IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MATTHEW HULBUTTA,	)	
Appellant,	)	
-vs.-	)	**M-2000-115**
STATE OF OKLAHOMA,	)	
Appellee.	)	

ACCELERATED DOCKET ORDER

Following a non-jury trial in the District Court of Seminole County, Case Nos. CF-99-162 and CM-99-684, the Honorable Joseph Wrigley presiding, Appellant was found guilty in CF-99-162 of Count One - Assault and Battery, Count Three - Assault Upon a Peace Officer, and Count Four - Malicious Injury to Property; and in CM-99-684 of two counts of Domestic Abuse - Assault and Battery. In CF-99-162, Judge Wrigley sentenced Appellant to 90 days and a $500.00 fine on Count One, 6 months and a $250.00 fine on Count Three, and 6 months and a $250.00 fine on Count Four. In CM-99-684 Appellant was sentenced to one year terms and fines of $500.00 per count. All sentences were ordered to be served consecutively. From these January 19, 2000, Judgments and Sentences, Appellant has perfected this appeal.

The appeal was regularly assigned to the Court's Accelerated Docket under Section XI of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2000). Oral argument was held on January 11, 2001, and the Court duly considered Appellant's two propositions of error raised upon appeal:

Proposition I

> Because Counts I and II of CM-99-684 arose from a single course of conduct and not separate and distinct offenses, Mr. Hulbutta's convictions for both counts violated the double jeopardy clauses of the U.S. and Oklahoma constitutions.

Proposition II

There was insufficient evidence to prove Mr. Hulbutta intended to assault Officer Ryan Terry by spitting on him.

After hearing oral argument and after a thorough consideration of Appellant's propositions of error and the entire record before us on appeal, by a vote of four (4) to one (1) (J. Strubhar voting to affirm all counts), we affirm each of Appellant's convictions save that of Count II in CM-99-684 which we reverse with instructions to dismiss. In reviewing the evidence in the record on appeal in the light most favorable to the State, we find a rational trier of fact could find each of the elements of the offense of Assault Upon a Peace Officer beyond a reasonable doubt.[1] Accordingly there is no error under Proposition II.

In Proposition I Appellant argues that there was only one assault and battery which occurred on September 15, 1999, and that prosecution of Appellant for two offenses of assault and battery violates the prohibition against double jeopardy. The evidence at Appellant's trial bares out Appellant's contention that only one assault and battery occurred on September 15, 1999. In this appeal the State does not challenge this assessment of the evidence. Instead the State argues there was evidence of a separate and distinct assault and battery occurring one to two weeks prior to September 15th.

The Information in CM-99-684 alleged two counts of Domestic Abuse – Assault and Battery occurring on September 15th. Nothing within this Information placed Appellant on notice that it was acts previous to September 15th that he was being prosecuted.[2] Throughout the trial Appellant's counsel objected

[1] "The proper test for sufficiency of the evidence is whether, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Applegate v. State*, 1995 OK CR 49, ¶ 18, 904 P.2d 130, 136

[2] "The test to assess the sufficiency of the information is two-pronged: (1) whether the defendant was in fact misled by it, and (2) whether conviction under it would expose the defendant to the possibility of being put in jeopardy a second time for the same offense." *Fields v. State*, 1996 OK CR 35, ¶ 25, 923 P.2d 624, 629.

repeatedly to testimony elicited by the State about assaults occurring at times other than September 15th. Each of these objections were overruled without explanation by the trial court. Under these circumstances, Appellant's conviction upon Count II in CM-99-684 must be reversed and that Count dismissed.[3]

IT IS THEREFORE THE ORDER OF THIS COURT that except for Appellant's conviction upon Count II in CM-99-684 which is **REVERSED WITH INSTRUCTIONS TO DISMISS**, the January 19, 2000, Judgments and Sentences of the District Court of Seminole County in Case Nos. CF-99-162 and CM-99-684 are each hereby **AFFIRMED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 31st day of January, 2001.

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

Concurring in part/ dissenting in part
RETA M. STRUBHAR, Judge

STEVE LILE, Judge

ATTEST:

Clerk

RE

[3] *See Munson v. State*, 1988 OK CR 124, ¶ 27, 758 P.2d 324, 332 ("If appellant had not been put on notice of the underlying felonies that he would be required to defend against, due process considerations would have required a reversal.").