



- V. It was error for the State to force Appellant to choose between two constitutional rights, his right to a preliminary hearing on the supplemental information and his right to a speedy trial, on the day trial was supposed to begin.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find merit in proposition four and other errors, which requires modification of Appellant's sentence, as further stated below.

With respect to proposition one, we find the officer's statements, alleged to be an evidentiary harpoon here, were responsive to the questions asked of him. Given the record before us and previous questioning regarding Appellant being "targeted" by police for other armed robberies, we find the trial judge did not abuse his discretion by overruling the motion for mistrial. *Knighon v. State*, 912 P.2d 878, 894 (Okl.Cr.1996.)

With respect to proposition two, we find trial error was committed when Officer Martin was erroneously allowed to testify, over defense counsel's objections, about extra-judicial identifications of Appellant made by three witnesses. Testimony by a third party that an identification was made, or that a particular person was identified, is error. *Kamees v State*, 815 P.2d 1204, 1207-08 (Okl.Cr.1991); *Maple v. State*, 662 P.2d 315 (Okl.Cr.1983). However, the error here was harmless as each of the witnesses took the stand and identified Appellant at trial. *Allen v. State*, 783 P.2d 494 (Okl.Cr.1990). While the error was somewhat compounded when the trial court allowed Martin to testify about Ms. Ramsey's extra-judicial identification when she had yet to identify Appellant in court, the record reflects Ms. Ramsey was a reluctant

witness who had previously given a statement that one of the robbers was a “boyfriend of Trina (sic) Thomas, an employee that used to work there.” Under the specific circumstances here, we find the error did not affect the outcome of this proceeding and was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

With respect to proposition three, we find no error occurred, as the statements were not offered to show action in conformity therewith, but to show the witness was biased and had a motive to lie. 12 O.S.1991, § 2404(B); *Beck v. State*, 824 P.2d 385, 388 (Okl.Cr.1991) (finding bias evidence is never collateral).

With respect to proposition five, we find Appellant was not denied his right to speedy trial under the facts of this case, and the question of whether or not he was forced to choose between two constitutional rights is moot, as per the relief granted concerning proposition four.

And finally, with respect to proposition four, we find the State should have filed an appeal under 22 O.S.1991, § 1089.1 when the Special Judge sustained a demurrer to page two of the information at the preliminary hearing, for that section provides that the State “shall have the right to appeal an adverse ruling or order of a magistrate ... sustaining a demurrer to the information.” When the State did not file an appeal from that adverse ruling, the Special Judge’s order sustaining the demurrer to the second page became final. See 22 O.S.1991, § 1089.3 (“In the event the state does not file the application to appeal... [t]he magistrate’s order shall then be final.”).

Appellant's subsequent decision to waive his right to a further preliminary hearing, following the district judge's erroneous decision to remand the matter for preliminary hearing despite the lack of appeal, did not render the final order of the Special Judge a nullity. Therefore, it was error to allow the State to proceed on page two of the information at trial, and the sentence is ordered modified to correct that error.

### **DECISION**

Appellant's conviction is hereby **AFFIRMED**, but his sentence is hereby **MODIFIED** to twenty (20) years imprisonment.

AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY  
THE HONORABLE JAMES E. EDMONDSON, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, P.J.**  
JOHNSON, V.P.J.: CONCUR  
CHAPEL, J.: CONCUR  
STRUBHAR, J.: CONCUR  
LILE, J.: CONCUR IN PART/DISSENT IN PART

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