IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROBERT PERRY RIMMER	)	
	)	
Appellant,	)	
v.	)	Case No. F-99-1317
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Robert Perry Rimmer was tried by jury and convicted of Robbery with Firearms in violation of 21 O.S.Supp.1997, § 801 in the District Court of Comanche County, Case No. CF-99-64. In accordance with the jury's recommendation the Honorable David B. Lewis sentenced Rimmer to fourteen (14) years imprisonment. Rimmer appeals this conviction and sentence.

Rimmer raises three propositions of error in support of his appeal:

I. Evidence is insufficient to support the verdict;
II. The admission of other crimes denied Rimmer a fair trial; and
III. The trial court erred by denying the co-defendant the right to invoke the Fifth Amendment.

After thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we find Proposition I requires reversal. Circumstantial evidence must negate every reasonable hypothesis other than guilt.[1] The relevant evidence showed

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[1] *Hooper v. State*, 1997 OK CR 64, 947 P.2d 1090, 1103, *cert. denied*, 524 U.S. 943, 118 S.Ct. 2353, 141 L.Ed.2d 722 (1998).

Rimmer's wife borrowed a friend's Eagle Talon about 12:45. Rimmer's son Benjamin used the Talon and committed an armed robbery between 1:45 and 2:30. An older white man drove the car, and Benjamin didn't know many people in Lawton. Nobody identified the driver. An older white man drove the Talon to the friend's house at 7:10. He saw officers and fled. Again, the driver could not be identified. Rimmer was stopped while running near where the Talon was abandoned during the chase. He admitted driving the car after 4:30 that evening. He did not have the car keys when stopped. This is simply not enough to connect Rimmer to the robbery.[2] The State presented insufficient evidence to convict Rimmer of armed robbery, and this case is **REVERSED** with instructions to **DISMISS**.

Decision

The Judgment and Sentence of the District Court is **REVERSED** with instructions to **DISMISS**.

[2] This evidentiary problem was exacerbated by the admission of irrelevant, highly prejudicial other crimes evidence. Testimony regarding the syringe in the Talon and Benjamin's purchase of crack cocaine should not have been admitted.

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OPINION BY: CHAPEL, JUDGE

STRUBHAR, P.J.:	CONCUR
LUMPKIN, V.P.J.:	DISSENT
JOHNSON, J.:	CONCUR
LILE, J.:	DISSENT

LUMPKIN, JUDGE: DISSENTS

For quite some time, I have been advocating the death of the so-called "reasonable hypothesis" test. *See White v. State*, 1995 OK CR 15, ¶ 4, 900 P.2d 982, 984 (Lumpkin, J., specially concurring) ("There is no basis in logic or the law for differentiating between cases containing entirely circumstantial evidence and cases containing both direct and circumstantial evidence.") On this point, I am not alone. The United States Supreme Court reached the same conclusion forty-six years ago in *Holland v. U.S*, 348 U.S. 121, 140, 75 S.Ct. 127, 137-38, 99 L.Ed. 150 (1954):

> [T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect, *United States v. Austin-Bagley Corp.*, 2 Cir., 31 F.2d 229, 234, *certiorari denied*, 279 U.S. 863, 49 S.Ct. 479, 73 L.Ed. 1002; *United States v. Becker*, 2 Cir., 62 F.2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), ss 25--26.
>
> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

In the instant case, after receiving its instructions, including a uniform instruction that read, "The law makes no distinction between the

weight to be given to either direct or circumstantial evidence," the jury determined Appellant had been proven guilty beyond a reasonable doubt. This Court's Opinion, however, reverses the trier of fact's unanimous decision by relying on the antiquated notion that circumstantial evidence must negate every reasonable hypothesis other than guilt. Although this is the test a majority of this Court has adopted, its application to the instant case results in a miscarriage of justice. Therefore, I dissent.

Here, the record reflects that on the date in question, Appellant, his wife Holly, and his son Benjamin were living at the home of Al Jackowiak and Monica Cowan. Holly asked to borrow Ms. Cowan's Eagle Talon at about 12:45 p.m. Mr. and Mrs. Biggs were robbed by Benjamin an hour or so later, sometime between 1:45 p.m. to 2:30 p.m.

Two eyewitnesses saw Benjamin running away from the robbery scene and getting into Ms. Cowan's Eagle Talon. Another man was waiting in the driver's seat, but the eyewitnesses could not identify the driver as the two men drove away from the scene.

Benjamin admitted committing the robbery, but claimed he acted alone. He testified that after trading some jewelry from the robbery for crack cocaine, he returned home at 3:30.[1] According to Benjamin, he

[1] Officer Harrell drove past the home at 3:15 p.m., 3:30 p.m., and 4:05 p.m., but the Talon was not there.

left sometime later[2] with Appellant and Holly. They went to McDonalds, then went to get the Talon's brakes fixed.[3] The person who was going to fix the brakes was not home, so the three returned home with Benjamin driving, Appellant in the passenger's seat, and Holly in back. It was 7:10 p.m.

Appellant, on the other hand, claimed he, Holly, and his son had been at home until around 4:30 p.m., except for a few minutes when Benjamin left to get cigarettes.[4] The trio left to get the car's brakes fixed. When the mechanic was not home, they went to Wal-Mart, not McDonalds, to buy groceries for supper. Appellant drove, and they returned home at 7:10 p.m.

Police officers, waiting at the home in unmarked vehicles saw three people inside the Talon. An older white male was driving, and a younger white male was in the passenger's seat. The Talon sped up as it passed the officers' unmarked vehicles. Officers noted the tag had been removed. The officers pursued, and a high speed chase through Lawton commenced. Officers lost the vehicle momentarily, but found it abandoned. Appellant, Benjamin, and Holly were apprehended nearby on foot. Appellant claimed he fled because Holly owed fines in Altus, and Benjamin had gotten in trouble with drugs there.

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[2] During the preliminary hearing, he had testified they left together at 3:30 p.m.; at trial, he testified he could not remember the time.

[3] Mr. Jackowiak testified, however, that the brakes were "good."

Although the evidence of Appellant's guilt is circumstantial, after reviewing it in the light most favorable to the prosecution, I believe any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 32, ¶ 7, 709 P.2d 202, 203-04. Moreover, while I am not entirely convinced the evidence supports another "reasonable" hypothesis other than guilt, I admit this question is surely a closer call. However, I strongly believe the reasonable hypothesis test gives the appellate courts too much license to nullify verdicts rendered by those responsible for judging the weight of the evidence and credibility of witnesses.

[4] See note one.