

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DARNELL LAMAR WRIGHT, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2012-170

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA  
FEB 14 2014  
MICHAEL S. RICHIE  
CLERK

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Darnell Lamar Wright, was tried by jury and convicted of Robbery with a Firearm (Count 1) (21 O.S.2011, § 801); False Personation (Count 3) (21 O.S.2001, § 1531(4)); and Assault while Masked (Count 6) (21 O.S.2001, § 1303), After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case Number CF-2010-599.<sup>1</sup> The jury recommended as punishment imprisonment for life in Count 1, four (4) years in Count 3, and twenty (20) years in Count 6. The trial court sentenced accordingly and ordered the sentences to run consecutively.<sup>2</sup> It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of this appeal:

<sup>1</sup> The magistrate sustained a demurrer to Counts 2, 4 and 5 at the close of the preliminary hearing.  
<sup>2</sup> Any person convicted of robbery with a firearm as defined in 21 O.S.2001, § 801 shall be required to serve not less than eighty-five percent of any sentence of imprisonment imposed prior to becoming eligible for consideration for parole. 21 O.S.Supp.2009, § 13.1(8).

- I. The trial court committed fundamental error by issuing an inaccurate and confusing answer to the jury's question regarding Appellant's parole eligibility on Counts 3 and 6.
- II. There was insufficient evidence upon which to convict Appellant of falsely impersonating another to create liability.
- III. Appellant's conviction for falsely personating another to create liability should be reversed because the statute, as instructed on by the trial court, is unconstitutionally vague, overbroad, and set up an unconstitutional presumption.
- IV. Appellant's convictions of Count 1 and 6 violate Okla. Stat. tit. 21, § 11, as well as the State and federal ban on double jeopardy.
- V. Prejudicial error in the admission of evidence denied Appellant of a fair trial.
- VI. Appellant's rights to confrontation and a fair trial were violated by the erroneous admission of cash never connected to Appellant or the robbery.
- VII. Cumulative error requires reversal of Appellant's convictions and sentences.

After 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 Appellant is entitled to relief as to Proposition Four, but otherwise affirm Appellant's convictions and sentences.

In Proposition One, Appellant challenges the trial court's supplemental instruction that the jurors were not to consider parole in response to the jury's question concerning Appellant's parole eligibility as to the offenses of false personation and assault while masked. Appellant failed to challenge the instruction at trial, thus, he has waived appellate review of this claim for all but plain error. *Burgess v. State*, 2010 OK CR 25, ¶ 21, 243 P.3d 461, 465;

*Romano v. State*, 1995 OK CR 74, ¶ 80, 909 P.2d 92, 120. We review Appellant's claim for plain error pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907. To be entitled to relief for plain error, a defendant must show: (1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning that the error affected the outcome of the proceeding. *Id.*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. "If these elements are met, this Court will correct plain error only if the error 'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings' or otherwise represents a "miscarriage of justice." *Id.*, quoting *Simpson v. State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701.

We find that Appellant has not shown the existence of an actual error. The jury instructions, as a whole, accurately stated the applicable law. *Eizember v. State*, 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236. The trial court properly informed the jury of the statutory requirement that a defendant must serve 85% of any sentence for the offense of robbery with a firearm before he or she can be considered for parole. *Florez v. State*, 2010 OK CR 21, ¶ 4, 239 P.3d 156, citing *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-83; 21 O.S.Supp.2009, § 13.1(8). Because the offenses of false personation and assault while masked are not subject to the 85% Rule, the issue of parole eligibility was not proper for the jury's consideration as to those offenses. *Skinner v. State*, 2009 OK CR 19, ¶ 41, 210 P.3d 840, 854-55; *Watts v. State*, 2008 OK CR 27, ¶ 9, 194 P.3d 133, 137; *Scott v. State*, 2005 OK CR 3, ¶ 6, 107

P.3d 605, 606-07. Taken in context, the supplemental instruction did not contradict the instruction on the 85% Rule and the instructions were not confusing. *But Cf. Lewis v. State*, 1998 OK CR 24, ¶¶ 22-23, 970 P.2d 1158, 1168. The instruction on the 85% Rule explicitly stated it applied to the offense of robbery with a firearm. The trial court's supplemental instruction explicitly addressed the jury's question concerning Appellant's parole eligibility as to the offenses of false personation and assault while masked. There was no error, thus plain error did not occur. Proposition One is denied.

In Proposition Two, Appellant challenges the sufficiency of the evidence supporting his conviction for false personation in Count 3. Reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559; *Barkus v. State*, 1996 OK CR 45, ¶¶ 3-4, 926 P.2d 312, 312-13 (evidence of the existence of an actual person is not required to prove the offense of false personation); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204. Proposition Two is denied.

In Proposition Three, Appellant challenges the constitutionality of the statutory provision that establishes the offense of false personation. Appellant failed to challenge the constitutionality of 21 O.S.2001, § 1531(4) before the trial court. Thus, he has waived appellate review of his claim for all but plain error. *Anderson v. State*, 2010 OK CR 26, ¶ 11, 252 P.3d 211, 213; *Frederick v. State*, 1983 OK CR 114, ¶ 6, 667 P.2d 988, 991. We review Appellant's claim

for plain error pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907.

Appellant has not overcome the presumption of constitutionality and shown the existence of an actual error. *State v. Hall*, 2008 OK CR 15, ¶ 23, 185 P.3d 397, 403; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923; *Hilliary v. State*, 1981 OK CR 78, ¶ 12, 630 P.2d 791, 794. As Appellant has not shown that the statute reaches a substantial amount of constitutionally protected conduct, we reject his overbreadth challenge. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *Howard v. City of Tulsa*, 1986 OK cR 5, ¶ 5, 8, 712 P.2d 797, 798, quoting *Profit v. City of Tulsa*, 1978 OK CR 9, ¶ 8, 574 P.2d 1053, 1055. We have no difficulty concluding that § 1531(4) gives fair notice of the proscribed activity and is not void for vagueness on its face. *Wilkins v. State*, 1999 OK CR, ¶ 8, 985 P.2d 184, 186. As § 1531(4) neither creates any evidentiary presumption nor requires the defendant to prove the existence of a fact or be guilty of a greater offense, we find that the statutory provision does not unconstitutionally shift the burden of proof onto the accused. *Mullaney v. Wilbur*, 421 U.S. 684, 692, 703-04, 95 S.Ct. 1881, 1886, 1892, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); *Birdine v. State*, 2004 OK CR 7, ¶ 3, 85 P.3d 284, 285, quoting *Francis v. Franklin*, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970, 85 L.Ed.2d 344 (1985). There is no error, thus plain error did not occur. Proposition Three is denied.

In Proposition Four, Appellant contends that his convictions for robbery with a firearm and assault while masked violate 21 O.S.2001, § 11. We agree. Reviewing the evidence we find that the offenses of robbery with a firearm and assault while masked were not a series of separate and distinct crimes. *Watts*, 2008 OK CR 27, ¶ 16, 194 P.3d 133, 139; *Davis v. State*, 1999 OK CR 48, ¶¶ 12-13, 993 P.2d 124, 126-27. As the evidence does not reveal that Appellant committed an assault with a dangerous weapon, while masked, at a different time or upon a different victim than the robbery with a firearm, we find that the two offenses truly arose out of one act. *Logsdon v. State*, 2010 OK CR 7, ¶¶ 17-18, 231 P.3d 1156, 1164-65 (determining that § 11 not violated where offenses occurred at different times or involved different victims); *Ziegler v. State*, 1980 OK CR 23, ¶ 10, 610 P.2d 251, 254 (holding burglary, rape and unauthorized use of motor vehicle were separate crimes because burglary was complete upon forced entry with the intent to commit a crime); Inst. No. 5-50, OUJI-CR(2d) (Supp.2010). Therefore, we reverse Appellant's conviction for assault while masked in Count 6.

In Proposition Five, Appellant challenges the trial court's admission of State's Exhibit No. 18. Although Appellant objected to the admission of this video at trial, he failed to raise the challenge that he now asserts on appeal. Therefore, we find that he has waived appellate review of this issue for all but plain error. *Simpson*, 1994 OK CR 40, ¶¶ 11, 23, 876 P.2d at 694-95, 698-99; *Short v. State*, 1999 OK CR 15, ¶ 27, 980 P.2d 1081, 1094 ("When a specific objection is raised at trial, this Court will not entertain a different objection on

appeal.”). Reviewing Appellant’s claim for plain error pursuant to the test set forth in *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907, we find that Appellant has not shown the existence of an actual error. *Id.*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

Although photographs of an accused in pretrial restraints are inherently prejudicial, we find that, under the unique circumstances of this case, the probative value of the video was not substantially outweighed by its prejudicial effect. *Warner v. State*, 2006 OK CR 40, ¶ 167, 144 P.3d 838, 887; *Gilbert v. State*, 1997 OK CR 71, ¶¶ 80-81, 951 P.2d 98, 119. The video held excellent probative value. It corroborated the witnesses’ testimony and depicted the crime scene. *Davis v. State*, 2011 OK CR 29, ¶ 86, 268 P.3d 86, 113. There was nothing unfairly prejudicial about the images of the handgun on the video. *Id.*, 2011 OK CR 29, ¶ 153, 268 P.3d at 125; *Washington v. State*, 1999 OK CR 22, ¶ 26, 989 P.2d 960, 971. The very brief segments which depicted Appellant striking his head against the plastic cage inside a patrol car tended to refute Appellant’s defense as they were probative on the issue of identity and tended to establish Appellant’s consciousness of guilt. *Dodd v. State*, 2004 OK CR 31, ¶¶ 34-36, 100 P.3d 1017, 1031. There is no error, thus plain error did not occur. Proposition Five is denied.

In Proposition Six, Appellant challenges the trial court’s admission of State’s Exhibit No. 1, the currency recovered from the pockets of Appellant’s girlfriend. We find that the trial court did not abuse its discretion in the admission of the currency recovered from Daffney Gibbs’ pockets. *Marshall v.*

*State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474; *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. As Gibbs was discovered at the scene of the robbery, in close proximity to Appellant, and had in her possession torn bills which matched those found on the ground and in Appellant's possession, we find that the currency was sufficiently connected to the charged offense. *See Harmon v. State*, 2011 OK CR 6, ¶¶ 50-51, 248 P.2d 918, 937. We further find that the probative value of the currency found on Gibbs' person was not substantially outweighed by its prejudicial effect. *Postelle v. State*, 2011 OK CR 30, ¶ 31, 267 P.3d 114, 131, *cert. denied*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 282, 184 L.Ed.2d 165 (2012). When added to the other currency that was recovered, the currency roughly equaled the amount of money taken from the hotel cash register.

We further find that Appellant was not denied a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (quotations and citation omitted). Appellant was not denied the opportunity to call Gibbs as a witness or otherwise respond to the State's introduction of the currency. *See Lott v. State*, 2004 OK CR 27, ¶ 81, 98 P.3d 318, 342. Proposition Six is denied.

In Proposition Seven, Appellant contends that the combined errors in his trial denied him the right to a constitutionally guaranteed fair trial. We find Appellant was not denied a fair trial by cumulative error. *Ashinsky v. State*, 1989 OK CR 59, ¶ 31, 780 P.2d 201, 209; *Bechtel v. State*, 1987 OK CR 126, 738 P.2d 559, 561. In Proposition Four we determined that Appellant's convictions for both robbery with a firearm and assault while masked violated

21 O.S.2001, § 11. However, this sole error cannot support an accumulation of error claim. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908. Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

### DECISION

The Judgment and Sentence of the district court on Counts 1 and 3 is **AFFIRMED**. The Judgment and Sentence of the district on Count 6 is **REVERSED** with instructions to **DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY  
THE HONORABLE KURT G. GLASSCO, DISTRICT JUDGE

#### APPEARANCES AT TRIAL

CHRIS ECONOMOU  
ATTORNEY AT LAW  
502 SOUTH DENVER  
TULSA, OK 74119  
COUNSEL FOR DEFENDANT

MICHAEL J. ENGLISH  
GARY L. DAVIS  
ASSISTANT DISTRICT ATTORNEYS  
500 S. DENVER, STE 900  
TULSA, OK 74103  
COUNSEL FOR THE STATE

**OPINION BY: LUMPKIN, J.**  
LEWIS, P.J.: CONCUR  
SMITH, V.P.J.: CONCUR  
C. JOHNSON, J.: CONCUR  
A. JOHNSON, J.: CONCUR

#### APPEARANCES ON APPEAL

MATTHEW D. HAIRE  
APPELLATE DEFENSE COUNSEL  
P.O. BOX 926  
NORMAN, OK 73070  
COUNSEL FOR APPELLANT

E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA  
LORI S. CARTER  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> ST.  
OKLAHOMA CITY, OK 73105  
COUNSEL FOR THE STATE

RE