

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL WAYNE SCHULZE,)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

Not for Publication

Case No. F-2006-896

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 10 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, JUDGE:

Michael Wayne Schulze was tried by jury and convicted of Count I, First Degree Arson in violation of 21 O.S.2001, § 1401, after former conviction of two felonies; Count II, Assault and battery domestic abuse (misdemeanor) in violation of 21 O.S.Supp.2005, § 644(C); Count III, Assault and battery (misdemeanor) in violation of 21 O.S.Supp.2005, § 644(B); and Count IV, public intoxication in violation of 37 O.S.2001, § 8, in the District Court of Cherokee County, Case No. CF-2005-471. In accordance with the jury's recommendation the Honorable G. Bruce Sewell sentenced Schulze to forty-five (45) years imprisonment and a \$25,000 fine (Count I); one (1) year in the county jail and a \$5,000 fine (Count II); ninety (90) days in jail and a \$750 fine (Count III); and thirty (30) days in jail and a \$100 fine (Count IV). Schulze appeals from these convictions and sentences.

Schulze raises five propositions of error in support of his appeal:

- I. The evidence is insufficient to prove beyond a reasonable doubt Schulze was guilty of Count I – Arson in the First Degree;
- II. Schulze's sentence of imprisonment on Count I should be modified because it was based on a misleading jury instruction;

- III. The fine imposed on Schulze for Count I – Arson in the First Degree – should be vacated or modified because it was not authorized by law and was the result of erroneous jury instructions;
- IV. The sentence on each misdemeanor count should be reversed or modified because each was the result of an erroneous jury instruction; and
- V. Schulze was prejudiced by the prosecutor’s improper conduct in regard to sentencing.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Schulze’s sentences for Counts III and IV must be modified. No further relief is required. We find in Proposition I that, taking the evidence in the light most favorable to the State, any rational trier of fact could find that Schulze set the trailer on fire.¹ Schulze’s Motion for New Trial on this issue is denied.² We find in Proposition II that the trial court erred in instructing jurors Schulze could be sentenced to any number of years rather than life imprisonment.³ However, we find that, under the narrow circumstances of this case, this error does not require relief.

We find in Proposition III that the trial court did not err in instructing jurors that they could recommend a fine of no more than \$25,000 on Count I.⁴

¹ *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, 1041-42. The jury is the judge of witness credibility, and this Court will not disturb a jury verdict where evidence conflicts, and the jury verdict is supported by evidence. *Matthews v. State*, 2002 OK CR 16, 45 P.3d 907, 919-20.

² Schulze has not presented this Court with timely affidavits showing newly discovered evidence which is material or would create a probability that the trial would have a different result. *Wilhoit v. State*, 1991 OK CR 50, 816 P.2d 545, 546; 22 O.S.2001, § 953; Rule 2.1(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007).

³ 21 O.S.Supp.2002, § 51.1(B). Instructions must accurately state the applicable law. *Jackson v. State*, 2006 OK CR 45, 146 P.3d 1149, 1160.

⁴ The arson statute specifically provides for a fine of no more than \$25,000. The sentence enhancement statute, 21 O.S.Supp.2002, § 51.1, provides for an increase in sentencing based on prior convictions. Section 51.1 does not abrogate the specific fine included in the arson statute. As Section 51.1 mandates a minimum term of imprisonment, any fine imposed is necessarily in addition to that imprisonment. The trial court did not err in instructing jurors

We find in Proposition IV that the trial court failed to instruct the jury on the correct range of punishment for Counts III and IV. The language used in instruction on those counts incorrectly implied that jurors must impose a fine. Although Schulze did not object to the instructions, this error in instruction constitutes a substantial violation of a constitutional or statutory right, and requires relief.⁵ Schulze's fines for Counts III and IV are vacated. We find in Proposition V that the prosecutor did not engage in improper argument.⁶

Decision

The Judgments and Sentences of the District Court for Counts I and II are **AFFIRMED**. The Judgments for Counts III and IV are **AFFIRMED**. The Sentences for Counts III and IV are **MODIFIED** by **VACATING** the fines imposed for those Counts. Schulze's Motion for New Trial is **DENIED**. 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.

that, if they found Schulze had prior convictions, they could recommend imprisonment and a fine.

⁵ 20 O.S.2001, § 3001.1.

⁶ Both parties have wide latitude to argue and make inferences from the evidence, and error in argument will not warrant relief unless the defendant is deprived of a fair trial and has suffered prejudice. *Brewer v. State*, 2006 OK CR 16, 133 P.3d 892, 895; *Spears v. State*, 1995 OK CR 36, 900 P.2d 431, 445.

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OPINION BY: CHAPEL, J.

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