

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANTHONY WAYNE MCCOSAR,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-2008-432

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 17 2009

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

C. JOHNSON, PRESIDING JUDGE:

Appellant, Anthony Wayne McCosar, was convicted after jury trial in Tulsa County District Court, Case No. CF-2007-6518, of Assault and Battery with a Dangerous Weapon, After Former Conviction of Two or More Felonies (Count I), Threatening an Act of Violence (Count II), Public Intoxication (Count III) and Assault with a Dangerous Weapon, After Former Conviction of Two or More Felonies (Count IV). The jury assessed punishment at twenty five years imprisonment and a \$10,000 fine on Count I, six months on Count II, 30 days on Count III and twenty years imprisonment and a \$10,000 fine on Count IV. The trial court sentenced Appellant accordingly, ordering Appellant's sentences on Counts I and IV to run consecutively with each other and to run concurrently with sentences imposed on Counts II and III. It is from this Judgment and Sentence that Appellant appeals to this Court.

Appellant raises the following propositions of error:

1. The \$20,000 in fines assessed against Mr. McCosar were the result of erroneous jury instructions and should be vacated or modified.

2. Prosecutorial misconduct constituted fundamental error and deprived Mr. McCosar of a fair trial.
3. Mr. McCosar was prejudiced by ineffective assistance of counsel.
4. Under the facts and circumstances of Appellant's case, Mr. McCosar's consecutive sentences that total forty-five years imprisonment are excessive, should shock the conscience of this Court and should be favorably modified.
5. The cumulative effect of all these errors deprived Appellant of a fair trial and warrants relief for Mr. McCosar.

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 Mr. McCosar's judgment and modify his sentence. As to Proposition I, we find that Appellant was charged in Counts I and IV under 21 O.S.2001, § 645, which does not provide for the assessment of a monetary fine. Although a fine for these crimes could be assessed under the general fine statute, 21 O.S.2001, § 64(B), this statute does not require such. Contra to the permissive language of the general fine statute, the trial court's instructions misled the jury to believe that the imposition of a \$10,000 fine was mandatory in both Counts I and IV. While defense counsel did not object to these instructions, we find that these erroneous instructions constituted plain error requiring relief. *McFarland v. State*, F-2006-17 (November 14, 2007). Accordingly, we vacate the fines imposed in Counts I and IV.

With regard to Proposition II, we find that most of the comments at issue were proper. Further, given the State's evidence against Appellant, any inappropriate comments made by the prosecutor and not objected to did not

deprive Appellant of a fair trial or affect the jury's finding of guilt or assessment of punishment. There was no plain error here. *DeRosa v. State*, 2004 OK CR 19, ¶ 53, 89 P.3d 1124, 1145.

In Proposition III, we find that Appellant was not denied his Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246.

In Appellant's fourth proposition he claims that his sentences were excessive. It is first significant to note that this Court has vacated the fines imposed on Counts I and IV due to error alleged in Proposition I. Further, Appellant's sentences were at the lower range of punishment prescribed by statute. The sentence imposed on Count IV was the minimum allowed and the sentence imposed on Count I was only five years above the minimum allowed. Although sentences on Counts I and IV were ordered to run consecutively, the other sentences were ordered to run concurrently with the sentences imposed on Counts I and IV. The sentences imposed do not shock the conscience of the Court and were not excessive. *Rea v. State*, 2001 OK CR 28, ¶ 5, n.3, 34 P.3d 148, 149 n.3.

Finally, Appellant claims that the errors alleged, when considered cumulatively, warrant relief. This Court has recognized that when there are "numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial." *DeRosa*, 2004 OK CR 19, ¶

100, 89 P.3d at 1157, quoting *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. The errors alleged, considered both singly and cumulatively, do not require relief because they did not render his trial fundamentally unfair or taint the jury's verdict.

DECISION

The Judgments of the district court are **AFFIRMED**. The Sentences for Counts II and III are **AFFIRMED**. The Sentences for Counts I and IV are **MODIFIED** to **VACATE** the \$10,000 fines. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM C. KELLOUGH, DISTRICT JUDGE

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OPINION BY C. JOHNSON, P.J.
A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR
LEWIS, J.: CONCUR

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