

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MELVIN EDWARD DAN,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2011-1047

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 25 2013

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Melvin Edward Dan, Appellant, was tried by jury and found guilty of Count 1, robbery with a dangerous weapon, in violation of 21 O.S.2001, § 801; Count 2, burglary in the first degree, in violation of 21 O.S.2001, § 1431; and Count 3, possession of a firearm after previous juvenile adjudication for a felony, in violation of 21 O.S.Supp.2009, § 1283(D); in the District Court of Tulsa County, Case No. CF-2010-2540. The jury sentenced Appellant to fifteen (15) years imprisonment in Count 1, ten (10) years imprisonment in Count 2, and six (6) years imprisonment in Count 3.¹ The Honorable William J. Musseman, District Judge, pronounced judgment and sentence, ordering the sentences served consecutively. Mr. Dan appeals the following propositions of error:

¹ Appellant must serve 85% of his sentences in Counts 1 and 2 before being eligible for consideration for parole. 21 O.S.Supp.2009, § 13.1(8) and (12).

1. The one-person show-up in this case was highly suggestive and tainted the at-trial identification;
2. Absent the identifications which stemmed from the suggestive one-person show-up, the evidence is insufficient to support the verdicts;
3. Multiple convictions and punishments based on the same use of a firearm violates the prohibition against double jeopardy and double punishment; either robbery with firearms or felony possession of a firearm must be dismissed;
4. The admission of other crime evidence deprived Appellant of a fair trial;
5. The jury was misinstructed as to the available sentences for the charged crimes;
6. The sentences are excessive;
7. Cumulative error deprived Appellant of a fair trial.

Appellant's first proposition is that the in-court identifications by the eyewitnesses at trial were tainted by an unduly suggestive pre-trial show-up identification. By failing to object to the admission of this evidence at trial, Appellant waived all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶¶ 2, 12, 876 P.2d 690, 692, 695. To obtain relief for plain error, an appellant must show an actual error (i.e., deviation from a legal rule) that is plain or obvious; and that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. This Court will correct plain error when it seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Murphy v. State*,

2012 OK CR 8, ¶ 18, 281 P.3d 1283, 1290; 20 O.S.2011, § 3001.1. We find that the trial court's admission of the show-up identifications and the subsequent in-court identifications was not error, and therefore not plain error. *Young v. State*, 2000 OK CR 17, ¶¶ 30-33, 12 P.3d 20, 34. Proposition One is denied.

Appellant's Proposition Two challenges the sufficiency of the evidence to support his convictions. We find that the evidence in Counts 1 and 2 meets the standard of legal sufficiency under *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203. However, in Count 3, the State failed to present sufficient evidence that Appellant was previously adjudicated a delinquent child "for the commission of an offense, which *would have constituted a felony offense* if committed by an adult," as the charged crime is defined by 21 O.S.Supp.2009, § 1283(D)(emphasis added).² The only evidence offered in support of the "previous juvenile adjudication for a felony" element in Count 3 was State's Exhibit 19, which does not memorialize the nature of the offense

² We are cognizant that appellate counsel failed to raise this particular challenge to the sufficiency of the evidence in Count 3, and thus waived the error. Rule 3.5(A)(5), 22 O.S.Supp.2012, Ch. 18, App. The Court noticed the error in the course of its examination of Appellant's Proposition Four. The failure of the State's proof here is obvious from the record, and the conviction and punishment of six (6) years imprisonment, upon legally insufficient proof, would violate Appellant's substantial statutory and constitutional rights. *Lockhart v. State*, 10 Okl.Cr. 582, 587, 139 P. 1156, 1158 (1914) ("In a case like this, where the evidence is so plainly insufficient to show the necessary elements of the offense charged, there should be no hesitation in reversing the judgment of conviction"). Such a conviction also adversely impacts the fairness, integrity, and public reputation of judicial proceedings. *Murphy*, supra; 20 O.S.2011, § 3001.1. We therefore reverse this conviction for plain error.

for which Appellant was adjudicated delinquent.³ Count 3 will be reversed. *Kinchion v. State*, 2003 OK CR 28, ¶ 13, 81 P.3d 681, 685.

Appellant's Proposition Three, challenging his convictions for robbery with firearms and possession of a firearm after previous juvenile adjudication for a felony as violative of 21 O.S.2001, § 11, and the constitutional prohibitions against double jeopardy; and Proposition Four, alleging error in the prosecutor's statement to the jury concerning the nature of his prior juvenile adjudication, are moot, and therefore, denied.

In Proposition Five, Appellant claims the trial court's instruction that the punishment for robbery with firearms was not less than five (5) years, nor more than life imprisonment, was erroneous. Counsel failed to object to the instruction at trial, and thus waived all but plain error. *Simpson*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692. Section 801 of Title 21 provides that any person convicted of robbery with a firearm "shall suffer punishment by imprisonment *for life* in the State Penitentiary, *or for a period of time not less than five (5) years*, at the discretion of the court, *or the jury trying the same.*" (emphasis added). Robbery with firearms is punishable by any term of years not less than

³ At preliminary hearing, the State also offered in evidence a copy of the State's petition in the juvenile case, which states that the charge of delinquency was based on the felony crime of assault with a dangerous weapon. However, this petition was never offered in evidence at Appellant's trial. We also note that the district court's instruction to the jury on this crime failed to include this required statutory element, i.e., that the previous juvenile adjudication was for a felony offense. The relevant instruction simply told the jury that the State must prove "the defendant was adjudicated as a juvenile" prior to his possession of the firearm.

five, or by life imprisonment. *Rogers v. State*, 1969 OK CR 251, ¶ 5, 462 P.2d 313, 314 (finding the “maximum years of punishment is [sic] unlimited” under robbery with firearms statute). The instruction on this point was entirely accurate. There is no error, and no plain error. Proposition Five is denied.

In Proposition Six, Appellant challenges his sentences as excessive. Considering the facts and circumstances, the sentences imposed do not shock the Court’s conscience. Proposition Six is without merit. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148.

In Proposition Seven, Appellant seeks reversal or modification due to cumulative error. Appellant was erroneously convicted upon insufficient evidence in Count 3, which will be reversed. We find no other significant errors, and therefore no accumulation of errors requiring relief. Proposition Seven is denied. *Mitchell v. State*, 2010 OK CR 14, ¶ 129, 235 P.3d 640, 665.

DECISION

The Judgment and Sentence of the District Court of Tulsa County in Counts 1 and 2 is **AFFIRMED**. Count 3 is **REVERSED** and **REMANDED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM J. MUSSEMAN, DISTRICT JUDGE**

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

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