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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-180

Filed: 15 November 2016

Wake County, Nos. 12 CRS 217205-06, 8196

STATE OF NORTH CAROLINA

v.

DAVID LAWRENCE COKER, JR.

Appeal by defendant from judgments entered 16 July 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Attorney General Roy Cooper, by Associate Attorney General John W. Congleton, for the State.*

*Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., and Fanney Law Office, PLLC, by John K. Fanney, for defendant-appellant.*

CALABRIA, Judge.

Defendant pleaded guilty to multiple offenses. On appeal, defendant challenges the trial court's order of restitution. The State concedes that the restitution order was not supported by evidence sufficient to establish an appropriate amount of restitution. We affirm the trial court's judgment on sentencing, vacate the restitution order, and remand for a proper calculation of restitution based upon competent evidence.

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I. Factual and Procedural Background

Defendant entered a guilty plea to felony death by vehicle (“FDBV”), assault with a deadly weapon inflicting serious injury (“AWDWISI”), and driving while impaired (“DWI”) on 19 December 2014. Although sentencing was continued under the terms of his plea arrangement, defendant paid into court \$50,000.00 toward restitution at the time of his plea.<sup>1</sup> On 16 July 2015, the trial court sentenced defendant to an active prison term of 25 to 42 months for AWDWISI in 12 CRS 217206. The court suspended a second sentence of 25 to 42 months’ imprisonment for FDBV in 12 CRS 217205 and placed defendant on 60 months of supervised probation, consecutive to his sentence in 12 CRS 217206.<sup>2</sup> The court ordered defendant to pay \$200,000.00 in restitution in addition to the \$50,000.00 previously deposited with the court. Defendant filed timely notice of appeal.

II. Restitution

Defendant now challenges the trial court’s \$200,000.00 restitution award as unsupported by any evidence adduced at the sentencing hearing. *See* N.C. Gen. Stat. § 15A-1340.36(a) (2015) (“The amount of restitution must be limited to that supported by the record[.]”). The State concedes that “there was no testimony or other evidence

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<sup>1</sup> It appears a restitution worksheet related to this \$50,000.00 payment was tendered at the 16 July 2015 sentencing proceeding.

<sup>2</sup> The court arrested judgment on the DWI conviction in 12 CRS 8196 as a lesser included offense of FDBV in 12 CRS 217205. *See State v. Davis*, 198 N.C. App. 443, 452, 680 S.E.2d 239, 246 (2009).

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submitted at the hearing to support a specific amount of restitution.” It emphasizes, however, that the court heard “evidence that would support an award of restitution,” including testimony from the surviving victim and from the guardian of the eldest of the deceased victim’s three minor children. Accordingly, the State asks this Court to remand to the trial court for entry of an appropriate restitution award.

Absent a stipulation by the parties, the amount of a restitution award “must be supported by evidence adduced at trial or at sentencing.” *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). “[N]o objection is required to preserve for appellate review issues concerning the imposition of restitution.” *State v. Smith*, 210 N.C. App. 439, 443, 707 S.E.2d 779, 782 (2011). Moreover, a defendant’s silence in response to a restitution order announced in open court does not constitute a stipulation to the amount awarded, absent a clear indication of his assent thereto. *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010).

In the case *sub judice*, it is undisputed that the sentencing court received no evidence regarding the amount of economic loss sustained by the victims and no stipulation from defendant admitting the amount owed. We therefore vacate the restitution award and “remand for the trial court to determine the amount of damage proximately caused by defendant’s conduct and to calculate the correct amount of

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restitution.”<sup>3</sup> *State v. Moore*, 365 N.C. 283, 286, 715 S.E.2d 847, 849-50 (2011). The judgments are otherwise affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).

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<sup>3</sup> Defendant does not assign error to the extended period of probation imposed by the sentencing court “due to [the] high amount of [his] monetary obligations.” *See* N.C. Gen. Stat. § 15A-1343.2(d) (2015). Accordingly, we decline to disturb defendant’s sentence in 12 CRS 217205. We note that the judgment provides for the termination of defendant’s probation once “all money [is] paid.” *See* N.C. Gen. Stat. § 15A-1342(b) (2015).