

FEB 28 2003

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**  
MICHAEL S. RICHIE  
CLERK

KRISTY LADELL THOMPSON, )  
 )  
 Appellants, )  
 v. )  
 STATE OF OKLAHOMA )  
 )  
 Appellee. )

**NOT FOR PUBLICATION**

Case No. F-2002-203

**SUMMARY OPINION**

**LUMPKIN, JUDGE:**

Appellant Kristy Ladell Thompson was tried conjointly in the District Court of Stephens County, Case No. CF-2001-293, 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. In support of her appeal, Appellant raises the following propositions of error:

- I. The evidence was insufficient to support the crime of Robbery with a Weapon.
- II. The evidence was insufficient to support conviction on Assault and Battery.

- III. The evidence was insufficient to support a charge of conspiracy.
- IV. Appellant should not have been punished twice for the same offense.
- V. An evidentiary harpoon and subsequent prosecutorial misconduct deprived Appellant of a fair trial.
- VI. 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 IV.

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).<sup>1</sup>

Proposition II we address in conjunction with Proposition IV, as we find it is not necessary to review the sufficiency of the evidence supporting the Assault and Battery Conviction as Appellant's convictions for both Robbery with a Weapon and Assault and Battery with a Weapon violate the provisions 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

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<sup>1</sup> 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).

III, Assault and Battery with a Weapon, is reversed with instructions to dismiss.

In Proposition III, we find sufficient circumstantial evidence was presented upon which to base a finding that an agreement did exist between Appellant and her co-defendant 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).

In Proposition V, 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 VI, 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.