

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 10-132

CHARLES RAYFORD JOHNSTON
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 22, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR-09-1288]

HONORABLE WILLARD PROCTOR
JR., JUDGE

AFFIRMED

COURTNEY HUDSON HENRY, Judge

In a bench trial, the Circuit Court of Pulaski County found appellant guilty of second-degree battery and placed him on probation for a period of six years. The circuit court also ordered appellant to pay the victim restitution in the amount of \$39,612. For reversal, appellant argues that the trial court erred in ordering restitution when the State failed to introduce any evidence to support the award. We affirm because the issue is not preserved for appeal.

The record reflects that appellant sliced the right hand of his neighbor, Brandon Isaacs, with a large kitchen knife. The laceration severed an artery and several tendons, and Isaacs underwent two surgeries to, in his words, “reattach my hand.” Isaacs testified that he continued to suffer from nerve damage and that he no longer had full use of his right hand. After the circuit court found appellant guilty of second-degree battery, the court inquired

about the amount of restitution. The State responded that it did not have that information at the time but that it would provide it at the upcoming sentencing hearing.

At sentencing, the following colloquy took place between court and counsel:

THE COURT: Was there restitution? Have you all gotten anything on the --

PROSECUTOR: There will be, Judge. The victim has some very severe hand injuries. In fact, he may have more medical --

THE COURT: Yeah. Is he here?

PROSECUTOR: Yes.

THE COURT: If you will come forward. I tell you what, Ms. Patterson [prosecutor], what you may need to do. Why don't we let him --

PROSECUTOR: I will say that Mr. Isaacs has all of his paperwork. He does have a total. It was \$39,612.

THE COURT: All right. \$39,612?

PROSECUTOR: Yes, your honor.

THE COURT: How will he be able to pay that out?

DEFENSE COUNSEL: The problem, Your Honor, is if -- with the charges that are against him and what he has been found guilty of, he will lose his employment. And so far as being able to pay that out, we're not sure. He has had the same employer for thirty years and they are not going to allow him to stay on after this.

After discussing sentencing options and computing various monthly amounts for the payments of restitution, the court sentenced appellant to six years of probation under the provisions of Act 548 (Act of Mar. 5, 2001, No. 548, 2001 Ark. Acts 2190) and ordered him to pay \$39,612 in restitution at the rate of \$550 per month.

On appeal, appellant points out that the State did not present the testimony of the victim as to the amount of restitution or introduce into evidence the victim's medical records. Appellant contends that the trial court erred by issuing its ruling based upon facts that were not in evidence. It is well settled that statements and arguments made by counsel to the judge are not evidence. *Wright v. State*, 67 Ark. App. 365, 1 S.W.3d 41 (1999). However, as shown by the record, appellant did not object when the circuit court accepted the prosecutor's statement concerning Isaac's medical expenses in lieu of introducing evidence on the amount of claimed restitution. Under our precedents, a contemporaneous objection is generally required to preserve an issue on appeal. See *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). And, we have held that questions concerning restitution are subject to the contemporaneous-objection rule. *Cotnam v. State*, 36 Ark. App. 109, 819 S.W.2d 291 (1991). Accord *Simmons v. State*, 90 Ark. App. 273, 205 S.W.3d 194 (2005).

Appellant admits that he failed to raise an objection at the sentencing hearing. Nonetheless, he argues that the issue is properly before this court under the fourth possible exception to the contemporaneous-objection rule mentioned in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). This exception is based on Rule 103(d) of the Arkansas Rules of Evidence, which provides that “[n]othing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.” However, the *Wicks* court cautioned against reliance on this exception in that the rule is stated in the negative, “not imposing an affirmative duty, and at most applies only to a ruling which

Cite as 2010 Ark. App. 626

admits or excludes evidence.” *Wicks* at 787, 606 S.W.2d at 370. Clearly, Rule 103(b) does not require us to address issues that are not preserved for appeal, and we are not inclined to extend the exception under the facts of this case. Appellant did not contest the amount of damages claimed in restitution, and a proper objection could have avoided any error. Appellant’s silence and apparent acquiescence are akin to invited error, where one who is responsible for error cannot be heard to complain. *Jones v. State*, 2010 Ark. App. 280.

Affirmed.

GRUBER and BAKER, JJ., agree.