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JAMES W. PATTERSON  
CLERK

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

EDDIE DEWAYNE HOLLINS and )  
MELISSA JOANN DAVIS )

Appellant, )

-vs- )

STATE OF OKLAHOMA, )

Appellee. )

NOT FOR PUBLICATION

No. F-98-605

**SUMMARY OPINION**

**STRUBHAR, PRESIDING JUDGE:**

Appellants, Eddie Dewayne Hollins and Melissa Joann Davis, were convicted of Assault With a Dangerous Weapon (Count I); Drive-by-Shooting (Count II); and Conspiracy to Commit a Felony (Count III), in the District Court of Pottawatomie County, Case Number CF-97-524, following a jury trial before the Honorable Glenn Dale Carter. Following its return of a guilty verdict, the jury recommended that Appellants each be sentenced to five years imprisonment on Count I, fifteen years imprisonment on Count II, and five years imprisonment on Count III. The trial court sentenced Appellants accordingly, ordering the sentences run 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 reaching our decision, we considered the following propositions of error and

determined neither reversal or modification to be required under the law and the evidence:

- I. Appellants' conviction on Count III, Conspiracy to Commit a Felony, should be reversed and remanded with instructions to dismiss because the State failed to prove that a conspiracy existed.
- II. Under the facts of the case, Appellants' convictions for both Conspiracy to Commit a Felony and both Drive-By-Shooting and Assault With a Dangerous Weapon violated their constitutional and statutory protections against double punishment.
- III. Appellants' simultaneous convictions for Assault With a Dangerous Weapon and Drive-By-Shooting violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, Article II, § 21 of the Oklahoma Constitution and 21 O.S.1991, § 11.
- IV. The district court committed reversible error when, during voir dire, it instructed the jury that Appellants' were presumed to be not guilty. This error violated Appellants' right to Due Process pursuant to amendments five and fourteen of the United States Constitution and Article II, sections 7 and 20, of the Oklahoma Constitution.
- V. The sentence imposed is excessive and should be modified.

#### **DECISION**

As to Appellants' first proposition, we find that there was sufficient evidence to support the jury's finding beyond a reasonable doubt that a conspiracy existed. *See Spuehler v. State*, 709 P.2d 202, 204 (Okla.Cr.1985).

We also find, regarding the second proposition, that under the facts of this case, convictions for both conspiracy and the other two felonies did not violate Appellants' rights to be free from double punishment. This Court has

consistently held "that a conspiracy to commit an unlawful act constitutes an independent crime, complete in itself and distinct from the unlawful act contemplated." *Stohler ex rel. Lamm v. State*, 696 P.2d 1038, 1040 (Okl.Cr.1985). We decline to depart from this precedent at this time.

As to Appellants' third proposition, we find error which requires reversal. In Appellants' case, Assault With a Dangerous Weapon is not separate and distinct from the crime of Drive-By-Shooting. On the facts of this case, the two offenses were clearly incident to a single objective. This was violative of the prohibition against double punishment in 21 O.S.1991, § 11. *See Hale v. State*, 888 P.2d 1027, 1029 (Okl.Cr.1995). Accordingly, this Court reverses Count I, Assault With a Dangerous Weapon, with instructions to dismiss.

Appellant's fourth proposition does not require relief as the objectionable comment was not met with objection and did not rise to the level of plain error. *See Simpson v. State*, 876 P.2d 690 (Okl.Cr.1994).

Finally we do not find that that sentences imposed were excessive. *See renfro v. State*, 734 P.2d 286, 290 (Okl.Cr.1987).

The Judgment and Sentence of the trial court regarding Counts II and III is **AFFIRMED**. Count I is **REVERSED** with instructions to **DISMISS**.

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**OPINION BY: STRUBHAR, P.J.**  
LUMPKIN, V.P.J.: CONCUR IN RESULT  
JOHNSON, J.: CONCUR  
CHAPEL, J.: CONCUR  
LILE, J.: CONCUR IN RESULT

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