

FEB 28 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

KENNETH GLENN THOMPSON,)
)
 Appellant,)
 v.)
)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2002-202

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant Kenneth Glenn Thompson was tried conjointly with co-defendant Kristy Ladell Thompson in the District Court of Stephens County, Case No. CF-2001-292 and found guilty of Robbery with a Weapon (Count I) (21 O.S. 2001, § 801), Conspiracy (Count II) (21 O.S. 2001, § 421) and Assault and Battery with a Dangerous Weapon (Count III) (21 O.S. 2001, § 645), After Former Conviction of a Felony. The jury recommended as punishment imprisonment for ten (10) years in Count I, and two (2) years in each of Counts II and III. The trial court sentenced accordingly, ordering the sentences in Count II to run consecutive to the sentence in Count I, and Count III to run consecutive to Counts I and II.

From these judgments and sentences, Appellant appeals.¹ In support of his appeal, Appellant raises the following propositions of error:

¹ Co-defendant Kristy Ladell Thompson appeals separately. See Case No. F-2002-203, Kristy Ladell Thompson v. State.

- I. The evidence was insufficient to support the crime of Robbery with a Weapon.
- II. The evidence was insufficient to support a conviction for Conspiracy.
- III. Appellant should not have been punished twice for the same offense.
- IV. An evidentiary harpoon and subsequent prosecutorial misconduct deprived Appellant of a fair trial.
- V. Cumulative error deprived Appellant of a fair trial.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence, as to Counts I and II. Count III is reversed with instructions to dismiss as adjudicated in Proposition III.

In Proposition I, we find the circumstantial evidence sufficient to support Appellant's conviction for Robbery with a Weapon. *See Mitchell v. State*, 884 P.2d 1186, 1199 (Okl.Cr.1994).²

In Proposition II, we find sufficient circumstantial evidence was presented upon which to base a finding that an agreement did exist thereby supporting a conviction for conspiracy. *See Mayes v. State*, 887 P.2d 1288, 1313 (Okl.Cr.1994); *State v. Davis*, 823 P.2d 367, 370 (Okl.Cr.1991).

² In this writer's opinion, the test used for determining the sufficiency of the evidence in cases comprised of direct evidence or direct and circumstantial evidence, as set forth in *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985) should also be applied in cases comprised entirely of circumstantial evidence. *White v. State*, 900 P.2d 982, 994 (Okl.Cr.1995)(Lumpkin specially concurring).

In Proposition III, we find Appellant's convictions for both Robbery with a Weapon and Assault and Battery with a Weapon a violation of 22 O.S. 2001, § 11 as the two crimes arose out of one act. *See Davis v. State*, 993 P.2d 124, 126-27 (Okl.Cr.1999). Therefore, Appellant's conviction in Count III, Assault and Battery with a Weapon, is reversed with instructions to dismiss.

In Proposition IV, we find the court's admonition to the jury to disregard any comments regarding Officer Aguilera's concerns about Appellants once they left the Marlow City Jail cured any error as that information, together with testimony concerning Appellant's alias, did not determine the verdict. *See Patton v. State*, 973 P.2d 270, 292-293 (Okl.Cr.1998).

In Proposition V, we find Appellant was not denied a fair trial by cumulative error. *See Conover v. State*, 933 P.2d 904 (Okl.Cr.1997); *Ashinsky v. State*, 780 P.2d 201, 209 (Okl.Cr.1989).

DECISION

The Judgments and Sentences in Counts I and II are **AFFIRMED**, the Judgment and Sentence in Count III is **REVERSED** with instructions to **DISMISS**.

AN APPEAL FROM THE DISTRICT COURT OF STEPHENS COUNTY
THE HONORABLE GEORGE W. LINDLEY, DISTRICT JUDGE

APPEARANCES AT TRIAL

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

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

I concur in affirming the conviction and sentence for Robbery with a Weapon. I also concur in reversing and dismissing the Assault and Battery Count. However, I would also reverse and dismiss the Conspiracy Count, as there was insufficient evidence to support it.