IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

KEITH AVEY,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. F-2000-618
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, Keith Avey, was convicted in the District Court of Oklahoma County of Driving While Under the Influence, After Former Conviction of Driving Under the Influence, Case No. CF-97-5604. The case was tried to a jury before the Honorable Donald L. Howard. The jury assessed punishment at eight years imprisonment and a one thousand dollar fine. The trial court sentenced Appellant accordingly and additionally ordered him to pay $500.00 in restitution.

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 of eight years imprisonment and a $1,000.00 fine 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. The trial court erred when it failed to instruct the jury on the lesser included offense of Driving While Impaired.

II. The trial court failed to adhere to the requirements of 22 O.S.Supp.1997, § 991f, thereby assessing restitution without first holding a hearing.

III. Appellant received ineffective assistance of counsel.

IV. Insufficient evidence existed to convict Appellant.

V. Appellant's sentence and fine are excessive.

DECISION

As to Appellant's first proposition, we find that given the evidence presented in this case, that Appellant smelled strongly of alcohol, had bloodshot eyes, slurred speech and staggered as he walked away from the scene of the collision, the trial court did not abuse its discretion in declining to give, *sua sponte*, an instruction on the lesser included offense of Driving While Impaired. *See Taylor v. State*, 881 P.2d 755, 758 (Okl.Cr.1994).

With regard to Appellant's second proposition, we find the trial court abused its discretion in assessing restitution in the absence of evidence indicating the actual amount of loss suffered by each victim. Because 22 O.S.Supp.1997, § 991f(C)(1)&(2), mandates that restitution be awarded to the victim by the trial court to compensate for the victim's actual economic loss suffered as a result of the defendant's criminal act, we remand the case to the district court for a hearing on the amount of actual economic loss suffered by

the victims as a result of the crime committed by Appellant. We note that while 22 O.S.Supp.1997, § 991a(A)(1)(a) provides that when a court suspends a sentence and also orders a defendant to pay restitution at any time during his suspended sentence, the court shall consider whether the defendant is able to pay such restitution without imposing manifest hardship on him or his family, section 991f, provides that "the amount of restitution shall be established regardless of the financial resources of the offender." 22 O.S.Supp.1997, § 991f(C)(2)(b). Thus, as restitution in this case is ordered under 991f, the trial court need not consider the hardship the order of restitution would have upon Appellant or his family. We also noted that on remand the district court shall have the opportunity to consider any civil judgments in determining the appropriate restitution in the present case as is required by 22 O.S.Supp.1997, § 991f(C)(3)(d).

We find in Appellant's third proposition that defense counsel did object to the order of restitution on the grounds that that State had not proven the amount of the victims' loss. As was discussed in Proposition II, the trial court was not required to determine under section 991f whether order of restitution would present a manifest hardship to Appellant or his family. Thus, the claim that defense counsel was ineffective is without merit. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

We also deny Appellant's Application for an Evidentiary Hearing on Sixth Amendment Claims as the matter is being remanded to the district court for a hearing on restitution wherein Appellant's civil judgments will be considered.

Appellant's fourth proposition is without merit as the evidence was sufficient to support Appellant's conviction. *Spuehler v. State*, 709 P.2d 202, 203 (Okl.Cr.1985). *See also Harris v. State*, 773 P.2d 1273, 1274 (Okl.Cr.1989).

Finally, we find that Appellant's sentence is not excessive. *See Perryman v. State*, 990 P.2d 900, 905 (Okl.Cr.1999).

The Judgment and Sentence of the trial court is **AFFIRMED**. The case is **REMANDED** to the district court for a hearing on restitution not inconsistent with this opinion.

APPEARANCES AT TRIAL

FRANK KIRK
10812 N. MAY AVENUE
OKLAHOMA CITY, OKLAHOMA
ATTORNEY FOR APPELLANT

JAMES SIDERIAS
SONJA PORTER
611 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA
73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

KATRINA CONRAD-LEGLER
OKLAHOMA INDIGENT DEFENSE
SYSTEM
1623 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
LORI S. CARTER
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA
73105
ATTORNEYS FOR APPELLEE

OPINION BY: STRUBHAR, J.
LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR

LUMPKIN, P.J. CONCURRING IN PART, DISSENTING IN PART

I dissent to the opinion insofar as it remands the case to the district court for a hearing on the amount of actual economic loss suffered by the victims. The trial court must make the determination to the extent of the damages to the victim with reasonable certainty. *Honeycutt v. State*, 834 P.2d 993,1000 (Okl.Cr.1992) set the standard of preponderance of evidence for the economic loss in ordering restitution.

> 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 the loss.

The victim's out of pocket expenses were not documented in the record; however, the trial court heard testimony regarding the insurance deductibles of the two victims. Restitution was awarded from that testimony. Appellant did not request that the letter from the victim explaining his expenses be entered into the record. Based on preponderance of the evidence, proof was sufficient for the restitution of $500. It is not necessary for this Court to remand this case.