IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY ROGER WATTS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-2005-963**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant, Larry Roger Watts, was tried by jury in the District Court of Tulsa County, Case Number F-2003-508, and convicted of Use of a Vehicle to Facilitate the Intentional Discharge of a Weapon, after two former felony convictions, in violation of 21 O.S.2001, § 652. The jury set punishment at three (3) years imprisonment, plus an $8,000 fine. The trial judge sentenced Appellant in accordance with the jury's determination. Appellant now appeals his conviction and sentence.

Appellant raises the following propositions of error in this appeal:

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

II. Because the Legislature removed "air guns" from the statute's list of instruments which could not be fired from a vehicle, the prosecution's evidence that Appellant allegedly fired an air gun from a car does not support a conviction under the statute charged;

III. The prosecutor's invocation of societal alarm deprived Appellant of a fair trial and resulted in the jury imposing an excessive sentence;

IV. Because Appellant's arrest was illegal, the evidence obtained from his vehicle was illegally seized; therefore his conviction must be reversed; and

V. Because the police erased the dispatcher's tapes of the incident, the charge against Mr. Watts should be dismissed.

After thoroughly considering these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is not required, but we modify the conviction and sentence, as below.

With respect to proposition one, we agree that the drive-by shooting statute, 21 O.S.2001, § 652, is directed toward people, not property. *See, e.g., Burleson v. State*, 2002 OK CR 15, ¶ 5, 46 P.3d 150, 152 ("Drive-by shooting, like shooting with intent to kill or assault and battery with a deadly weapon, is indisputably a crime against the person.")[1] Here, the undisputed fact was that there were no persons in the building, in front of it, or anywhere near where the shooting took place. As such, the conviction for that crime cannot stand.

However, Appellant was originally charged with felony Malicious Injury to Property as a second count, and, at one point, made that allegation as an alternative theory to drive-by shooting. Defense counsel and Appellant both vigorously defended against that charge, and the prosecutor began questioning his ability to proceed under alternate theories, despite the fact that this is clearly allowed under 22 O.S.2001, § 404. Ultimately, through a series of rulings requiring the State to elect and defense attacks on the alternate theory plan, the State settled upon and tried the case under the drive-by shooting statute.

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[1] Indeed, the provision is a subpart of a statute that otherwise deals with shooting with an intent to kill or assault and batter with a deadly weapon. Also, the jury instructions for this crime are found under the subject heading "crimes against the person."

We find the State should have been allowed to proceed under alternate theories in this case, and Appellant has suffered no surprise or prejudice by our decision to modify the conviction and sentence to a felony violation of the Malicious Injury to Property statute, 21 O.S.2001, § 1760. While it cannot be said that Malicious Mischief is a "lesser included" offense to drive by shooting, by proving the intentional discharge of the weapon into the victim's window, thereby shattering it, with a form of reckless disregard, all of the elements of Malicious Mischief were clearly proven, except value. However, at trial, the victim also testified that she had suffered $3,700 in damages to her business as a result of this act. Moreover, this was not the first time such injuries had been suffered.

With respect to proposition two and four, we find those claims have been rendered moot as per our decision above. With respect to proposition three, we find the record does not support plain error with respect to the incidents of alleged societal alarm invocation, and the one argument to which the defense did object only touched upon the issue at best; it did not decide the verdict or inflame the jury. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693.

With respect to proposition five, we find Appellant has failed to demonstrate that the evidence was exculpatory or the State acted in bad faith.

DECISION

The judgment is hereby **MODIFIED** to a conviction for felony Malicious Injury to Property, rather than Use of a Vehicle to Facilitate the Intentional Discharge of a Weapon. As such, the sentence is **MODIFIED** to two (2) years imprisonment and a $1,000 fine. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE LAWRENCE W. PARISH, DISTRICT JUDGE

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OPINION BY: LUMPKIN, P.J.
C. JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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