IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SCOTT LEE FOX,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2002-492**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant, Scott Lee Fox, was tried by jury in the District Court of Seminole County, Case Number CF-2001-276A, and convicted of the following crimes: Assault and Battery with Intent to Kill (Count I), in violation of 21 O.S.2001, § 652; First Degree Burglary (Count II), in violation of 21 O.S.2001, § 1431; Robbery by Force or Fear (Count IV), in violation of 21 O.S.2001, § 791; Assault and Battery with a Dangerous Weapon (Count V), in violation of 21 O.S.2001, § 645; and two counts of Injury to a Minor Child (Counts VI and VII), both in violation of 21 O.S.2001, § 843.[1] The jury set punishment at thirty (30) years imprisonment on Count I and twenty (20) years imprisonment on each of Counts II, IV, V, VI, and VII, along with various fees, costs, and assessments. The trial judge sentenced Appellant in accordance with the jury's verdict. However, the trial judge ordered Counts I and IV to run concurrently to each other, Counts II, VI, and VII to run concurrently to each other but

[1] The trial judge sustained a demurrer at the conclusion of the State's case-in-chief on Count

consecutively to Counts I and IV, and Count V to run consecutively to all other counts. Furthermore, the trial judge revoked Appellant's seven (7) year suspended sentence in Seminole County District Court Case Number CF-1999-178B, and ordered that sentence to be served consecutively to all sentences in CF-2001-276A. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. Admission of other crimes evidence prejudiced the jury, deprived Appellant of his fundamental right to a fair trial and warrants reversal of his sentences;

II. The trial evidence was insufficient to support Appellant's conviction for Count VII, injury to a minor child, because the evidence failed to exclude every reasonable hypothesis except that of Appellant's guilt;

III. This Court should remand Appellant's case to the District Court with Instructions to correct the judgment and sentence by an order *nunc pro tunc*; and

IV. The District Court's revocation of Appellant's suspended sentence was excessive under the facts of this case and should be reversed or favorably modified.

After thoroughly considering these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is required with respect to Count VII, as set forth below.

With respect to proposition one, we find no plain error occurred in the admission of this evidence. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994); *Burks v. State*, 594 P.2d 771, 774 (Okl.Cr.1979), *reversed in part on other grounds, Jones v. State*, 772 P.2d 922 (Okl.Cr.1989); *Neill v. State*, 896 P.2d 537, 550 (Okl.Cr.1994). With respect to proposition two, we agree that what

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III, Assault and Battery with a Dangerous Weapon.

little evidence was admitted at trial on Count VII, injury to minor child R.P., was insufficient to exclude every reasonable hypothesis other than Appellant's guilt. *Hooks v. State*, 19 P.3d 294, 305 (Okl.Cr.2001).[2] Likelihoods and probabilities must be put aside.

With respect to proposition three, the District Court shall issue a *nunc pro tunc* order, as set forth below. With respect to proposition four, we find the trial court did not abuse its discretion by revoking Appellant's suspended sentence. The resulting consecutively served sentences, while severe, are not so excessive as to shock this Court's conscience. *Rea v. State*, 34 P.3d 148, 149 (Okl.Cr.2001).

DECISION

The judgments and sentences on Counts I, II, IV, V, and VI are hereby **AFFIRMED.** The judgment and sentence on Count VII, Injury to Minor Child (R.P.) is hereby **REVERSED** and **DISMISSED.** This matter is hereby **REMANDED** to the District Court of Seminole County for further action consistent with this opinion, including the *nunc pro tunc* entry of an amended judgment and sentence showing Appellant's conviction under Count VI was a violation of 10 O.S.2001, § 7115, rather than 21 O.S.2001, § 843.

AN APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY
THE HONORABLE LEE G. STILLWELL, ASSOCIATE DISTRICT JUDGE

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[2] I have repeatedly stated my disagreement with the reasonable hypothesis test for evaluating circumstantial evidence cases. See e.g., my concur in result opinion in *Hooks*, 19 P.3d at 319. I do so again here, but use it as a matter of *stare decisis*. Regardless, the lack of evidence as to how the child was injured would dictate the same result, even if the proper test, as set out in *Spuehler v. State*, 709 P.2d 202 (Okl.Cr.1985) were applied.

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

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