IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRYCE ANDREW DAVIS,	)	
	)	**NOT FOR PUBLICATION**
Appellant,	)	
vs.	)	**No. F-2012-212**
	)	
THE STATE OF OKLAHOMA,	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

On May 24, 2011, Bryce Andrew Davis entered a plea of *nolo contendere* to the crime of Aggravated Assault and Battery in violation of 21 O.S.Supp.2002, § 646, in the District Court of Tulsa County, Case No. CF-2010-3176. The Honorable Kurt G. Glassco withheld a finding of guilt and passed judgment and sentencing for Davis to complete the Regimented Inmate Discipline Program (RID). On January 13, 2012, after Davis completed the RID program, a sentencing hearing was held. The court sentenced Davis to a ten year deferred sentence under the supervision of the Department of Corrections. A restitution hearing was held on February 24, 2012, after which the court ordered Davis to pay restitution in the amount of $30,528.43. From this Order of restitution, Davis appeals. He raises one proposition of error in support of his petition.

1. The Order of restitution exceeds the authority of the District Court and should be modified.

After thorough consideration of the entire record before us, including the original record, transcripts, briefs and exhibits, we find that the District Court did

abuse its discretion in ordering restitution in this case, and we therefore remand this case for modification of the restitution Order in accordance with this opinion.

The facts of the underlying crime and the extent of the victim's injuries are not disputed. In June of 2010, Bryce assaulted E.H., a minor, at a Walmart, by punching him twice in the face. He suffered injuries to his face including a crushed cheek bone and an orbital wall fracture, requiring the insertion of metal plates and screws and additional plastic surgery. A restitution hearing was held where the parents of E.H. testified to their medical expenses, lost income as a result of caring for their son, mileage incurred as a result of traveling to doctor visits and copying expenses for records relating to the assault. At the conclusion of the restitution hearing, the court ordered restitution in the amount of $30,528.43. This number included $20,383.30 for medical expenses; $3,076.90 for Mr. Hahne's lost wages; $1,558.80 for Mrs. Hahne's lost wages; $288.20 for Mrs. Hahne's mileage; $221.23 for copying expenses; and $5,000.00 described as a 25% upward adjustment for future medical expenses.

Davis argues that the court exceeded its authority by failing to limit the restitution award to "the amount of economic loss suffered" by the Hahnes as required by 22 O.S.2001, § 991(f). Davis requests this Court modify the restitution order to reflect the actual damages incurred for out-of-pocket medical expenses; for Mrs. Hahne's lost income; and for mileage. Davis further requests this Court strike the grant of restitution for Mr. Hahne's lost income and for future medical expenses, because they cannot be determined with a reasonable certainty, and for

expenses incurred for copying documents, because the statute does not extend to copying expenses.

22 O.S.2001, § 991(f) provides for restitution in criminal cases. The same statute also limits the scope of restitution. A victim may only be compensated "up to three times the amount of the economic loss suffered as a direct result of the criminal act of the defendant." 22 O.S.2001, § 991(f)(C)(2)a. *See also* 22 O.S.201, § 991(f)(A)(1). "Economic loss" is defined as the

> actual financial detriment suffered by the victim consisting of medical expenses actually incurred, damage to or loss of real and personal property and any other out-of-pocket expenses, including loss of earnings, reasonably incurred as the direct result of the criminal act of the defendant. No other elements of damage shall be included as an economic loss for purposes of this section.

22 O.S.2001, § 991(f)(A)(3). Section 991(f)'s limitation of economic loss to "actual financial detriment suffered by the victim" dictates that a restitution remedy must be based upon the medical costs the victim must pay after insurance, rather than the initial bill issued by the medical provider.

Other sections of the statute bolster this conclusion. Section 991(f)(C)(3)e, for example, directs that trial courts "shall consider any pre-existing orders imposed on the defendant, including but not limited to, orders imposed under civil and criminal proceedings." Section 991(f)(F) requires "crime victim[s to] provide all documentation and evidence of compensation or reimbursement from insurance companies or agencies of this state, any other state, or the federal government received as a direct result of the crime for injury, loss of earnings or out-of-pocket loss." The State urges this Court to interpret these provisions to mean that a court

must *contemplate* any compensation to a victim as a direct result of the crime but *need not deduct* that compensation from the restitution award. This argument is without merit. Sections 991(f)(C)(3)e and 991(f)(F) direct courts to consider compensation resulting from the crime because that compensation impacts the actual financial detriment of the victim.

We conclude that the trial court abused its discretion when it assessed $20,383.30 restitution for medical expenses, the total value initially billed by the service providers, prior to being written down by the insurer's contract with the providers, and prior to satisfaction by the insurance company. The appropriate value, the medical expenses actually paid by the Hahnes, was $2,267.00. The trial court had the authority to triple this number. *See Logsdon v. State,* 2010 OK CR 7, ¶ 12, 231 P.3d 1156, 163 ("[m]erely totaling up payments made to Logsdon. . . without . . . accounting for . . . any compensation that victims may have received from other sources (e.g., insurance, civil judgments, etc.), does not produce the accurate measure of a victim's 'actual financial detriment' contemplated by 22 O.S.2001, § 991f(A)(3). Nor does it explain whether any excess amount of restitution was allowed. *See* 22 O.S.2001, § 991f(A)(1) and (C)(2)."). We hereby modify the Order for medical expenses to reflect an award of 3 times $2,267.00, the amount of actual economic damages incurred, or $6,801.00.

Davis also seeks a modification of the amount awarded for Mrs. Hahne's loss of income and mileage expenses, arguing that there was insufficient evidence to support her claims. To the contrary, we find the State established both by the preponderance of the evidence.

Davis argues that both Mr. Hahne's estimated loss of income as well as the need for and cost of future medical expenses in this matter were not established with reasonable certainty and should, therefore, be stricken.

> Inherent in the definition of reasonable certainty is the requirement of proof of a victim's loss. The record must reflect a basis for the trial judge's determination of a victim's loss or the decision is arbitrary and violative of Section 991a. . . . [S]uch determination should be shown by a preponderance of the evidence. This standard does not dictate a certain amount or type of evidence, or that the evidence be corroborated, but rather the focus is on whether the testimony contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, justify an inference that the amount is or is not the actual amount of a victim's loss.

Honeycutt v. State, 1992 OK CR 36, ¶¶33, 34, 834 P.2d 993, 1000.

We find that Mr. Hahne's estimation of lost income was not supported by sufficient proof of loss. He did not know which or how many days he took off from work. As a proxy, he used the number days that his son had related doctor appointments, stopping short of testifying that he went to each of the appointments. Mr. Hahne failed to testify to any specific opportunity that he lost as a result of the appointments. The State has not established by a preponderance of the evidence that Mr. Hahne suffered $3,076.00 in losses, or even what loss is appropriate. The grant of restitution for Mr. Hahne's lost wages was an abuse of discretion. This sum must be stricken from the restitution award.

Davis also challenges the court's order for a 25% upward adjustment for future medical expenses. 22 O.S.2001, § 991f(A)(3) plainly limits criminal restitution to damages "suffered" or "incurred". "No other elements of damage shall

be included as an economic loss for purposes of this section." *Id.* The only record evidence of a need for future treatment is found in the testimony of Mrs. Hahne, wherein she explains that she must take her son to bi-annual checkups for an undetermined time. Her co-pay for those visits is $25.00. There is no testimony or documentary evidence about the cost of those visits independent of the insurance benefit. The only other indication that there may be future medical expenses is a letter written by E.H.'s dentist, Dr. Befans, stating:

> [a]s of November 14, 2011, [E.H.] is still experiencing numbness in the upper left quadrant of his mouth. . . . An injury such as [this] one . . . may have long term dental implications, which may or may not include root canal therapy, crowns, extractions, tooth replacements, maxillofacial surgery, etc. In cases involving trauma, it may take years for problems to manifest.

This prognosis is too indefinite to form a basis for incurred economic loss and, but for the trebling of actual, incurred damages, there simply is no statutory provision for insuring against potential damages.

Where a victim is undergoing a defined course of treatment and can establish through competent testimony, with "reasonable certainty," what the scope of the remainder of the treatment will be and what the cost of that treatment will be, it is reasonable to conclude that sum has been incurred, and to include that sum in the restitution order, subject to amendment. *See* 22 O.S.2001, § 991(f)(C)(3)c. The evidence presented here, however, is too speculative and cannot support a grant of restitution for potential future treatment under this statute. The trial court abused its discretion by granting the 25% upward adjustment. This $5,000.00 sum should be struck from the restitution award.

Finally, we find that the expenses incurred for copying related medical and court records were appropriately addressed in the restitution order. In *Taylor v. State*, 2002 OK CR 13, ¶ 6, 45 P.3d 103, 105-06, we recognized that "[i]n defining its terms, the [Victim's Rights] Act . . . specifically notes that trial courts may order defendants to pay a victim's out-of-pocket loss, including 'unreimbursed and nonreimbursable economic losses incurred as a consequence of participation in prosecution and proceedings related to the crime.'" *Id.* (citing 21 O.S.Supp.1997, § 142B and §§ 142A-1(4), 142A-1(6)). Though the Hahnes had not received a bill at the time of the restitution hearing, the work was completed and the testimony of Mrs. Hahne that she was responsible for the same was sufficient to support the award.

DECISION

The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED.** This case is **REMANDED** to the district court, however, for **MODIFICATION** of the **RESTITUTION ORDER** consistent with this opinion herein. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KURT GLASSCO, DISTRICT JUDGE

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OPINION BY: SMITH, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: DISSENT
LUMPKIN, J.: DISSENT
C. JOHNSON, J.: CONCUR

LEWIS, V.P.J., dissenting.

I respectfully dissent. We should review the district court's restitution order only for an abuse of discretion. *Logsdon v. State*, 2010 OK CR 7, ¶ 8, 231 P.3d 1156, 1162. An abuse of discretion is a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 46, 47. Today, using a standard of review that more nearly approximates *de novo* strict scrutiny, the Court rewrites the restitution statute in ways that were never contemplated or thought necessary by the Oklahoma Legislature; and having done so, it unjustifiably modifies the restitution amount ordered by the district court.

The strongest criticism that could be made of the trial court's order is the decision to award the full amount of $20,383.30 for medical expenses incurred by the victim. The majority claims this much of the award is in error because the statute "dictates" that restitution be calculated only from "medical costs the victim must pay after insurance, rather than the initial bill issued by the medical provider." This might seem like a reasonable approach to calculating the victim's economic loss, but after today's opinion, it is the *only* approach. The State urges a more pragmatic reading, that the statute directs the district court to *consider* amounts of compensation from other sources. The majority brushes this aside, adopting an inflexible definition of loss that may work unforeseen injustices in future cases. Because the trial court here properly considered all sources of compensation, I would affirm this part of order.

The majority then deconstructs the *entire* award of job-related restitution to Mr. Hahne, finding the State failed to prove his losses by a preponderance of the evidence. The Court first quotes, and then apparently ignores, the statement in *Honeycutt* which explains that the preponderance of the evidence standard:

> does not dictate a certain amount or type of evidence . . . but rather focuses on whether the testimony contains inherent improbabilities or contradictions, which . . . justify an inference that the amount is or is not the actual amount of a victim's loss.

Id., 1992 OK CR 36, ¶¶ 33-34, 834 P.2d 993, 1000. Fixating on the statutory requirement that losses be established with "reasonable certainty," the majority objects that Mr. Hahne could not say "which or how many days" he was unable to attend to his work while caring for his son; and says that he has not shown "any specific opportunity that he lost as a result of the appointments."

Surely Mr. Hahne's testimony shows, *more likely than not,* that he missed a number of days from work to care for his son, which he has approximated in sworn testimony, and thereby incurred some actual losses. The Court might quibble with his estimate and adjust the award to reflect some margin of error, but instead, it vacates the *entire* award as if no loss had been suffered. What part of Mr. Hahne's testimony contains the "inherent improbabilities or contradictions" that can "justify an inference" by this Court that Mr. Hahne has suffered *no loss* at all? The majority ignores reasonable inferences from the testimony to reach the inherently *improbable* conclusion that Mr. Hahne

suffered no loss whatsoever. This is a disappointing application of appellate review, indeed.

Finally, the Court vacates a further $5,000.00 of the restitution award, which reflected the district court's 25% upward adjustment to account for the victim's future medical expenses. The Court here cites the Legislature's use of the past tense in the words "suffered" and "incurred" with respect to compensable economic loss, but seems to allow for such an adjustment where a "victim is undergoing a defined course of treatment" and can establish with "reasonable certainty" the future course and expense of that treatment. Again, this is simply the Court rewriting the statute.

The standard of restitution imposed by the Legislature includes economic losses "reasonably incurred as the direct result of the criminal act of the defendant." 22 O.S.2011, § 991(f)(A)(3). In support of the upward adjustment, the district court had medical evidence that the victim continues to experience "numbness in the upper left quadrant of his mouth," and that his injuries "may have long-term dental implications" including "root canal therapy, crowns, extractions, tooth replacements, maxillofacial surgery, etc." It may "take years for problems to manifest." The majority finds this evidence "too speculative" and "too indefinite to form a basis for incurred economic loss."[1]

[1] Despite the Court's order today, in the event that additional losses materialize in the future, the restitution statute provides that the district court "shall have the authority to amend or alter any order of restitution made pursuant to this section providing that the court shall state its reasons and conclusions as a matter of record for any change or amendment to any previous order." 22 O.S.2011, § 991f(C)(3)(c).

Again ignoring *Honeycutt's* exposition of the preponderance of the evidence standard, the Court's opinion fails to identify the "inherent improbabilities or contradictions" in the evidence that "justify an inference" that the district's award for future medical expense was *entirely* incorrect. The majority has simply confused its own views of the strength of the State's evidence with the proper scope of appellate review: Is the district court's order a "clearly erroneous conclusion and judgment, one that is *clearly against* the logic and effect of the facts presented"? *Marshall*, 2010 OK CR 8, ¶ 24, 232 P.3d at 47 (emphasis added). The Court today provides no convincing justification for this intrusive incursion into the specifics of a reasonable restitution order that is logically supported by the evidence.

I am authorized to state that Judge Lumpkin joins me in this dissent.