

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 22 2002
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JIMMY LEE MULLINS,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

Case No. F-2001-281

SUMMARY OPINION

CHAPEL, JUDGE:

Jimmy Lee Mullins was tried by jury and convicted in Latimer County District Court Case No. CF-2000-66 of Count I: Second Degree Murder in violation of 21 O.S. 1991, § 701.8; Count II: Leaving the Scene of an Accident involving Death in violation of 47 O.S.Supp. 1999, § 10-102.1; and Count III: Leaving the Scene of an Accident involving Non-Fatal Personal Injuries in violation of 47 O.S.Supp. 1999, § 10-102. In accordance with the jury's recommendation, the Honorable Bill Welch sentenced Mullins to fifteen (15) years imprisonment on Count I, ten (10) years imprisonment on Count II, and two years imprisonment on Count III. Judge Welch ordered the sentences to be served consecutively. Mullins perfected his appeal to this Court.

Mullins raises the following propositions of error:

- I. Jimmy Mullins's convictions for leaving the scene of an accident involving serious injury and leaving the scene of an accident involving death, both for the same accident, violate the prohibition against multiple punishment and double jeopardy.
- II. Prosecutorial misconduct denied Jimmy Mullins a fair trial.
- III. The trial court erred by admitting a toxicology report showing methamphetamine in Mr. Mullins'[s] system

because it was improper other crimes evidence and because its probative value, if any, was substantially outweighed by its prejudicial effect.

- IV. Mr. Mullins'[s] maximum ten year consecutive sentence for Count 2, leaving the scene of an accident involving death, was excessive.
- V. The cumulative effect of all these errors deprived Mr. Mullins of a fair trial.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find that Mullins's conviction for Count III (Leaving the Scene of an Accident involving Non-Fatal Personal Injuries) must be reversed and remanded with instructions to dismiss.

We find in Proposition I that Mullins's convictions for both Count II (Leaving the Scene of an Accident involving Death) and Count III (Leaving the Scene of an Accident involving Non-Fatal Personal Injuries) violate his statutory protection against multiple punishment under 21 O.S.1991, § 11.¹ We find in Proposition II that the prosecutor's comments were not plain error.² We find in Proposition III that the trial judge did not abuse his discretion in admitting a

¹ Section 11 protects against separate punishment where offenses, which arise out of a single criminal act, are not separate and distinct. There was only one accident scene and Mullins left the scene once, therefore, the State can only charge Mullins with one violation of leaving the scene. Additionally, the act of leaving the scene is substantively differently than acts that may give rise to multiple criminal charges. One act of leaving the scene may violate either 47 O.S.Supp.1999, §§ 10-102 or 10-102.1 but not both. We distinguish our recent conclusion in *Burleson v. Saffle*, 2002 OK CR 15. That decision interprets the "drive-by shooting" statute, which focuses on the defendant's action harming each individual victim. That is, the statute primarily focuses on the action of the defendant affecting each victim, and describes a crime against the person. In contrast, the statutory prohibitions against leaving the scene of the crime focus on the defendant's action in leaving the scene, which may only be done once. The effect of the defendant's actions on the victims is peripheral to this crime, and it is not a crime against the person.

² See *Selsor v. State*, 2 P.3d 344, 354 (Okl.Cr.2000), cert. denied, 532 U.S. 1039, 121 S.Ct. 2002, 149 L.Ed.2d 1004 (2001) (holding that this Court will review for plain error were the defendant did not object to any of the alleged instances of prosecutorial misconduct). Mullins

toxicology report showing methamphetamine in Mullins's system because the report was relevant to the lesser included offense of First Degree Manslaughter.³ We find in Proposition IV that Mullins's ten (10) year sentence for Count II (Leaving the Scene of an Accident involving Death) is not excessive.⁴ In Proposition V we find no cumulative error.⁵

Decision

The Judgment and Sentence of the trial court for Count I Second Degree Murder, and for Count II Leaving the Scene of an Accident involving Death, is **AFFIRMED**. The Judgment and Sentence for Count III: Leaving the Scene of an Accident involving Non-Fatal Personal Injuries is **REVERSED** and **REMANDED** with instruction to **DISMISS**.

failed to object to any of the alleged instances of prosecutorial misconduct. Although some comments border on error, they did not affect a substantial right or deny Mullins a fair trial.

³ See *McGregor v. State*, 885 P.2d 1366, 1381 (Okl.Cr.1994), *cert. denied*, 516 U.S. 827, 116 S.Ct. 95, 133 L.Ed.2d 50 (1995)

⁴ See *Jones v. State*, 965 P.2d 385 (Okl.Cr.1998). The sentence falls within the statutory range and the jury's sentencing recommendation was based upon their rational evaluation of the facts and circumstances. Additionally, there was no abuse of discretion in the trial judge's decision to run Mullins's sentences consecutively.

⁵ See *Selsor v. State*, 2 P.3d at 355 (holding that there is no accumulation of error where individual errors were either cured or did not affect a substantial right).

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OPINION BY: CHAPEL, J.

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

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LILE, JUDGE: CONCURS IN RESULTS

I concur that Count III must be reversed and dismissed based upon *Hale v. State*, 1995 OK CR 7, 888 P.2d 1027, and *Davis v. State*, 1999 OK CR 48, 993 P.2d 124.