IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

LAWRENCE D. RAILBACK, JR., Appellant,	)	NOT FOR PUBLICATION
-vs-	)	No. F-98-1315
STATE OF OKLAHOMA, Appellee.	)	

SUMMARY OPINION

STRUBHAR, PRESIDING JUDGE:

Appellant, Lawrence D. Railback, Jr., was convicted of Shooting with Intent to Kill (Count I), Attempted Robbery with a Dangerous Weapon (Count II), and Unauthorized Use of a Vehicle (Count III), each After Former Conviction of Two or More Felonies, in the District Court of Oklahoma County, Case Number CF-95-7881, following a jury trial before the Honorable William Burkett. Following its return of a guilty verdict, the jury recommended that Appellant be sentenced to life imprisonment on Count I, forty-five years imprisonment on Count II, and twenty-five years imprisonment on Count III. The trial court sentenced Appellant accordingly and ordered the sentences run consecutively.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm in part and reverse in part. In reaching our decision, we considered the following

propositions of error and determined this result to be required under the law and the evidence:

I. Appellant was prejudiced and denied a fair trial by the admission of other crimes evidence.

II. The trial court erred by failing to suppress certain statements.

III. Appellant was denied a fair trial and due process of law.

IV. Appellant's convictions for both Shooting with Intent to Kill and Attempted Robbery with a Dangerous Weapon violated the prohibitions against double jeopardy and double punishment.

DECISION

As to appellant's first proposition, we find that Appellant was not prejudiced and denied a fair trial by the improper introduction of other crimes evidence.

We also find, with regard to Appellant's second proposition that the trial court did not error in failing to suppress certain statements as it was found in the *Jackson v. Denno* hearing that the statements at issue were voluntarily made.

Appellant's third proposition is without merit as any error which occurred when the trial court failed to sequester the jury after instructions were given was waived by counsel's failure to object. *See Elliott v. State*, 753 P.2d 920, 922 (Okl.Cr.1988). Further Appellant was not denied effective assistance of counsel because while counsel should have objected, Appellant has not shown

prejudice from counsel's alleged deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Finally, we do find merit in Appellant's final proposition wherein he argues that his convictions for both Shooting with Intent to Kill and Attempted Robbery with a Dangerous Weapon violated the prohibitions against double punishment and double jeopardy. As Appellant correctly notes, this Court has applied a double punishment analysis under 21 O.S.1991, § 11 to a case with substantially similar facts. In *Bray v. State*, 494 P.2d 339 (Okl.Cr.1972), the defendant shot at the driver of a vehicle in an attempt to rob the driver of his vehicle. As in the present case, the defendant ordered the driver to exit his vehicle, and when the driver did not immediately do so, the defendant shot the driver. As a result of this single act, the defendant in *Bray* was convicted of both Shooting with Intent to Kill and Robbery with Firearms. This Court, after reviewing section 11 and numerous prior cases from this Court regarding the application of section 11, held that in view of the prior case law and the obvious intent of section 11, it was apparent the defendant could not be convicted and punished under different sections of the criminal code for the same act. This Court then dismissed the offense which carried the lesser penalty. Based upon a reasonable interpretation of section 11 and precedent

from this Court, Appellant's conviction for the offense of Attempted Robbery with a Dangerous Weapon is reversed with instructions to dismiss.

The Judgment and Sentence of the trial court is **AFFIRMED** as to Counts I and III. Count II, Attempted Robbery with a Dangerous Weapon, is **REVERSED** with instructions to **DISMISS**.

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OPINION BY: STRUBHAR, P.J.
LUMPKIN, V.P.J.: CONCUR IN PART/DISSENT IN PART
JOHNSON, J.: CONCUR IN RESULTS
CHAPEL, J.: CONCUR
LILE, J.: CONCUR IN RESULTS

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

I concur in the Court's decision to affirm the judgment and sentence in Counts I and III. However, I must dissent to the reversal with instructions to dismiss as to Count II.

The Court's reliance on *Bray v. State*, 494 P.2d 339 (Okl.Cr.1972) is misplaced. As we noted in *Ashinsky v. State*, 780 P.2d 201, 208 (Okl.Cr.1989), *Bray* is distinguishable from the facts in this case. Bray was convicted of two separate crimes arising from the same facts in two separate trials. Here, as in *Ashinsky*, the convictions were rendered in a single trial. In *Bray*, the Court applied the same transaction test to the second trial and determined the second trial was prohibited and dismissed the conviction. As in *Ashinsky*, we should look to the elements of the crimes of which Appellant was convicted in this case and find the elements make the offenses separate and distinct, thus no error and affirm the judgment and sentence in Count II.