**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

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| JERRY LEE MAYS,<br><br>Appellant,<br>v.<br><br>STATE OF OKLAHOMA<br><br>Appellee. | ) | **NOT FOR PUBLICATION**<br><br>Case No. F-2005-422 |



**SUMMARY OPINION**

**LUMPKIN, VICE-PRESIDING JUDGE:**

Appellant Jerry Lee Mays was tried by jury for Shooting with Intent to Kill (Ronny Peters) (Count I) (21 O.S. 2001, § 652); Felonious Possession of Firearm After Former Conviction of a Felony (Count II) (21 O.S. Supp. 2002, § 1283); Assault and Battery With a Dangerous Weapon (Count III) (21 O.S. 2001, § 645); and Shooting with Intent to Kill (Kevin Surrett) (Count IV) (21 O.S. 2001, § 652), all counts After Former Conviction of Two or More Felonies, Case No. CF-2004-4929 in the District Court of Tulsa County. The jury found Appellant guilty as charged on all counts except in Count III, Appellant was found guilty of the lesser offense of Assault and Battery. The jury recommended as punishment forty (40) years imprisonment in each of Counts I and IV, thirty (30) years imprisonment in Count II, and ninety (90) days in jail and a one thousand dollar ($1,000) fine in Count III. The trial court sentenced accordingly ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. The evidence at trial was insufficient to support a conviction in Count C, shooting with intent to kill. There was no evidence to support any intent to kill Kevin Surrett when Appellant fired his weapon.

II. Appellant's convictions for shooting with intent to kill, AFCF, and felonious possession of a firearm, AFCF, violate 21 O.S. 2001, § 11, as well as the double jeopardy provisions of the Oklahoma and United States Constitutions.

III. Appellant's thirty year sentence in Count D, possession of firearm after former conviction of two or more felonies, is excessive and should be modified.

IV. Appellant's convictions for assault and battery must be reversed. The jury should not have been instructed on the crime as a lesser included offense of assault and battery with a dangerous weapon.

V. The trial court should have instructed the jury as to the applicability of 21 O.S.2001, § 13.1 to each count of shooting with intent to kill.

VI. Prosecutorial misconduct deprived Appellant of a fair trial and/or sentencing proceeding in violation of the Fourteenth Amendment to the United States Constitution.

VII. The jury instructions relating to reasonable doubt and circumstantial evidence served to deprive Appellant of his right to due process in violation of the Fourteenth Amendment to the United States Constitution.

VIII. The accumulation of error in this case deprived Appellant of due process of law, necessitating reversal pursuant to the Sixth and Fourteenth Amendments to the United States Constitution as well as Article II § 7 of the Oklahoma Constitution.

After a 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 under the law and the evidence, reversal is not warranted. However, sentence modification in Counts I and IV is necessary.

In Proposition I, reviewing the evidence and the reasonable inferences drawn therefrom, in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that Appellant shot at Mr. Surrett with the intent to kill him. *See Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. *See also Scott v. State*, 1991 OK CR 31, ¶ 4, 808 P.2d 73, 75-76.[1] Appellant places much emphasis on the victim's impression of his (Appellant's) actions and whether the victim thought Appellant had the intent to kill. While this is certainly a factor to consider, under our case law, the victim's impression of the defendant's actions and intent is not given any more weight than other evidence offered to support the element of intent. *See Kelley v. State*, 1988 OK CR 1, ¶ 7, 748 P.2d 43,44-45; *Mosier v. State*, 1983 OK CR 149, ¶ 21, 671 P.2d 62, 67; *Crenshaw v. State*, 1982 OK CR 181, ¶ 6, 654 P.2d 637, 639; *Maynard v. State*, 1981 OK CR 17, ¶ 5 , 625 P.2d 111, 112; *Jewell v. State*, 1970 OK CR 103, ¶ 4, 473 P.2d 271, 271-273.

"Where a person shoots into a crowd, not caring whom he may kill, with intent to kill some one of them, it is an assault with intent to kill each one of them." *Phillips v. U.S.*, 2 Okla. Crim. 628, 1909 OK CR 94, 103 P. 861. It may be presumed that a defendant knew and intended the natural consequences of his use of a firearm, that being the death of those against whom the firearms

[1] "Intent is a state of mind that will be proven, if at all, by circumstantial evidence. . . Circumstantial evidence by its nature requires the jury to use it to draw reasonable inferences.

are used. *Mosier,* 1983 OK CR 149, ¶ 21, 671 P.2d at 67. Here the evidence showed that Appellant shot at Mr. Surrett or at the very least, Appellant shot at the group of people of which Mr. Surrett was a part. Presuming Appellant knew and intended the natural consequences of his firing at the men, the evidence is sufficient to support a finding that Appellant shot at Mr. Surrett with the intent to kill him. Therefore, it is not necessary to address Appellant's argument concerning the doctrine of transferred intent.

In Proposition II, Appellant's convictions for felonious possession of a firearm, after former conviction of two or more felonies (AFCF), and shooting with intent to kill, AFCF, are not barred by 21 O.S. 2001, § 11 or constitutional double jeopardy protections. Appellant committed the offense of felonious possession of the firearm when he first entered the Poultry Express property and pulled out his weapon. Appellant committed the separate offense of shooting with intent to kill Mr. Surrett and Mr. Peters when he entered the property the second time and fired the gun at the men with the intent to kill them. *See Hale v. State,* 1995 OK CR 7, ¶ 5, 888 P.2d 1027, 1028. *See also McElmurry v. State,* 2002 OK CR 40, ¶¶ 79 – 80, 60 P.3d 4, 24. *Contra* H*ammon v. State,* 1995 OK CR 33, 898 P.2d 1287.[2] The evidence in this case shows the commission of two separate and distinct offenses.

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On appellate review this Court accepts all reasonable inferences which tend to support the jury's verdict." 1991 OK CR 31, ¶ 4, 808 P.2d at 75-76.

[2] In *Hammons,* this Court found convictions for using a firearm while in the commission of a felony and felony murder with the underlying felony being robbery with a dangerous weapon was a double jeopardy violation as "[t]he same act of using a firearm during the robbery was punished under two statutes". 1995 OK CR 33, ¶ 71, 898 P.2d at 1303.

In Proposition III, we find the prior felony conviction used to enhance Appellant's sentence for felonious possession of a firearm under 21 O.S. Supp. 2002, § 51.1 (C), a 2001 conviction for second degree burglary, was the same conviction relied upon to bring the criminal charge under 21 O.S. 2001, § 1283. This dual use of the same conviction is prohibited by *Snyder v.* State, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654. *See also Chapple v. State,* 1993 OK CR 38, ¶ 23, 866 P.2d 1213, 1217. This error is subject to harmless error review though as Appellant stipulated to four prior felony convictions, including the 2001 conviction for second degree burglary. Therefore, even excluding the 2001 second degree burglary conviction, there were still three prior convictions available for enhancement purposes. Accordingly, Appellant was properly sentenced as a habitual offender under 21 O.S.Supp.2002, § 51.1(C).

Further, we find the inclusion of the fourth prior felony conviction did not contribute to an excessive sentence. The range of punishment, whether Appellant had three or four prior felony convictions, was three years to life. The jury questions raised during deliberations do not give any indication that it made any difference whether Appellant had three or four prior convictions. As addressed in other propositions, no errors occurred which appear to have contributed to an excessive sentence in Count II. Therefore, considering all the facts and circumstances of the case, the thirty year sentence for felonious possession of a firearm, AFCF, is not so excessive as to shock the conscience of the Court. *Bartell v. State,* 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101. Further, we reject Appellant's suggestion to reverse *Snyder.* Appellant's argument that *Snyder*

"fails to consider the truly unique nature of 21 O.S.Supp. 2002, § 1283" is unavailing.

In Proposition IV, we find no error in the trial court giving jury instructions on the lesser included offense of "simple" assault and battery. The record reflects the instructions were proposed and prepared by the trial court but Appellant personally indicated his desire for the instructions to be given to the jury. If the trial court proposes the lesser included offense instruction and the defense does not object (as in the present case), we will presume the defendant desired the lesser included offense instruction as a benefit. *Shrum v. State*, 1999 OK CR 41, ¶ 11, 991 P.2d 1032, 1037. The record in this case makes it clear Appellant desired the lesser included offense instruction and did not want to proceed "all or nothing" as appellate counsel argues.

Recently, in *McHam v. State*, 2005 OK CR 28, 126 P.3d 662, we stated that if the defendant requests instructions on a lesser related offense, the trial court should give them if the evidence reasonably makes out a *prima facie* case for that offense. 2005 OK CR 28, ¶ 20, 126 P.3d at 669-670. "If the defendant is convicted of the lesser offense and appeals, this Court may consider the sufficiency of the evidence to support the conviction, and whether the defendant was unfairly surprised by the instructions, or accepted the lesser-offense alternative as a benefit." *Id.* Here, Appellant clearly accepted the lesser offense alternative, there is no indication he was surprised by the instructions, and a review of the evidence supports the court's decision.

This Court has determined that a car is not "an inherently dangerous weapon". *Taylor v. State,* 1994 OK CR 61, ¶ 9, 881 P.2d 755, 758 citing *State v. Hollis*, 1954 OK CR 98, 273 P.2d 459 and *Beck v. State,* 73 Okl.Cr. 229, 119 P.2d 865 (1942). "An automobile, when used in such a manner as is likely to produce death or great bodily harm, is a 'dangerous weapon'." *Matin v. State,* 1958 OK CR 113, ¶ 17, 333 P.2d 585, 591. This Court has therefore looked to see if the car was a dangerous weapon "by reason of the manner in which it was being driven". *Id.* at ¶ 20. *See also Joplin v. State*, 1983 OK CR 63, ¶ 6, 663 P.2d 746, 747. In the present case, the evidence shows Appellant did not use his car in such a manner as is likely to produce death or great bodily harm. Therefore, the trial court did not abuse its discretion in giving the instruction on the lesser included offense. *McHam*, 2005 OK CR 28, ¶ 20, 126 P.3d at 669-670.

However, the jury was improperly instructed that the conviction for assault and battery could be enhanced with prior felony convictions. The conviction for assault and battery was a misdemeanor which could not be enhanced with prior felony convictions. This error does not require modification of the sentence though. Despite erroneously informing the jury the punishment was "after two or more previous convictions", the range of punishment set forth was correct for a first time misdemeanor offense. *See* 21 O.S. Supp. 2004, § 644(B). Appellant's sentence was within statutory range for a first misdemeanor offense, and based upon Appellant's stipulation to the prior convictions and strong evidence supporting the conviction, the sentence was not excessive. Based upon the foregoing, the improper reference to the prior

convictions was harmless error as it did not have a substantial influence on the outcome of the sentencing stage of trial. *See Simpson v. State,* 1994 OK CR 40, ¶ 37, 876 P.2d 690, 702.

In Proposition V, the trial court erred in failing to give Appellant's requested jury instruction on the 85% Rule. *Anderson v. State,* 2006 OK CR 6, ¶ 25, ___ P.3d ___.[3] While this error does not require reversal of the convictions it does warrant modification of the sentences. Therefore, the forty (40) year sentences for each count of shooting with intent to kill (Counts I and IV) are modified to thirty (30) years for each count.

In Proposition VI, we find Appellant was not denied a fair trial by prosecutorial misconduct. Initially, defense counsel's failure to raise any objections to the challenged questioning on *voir dire* waives all but plain error review. *See McElmurry,* 2002 OK CR 40, ¶ 21, 60 P.3d at 16; *Jeffries v. State,* 1984 OK CR 51, ¶ 18, 679 P.2d 846, 851.

The comments in the present case are distinguishable from those condemned in *Scott v. State,* 1982 OK CR 108, ¶ 20, 649 P.2d 560, 564. Here, the prosecutor's comments were an attempt to explain the different roles of the

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[3] Based upon the principle of *stare decisis* I accede to application of *Anderson* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson* which states:

> While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, **it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal."** ***Id.***

2006 OK CR 6, ¶ 25 (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner.

prosecutor and the defense in order to determine whether potential jurors could give fair consideration to each side. There is no implication in the prosecutor's statements that defense counsel's duty of zealous representation was different from or in contrast to the prosecutor's duty to seek justice. Nor is there any indication that the comments meant the defense would do whatever it takes to win. Further, telling the jury that the State represented the people was not improper. Appellant has failed to meet his burden of showing any prejudice as a result of any improper remarks. *King v. State*, 1987 OK CR 131, ¶ 6, 738 P.2d 947, 948; *Smith v. State*, 1982 OK CR 89, ¶ 25, 656 P.2d 277, 283-84. The record reflects jury members were seated who said they could fairly listen to the evidence and decide the issues based upon the evidence presented in court. Even if some of the prosecutor's comments were objectionable, they were not so prejudicial as to adversely affect the fundamental fairness of Appellant's trial. *See Nobles v. State,* 1983 OK CR 112, ¶ 10, 668 P.2d 1139, 1142.

As for Appellant's challenge to comments made during the third stage closing argument, we also review only for plain error as no defense objections were raised to the comments. *Bland v. State,* 2000 OK CR 11, ¶ 89, 4 P.3d 702, 726. It is within the bounds of closing argument for the prosecutor to request or recommend a specific sentence. *See Hammer v. State,* 1988 OK CR 149, ¶ 15, 760 P.2d 200, 204; *Mahorney v. State,* 1983 OK CR 71, ¶ 17, 664 P.2d 1042, 1047. However, recommendations of sentences based upon the prosecutor's experience or expertise, *Moore v. State,* 1983 OK CR 157, ¶ 14, 672 P.2d 1175,

1178-79, and personal sense of justice, *Washington v. State,* 1999 OK CR 22, ¶ 63, 989 P.2d 960, 979, have been held improper.

In the present case, the prosecutor's request for a sentence of "at least 40 years" for the convictions for shooting with intent to kill, AFCF, was clearly based upon the evidence and not her expertise or personal opinion. Reviewing the argument in its entirety, the prosecutor made it clear to the jury that her recommendation was not binding on them and that it was their sole responsibility to fix punishment. There is no indication that Appellant was prejudiced by the comments. This is particularly so regarding the convictions for shooting with intent to kill where the jury imposed the minimum forty years recommended by the prosecutor.

As for the felonious possession of a firearm, AFCF conviction, the prosecutor requested the jury sentence Appellant to a minimum of between twenty and forty years, stating "this is not something where a term of three years is appropriate". Under 21 O.S. 2001, §§ 1283 and 51.1(C) the range of punishment was three years to life. Reading the argument in its entirety and in context, the prosecutor's questions were well within the bounds of closing argument and Appellant has failed to show any prejudice. *Bland,* 2000 OK CR 11, ¶ 79, 4 P.3d at 728.

In Proposition VI, we find the trial court did not abuse its discretion in rejecting Appellant's requested jury instructions on reasonable doubt and circumstantial evidence. *See Omalza v. State,* 1995 OK CR 80, ¶ 52, 911 P.2d 286, 303. Appellant's argument that this Court's attempt in *Easlick* to construct

a unified approach to the sufficiency of the evidence review, "has created unnecessary confusion which would be lessened by the use of an instruction defining reasonable doubt" is not supported by any authority. Absent plain error we will not address assertions unsupported by legal authority. *Romano v. State,* 1995 OK CR 74, ¶ 65, 909 P.2d 92, 117. The instructions given to the jury in this case correctly stated the applicable law. As such, we find no plain error in the trial court's refusal to give Appellant's requested instructions. Further, Appellant's argument to overturn *Easlick* is not persuasive, and we reject his request to reconsider our decision.

In Proposition VII, we find Appellant was not denied a fair trial by the accumulation of error. While we have found error occurring in both the guilt/innocence and sentencing stages of this trial, none of these errors required reversal singly. Error requires only modification of the sentence in Counts I and IV. In viewing the cumulative effect of these errors we find they do not require reversal of this case as none were so egregious or numerous as to have denied Appellant a fair trial. *Williams v. State,* 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. Therefore, no new trial is warranted and the sentences in Counts I and IV are modified.

**DECISION**

The Judgment and Sentences in **Counts II and III** are **AFFIRMED.** The Judgments in **Counts I and IV** are **AFFIRMED** and the Sentences are **MODIFIED** to thirty (30) years in each count. Pursuant to Rule 3.15, *Rules of*

*the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon 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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C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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