

FILED
 IN COURT OF CRIMINAL APPEALS
 STATE OF OKLAHOMA
 APR 12 2001
 JAMES W. PATTERSON
 CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

JESSE STANARD,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
 No. F-1999-1084

SUMMARY OPINION

STRUBHAR, J:

Jesse Stanard, Appellant, was convicted of one count of Assault and Battery with a Deadly Weapon with Intent to Kill, After Former Conviction of a Felony (21 O.S.Supp.1992, §652)(Count I) and two counts of Assault and Battery with a Dangerous Weapon, After Former Conviction of a Felony (21 O.S.1991, § 645)(Counts IV & V),¹ following a jury trial in the District Court of Oklahoma County, Case No. CF-98-3758, the Honorable Susan W. Bragg, District Judge, presiding. The jury recommended fifteen (15) years imprisonment on Count I and ten (10) years imprisonment on Counts IV and V. The trial court sentenced Appellant accordingly and ordered the terms to be served consecutively. From this Judgment and Sentence, he appeals.

The following propositions of error were considered:

- I. Appellant's forced participation in a joint trial denied him a fair trial in violation of his due process rights under the Fifth and Fourteenth

¹ Appellant was tried jointly with Fritz Aaron Catton who was charged solely in Counts II and III. Catton has appealed his convictions separately under Case No. F-99-1106.

Amendments of the United States Constitution and Article II, Section 7 of the Oklahoma Constitution;

- II. The trial court committed prejudicial error when she released the jury to mingle with the public after deliberations had begun;
- III. The trial court committed reversible error by failing to give a cautionary eyewitness instruction when the evidence clearly supported such instruction, and a request for the instruction was made;
- IV. The trial court committed reversible error in permitting the prosecution to introduce a weapon into evidence which was not connected to the crime and to allow him to use the evidence for demonstrative purposes thereby prejudicing the appellant and preventing him from receiving a fair trial; and
- V. The trial court abused its discretion in refusing to run the sentences recommended by the jury concurrently, rather than consecutively.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm in part and reverse in part. As to Proposition I, we find Appellant and co-defendant Catton's defenses to Count I were mutually antagonistic under this Court's case law and that the trial court erred in failing to sever their trials on Count I. *Neill v. State*, 827 P.2d 884, 887-88 (Okla.Cr.1992), *cert. denied*, 516 U.S. 1080, 116 S.Ct. 791, 133 L.Ed.2d 740 (1996). Accordingly, Count I must be reversed and remanded for new trial. *See Lafavers v. State*, 819 P.2d 1362, 1365-68 (Okla.Cr.1991), *cert. denied*, 516 U.S. 1095, 116 S.Ct. 820, 133 L.Ed.2d 763 (1996). As to Proposition II, we find Appellant was not prejudiced by the separation of the jury because the trial court thoroughly admonished the jury and there is no indication that this admonishment was not followed.

Day v. State, 784 P.2d 79, 84 (Okl.Cr.1989). As to Proposition III, we find the disposition of Proposition I renders this claim moot. As to Proposition IV, we find the trial court did not err in admitting State's Exhibit 22, an aluminum baseball bat, for demonstrative purposes. *Foster v. State*, 714 P.2d 1031, 1035 (Okl.Cr.), *cert. denied*, 479 U.S. 873, 107 S.Ct. 249, 93 L.Ed.2d 173 (1986). *See also Dyke v. State*, 716 P.2d 693, 700 (Okl.Cr.1996). As to Proposition V, we find the trial court did not abuse its discretion in running Appellant's sentences consecutively and that the sentences imposed are not so excessive based on this record as to shock the conscience of the Court. *Harmon v. State*, 748 P.2d 992, 996 (Okl.Cr.1988).

DECISION

The Judgment and Sentence of the trial court on Counts IV and V is **AFFIRMED**. The Judgment and Sentence of the trial court on Count I is **REVERSED AND REMANDED** for a new trial.

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OPINION BY: STRUBHAR, J.

LUMPKIN, P.J: CONCUR

JOHNSON, V.P.J.:CONCUR

CHAPEL, J.: CONCUR IN PART/DISSENT IN PART

LILE, J.: CONCUR IN RESULT

RB

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in reversing Count I. However, I dissent to affirming Counts IV and V as I find merit in Proposition II.