

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES LEE GILFORD, JR.,)
)
Appellant,)
)
v.)
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION

Case No. F-2010-1237

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP - 5 2012

SUMMARY OPINION

A. JOHNSON, PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant James Lee Gilford, Jr. was tried by jury and convicted of Robbery with a Weapon (Count I), in violation of 21 O.S.2001, § 801, Assault and Battery with a Dangerous Weapon (Count II), in violation of 21 O.S.Supp.2006, § 645, Assault While Masked or Disguised (Count III), in violation of 21 O.S.2001, § 1303, and First Degree Burglary (Count IV), in violation of 21 O.S.2001, § 1431, each after former conviction of six felonies, in the District Court of Tulsa County, Case No. CF-2009-25. The jury fixed punishment at life imprisonment on each count. The Honorable Kurt G. Glassco, who presided at trial, sentenced Gilford accordingly and ordered the sentences to be served consecutively.¹ The court also imposed a \$100 fine on Count III. From this Judgment and Sentence Gilford appeals, raising the following issues:

¹ Gilford must serve 85% of his sentences on Counts I and IV before becoming eligible for parole consideration. 21 O.S.Supp.2007, § 13.1.

- (1) whether the State's use of peremptory challenges to remove minorities from the petit jury violated his rights under *Batson v. Kentucky*² and his rights under the equal protection clauses of the federal and state constitutions;
- (2) whether he was denied due process and his rights to confrontation and a fair trial when the State presented the jury with materially misleading and inaccurate information concerning the criminal history, testimonial *quid pro quo*, and credibility of a key State's witness;
- (3) whether multiple convictions and sentences for robbery with a weapon, assault and battery with a dangerous weapon and assault while masked or disguised were based upon a single act against a single victim and violated his rights to be free from multiple punishment under 21 O.S.2001, § 11; and
- (4) whether the judgment and sentence on Count II contains material and prejudicial inaccuracies and should be modified.

We find reversal is required on Counts II and III for the reasons discussed below. We, however, affirm the Judgment and Sentence of the District Court on Counts I and IV.

1. Jury Selection

The district court chose to believe the prosecutor's proffered race neutral explanations with regard to the three panelists Gilford complains were removed in violation of *Batson v. Kentucky*. The record supports the district court's ruling that Gilford failed to meet his burden of showing discriminatory intent in the removal of these panelists. *Grant v. State*, 2009 OK CR 11, ¶¶ 26-28, 205 P.3d 1, 14-15; *Smith v. State*, 2007 OK CR 16, ¶¶ 11-16, 157 P.3d 1155, 1162-63. Hence, we find that the district court did not clearly err in determining

² 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

that there was no *Batson* violation. *Smith*, 2007 OK CR 16, ¶ 16, 157 P.3d at 1163.

2. Due Process

We cannot find on this record that Gilford was denied due process, his right to confrontation or a fair trial by the prosecution's failure to timely disclose a plea agreement made with co-defendant Livingston or its failure to disclose the existence of Livingston's prior misdemeanor involving dishonesty.³

"Evidence of a witness's bias, credibility and motivation for testifying is always relevant." *Baker v. State*, 2010 OK CR 19, ¶ 5, 238 P.3d 10, 11. We have considered the materiality of the untimely disclosed and non-disclosed impeachment information and find that there is not a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Jones v. State*, 2006 OK CR 5, ¶ 51, 128 P.3d 521, 540-41; *Wright v. State*, 2001 OK CR 19, ¶ 22, 30 P.3d 1148, 1152.

³ In conjunction with this claim, Gilford asks this Court to take judicial notice of records from Tulsa Municipal Court Case No. 5417948, showing that Livingston pled no contest to Larceny of Merchandise from a Retailer (a misdemeanor involving dishonesty) and to take judicial notice of records from Tulsa County District Court Case No. CM-2008-97, in which Livingston was charged prior to the present case with two misdemeanor drug charges. (Exhibits A and B) Livingston's larceny case is mentioned in the Tulsa County records of Case No. CM-2008-97 and Gilford argues that the State was on notice of Livingston's misdemeanor involving dishonesty. These records are certified copies of the actual records. In the alternative, Gilford asks this Court to direct a supplementation of the record with this information under Rule 3.11, (A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012) This Court may take judicial notice of these records under 12 O.S.2011, § 2202(B). See also *Collier v. Reese*, 2009 OK 86, ¶ 8, n.7, 223 P.3d 966, 970, n.7; *McHam v. State*, 2005 OK CR 28, ¶ 33, 126 P.3d 662, 672.

See also Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995)(“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”)

3. Multiple Punishment

Title 21 O.S.2001, § 11(A) governs multiple punishments for a single criminal act.⁴ “The proper analysis of a § 11 claim focuses on the relationship between the crimes.” *Head v. State*, 2006 OK CR 44, ¶ 11, 146 P.3d 1141, 1144; *see also Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126. Section 11 does not bar the charging and conviction of two separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 127. “Section 11 is not violated where offenses arising from the same transaction are separate and distinct and require dissimilar proof.” *Jones v. State*, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 543.

Under the facts of this case, the assault and battery and assault while masked were the same act comprising the robbery. Robbery with a dangerous

⁴ Section 11 provides in relevant part that:

[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

weapon is the wrongful taking and carrying away of another's personal property from the person by force through the use of a dangerous weapon. See OUJI-CR2d 4-144. In this case, Gilford pushed his way into the victim's room, wearing a mask, and stabbed the victim while his confederate, Livingston, took the victim's bag with money and drugs. The acts of assault were part and parcel of the force used to effectuate the robbery and avoid detection. The acts were simultaneous with no temporal separation and against a single victim. We find that Gilford's convictions for Assault and Battery with a Dangerous Weapon and Assault While Masked violate the prohibition against multiple punishment for a single act in § 11 and must be reversed.

4. *Nunc Pro Tunc* Order

The dismissal of Count II—because of the multiple punishment violation—renders this claim concerning inaccuracies in the Judgment and Sentence for Count II moot.

DECISION

The Judgment and Sentence of the district court on Counts I and IV is **AFFIRMED**. The Judgment and Sentence of the district court on Counts II and III is **REVERSED with instructions to dismiss**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2012), the **MANDATE is ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

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

RE

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LUMPKIN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

I concur in the Court's decision to affirm the Judgment and Sentence as to Counts I and IV and to the reversal of Count II. However I dissent to the reversal of Count III.

First, I note that despite the fact that Appellant admits that he failed to preserve appellate review of his statutory multiple punishment claim the Opinion fails to properly apply plain error review. This Court has clearly determined it will review a statutory multiple punishment claim only for plain error when the issue was not raised in the trial court. *Head v. State*, 2006 OK CR 44, ¶ 9, 146 P.3d 1141, 1144. Therefore, this Court reviews Appellant's statutory multiple punishment claim under the three part test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

The first step is to determine whether Appellant has shown the existence of an actual error. *Id.*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923. Because plain error is not a separate basis of appellate review, the Court turns to the rule of law applicable to the particular claim to make this determination. *See Hogan*, 2006 OK CR 19, ¶ 39, 139 P.3d at 923 (reviewing settled law regarding jury instructions in assessing whether an actual error occurred); *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 701 (finding that plain error is not a separate basis for appellate relief).

The proper analysis of a claim raised under Section 11 is then to focus on the relationship between the crimes. If the crimes truly arise out of one act. . . then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal

provisions cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

Davis v. State, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. “[W]here there are a series of separate and distinct crimes, Section 11 is not violated.” *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126.

In *Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254, this Court found that the defendant’s convictions for first degree burglary, rape, sodomy and unauthorized use of a motor vehicle were a series of separate and distinct crimes. “[T]he convictions did not violate Section 11 because the burglary was complete upon the forced entry with the intent to commit a crime and the crimes committed inside the residence were not necessary elements of burglary.” *Davis*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126 (citing *Ziegler*, 1980 OK CR 23, ¶ 10, 610 P.2d at 254). In *Rogers v. State*, 1994 OK CR 82, 889 P.2d 288, this Court determined that the offenses of Robbery With a Firearm and Unlawful Wearing of a Mask were separate and distinct crimes. *Id.*, 1994 OK CR 82, ¶¶ 24-25, 889 P.2d at 292-93. The crime of Unlawful Wearing of a Mask was completed when the appellant, while masked, assaulted the cashier with a firearm. *Id.*, 1994 OK CR 82, ¶ 25, 889 P.2d at 293. Therefore, this Court determines whether the crimes truly arise out of one act. *Davis*, 1999 OK CR 48, ¶ 13, 993 P.2d at 126.

Turning to the record in the present case, Appellant committed three separate acts constituting three separate and distinct crimes. The offense

charged in Count IV, First Degree Burglary, was the first offense to occur. This offense was complete upon Appellant's forced entry into Shelton's home with the intent to commit a crime and the crimes inside Shelton's residence were not necessary elements of the burglary. *Id.*, 1999 OK CR 48, ¶ 12, 993 P.2d at 126. Thereafter, the offense charged in Count III, Assault While Masked or Disguised, occurred. This offense was complete when Appellant, wearing a mask, assaulted Skelton with a knife. *Rogers*, 1994 OK CR 82, ¶ 25, 889 P.2d at 292-93. The offense charged in Count I, Robbery With a Weapon, was the last offense to occur. This offense was also separated from Count III, by the fact that Appellant's co-defendant participated in this offense. Appellant and his co-defendant robbed Shelton by demanding money and marijuana, stabbing Shelton in the arm, hitting him in the head, and cutting his head with the knife. This offense was complete when Appellant and his co-defendant took the money and marijuana from Shelton's immediate presence and carried it away. *Id.*; *See also* Inst. No. 4-141, OUJI-CR(2d) (Supp.2010). As such, Appellant has not proven the existence of an actual error in Counts I, III or IV. I find that plain error did not occur and that Appellant's conviction and sentence in Count III should be affirmed.

As to Count II, Assault and Battery With a Dangerous Weapon, I find that Appellant has shown the existence of an actual error. I agree that Appellant's conviction for Assault and Battery With a Dangerous Weapon arose from the same act comprising Appellant's conviction for Robbery With a Weapon. Turning to the second step of plain error analysis I find that this

error was obvious on the record despite the lack of objection. *Id.*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Further, under the third step of plain error analysis, I find that this error affected Appellant's substantial rights. *Id.*; *Simpson v. State*, 1994 OK CR 40, ¶¶ 29-30, 876 P.2d 690, 700-01; 20 O.S.2001, § 3001.1.). Plain error occurred. As such, I agree that Count II should be reversed.

I write further to point out that Appellant's *ex parte* attachments to his brief in support of Proposition II are not properly before this Court for review. *Warner v. State*, 2006 OK CR 40, ¶ 14, 144 P.3d 838, 858; Rule 3.11(B)(3), These *ex parte* attachments have neither been properly identified nor subjected to cross examination. This Court only reviews what has been admitted in the district court through the adjudicatory process or as a result of a remand for evidentiary hearing pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012). See *Dewberry v. State*, 1998 OK CR 10, ¶ 9, 954 P.2d 774, 776; *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2012) ("The Record on appeal is formulated only by matters which have been admitted during proceedings in the trial court."). We cannot take judicial notice of another court's action not within this Court's knowledge and without an admissible judgment and sentence. See *Berget v. State*, 1991 OK CR 121, ¶ 9, 824 P.2d 364, 368-69. Appellant's *ex parte* attachments can only be used to determine whether an evidentiary hearing is required not to adjudicate the issue on appeal. *Warner*, 2006 OK CR 40, ¶ 14 n.3, 144 P.3d at 858 n. 3.