

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

TIMMY EUGENE OWEN, )  
 )  
 Appellant, )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

Not for Publication

Case No. F-2006-598

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**

**APR 13 2007**

**SUMMARY OPINION**

**MICHAEL S. RICHIE**  
**CLERK**

**CHAPEL, JUDGE:**

Timmy Eugene Owen was tried by jury and convicted of Count I: Escaping from Grady County Jail After Former Conviction of a Felony, in violation of 21 O.S.2001 § 443; and Count II: Assault and Battery Upon a Police Officer After Former Conviction of a Felony, in violation of 21 O.S.2001 § 649 in the District Court of Grady County, Case No. CF-05-413. In accordance with the jury's recommendation, the Honorable Richard Van Dyck sentenced Owen to serve the following sentences: Count I: imprisonment for life; and Count II: imprisonment for ten (10) years, to run consecutively. Owen appeals from this conviction and sentence and raises six propositions of error in support of his appeal.

- I. The trial court erred in not granting a mistrial because the State's improper cross-examination of Appellant deprived Mr. Owen of a fair trial.
- II. Prosecutorial misconduct deprived Appellant of a fair trial.
- III. Appellant's sentences, including the maximum sentence of life imprisonment for escaping from county jail, are grossly excessive, should shock the conscience of this Court and should be favorably modified.
- IV. Appellant's convictions for escaping from Grady County Jail and for assault and battery upon a police officer violate the prohibitions against double punishment and double jeopardy.

- V. The cumulative effect of all these errors deprived Mr. Owen of a fair trial.
- VI. The Court should remand Mr. Owen's case to the District Court of Grady County with instructions to correct the Judgment and Sentence by an order *nunc pro tunc*.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that reversal of Owen's sentences is required by the law and evidence.

In Proposition I, we find that the court did not abuse its discretion in overruling Owen's motion for a mistrial.<sup>1</sup> In Proposition II, we find that the State improperly questioned Owen about specific allegations regarding the offenses for which he was imprisoned.<sup>2</sup> We find that this prosecutorial misconduct did not affect the jury's verdict in this case, but it did contribute to the jury sentencing Owen to the maximum possible sentence.<sup>3</sup> Thus, Owen's

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<sup>1</sup> *Knighton v. State*, 1996 OK CR 2, ¶ 64, 912 P.2d 878, 894 (decision to grant a mistrial at defense request is left to the sound discretion of the trial court). In light of the overall record, the comments that Owen challenges did not influence the jury in its conviction of Owen. The evidence of guilt is overwhelming. The record indicates that Owen was planning to escape. He made a cryptic phone call the evening of the escape to arrange for a place to stay. He called Bearden to bring water to the pod, right before the attack. The surveillance video shows a white inmate participating in the assault and battery of Bearden, and Bearden identified this inmate as Owen. Moreover, the testimony of Johnson, Owen's co-defendant, that Owen was not involved in the assault of Bearden was less than credible, given Johnson's extensive criminal history and his refusal to identify the other inmate that participated in the assault. The jury obviously did not believe either Johnson's or Owen's testimony.

<sup>2</sup> In a prosecution for escape, it is proper to place before the jury the reasons and grounds for which the appellant is legally incarcerated. *McBrain v. State*, 1988 OK CR 261, ¶ 7, 764 P.2d 905, 907. Here, the prosecutor properly read the information to the jury, reciting the specific charges for which Owen was imprisoned. The prosecution, however, cannot put forth any additional inflammatory details regarding the allegations for which Owen was imprisoned. The details of Owen's alleged prior crimes are completely irrelevant to the charges being tried here.

<sup>3</sup> *Myers v. State*, 2006 OK CR 12, ¶ 62, 133 P.3d 312, 329-30 *cert. denied*, 127 S.Ct. 939 (2007) (allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect of the conduct deprived the defendant of a fair trial). The evidence of guilt was overwhelming. However, it would have been impossible for the jury not to consider the prosecutor's inflammatory language and the emphasis on specific details of the domestic abuse charges for which Owen was jailed. As to the other instances of prosecutorial misconduct that Owen alleges, we find that there is no plain error on the comments that were not objected to. *Le v. State*, 1997 OK CR 55, ¶ 38, 947 P.2d 535, 551. As to the other questions that were objected to, any error would not have affected the jury's verdict in the case. Any error is

sentences are reversed and remanded. In Proposition III, we find that Owen's claim of excessive sentence is mooted by the relief recommended in Proposition II. In Proposition IV, we find that prohibitions against double jeopardy or double punishment are not violated. Escape from a Penal Institution and Assault and Battery upon a Police Officer are separate offenses, requiring dissimilar proof.<sup>4</sup> In Proposition V, we find that there is no cumulative error.<sup>5</sup> In Proposition VI, we find that Owen's Judgment and Sentence should be corrected, through an order *nunc pro tunc* to reflect that Owen was convicted of Escape from a Penal Institution.<sup>6</sup>

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remedied by the resentencing that is ordered. Owen also claims that defense counsel was ineffective for failing to object to instances of misconduct. Defense counsel objected numerous times to alleged prosecutorial misconduct. Owen cannot show ineffective assistance or prejudice from a failure to object to a few more allegedly improper questions. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

<sup>4</sup> 21 O.S.2001, § 11A (an act or omission which is made punishable in different ways by different provisions of the code may be punished under either of such provisions, but cannot be punished under more than one section of law); *Jones v. State*, 2006 OK CR 5, ¶ 63, 128 P.3d 521, 542-43, *reh'g granted*, 132 P.3d 1 (Okla. Crim. App. 2006), *cert. denied*, 127 S.Ct. 404 (2006) (the proper analysis of a Section 11 claim focuses on the relationship between the crimes; § 11 is not violated where offenses arising from the same transaction are separate and distinct and require dissimilar proof). The beating of Bearden is what led to Owen's conviction for Assault and Battery upon a Police Officer. The act of breaking out of jail is what led to his conviction for Escape. Two separate acts were committed. Punishment for both is not prohibited under § 11. Likewise, there is no double jeopardy violation. Both Escape and Assault and Battery upon a Police Officer require proof of an element that the other does not. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) (where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not).

<sup>5</sup> We found in Proposition II that the prosecutor's improper statements influenced the jury in sentencing Owen, and the case must be remanded for resentencing. We found no other error requiring relief. Where there is no error, there is no accumulation of error. *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520.

<sup>6</sup> Owen claims that the information filed alleged that he committed Escape from Grady County Jail and that this was the charge for which he was convicted. The section under which Owen was convicted is entitled Escape from a Penal Institution. 21 O.S.2001 § 443. The Judgment and Sentence incorrectly reflects that he was convicted of Escaping from Department of Corrections.

**Decision**

The Judgments of the District Court are hereby **AFFIRMED**. The Sentences of the District Court are **REVERSED** and **REMANDED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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**OPINION BY: CHAPEL, J.**

LUMPKIN, P.J.: DISSENT  
C. JOHNSON, V.P.J.: CONCUR  
A. JOHNSON, J.: CONCUR  
LEWIS, J.: CONCUR

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**LUMPKIN, PRESIDING JUDGE: DISSENTING**

Reversal and remand for resentencing is not warranted based upon only two prosecutorial comments concerning Appellant's pending charges. The prosecutor's comments were invited by Appellant's testimony and were within the bounds of cross-examination. Any error in these comments was cured by the trial court sustaining the defense objection to one comment and warning the prosecutor he was "treading on thin ice" in the second instance. The prosecutor's comments clearly did not affect the jury's sentencing determination. Appellant's entire testimony was inconsistent and mostly unbelievable. The jury, a rational trier of fact, obviously chose not to believe Appellant and his companion in the escape, Johnson. Further, if the jury had been inflamed by the prosecutor's statements, it apparently did not carry over to the escape conviction where Appellant faced a life sentence as well but was sentenced to only 10 years.