

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 31 2001
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID LAND ASHLOCK,) NOT FOR PUBLICATION
)
 Appellant,)
 v.) Case No. F-2000-1138
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

S U M M A R Y O P I N I O N

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, David Land Ashlock, was convicted of Assault and Battery with a Dangerous Weapon, after former conviction of two felonies, in Creek County District Court, Case No. CF 1999-110. Jury trial was held before the Honorable David Martin, Associate District Judge, on September 20th - 24th, 1999. The jury set punishment at forty (40) years imprisonment and assessed a Ten Thousand Dollar (\$10,000.00) fine. From the Judgment and Sentence imposed, Appellant filed this appeal.

Appellant raised three propositions of error:

1. The trial court erred in not giving an instruction on defense of another charge of assault and battery with a dangerous weapon;
2. Mr. Ashlock was deprived of a fair trial when the jury convicted Mr. Ashlock of a crime not charged; and
3. The prosecutor committed reversible error when he attempted to define, over objection, the term reasonable doubt.

After thorough consideration of these propositions and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that reversal is warranted on Proposition II for the reasons set forth below.

The amended Information filed in this case charged Mr. Ashlock with first degree Manslaughter and referenced the statutory authority of “21 O.S. § 711.” At trial, over trial counsel’s objection and without comment from the State, the trial court instructed the jury on the crime of Assault and Battery with a Dangerous Weapon. The jury specifically found Appellant “not guilty” of Manslaughter, but guilty of Assault and Battery with a Dangerous Weapon. Appellant submits he was deprived of a fair trial when he was convicted of a crime not charged in the Information, after he objected to the trial court’s proposed instruction. We agree.

All lesser included instructions are to be given if they are supported by the evidence, and a defendant is deemed to know that he may be convicted of the greater crime with which he is charged and any lesser included offense whether the lesser included offense is pled in the Information or not. *Shrum v. State*, 1999 OK CR 41, ¶ 6, 991 P.2d 1032, 1034. In the present case, the State’s evidence would support an instruction on Assault and Battery with a Dangerous Weapon.

However, when a trial court proposes a lesser included instruction be given and the defendant objects, the defendant has a “right” to affirmatively

waive any lesser included offense instruction and proceed on an “all or nothing approach.” *Shrum*, 1999 OK CR 41, ¶ 11, 991 P.2d at 1036. It is clear from the record before us that Appellant’s trial counsel objected to the instructions and attempted to waive *any* lesser offense instructions. Despite this strong objection, the trial court did not make any personal inquiry of the defendant to determine his intentions and went on to give the instruction. *Cf. Ballard v. State*, 2001 OK CR 20, ¶ 8, -- P.3d -- (reversal required where record did not show trial court obtained a personal affirmative waiver of lesser included offenses from the defendant). The jury went on to convict Appellant of the lesser offense. Had the trial court honored Appellant’s strategic trial decision, we cannot say the jury would have convicted him of any crime.

Accordingly, we find Appellant was denied a fair trial and the trial court committed reversible error when it instructed the jury, over the defendant’s objection, on a crime not charged in the Information - a crime which was not necessarily included in the offense charged. The trial court failed comply with *Shrum*, 1999 OK CR 41, ¶ 11, 991 P.2d at 1036, and *Ballard*, 2001 OK CR 20, ¶ 8, -- P.3d -- , and deprived Appellant of his right to affirmatively waive instructions on lesser offenses and proceed on an “all or nothing” approach.

DECISION

The Judgment and Sentence of the trial court is **REVERSED**
AND REMANDED WITH INSTRUCTIONS TO DISMISS.

APPEARANCES AT TRIAL

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OPINION BY: JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN RESULT
CHAPEL, J.: CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS

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LUMPKIN, P.J.: CONCUR IN RESULT

This case exemplifies the problems which arise when an appellate court disregards established legal principals and seeks to venture into the unknown abyss of results desired rather than principals followed. I tried to point out the problem of disregarding objective standards in my separate vote in *Shrum*. See *Shrum v. State*, 991 P.2d 1032, 1037-39 (Okl.Cr. 1999) (Lumpkin, VPJ: Concur in Results). Now, that result sought in *Shrum* dictates the reversal of a conviction, with instructions to dismiss, for a crime not included within the primary charge presented by the information filed in the case.

In *Smith v. State*, 727 P.2d 1366 (Okl.Cr. 1986) this court held that "Every charge of homicide necessarily includes an assault and battery, and when death has resulted the perpetrator can only be convicted of some degree of homicide. No conviction can be had for assault or assault and battery." *Baysinger v. Territory*, 15 Okl. 386, 82 P. 728 (1905). Therefore, the trial court gave an instruction not supported by the evidence, which resulted in conviction of a crime not charged. The record shows Appellant was specifically found "not guilty" of first degree manslaughter, the crime that was charged. As a result of this error of instruction the case, regrettably, must be reversed with instructions to dismiss due to the jury verdict. If this court had retained clear, objective criteria for when lesser included instructions should be given this

type of error would not occur. Regardless of that fact, in this case the law dictates the action this court must take.