

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GREGORY KYLE MALONE,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2003-257

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 15 2004

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, JUDGE:

Gregory Kyle Malone was tried by jury and convicted of Count I, First Degree Burglary in violation of 21 O.S.1991, § 1431; and Count II, Robbery With a Dangerous Weapon in violation of 21 O.S.1991, § 801, after former conviction of two or more felonies, in the District Court of Tulsa County, Case No. CF-1999-6052.¹ In accordance with the jury's recommendation the Honorable Rebecca Brett Nightingale sentenced Malone to twenty (20) years imprisonment on Count I, and forty (40) years imprisonment on Count II. Malone appeals from these convictions and sentences.

Malone raises four propositions of error in support of his appeal:

- I. The court improperly instructed the jury it could convict on Count One if it found essential elements of an offense for which Malone was not on trial;
- II. The evidence was insufficient to sustain a conviction on Count One as charged;
- III. Prosecutorial misconduct during second stage closing requires modification of the sentences imposed; and
- IV. The court improperly punished Malone with consecutive sentences for two counts which penalized the same criminal conduct.

¹ Malone was acquitted of Count III, Assault With a Dangerous Weapon.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, exhibits and briefs, we find that the law and evidence require reversal on Count I only. Count II is affirmed.

In Proposition I Malone claims the trial court improperly instructed the jury on an offense with which he was not charged. The elements of first degree burglary are breaking and entering another's occupied house with the intent to commit some crime inside.² However, the State's Information in this case was unusually precise. Count I charged Malone with breaking into a house "to commit the crime of Robbery/Assault with a Dangerous Weapon." That is, Malone was charged with burglary with the intent to commit the crimes he was charged with committing inside the house. Over Malone's objection the trial court instructed jurors on the basic elements of first degree burglary. The trial court also instructed the jury on the meaning of "intent to steal", which was neither charged nor otherwise instructed on in this case.

These instructions violated his due process rights by improperly broadening the elements of the crime with which he was actually charged. A defendant has the right to have the jury instructed on each element of the charged crime.³ The State's burden changed when prosecutors charged Malone with first degree burglary with the particular intent to commit robbery or assault. Rather than having to prove that Malone intended to commit "some" crime when he committed burglary, the State had the burden to prove

² 21 O.S.2001, § 1431; OUJI-CR (2nd) 5-12.

Malone intended to commit robbery or assault. That was the crime charged within the four corners of the Information, it was the crime proved at preliminary hearing, and it was the crime on which Malone had notice he was to defend himself at trial.⁴ By pleading specific language, the State told Malone those were the specific crimes he must defend against, not the more general statutory language of “some crime”. This Court has found error requiring reversal where the trial court instructs on a crime other than the crime charged.⁵

In deciding this issue, we do not consider whether the evidence at trial supported either the crime charged in the Information or the crime on which the jury was instructed. The strength of the evidence is completely irrelevant to the question raised. The only issue is whether the trial court correctly instructed on the law of the case. The trial court should give the standard uniform instructions unless the instructions do not accurately state the law.⁶ However, this implies that the trial court has a duty to ensure that the uniform instructions accurately reflect the law. The specific language used in Malone’s Information rendered the uniform instructions inaccurate in this case. The

³ *Pinkley v. State*, 2002 OK CR 26, 49 P.3d 756, 758-59; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

⁴ *Parker v. State*, 1996 OK CR 19, 917 P.2d 980, 985, *cert. denied*, 519 U.S. 1096, 117 S.Ct. 777, 136 L.Ed.2d 721 (1997).

⁵ *Edwards v. State*, 1991 OK CR 71, 815 P.2d 670, 671 (State conceded error and successfully argued that remand rather than dismissal was the proper remedy); *Carter v. State*, 1988 OK CR 250, 764 P.2d 206, 209, *overruled on other grounds by Edwards v. State*, 1991 OK CR 71, 815 P.2d 670 (finding that proper remedy for instruction error was dismissal). This Court has also found error requiring relief where a trial court’s misinstruction on the elements broadened the crime charged beyond its statutory definition. *Atteberry v. State*, 1986 OK CR 186, 731 P.2d 420, 422. Here, the trial court’s misinstruction, while within the statutory definition, was broader than the crime as charged in the Information.

trial court abused its discretion in instructing jurors on “intent to commit some crime” and “intent to steal” over Malone’s objection. This Proposition is granted, and Count I is reversed and remanded. Given this resolution, Proposition II is moot.

We find in Proposition III that the prosecutor’s argument outside the facts in this case was cured when the trial court sustained Malone’s objection to the comments and admonished the jury to disregard them.⁷ We find in Proposition IV that Malone completed the burglary in this case before he discovered the weapon and committed robbery with a dangerous weapon. While any claim of error in sentencing is moot given our resolution of Proposition I, the statutory prohibition against multiple punishment for crimes arising from one act does not prevent a retrial on Count I.⁸

Decision

The Judgment and Sentence of the District Court on Count I is **REVERSED** and **REMANDED**. The Judgment and Sentence of the District Court on Count II is **AFFIRMED**.

⁶ 12 O.S.2001, § 577.2.

⁷ *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 887-88. Malone cannot show this error substantially affected his sentence, as the jury gave him the minimum sentence on the burglary charge. In any event, any claim of error in this sentence is moot given our resolution of Proposition I. The prosecutor’s statement referring to safety in one’s home, in context of an explanation of why burglary is a felony, was an argument from the law and not improper.

⁸ 21 O.S.2001, § 11.

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OPINION BY: CHAPEL, J.

JOHNSON, P.J.: CONCUR
LILE, V.P.J.: DISSENT
LUMPKIN, J.: CONCUR IN RESULTS
STRUBHAR, J.: CONCUR IN RESULTS

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