



ORIGINAL

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

**IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA**

OCT - 6 2022

JOHN D. HADDEN
CLERK

TREVOR LEIF TOPPAH,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2021-522

SUMMARY OPINION

ROWLAND, PRESIDING JUDGE:

Appellant Trevor Leif Toppah appeals his Judgment and Sentence from the District Court of Comanche County, Case No. CF-2019-313, for Aggravated Assault and Battery, After Former Conviction of Three Felonies (Count 1), in violation of 21 O.S.2011, § 646; and Conspiracy to Commit Assault and Battery (Count 2), in violation of 21 O.S.2011, § 421. The Honorable Emmit Tayloe, District Judge, presided over Toppah’s non-jury trial and sentenced him to ten years imprisonment, to be served consecutively to his sentence in Case No. CF-2018-204, and a term of one year imprisonment on Count 2, with all but the first six months

suspended, to be served consecutively to Count 1.¹ The court further ordered Toppah to pay restitution in the amount of \$20,288.93 as to Count 1. Toppah raises the following issues:

- (1) whether his conviction for conspiracy to commit assault and battery was proven beyond a reasonable doubt;
- (2) whether the district court abused its discretion by imposing restitution without following the mandatory statutory procedures;
- (3) whether he received effective assistance of counsel;
- (4) whether the district court erred when it assessed an indigent defense fee greater than allowed by statute; and
- (5) whether an accumulation of error deprived him of a fair trial.

We affirm the Judgment and Sentence of the district court but find the assessed indigent defense fee must be modified.

¹ The transcript of the sentencing shows that Judge Tayloe ordered the time on Count 2 to be served in the Comanche County jail, recognizing that the offense was a misdemeanor as charged in the Information. However, the Judgment and Sentence provides that Count 2 is a felony and orders the time to be served under the custody and control of the Oklahoma Department of Corrections. This discrepancy is not mentioned in the appellate filings.

1.

Toppah claims that the evidence was insufficient to prove a conspiracy beyond a reasonable doubt and that Count 2 must be dismissed. The evidence of an agreement supporting the conspiracy charge in this case is, admittedly, far from compelling. However, our very familiar task in reviewing challenges to the sufficiency of the evidence is to determine “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.” *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203–04 (quoting *Jackson v. Virginia*, 443 U.S. 307 (1979)).

The jail video shows one of Toppah’s codefendants climbing onto a table in the recreation area, making some sort of hand gesture and perhaps nodding his head, and immediately afterward his two codefendants simultaneously join him in viciously beating the victim. The question is thus whether the trier of fact, in this case the trial judge, could have reasonably found the evidence sufficient to prove an agreement among the three. We find a rational trier of fact could find the elements satisfied by this evidence. Accordingly, we reject

Toppah's challenge to the sufficiency of the evidence and find his conviction for conspiracy may stand.

2.

Toppah claims that the district court erred by ordering restitution without following the statutory requirements. His counsel did not object to the presentation of information regarding restitution or to the court's restitution determination, waiving all but plain error. For relief, Toppah must prove: 1) the existence of an actual error; 2) that the error is plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Even where this showing is made, this Court will correct plain error only where the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*

Restitution procedures are set forth in 22 O.S.Supp.2019, § 991a. *See also Logsdon v. State*, 2010 OK CR 7, ¶¶ 9-10, 231 P.3d 1156, 1162. Generally, Section 991a(A)(1)(a) provides that restitution may be ordered only to the extent that the damage to the victim is

determined with “reasonable certainty.” A crime victim may be compensated by “restitution” for up to three times the amount of economic loss suffered by the victim as a direct result of the criminal act of the defendant. 22 O.S.2011, § 991f(A)(1). “Economic loss” includes the actual financial detriment suffered by the victim and may include such things as medical expenses, damage to or loss of real or personal property, and loss of earnings reasonably incurred as a direct result of the defendant’s criminal act. 22 O.S.2011, § 991f(A)(3). As any cost imposed by the sentencing court does not have to be paid until after an appellant is released from incarceration, the determination of indigency or hardship may be made following his or her release. *See White v. State*, 1988 OK CR 117, ¶ 8, 756 P.2d 1251, 1252.

The documentation presented to the district court provided an accurate accounting of the victim’s medical expenses. The failure to utilize official restitution forms completed and signed by the victim did not amount to plain error, as the failure did not affect the outcome of the decision to impose restitution. The district court did not err in ordering restitution without determining Toppah’s ability

to pay, as he was ordered to return to court following his release for a determination of his payment plan. This claim is rejected.

3.

Toppah claims his counsel was ineffective because she did not object to the district court's imposition of restitution. This Court reviews claims of ineffective assistance of counsel to determine: (1) whether counsel's performance was constitutionally deficient; and (2) whether counsel's performance prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. This Court need not determine whether counsel's performance was deficient if there is no showing of prejudice. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

The record shows that Toppah's trial counsel reviewed the exhibits presented to the district court for the determination of restitution with Toppah before deciding she would enter no objection. As we have decided that the order for restitution by the district court was proper, Toppah can show no prejudice. This claim is therefore denied.

4.

Toppah claims the district court erred when it assessed a greater indigent defense fee than allowed by statute. Title 22 O.S.2011 § 1355.14(E) provides that the court shall assess a fee for the cost of indigent representation. Section 1355.14 does not provide a specific fee for non-jury trial but does require assessment of a \$250.00 fee for any proceedings not specifically provided for in the statute. The district court committed a plain error by imposing a \$500.00 assessment for indigent defense—a point conceded by the State. Relief must therefore be granted, and Toppah’s Judgment and Sentence must be modified to reflect the appropriate \$250.00 indigent defense fee for this case.

5.

Toppah claims that he was deprived of a fair trial because of an accumulation of error. We disagree. “The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal.” *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263. Cumulative errors that do not affect the outcome of the proceeding do not deprive the defendant of a fair trial. *Id.*

The only error found on appeal was an erroneous assessment of the indigent defense fee which will be corrected by order of the district court. That error, however, did not affect the outcome of the trial on the charged offenses. Therefore, there are no other errors that merit additional relief in this case. This claim is denied.

DECISION

The Judgment and Sentence on Counts 1 and 2 is **AFFIRMED**. The case is **REMANDED** to the district court with instructions to **MODIFY** the indigent defense fee to \$250.00. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT
OF COMANCHE COUNTY
THE HONORABLE EMMIT TAYLOE, DISTRICT JUDGE**

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OPINION BY: ROWLAND, P.J.

HUDSON, V.P.J.: Concur

LUMPKIN, J.: Concur

LEWIS, J.: Concur in Results

MUSSEMAN, J.: Concur in Part and Dissent in Part

MUSSEMAN, J., CONCUR IN PART/DISSENT IN PART:

I would find that the State did not provide sufficient evidence to convict Appellant of conspiracy. The ultimate question of sufficiency of the evidence should be resolved with deference to the fact finder and in a light most favorable to the prevailing party below. *Dodd v. State*, 2004 OK CR 31, ¶ 80, 100 P.3d 1017, 1041. In order to have committed the offense of conspiracy, Appellant must have conspired with the other co-defendants to commit the crime of assault and battery. 21 O.S.2011, § 421(A). The elements of conspiracy are an agreement to commit the crime charged and an overt act by one or more of the parties in furtherance of the conspiracy. *Hackney v. State*, 1994 OK CR 29, ¶ 6, 874 P.2d 810, 813. The question is whether reasonable minds could conclude, from the circumstances, acts, and conduct of the parties, that an unlawful agreement existed. *Mitchell v. State*, 2018 OK CR 24, ¶ 19, 424 P.3d 677, 684. Circumstantial evidence may support a conspiracy charge. *Id.* at ¶ 11, 424 P.3d at 682.

The presentation of evidence of conspiracy in this case is insufficient, even when any possible circumstantial evidence is reviewed in light most favorable to the State. The section of video

entered into evidence shows a jail pod with nearly twenty inmates moving about the pod and shows Toppah clearly engaged in an assault and battery of another inmate. However, the video does not show an agreement between Toppah and any other person to engage in the assault and battery. Testimony of the witnesses is also insufficient to show any agreement between Toppah and any other person. Defense counsel immediately objected to the only testimony that was at all related to the conspiracy charge and his objection was sustained by the trial court. Therefore, the testimony could not be considered. There is no other evidence in the record that the codefendants engaged in any conduct showing an agreement to commit the assault and battery.

Even considering the evidence in light most favorable to the State, the evidence is insufficient to prove Toppah committed conspiracy to commit assault and battery beyond a reasonable doubt. Therefore, I respectfully dissent in affirming the trial court's finding of guilt on Count 2, but otherwise concur in the majority's resolution of this case.