



**ORIGINAL**

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

**FILED**  
COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JUL - 7 2022

JOHN D. HADDEN  
CLERK

**AIRICK WILLIAM FULLER,** )

**Appellant,** )

**v.** )

**STATE OF OKLAHOMA,** )

**Appellee.** )

**NOT FOR PUBLICATION**

**No. F-2021-123**

**SUMMARY OPINION**

**HUDSON, VICE PRESIDING JUDGE:**

Appellant, Airick William Fuller, was tried and convicted by a jury in the District Court of Custer County, Case No. CF-2019-283, of Counts 1-2: Kidnapping, After Two Prior Felony Convictions, in violation of 21 O.S.Supp.2012, § 741; and Count 3: Robbery in the First Degree, After Two Prior Felony Convictions, in violation of 21 O.S.2011, § 797. The jury sentenced Fuller to ten years imprisonment each on Counts 1-2 and thirty years imprisonment on Count 3. The Honorable Jill C. Weedon, District Judge, pronounced judgment and sentence in accordance with the jury's verdict and

ordered credit for time served.<sup>1</sup> Judge Weedon further ordered that the sentences for all three counts run concurrently.<sup>2</sup>

Fuller now appeals alleging the following propositions of error:

- I. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR FIRST-DEGREE ROBBERY; and
- II. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF SECOND-DEGREE ROBBERY.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that no relief is required under the law and evidence. Appellant's judgment and sentence is **AFFIRMED**. However, we **REMAND** this matter to the District Court with instructions to enter an order *nunc pro tunc* correcting the judgment and sentence document to reflect the trial court's order for concurrent sentences if this matter has not already been addressed.

**Proposition I.** Taken in the light most favorable to the State, sufficient evidence was presented at trial to allow any rational trier

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<sup>1</sup> Appellant must serve 85% of the sentence imposed on Count 3 before becoming parole eligible. 21 O.S.Supp.2015, § 13.1.

<sup>2</sup> The judgment and sentence document in the record on appeal does not reflect the trial court's pronouncement at formal sentencing that Appellant's sentences run concurrently. We address this matter *infra*.

of fact to conclude beyond a reasonable doubt that Appellant was guilty of first degree robbery as charged in this case. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35.

Taken in the light most favorable to the State, the record evidence allowed the jury to infer that Jason White didn't fight back while being beaten and having his shoes taken off his feet because Appellant put the gun to White's head earlier during the kidnapping and had threatened to shoot him. Evidence of the beating Appellant inflicted on White and Jalen Hernandez without resistance demonstrated the immediate nature of the threat of serious bodily injury White faced and the fear induced from the total circumstances presented. Although White never saw the gun while being beaten, the most that can be made of this fact is that White simply didn't know where the gun was. Sufficient evidence was therefore presented to show beyond a reasonable doubt that Appellant threatened White with immediate serious bodily injury during the commission of the robbery in order to overcome any resistance to the taking of the shoes from his person. 21 O.S.2011, § 797(2). See

*Owens v. State*, 2010 OK CR 1, ¶ 8, 229 P.3d 1261, 1264-65; 10A O.S.2021, § 1-1-105(35); 27A O.S.2021, § 2-6-202(7). Proposition I is denied.

**Proposition II.** We review the trial court’s decision on instructions for abuse of discretion. *Davis v. State*, 2018 OK CR 7, ¶ 7, 419 P.3d 271, 277. Our review of this claim is limited to plain error, however, because Appellant did not request instructions on second degree robbery. *Leech v. State*, 2003 OK CR 4, ¶ 4, 66 P.3d 987, 989. To prove plain error, Appellant must show an actual or obvious error affected his substantial rights. *Williams v. State*, 2021 OK CR 19, ¶ 4, 496 P.3d 621, 623. Even then, we will only correct plain error “if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice.” *Id.* (quoting *Lamar v. State*, 2018 OK CR 8, ¶ 40, 419 P.3d 283, 294); 20 O.S.2011, § 3001.1.

Appellant fails to show an actual or obvious error affecting his substantial rights. “We require *prima facie* evidence of the lesser offense to support giving a lesser included instruction.” *Davis*, 2018 OK CR 7, ¶ 7, 419 P.3d at 277. *Prima facie* evidence in this context

means evidence that would allow a jury rationally to convict on the lesser offense and acquit the defendant of the charged crime. *Id.*

While trial counsel could have requested instructions on second degree robbery based on the record evidence, *see* 21 O.S.2011, §§ 791, 794, 797, it appears that trial counsel made a strategic decision to request lesser offense instructions on the misdemeanor crime of assault and battery—as opposed to robbery in the second degree which in this case carried the same enhanced sentence of 20 to life as robbery in the first degree due to Appellant’s priors. *See* 21 O.S.Supp.2018, § 51.1(B); 57 O.S.Supp.2020, § 571(2)(s),(t). This was consistent with Appellant’s trial defense that this case involved a street fight broadcast on the internet that undoubtedly embarrassed the victims but the State simply did not present enough evidence to prove beyond a reasonable doubt the charged crimes of kidnapping and robbery.

Under our case law, the district court has a duty to instruct on all requested lesser-included or lesser-related offenses when there is evidence to support it. *Ball v. State*, 2007 OK CR 42, ¶ 31, 173 P.3d 81, 90. When the defendant fails to request the instruction, relief will be granted only if the failure to submit the instruction goes to the

foundation of the case or takes from the defendant a right essential to his defense. *Grissom v. State*, 2011 OK CR 3, ¶ 28, 253 P.3d 969, 980; *Simpson v. State*, 1994 OK CR 40, ¶ 12, 876 P.2d 690, 695. Under the total circumstances presented here, Appellant fails to show the trial court committed an actual or obvious error affecting Appellant's substantial rights by failing *sua sponte* to instruct on second degree robbery. There was no plain error. Proposition II is denied.

### **DECISION**

The Judgment and Sentence of the district court is **AFFIRMED**. However, this matter is **REMANDED** to the District Court with instructions to enter an order *nunc pro tunc* correcting the judgment and sentence document to reflect the trial court's order for concurrent sentences if this matter has not already been addressed. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM  
THE DISTRICT COURT OF CUSTER COUNTY  
THE HONORABLE JILL C. WEEDON, DISTRICT JUDGE**

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**OPINION BY: HUDSON, V.P.J.**

**ROWLAND, P.J.: CONCUR**  
**LUMPKIN, J.: CONCUR**  
**LEWIS, J.: CONCUR IN RESULTS**  
**MUSSEMAN, J.: CONCUR**