

JUN 30 2000

JAMES W. PATTERSON  
CLERK

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

JASON BENJAMIN FILION, )

Appellant, )

-vs- )

STATE OF OKLAHOMA, )

Appellee. )

NOT FOR PUBLICATION

No. F-99-559

**SUMMARY OPINION**

**STRUBHAR, PRESIDING JUDGE:**

Appellant, Jason Benjamin Filion, was convicted of Assault and Battery with a Dangerous Weapon by Use of a Firearm (Count I) and Carrying a Concealed Weapon (Count II), in the District Court of Tulsa County, Case Number CF-98-2553, following a jury trial before the Honorable Thomas C. Gillert. Following the return of a guilty verdict, the trial court sentenced Appellant to ten years imprisonment and a \$10,000.00 fine on Count I and thirty days imprisonment and a \$250.00 fine on Count II. The sentences were ordered to run consecutively. Appellant appeals only his Judgment and Sentence on Count I.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we reverse and remand Count I for a new trial. 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. The trial court erred in failing to instruct the jury on Reckless Conduct with a Firearm which was warranted by the evidence.
- II. The trial court erred in failing to allow a jury instruction on accident and as a result of the error, Appellant was wrongly convicted.
- III. The evidence was insufficient to sustain Appellant's conviction of Assault and Battery with a Dangerous Weapon and as a result, Appellant was wrongly convicted.
- IV. Appellant received ineffective assistance of trial counsel, therefore his conviction and sentence must be reversed.
- V. reversible error occurred when the prosecutor repeatedly made comments to the jury that were solely calculated to unduly prejudice Appellant and wrongly taint the jury against him.
- VI. The trial errors complained of herein cumulatively denied Appellant's right to a fair trial under the Federal and Oklahoma Constitutions and therefore, Appellant's conviction must be reversed or his sentence modified.

### **DECISION**

We find merit in Appellant's first proposition wherein he claims that the trial court erred in failing to give his requested instruction on the lesser included offense of Reckless Conduct with a Firearm.<sup>1</sup> In *Shrum v. State*, 1999 OK CR 41, ¶ 10, this Court held that the evidence test is to be used to determine what

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<sup>1</sup> Defense Counsel's oral request for an unmodified uniform instructions, contained in OUJI-CR, was sufficient to satisfy the requirement that the request be in writing. See *Nance v. State*, 1992 OK CR 54, 838 P.2d 513, 516.

constitutes a lesser included offense of any charged crime. Further, "this test has been used to support a lesser included offense instruction where the facts at trial indicate a lesser offense, but those facts were not alleged in the Information. *Id.*, at ¶ 9.

The State responds that the evidence was not sufficient to support instructions on the lesser crime of Reckless Conduct with a Firearm. The State points to the testimony of State's witnesses who testified that they did not see a car drive by at the time of the shooting. It also relies upon the testimony of Mr. York that Appellant pointed the gun at Brandy and then shot her. When determining whether the evidence warranted an instruction on the lesser included offense, this Court does not review the evidence in the light most favorable to the State. Rather, we look to the crimes that the evidence at trial tended to prove. *Shrum*, at ¶ 9. Although the State's evidence conflicted with some of that provided by the defense, this Court does not determine whether an instruction on a lesser included offense was warranted based upon which evidence we find to be most credible. We have long recognized that where the evidence conflicts, "[i]t is the province of the jury to resolve conflicts and to reconcile testimony concerning the motives of the witnesses and other circumstances of the case." *Bernay v. State*, 1999 OK CR 37, 989 P.2d 998, 1008.

The crime of Reckless Conduct with a Firearm is supported by evidence that a defendant engaged in conduct with a loaded pistol which created a situation of unreasonable risk and probability of death or great bodily harm to another and demonstrated a conscious disregard for the safety of another person. 21 O.S.Supp.1995, § 1289.11; OUJI-CR 6-44. Each of these elements was supported by some evidence presented at trial. Accordingly, the evidence presented at trial supported an instruction on this lesser included crime and that the trial court erred in declining to give this requested instruction. Appellant's conviction for Count I, Assault and Battery with a Dangerous Weapon by Use of a Firearm, is **REVERSED** and **REMANDED** for a **NEW TRIAL**.

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**OPINION BY: STRUBHAR, P.J.**  
LUMPKIN, V.P.J.: DISSENT  
JOHNSON, J.: CONCUR  
CHAPEL, J.: CONCUR  
LILE, J.: CONCUR

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**LUMPKIN, VICE-PRESIDING JUDGE: DISSENT**

The Appellant received an instruction on the appropriate lesser included offense in this case and was convicted of that offense. The only evidence supporting the orally requested instruction for Reckless Conduct with a Firearm was Appellant's self serving statement, which was not supported by the other evidence in the case. I continue in the view I expressed in *Nance v. State*, 838 P.2d 513, 516-518 (Okl.Cr.1992) (Lumpkin, Vice-Presiding Judge Concur in Part/Dissent in Part) that counsel should be required to submit requested instructions in writing. Regardless, the evidence presented in this case only supports the lesser included offense instruction that was given. I would affirm the judgment and sentence.