

JUN - 8 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA  
MICHAEL S. RICHIE  
CLERK

DELBERT EARL MCNEIL, JR.	)	
	)	
Appellant,	)	
v.	)	Case No. F-2004-197
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

**SUMMARY OPINION**

**CHAPEL, PRESIDING JUDGE:**

Delbert Earl McNeil, Jr., was tried by jury and convicted of Count I, Possession of a Controlled Dangerous Substance in violation of 63 O.S.2001, § 2-402; Count III, Resisting an Officer (Misdemeanor) in violation of 21 O.S.2001, § 268; and Count V, Speeding in violation of 47 O.S.Supp.2003, § 11-801, in the District Court of McClain County, Case No. CF-2003-180.1 In accordance with the jury's recommendation the Honorable Candace L. Blalock sentenced McNeil to two (2) years imprisonment (Count I); a \$500 fine (Count III); and ten (10) days incarceration in the county jail and a \$50.00 fine (Count V). McNeil received credit for time served on the ten days in county jail and all fines were suspended. McNeil appeals these convictions and sentences.

McNeil raises four propositions of error on appeal:

- I. McNeil was denied a fair trial by improper admission of evidence of other crimes or bad acts unrelated to the charges on trial;
- II. McNeil was denied a fair trial by the evidentiary harpoons Trooper Anderson injected in his trial testimony;

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<sup>1</sup> McNeil was acquitted of Count II, possession of drug paraphernalia, and Count VI, littering. The State dismissed Count IV, driving without a license.

- III. McNeil was denied a fair trial by the prosecutor's impropriety in defining "reasonable doubt" during voir dire, and by the trial court's failure to advise the jury that the defense objection had been sustained and refusal to admonish the jury, as requested by the defense; and
- IV. McNeil's sentence on Count V - speeding, exceeds the maximum allowed by statute.

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. We find in Proposition II that the evidentiary harpoons and grossly improper testimony given by the officer were not cured by the trial court. Anderson's testimony was rife with harpoons designed to prejudice Anderson. Normally, we would hold that the trial court's admonition to the jury cured error in two of the statements.<sup>2</sup> However, the cumulative effect of Anderson's testimony was to suggest that McNeil, to his knowledge, was a much worse person, and much more dangerous criminal, than the evidence before this jury suggested. The evidence for the felony of possession of methamphetamine was circumstantial and not overwhelming. Anderson's repeated references to other crimes, McNeil's supposed dangerousness, and (particularly) methamphetamine manufacture, could only have improperly influenced the jury's conclusion that, if methamphetamine was present at the scene, it must have been McNeil's. McNeil deserved a trial before a jury free from this kind of improper inference. A trial court's admonitions will not cure error where, after considering the evidence, the error appears to have

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<sup>2</sup> *Welch v. State*, 2000 OK CR 8, 2 P.3d 356, 369-70, *cert. denied*, 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567; *Anderson v. State*, 1999 OK CR 44, 992 P.2d 409, 421, *cert. denied*, 531 U.S. 850, 121 S.Ct. 124, 148 L.Ed.2d 79 (2000).

determined the verdict.<sup>3</sup> This proposition is granted, and the case is reversed and remanded for a new trial. As the case must be reversed, we do not consider McNeil's remaining propositions of error.

### **Decision**

The Judgments and Sentences of the District Court on Counts I and III are 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. 2005, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

#### **ATTORNEYS AT TRIAL**

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

#### **ATTORNEYS ON APPEAL**

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<sup>3</sup> *Al-Mosawi v. State*, 1996 OK CR 59, 929 P.2d 270, 284, *cert. denied*, 522 U.S. 852, 118 S.Ct. 145, 139 L.Ed.2d 92 (1997).

## **DISSENT: LUMPKIN, VICE PRESIDING JUDGE**

The opinion of the Court uses far too much energy looking at Trooper Anderson's alleged bias against Appellant, and neglects to review the actual issues being declared evidentiary harpoons. A review of the claims reveals one that the trial judge allowed into evidence for questioning on cross-examination, one that did not even receive an objection from defense counsel, one that was invited by defense counsel, and two that were sustained, but do not even come close to the level that warrant their consideration as "harpoons". A claim-by-claim review exposes the puffery being applied to these "harpoons" and a disregard of what were in actuality mere statements of fact, not a showing of any bias..

### **1. Trooper Anderson's "Dangerous" Comment**

During Trooper Anderson's direct testimony of what occurred as he approached Appellant's vehicle, he mentioned that based on his past experience with the Appellant, he was to be considered "dangerous." Following an objection and bench conference, the trial judge admonished the jury to disregard the comment. This Court has consistently held that when inadmissible evidence or an improper comment is presented to a jury, an admonishment to the jury by the court that the evidence or comment is not to be considered will cure any error. *Welch v. State*, 2000 OK CR 8, ¶¶ 25-6, 2 P.3d 356, 369-70 (Okla. Crim. 2000). Because the trial judge properly admonished the jury the error was cured.

### **2. Suspended Driver's License**

Appellant claims that a harpoon arose at trial when Trooper Anderson stated that he "was pretty sure that [Appellant's] driver's license was still suspended." When defense counsel objected to the response, the trial judge overruled and suggested counsel make his point on cross examination.

Determining whether an evidentiary harpoon has been thrown requires the six steps this Court applied in Ochoa v. State, 1998 OK CR 41, ¶ 39; 963 P.2d 583, 598. Step three of this test requires that the statement be "willfully jabbed rather than inadvertent." *Id.* The fifth requirement requires that the statement be "calculated to prejudice the defendant." *Id.* A reading of the transcript indicates that Trooper Anderson did not willfully jab at Appellant, nor did he calculate to prejudice the Appellant with this comment. Trooper Anderson made the statement to explain the reason he removed Appellant from the vehicle. No evidentiary harpoon is present.

### **3. Inventory search of the vehicle.**

On direct examination, Trooper Anderson was questioned about the inventory that he conducted. The line of questioning involved what procedures the highway patrol requires, and what he did in his collection. In response to the prosecutor's request for a description of what he did in his search, Trooper Anderson described the results of his search concluding that several items were, "used to manufacture methamphetamine.", Defense counsel objected. While the trial judge could have as easily admitted the testimony as part of the *res gestae* of the crime charged, the trial judge sustained the objection.

There is no indication in the line of questioning that this was willfully jabbed, or calculated to prejudice the defendant. *Ochoa*, 963 P.2d at 598. The response was included following a list of items the trooper found in the vehicle, which are commonly used for illegal means. No harpoon is present.

#### **4. Testimony About the Gas Can**

Appellant also claims that Trooper Anderson's testimony on cross-examination regarding a gas can in the bed of Appellant's truck had the appearance of one commonly used in methamphetamine manufacture. A reading of the testimony indicates that not only is this not an evidentiary harpoon, it was invited and not objected to.

Trooper Anderson was questioned about his testimony on direct examination that indicated a gas can with a hose attached to it was found in the bed of the truck. From his experience, when a gas can is constructed in such a fashion the indication is that it is being used in the manufacture of methamphetamine. The answer was responsive to the question asked, no objection was entered, and therefore no error occurred.

#### **5. "Meth Cook" testimony**

The only comment made at trial by Trooper Anderson that rises to the level of an evidentiary harpoon occurred at the goading of defense counsel. Continuing a harassing line of testimony, defense counsel appears to seek out a mistrial:

[MR. DOUGLAS]:                    You knew it was meth?

[TROOPER ANDERSON]:        I had no doubt in my mind it was.

[MR. DOUGLAS]: Because you deal with the criminal element, and this is a poor black man down the highway that you had met before. And he's just automatically a drug dealer, and automatically that's methamphetamine because you didn't like him?

[TROOPER ANDERSON]: Well, no, he's a meth cook from Garvin County. That's the reason I knew.

(Tr. II, pp. 135-36)

Upon receiving the anticipated response from Trooper Anderson, defense counsel immediately moved for mistrial. While the trial judge agreed that this was a harpoon and admonished the jury, she also noted that it was invited. It is a universally recognized principle in the law that invited error is not error and the opposing party has the right to respond. *See Hooper v. State*, 947 P.2d 1090, 1100, (Okl.Cr.1997), *cert. denied*, 524 U.S. 943, 118 S.Ct. 2353, 141 L.Ed.2d 722 (1998). Because the error was invited, there occurred no harpoon in this exchange.

### **Totality of the evidence**

A review of each alleged harpoon shows clear evidence that each was either invited, cured, or did not exist to begin with. No trial is perfect, including this one, however trying to create a copper sculpture out of pennies takes lots of pennies. The attempt to sculpt error out of this record comes up short of the change needed to make the case and when the record is viewed from the totality of the circumstances, the judgment of guilt must be sustained

and the sentences, except for the fine for speeding in Count V, should be affirmed. The fine in Count V should be modified to \$35.00.