

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

DANIEL TERRELL SMITH,)
)
 Appellant,)
 vs.)
)
THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2017-724

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 26 2018

JOHN D. HADDEN
CLERK

SUMMARY OPINION

KUEHN, JUDGE:

Daniel Terrell Smith was tried by jury and convicted of Count I, Assault and Battery With a Dangerous Weapon in violation of 21 O.S.2011, § 645, Count II, Burglary in the First Degree in violation of 21 O.S.2011, § 1431, Count III, Domestic Abuse Assault and Battery in violation of 21 O.S.2011, § 644(C), Count IV, Violation of a Protective Order in violation of 22 O.S.2011, § 60.6, and Count V, Maiming in violation of 21 O.S.2011, § 751, in the District Court of Oklahoma County, Case No. CF-2014-7327.¹ In accordance with the jury's recommendation the Honorable Timothy R. Henderson sentenced Appellant to ten (10) years imprisonment on each of Counts I and II, a

¹ Appellant was acquitted in Count I of the charged crime, assault and battery with intent to kill, and was acquitted of Count VI, larceny from a house.

fine of \$5000.00 (Count III), a fine of \$1000.00 (Count IV), and twenty (20) years imprisonment (Count V), to run consecutively. Appellant appeals from these convictions and sentences.

Appellant raises two propositions of error in support of his appeal:

- I. The trial court erred in admitting evidence for which the unfair prejudicial effect substantially outweighed the probative value.
- II. Appellant's convictions for both maiming and assault and battery with a dangerous weapon violated his constitutional and statutory protections against double jeopardy.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that Appellant's conviction and sentence in Count I must be dismissed.

We find in Proposition I that the trial court did not abuse its discretion in admitting evidence of bad acts or other crimes. *Kirkwood v. State*, 2018 OK CR 9, ¶ 3, __ P.3d __. An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. A person should be convicted only by evidence of the crimes charged. *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365. However, evidence

of other bad acts may be admissible to show, for example, motive, intent, identity and absence of mistake or accident. 12 O.S.2011, § 2404(B). The evidence (a) must be probative of a disputed issue; (b) there must be a visible connection between the charged crimes and the other crimes evidence; (c) the evidence must be necessary to support the State's burden of proof; (d) it must be clear and convincing; and (e) the evidence's probative value must outweigh its prejudicial effect. *Miller v. State*, 2013 OK CR 11, ¶ 89, 313 P.3d 934, 966. When other crimes evidence is admitted, the trial court must instruct jurors on its limited use at the time and again at the close of trial. *Id.* The evidence of the nightclub encounter showed that Appellant blamed the victim in Count I for the failure of his relationship with his ex-girlfriend, and that he had previously sought her out in anger. This was relevant to show motive, and was not provided through any other testimony. *Eizember v. State*, 2007 OK CR 29, ¶ 83, 164 P.3d 208, 231. This proposition is denied.

In Proposition II the State concedes that Appellant's convictions for maiming and assault and battery with a dangerous weapon constitute double punishment because they each arose from the same act. As a remedy this Court must dismiss one of the charges. Generally,

this Court will dismiss the charge carrying the lesser punishment. *Anderson v. State*, 1972 OK CR 289, ¶ 6, 502 P.2d 1299, 1301. This proposition is granted, and Appellant's conviction and sentence on Count I is vacated and dismissed.

DECISION

The Judgments and Sentences of the District Court of Oklahoma County in Counts II, III, IV and V are **AFFIRMED**. The Judgment and Sentence in Count I is **DISMISSED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App.-(2018), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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OPINION BY KUEHN, J.

LUMPKIN, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
HUDSON, J.: CONCUR
ROWLAND, J.: CONCUR