

SEP 19 2000

JAMES W. PATTERSON  
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**IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA**

ROBERT WAYNE GALLIMORE, )  
)  
Appellant, )  
)  
-vs- )  
)  
STATE OF OKLAHOMA, )  
)  
Appellee. )

NOT FOR PUBLICATION

No. F-99-1428

**SUMMARY OPINION**

**STRUBHAR, PRESIDING JUDGE:**

Appellant, Robert Wayne Gallimore, was convicted of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm (Count I), Possession of Marijuana (Count II) and Attempting to Elude a Police Officer (Count III), in the District Court of Oklahoma County, Case Number CF-97-4772, following a jury trial before the Honorable Twyla Mason Gray. The jury recommended that Appellant be sentenced to serve a term of fifteen years imprisonment on Count I, six months in jail and a \$500.00 fine on Count II, and six months in jail and a \$1,000.00 fine on Count III. The trial court sentenced Appellant accordingly and ordered he pay restitution in the amount of \$375.00.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's Judgment and Sentence but remand for a hearing on restitution. In

reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

- I. Appellant should be relieved of the restitution ordered by the trial court because the amount of the victim's loss was not determined with reasonable certainty and recovery has been waived.
- II. Appellant was prejudiced by prosecutorial misconduct.
- III. Appellant was prejudiced by inadmissible evidence of purported gang membership, which was outside the personal knowledge of the witness.
- IV. Appellant was prejudiced by ineffective assistance of counsel.

### **DECISION**

As to Appellant's first proposition, we find that the trial court abused its discretion in assessing restitution in the absence of evidence indicating the amount of loss suffered by the victim. Because 22 O.S.Supp.1998, § 991f mandates that restitution be ordered in all cases where actual economic loss is suffered by the victim of a crime, we remand the case to the district court for a hearing on the amount of actual economic loss suffered by the victim as a result of the crime committed by Appellant in this case.

Regarding Appellant's second proposition, we find that most of the comments complained of were not prosecutorial misconduct. Of those that did border upon impropriety, none can be found to have affected Appellant's substantial rights or contributed to his conviction. Accordingly, relief is not warranted. *Ullery v. State*, 988 P.2d 332, 351 (Okla. Cr. 1999).

Appellant's third proposition is likewise without merit. This Court has held that "once the defendant opened the door, he can not object to the development of this issue." *Davis v. State*, 885 P.2d 665, 668 (Okl.Cr.1994). Even if the officer's testimony regarding Appellant's gang affiliation was inadmissible hearsay, we find, in light of the strong evidence properly introduced against Appellant, that the violation of the confrontation clause through the admission of inadmissible hearsay was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). This proposition warrants no relief.

Finally, we find that Appellant was not denied effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Appellant's Judgment and Sentence of fifteen years imprisonment is **AFFIRMED**. The case is **REMANDED** to the district court for a hearing on restitution not inconsistent with this opinion.

**APPEARANCES AT TRIAL**

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**OPINION BY: STRUBHAR, P.J.**  
LUMPKIN, V.P.J.: CONCUR  
JOHNSON, J.: CONCUR  
CHAPEL, J.: CONCUR  
LILE, J.: CONCUR

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