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

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| **KEVON ANDRA MCLAREN,** | ) | |
| | ) | |
| **Appellant,** | ) | **NOT FOR PUBLICATION** |
| | ) | |
| **v.** | ) | **Case No. F-2012-1126** |
| | ) | |
| **THE STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Appellee.** | ) | |

**SUMMARY OPINION**

**LUMPKIN, JUDGE:**

Appellant, Kevon Andra McLaren, was tried in a non-jury trial before the Honorable Allen McCall, District Judge, District Court of Comanche County, Case Nos. CF-2011-447 and CF-2011-448.[1] He was convicted of Robbery with a Firearm (21 O.S.2001, § 801) in CF-2011-447. The trial court sentenced him to imprisonment for ten (10) years and ordered him to pay a fine in the amount of $1,000.00. The trial court further ordered Appellant to pay restitution in the amount of $32.00.

In CF-2011-448, Appellant was convicted of Conspiracy to Commit Robbery with a Firearm (Count I) (21 O.S.2001, § 421); Robbery with a Firearm (Counts 2-4) (21 O.S.2001, § 801); Kidnapping (Counts 5-10) (21 O.S.Supp.2009, § 741); Shooting with Intent to Kill (Counts 11-14) (21 O.S.Supp.2007, § 652(A)); and First Degree Burglary (Count 15) (21 O.S.2001, § 1431) in CF-2011-447. The trial court sentenced Appellant to imprisonment

[1] The District Court jointly tried these two matters. Appellant appealed to this Court in Case Nos. F-2012-1126 and F-2012-1127. We granted Appellant's request to consolidate his appeals and ordered all filings transferred and the appeal record consolidated in F-2012-1126.

for five (5) years in Count 1; twenty (20) years, each, in Counts 2-4; ten (10) years, each, in Counts 5-10; thirty-five (35) years, each, in Counts 11-15; and ten (10) years in Count 15. The trial court ordered all of the sentences in CF-2011-448 to run to run concurrently with each other but consecutive to Appellant's sentence in CF-2011-447.[2] The trial court further sentenced Appellant to pay a fine in the amount of $1,000.00 in each count. The trial court further ordered Appellant to pay restitution to the Oklahoma Crime Victims Compensation Board in the amount of $971.43 in Count 4; $20,000.00 in Count 12; $26,443.04 in Count 13; and $20,000.00 in Count 14. It is from these judgments and sentences that Appellant appeals.

Appellant raises the following propositions of error in this appeal:

I. Appellant's convictions for both kidnapping and robbery violate the prohibition against multiple punishments.

II. The trial court abused its discretion by imposing restitution without following statutory procedures governing restitution orders.

After thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we find that Appellant's conviction in Count 9 must be reversed.

In Proposition One, Appellant contends that his convictions for both robbery with a firearm (Counts 2-4) and kidnapping (Count 5-10) violate the State statutory prohibition against double punishment. 21 O.S.2011, § 11(A).

[2] Any person convicted of Shooting with Intent to Kill, as provided in 21 O.S.2001, § 652; Robbery with a Firearm, as provided in 21 O.S.2001, § 801; or First Degree Burglary, as provided for in 21 O.S.2001, § 1436, shall be required to serve not less than eighty-five percent of any sentence of imprisonment imposed prior to becoming eligible for consideration for parole. 21 O.S.Supp.2009, § 13.1.

Appellant committed numerous offenses against six separate people. The offenses in Counts 5, 6, and 8 were committed against different individual victims than in the other challenged counts. Accordingly, we find that the offenses were separate and distinct offenses which do not violate § 11(A). *Hoffman v. State*, 1980 OK CR 35, ¶ 8, 611 P.2d 267, 269-70; *Jennings v. State*, 1973 OK CR 74, ¶ 15, 506 P.2d 931, 935; *Wilson v. State*, 1973 OK CR 43, ¶ 10, 506 P.2d 604, 607.

We further find that Appellant's convictions for Counts 2, 4, 7, and 10 do not violate § 11(A) as they did not arise out of one act. *Logsdon v. State*, 2010 OK CR 7, ¶ 17, 231 P.3d 1156, 1164-65; *Watts v. State*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. The offense of robbery with a firearm in Count 2 was complete when Appellant's coconspirator took the victim's $10.00 and carried it away for the slightest distance. Inst. No. 4-146, OUJI-CR(2d) (Supp.2013); *Cunningham v. District Ct. of Tulsa Co.*, 1967 OK CR 183, ¶ 24, 432 P.2d 992, 997; *Brinkley v. State*, 1936 OK CR 117, 61 P.2d 1023, 1025. Thereafter, Appellant committed the offense of kidnapping in Count 7 when he seized the same victim with the intent to confine the victim inside the apartment. *See Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254.

We reach the same conclusion as to Counts 4 and 10. The offense of robbery with a firearm in Count 4 was complete when Appellant's coconspirator took the victim's $100.00 and carried it away for the slightest distance. Thereafter, Appellant committed the offense of kidnapping in Count

10 when he seized the same victim with the intent to confine the victim inside the apartment. *Id.*

However, we find that Appellant's conviction for the offense of kidnapping in Count 9 was not a separate and distinct offense from his conviction for robbery with a firearm in Count 3. The State charged Appellant with robbery with a firearm in the taking of the victim's "cash and personal property" in Count 3. Although Appellant took and carried away the victim's cash very early in the criminal episode, the evidence at trial revealed that Appellant did not complete the taking and carrying away of the victim's personal property before he seized the victim and confined him in the apartment. See *Ziegler*, 1980 OK CR 23, ¶ 10, 610 P.2d at 254. Accordingly, we find that the two offenses violate § 11(A) as they arose from the same act. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126-27. Appellant's conviction in Count 9 is reversed.

In Proposition Two, Appellant contends that the trial court failed to follow the statutory procedures governing the assessment of restitution. Appellant failed to raise the instant challenge before the trial court. Accordingly, we find that he has waived appellate review of the issue for all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d 690, 694-95, 698-99. We review Appellant's claims for plain error pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

> To be entitled to relief under the plain error doctrine, [an appellant] must prove: 1) the existence of an actual error (i.e., deviation from a legal rule); 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. *See Simpson v. State*,

> 1994 OK CR 40, ¶¶ 3, 11, 23, 876 P.2d 690, 694, 695, 698; 20 O.S.2001, § 3001.1. If these elements are met, this Court will correct plain error only if the error "seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (*citing United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); 20 O.S.2001, § 3001.1.

*Id.*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

We find that Appellant has not shown the existence of an actual and obvious error as he has not shown that the trial court did not determine the extent of the victims' losses with reasonable certainty. *Logsdon*, 2010 OK CR 7, ¶ 9, 231 P.3d at 1162; *Honeycutt v. State*, 1992 OK CR 36, ¶¶ 31-33, 834 P.2d 993, 1000. In Case No. CF-2011-448, the Oklahoma Crime Victims Compensation Board requested restitution for those amounts the Board had paid on behalf of Appellant's victims. 21 O.S.2011, § 142.12(A). Appellant did not challenge the amounts that the Board requested and the trial court ordered restitution in those amounts. Accordingly, we find that the record reflects a sufficient basis for the trial court's assessment of restitution. 21 O.S.2011, §§ 142.3(9), 142.5(A), 142.10(B)(1).

In CF-2011-447, Appellant stated the amount of money he took from the convenience store in his videotaped confession. The videotape was introduced into evidence and coupled with the other testimony at trial provided a basis for the trial court's determination of the victim's loss. Accordingly, we find that plain error did not occur. Proposition Two is denied.

**DECISION**

Appellant's conviction for Kidnapping in Count 9 in District Court of Comanche County Case No. CF-2011-448 is **REVERSED.** The judgments and sentences are otherwise **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE ALLEN McCALL, DISTRICT JUDGE

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

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