

AUG - 6 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JEFFREY ALLEN BROWN

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

)
)
) **NOT FOR PUBLICATION**
)

) **Case No. F-2000-771**
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)

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Jeffrey Allen Brown, was tried by jury in the District Court of Comanche County, Case No. CF-99-192, and convicted of Attempted Escape from the Department of Corrections, after former conviction of two felonies, in violation of 21 O.S.Supp.1991, § 434. The jury recommended the minimum available sentence, twenty (20) years imprisonment, and the trial judge sentenced Appellant accordingly. He now appeals his conviction and sentence.

Appellant raises the following propositions of error in this appeal:

- I. Appellant was denied a fair trial and faced trial by ambush when a state witness was allowed to testify to a previously undisclosed custodial statement allegedly made by Appellant;
- II. The trial evidence was insufficient to support Appellant's conviction for attempted escape from the penitentiary; and
- II. The trial court's sentencing policy was an abuse of discretion because it punished Appellant for exercising his right to a jury trial by refusing consideration of a concurrent sentence.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have

determined neither reversal nor modification is required.

With respect to proposition one, we find evidence of at least one discovery violation by the State, the tape recording of Appellant being given the *Miranda* warnings. It is unclear, under this record, whether or not defense counsel received notice or discovery relating to Appellant's alleged unrecorded statement to Officer McFadden. Defense counsel did not emphatically claim McFadden's report had not been produced, and he did not seek a continuance to obtain the tape recording for review. Moreover, Appellant has not sought supplement the record with the tape recording, nor did he seek to have Officer McFadden's report included in the record. Thus, we are unable to assess the materiality of the omission(s), and so we find the discovery violation(s) did not prejudice Appellant. See *Simpson v. State*, 876 P.2d 690, 695 (Okla.Cr.1994)(error which has no bearing on the outcome of the trial will not mandate reversal); Rule 2.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2000).

We further find defense counsel did not object at trial based upon the alleged involuntary nature of Appellant's statement to Officer McFadden. He claimed a lack of notice. A *Jackson v. Denno* hearing was held by the trial judge, and the trial judge's ruling admitting the statement, under this record, is sufficiently supported. *Knighton v. State*, 912 P.2d 878, 887 (Okla.Cr.1996); *Hawkins v. State*, 891 P.2d 586, 594 (Okla.Cr.1994); see also *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975) (The critical safeguard is a person's right to cut off questioning.). We cannot say this ruling amounted to an abuse of discretion or plain error. *Moles v. State*, 520 P.2d

822, 824 (Okl.Cr.1974). Even assuming, *arguendo*, Appellant's statement was involuntary or inadmissible, we find the error harmless, as the evidence clearly shows the elements of attempted escape. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *Simpson*, 876 P.2d at 702.

With respect to proposition two, after viewing the evidence in the light most favorable to the State and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985).

With respect to proposition three, we find the trial judge abused his discretion by failing to consider a concurrent sentence, based solely upon Appellant's decision to exercise his Constitutional right to a jury trial. Although this was error, we find it unnecessary to remand for resentencing or modify the sentence under these particular facts (six prior felony convictions, including one for escape) and in light of the relief sought by appellate counsel.

DECISION

The judgment and sentence are hereby **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE ROY D. MOORE, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: DISSENT
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

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