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

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| PATRICK NEAL McBRAYER and JAMES HALL McBRAYER, | ) | |
| Appellants, | ) | NOT FOR PUBLICATION |
| -vs- | ) | Nos. F-98-375<br>F-98-670 |
| STATE OF OKLAHOMA, | ) | |
| Appellee. | ) | |

## SUMMARY OPINION

**STRUBHAR, PRESIDING JUDGE:**

Appellants, Patrick Neal McBrayer and James Hall McBrayer, were convicted of Conspiracy to Conceal Stolen or Embezzled Property, Case No. CF-97-88, and Knowingly Concealing Stolen or Embezzled Property, Case No. CF-96-87, in the District Court of Johnston County, following a jury trial before the Honorable John H. Scaggs. The jury found Appellants guilty of the crimes charged and assessed punishment for each of them at one year imprisonment in the county jail and a $500.00 fine for Knowingly Concealing Stolen or Embezzled Property and a fine of $5,000.00 for the conspiracy conviction. The trial court sentenced Appellants accordingly and in addition, ordered them to pay $7,500.00 in restitution.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse.

In reaching our decision, we considered the following propositions of error and determined this result to be required under the law and the evidence:

I. The trial court committed fundamental error by permitting the prosecution to amend the charges during trial, after its case in chief, to include embezzlement.

II. The conduct of the trial judge evidenced a bias against Appellants and deprived them of a fair trial.

III. An essential element of knowingly concealing stolen property - that the property was in fact stolen - was previously litigated and decided against the State in McClain County. Thus, the State was collaterally estopped from relitigating the issue in Johnston county.

**DECISION**

Because we find that this case warrants reversal on error raised in Proposition II, we need not fully address the other propositions. We find with regard to Proposition II, that in the present case, while the trial court's initial admonishment to the witness may have been appropriate, his second admonishment and subsequent jailing of the witness was not appropriate under the circumstances of this case. Whether the witness was jailed overnight as a material witness or for perjury makes no difference to the outcome of this case as both were unnecessary and inappropriate under the circumstances. The trial court's conclusion that the witness had committed perjury was not based upon her testimony being inconsistent with a prior sworn statement, but rather appears to have been based upon the judge's

conclusion that her testimony varied from what she had previously told the prosecutor. This does not support a finding by the trial court that the witness had *probably* perjured herself as is required by statute before a witness can be summarily jailed for perjury. *See* 21 O.S.1991, § 501. Further, it was neither appropriate or necessary to jail the witness as a material witness in this case as her testimony had almost concluded. She had finished direct examination and was almost through cross examination at the time that the trial court concluded the proceedings for the day and decided to jail her overnight to prevent her from being influenced by Appellants. The jailing of the witness overnight was coercive and can clearly be seen to have exerted duress over the witness who, not surprisingly, changed her testimony the following day to conform to the prosecutor's theory of the case. As in *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), the trial court's actions effectively deprived Appellants of their defense and deprived them of Due Process under the Fourteenth Amendment. This error was prejudicial and not harmless as this witness was central to Appellants' defense. Based upon this error this case is reversed and remanded for a new trial.

Although we need not fully address Appellants' argument in Proposition III, we do note that before the present case is retried, it would behoove the trial court to determine whether the charges in the McClain County case arose out

of the same incident and concern the same property which gave rise to the charges in the present case. If so, before the charges in the present case can be retried, the prosecutor must clearly show that it has acquired 'new' evidence since the dismissal in accordance with the law set forth in *Chase v. State*, 517 P.2d 1142, 1143 (Okl.Cr.1973). *See also Tilley v. State*, 869 P.2d 847, 849 (Okl.Cr.1993).

The Judgment and Sentence of the trial court is **REVERSED** and **REMANDED** for a **NEW TRIAL.**

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**OPINION BY: STRUBHAR, P.J.**
LUMPKIN, V.P.J.: DISSENT
JOHNSON, J.: CONCUR
CHAPEL, J.: SPECIALLY CONCUR
LILE, J.: DISSENT

**CHAPEL, JUDGE, SPECIALLY CONCURRING:**

I join the majority opinion. However, I believe it is important to respond to Judges Lumpkin and Lile's conclusions that the trial judge properly invoked and followed the provisions of 21 O.S. 1991, § 501. To support his conclusion, Judge Lumpkin states "In the present case, the admonishment, which was not nearly as strong as that in *Webb*, came in the midst of the witness's testimony, after it became apparent the testimony was inconsistent with testimony she had just given in the same proceeding." This is incorrect. At the very most, in this case, there were prior unsworn inconsistent statements which should have been left to the lawyers to explore through cross examination. The jury could then have determined the witnesses' credibility.

Judge Lile, in his dissent, makes the same mistake made by the trial judge. He apparently believes Ann Marie Groves was telling the truth in her out-of-court prior inconsistent statements rather than her in-court sworn testimony. At no time prior to her jailing did this witness give clearly inconsistent sworn testimony. In our system, it is not the judge's duty to make subtle judgments as to a witness's credibility in a jury trial. Rather, that is the duty of the jury. There is nothing in this record which would support the necessary statutory conclusion that the witness had "probably" perjured herself or which justified the extreme measure of jailing the witness.

It should also be noted that the last words of the witness, a young, twenty-four year old mother of an infant, before being led off to jail by deputies

as an accused perjurer, were, "What about my son?" Not surprisingly, when the trial resumed the next morning, the district attorney had a very, very cooperative witness.

**LUMPKIN, VICE-PRESIDING JUDGE: DISSENTS**

I dissent to the reversal of this case and find *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) distinguishable. In *Webb*, the witness had not yet testified when the trial judge strongly admonished him against perjuring himself. After the judge's comments, the witness refused to testify. The Supreme Court found the "unnecessarily strong terms" used by the judge could well have exerted such duress as to cause the witness to refuse to testify. 409 U.S. at 97, 93 S.Ct. at 353. In the present case, the admonishment, which was not nearly as strong as that in *Webb*, came in the midst of the witness's testimony, after it became apparent the testimony was inconsistent with testimony she had just given in the same proceeding. The witness had almost concluded her testimony when the trial court excused the jury and followed the provisions of 21 O.S.1991, § 501.

As to section 501, the record in the case clearly supports the court's finding that the witness had "probably" perjured herself before committing her to jail. In ordering the witness to jail, the trial judge clearly followed the procedures set forth in 21 O.S.1991, § 501 (upon finding a witness has probably committed perjury, trial court "must immediately commit such person . . . to prison). The record does not support the inference that the jailing of the witness was so coercive as to compel her to change her testimony. Appellant has failed to show any prejudice from the witness's decision to change her

testimony and elect to tell the truth once called back to the stand. In addition, Appellants have failed to show any denial of due process or prejudice from the action by the trial judge.

**LILE, J.: DISSENTS**

I commend the trial court for its attempt to maintain order in a trial that more closely resembled a family feud than a criminal prosecution. The complaining witnesses (The Stinsons) went to Wisconsin and left their home place in the care of a daughter, Ann Marie Groves (his step-daughter, her daughter). They asked Ms. Groves to take care of the property and told her she could sell "stuff" to pay the bills. (The scope of this authority was uncertain; it may have included only used tires from the tire business or may have included everything in sight according to some of those involved.) Ms. Graves brought along her common law husband, Tim Mayer, who took a broad view of the authority to sell, believing he was authorized to sell a $6,000 bobcat for $500. The appellants (The McBrayers) apparently felt more comfortable dealing with the common law husband, Tim Mayer, than with the daughter (Ann Marie Groves) because when they recruited Gary Wilson (another family friend) to load the bobcat they advised him that they "needed to pick it up while Tim had Ann Marie at Wal-Mart so she wouldn't know about it." In payment, a cashier's check for $500 was made payable to Ann Marie Groves. Tim Mayer negotiated the check.

Ultimately, the Stinsons missed their bobcat. The McBrayers were charged, tried and convicted, and we now consider the appeal of their convictions.

By the time of trial, Ann Marie Groves and Tim Mayer were no longer in love. Ann Marie told the Stinsons she didn't know about what was going on, that she was afraid of Tim Mayer, and it was all his fault. She told the police she didn't know about the bobcat sale, and she told the district attorney she didn't know about the bobcat sale. During the trial, she was offered a place to live by one or more of the Appellants. (According to family friend Gary Wilson, this occurred in the hallway just before the witness testified.) Prior to the trial, the witness had been told by the wife of one of the appellants (Terry McBrayer) that while "working for D.O.C. she had found out that you can get rid of people. That there's a way to get rid of people using a plant or something," which statement Ann Marie took to be a threat; but she asserted that "I don't know if it was towards me, but it made me think I better stay on my Ps and Qs of what goes on." During the trial, Ann Marie went to lunch with the appellants and her sister, Candice, who was or had been at one time in the custody of one of the appellants. Defense counsel told the trial court that there were no discussions about the case.

The Appellants called Ann Marie Groves to the stand as their witness. They wanted to establish and did establish that she authorized the sale of the bobcat. In response to questioning, she testified that "yes, me & Tim sold it to Jim McBrayer and Neal McBrayer." It was hard to hear her answer, but when asked to speak up, she affirmed that "we sold it to Jim & Neal McBrayer." She

further stated she was paid with a cashier's check that was made out to her, and that she put it in a joint account and paid bills.

On cross examination by the prosecuting attorney, she could not remember telling Officer Miller that she didn't know about the sale; couldn't remember telling the Stinsons that she didn't know about the sale; and couldn't remember telling the district attorney that she didn't know about the sale.

At this point, the trial judge excused the jury and advised the witness that perjury was "lying under oath"; carried up to 5 years in D.O.C.; admitted that although he didn't know what the truth was, that he thought she was awfully close to perjury; stated that if she was testifying truthfully that was fine; and advised her to tell the truth.

On further cross examination, the witness changed her story and testified that she knew about the sale but was not personally involved in the sale. At this time the wife of one of the Appellants developed some unidentified medical emergency that required the assistance of EMTs and a trip to the emergency room. It also required that the trial be halted, and at the request of the defense attorney, the case was continued until the next morning.

After the jury was excused, (following inquiry about the effects of the medical emergency on the jurors' ability to be fair and impartial) the prosecutor proposed to the judge that he thought the witness was being influenced and explained why. The trial court found that there was "evidence that

substantiates a basis that you are, number one, a material witness, and, number two, you have perjured yourself in this case today"; further that "there is evidence that raises a reasonable suspicion, if not without a doubt, that you have been influenced in your testimony." The trial court's conclusions were clearly supported by the events to that point in the trial. She was placed in jail and the trial court appointed a lawyer to represent her. The next morning, with her attorney present, the witness testified that she didn't know about the sale of the bobcat, and further that she remembered telling the prosecutor that she didn't know about the sale of the bobcat.

As set forth by Judge Lumpkin, the trial judge did not abuse his discretion in invoking Title 21 O.S. § 501. The trial court's action in immediately appointing counsel to represent the witness negated any coercive pressure and thoroughly diluted any duress arising out of these events. The actions of the trial court were proper under the circumstances. The trial court did not abuse its discretion under the circumstances, and the case should not be reversed on these grounds. The defendants are not entitled to a defense based upon perjured testimony and Due Process does not require a court to set idly by when clearly perjured testimony is being offered. Respectfully, I Dissent.