

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

BRYAN DECHEVERIA ARAGON, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2012-167

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

SEP 23 2013

**SUMMARY OPINION**

**A. JOHNSON, JUDGE:**

MICHAEL S. RICHIE  
CLERK

Appellant Bryan Decheveria Aragon was tried by jury in the District Court of Cleveland County, Case No. CF-2009-1472, and convicted of Robbery with a Firearm (Count 1), in violation of 21 O.S.2001, § 801, Assault and Battery with a Dangerous Weapon (Count 2), in violation of 21 O.S.Supp.2006, § 645, Conspiracy to Commit a Felony (Count 3), in violation of 21 O.S.2001, § 421, Burglary in the First Degree (Count 4), in violation of 21 O.S.2001, §§ 1431 & 1436, Kidnapping (Count 5), in violation of 21 O.S.Supp.2009, § 741, and Possession of a Firearm in the Commission of a Felony (Count 6), in violation of 21 O.S.Supp.2007, § 1287.<sup>1</sup> The jury fixed punishment at twelve years imprisonment on Count 1, ten years imprisonment on Count 2, three years imprisonment on Count 3, twelve years imprisonment on Count 4, five

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<sup>1</sup> The State charged Aragon with acting in concert with Melvin Ray Jenkins and Naman Pettway. Both Jenkins and Pettway entered a guilty plea prior to Aragon's trial to a single count of robbery with a firearm and each received a twelve year sentence.

years imprisonment on Count 5, and five years imprisonment on Count 6.<sup>2</sup> The Honorable Tom A. Lucas, who presided at trial, sentenced Aragon according to the jury's verdict and ordered the sentences to be served consecutively, but suspended the sentences in Counts 3, 5, and 6. From this Judgment and Sentence Aragon appeals, raising the following issues:

- (1) whether it was error for the prosecutor to call co-defendants, Jenkins and Pettway, knowing they would refuse to testify and whether the introduction of their hearsay statements deprived him of his right to confront the witnesses against him;
- (2) whether prosecutorial misconduct deprived him of a fair trial; and
- (3) whether his convictions for robbery with a firearm, kidnapping, assault and battery with a dangerous weapon, and possession of a firearm in the commission of a felony punish him multiple times for a single criminal transaction in violation of the prohibition against double punishment.

We find reversal is not required and affirm the Judgment and Sentence of the District Court on Counts 1, 2 3 and 4. We find relief is required on Counts 5 and 6 for the reasons discussed below.

**1.**

Aragon's claim that it was reversible error for the prosecutor to call Pettway and Jenkins knowing that they would refuse to testify does not require relief under the circumstances of this case. Neither Pettway nor Jenkins asserted a Fifth Amendment privilege not to testify and each answered some questions posed by the prosecutor and all questions posed on cross-

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<sup>2</sup> Under 21 O.S.Supp.2011, § 13.1, Aragon must serve 85% of the sentences imposed on Counts 1 and 4 before he is eligible for parole.

examination. More importantly, the prosecutor did not attempt to build the State's case out of inferences arising from use of Pettway's and Jenkins' refusals to answer certain questions or make inferences from Pettway's and Jenkins' refusal to answer questions to add critical weight to the State's case in a form not subject to cross-examination. See *Namet v. United States*, 373 U.S. 179, 186–187, 83 S.Ct. 1151, 1155–56, 10 L.Ed.2d 278 (1963); *Payne v. State*, 1987 OK CR 214, ¶ 11, 744 P.2d 196, 200.

We also reject Aragon's claim that admission of Jenkins' and Pettway's hearsay statements denied him the right of confrontation in violation of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Aragon's case is distinguishable from those cases because Aragon's co-defendants testified and were subject to cross examination. See *Shelton v. State*, 1990 OK CR 34, ¶ 22, 793 P.2d 866, 873 (holding *Bruton* does not extend to cases where the codefendant, whose statements are used at trial, testifies as a witness and is subject to cross-examination.) No relief is required.

## 2.

Relief is not required on Aragon's prosecutorial misconduct claim because any error in the prosecutor's argument did not deprive Aragon of a fair trial or a fair and reliable sentencing proceeding. See *Harmon v. State*, 2011 OK CR 6, ¶ 80, 248 P.3d 918, 943. Moreover, the district court correctly sustained defense counsel's objection to the second remark challenged by

Aragon thus curing any error. *See Hanson v. State*, 2009 OK CR 13, ¶ 19, 206 P.3d 1020, 1028; *Mack*, 2008 OK CR 23, ¶ 9, 188 P.3d at 1289 (When the district court sustains an objection to improper argument, error is cured.)

**3.**

The State concedes that Aragon's conviction for Possession of a Firearm in the Commission of a Felony (Count 6) violates 21 O.S.2001, § 11 and must be dismissed. We also find that Aragon's convictions for both Robbery with a Firearm and Kidnapping violate § 11 because they arose out of the same act. *See Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. We therefore reverse Aragon's kidnapping conviction in Count 5. Aragon's convictions for Robbery with a Firearm and Assault and Battery with a Dangerous Weapon do not violate 21 O.S.2001, § 11 and the prohibition against multiple punishment because, under the facts of this case, the acts were separate and distinct. *Id.*; *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1144.

**DECISION**

The Judgment and Sentence of the district court on Counts 1, 2, 3 and 4 is **AFFIRMED**. The Judgment and Sentence of the district court on Counts 5 and 6 is **REVERSED** with instructions to **DISMISS**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY  
THE HONORABLE TOM A. LUCAS, DISTRICT JUDGE

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**OPINION BY: A. JOHNSON, J.**  
**LEWIS, P.J.: Concur**  
**SMITH, V.P.J.: Concur in Results**  
**LUMPKIN, J.: Concur in Results**  
**C. JOHNSON, J.: Concur**

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