

FEB 07 2000

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JACKIE DEAN SHEPHERD,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-99-513

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Jackie Dean Shepherd was tried by jury and convicted of First Degree Arson (21 O.S.Supp.1996, § 1401), Case No. CF-98-252, in the District Court of Wagoner County. The jury recommended as punishment five (5) years imprisonment and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. Appellant should be relieved of the restitution ordered by the trial court because: 1) the amount of Cheryl Shepherd's loss was not determined with reasonable certainty and recovery has been waived; and 2) the trial court could not delegate its sentencing authority to the Department of Corrections.

II. Appellant was prejudiced by improper admission of other crimes evidence.

III. The trial evidence was insufficient to support Appellant's conviction for arson in the first degree.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that in Proposition I, Cheryl Shepherd has not waived payment of restitution as the record does reflect some evidence of her loss. This case is remanded to the District Court for a determination with reasonable certainty of the amount of the victim's loss. *See Honeycutt v. State*, 834 P.2d 993 (Okl.Cr.1992). In remanding the case for a proper determination of the victim's losses, the trial court is directed to limit those losses to the house and contents therein which were damaged by Appellant's act of arson. The Dodge Neon, which is the subject of another case, is not to be included in those losses. Further, as conceded by the State, the trial court erred by delegating its authority to order restitution to the Department of Corrections. *See 22 O.S.Supp.1998, § 991f*. This error does not warrant vacation of the restitution order, but underscores the need to remand the case to the district court for a proper determination of restitution in accordance with this opinion and the requisites of *22 O.S.Supp.1998, § 991f*.

In Proposition II, Appellant was not prejudiced by the introduction of evidence of other crimes as Appellant received pre-trial notice of the evidence and the evidence was probative of his motive and intent to harm Cheryl Shepherd. *See Short v. State*, 980 P.2d 1081, 1097 (Okl.Cr.1999). In Proposition III, the evidence was sufficient to support the conviction for first degree arson. *See Nunley v. State*, 681 P.2d 771, 772 (Okl.Cr1984).

DECISION

The Judgment is **AFFIRMED** and the case is **REMANDED** a hearing on restitution not inconsistent with this opinion.

AN APPEAL FROM THE DISTRICT COURT OF WAGONER COUNTY
THE HONORABLE G. BRUCE SEWELL, DISTRICT JUDGE

APPEARANCES AT TRIAL

DONOVAN DOBBS
P.O. BOX 274
WAGONER, OK
COUNSEL FOR APPELLANT

DIANE BARKER HARROLD
DISTRICT ATTORNEY
GARY HUGGINS
ASSISTANT DISTRICT ATTORNEY
WAGONER COUNTY COURTHOUSE
WAGONER, OK
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

S. GAIL GUNNING
1623 CROSS CENTER DR.
NORMAN, OK 73019
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
LORI S. CARTER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLA. CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.

STRUBHAR, P.J.: CONCUR
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR

RB