

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID DEONTAE MCCOY,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2009-129

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 27 2010

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Appellant, David Deontae McCoy, was tried by jury and found guilty of Count 1, burglary in the first degree,¹ in violation of 21 O.S.2001, § 1431; Count 2, robbery by two or more persons,² in violation of 21 O.S.2001, § 800; Count 3, assault and battery with a dangerous weapon, in violation of 21 O.S.Supp.2006, § 645; and Count 4, assault with a dangerous weapon, in violation of 21 O.S.Supp.2006, § 645; all after former conviction of two or more felonies, in the District Court of Oklahoma County, Case No. CF-2007-6878. The jury returned guilty verdicts and recommended Appellant serve twenty (20) years imprisonment on Count 1; twenty (20) years imprisonment on Count 2; thirty (30) years imprisonment on Count 3, and twenty-five (25) years imprisonment on Count 4. The honorable Virgil Black, District Judge, pronounced judgment in accordance with the verdict, and ordered the

¹ Burglary in the first degree is subject to the 85% requirement of 21 O.S.Supp.2002, § 13.1(7).

² Robbery by two or more persons (conjoint robbery) is also subject to the 85% requirement of 21 O.S.Supp.2002, § 13.1(7).

sentences served concurrently. Appellant timely appealed, raising the following propositions of error:

1. The Appellant's convictions were predicated upon the unreliable and mistaken eyewitness identification of Megan Kinter.
2. Mr. McCoy's convictions must be reversed because the trial court erred by failing to give a cautionary jury instruction on eyewitness identification.
3. Multiple charges, convictions, and punishments for counts 1,2, and 4, offenses involving Megan Kinter and counts 1 and 3, offenses involving Jessy Samples violate Appellant's constitutional protection against double jeopardy and/or statutory protection against double punishment.
4. Appellant was denied due process of law as to the conviction on count IV – assault with a dangerous weapon by the trial court's failure to submit the required jury instruction on the essential elements of this charge.
5. The admission of photographs (State's Exhibits 19–21) violated Appellant's confrontation rights, regardless of whether there was any proper exception to the hearsay rule under state law.
6. The repeated instances of misconduct by the prosecutors deprived Mr. McCoy of a fair trial and resulted in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article Two, Section Twenty of the Oklahoma Constitution.
7. Mr. McCoy was deprived of the effective assistance of counsel during both stages of trial as guaranteed by the Sixth Amendment of the United States Constitution.
8. The accumulation of errors deprived Mr. McCoy of a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article Two, Section Seven of the Oklahoma Constitution.
9. The written judgment and sentence entered into the record should be corrected by and order *nunc pro tunc* to accurately reflect that Mr. McCoy as to counts III and IV of the information was convicted of assault and battery with a

dangerous weapon (CT III) and assault with a dangerous weapon (CT IV).

In Proposition One, we find that the evidence was more than sufficient to show that Appellant was at least a principal aider and abettor in the crimes charged. *Bennett v. State*, 1987 OK CR 208, ¶ 11, 743 P.2d 1096, 1098. This proposition is without merit.

Proposition Two argues that the district court erred by failing to give a cautionary instruction on eyewitness identification. No cautionary instruction was requested at trial. We review only for plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 10, 876 P.2d 690, 695. We find that there was no likelihood of an improper misidentification that would warrant a cautionary instruction here. Failure to give such an instruction was not plain error. *Johnson v. State*, 1986 OK CR 156, ¶ 14, 727 P.2d 965, 970.

Appellant's Proposition Three argues that his multiple convictions violate the statutory prohibition against multiple punishments and the constitutional protection against double jeopardy. 21 O.S.2001, § 11; U.S. Const. Amends. V, XIV; Okla. Const. art. II, § 21. We disagree. Appellant's convictions are separate and distinct criminal acts that do not subject him to unlawful multiple punishments or double jeopardy. *Davis v. State*, 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-127.

In Proposition Four, Appellant argues the district court committed fundamental error when it failed to instruct the jury on the elements of assault with a dangerous weapon as charged in Count 4. Appellant waived this error by failing to object or request different instructions at trial, and we review only

for plain error. *Simpson*, 1994 OK CR 40, ¶ 10, 876 P.2d at 695. In *Pierce v. State*, 1988 OK CR 294, 766 P.2d 365, this Court held:

The failure of the trial court to instruct on an essential element of the offense charged is fundamental reversible error, as it constitutes a substantial violation of an accused's constitutional and statutory rights. The trial judge, whether requested or not, has an obligation to instruct the jury on the essential elements of the offense charged.

Id., 1988 OK CR 294, ¶ 3, 766 P.2d at 366 (internal citations omitted).

The essential elements of assault with a dangerous weapon are: (1) an assault; (2) upon another person; (3) with a sharp or dangerous weapon; (4) without justifiable or excusable cause; (5) with intent to do bodily harm. 21 O.S.Supp.2006, § 645; Instruction No. 4-12, OUJI-CR(2d). Proof of "intent to do bodily harm" is a necessary element of assault and battery with a dangerous weapon. *James v. State*, 1979 OK CR 82, ¶ 4, 599 P.2d 411, 412. The district court's failure to instruct on this essential element was a substantial violation of Appellant's statutory and constitutional rights. Instructional error of this type may be harmless. *Primeaux v. State*, 2004 OK CR 16, ¶ 81, 88 P.3d 893, 908. The question is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.*, 2004 OK CR 16, ¶ 81, 88 P.3d 893, 908, citing *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999); see also 20 O.S.2001, § 3001.1 (judgment shall not be reversed for instructional error unless it has "probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."). Under the specific facts here, we cannot say beyond a reasonable doubt that a properly

instructed jury would have found the defendant guilty. Count 4 is therefore reversed and remanded for a new trial. The district court omitted this same essential element from the instructions on Count 3, assault and battery with a dangerous weapon. This claim is not raised on appeal. Because Count 3 involved Appellant stabbing the victim with no justifiable cause, we find the error in the omission of the element of "intent to do bodily harm" from the instructions on Count 3 was harmless beyond a reasonable doubt.

In Proposition Five, Appellant challenges the admission of unfairly prejudicial photographs. This error is waived by the failure to object at trial. *Turrentine v. State*, 1998 OK CR 33, ¶ 53, 965 P.2d 955, 973. We find no plain error in admitting the photographs into evidence. Proposition Five is therefore denied.

Appellant's Proposition Six argues that prosecutorial misconduct denied him a fair trial. The single instance of improper conduct by the prosecutor was cured by the district court's admonition to the jury. *Garrison v. State*, 2004 OK CR 35, ¶ 96, 103 P.3d 590, 608. Proposition Six requires no relief.

In Proposition Seven, Appellant claims he was denied the effective assistance of counsel. Applying the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we find that Appellant has failed to show that his trial counsel's conduct was prejudicial to the outcome of his trial. Proposition Seven is denied. We likewise reject the argument in Proposition Eight, that the cumulative prejudicial effect of errors

rendered Appellant's trial and sentence unreliable. *Jackson v. State*, 2007 OK CR 24, ¶33, 163 P.3d 596, 605.

In Proposition Nine, we find that the Judgment and Sentence incorrectly shows that Appellant was convicted in Count 3 of assault and battery with a *deadly* weapon and in Count 4 of assault with a *deadly* weapon (O.R. 183). We therefore order that the trial court remedy this error by an order *nunc pro tunc* correcting those errors to reflect Appellant's actual convictions of assault and battery with a dangerous weapon in Count 3 and assault with a dangerous weapon in Count 4.

DECISION

Counts 1 and 2 are **AFFIRMED**. The Judgment and Sentence of the District Court in Count 3 is **REMANDED** for correction nunc pro tunc as specified herein, and otherwise **AFFIRMED**.³ Count 4 is **REVERSED** and **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE**

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A. JOHNSON, V.P.J.: Concur
LUMPKIN, J.: Concur in Results

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³ It is unnecessary to correct the error in Count 4 because that count is remanded for new trial on other grounds.