FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 2 6 2003

MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

CHARLES ARDELL MERRILL, JR.)
)
          Appellant,)   NOT FOR PUBLICATION
)   No. F-2002-1377
     -vs-   )
)
STATE OF OKLAHOMA,)
)
          Appellee.)

SUMMARY OPINION

STRUBHAR, J.:

Appellant, Charles Ardell Merrill, Jr., was convicted of First Degree Robbery, After Former Conviction of Two or More Felonies in the District Court of Oklahoma County, Case No. CF-2001-4913, following a jury trial before the Honorable Virgil C. Black. After returning a guilty verdict, the jury recommended that Appellant be sentenced to thirty years imprisonment. The trial court sentenced Appellant accordingly. From this judgment and sentence, he appeals.

Appellant raises the following propositions of error for review:

I. Reversible error and a due process violation occurred when the trial court allowed jurors to separate, over defense counsel's objection, after the jury had begun deliberations; and

II. Cumulative errors denied Mr. Merrill a fundamentally fair trial and due process under the federal and Oklahoma Constitutions and thus require reversal or a sentence modification.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, briefs and

exhibits of the parties, we reverse Appellant's conviction and remand his case for a new trial.

In reviewing the above claims, we find merit in Appellant's first proposition. The record reflects that after the jury had begun deliberations they were allowed to separate and go home for the evening, over the objection of defense counsel. This Court has consistently held that 22 O.S.2001, § 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."

In the present case, the State failed to rebut the automatic presumption of prejudice. 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.

DECISION

The Judgment and Sentence of the trial court is **REVERSED AND REMANDED FOR NEW TRIAL.**

APPEARANCES AT TRIAL	APPEARANCES ON APPEAL
DOUG MERRITT CYNTHIA TEDDER ASST. PUBLIC DEFENDERS 320 ROBERT S. KERR, #611 OKLAHOMA CITY, OK 73102 ATTORNEYS FOR APPELLANT	WENDELL B. SUTTON ASST. PUBLIC DEFENDER 320 ROBERT S. KERR 611 COUNTY OFFICE BLDG. OKLAHOMA CITY, OK 73102 ATTORNEY FOR APPELLANT
HEATHER MENDOZA ASSISTANT DISTRICT ATTORNEY 320 ROBERT S. KERR SUITE 505 OKLAHOMA CITY, OK 73102 ATTORNEY FOR THE STATE	W.A. DREW EDMONDSON ATTORNEY GENERAL OF OKLAHOMA TONYA QUINN ASSISTANT ATTORNEY GENERAL 2300 N.LINCOLN BLVD., SUITE112 OKLAHOMA CITY, OK 73105 ATTORNEYS FOR APPELLEE

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

RB

LUMPKIN, JUDGE: CONCUR IN RESULT

I agree with the argument by the State that this Court should not automatically reverse and remand for a new trial in cases of this type. The statutory language of 22 O.S. 2001, § 857, is subject to review under the guidelines we set forth in *Simpson v. State*, 876 P.2d 690 (Okl.Cr.1994). However the problem in this case is no attempt was made to rebut the automatic presumption by inquiring of the jurors. Therefore, there is no evidentiary record against which this Court can apply *Simpson*. As a result, I must concur in the results reached by the Court in this case.