

- II. Appellant's sentences are excessive under the facts and should be modified.
- III. The trial court abused its discretion by imposing restitution and a victim compensation assessment without following the mandatory statutory procedures governing these assessments.

After a thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we have determined that the district court's restitution order must be vacated and new proceedings conducted to determine a proper restitution amount.

In his first proposition, Appellant contends that the State failed to prove beyond a reasonable doubt that he was not acting in self defense. Viewing the evidence in the case in the light most favorable to the State, we find it was sufficient to prove beyond a reasonable doubt that Appellant was guilty of Assault and Battery With a Deadly Weapon upon both victims. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. By raising the defense of self defense appellant admitted the elements of the charge, but offered a legal justification for conduct which would otherwise be criminal. *West v. State*, 1990 OK CR 61, ¶ 6, 798 P.2d 1083, 1085. Taking the evidence in the light most favorable to the State, the trier of fact could have rationally found beyond a reasonable doubt that Appellant did not act in self defense. *McKee v. State*, 1962 OK CR 57, ¶¶ 19-21, 372 P.2d 243, 245. Appellant and his compatriot instigated a heated confrontation with the two victims and provoked the altercation with physically aggressive acts. OUJI-CR(2d) 8-53 (Supp.2009). Appellant was not entitled to the use of self defense. OUJI-CR(2d) 8-50

(Supp.2009); *Jones v. State*, 2009 OK CR 1, ¶ 64, 201 P.3d 869, 886 (“self-defense is not available to a person who was the aggressor or provoked another with the intent to cause the altercation or who voluntarily entered into mutual combat.”). Even were we to find that Appellant was entitled to use self defense, he was not justified in the use of deadly force. OUJI-CR(2d) 8-46 (Supp.2009). *Novak v. State*, 1982 OK CR 85, ¶ 4, 646 P.2d 1309, 1310 (“A simple assault cannot be repelled with a deadly weapon unless the assault is such as to excite the assaulted person's fears as a reasonable man of danger to life or great bodily harm.”) (quotations and citation omitted). Neither victim had any sort of weapon. Appellant stabbed the two men multiple times in the left chest with a utility knife. This proposition is denied.

In his second proposition, Appellant claims that his sentences are excessive. We find Appellant’s sentences are within the applicable statutory ranges and when considered under all the facts and circumstances of the case, are not so excessive as to shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291. This proposition is denied.

In his third proposition, Appellant contends that the trial court’s assessment of restitution was arbitrary because the trial court failed to follow the governing statutory procedures. Appellant did not object to the manner or amount of the restitution assessment before the trial court. Thus, he has waived appellate review of the instant challenge for all but plain error. *Simpson*

v. State, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 694. We find that plain error occurred.

At sentencing, the damage to the victim was not determined with “reasonable certainty.” *Logsdon v. State*, 2010 OK CR 7, ¶ 9, 231 P.3d 1156, 1162; 22 O.S.2001, § 991a (A)(1)(a). The assistant district attorney did not present the “official request for restitution form” including all invoices, bills, receipts, and other evidence of injury, loss of earnings and out-of-pocket loss as required by 22 O.S.2001, § 991f(E)(3). Instead, without any authentication or identification, the assistant district attorney presented the first page of a Claim Verification Report from the Oklahoma Crime Victim’s Compensation Board. *See* 21 O.S.2001, § 142.1. The evidence presented at sentencing was sufficient to establish the original amount of the victim’s medical bills, however, the record is silent concerning whether the victim had received compensation from other sources. 22 O.S.2001, § 991f(F). The record does not reveal whether the victim had received reimbursement from the Crime Victims Compensation Fund. Further, the record reveals that the victim had received some financial assistance from the State of Texas but the nature and amount of that assistance is not within the record. As the actual financial detriment suffered by the victim was not determined, the district court’s restitution order must be vacated and new proceedings conducted to determine a proper restitution amount.

Appellant further contends that in determining the victims compensation assessment the trial court failed to consider the factors set forth in 21

O.S.Supp.2009, § 142.18(A). This Court has held that a trial court abuses its discretion when it imposes a victims compensation assessment without considering the statutorily mandated factors. *Walters v. State*, 1993 OK CR 4, ¶ 17, 848 P.2d 20, 25. Appellant did not object to the manner or amount of the victims compensation assessment before the trial court. Thus, he has waived appellate review of the instant challenge for all but plain error. *Simpson*, 1994 OK CR 40, ¶ 11, 876 P.2d at 694.

In the present case, the trial court properly followed the sentencing procedure established by the Legislature for violent felony offenses. As mandated by 22 O.S.Supp.2002, § 982, the trial court ordered a pre-sentence investigation at the conclusion of the trial. Based upon the severity of the offenses and the minimal assessment, we cannot say that the trial court abused its discretion. As no actual error has been shown, plain error did not occur. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923.

DECISION

Appellant's convictions and sentences are **AFFIRMED**. The district court's restitution order is **VACATED**. This matter is **REMANDED** to the district court to conduct new proceedings to determine the proper amount of restitution and for the issuance of a new judgment and sentence in conformity with this determination. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY
THE HONORABLE THOMAS C. LANDRITH, DISTRICT JUDGE

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C. JOHNSON, J.: CONCUR
SMITH, J.: CONCUR

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