

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SERAPIO PENNY CORONADO,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. F-2006-669

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 29 2007

S U M M A R Y O P I N I O N

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

Serapio Penny Coronado, Appellant, was tried by jury and found guilty of Count I, attempted burglary in the second degree, in violation of 21 O.S. 2001, § 1435, after one prior felony conviction, in Jackson County District Court, Case No. CF-2005-247. The jury sentenced Appellant to four (4) years. The Honorable Richard Darby, District Judge, pronounced judgment and sentence accordingly, and ordered restitution of \$25. Mr. Coronado appeals in the following proposition of errors.

- 1. The district court committed reversible error by failing to instruct the jury on the lesser included offense of malicious mischief.
- 2. The district court erroneously imposed restitution because the state did not offer any proof of the amount sought.

This Court has held that when a District Court does not *sua sponte* instruct the jury and the Appellant is convicted of the charged offense and then complains for the first time on appeal that the District Court should have given some lesser offense instruction, we will review for plain error. *McHam v. State*,

2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. However, where the evidence does not reasonably support a conviction on the lesser included offense, or where the evidence provides no support for the defendant's theory of the case, then the instructions should not be provided by the court. Also, where the defendant claims he is innocent of any crime, he is not entitled to lesser-included offense instructions. *Hooker v. State*, 1994 OK CR 75, ¶ 31-3, 887 P.2d 1351, 1361.

This Court has adopted the “evidence test” to determine what constitutes a lesser included offense. *Shrum v. State*, 1999 OK CR 41, ¶ 9-10, 991 P.2d 1032, 1036. Lesser related offenses are defined as those that are “inherently related” to the greater offense, because they fall within the same category of crime and are designed to protect the same interest. *Shrum v. State*, 1999 OK CR 41, ¶ 6, n.3, 991 P.2d 1032, 1034, n.3.

In applying the evidence test, Attempted Burglary is directed to protecting property inside a building from someone with intent to steal while Malicious Mischief is directed at protecting property from someone with the intent to damage or destroy. The two crimes are not related to protecting the same interests and therefore, Malicious Mischief is not a lesser included offense of Attempted Burglary.

In addition, the Appellant maintained his claim of innocence in the instant case. He did not claim that he damaged property instead of attempting

to break into property. This alone would suffice to deny Appellant the lesser included instruction.

Appellant further argues that he received ineffective assistance of counsel because trial counsel did not request the lesser included instruction. This claim is groundless and without merit.

This Court has consistently held that Malicious Mischief is not a lesser included offense of Burglary. *See Rowland v. State*, 1991 OK CR 94, ¶ 11, 817 P.2d 263, 266; *Smith v. State*, 1985 OK CR 15, ¶ 19, 695 P.2d 1360, 1365. The District Court's failure to provide the jury instruction for the lesser included offense of Malicious Mischief was not an error. Proposition One is denied.

This Court has held that restitution may be ordered if the damages are determinable with reasonable certainty. *Taylor v. State*, 2002 OK CR 13, ¶ 5, 45 P.3d 103, 105. Further, this Court has held that the record must reflect a basis for the district judge's determination of a victim's loss or the decision is arbitrary. *Honeycutt v. State*, 1992 OK CR 36, ¶ 33, 834 P.2d 993, 1000.

In Appellant's trial, there was evidence presented that a lock and hasp were damaged but no evidence was presented to determine the value of the lock and hasp. The District Court ordered restitution of \$25. The State concedes that no evidence was offered at trial to show with a reasonable certainty the value of the lock and hasp.

Proposition Two is remanded with instructions for a proper determination of the restitution amount.

DECISION

The Judgment and Sentence of the District Court of Jackson County is **AFFIRMED** in part and **REMANDED** with instructions for a proper determination of the restitution amount. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF JACKSON COUNTY
THE HONORABLE RICHARD DARBY, DISTRICT JUDGE

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OPINION BY LEWIS, J.
LUMPKIN, P.J.: Concurs
C. JOHNSON, V.P.J.: Concurs
CHAPEL, J.: Concurs
A. JOHNSON, J.: Concurs