

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 MAR 13 2002
 JAMES W. PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN WAYNE ROBERTSON)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA)
)
 Appellee.)

Case No. F-01-313

SUMMARY OPINION

CHAPEL, JUDGE:

Steven Wayne Robertson was tried by jury and convicted of Count I, Attempted Burglary in the First Degree in violation 21 O.S.1991, §§ 1431, 1436, and Count II, Assault with a Dangerous Weapon in violation of 21 O.S.Supp.1999, § 645, both after former conviction of a felony, in the District Court of Seminole County, Case No. CF-2000-279. In accordance with the jury's recommendation the Honorable Lee G. Stilwell sentenced Robertson to two terms of ten (10) years imprisonment. Robertson appeals from these convictions and sentences

Robertson raises three propositions of error in support of his appeal:

- I. Robertson's double punishment for a single criminal act requires that the conviction for Count I, attempted burglary in the first degree, or Count II, assault with a dangerous weapon, be reversed with INSTRUCTIONS to dismiss;
- II. Robertson was prejudiced by the trial court's refusal to instruct on the lesser related or lesser included offense of malicious injury to property; and
- III. Robertson was denied a fair trial by the prosecutor's improprieties.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find modification of Robertson's sentences is required. We find in Proposition I that Count II is supported by Imogene Griffith's testimony she saw Robertson walk up her driveway carrying an axe shortly after hearing a commotion, and was afraid for her safety.¹ As different evidence supports each crime, and the offenses do not share elements, neither the statutory prohibition against multiple punishment nor double jeopardy are violated.² We find in Proposition II that Robertson was not entitled to instructions on malicious injury of property.³ We find in Proposition III that persistent improper comments in argument require modification of Robertson's sentence,⁴ and direct that his two ten-year sentences be **MODIFIED** to run concurrently.

Decision

The Judgments of the District Court are **AFFIRMED**. The Sentences of the District Court are **MODIFIED** to run concurrently.

¹ 21 O.S.1991, § 641; *Douglas v. State*, 1990 OK CR 47, 795 P.2d 1070, 1073, *overruled in part on other grounds Kaulaity v. State*, 1993 OK CR 40, 859 P.2d 521.

² 21 O.S.1991, § 11; *Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 883-84.

³ *Childress v. State*, 2000 OK CR 10, 1 P.3d 1006, 112-23; *Rowland v. State*, 1991 OK CR 94, 817 P.2d 263, 266; *see also Wooldridge v. State*, 1990 OK CR 77, 801 P.2d 729, *cert. denied*, 518 U.S. 1010, 116 S.Ct. 2533, 135 L.Ed.2d 1056 (1996). If the jury believed Robertson was too intoxicated to form the intent to commit burglary, he would also be unable to form the intent to maliciously injure or destroy property.

⁴ *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 315, *cert. denied*, ___ U.S. ___, 122 S.Ct. 371, 151 L.Ed.2d 282; *Powell v. State*, 2000 OK CR 5, 995 P.2d 510, 536, *cert. denied*, 531 U.S. 935, 121 S.Ct. 321, 148 L.Ed.2d 258; *Freeman v. State*, 1994 OK CR 37, 876 P.2d 283, 287, *cert. denied*, 513 U.S. 1022, 115 S.Ct. 590, 130 L.Ed.2d 503.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR
JOHNSON, V.P.J.:	CONCUR
STRUBHAR, J.:	CONCUR
LILE, J.:	CONCUR IN PART/DISSENT IN PART

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