



Appellant's second proposition of error argues that the sentence is excessive and must be favorably modified in the interest of justice. Pursuant to Section 1788 of Title 21, the punishment range for Malicious Mischief is a fine of not less than \$100.00 and not more than \$500.00 or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. Finding Appellant's sentence not so excessive as to shock the conscience of the Court, we decline to modify. *Middaugh v. State*, 1988 OK CR 295, ¶¶ 20-21, 767 P.2d 432.

Appellant's third proposition of error argues that the restitution order should be vacated because the proper procedure was not followed, the amount of actual loss was not determined with reasonable certainty, the unnamed insurance company was not a victim entitled to restitution, and all or the majority of the requested recovery has been waived. We agree that the amount of actual loss was not determined with reasonable certainty. *See Honeycutt v. State*, 1992 OK CR 36, ¶¶ 31-36, 834 P.2d 993. Testimony by the victim is that total damages were "a little over" \$21,000.00 and that insurance covered "close to" \$13,400.00. The State advised the trial court that \$13,883.00 was covered by insurance and "approximately" \$8,000.00 was not covered by insurance and asked for restitution in the amount of \$21,883.00. Finding merit to this proposition of error, the restitution is vacated and the matter remanded for a hearing to properly determine what the restitution in this matter should be.

Appellant's fourth proposition of error argues that any failure to preserve issues for review was the result of ineffective assistance of counsel. To prevail on

this claim Appellant must demonstrate that counsel's representation was unreasonable under prevailing professional norms and that the challenged action could not be considered sound trial strategy. The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The issue is whether counsel exercised the skill, judgment and diligence of a reasonably competent defense attorney in light of his/her overall performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Appellant has not met this burden.

Appellant's final proposition of error argues that the cumulative effect of all the errors addressed above deprived him of a fair trial. In the absence of individual error, there can be no accumulation of error. Appellant has not shown error or a cumulative effect of errors. *See Matthews v. State*, 2002 OK CR 16, ¶ 57, 45 P.3d 907.

### **DECISION**

The Judgment and Sentence are **AFFIRMED**, but the restitution imposed is **VACATED** and the matter is **REMANDED** to the District Court for a hearing to determine restitution. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF ATOKA COUNTY  
HONORABLE NEAL MERRIOTT, ASSOCIATE DISTRICT JUDGE**

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**OPINION BY: JOHNSON, C., J.**

A. JOHNSON, P.J.: CONCUR  
LEWIS, V.P.J.: CONCUR  
LUMPKIN, J.: CONCUR IN RESULTS  
SMITH, J.: CONCUR

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