IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KENNETH LEE RAWLINS,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
v.	)	Case No. F 2004-866
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

Appellant, Kenneth Lee Rawlins, was tried by a jury in Love County District Court, in Case Nos. CF 2003-76, CF 2003-77, and CF 2003-78, for Shooting with Intent to Kill, in violation of 21 O.S.2001, § 652(A). Appellant was tried jointly with his codefendant/brother Ricky Rawlins, Jr. on July 12th – 14th, 2004, before the Honorable John Skaggs, District Judge. The jury found Kenneth Lee Rawlins guilty in Case Nos. CF 2003-76 and CF 2003-77 of Assault and Battery with a Dangerous Weapon and set punishment at seven (7) years imprisonment in each case. The jury found Kenneth Lee Rawlins guilty in Case No. CF 2003-78 of Assault and Battery with a Deadly Weapon and set punishment at ten (10) years imprisonment.[1] Judge Skaggs sentenced Kenneth Lee Rawlins in accordance with the jury's verdicts on August 26, 2004 and ordered him to serve the sentences consecutively. From the Judgment and Sentences imposed, Appellant Kenneth Lee Rawlins perfected this appeal.

Mr. Rawlins raises twelve (12) propositions of error:

---

[1] Ricky Rawlins Jr. was also found guilty in Case Nos. 2003-76 and 2003-77 of Assault and Battery with a Deadly Weapon and was sentenced to twelve (12) years imprisonment and in

1. Appellant's constitutional right to confront adverse witnesses was violated by the introduction of extrajudicial, testimonial statements made by Appellant's father. The hearsay evidence went to the very heart of the case and prevented a fair trial;

2. Mr. Rawlins' conviction for assault and battery with a deadly weapon is wrongful because the jury was erroneously instructed that the crime was a lesser-included offense of shooting with intent to kill;

3. The jury was erroneously instructed that either an assault or a battery was sufficient to support a conviction for assault and battery with a deadly weapon, when the law requires both an assault and a battery for such a conviction;

4. The conviction in case number CF-2003-77 must be reversed because the jury was erroneously instructed that either an assault or a battery was sufficient to support a conviction for assault and battery with a dangerous weapon, when the law requires both an assault and a battery for such a conviction;

5. Because the evidence was insufficient to prove that Mike or Stacey Ayres were actually hit with anything, the convictions for assault and battery in Case Numbers CF 2003-77 and CF 2003-78 must be reversed with orders to dismiss;

6. The trial court failed to instruct the jury on the defense of accident, depriving Appellant of instructions on his theory of defense in Case Nos. CF 2003-76 and CF 2003-77;

7. Irrelevant instructions erroneously conveyed to the jury that Mr. Rawlins was not legally entitled to act in self-defense or in the defense of his father. Additionally, the instructions on self-defense were incomplete;

8. The trial judge made erroneous rulings that were prejudicial in and of themselves and were also prejudicial because they improperly indicated to the jury the judge's belief that the Ayres had done nothing wrong and that the Rawlins were not credible;

9. After the prosecutor invited the jury to leave sentencing to the judge, the court gave unusually detailed instructions to the jury

---

Case No. 2003-78 of Shooting with Intent to Kill and was sentenced to twenty-five (25) years imprisonment.

about the court's sentencing powers. The information was inappropriately given and resulted in inflated sentences;

10. Prosecutorial misconduct so infected the trial proceedings with unfairness that Mr. Rawlins' constitutional rights to due process and a fair trial were violated;

11. Because one of the jurors who tried the case was not qualified to be on the jury, the convictions must be reversed for a new trial; and,

12. Cumulative errors deprived Mr. Rawlins of a fair trial and reliable verdict.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find Mr. Rawlins's convictions in Case Nos. CF 2003-76 and CF 2003-77 should be affirmed. Case No. CF 2003-78 is reversed and remanded for a new trial for the reasons set forth below.

Although inadmissible hearsay was heard by the jury, we find the statements attributed to Appellant's father did not ultimately affect the outcome of the trial and any error in their admission was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). No relief is required on Proposition One.

Over objection and without request from the State, the trial court instructed the jury that the offense of assault and battery with a deadly weapon was a lesser included offense of shooting with intent to kill. To so instruct the jury was error. Assault and battery with a deadly weapon is not a lesser included offense of shooting with intent to kill because "Section 652 is intended to cover all assaults made with the intent to kill: that the first

sentence is for assaults with a firearm and the remainder of the Section is for other assaults with such intent." *Favro v. State*, 1988 OK CR 18, ¶ 5, 749 P.2d 127, 128. That the range of punishment for assault and battery with a deadly weapon is less than shooting with intent to kill does not make it a lesser included offense. *Id.* The lesser included offenses for "Section 652 are found in 21 O.S.1981, § 645 where the intent is to do bodily harm, not kill." *Id.* at ¶ 8, 749 P.2d at 130. *See also Meggett v. State*, 1979 OK CR 89, 599 P.2d 1110 (affirming trial court's refusal to instruct the jury on assault and battery with a deadly weapon where the assault was made with a firearm with the intent to kill; noting Section 652 prohibits all assaults made with an intent to kill and the first section applicable when a firearm is used.); *Koonce v. State*, 1985 OK CR 26, 696 P.2d 501, 505 (finding no error in trial court's refusal to instruct on assault and battery with a deadly weapon in shooting with intent to kill prosecution where the evidence showed the defendant "shot" the victim). To the extent that *Elder v. State*, 1988 OK CR 96, 755 P.2d 690 is inconsistent with this holding, it is overruled. Accordingly, relief is warranted on Proposition Two, and Appellant's conviction for assault and battery with a deadly weapon in Case No. CF 2003-78 should be reversed and remanded for a new trial. *Favro, id.* Our holding here renders the claim raised in Proposition Three moot.

The State concedes the error raised in Proposition Four but argues the error was harmless. We agree. The evidence leaves no doubt that the jury concluded an assault and battery occurred. Their verdict form so indicates

and in that respect this case is distinguishable from *Bush v. State*, 1966 OK CR 77, ¶ 11, 415 P.2d 185. Even though the jury was not properly instructed on the first element of the crime, the error was harmless, and the verdict itself was certain, positive and free from ambiguity. *Bush, id.*

Proposition Five is without merit. The jury could conclude from the evidence presented that Stacey Ayres was hit with shattering glass when Appellant and his brother fired on the vehicle. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204 (viewed in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). The sufficiency argument pertaining to Case No. CF 2003-78 is rendered moot by our decision to reverse that case and remand for a new trial.

Any error in the trial court's failure to instruct the jury on the defense of accident in Case Nos. CF 2003-76 and CF 2003-77 was harmless beyond a reasonable doubt. *See Fowler v. State*, 1989 OK CR 52, ¶ 37, 779 P.2d 580, 587 (applying harmless error analysis to instruction error). No relief is warranted on Proposition Six.

The determination of which instructions shall be given the jury is a matter within the discretion of the trial court. Absent an abuse of discretion, this Court will not interfere with the trial court's judgment if the jury instructions, as a whole, accurately state the applicable law. *Williams v. State*, 2001 OK CR 9, ¶ 22, 22 P.3d 702, 711. Although some instructional error occurred, we find the jury's verdicts were not affected by the irrelevant

instructions. The evidence overwhelmingly showed that Appellant did not come to his father's defense believing he was assisting in the justifiable removal of trespassers. While there was some instructional error with regard to the self-defense and defense of another instructions and while some irrelevant instructions were given, we find those errors did not contribute to the jury's verdicts. *Harmon v. State*, 2005 OK CR 19, ¶ 7, 122 P.3d 861, 864 (question was whether the erroneous instruction affected the jury's verdict).

The trial court made several erroneous rulings during the trial. However, we find these errors harmless beyond a reasonable doubt. *See Klinker v. State*, 1992 OK CR 7, 826 P.2d 998, 999 (application of harmless error analysis to erroneous § 2608 ruling). We are not persuaded by Appellant's contention that some of the rulings complained of amounted to the trial court's expression of his personal opinion or belief in the evidence.

The trial court's oral instructions to the jury about its power to suspend, defer, and/or run sentences consecutively or concurrently went too far and the better response would have been to refer them back to their instructions and to inform the jurors that these matters were not for their consideration. *See Trice v. State*, 1993 OK CR 19, ¶ 52, 853 P.2d 203, 218 ("When a deliberating jury seeks information concerning its power to run sentences consecutively, the trial judge should respond by stating that all the information needed to make the decision is contained in the instructions. The giving of such an instruction, we have held, creates a presumption that the jury acted in accordance with it.") Still no relief is warranted on Proposition Nine, because Appellant cannot show

he was prejudiced by the trial court's oral instructions and only speculates the jurors' knowledge that the trial court could set punishment, suspend or defer sentences caused them to set inflated sentences. *Smallwood v. State*, 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227 (it is not error alone which reverses lower court's judgments but error plus injury, and it is appellant's burden to show he was prejudiced in his substantial rights by the commission of the alleged error).

In Proposition Ten, Appellant complains that prosecutorial misconduct deprived him of a fundamentally fair trial. Although the prosecutor improperly used extrinsic evidence to impeach the codefendant, we found that error harmless. The prosecutor's questions and closing argument relating to the co-defendant's "story" and silence was also improper, but Appellant's contention that he was prejudiced by it is purely speculative. *Banks v. State*, 2002 OK CR 9, ¶ 46, 43 P.3d 390, 402; *White v. State*, 1995 OK CR 15, ¶ 22, 900 P.2d 982, 992. Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial. *Jones v. State*, 2006 OK CR 5, ¶ 76, 128 P.3d 521, 545. Reversal is not required unless in light of the entire record, a defendant has suffered prejudice. *Id.* Although some misconduct occurred, we find no relief is warranted because Appellant cannot show he was prejudiced.

Proposition Eleven is also denied. The trial court's failure to *sua sponte* remove an *inactive* reserve deputy (who had not been active for ten years) for cause was not error. 38 O.S.2001, § 28(C); *Ochoa v. State*, 1998 OK CR 41, ¶

17, 963 P.2d 583 (retired deputy sheriff not subject to removal for cause under 38 O.S. § 28).

Viewed cumulatively, the errors identified in this case do not warrant relief and were not so great as to have denied Appellant of a fundamentally fair trial. *Lockett v. State*, 2002 OK CR 30, ¶ 43, 53 P.3d 418, 431.

DECISION

The Judgment and Sentences imposed in Love County District Court, Case Nos. CF 2003-76 and CF 2003-77, for Assault and Battery with a Dangerous Weapon, are hereby **AFFIRMED**. The Judgment and Sentence imposed in Love County District Court, Case No. CF 2003-78, for Assault and Battery with a Deadly Weapon, is **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.

AN APPEAL FROM THE DISTRICT COURT OF LOVE COUNTY
THE HONORABLE JOHN SKAGGS, DISTRICT JUDGE

APPEARANCES AT TRIAL
MR. JAMES W. BERRY
ATTORNEY AT LAW
P. O. BOX 21803
OKLAHOMA CITY, OK 73156-1803
ATTORNEY FOR DEFENDANT
RICKY RAWLINS, JR.

MR. DONALD A. HERRING
ATTORNEY AT LAW
5900 MOSTELLER DRIVE, STE. 1100
OKLAHOMA CITY, OK 73112
ATTORNEY FOR DEFENDANT
KENNETH LEE RAWLINS

APPEARANCES ON APPEAL
LEE ANN JONES PETERS
APPELLATE DEFENSE COUNSEL
P. O. BOX 926
NORMAN, OK 73070
ATTORNEY FOR APPELLANT

MR. MITCHELL D. SPERRY DISTRICT ATTORNEY CARTER COUNTY COURTHOUSE ARDMORE, OK 73401 ATTORNEY FOR THE STATE	W.A. DREW EDMONDSON ATTORNEY GENERAL OF OKLAHOMA WILLIAM R. HOLMES ASSISTANT ATTORNEY GENERAL 112 STATE CAPITOL BUILDING OKLAHOMA CITY, OK 73105 ATTORNEYS FOR STATE

OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS
LUMPKIN, V.P.J. :	CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	SPECIALLY CONCURS

RE

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

I concur in the Court's decision to affirm the convictions for Assault and Battery with a Dangerous Weapon but must dissent to the decision to reverse and remand the conviction for Assault and Battery with a Deadly Weapon. This case is a vivid example of the concerns I expressed in my separate writing in *Shrum v. State*, 1999 OK CR 41, ¶ 11, 991 P.2d 1032, 1036 (where the Court determined that a jury should be instructed as to all "related" crimes rather than "lesser included crimes.") Whether under *Shrum* or the traditional standard set out in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L. Ed. 2d 306 (1932), this conviction should be affirmed.

First, a firearm is a deadly weapon per se. *Beeler v. State*, 1959 OK CR 9, ¶ 18, 334 P.2d 799, 806. *See also State v. Spurlock*, 1962 OK CR 53, ¶ 14, 371 P.2d 739, 741.

Second, the cases cited to support the reversal do not take into account the Legislature's change in the statute in 1992. I tried to point this out in my separate writing to other cases. As a result of that legislative change, there are three distinct and separate offenses contained within the statute. Subsection A requires a shooting **with intent to kill**. Subsection B prohibits the use of a vehicle to facilitate the discharge of a firearm or other weapon. Subsection C prohibits the assault and battery with a deadly weapon, without an intent to kill but likely to produce death or "in any manner attempts to kill another."

Each of these offenses has separate and distinct elements. They are not just one offense that can be charged in different ways.

Third, the difference between Subsection A and Subsection C is such that the elements of Subsection C are contained in the elements of Subsection A and thus the *Blockburger* traditional test for lesser included offenses can be met as well as the *Shrum* related offenses test. While Subsection A requires the shooting of another or discharging a firearm **with the intent to kill**, Subsection C merely requires the use of a deadly weapon, i.e. firearm, to commit assault and battery without the intent to kill but by means likely to produce death **or** actually **attempts** to kill another. Just because the separate offenses are set out as separate subsections in a single statute does not mean the same rules of construction should not apply as are used in construing separate statutes.

Fourth, the State has the discretion to select under which statute a charge should be brought or if a crime should be charged in the alternative pursuant to 22 O.S. 2001, § 404. The trial judge has the responsibility to instruct the jury on the crimes charged and all the lesser included, or now related offenses. If a judge so instructs, there can be no error, and that is the case here.

Judge Skaggs applied a reasonable interpretation to the provisions of Section 652 as it existed at the time of the commission of the crime. Appellant received the benefit of having lesser included and related offenses presented to

the jury. The jury rendered a verdict that is supported by the evidence. There is no error and this Court should affirm.

LEWIS, JUDGE, SPECIALLY CONCUR:

While I concur in affirming the convictions in Cases CF-2003-77 and CF-2003-76, I write to address the issue of confrontation or the lack thereof.

Eliciting the father's statements without producing him as a witness violated Appellant's constitutional right to confront witnesses. Crawford v. Washington 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Admitting the evidence, when Appellant had no opportunity to cross examine his father, deprived Appellant of his Sixth Amendment right of confrontation. The opinion finds this violation of the defendant's rights harmless. I disagree with the opinion's conclusion that the inadmissible evidence was not outcome determinative.

However, I do agree to affirming the convictions in cases CF-2003-77 and CF-2003-76 due to the other overwhelming evidence of guilt.