

JUN - 7 2001

JAMES W. PATTERSON  
CLERK

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

ROBERT F. BARNES, )

Appellant, )

-vs- )

STATE OF OKLAHOMA, )

Appellee. )

NOT FOR PUBLICATION

No. F-2000-671

**SUMMARY OPINION**

**STRUBHAR, JUDGE:**

Appellant, Robert F. Barnes, was charged with Maiming (Count I) and Assault and Battery with a Dangerous Weapon (Count II) in the District Court of Tulsa County, Case No. CF-99-1530. He was tried by a jury before the Honorable Thomas C. Gillert. The jury found Appellant guilty as charged on Count I but convicted him of the lesser offense of Assault and Battery on Count II. They assessed punishment at one year in the county jail and a one thousand dollar fine on Count I and a one thousand dollar fine on Count II. The trial court sentenced Appellant accordingly and ordered restitution in the amount of \$115,232.76.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Count I and reverse Count II with instructions to dismiss. 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. Separate punishment imposed for a single criminal episode requires reversal.
- II. The district court erred in failing to instruct jurors on lesser included offenses.
- III. Prosecutorial misconduct deprived Appellant of a fair trial and rendered his conviction unreliable.
- IV. The district judge abused his discretion in the ordering of restitution.

### **DECISION**

As to Appellant's first proposition we find the victim in this case was injured as a result of a single act which cannot be punished under more than one statutory provision without violating the 21 O.S.1991, § 11 prohibition against multiple punishment. Accordingly, we reverse Count II, Assault and Battery, with instructions to dismiss.

With regard to Appellant's second proposition, we note that instructions on lesser offenses are only required when there is evidence to support the finding of the offense, and under the evidence presented in the present case, the trial court did not abuse its discretion in declining to give, *sua sponte*, instructions on lesser included offenses to maiming. *Taylor v. State*, 881 P.2d 755, 758 (Okl.Cr.1994).

Appellant's third proposition warrants no relief as none of the alleged instances of prosecutorial misconduct rose to the level of plain error. See *Anderson v. State*, 992 P.2d 409, 421 (Okl.Cr.1999).

Finally, Appellant did not designate that the restitution order be included in the record on appeal. Thus, we cannot tell from the record before this Court whether Appellant was ordered to pay restitution to Bacon or the medical providers. We also cannot determine whether the amount of restitution ordered compensated the designated recipient for actual loss. In Oklahoma a defendant bears the burden to provide a sufficient record upon which this Court may determine the issue raised. *Hill v. State*, 898 P.2d 155, 160 (Okl.Cr.1995). Failure to provide a complete record for review waives all but fundamental error. *Kinsey v. State*, 798 P.2d 630, 632 (Okl.Cr.1990). As we cannot find fundamental error on the record before this Court, relief is not required.

Appellant's Judgment and Sentence on Count I is **AFFIRMED**. However, his Judgment and Sentence on Count II, is **REVERSED** with instructions to **DISMISS**.

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

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