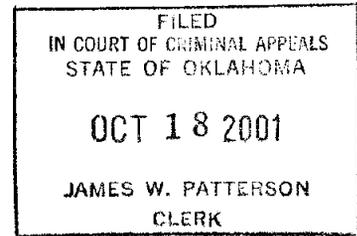


**IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA**

DUSTIN LOY WELLS, )  
 )  
 Appellant, )  
 )  
 -vs- )  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION  
No. F-2000-805



**SUMMARY OPINION**

**STRUBHAR, J.:**

Dustin Loy Wells, Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-99-4069, District Judge Thomas C. Gillert presiding and convicted of Shooting with Intent to Kill (Count 1), Possession of a Stolen Vehicle (Count 2), three counts of Assault with a Dangerous Weapon (Counts 5, 6, & 8), Use of a Vehicle to Facilitate Discharge of a Weapon (Count 7) and Assault and Battery (Count 9).<sup>1</sup> Following the jury's recommendation, the trial court sentenced Appellant to forty-five years imprisonment and a \$10,000.00 fine on Count 1, three years imprisonment and a \$3,500.00 fine on Count 2, six years imprisonment on Count 5, ten years imprisonment and a \$10,000.00 fine on Count 6, twenty years imprisonment and a \$10,000.00 fine on Count 7, five years imprisonment on Count 8 and ninety days on Count 9. The trial court ordered the sentences to be served consecutively. From this judgment and sentence, Appellant appeals.

The following propositions of error were considered:

- I. The trial court abused its discretion by denying Appellant's motion for severance;
- II. Evidence that the alleged victims identified the defendant in an out-of-court setting requires reversal;
- III. The trial court erred in overruling Appellant's motion for directed verdict on assault with a dangerous weapon against a crowd or, in the alternative, the convictions in counts 5 and 8 are in violation of double jeopardy;
- IV. Admission of prejudicial evidence requires reversal or modification;
- V. No evidence existed from which the jury could find an intent to kill;
- VI. Prosecutorial misconduct deprived the Appellant of a fair trial and rendered his conviction unreliable; and
- VII. Cumulative errors warrant reversal of conviction and/or sentence.

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 the trial court did not abuse its discretion in joining these separately punishable offenses for trial. *Brewer v. City of Tulsa*, 811 P.2d 604, 607 (Okl.Cr.1991). As to Proposition II, we find the admission of Colburn's testimony regarding the out-of-court identification of Appellant by Maxey, Tunnell, Robl and Delaloye as well as State's Exhibits 66, 67 and 68 was error. *J.A.M. v. State*, 749 P.2d 116, 118 (Okl.Cr.1988). However, we find the error harmless beyond a reasonable doubt in light of the in-court

---

<sup>1</sup> Appellant was acquitted of Counts 3 and 4.

identifications of Appellant and the strength of the case overall. *Ochoa v. State*, 963 P.2d 583, 596-97 (Okl.Cr.1998), *cert. denied*, 526 U.S. 1023, 119 S.Ct. 1263, 143 L.Ed.2d 358 (1999). As to Proposition III, we find the evidence adduced at trial was insufficient and that Count 8 - assault with a dangerous weapon on a crowd must be reversed with instructions to dismiss. *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985). As to Proposition IV, we find the trial court did not abuse its discretion in admitting State's Exhibits 55 and 56. *Welch v. State*, 2 P.3d 356, 367 & 370 (Okl.Cr.), *cert. denied*, \_\_\_U.S.\_\_\_, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000). As to Proposition V, we find the evidence adduced at trial was sufficient for the jury to find Appellant intended to kill Tunnell when he shot him. *Miller v. State*, 977 P.2d 1099, 1107 (Okl.Cr.1998), *cert. denied*, 528 U.S. 897, 120 S.Ct. 228, 145 L.Ed.2d 192 (1999). As to Proposition VI, although the prosecutor committed misconduct by repeatedly calling Appellant a coward and a predator, commenting on Appellant's in-court conduct and demeanor and sponsoring erroneous identification evidence, we find relief is not warranted as the improprieties did not deprive Appellant of a fair trial or result in a miscarriage of justice. *Spears v. State*, 900 P.2d 431, 445 (Okl.Cr.), *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995). We do, however, caution the prosecutor to refrain from such conduct in the future. As to Proposition VII, we find no error except that identified in Proposition III, which by itself or in combination with other errors, deprived Appellant of a fair trial and requires relief.

**DECISION**

The Judgment and Sentence of the trial court on Counts 1, 2, 5, 6, 7 and 9 is **AFFIRMED**. Count 8 is **REVERSED with instruction to DISMISS**.

**APPEARANCES AT TRIAL**

MARNA S. FRANKLIN  
ASST. PUBLIC DEFENDER  
TULSA COUNTY PUBLIC  
DEFENDER'S OFFICE  
423 S. BOULDER  
TULSA, OK 74103  
ATTORNEY FOR APPELLANT

CHAD GREER  
ASSISTANT DISTRICT ATTORNEY  
406 COURTHOUSE  
500 S. DENVER AVE.  
TULSA, OK 74103  
ATTORNEY FOR THE STATE

**APPEARANCES ON APPEAL**

JULIA O'CONNELL  
ASST. PUBLIC DEFENDER  
423 S. BOULDER, STE. 300  
TULSA, OK 74103  
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON  
ATTORNEY GENERAL  
OF OKLAHOMA  
WILLIAM R. HOLMES  
ASSISTANT ATTORNEY GENERAL  
2300 N.LINCOLN BLVD., SUITE112  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE

**OPINION BY: STRUBHAR, J.**

LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART  
JOHNSON, V.P.J.: CONCUR  
CHAPEL, J.: CONCUR  
LILE, J.: CONCUR IN RESULT

**LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART**

I concur in the Court's decision to affirm the judgments and sentences in Counts 1, 2, 5, 6, 7 and 9. However, I dissent to the reversal with instructions to dismiss Count 8. *See Holdge v. State*, 586 P.2d 744, 748 (Okl.Cr.1978).