IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES DAVID SMITH	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2000-1408**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, James David Smith, was tried by jury in the District Court of Oklahoma County, Case No. CF-99-2703, and convicted of Second Degree Burglary, after former conviction of two or more felonies, in violation of 21 O.S.1991, § 1435. The jury set punishment at twenty-three (23) years imprisonment, and the trial judge sentenced Appellant accordingly. Appellant now appeals his conviction and sentence.

Appellant raises one proposition of error in this appeal. He claims the trial court's refusal to instruct the jury on three lesser-included offenses supported by the evidence and requested by the defense denied him due process of law in violation of the United State and Oklahoma Constitutions. However, after thorough consideration of this proposition and the entire record before us, including the original record, transcripts, and briefs of the parties, we find neither reversal nor modification is required.

In many previous cases, this Court has found tampering with a vehicle

and malicious mischief are not lesser included offenses of burglary.[1] By analogy, the same result has been reached with regard to interfering with a vehicle.[2]

More recently, in *Shrum v. State*, 991 P.2d 1032, 1036 (Okl.Cr.1999), this Court adopted the so-called "evidence test" in order "to determine what constitutes a lesser included offense of any charged crime."[3]

According to legal commentators, the evidence test is sometimes known as the "cognate evidence test" or "inherent relationship test"[4] and is another way of describing the concept of "lesser-related" offenses.[5] (*Shrum* uses such terms as "closely or inherently related" offenses and "lesser forms of homicide".)

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[1] *See e.g., Rowland v. State,* 817 P.2d 263, 266 (Okl.Cr.1991) ("Malicious Mischief is not a lesser included offense of Burglary"); *Wooldridge v. State,* 801 P.2d 729, 733 (Okl.Cr.1990) (malicious mischief not a lesser included offense to burglary); *Johnson v. State,* 725 P.2d 1270, 1272 (Okl.Cr.1986) (evidence did not justify instructions for malicious mischief and entering with specific intent as lesser included offense of burglary); *Hankins v. State,* 602 P.2d 1052, 1053 (Okl.Cr.1979)(no error in failing to instruct on tampering as lesser included offense, based upon lack of evidence); *Hutton v. State,* 572 P.2d 253, 256 (Okl.Cr.1977)(defendant was not entitled to a tampering instruction, although one was given, where no evidence was presented to explain his presence in the car other than burglarious intent); *Morrow v. State,* 502 P.2d 339, 340 (Okl.Cr.1972) (no error in failing to give requested instruction on tampering with a vehicle); *but see Finley v. State,* 623 P.2d 1031, 1034 (Okl.Cr.1981) (in dicta, tampering referred to as a lesser-included offense of burglary of an automobile); *Scott v. State,* 763 P.2d 141, 142 (Okl.Cr.1988)(defendant's burglary charge could not be reduced to the crime of tampering, where there was no evidence of an unauthorized physical alteration to the vehicle).

[2] *Smith v. State,* 544 P.2d 558, 560 (Okl.Cr.1975) (interfering with a vehicle not a lesser-included offense to larceny); *Tillman v. State,* 169 P.2d 223, 227 (Okl.Cr.1946).

[3] I concurred in the result reached in *Shrum,* but indicated my belief the Court should follow the statutory elements approach to resolving the issue of lesser-included offenses, for that method allows for objective application. I apply *Shrum* here as a matter of *stare decisis.*

[4] In construing the federal rules of criminal procedure, the United States Supreme Court rejected the "inherent relationship test" in favor of the statutory elements test. *See Schmuck v. United States,* 489 U.S. 705, 716, 109 S.Ct. 1443, 1451, 103 L.Ed.2d 734 (1988).

[5] "To be precise, lesser included offenses are only crimes that are included within the elements of another crime. Related or cognate offenses, on the other hand, are crimes that are in some way related or similar to each other, but are not necessarily included with each other. An LIO (lesser included offense) only has elements that are included within those of the greater, with no elements in addition to those of the greater. In contrast, related offenses could each have elements that the other does not have." James A. Shellenberger and James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and*

The inherent relationship test looks at whether the greater and lesser crimes "relate to the protection of the same interests" and whether they are "so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."[6]

The burglary statutes are directed at protecting property inside a home or car.[7] Tampering[8] and Interfering[9] are directed at protecting the car itself from acts of theft and vandalism. Malicious Mischief would not qualify as either a lesser-included or lesser-related offense.

Based upon the above-reference cases, the trial judge's reliance on language from *Taylor v. State*, 377 P.2d 508, 510 (Okl.Cr.1962), and the fact that the misdemeanor crimes do not really relate to the protection of the same interest, we find it was not plain error to deny the requested instructions.

Double Jeopardy Remedies, 79 Marq.L.Rev. 1, 13 (1995).

[6] James A. Shellenberger and James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq.L.Rev. 1, 13, n. 23 (1995). However, one of the problems with an inherent-relationship/evidence approach is that "it is sometimes difficult to ascertain the bounds" of such theory. Christen R. Blair, *Lesser Included Offenses in Oklahoma*, 38 Okla.L.Rev. 697, 701 (1985).

[7] Second degree burglary is found in Chapter 58 of our criminal code, under the heading "Burglary and House Breaking." The crimes described involve breaking and entering into homes and vehicles with an intent to commit a crime therein. The intent appears to be directed toward protection of what is located inside, such as people and property.

[8] The tampering statute is found in the highway safety code among statutes related to stealing an automobile or using vehicles without permission. *See Taylor v. State*, 377 P.2d 508, 510 (Okl.Cr.1962) ("[I]t is clear that the Legislature intended that this subsection be for the purpose of closing all loop-holes relating to Larceny of Automobiles. It is evident this law was designed to establish criminal liability in cases of stealing hub-caps, tires, carburators, spark plugs, etc., or any other tampering with automobiles."); *Brown v. State*, 546 P.2d 1023, 1026 (Okl.Cr.1976)(relying on *Taylor*).

[9] The interfering statute is found in Chapter 69 of our criminal statutes, under the heading malicious mischief. The clear intent of these crimes is to prevent acts of vandalism, including destroying or injuring a railroad, public road, church, crops, landmarks, dams, written instruments, mail, pipes, wires, and cars.

Moreover, any conceivable due process error in failing to give the instructions was harmless beyond a reasonable doubt, based upon the evidence admitted at trial. *Simpson v. State*, 876 P.2d 690, 701 (Okl.Cr.1994). Appellant was caught red-handed wearing gloves and in possession of a ring and papers taken from the car. No evidence, other than burglarious intent, was presented to explain his presence in the car.

DECISION

The judgment and sentence are hereby **AFFIRMED.**

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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CHAPEL, J.: CONCUR IN RESULTS
STRUBHAR, J.: CONCUR IN RESULTS
LILE, J.: CONCUR

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