

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN - 9 2000
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICHARD LEE POTTS,)
)
Appellant,) NOT FOR PUBLICATION
)
v.) Case No. F-99-127
)
THE STATE OF OKLAHOMA,)
)
Appellee.)

SUMMARY OPINION

LILE, JUDGE:

Appellant, Richard Lee Potts, was convicted at jury trial of Count I- Assault and Battery with a Deadly Weapon (21 O.S.1991, § 652); Count II- Shooting with Intent to Kill (21 O.S.1991, § 652), both After Former Conviction of Two Former Felonies, and Count III-Possession of a Firearm, After Former Conviction of a Felony (21 O.S.Supp.1997, § 1283) in the District Court of Tulsa County, Case No. CF-98-2628. The Honorable Jesse S. Harris, District Judge, followed the verdict of the jury and sentenced Appellant to twenty (20) years on Count I and II and ten (10) years on Count III, plus fines of \$7,500 on each count. Appellant has perfected his appeal to this Court.

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

- 1) THE TRIAL COURT SHOULD HAVE EXCLUDED IDENTIFICATION TESTIMONY THAT THE STATE FAILED TO PRODUCE IN DISCOVERY.

- 2) WHERE POSSESSION OF A FIREARM AFTER FORMER CONVICTION OF A FELONY IS SIMPLY A FACET OF THE PRIMARY OFFENSE OF SHOOTING WITH INTENT TO KILL, SECTION 11 PROHIBITS DOUBLE PUNISHMENT FOR THE SINGLE COURSE OF CRIMINAL CONDUCT.
- 3) PROSECUTORIAL MISCONDUCT DEPRIVED MR. POTTS OF A CONSTITUTIONALLY FAIR TRIAL.
- 4) THE TRIAL COURT FUNDAMENTALLY ERRED BY SUBMITTING AN INSTRUCTION ON CONFESSIONS WHERE THE DEFENDANT DID NOT CONFESS.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts and briefs of the parties, we find merit in Proposition II only, requiring that Count III be Reversed and Remanded, with instructions to Dismiss.

With regard to Proposition I, we find that the State properly complied with the requirements of 12 O.S.1991, § 78, and that the testimony of the witness at trial was within the scope of the summary of testimony.

With regard to Proposition II, we find that the only evidence of Shooting with Intent to Kill, After Former Conviction of a Felony, consists of the act of Appellant firing the firearm at first Mr. Neal and then his son. These acts are the same as the act of possession of the firearm and prosecution for Count III violates the provisions of 21 O.S.1991, § 11. *See Davis v. State*, 1999 OK CR 48, ¶¶ 6-15, ___P.2d___, 70 O.B.J. 3763. Therefore, Count III is Reversed and Remanded, with instructions to Dismiss.

With regard to Proposition III, we find that Appellant was in no way prejudiced by the prosecutor's cross-examinations of the witnesses. Any error that may have occurred would have been harmless in light of the evidence of guilt. *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287. Further, we find that any error that may have occurred in the prosecutor's cross-examination of witness Glen Moreland was cured when the trial court sustained the defense counsel's objection and admonished the jury to disregard the complained-of question. *Martinez v. State*, 1999 OK CR 33, ¶ 47, 984 P.2d 813, 826; *Pruitt v. State*, 1983 OK CR 145, ¶ 12, 670 P.2d 999, 1001. Lastly, the prosecutor's closing argument was inferred from the evidence and fell well within the wide latitude allowed by this Court. *Miller v. State*, 1998 OK CR 59, 977 P.2d 1099; *Le v. State*, 1997 OK CR 55, 947 P.2d 535.

With regard to Proposition IV, we find no plain error. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690.

DECISION

The Judgment and Sentence of the district court for Count III is **REVERSED** and **REMANDED** with instructions to **DISMISS**. The Judgment and Sentence as to all other counts is **AFFIRMED**.

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OPINION BY: LILE, J.

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LUMPKIN, V.P.J.: CONCURS

JOHNSON, J.: CONCURS

CHAPEL, J.: CONCURS

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