IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CARLOS JAMES MIERA, JR., **Appellant,**	)	**NOT FOR PUBLICATION**
-vs.-	)	**No. RE-2016-282**
THE STATE OF OKLAHOMA, **Appellee.**	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

On June 13, 2011, in the District Court of Kay County, Case No. CF-2011-199, the Honorable D.W. Boyd, District Judge, sentenced Appellant to ten (10) years imprisonment for Possession of Firearms After Felony Conviction. In accordance with a plea agreement, Judge Boyd suspended execution of all but the first four (4) months of that term, conditioned on written rules of probation. The State subsequently moved to revoke this suspension order, and on March 1, 2016, filed a "Third Amended Motion to Revoke Suspended Sentence" that alleged Appellant violated his probation by committing on September 8, 2015, the crimes of Burglary in the First Degree, Conspiracy, Assault with a Dangerous Weapon, and Extortion Induced by Threats, all after former conviction of two or more felonies and all as charged in Kay County District Court Case No. CF-2015-702.

Following a preliminary hearing on the alleged new offenses, an evidentiary hearing was had on the State's Third Amended Motion to Revoke. In support of that Motion, the State introduced a transcript of the preliminary hearing testimony and presented the testimony of a police officer who had investigated the new offenses. This evidence revealed that on September 8, 2015, just before 11:00 o'clock at night, two men, without knocking and

uninvited, opened the front door of the home of Travis Gooden, and then walked into the front room where Gooden was sitting on a couch watching television. Gooden recognized one of these individuals as a man he knew as Tomahawk, but the other man he had never met before. Because this second individual was not wearing a shirt, Gooden was able to observe the tattoos on his chest and upper body.

Tomahawk put his hand around Gooden's neck and began talking to him. Appellant remained quiet but moved around with a knife in his hand. After several minutes of conversation, the three men went outside onto the front porch for an additional five minutes because Gooden's children were in the room asleep on a mattress lying on the floor. While on the front porch Gooden and Tomahawk spoke further. Gooden testified that while on the front porch, Appellant "walked back and forth with a knife to his head, tapping it to his forehead and saying he liked the smell of blood and he wanted to cut me," but he said Tomahawk wouldn't let him. (I P.H.Tr. 10.) Before leaving, Appellant told Gooden that if he didn't pay the $200.00 a week as Tomahawk had demanded, he would come back and slice Gooden's throat and the throats of his children. On the men leaving his front porch, Gooden saw the two of them go into the home of his next-door neighbor.

In explaining what he thought was behind this incident, Gooden advised that he had committed several burglaries years ago with a man named David Jones. Gooden explained that he had pled guilty to those burglaries, that Jones now "had a beef" with him, considered him "a snitch . . . [who] needed an ass-whooping," and that Tomahawk, who "used to hang out with David Jones a lot" and "run together" came to his home "[t]o try and get money out of [him]." (*Id.* 16-17.) Gooden said that once the men left, he took the children to his

mother's house, "[b]ecause if they're coming back, I don't want the kids there," and he then waved down a police officer. (*Id.* 14.)

On the officer going to the neighbor's house to investigate and question the occupants, he was able to present Gooden an individual photograph of each one of the two men who Gooden had described as well as a photograph of the neighbor. Gooden identified the photos of Tomahawk and Appellant as the men who came into his home. During his testimony, Gooden confirmed that the two men appeared to be acting together as though they had some kind of agreement to come into his house. (*Id.* 8.) At the conclusion of the evidentiary hearing, the Honorable David A. Bandy, Associate District Judge, on April 1, 2016, revoked an eight-(8)-year portion of the suspension order.

Appellant now appeals this final order of revocation, and he raises four propositions of error:

> 1. Insufficient evidence was presented to show that Mr. Miera committed any new crimes due to the tainted pre-hearing identification. As a result, Mr. Miera was denied his statutory and due process rights to a fundamentally fair hearing.
>
> 2. Insufficient evidence was presented to show by a preponderance of the evidence that Mr. Miera committed the new crimes as alleged.
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> 3. Because Mr. Miera was forced to choose between preserving his right to remain silent on the new offenses or presented [sic] a defense at the revocation hearing, the revocation order must be reversed.
>
> 4. Mr. Miera was denied due process of law by the trial court's failure to make a written statement of the evidence relied upon in revoking the suspended sentence.

Having thoroughly considered these propositions of error and the entire record before this Court, including the original record, transcript, and briefs of the parties, the Court finds no error warranting reversal or modification.

In Proposition I, Appellant complains that the police officer showing Gooden a single photo of him was so suggestive as to make Gooden's identification of him inadmissible. In support of this claim, Appellant cites *Foster v. California*, 394 U.S. 440, 442 & n.2, 89 S.Ct. 1127, 1128 & n.2, 22 L.Ed. 2d 402 (1969), wherein the U.S. Supreme Court held that identification procedures in some cases, under the totality of the circumstances, may be so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny due process and make the identification constitutionally inadmissible as a matter of law. We do not find Appellant's matter presents such a case.

As noted in *Welliver v. State* (also cited by Appellant), "'[I]improper suggestiveness does not indicate conclusively that the in-court identification was unreliable, thereby requiring exclusion. The central question is whether, under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive.'" *Welliver v. State*, 1980 OK CR 101, ¶ 4, 620 P.2d 438, In Appellant's matter, before seeing the photograph, Gooden gave an accurate description of Appellant, which included his upper body tattoos. It was this description, coupled with the information of Appellant being with Tomahawk (an individual known by Gooden) and their escape into a neighbor's house, that led the police officer to discern Appellant's identity, obtain his photograph, and show it to Gooden on the same night the offenses occurred. These circumstances cause any issue over the suggestiveness of this identification to be one running to the weight and credibility of that

identification and not one revealing an identification so inherently unreliable that its admission would deny due process.

Appellant's Proposition II contends that there was insufficient evidence to prove those offenses alleged to be probation violations. Appellant argues that the crime of Extortion Induced by Threats was not proven as the State failed to prove that any money or property was obtained from Gooden.[1] In *Ketterman v. State*, 1985 OK CR 138, 708 P.2d 1134, an application to revoke alleged the defendant violated his probation by committing the felony of Maiming. The evidence, however, did not support a finding that the defendant was guilty of that offense, but it did prove the lesser included offense of Assault and Battery. That act also constituted a violation of the defendant's rules of probation and was an act that the Court found would support the order of revocation. *Ketterman*, ¶¶ 4-5, 708 P.2d at 1135-36.[2] As the evidence in Appellant's matter was sufficient to prove the lesser included offense of attempted extortion in violation of Appellant's conditions of probation, no prejudice is demonstrated, and this is especially true here where there is proof of other probation violations as well. "Violation of even one condition of probation is sufficient to justify revocation of a suspended sentence." *Tilden v. State*, 2013 OK CR 10, ¶ 10, 306 P.3d 554, 557.

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[1] By statute, "Extortion" is defined as follows: "Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right." 21 O.S.2011, § 1481.

[2] *See also McFarlin v. State*, 1976 OK CR 188, ¶ 13, 554 P.2d 56, 60 ("the true test is not whether the defendant violated each and every element of formal complaint, but rather whether or not there is competent evidence in which the court could find that the defendant has violated the terms and conditions of his probation") *overruled on other grounds in Bishop v. State*, 1979 OK CR 42, ¶ 4, 595 P.2d 795, 797.

On reviewing the evidence before the District Court, we find it to be sufficient to support the remaining three offenses alleged in the State's revocation motion. We therefore reject Appellant's theory that there could be no Assault with a Dangerous Weapon because Appellant's acts did not amount to an offer of immediate force or violence to do a corporal hurt to another, but were instead at most, according to Appellant's theory, an offer to use force or violence at some future date if Gooden did not comply. *See* 21 O.S.2011, § 641 ("An assault is any willful and unlawful attempt or *offer* with force or violence to do a corporal hurt to another.") (emphasis added).

For an assault to occur, it is sufficient if the perpetrator performs an act that places another in apprehension of receiving an immediate battery. *See Dunbar v State*, 75 Okl.Cr. 275, 275, 131 P.2d 116, 117 (Court's Syllabus)("'An assault is any wilful and unlawful attempt or offer with force or violence to do a corporal hurt to another' or by any threatening gesture, showing in itself or by words accompanying it, sufficient to cause a well-founded apprehension of immediate peril."); Instruction No.4-26, OUJI-CR (2d) (Supp. 2017) (Committee Comments) ("Oklahoma defines an assault in accordance with both of the common law definitions: an attempt to commit a battery, or the intentional placing of another in apprehension of receiving an immediate battery."); *Assault*, Black's Law Dictionary (8th ed. 2004) ("The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact . . . ."). Appellant's pacing back and forth in a deranged manner while tapping a knife to his forehead and stating that he liked the smell of blood, wanted to cut Gooden but Tomahawk would not let him, and all occurring while Tomahawk had his hand around Gooden's throat, were certainly acts that would give rise to a well-founded apprehension

of immediate peril. *Cf. Lewis v. State*, 1984 OK CR 64, ¶ 7, 681 P.2d 772, 773 ("An intent to do bodily harm under 21 O.S. 1981 § 645 [Assault with a Dangerous Weapon statute], may be established by direct or circumstantial evidence, and it is no defense that the intent to do bodily harm is conditioned on some act of the victim where the accused cannot lawfully impose such a condition.").

Appellant's Proposition II contention that there is insufficient evidence of Burglary in the First Degree and conspiracy to commit a burglary both rely on his above claims that there was no proven crimes of extortion or assault. Appellant reasons that because there were no crimes committed after Appellant entered Gooden's home, there cannot be a burglary or a conspiracy to commit a burglary because the crime of burglary requires proof that Appellant entered Gooden's dwelling with the intent to commit a crime therein.[3] As Appellant's premise that Appellant committed no crime after entering the home is faulty for the reasons set forth above, his argument that there was no burglary is not supported by this record.

Lastly, we reject Appellant's contention there was no proof of an agreement between him and Tomahawk as necessary to prove a crime of Conspiracy. Our authorities have found proof of such an agreement can be derived from circumstantial evidence, and that such evidence can come about from the behavior of the co-conspirators during the commission of the crime agreed to be committed. *E.g., Powell v. State*, 2000 OK CR 5, ¶¶ 71-74, 995 P.2d 510, 528. In Appellant's matter, we find the evidence was sufficient to

[3] The statute defining Burglary in the First Degree states, "Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein . . . is guilty of burglary in the first degree." 21 O.S.2011, § 1431.

meet the preponderance of the evidence standard necessary for a trial court on revocation to find the commission of a conspiracy. Consequently, Appellant's Proposition II has failed to show Appellant is entitled to relief under his theories of insufficient evidence to prove violations of probation.

Proposition III asserts that error occurred in the District Court forcing Appellant to proceed in the revocation matter prior to his being tried on the new offenses. Appellant claims this required him to either forfeit his Fifth Amendment right to remain silent in connection with his new offenses by testifying at his revocation hearing, or to remain silent and thereby forfeit his due process right to present evidence at the revocation hearing. Appellant argues that requiring him to make such a choice between constitutional rights was error requiring reversal and cites the decisions of *Williams v. State,* 1996 OK CR 16, 915 P.2d 371, and *Simmons v. United State,* 390 U.S. 377, 88 S.Ct. 976, 19 L.Ed.2d 1247 (1968), in support of that claim.

The Court has reviewed those decisions, and it finds that they are distinguishable from what has occurred in Appellant's matter. Both *Williams* and *Simmons* involved the balancing of constitutional rights in a single case and not multiple ones as presented by Appellant's matter. Here the District Court did nothing to limit Appellant in how to most effectively present his revocation case nor did it restrict Appellant's freedom to choose to testify, if he so desired. As Appellant cites no authority that is on point with his particular situation, we find his Proposition III fails to demonstrate error.

Appellant's final claim of error, Proposition IV, asserts Appellant was denied due process when Judge Bandy partially revoked the suspension order without specifying what probation violations he was finding Appellant committed and without identifying what evidence on which he relied to find

those violations.[4] As Appellant did not object to Judge Bandy's alleged omission, he has waived all but plain error. *Tate v. State*, 2013 OK CR 18, ¶ 30, 313 P.3d 274, 283.

The State's Third Amended Motion to Revoked specified the alleged offenses committed by Appellant, all as charged in Case No. CF-2015-702, in violation of probation. Prior to his evidentiary hearing on that Motion, Appellant received a preliminary hearing on his new charges. The prepared transcript of that hearing had been presented to Appellant and it was thereafter offered at the revocation hearing as the primary evidence against him for revocation. As our cases have declined to find reversible error whenever the defendant has been "'sufficiently apprised of the grounds upon which his sentence is revoked,'" (*Tate*, ¶ 33, 313 P.3d at 283-84), we find no plain error occurring in Appellant's matter.

DECISION

The final order of April 1, 2016, partially revoking the suspension order in Kay County District Court Case No. CF-2011-199, is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KAY COUNTY
THE HONORABLE DAVID A. BANDY, ASSOCIATE DISTRICT JUDGE

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[4] *See Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 1762, 36 L.Ed. 2d 656 (1973).(holding that in revocation proceedings, the "'minimum requirements of due process'" include, among other things, that the probationer be provided "'a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole.'").

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OPINION BY: LUMPKIN, P.J.
LEWIS, V. P.J.: Concur
JOHNSON, J.: Not Participating
SMITH, J.: Concur
HUDSON, J.: Concur

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