IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CLAUDE THOMAS GIFFORD,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2002-87**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Claude Thomas Gifford, was tried by jury in the District Court of Cleveland County, Case Number CF-2000-797, and convicted of the following crimes: Robbery in the First Degree (Count I), in violation of 21 O.S.1991, § 797, after two or more prior convictions; Assault and Battery with a Dangerous Weapon (Count II), in violation of 21 O.S.1991, § 645, after two or more prior convictions, and Assault and Battery, in violation of 21 O.S.1991, § 645. The jury set punishment at thirty-eight (38) years imprisonment on Count I, forty-eight (48) years imprisonment on Count II, and ninety (90) days in the county jail on Count III. The trial judge sentenced Appellant in accordance with the jury's determination. He ordered all sentences to be served consecutively, but suspended the last thirty-eight (38) years of the sentence on Count II.[1] Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

[1] The actual judgment and sentence, attached to Appellant's Petition in error, provides that the

I. Appellant has suffered double punishment by his conviction and sentencing on Count I – Robbery in the First Degree (by force and fear), and Count II – Assault and Battery with a Dangerous Weapon, both allegedly committed simultaneously against a single victim;

II. Appellant's conviction on Count I—Robbery in the First Degree—should be reversed or modified, because it was based upon a misleading jury instruction and a misleading verdict form that amounted to a directed verdict of robbery in the first degree;

III. Appellant's conviction on Count II—Assault and Battery with a Dangerous Weapon—should be reversed because the trial court failed to properly instruct the jury on the essential element "dangerous weapon" and the erroneous instruction implied an intent to kill, which is not an element of the charge against Appellant;

IV. Improper admission of statements made by absent witnesses denied Appellant his right to confront his accusers and was highly prejudicial to his defense;

V. Appellant's sentences should be modified, based upon the State's failure to provide sufficient proof of out-of-state prior convictions to be used for enhancement;

VI. Incarceration fees assessed against Appellant should be vacated and the matter remanded to the district court for a hearing and specific findings, as required by statute; and

VII. Appellant's court costs should be modified to relieve the indigent of payment for transcript preparation.

II. The testimony of Detective Phil Long, who sat through the trial as the case agent, completely exceeded the proper scope of expert testimony as it was not supported by sufficient facts.

After thoroughly considering these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we reverse Appellant's conviction on Count I and modify his sentence as set forth below.

---

last thirty-eight (38) years were suspended, but the judge actually pronounced that only the

With respect to proposition one, we find Appellant's simultaneous convictions for Robbery in the First Degree by force and fear against Shaun Sullivan (Count I) and Assault and Battery with a Dangerous Weapon against Shaun Sullivan (Count II) violate the statutory prohibition against double punishment, under the facts of this case. 22 O.S.Supp.1999, § 11. We find these were not separate and distinct crimes. *Davis v. State*, 993 P.2d 124, 126 (Okl.Cr.1999); *Hale v. State*, 888 P.2d 1027, 1029 (Okl.Cr.1995.)

Proposition two is moot, as per our resolution of proposition one and the relief ordered below. With respect to proposition three, we find the instructions, taken as a whole, fairly and accurately state the applicable law, and there was no plain error. *Freeman v. State*, 876 P.2d 283, 289 (Okl.Cr.1994); *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994).

With respect to proposition four, we find the trial court did not abuse its discretion in admitting the evidence, and any possible error was harmless beyond a reasonable doubt. *Simpson*, 876 P.2d at 701; *McIntosh v. State*, 810 P.2d 373, 376 (Okl.Cr.1991); 12 O.S.2001, §§ 2804(A)(5) & 2804(B)(5); *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 2538-39, 65 L.Ed.2d 597 (1980).

With respect to proposition five, we find modification is not warranted. *Cooper v. State*, 810 P.2d 1303-06 (Okl.Cr.1991). With respect to proposition six, we find the same is moot, as the amended judgment and sentence ordered incarceration fees suspended "in full." With respect to proposition seven, we find the district court did not err in assessing the cost of preparing the transcript to

---

last twenty-eight (28) years would be suspended.

Appellant. Those fees to be paid upon his release, along with other costs reasonably related to the prosecution, following a Rule VIII hearing and determination of his ability to pay, at that time. Rule 8.3, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2001); 20 O.S.2001, § 106.4.

DECISION

Appellant's conviction and sentence on Count I is hereby **REVERSED** and **DISMISSED**. Appellant's conviction and forty-eight (48) year sentence on Count II is hereby **AFFIRMED**, but the order suspending the final thirty-eight (38) years of that sentence is hereby **VACATED.** Appellant's conviction and sentence on Count III is hereby **AFFIRMED**, with the sentences to be served consecutively.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY
THE HONORABLE TOM A. LUCAS, DISTRICT JUDGE

APPEARANCES AT TRIAL

DOUGLAS J. SMITH
104 EAST EUFAULA STREET
NORMAN, OK 73069
COUNSEL FOR APPELLANT

KATHERINE ENGLISH
MARCI LOGAN
ASSISTANT DISTRICT ATTORNEYS
DISTRICT ATTORNEY'S OFFICE
201 SOUTH JONES
NORMAN, OK 73069
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

S. GAIL GUNNING
1623 CROSS CENTER DRIVE
NORMAN, OK 73019
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DIANE L. SLAYTON
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

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

RE