

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TONY CARNELL BROWN,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2007-987

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OCT 10 2008

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

CHAPEL, JUDGE:

Tony Brown was tried by jury and convicted, in Tulsa County District Court Case No. CF-2007-1420, of Second Degree Burglary in violation of 21 O.S.2001, § 1435 and Attempted Larceny of a Motor Vehicle in violation of 21 O.S.Supp.2002, § 1720. Both convictions were After Former Conviction of Two or More Felonies. In accordance with the jury's recommendation, the Honorable Rebecca Nightingale sentenced Brown to ten (10) and seven (7) years' imprisonment to be served consecutively. Brown was also ordered to pay a \$ 1,000.00 fine. Brown appeals these convictions and sentences.

Brown raises the following propositions of error:

- I. It was reversible error not to instruct the jury on the offense of unlawful entry as a lesser-included offense of Second Degree Burglary in Count I.
- II. The preliminary hearing magistrate lacked the authority to bind Appellant over on the charge of Attempted larceny of an automobile.
- III. The evidence was insufficient to support a conviction for attempted larceny of an automobile. In the alternative to outright reversal, Appellant's conviction in Count III must be reversed for a new trial so that a jury can be properly

instructed on the lesser offense of tampering with a motor vehicle.

- IV. The State should not have been permitted to present Detective James McClaughry as a rebuttal witness. As a result of his testimony, the jury was presented with erroneously admitted evidence which prejudiced the Appellant.
- V. Appellant received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.
- VI. Prosecutor misconduct undermined Appellant's right to a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Brown's convictions must be reversed based upon the law and the evidence. We find in Propositions I and III that the evidence required that the jury be instructed on the lesser-included offense of Unlawful Entry for the Second Degree Burglary charge and Tampering with a Motor Vehicle for the Attempted Larceny of Motor Vehicle charge.¹ We find in Proposition IV that a new trial is required by a State's witness's testimony that based on his neurolinguistic training, Brown lied to him in his statement regarding the

¹ The trial court has a duty to instruct the jury on all lesser-included offenses supported by the evidence at trial. *Childress v. State*, 1 P.3d 1006 (Okl.Cr.2006)(trial court has a duty to give lesser-included instructions if evidence could support lesser charge). Both lesser-included instructions were supported by substantial evidence at trial despite Brown's claim of innocence. *McHam v. State*, 126 P.3d 662 (Okl.Cr.2005)(lesser-included instructions not precluded by a defendant's claim of innocence). Additionally, in Proposition III, we find that although the evidence was minimal to support Brown's Attempted Larceny of a Motor Vehicle conviction, it was sufficient. *Spuehler v. State*, 709 P.2d 202, 203-04 (Okl.Cr.1985).

Moreover, the magistrate's amendment of the State's original misdemeanor charge of Tampering with a Motor Vehicle to the felony charge of Attempted Larceny of a Motor Vehicle was questionable. Oklahoma law prohibits misdemeanor charges from being presented at a preliminary hearing. 22 OS.Supp.2003, § 258 (preliminary hearing prohibited for

crime (and by extension, was lying at trial).² Proposition II, V and VI are not addressed due to the relief recommended in Proposition IV.³

Decision

The Judgments and Sentences are **REVERSED and REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEYS AT TRIAL

ALLEN MALONE
ASSISTANT PUBLIC DEFENDER
PYTHIAN BUILDING
423 S. BOULDER AVE, SUITE 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR DEFENDANT

LEE BERLIN
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER, SUITE 900
TULSA, OKLAHOMA 74103
ATTORNEY FOR STATE

ATTORNEYS ON APPEAL

STUART W. SOUTHERLAND
TULSA COUNTY PUBLIC DEFENDER
423 S. BOULDER AVE, SUITE 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER L. STRICKLAND
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR APPELLEE

OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, V.P.J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

misdemeanor). Thus, jurisdictionally this charge was not before the magistrate at the hearing so there was nothing for him to amend.

² A witness cannot testify that another witness, including the defendant, is truthful or untruthful. *Davenport v. State*, 806 P.2d 655, 659 (Okla. Cr. 1991). *Davenport v. State*, 806 P.2d 655, 659 (Okla. Cr. 1991). This credibility decision is solely for the jury. Here, the trial judge even noted that the State's witness, a detective, had testified that Brown was lying. This destroyed Brown's defense, which turned on his credibility. The detective's testimony was extremely prejudicial and denied Brown a fair trial.

³ Proposition II is discussed in brief in the footnote for Propositions I and III. Brown's Motion for Supplementation of the record and Application for Evidentiary Hearing is **MOOT** due to the relief recommended in Proposition IV. Additionally, Brown's Application for Oral Argument is **DENIED**.

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

While I concur in the results reached by this opinion, I must dissent to the discussion regarding the requirement to instruct on lesser included offenses. I still adhere to our case law that holds when a defendant's defense is that he is innocent, then he is not eligible for lesser included offense instructions. See *Gilson v. State*, 2000 OK CR 14, ¶ 119, 8 P.3d 883, 918; *Mitchell v. State*, 1994 OK CR 70, ¶ 36, 884 P.2d 1186, 1200-1201. The Court in *McHam v. State*, 2005 OK CR 28, 126 P.3d 662, did not change that rule of law. In addition, when instructed on a lesser included offense a jury is told they must first find the defendant not-guilty of the primary charge before considering the secondary offense. Guilt was established and found as to the primary charge in this case, therefore, the jury would not have been able to proceed to any secondary offenses, even if the instruction had been given. Regardless, I do find that other errors require a remand for a new trial.