

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

KENNETH KELMER JACKSON, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2004-184

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

JAN 21 2005

MICHAEL S. RICHIE  
CLERK

**SUMMARY OPINION**

**JOHNSON, PRESIDING JUDGE:**

Appellant, Kenneth Kelmer Jackson, was convicted after jury trial in Tulsa County District Court, Case No. CF-2001-1189, of Count 1: Accessory After the Fact to First-Degree Murder (21 O.S.Supp.1999, §§ 173, 175), and Count 2: Knowingly Concealing Stolen Property (21 O.S.Supp.1999, § 1713). The jury recommended punishment of fourteen years imprisonment on Count 1, and five years imprisonment on Count 2. On August 20, 2003, the Honorable Rebecca Nightingale, District Judge, sentenced Appellant in accordance with the jury's recommendation, and ordered the sentences to be served consecutively.

On appeal, Appellant raises the following propositions of error:

1. Appellant cannot lawfully be convicted of both Accessory After the Fact and Knowingly Concealing Stolen Property based upon one act.
2. Appellant was denied due process of law and did not receive a fair trial because of the repeated introduction of highly prejudicial photographs and testimony.
3. Appellant was denied his due process rights to a fair trial and reliable sentencing proceeding in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution by the combination of his trial counsel's ineffective assistance and the

prosecutorial misconduct of the prosecutor.

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm in part and reverse in part. In Proposition 1, Appellant contends his convictions for both Accessory to First-Degree Murder and Knowingly Concealing Stolen Property constitute double punishment for a single act in violation of 21 O.S.2001, § 11. We agree. The conduct comprising the Accessory charge – receiving property from a man who murdered to obtain it – was the same conduct supporting the Concealing Stolen Property charge. Under these facts, convictions for both crimes based on a single act constituted double punishment. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126; *Hale v. State*, 1995 OK CR 7, ¶ 6, 888 P.2d 1027, 1030. Count 2 is therefore **REVERSED WITH INSTRUCTIONS TO DISMISS**. As to Proposition 2, to establish Appellant's guilt for Accessory to First-Degree Murder, the State was required to prove that a murder took place, and was not obligated to accept a stipulation to that fact. *Guy v. State*, 1989 OK CR 35, 778 P.2d 470, 473. As to whether the State's evidence concerning the details of the underlying crimes was needlessly cumulative or unfairly prejudicial, considering the sufficiency of the evidence supporting Appellant's conviction, and the fact that the sentence recommended by the jury was less than one-third of the maximum, we find no prejudice. 20 O.S.2001, § 3001.1; *Prichard v. State*, 1975 OK CR 154, ¶ 11, 539 P.2d 392, 394. Proposition 2 is denied. As to Proposition 3, having found grounds for relief in Proposition 1, the portion of Appellant's ineffective-counsel argument dealing with the failure to raise the double-punishment issue at trial is moot. As for the remaining allegations of deficient performance, Appellant has failed to meet his burden of showing prejudice; as noted, the evidence against Appellant was considerable, and the sentence imposed was nowhere

near the maximum allowed by law. 21 O.S.2001, § 175(5); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), *Phillips v. State*, 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044, *cert. denied*, 531 U.S. 837, 121 S.Ct. 97, 148 L.Ed.2d 56 (2000).

### **DECISION**

The Judgment and Sentence of the district court as to Count 1 is **AFFIRMED**. Count 2 is **REVERSED WITH INSTRUCTIONS TO DISMISS**.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE REBECCA NIGHTINGALE, DISTRICT JUDGE

#### **APPEARANCES AT TRIAL**

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#### **OPINION BY JOHNSON, P.J.**

LILE, V.P.J.: CONCUR IN PART/DISSENTS IN PART  
LUMPKIN, J.: CONCUR  
CHAPEL, J.: CONCUR