

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

EARNEST TOBY BEARSHEAD, )

Appellant, )

v. )

THE STATE OF OKLAHOMA, )

Appellee. )

NOT FOR PUBLICATION

Case No. F-2012-1039

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

JAN 23 2014

**SUMMARY OPINION**

**A. JOHNSON, JUDGE:**

**MICHAEL S. RICHIE**  
**CLERK**

Appellant Earnest Toby Bearshead was tried by jury and convicted of Robbery with a Firearm in violation of 21 O.S.2001, § 801 (Count 1), and False Personation in violation of 21 O.S.2001, § 1531 (Count 2), in the District Court of Tulsa County, Case No. CF-2011-2901. The jury fixed punishment at nine years imprisonment on Count 1 and five years imprisonment on Count 2. The Honorable Daman Cantrell, who presided at trial, sentenced Bearshead according to the jury's verdict and ordered the sentences to be served consecutively to each other.<sup>1</sup> Bearshead does not contest either his conviction of Robbery with a Firearm or the sentence imposed therein. In challenging his conviction of False Personation in Count 2, he raises the following issues:

- (1) whether the evidence was sufficient to support his conviction for false personation;
- (2) whether the jury should have been instructed on the offense of obstruction as a lesser-related offense of false personation under the facts of this case; and

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<sup>1</sup> Under 21 O.S.Supp.2009, § 13.1, Bearshead must serve 85% of the sentence imposed on Count 1 before he is eligible for parole.

- (3) whether his sentence for false personation is excessive and should be modified.

We find merit in Bearshead's first claim and reverse his conviction on Count 2, false personation.

### DISCUSSION

Bearshead first claims the evidence was insufficient to prove that he committed the crime of false personation. We review sufficiency of the evidence claims to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime charged beyond a reasonable doubt." *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319-320, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

Title 21 O.S.2011, § 1531, establishes the crime of false personation by stating in relevant part:

Any person who falsely personates another, and in such assumed character:

...

4. Does any other act whereby, if it were done by the person falsely personated, he might in any event become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture or penalty, or whereby any benefit might accrue to the party personating, or to any other person; shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding ten (10) years.

21 O.S.2011, § 1531. In *Barkus v. State*, 1996 OK CR 45, ¶ 4, 926 P.2d 312, 313, this Court set out the elements of the offense of false personation thus:

first, the assumption by one person of another person's character;

second, the intentional personation of that character and

third, such person either

(i) does any act whereby, if it were done by the person falsely personated, he might become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty; or

(ii) accrues any benefit as a result of the personation.

Bearshead claims first that the only evidence he proffered a false identity to police was the videotape of his interview with Detective Ryden which was played for the jury, but never admitted into evidence. According to Bearshead, because the videotape was never admitted into evidence, there was no proof that he assumed the name of "Oscar" Bearshead. Bearshead concludes this Court must find the evidence was insufficient on the first two elements of the offense (i.e., the intentional assumption by one person of another person's character).

This portion of Bearshead's claim fails for two reasons. First, the taped interview was not the only evidence of Bearshead's use of the name "Oscar Bearshead." Detective Ryden testified that when he interviewed Bearshead, Bearshead "claimed his name was Oscar, not Toby, to begin with" (Tr. at 188). This testimony is corroborated by the fact that after Bearshead told Ryden his real name, Ryden crossed out the name "Oscar" at the top of the rights waiver form and wrote "Toby" (Tr. at 199; State's Exhibit 1). Second, the trial

transcript shows that the tape was offered by the State as State's Exhibit 3, and by agreement of the parties was admitted as Court's Exhibit 1. The transcript shows further that the videotape was published (played) to the jury with the judge's permission.

The videotape of Detective Ryden's interview with Bearshead corroborated Ryden's testimony that Bearshead affirmed his name as "Oscar" at the beginning of the interview. Later in that tape Bearshead told Ryden that he assumed the name "Oscar" because he did not want police to know his name. Bearshead also admitted to Detective Ryden that he lied about his date of birth, originally giving officers his younger brother's birth date. This evidence was sufficient for a rational jury to find beyond a reasonable doubt that Bearshead assumed the character of another person and did so intentionally.

Bearshead claims next that the evidence was insufficient to show that he would have benefitted or subjected someone else to prosecution by giving a false name to a police officer. Neither party contends that Bearshead committed any act that would have subjected a person named "Oscar Bearshead" to any criminal prosecution or civil liability. Indeed, there is no evidence in the record that "Oscar Bearshead" is a real person. Instead, the State argues only that Bearshead benefitted from the false name and birth date he gave to Detective Ryden.<sup>2</sup>

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<sup>2</sup> Bearshead's jury was never instructed that conviction for false personation could be based on a finding that Bearshead benefitted from the impersonation, an option expressly provided for in

As evidence supporting its assertion that some benefit accrued to Bearshead as a result of his false personation, the State points to Detective Ryden's testimony. Ryden testified on direct examination that in his experience, a person would claim to be someone else in order "[t]o not be held responsible for their actions . . . (Tr. at 189). He also testified that "they'll give a false name hoping that we'll arrest them under that name instead of their real name" (Tr. at 189). On cross-examination, Ryden testified that he has come in contact with people who gave false names even after being arrested, "hoping that we arrest them under the wrong name, they get out, and then they're out free running on the streets after they make bond or something" (Tr. at 197). On redirect examination, Ryden elaborated on why someone in custody would claim to be someone else by explaining that his experience was

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OUI-CR 5-50, the uniform jury instruction upon which Bearshead's personation instruction was based. Rather, the jury was instructed that Bearshead only could be convicted if it were shown that Bearshead committed some act that might have made the impersonated person subject to a lawsuit or prosecution. Specifically, Bearshead's jury was instructed that

No person may be convicted of the felony of False Personation unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the defendant falsely assumed the identity of another person;

Second, the impersonation of that identity was intentional;

Third, under that false identity the defendant did any act that might have made the other person liable to any lawsuit or prosecution;

Fourth, if the act had been done by the other person.

(O.R. 127 (Instruction No. 29)). Thus, Bearshead's jury was never instructed on the element of the offense (benefit) alleged in the charging Information, the element upon which the State now bases its argument that the evidence was sufficient to prove Bearshead's guilt beyond a reasonable doubt.

that “they hope they’ll be arrested under the wrong name. And then if they’re able to bond out of jail, then we’ve arrested the wrong person, the wrong name, and we’re [sic] don’t know who they are and they’re not held accountable for what they did” (Tr. at 200).

While Detective Ryden’s testimony provided some educated speculation about how Bearshead might have hoped to benefit from taking the name of “Oscar Bearshed,” the State points to no evidence showing that any of these benefits actually accrued to Bearshead. There is, however, evidence to the contrary. Specifically, Bearshead did not escape responsibility for the robbery because he was ultimately charged, tried, and found guilty of the crime. Nor did Bearshead bond out under the assumed name “Oscar” thereby leaving the police not knowing his true identity. Absent any evidence that some benefit accrued to Bearshead from his false personation of “Oscar Bearshead,” the State failed to meet its burden of proving all elements of the crime beyond a reasonable doubt.<sup>3</sup> The Judgment and Sentence is reversed on this count.

### **DECISION**

The Judgment and Sentence of the district court is **AFFIRMED** for Count 1 (Robbery with a Firearm). The Judgment and Sentence is **REVERSED** and **REMANDED** with instructions to **DISMISS** for Count 2 (False Personation).

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<sup>3</sup> Neither Detective Ryden nor any other witness ever testified that Bearshead benefitted from the impersonation by avoiding arrest on an outstanding warrant although that was the allegation set out in the charging Information. Nor was any evidence ever produced showing that Bearshead was subject to arrest on any outstanding warrant at the time of the impersonation.

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 TULSA COUNTY  
THE HONORABLE DAMAN CANTRELL, DISTRICT JUDGE

**APPEARANCES AT TRIAL**

STEPHANIE SINGER  
MATT TARVIN  
ASSISTANT PUBLIC DEFENDERS  
423 S. BOULDER AVE., SUITE 300  
TULSA, OK 74103  
ATTORNEYS FOR DEFENDANT

NICK CODDING  
ASSISTANT DISTRICT ATTORNEY  
500 S. DENVER  
TULSA, OK 74103  
ATTORNEY FOR STATE

**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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**APPEARANCES ON APPEAL**

STUART W. SOUTHERLAND  
ASSISTANT PUBLIC DEFENDER  
423 S. BOULDER AVE., SUITE 300  
TULSA, OK 74103  
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL  
KEELEY L. MILLER  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE