crime, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant." 21 O.S.Supp.2009, § 142.18(A). Section 142.18(A) grants the trial court the discretion to impose the assessment anywhere in the range between \$50.00 and \$10,000.00, but cabins the court's exercise of that discretion by requiring the court to consider five factors. As a matter entrusted to the sound

discretion of the trial court then, the amount of the victim compensation assessment is subject to review for an abuse of discretion.

An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225. An abuse of discretion is also "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Stouffer*, 2006 OK CR 46, ¶ 60, 147 P.3d at 263 (internal citation and quotation marks omitted). Under either of these definitions, it is obvious that the exercise of judicial discretion must be based on a proper consideration of the facts established by evidence.

In *Walters v. State*, 1993 OK CR 4, ¶ 17, 848 P.2d 20, 25, this Court held that "[w]e cannot presume the statutorily required elements were considered where no evidence in the record addresses them," and found that the trial court abused its discretion by imposing a victim compensation assessment where no evidence was presented at trial or sentencing on two of the five factors listed in Section 142.18(A). To reach its result, the *Walters* court reasoned that it is the consideration of the enumerated statutory factors that satisfies the due process requirement that the assessment not be arbitrary. *Walters*, 1993 OK CR 4, ¶ 17, 848 P.2d at 25. Under *Walters*, when a trial court fails to consider evidence addressing these five statutory factors, due process is not satisfied and the assessment becomes an arbitrary act, an act

that is by at least one definition, an abuse of discretion. *See Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 19, 241 P.3d 214, 225 (defining abuse of discretion as any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue).

In this instance, the State cites primarily to pages in the presentence investigation report as providing the requisite evidence addressing the five statutory factors the trial judge was required to consider in setting the victim compensation assessment amount. While evidence addressing the mandatory factors may well be contained in the presentence investigation report, this information is not properly part of the record on appeal because this Court is prohibited from considering the contents of presentence investigation reports. *See* 22 O.S.2011, § 982(D) (“The presentence investigation reports specified in this section shall not be referred to, or be considered, in any appeal proceedings.”).

Beyond the presentence investigation report, the only other source of evidence cited by the State as supporting the trial court’s consideration of the five statutory factors, is a letter from the homicide victim’s mother that was read into the record at the sentencing hearing by the prosecutor. This letter, while addressing the emotional and physical impact of the crime on the victim’s mother, says nothing about the severity of the crime, or Dorsey’s prior criminal record, or the expenses of the victim of the crime, or Dorsey’s ability to pay, or the economic impact of the victim compensation assessment on Dorsey’s

dependents, if any. Consequently, none of the record cited by the State, that is available for review by this Court, provides any indication that the trial judge considered evidence addressing the five statutory factors set out in Section 142.18(A). Hence, just as this Court held in *Walters* that “[w]e cannot presume the statutorily required elements were considered where no evidence in the record addresses them,” we likewise cannot presume in this case that the trial judge considered the statutory factors where the State points to no evidence in the available record addressing them.³

To the extent, therefore, that an abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented, in a situation such as this where it appears that the victim compensation assessment is not based on any facts presented, we find that the trial judge abused his discretion by ordering a \$5,000.00 victim compensation assessment. This case must be remanded back to the district court to set a new victim compensation amount, if any, based on on-the-

³ It might be argued that evidence addressing some of the statutory factors (e.g., the severity of the crime and Dorsey’s criminal history), might be found in the trial record, especially the trial transcript. This may be true, but the trial transcript consists of approximately 1300 pages in five volumes with nearly one-hundred exhibits. It is the State’s duty to cite to the portions of the record supporting its position (e.g., relevant transcript pages, exhibits), just as much as it is an appellant’s duty to do so. See Rule 3.5(C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App.(2011)(“The parties shall also provide a reference to the pages of the record filed and the authorities relied upon in support of each point raised.”). And, it is certainly not this Court’s duty to search the record for support for the State’s position. In any event, these two factors (severity of crime and criminal history) are only two of five mandatory factors that Section 142.18(A) require a trial court to consider when deciding the amount of a victim compensation assessment. Consequently, support for the remaining three elements still needs to be found elsewhere in the record, and other than the presentence report (which we may not consider) and the letter from the homicide victim’s mother (which is simply not relevant to the statutory factors) the State points to no other evidence.

record evidence addressing the factors enumerated at 21 O.S.Supp.2009, § 142.18(A).

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. The victim compensation assessment set by the district court is **VACATED**. The case is **REMANDED** to the district court for further victim compensation assessment proceedings consistent with this opinion. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JAMES CAPUTO, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.
LEWIS, P.J.: Concur in Results
SMITH, V.P.J.: Recuse
LUMPKIN, J.: Concur in Part and Dissent in Part
C. JOHNSON, J.: Concur

RE

LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in affirming the Judgment and Sentence but dissent to the Opinion's analysis of the victim compensation assessment.

The imposition of a victim compensation assessment is a "penalty" that the district court is required to assess for a felony involving criminally injurious conduct. 21 O.S.Supp.2009, § 142.18(A). This "penalty" must be at least Fifty Dollars (\$50.00), but not exceed Ten Thousand Dollars (\$10,000.00). *Id.* It is not paid directly to the victim but is collected by the court clerk and paid to the Victims Compensation Revolving Fund. 21 O.S.Supp.2009, § 142.18(D).

The imposition of a victim compensation assessment is not the same as the determination of the restitution amount which must meet the statutory standard of proof. The Legislature has mandated that before ordering restitution, the trial judge must determine whether the restitution can be paid without imposing manifest hardship on the defendant or his immediate family and if the extent of the damage to the victim is determinable with reasonable certainty. 22 O.S.Supp.2009, § 991a(A)(1)(a). Because the Legislature mandated that the restitution amount be determined with reasonable certainty, the record must reflect proof of a victim's loss. *Honeycutt v. State*, 1992 OK CR 36, ¶ 33, 834 P.2d 993, 1000. Therefore, the district court must hold an evidentiary hearing on the issue and this Court reviews on appeal the sufficiency of the evidence to support the restitution amount. *Id.*, 1992 OK CR 36, ¶¶ 35, 39, 834 P.2d at 1000-01.

In contrast, the victim compensation assessment is not the type of penalty that requires review of the sufficiency of the evidence. The Legislature has not mandated that the district court determine the victim compensation assessment with reasonable certainty. 21 O.S.Supp.2009, § 142.18(A). Instead, the district court need only consider the factors set forth in § 142.18(A) when imposing a victim compensation assessment. See *Walters v. State*, 1993 OK CR 4, ¶ 15, 848 P.2d 20, 25. The Legislature has mandated that the district court shall consider such factors as the severity of the crime, the prior criminal record, the ability of the defendant to pay, and the economic impact of the assessment on the defendant's dependents. *Id.*

This Court's appellate review of a victim compensation assessment was set forth in *Walters*.

Excessiveness of the Victims Compensation Assessment is an issue reviewable on appeal on two grounds. First is whether the trial court abused its discretion in considering the factors mandated by 21 O.S.Supp. 1984 § 142.18. The second is whether the assessment shocks the conscience of the court.

Id., 1993 OK CR 4, ¶ 19, 848 P.2d at 25. In *Walters*, this Court determined that the district court had abused its discretion finding that "[w]e cannot presume the statutorily required [factors] were considered where no evidence in the record addresses them." *Id.*, 1993 OK CR 4, ¶ 17, 848 P.2d at 25.

Turning to the present case, Appellant claims that there is no evidence in the record addressing the statutory factors. He does not claim that the District Court abused its discretion in considering the statutory factors or that the victim compensation assessment is excessive. Therefore, this Court's review is

limited to determining whether there is evidence addressing the statutory factors. *Postelle v. State*, 2011 OK CR 30, ¶ 88, 267 P.3d 114, 145 (holding that this Court does not review issues for which the appellant provides no argument).

The District Court in the present case took the steps necessary to properly consider all of the factors under § 142.18(A). As mandated by 22 O.S.2011, § 982, the District Court ordered a presentence investigation at the conclusion of the trial. At sentencing the District Court as well as both parties acknowledged receipt of the presentence investigation. Neither Appellant nor the State contested the information contained in the presentence investigation and the document was made part of the court's record.

The statutory factors for the imposition of a victim compensation assessment are contained in a presentence investigation.

The information obtained from the investigation shall include, but shall not be limited to, a voluntary statement from each victim of the offense concerning the nature of the offense and the impact of the offense on the victim and the victim's immediate family, the amount of the loss suffered or incurred by the victim as a result of the criminal conduct of the offender, and the offender's age, marital status, living arrangements, financial obligations, income, family history, education, prior juvenile and criminal records, associations with other persons convicted of a felony offense, social history, indications of a predisposition to violence or substance abuse, remorse or guilt about the offense or the victim's harm, job skills, and employment history.

22 O.S.2011, § 982(B). Although this Court is not permitted to refer to or consider a presentence investigation report on appeal, the Court is not prohibited from considering the trial court's act of ordering and relying upon

such a report. See 22 O.S.2011, § 982(D).¹ Thus, I find that the district court necessarily considers all of the factors set forth in § 142.18(A), when the court receives and considers a presentence investigation report pursuant to § 982(B). Although the better practice is for the district court to make a full record at the sentencing hearing, captured by the transcript of this hearing, where the record otherwise reflects that the district court received and considered a presentence investigation report I cannot say that the district court did not properly consider all of the statutory factors.

As the record in the present case reveals that the District Court properly ordered, received and considered a presentence investigation report, I find that the District Court properly considered each of the factors set forth in § 142.18(A). I would affirm the victim compensation assessment.

¹ Approximately three years after this Court's adoption of *Walters*, the Legislature enacted the provision prohibiting presentence investigation reports from being referred to, or considered, in any appeal proceedings. 22 O.S.Supp.1997, § 982(D) (version 2). This provision remains in the current statute. 22 O.S.2011, § 982(D).