IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

VADELL LAMONT WRIGHT,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	No. F-2001-651
-vs-	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, J.:

Vadell Lamont Wright, Appellant, was tried by jury and convicted of one count of Unauthorized Use of a Motor Vehicle, After Former Conviction of Two Felonies (Count II) and one count of Using a Vehicle to Facilitate the Intentional Discharge of a Firearm, After Former Conviction of Two Felonies (Count VII), in the District Court of Oklahoma County, Case No. CF-99-3955, District Judge Susan P. Caswell presiding.[1] The trial court followed the jury's recommendation and sentenced Appellant to twenty years imprisonment for unauthorized use of a motor vehicle and twenty-five years imprisonment for using a vehicle to facilitate the intentional discharge of a firearm, to be served consecutively. From this judgment and sentence, Appellant appeals.

After thorough consideration of the entire record before us on appeal,

[1] Appellant was acquitted of Unauthorized Use of a Motor Vehicle and Assault and Battery with a Dangerous Weapon. (Counts III & VI) The other counts alleged in the Information were solely charged against Appellant's co-defendant, Cory Seavert.

including the original record, transcripts, and briefs of the parties, we reverse. The following propositions of error were considered and we find the claims raised in Propositions II and III require relief:

I. The trial court erred by allowing the jury to see Appellant in handcuffs;

II. The evidence was insufficient to support the charge of using a vehicle to discharge a firearm;

III. The trial court improperly negated Appellant's defense of mistake;

IV. Other crimes evidence deprived Appellant of a fair trial;

V. Improper jury communication deprived Appellant of a fair trial;

VI. The trial judge erred by failing to grant Seavert immunity;

VII. The trial court erred by failing to submit lesser-included instructions to the jury; and

VIII. Cumulative error deprived Appellant of a fair trial.

In his second proposition, Appellant claims his drive-by shooting conviction must be reversed because the trial evidence was insufficient to show he used a vehicle to facilitate his co-defendant's shooting at an officer as they tried to flee the officer after a car chase. Here, the evidence showed Appellant used a stolen car to flee from Officer Homan when he stopped to investigate a possible car accident involving Appellant and his co-defendant, Cory Seavert. Once Appellant collided with Homan's patrol car and the car chase ended, he and Seavert exited the car. Seavert fired at Homan from the passenger side of the car to prevent capture and both he and Appellant fled on foot. Homan

testified that he saw Seavert and Appellant exit the car facing him and then he ducked down in his car to avoid being shot. When he sat up and exited his car, both Appellant and Seavert were "starting to run" away. On cross-examination, Homan agreed with defense counsel that Appellant was "off and running" when Seavert fired the shot.

Under 21 O.S.Supp.1999, § 652(B), the State must prove the accused **used** the car to **facilitate** the firing of the weapon. Though the OUJI-CR2d Comment states these terms are understandable and need no definition, the jury here struggled with these terms in the context of this case and asked the court to define "using" or "use" and "facilitate." (Court's Exh. 4 & 5) The trial court did not define "using" or "use," but defined "facilitate" as "to make easier." Researching other states for better definitions of these terms and similar facts was not beneficial as most states use more specific language in their so-called drive-by shooting statutes and most cases involve the discharge of a gun by a gunman from inside the vehicle. The definition employed by the trial court, however, is a generally accepted definition of "facilitate" as it is used in criminal statutes. *See U.S. v. Linn,* 880 F.2d 209, 215 (9th Cir.1989); *U.S. v. McIntyre,* 836 F.2d 467, 473 (10th Cir.1987); *Platt v. U.S.*, 163 F.2d 165, 166 (10th Cir.1947). While arguably Appellant used the car in the sense that he drove it and was driving it immediately before the shooting, there is no evidence the car facilitated or made the shooting in this case easier. Here the action of driving the car and its physical presence were not inextricably linked

to the shooting. The car was not used as a staging ground for the shooting as there was no evidence Appellant or Seavert stole or drove the car for the purpose of shooting at Homan. Rather, it was used as a means of locomotion to flee from the police. Finding Appellant did not use the car to facilitate Seavert's intentional shooting based on these facts is consistent with the legislative intent of § 652 (B). In the Oklahoma Legislative Report, it was noted § B was intended to deal with drive-by shootings and provided a prison term "for anyone who discharges a firearm **from** a vehicle without regard for the safety of others." 52 Okla. Legis. Rep. #81. Based on the facts of this case, we find the evidence was insufficient to prove Appellant used the vehicle to facilitate the shooting. Accordingly, Appellant's conviction for drive-by shooting is reversed with instructions to dismiss.

In his third proposition, Appellant claims the trial court's response to one of the jury's questions negated his defense of mistake to Count II - unauthorized use of a vehicle (UUMV). During deliberations, the jury asked the following question and received the following response:

> Does he have to have consent of the actual, true, owner or who he thinks is the true owner?
> Consent of the actual true owner (element #4 of instruction #4)
>
> Susan P. Caswell

Court's Exh. 3.

Appellant preserved this claim by objecting on this basis. At trial, the trial court disagreed with Appellant's argument because it believed if one had

the consent of the true owner to use his/her car, then the user would not have the intent to deprive the owner of it. The trial court's reasoning is incorrect because if you borrow someone's car, you intend to deprive them of it, at least temporarily but with their consent. This Court has not addressed the issue of whether mistake is a defense to UUMV and whether the consent must be from the actual owner or from an apparent owner. This Court has held that the actual taking of the car need not be from the true owner. *See Magness v. State,* 476 P.2d 382, 382 (Okl.Cr.1970).

In conducting a search of other states, Texas was the only state found to have addressed this issue. Like Texas, Oklahoma has codified mistake of fact as a defense. 21 O.S.2001, § 152.[2] In *Lynch v. State,* 643 S.W.2d 737, 738 (Tx.Cr.App.1983), the Texas Court of Criminal Appeals unanimously held that the trial court erred in refusing to instruct on the defense of mistake of fact and refused to make UUMV a strict liability crime.[3] Because the defense of mistake of fact is statutory and there is no evidence the Legislature intended UUMV to be a strict liability crime in Oklahoma, we hold the defense is available. Here, arguably the evidence raised the defense because Appellant claimed in his

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[2] All persons are capable of committing crimes, except those belonging to the following classes:

5. Persons who committed the act, or made the omission charged, under an ignorance or mistake of fact which disproves any criminal intent. But ignorance of the law does not excuse from punishment for its violation;

[3] In Texas, a person commits the offense of unauthorized used if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner. V.T.C.A., Penal Code Sec. 31.07.

statement to police that he believed his co-defendant was the owner of the car and he had his permission to drive it. However, Appellant did not request a jury instruction on the defense; rather, he hoped the jury would find the state failed to prove beyond a reasonable doubt that he did not have consent of the owner and an intent to deprive since he was with the apparent owner. Given that the mistake of fact defense is statutory and available, the trial court's response to the jury's inquiry amounts to an erroneous instruction on the elements of UUMV that precluded the jury from properly evaluating the evidence. There is no doubt that the evidence in this case was more than sufficient to convict Appellant, his statement notwithstanding. Be that as it may, the trial court's response was incorrect. Accordingly, we reverse and remand Count II for a new trial.

DECISION

The Judgment and Sentence of the trial court on Count II is **REVERSED and REMANDED** for a new trial. The Judgment and Sentence on Count VII is **REVERSED with instructions to DISMISS.**

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JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
LILE, J.: CONCUR

RC/RD