

DEC 13 2001

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ROBERT ANTHONY LAMAR,)

Appellant,)

-vs-)

STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

No. F-2000-1262

SUMMARY OPINION

STRUBHAR, JUDGE:

Robert Anthony Lamar, Appellant, was tried by jury and convicted of Unauthorized Use of a Motor Vehicle, After Former Conviction of Two or More Felonies, in the District Court of Oklahoma County, Case No. CF-00-599. In accord with the jury's recommendation, District Judge Virgil C. Black sentenced Appellant to twenty-five years imprisonment. From this judgment and sentence, he appeals.

Appellant raises three propositions of error for review:

- I. Appellant's conviction must be dismissed because the trial court *sua sponte*, without a request or objection by the state, instructed on the lesser offense of unauthorized use of a motor vehicle over Appellant's objection;
- II. The state presented insufficient evidence to establish beyond a reasonable doubt that Mr. Lamar acted with the intent to deprive the owner, temporarily or otherwise, of the vehicle or its possession; and
- III. The trial court's refusal to give Appellant's requested instruction on the lesser related offense of joyriding, its failure to include voluntary

intoxication as a defense to unauthorized use of a motor vehicle, and prosecutorial misconduct denied Appellant due process and a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we find reversal is warranted based on the claim raised in Proposition III(A) for the reasons set forth below.

In Proposition III(A), Appellant claims he was denied due process of law when the trial court refused to give his requested instruction on the lesser included offense of joyriding that was supported by the evidence. All lesser included instructions that are supported by the record should be given unless waived. *Shrum v. State*, 991 P.2d 1032, 1036 (Okl.Cr.1999). Joyriding constitutes a lesser included offense of larceny and unauthorized use of a motor vehicle under the evidence test adopted in *Shrum*, as well as the statutory elements test utilized by this Court in the past.¹ See *Shrum*, 991 P.2d at 1035-36. See also *Graham v. State*, 2001 OK CR 18, ¶ 3, ___P.3d___, 72 OBJ 1996.

¹ Larceny, unauthorized use of a motor vehicle and joyriding all require the defendant to take/drive a vehicle, without the consent of the owner, with varying intents – with the intent to permanently deprive the owner (larceny), with the intent to deprive the owner, temporarily or otherwise, of the vehicle (unauthorized use of a motor vehicle) or for joyriding or any other purpose (joyriding).

At trial, Appellant testified he took the U-Haul truck "to see what it felt like because I never drove a diesel before and I was going to take it back when I got through with it." (Tr. 58) Appellant testified he did not intend to keep the truck, sell the truck, repaint it or do anything else with it. (Tr. 58) When asked if he just took the truck out for a spin and intended to return it, Appellant said, "yes, sir." (Tr. 58) Appellant also testified he was in search of a pay phone to call his sister. While this testimony supported the lesser included offense of unauthorized use of a motor vehicle, it also supported the lesser included offense of joyriding. By its verdict the jury rejected the State's theory that Appellant intended to permanently deprive the owners of the truck. The intent or purpose with which Appellant acted was a question for the jury that Appellant put at issue by testifying. Consequently, joyriding was not only a requested lesser included offense that was supported by the evidence, it was also the defense theory of the case and as such should have been given. *Shrum*, 991 P.2d at 1036; *Kinsey v. State*, 798 P.2d 630, 633 (Okl.Cr.1990). Accordingly, this case must be reversed and remanded for new trial.

DECISION

The Judgment and Sentence of the trial court is **REVERSED and REMANDED for a new trial.**

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OPINION BY: STRUBHAR, J.
LUMPKIN, P.J.: CONCUR IN RESULT
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: RECUSE
LILE, J.: CONCUR

RD

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