

After thorough consideration of the propositions raised, the Original Record, transcripts, briefs and arguments of the parties, we have determined neither proposition raised warrants relief and Appellant's convictions and sentences should be affirmed.

The issue raised in Proposition One is not properly before the Court. The time to raise this issue was after the ruling which resulted in a mistrial, before the next trial, by filing an application for a writ of prohibition. *Dollar v. State*, 1984 OK CR 1, ¶¶ 4-7, 674 P.2d 48, 49.

Proposition Two does not warrant relief. "Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such to deprive the defendant of a fair trial." *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 514, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000). Here, the prosecutor's questions and comments were not grossly improper and did not affect the fundamental fairness of the trial. The jury did not impose the maximum sentence and the fifteen (15) year sentence imposed does not shock the conscience of the Court. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149.

DECISION

The Judgment and Sentence imposed by the trial court in Oklahoma County District Court, Case No. CF 2003-3614, is hereby

AFFIRMED.

APPEARANCES AT TRIAL

TIM WILSON
JOSHUA LEE
ASSISTANT PUBLIC DEFENDERS
320 ROBERT S. KERR, SUITE 611

APPEARANCES ON APPEAL

AMY WELLINGTON
ASST. PUBLIC DEFENDER
320 ROBERT S. KERR, SUITE 611
OKLAHOMA CITY, OK 73102

OKLAHOMA CITY, OK 73102
ATTORNEYS FOR DEFENDANT

STEPHEN ALCORN
ASST. DISTRICT ATTORNEY
OKLA. CO. COURTHOUSE
320 ROBERT S. KERR, SUITE 505
OKLAHOMA CITY, OK 73102
ATTORNEY FOR THE STATE

ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SANDRA D. RINEHART
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR STATE

OPINION BY: JOHNSON, J.
CHAPEL, P.J. : DISSENTS
LUMPKIN, V.P.J. : SPECIALLY
CONCURS
LILE, J.: CONCURS

CHAPEL, PRESIDING JUDGE, DISSENTING:

I respectfully dissent for two reasons. First, I cannot agree that the issue raised in Proposition I is not properly before the Court. I would agree that the issue would not properly be before the Court if this Court consistently required such matters to be raised by filing an Application for a Writ *and* if this Court did in fact always decide such issues on the merits. However, that is not the case. In most, but not all, Applications for Writs filed raising issues such as that presented here, we decline to decide the issue and advise the applicant that if a conviction occurs the matter can be raised upon direct appeal. By refusing to decide this matter now on direct appeal, we are sending extremely mixed signals.

Secondly, on the merits, I find a serious double jeopardy problem. The number of jurors in a criminal case is constitutional protection for the benefit of the accused. Here the accused asked that an alternate juror be seated and the trial judge refused. A problem then arose which led the trial judge to excuse one of the twelve jurors, leaving only eleven jurors. The accused, having already had to endure an earlier mistrial resulting from improper testimony by a State's witness, waived his right to twelve jurors and agreed to proceed with the eleven remaining.

The State objected and cited Article 2, § 19 of the Oklahoma Constitution which provides, among other things, that "[I]n all cases, the parties may agree on a lesser number of jurors than provided herein." The prosecutor and the trial judge interpreted this section of the Oklahoma Constitution to mean that

the trial could not proceed with eleven jurors unless both the State and the accused agreed and the State refused to agree. The trial judge thereupon declared a mistrial on his own motion.

I am of the opinion the trial judge erred in his ruling. In my opinion Article 2, § 19 of the Oklahoma Constitution has no applicability after a trial has begun and jeopardy has attached. Rather, it applies *before* a trial begins. Attempting to apply Article 2, § 19 of the State Constitution after jeopardy has attached would create all kinds of Federal Constitutional double jeopardy problems. In this case, jeopardy had attached and through no fault of the accused and over his objection a mistrial was declared. Under these circumstances the trial judge should have done a “manifest necessity” analysis.

The right not to be put on trial twice for the same offense is fundamental to our system. The State may avoid the effect of double jeopardy only upon a showing of a “manifest necessity” or a high degree of necessity. I do not believe the State can meet the showing of a high degree of necessity in this case. The accused requested an alternate juror and was denied. The possibility that a juror may have to be replaced is the very reason for providing for alternates. Additionally, even though I am not at all sure he had to, the accused agreed to forego his right to allow his case to be decided by eleven jurors.

There being no manifest necessity to grant a mistrial, I conclude double jeopardy attached. I would remand this case with instructions to dismiss.

LUMPKIN, VICE-PRESIDING JUDGE: SPECIALLY CONCUR

I join in the Court's correct analysis and adjudication of the propositions of error actually before the Court at this time. The role of this Court is to adjudicate those issues presented to it for decision, not search the record for issues we might have raised if we were the advocate for the appellant. The issue raised by the dissent has neither been preserved by appellant nor raised for consideration by this Court on appeal.