

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-866

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Iredell County
No. 06 CRS 61968

PHILLIP LEE JONES, JR.

Court of Appeals

Appeal by Defendant from judgment entered 28 November 2007 by Judge W. David Lee in Iredell County Superior Court. Heard in the Court of Appeals 8 December 2008.

Attorney General Lucy Cooper by Assistant Attorney General Ann Stone, for the State.

Slip Opinion

Michael J. Reece, for Defendant.

ARROWOOD, Judge.

Phillip Jones, Jr. (Defendant) was convicted of assault with a deadly weapon inflicting serious injury. On appeal, Defendant contends that there was no evidence presented during trial or at sentencing to support the trial court's order of restitution. We find no error in Defendant's conviction, but remand the case for additional findings of fact on the issue of restitution.

On 5 March 2007, the Iredell County grand jury indicted Defendant for assault with a deadly weapon inflicting serious injury. The case came on for trial on 27 November 2007.

The evidence at trial tended to show that beginning in July 2006, Defendant was a tenant in a home owned by the victim, Michael Daniels. Defendant refused to pay his rent in December 2006, and Daniels and Defendant had confrontations concerning the rent on 8 and 15 December 2006. On 15 December, Defendant informed Daniels that he would vacate the property by the end of the month, and told Daniels to keep his deposit rather than collect the December rent. On 28 December 2006, Daniels and Defendant inadvertently crossed paths while driving. Daniels asked Defendant to pull over and talk. When he did, Daniels and Defendant got into an altercation during which Defendant stabbed Daniels with a knife. Daniels suffered two serious wounds to his back and injuries to his hands. Defendant claimed that he acted in self-defense because he thought that Daniels had a gun concealed in his pocket. There was no evidence that Daniels had a weapon.

Defendant moved to dismiss the charge at the close of the State's evidence, but not after the close of all evidence. The motion was denied. The jury found Defendant guilty as charged, and the trial court imposed an active prison term of 20 to 33 months.

During sentencing, the prosecutor and trial court discussed restitution. The prosecutor told the trial court that the Victim's Compensation Fund had paid \$5,214.00 in restitution and that Daniels had also paid \$1,101.00 of his own money for medical expenses. The State's restitution worksheet, which the prosecutor submitted to the trial court, requested the same amounts. The State offered no evidence to support the prosecutor's restitution

claims. The trial court ordered Defendant to pay a total of \$6,215.14 in restitution to the Victim's Compensation Fund and to Daniels.

Defendant's sole argument on appeal is that the trial court's order of restitution is not supported by any evidence introduced during the trial or sentencing. The State concedes that there is insufficient evidence to support the order. We agree, and vacate the order and remand for further consideration on the issue of restitution.

"The amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)) (citation omitted). Furthermore, this Court has held that the "unsworn statements of the prosecutor . . . [do] not constitute evidence and cannot support the amount of restitution recommended." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). A defendant does not need to object to the trial court's restitution order in order to preserve for appellate review the question of whether the order is supported by adequate evidence. *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007).

After examining the entire record, the only support for the restitution order are the prosecutor's unsworn statements to the trial court and the restitution worksheet. In light of our prior case law, the prosecutor's statements and the worksheet are

insufficient to support the trial court's order of restitution. Accordingly, although we find no error in Defendant's conviction, we vacate the restitution order and remand to the trial court for a new hearing on the issue of restitution.

No error in part; vacate in part; and remand.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).