

MAR - 2 2005

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RIGHIE
CLERK

ROBERT THOMAS ELTON,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION
No. F-2003-1335

SUMMARY OPINION

JOHNSON, J.:

Robert Thomas Elton, Appellant, was tried by jury in the District Court of Tulsa County, Case No. CF-2002-5476, where he was convicted of Count 1 – Robbery with a Dangerous Weapon and Count 2 – Assault and Battery with a Dangerous Weapon.¹ The jury recommended fifty (50) years imprisonment on Count 1 and ten (10) years imprisonment on Count 2. The Honorable Rebecca Brett Nightingale, who presided at trial, sentenced Appellant accordingly and ordered the sentences to be served consecutively. From this judgment and sentence, he appeals.

Appellant raises the following propositions of error:

- I. The jury should not have been instructed on the lesser offense of assault and battery with a dangerous weapon over Appellant Elton's objection;
- II. Appellant Elton's multiple convictions violate Okla.Stat.Tit. 21, § 11;
- III. The trial court's erroneous belief that it could not instruct on parole ineligibility, and its refusal to do so in light of that erroneous belief, requires reversal;

¹ Appellant was originally charged with Assault and Battery with a Deadly Weapon, but the jury convicted him of the lesser offense.

- IV. Under the facts and circumstances of this particular case, the imposition of sixty years imprisonment does not serve the ends of justice;
- V. Prosecutorial misconduct warrants reversal or sentence reduction;
- VI. The court erred in failing to instruct on impeachment by prior inconsistent statements; and
- VII. Prosecutorial misconduct- Failure to disclose evidence constitutes reversible error.²

After thorough consideration of the propositions, and the entire record before us on appeal, including the original record, transcripts, exhibits and briefs of the parties, we affirm.

As to Proposition I, we find the trial court did not abuse its discretion in instructing the jury on assault and battery with a dangerous weapon. *Shrum v. State*, 991 P.2d 1032, 1036-37 (Okl.Cr.1999). The prosecutor's assent to the trial court's proposed instruction operated as a *de facto* request under the circumstances of this case and Appellant had adequate notice to defend the assault and battery with a dangerous weapon charge.

As to Proposition II, we find that Appellant's two convictions, while occurring in close proximity to one another, were separate and distinct and do not violate 21 O.S.2001, § 11. See *Davis v. State*, 916 P.2d 251, 261 (Okl.Cr.1996); *Hale v. State*, 888 P.2d 1027, 1028 (Okl.Cr.1985).

As to Proposition III, we find the trial court did not err in refusing Appellant's request for a jury instruction that he would have to serve 85% of his sentence before becoming eligible for parole. See *Mayes v. State*, 887 P.2d 1288, 1316 (Okl.Cr.1994), *cert. denied*, 513 U.S. 1194, 115 S.Ct. 1260, 131

L.Ed.2d 140 (1995); *Ellis v. State*, 749 P.2d 114, 116 (Okl.Cr.1988); *Miller v. State*, 522 P.2d 642, 644 (Okl.Cr.1974).

As to Proposition IV, we find that Appellant's sentence is within the statutory range of punishment and that it is not so excessive as to shock the conscience of the Court. Therefore, no relief is required. *Rea v. State*, 34 P.3d 148, 149 (Okl.Cr.2001).

As to Proposition V and Appellant's *pro se* proposition raised in his supplemental brief, we have reviewed each of the alleged instances of misconduct and find none of the instances, either individually or in the aggregate, warrant relief. *See Banks v. State*, 43 P.3d 390, 401 (Okl.Cr.2002), *cert. denied*, 537 U.S. 1126, 123 S.Ct. 898, 154 L.Ed.2d 811 (2003); *Pickens v. State*, 19 P.3d 866, 881 (Okl.Cr.2001), *cert. denied*, 536 U.S. 961, 122 S.Ct. 2668, 153 L.Ed.2d 842 (2002); *Stemple v. State*, 994 P.2d 61, 71 (Okl.Cr.), *cert.denied*, 531 U.S. 905, 121 S.Ct. 247, 148 L.Ed.2d 178 (2000); *Omalza v. State*, 911 P.2d 286, 307 (Okl.Cr.1995); *Boyd v. State*, 743 P.2d 658, 661 (Okl.Cr.1987); *Ross v. State*, 588 P.2d 1269, 1270 (Okl.Cr.1978).

As to Proposition VI, we find that the trial court did not abuse its discretion in refusing to include Jones in Instruction 16. *Goulsby v. State*, 742 P.2d 567, 570 (Okl.Cr.1987). Accordingly, no relief is required.

² This proposition was raised in Appellant's *pro se* Supplemental Brief.

DECISION

The Judgment and Sentence of the trial court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2004), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE REBECCA BRETT NIGHTINGALE, DISTRICT JUDGE

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

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