

MAR 24 2000

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILL RICHARD SHEPPARD,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-99-14

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Will Richard Sheppard, was tried by jury in Oklahoma County District Court Case No. CF-98-1636 and convicted of two counts of Robbery with a Firearm, in violation of 21 O.S.1991, § 801, after former conviction of two felonies. The jury recommended sentences of twenty-seven (27) years imprisonment on each count. The trial judge sentenced Appellant accordingly and ordered the sentences on both counts to run concurrently. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

- I. Reversible error occurred when the trial court allowed jurors to separate, over defense counsel's objection, after the jury had begun deliberations;
- II. Reversal, or alternatively, sentence modification, is warranted by the trial court's erroneous admission of other crime evidence;
- III. Reversible error occurred when the trial judge overruled defense counsel's challenge to remove Juror Campbell for cause;
- IV. Appellant was denied an impartial jury composed of a fair cross-section of the community in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article II, Sections 7, 9, 19, and 20 of the Oklahoma Constitution because the State was allowed to exercise a peremptory challenge against Priscilla Liddell, and African-

American juror, without setting forth a sufficient race-neutral reason for the challenge;

- V. Reversible error occurred when the trial court refused to allow the defense to substitute Stacia Curry for witness Richie Mitchell for the limited purpose of explaining to the jury why Stacia Curry was in Court at Appellant's preliminary hearing; alternatively, reversible error occurred when the trial court denied Appellant's motion for mistrial and/or continuance to timely endorse Stacia Curry as a defense witness; and
- VI. Trial errors and prosecutorial misconduct, when considered in cumulative fashion, deprived Appellant of due process under the Federal and Oklahoma Constitutions and resulted in an excessive sentence.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we have determined relief is required.

We find merit in Appellant's first proposition. The record reflects the jury was improperly allowed on two occasions to separate after deliberations had begun. The jury was sent to their homes one evening and was sent out, unaccompanied, during the lunch hour on the following day. Prior to both occasions, defense counsel objected and directed the trial court's attention to the applicable statute, 22 O.S.1991, § 857.

Section 857 has been construed as a requirement that the jury "stay together" or not be allowed to "separate" after deliberations have begun. *McCormick v. State*, 845 P.2d 896, 902 (Okl.Cr.1993); *Stiles v. State*, 829 P.2d 984, 994 (Okl.Cr.1992); *Hayes v. State*, 397 P.2d 524, 527 (Okl.Cr.1964). There is to be no communication with the jury after submission of the case, by outsiders, the bailiff or court officials, unless by order of court. *Howell v. State*, 882 P.2d 1086, 1095 (Okl.Cr.1994).

If jurors are allowed to separate and commingle with people outside the

group, prejudice is presumed. *Mooney v. State*, 1999 OK CR 34, ¶ 63, 990 P.2d 875; *Day v. State*, 784 P.2d 79, 84 (Okl.Cr.1989); *Elliott v. State*, 753 P.2d 920, 922 (Okl.Crim.App.1988); *Bayliss v. State*, 795 P.2d 1079, 1081 (Okl.Cr.1990). A trial court commits error when it refuses a defendant's request to sequester the jury, and it is the State's burden to rebut the automatic presumption of prejudice. *Id.*; *Hiler v. State*, 796 P.2d 346, 351 (Okl.Cr.1990).

Here, the State failed to rebut the automatic presumption of prejudice, stating simply that the jury had taken its job seriously and no prejudice has been shown. Accordingly, under the law set forth above, we are required to reverse Appellant's convictions and sentences and to remand this matter to the district court for a new trial.

Having found reversible error occurred, Appellant's remaining proposition of error are now moot.

DECISION

The judgments and sentences under Count I and Count II are hereby **REVERSED** and this matter is hereby **REMANDED** to the District Court of Oklahoma County for a new trial.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE NOMA D. GURICH, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.

STRUBHAR, P.J.: CONCUR
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR

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