IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ANDRE LASUAN MARSHALL,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2002-537
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

JOHNSON, PRESIDING JUDGE:

Appellant, Andre Lasuan Marshall, was charged in Tulsa County District Court Case No. CF-2001-4055 with three counts of Shooting with Intent to Kill (21 O.S.2001, § 652) (Counts 1-3); one count of Entering a Building with Unlawful Intent (21 O.S.2001, § 1438) (Count 4), and one count of Possession of a Firearm After Conviction of a Felony (21 O.S.2001, § 1283) (Count 5).[1] The State alleged that Appellant had three prior felony convictions. A jury found Appellant guilty as charged on all counts, with the exception of Count 1, where it found Appellant guilty of the lesser offense of Assault with a Dangerous Weapon (21 O.S.2001, § 645). The jury recommended sentences of 20 years on Count 1, 30 years each on Counts 2 and 3, a $500 fine on Count 4, and four years on Count 5. On April 15, 2002, the Honorable Thomas C. Gillert, District Judge, sentenced Appellant in accordance with the jury's recommendation, ordering the sentences to be served concurrently. Appellant then timely filed this appeal.

Appellant raises the following propositions of error:

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[1] The Information originally charged Possession of a Firearm AFC as Count 4, and Entering a Building with Unlawful Intent as Count 5. Because trial was bifurcated pursuant to *Chapple v. State*, 1993 OK CR 38, 866 P.2d 1213, these counts were renumbered to avoid any speculation by the jury about omitted counts in the first stage of trial.

1. The evidence was insufficient to establish that Appellant shot with intent to kill.

2. The trial court erred in instructing the jury, over Appellant's objection, on the lesser offense of Assault with a Dangerous Weapon.

3. Appellant's conviction for both Possession of a Firearm After Conviction of a Felony, and Shooting with Intent to Kill After Conviction to Two Felonies, constitutes double jeopardy or double punishment.

4. Police testimony concerning "gang colors" constituted an evidentiary harpoon and denied Appellant a fair trial.

5. The evidence was insufficient to support Appellant's conviction for Entering with Unlawful Intent.

6. The trial court erred in not instructing the jury regarding 21 O.S.2001, § 13.1.

7. Prosecutorial misconduct during closing argument constituted reversible error.

8. Aggregate trial error warrants reversal of Appellant's convictions or modification of his sentences.

After thorough consideration of the propositions, and 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. Regarding Proposition 1, we find the evidence sufficient for a rational trier of fact to conclude that Appellant, who ran from the scene immediately after shots were fired at three police officers, was the shooter. *Rudd v. State*, 1982 OK CR 122, ¶ 10, 649 P.2d 791, 794. In Proposition 2, we agree that the trial court erred in instructing the jury on the included offense of Assault with a Dangerous Weapon over defense counsel's objection and without any request for such instructions from the State. *Shrum v. State*, 1999 OK CR 41, ¶ 11, 991 P.2d 1032, 1036-37. Count 1 is therefore reversed with instructions to dismiss. Proposition 3 is denied, as

Appellant's convictions for both Possession of a Firearm After Conviction of a Felony, and Shooting with Intent to Kill After Conviction to Two Felonies, are distinct crimes based on discrete acts. *Thomas v. State*, 1984 OK CR 19, ¶ 16, 675 P.2d 1016, 1021; *Smith v. State*, 1982 OK CR 154, ¶¶ 7-8, 651 P.2d 1067, 1069-70.

Regarding Proposition 4, we find police testimony regarding gang colors in a crowd of spectators admissible, as it was based on the personal observations and past experience of the witness. 12 O.S.2001, § 2701. Even assuming this evidence was inadmissible, we find no prejudice to Appellant, who was not wearing any discernible "gang colors" himself, particularly as the trial court sustained defense counsel's objection and admonished the jury to disregard the comment. *White v. State*, 1995 OK CR 15, 900 P.2d 982, 992. Regarding Proposition 5, we find the evidence insufficient to support a conviction on Count 4; while Appellant clearly entered the home of another without permission, in an apparent attempt to hide from police after the shooting, the evidence did not establish that he intended to destroy personal property therein merely because he happened to bleed on the homeowner's couch. 21 O.S.2001, §§ 1438(A), 1760.

In Proposition 6, we find the jury was properly instructed on all the law necessary to discharge its duty of recommending punishment. *Miller v. State*, 1974 OK CR 94, ¶ 6, 522 P.2d 642, 644. As to Proposition 7, of the four comments complained of, the first (alleged mischaracterization of the evidence) was not objected to and, because we find no fundamental error, is not grounds for relief. *Shelton v. State*, 1990 OK CR 34, ¶ 15, 793 P.2d 866, 872. The second (comment on a witness's veracity based on prosecutor's own discussions with witness) was met with an objection which was sustained, curing any error. *Walker v. State*, 1989 OK CR 64, ¶ 13, 781 P.2d 838, 841.

The third comment (alleged indirect reference to Appellant's failure to testify) was not objected to, and in any event was not improper. *Dangerfield v. State*, 1975 OK CR 223, ¶ 23, 542 P.2d 1311, 1316. The fourth comment (allegedly seeking sympathy for police victims), also unobjected to, was a fair rebuttal to defense counsel's closing argument. *Harvell v. State*, 1987 OK CR 177, ¶ 16, 742 P.2d 1138, 1142. Finally, as to Proposition 8, aside from those already specified, we find no errors which cumulatively warrant any additional relief. *Sanders v. State*, 2002 OK CR 42, ¶ 17, 60 P.3d 1048, 1051.

DECISION

The Judgment and Sentence of the district court with respect to Count 1 (Assault with a Dangerous Weapon) and 4 (Entering a Building with Unlawful Intent) is **REVERSED WITH INSTRUCTIONS TO DISMISS**. In all other respects, the Judgment and Sentence is **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE THOMAS C. GILLERT, DISTRICT JUDGE

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

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

I join with Judge Lile in dissenting to the reversal of Count I. Assuming arguendo, Count I should be reversed, it should only be reversed for a new trial due to instructional error, and not due to insufficiency of the evidence. Further, under *Shrum* and *Graham v. State*, 2001 OK CR 18, 27 P.3d 1026, the jury is not required to find the defendant not guilty of the primary charge before considering a lesser included offense. Therefore, we cannot presume, as we previously did, that the jury acquitted the defendant of the primary charge before it considered any lesser included offenses. Now, instead of directing juries to proceed in an orderly, objective fashion in considering the offenses from most serious to less serious, we are in effect directing juries to shop around among the smorgasbord of offense options presented and select one they feel is most appropriate. This is exactly the type of problem I sought to address in my separate writing to *Graham*, *id.* at 1028-29 (Lumpkin, P.J.: Concur in Results).