

JUN 8 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CHRISTOPHER B. ANDREWS,

Appellant,

-vs-

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. F-2000-451

SUMMARY OPINION

STRUBHAR, JUDGE:

Appellant, Christopher B. Andrews, was convicted of First Degree Robbery, in the District Court of Oklahoma County, Case Number CF-98-8150, following a jury trial before the Honorable Virgil C. Black. Following its return of a guilty verdict, the jury recommended that Appellant be sentenced to serve a term of thirty-five years imprisonment. The trial court sentenced Appellant accordingly.

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 proposition of error and determined this result to be required under the law and the evidence:

- I. Reversible error occurred when the trial judge allowed the jury to separate, over both defense and State objections, after the jury had begun its deliberations.

DECISION

We find merit in Appellant's proposition. The record reflects that after the jury had begun deliberations they were allowed to separate and go home for the night over the objection of both defense counsel and the prosecutor. This Court has consistently held that 22 O.S.1991, § 857 requires a jury be sequestered after it has heard the charge and remain so until it returns a verdict. See *Mooney v. State*, 990 P.2d 875, 892 (Okl.Cr.1999). See also *Bayliss v. State*, 795 P.2d 1079, 1080-81 (Okl.Cr.1990); *Day v. State*, 784 P.2d 79, 84 (Okl.Cr.1989); *Elliott v. State*, 753 P.2d 920, 922 (Okl.Cr.1988). "If after deliberations have begun the jury is allowed to separate and commingle with people outside the jury panel, prejudice to the defendant is presumed." *Mooney*, 990 P.2d at 892. In *Hiler v. State*, 796 P.2d 346, 351 (Okl.Cr.1990) this Court held that "[t]here can be no question that the State bears the burden of rebutting any presumption of prejudice when a violation of section 857 has been shown."

Here, the State failed to rebut the automatic presumption of prejudice by simply noting that the trial court admonished the jury once before recessing and that the jury is presumed to follow the instructions given to them by the trial court. Accordingly, this Court is required to reverse Appellant's Judgment and Sentence and to remand this case to the district court for a new trial. The

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

APPEARANCES AT TRIAL

MITCH SOLOMON
320 ROBERT S. KERR
OKLAHOMA CITY, OKLAHOMA
73102
ATTORNEY FOR APPELLANT

SHARON WIGDOR
320 ROBERT S. KERR
OKLAHOMA CITY, OKLAHOMA
73102
ATTORNEY FOR THE STATE

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

APPEARANCES ON APPEAL

ANDREA DIGILIO MILLER
611 COUNTY OFFICE BUILDING
OKLAHOMA CITY, OKLAHOMA
73102
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
JENNIFER B. WELCH
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA
73105
ATTORNEYS FOR APPELLEE