



THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR ASSAULT WITH A DANGEROUS WEAPON WITH INTENT TO DO BODILY HARM;

- II. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION FOR FELONIOUSLY POINTING A FIREARM IN COUNT ONE BECAUSE IT WAS CLEAR THAT THE REVOLVER HAD NO CYLINDER AND COULD NOT BE FIRED, AND THUS WAS NOT A FIREARM UNDER THE RELEVANT STATUTES;
- III. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION FOR [FELONIOUS] POSSESSION OF A FIREARM; and
- IV. APPELLANT WAS SUBJECTED TO BOTH DOUBLE PUNISHMENT AND DOUBLE JEOPARDY FOR THE SAME OFFENSE.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence for Appellant's convictions and sentences for Counts 1 and 2 of the Judgment and Sentence. Hence, that part of the Judgment and Sentence is **AFFIRMED**. However, Appellant's conviction and sentence for Count 4 of the Judgment and Sentence must be **REVERSED** and **REMANDED** with instructions to **DISMISS**.

1.

"We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111 (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 560, 571 (1979) and *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04). This analysis requires

examination of the entire record. *McDaniel v. Brown*, 558 U.S. 120, 131, 130 S. Ct. 665, 672, 175 L. Ed. 2d 582 (2010); *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. “This Court will accept all reasonable inferences and credibility choices that tend to support the verdict.” *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111.

The elements of Assault and Battery with a Dangerous Weapon are: 1) an assault and battery; 2) upon another person; 3) with a sharp or dangerous weapon; 4) without justifiable or excusable cause; and 5) with intent to do bodily harm. 21 O.S.2011, § 645; *Sherburn v. State*, 1990 OK CR 10, ¶¶ 5-6, 787 P.2d 1282, 1284; OUJI-CR (2d) 4-12. This Court has held that any object used in a manner likely to produce death or great bodily harm can be a dangerous weapon. *Hay v. State*, 1968 OK CR 209, ¶ 16, 447 P.2d 447, 451-52; *Wilcox v. State*, 1917 OK CR 137, 13 Okl.Cr. 599, 601, 166 P. 74, 75.

In the present case, the black Ruger revolver used to hit Michael Culverson was not a *per se* dangerous weapon because it was inoperable. Moreover, the manner in which the gun was used did not render it a dangerous weapon. Taken in the light most favorable to the State, the evidence showed Appellant “nudged” Michael Culverson on the forehead with the barrel of the gun, knocking his hat off. To be sure, Culverson testified he was hit hard enough with the gun to feel the blow and know Appellant “meant business.” But there were no apparent injuries suffered by the victim other than a “mark” on his head. And the evidence shows Appellant “nudged” the victim with the

gun in order to prevent him from walking away—not to inflict great bodily injury or death.

All things considered, insufficient evidence was presented to show that the manner in which Appellant used the gun in hitting the victim's forehead made the gun a dangerous weapon likely to cause great bodily injury. Relief is granted for Proposition I and his conviction and sentence for Assault and Battery with a Dangerous Weapon is reversed and remanded with instructions to dismiss.

**2.**

Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to conclude beyond a reasonable doubt that Appellant feloniously pointed a pistol at Michael Culverson as alleged in Count 1. Although the black Ruger revolver was missing its cylinder when Appellant pointed it at the victim, the issue is whether this gun was designed to discharge a projectile by the means described in 21 O.S.2011, § 1289.3. The record shows this gun was designed to discharge projectiles by the means described in the statute. Proposition II is denied. 21 O.S.2011, § 1289.3; 21 O.S.Supp.2012, § 1289.16; *Wimberly v. State*, 1985 OK CR 37, ¶¶ 4-7, 698 P.2d 27, 30.

**3.**

Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier of fact to find beyond a reasonable doubt the essential elements of the Count 2 Possession of a Firearm After

Former Felony Conviction charge. The State presented evidence that Appellant was a convicted felon who possessed a black Ruger revolver—albeit one incapable of firing. The legislative intent behind 21 O.S.Supp.2012, § 1283(A) “was to keep guns, real or imitation, out of the possession or control of felons. Hence, whether or not the pistol is capable of firing is not an element that must be proven to sustain a conviction under Section 1283.” *Sims v. State*, 1988 OK CR 193, ¶¶ 7-8, 762 P.2d 270, 271-72. Proposition III is denied.

4.

Appellant did not raise his double punishment and double jeopardy claims below, thus waiving review on appeal for all but plain error. *Barnard v. State*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767; *Logsdon v. State*, 2010 OK CR 7, ¶ 15, 231 P.3d 1156, 1164. Under the plain error test, Appellant must show an actual error, which is plain or obvious, and which affects his substantial rights. We will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Stewart v. State*, 2016 OK CR 9, ¶ 12, 372 P.3d 508, 511.

Where there is a series of separate and distinct crimes, requiring dissimilar proof, Section 11’s ban on “double punishment” is not violated. *Sanders v. State*, 2015 OK CR 11, ¶¶ 6-8, 358 P.3d 280, 283-84; *Logsdon*, 2010 OK CR 7, ¶ 17, 231 P.3d at 1165. Here there is a temporal break in time between Appellant’s act of feloniously pointing the black Ruger revolver at Michael Culverson and his subsequent possession of this same weapon both at

Margarita Pardo's apartment and later when he disposed of the pistol on the grounds of the apartment complex. There was no double punishment violation in this case and, thus, no plain error. *Bosse v. State*, 2015 OK CR 14, ¶ 43, 360 P.3d 1203, 1223, *rev'd on other grounds*, *Bosse v. Oklahoma*, No. 15-9173, slip op. (U.S. Oct. 10, 2016).

There was also no double jeopardy. Feloniously pointing a firearm and possession of a firearm after former felony conviction are two separate and distinct offenses. Each crime requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932); *Logsdon*, 2010 OK CR 7, ¶ 19, 231 P.3d at 1165. There is no error and thus, no plain error. Proposition IV is denied.

#### DECISION

Jones's convictions and sentences for Counts 1 and 2 of the Judgment and Sentence are **AFFIRMED**. The conviction and sentence for Count 4 of the Judgment and Sentence is **REVERSED** and **REMANDED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY  
THE HONORABLE KEN J. GRAHAM, DISTRICT JUDGE

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**OPINION BY: HUDSON, J.**  
**SMITH, P.J.: CONCUR IN RESULTS**  
**LUMPKIN, V.P.J.: CONCUR**  
**JOHNSON, J.: CONCUR**  
**LEWIS, J.: CONCUR**