

(3) whether his sentence is excessive.

We affirm the Judgment and Sentence of the District Court, but find remand necessary for a hearing on an appropriate Victim's Compensation Assessment in this case for the reasons discussed below.

1. Petty's convictions for both Assault and Battery with a Dangerous Weapon and Assault and Battery (Domestic Abuse) do not violate the statutory and constitutional prohibition on multiple punishments because Petty's assault and battery using a knife against the victim was a separate and distinct act from his domestic assault and battery using his fists. See 21 O.S.Supp.2006, §§ 644(C), 645. While these acts occurred close in time and during the same criminal transaction, they were separate and distinct crimes. See *Ball v. State*, 2007 OK CR 42, ¶ 43, 173 P.3d 81, 92 (holding that conviction for an act of rape and sodomy that occurred in quick succession does not violate § 11); *McDaniel v. State*, 1973 OK CR 222, ¶ 14, 509 P.2d 675, 681 (same). Nor does conviction of both acts here violate Petty's state or federal constitutional rights under the Double Jeopardy Clause because each crime requires proof of an element not required by the other. See *McElmurry v. State*, 2002 OK CR 40, ¶ 80, 60 P.3d 4, 24.

2. There is merit to Petty's claim that the trial court abused its discretion by not considering the statutory factors before imposing a \$5,000 Victim's Compensation Assessment (hereinafter VCA) at sentencing. At formal sentencing, the trial court imposed the jury's recommended sentence and then

informed Petty of his jail costs. The court informed Petty that he would owe a variety of costs and stated, without any explanation, that the court was imposing a \$5,000 VCA. On appeal, Petty does not challenge the trial court's authority to impose a VCA; rather he argues "the manner in which the cost was assessed resulted in an exorbitant amount of \$5,000." He maintains that had the trial court considered the statutory factors to determine the amount of an appropriate VCA, the assessment would have been less. Accordingly, he asks this Court to favorably modify the assessment.

Title 21 O.S.2001, § 142.18(A) mandates the imposition of a VCA between \$50 and \$10,000 after conviction for a felony involving criminally injurious conduct. In calculating the VCA "the court shall consider factors such as 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.2001, § 142.18(A). In *Walters v. State*, 1993 OK CR 4, ¶ 17, 848 P.2d 20, 25, this Court held it was error for the trial court not to consider all the factors in setting the VCA, "for it is the consideration of these four factors which satisfies the due process requirement that the assessment not be arbitrary." The *Walters* court refused to presume that the required factors were considered where no evidence in the record addressed them. The Court reversed Walters's VCA and remanded the matter for a proper hearing in which each of the required factors was to be considered. *Id.* As in *Walters*, ample evidence was presented at trial as to the severity of

the crime. Evidence relating to the economic impact of the assessment on Petty's dependents and his ability to pay were touched on during Petty's testimony when he testified that he was working two jobs to make ends meet prior to going to jail and that he did not have any children. No evidence was presented at trial or sentencing, however, regarding the expenses of the victim or Petty's current ability to pay.² Following *Walters*, we find that Petty's VCA must be vacated and the matter remanded for a hearing in which all of the required factors will be considered in assessing a VCA under 21 O.S.2001, § 142.18(A) .

3. Petty's sentence of three and a half years imprisonment does not shock our conscience. *Head v. State*, 2006 OK CR 44, ¶ 27, 146 P.3d 1141, 1148.

² We note it is possible in this case that evidence addressing the statutory factors for the assessment of a VCA was contained in a presentence investigation (PSI). Once Petty was convicted of Assault and Battery with a Dangerous Weapon, the trial court was statutorily obligated to order a presentence investigation under 22 O.S.Supp.2002, § 982(A), (F). The contents of the presentence investigation would include:

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 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 .

...

Id. at (B).

There is no evidence in this record that a PSI was ever conducted as one is never mentioned nor did the trial court assess the mandatory fee for a PSI. While a PSI could have been waived in this case, there is no waiver of a PSI in the record. Thus we cannot know if the trial court had evidence of all the factors from a PSI to consider before it assessed the VCA in this case.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED**. Petty's \$5,000 Victim's Compensation Assessment is vacated and the matter is remanded to the District Court for a hearing in which all of the required factors will be considered in assessing a Victim's Compensation Assessment in this matter. Under Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TWYLA MASON GRAY, DISTRICT JUDGE

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C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur in Results
CHAPEL, J.: Concur in Part, Dissent in Part
LEWIS, J.: Concur in Part, Dissent in Part

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CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming the conviction and sentence for Count I. However, I would reverse the conviction and sentence for Count II as it violates 21 O.S. 2001, § 11 and the double jeopardy clauses of both the state and federal Constitutions.

LEWIS, JUDGE, CONCURS IN PART, DISSENTS IN PART:

I agree to affirming the judgment and sentence in Count 1 and the order of remand as to the victim's compensation assessment, however I must dissent to Count 2. I would dismiss Count 2 as a violation of 21 O.S. §11(A).