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

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| CHAVIS LENARD DAY, Appellant, | ) | NOT FOR PUBLICATION |
| v. | ) | Case No. F-2007-526 |
| THE STATE OF OKLAHOMA, Appellee. | ) | |

## SUMMARY OPINION

**A. JOHNSON, JUDGE:**

Appellant Chavis Lenard Day was tried by jury and convicted in the District Court of Beckham County, Case No. CF-2006-346, of Shooting with Intent to Kill in violation of 21 O.S.Supp.2005, § 652(A) (Count 1), and Attempted Robbery with a Dangerous Weapon in violation of 21 O.S.2001, § 801, after former conviction of two or more felonies (Count 2). The jury fixed punishment at life imprisonment on each count. The Honorable Charles L. Goodwin, who presided at trial, sentenced Day accordingly, and ordered the sentences served concurrently. From this judgment and sentence Day appeals, raising the following issues:

(1) whether Day's trial and convictions for shooting with intent to kill (Count 1) and attempted robbery with a dangerous weapon (Count 2) subjected him to multiple punishments in violation of the state and federal constitutional prohibitions against double jeopardy and in violation of Oklahoma's statutory prohibition against multiple punishment found at 21 O.S.2001, § 11;

(2) whether the victim's eyewitness testimony as to Day's identity was credible and, if not, whether there was sufficient evidence to prove him guilty of the charged offenses beyond a reasonable doubt;

(3) whether the district court committed reversible jury instruction error by: (a) failing to instruct the jury on the reliability of eyewitness identification; (b) failing to instruct the jury on impeachment of a witness by former conviction; (c) improperly instructing the jury on determining punishment, and whether trial counsel was ineffective for not requesting an instruction on eyewitness identification;

(4) whether testimony about the alteration of a photo exhibit to remove possible gang-related writing constituted prejudicial evidence of other crimes or bad acts;

(5) whether the trial court erred by not instructing the jury that the attempted robbery count was subject to the statutory 85% limit on parole eligibility;

(6) whether the judgment and sentence document should be corrected *nunc pro tunc* to show that Day was convicted of attempted robbery with a deadly weapon and not robbery with a deadly weapon; and

(7) whether cumulative error deprived him of a fair trial.

We find reversal is not required and affirm the Judgment and Sentence of the District Court. We do, however, remand for a *nunc pro tunc* correction to the Judgment and Sentence document.

**1.**

We find no constitutional double jeopardy violation, nor do we find any violation of the statutory prohibition against multiple punishment at 21 O.S.2001, § 11. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *Davis v. State*, 1999 OK CR 48, ¶ 5, 993 P.2d 124, 125; *Ashinsky v. State*, 1989 OK CR 59, ¶ 30, 780 P.2d 201, 208.

**2.**

The jury is the exclusive judge of the weight and credibility of a witness's testimony and a reviewing court must accept those credibility choices and reasonable inferences that tend to support the verdict. *McCarty v. State*, 1995 OK CR 48, ¶ 28, 904 P.2d 110, 120. The credibility of the witness's identification was raised and tested at trial. The evidence of Day's identity was sufficient to support the convictions.

**3.**

**a.**

There was no serious question as to the reliability of the witness's identification of Day as his assailant. The district court did not err, therefore, by not issuing a cautionary jury instruction on the unreliability of eyewitness testimony. *McDoulett v. State*, 1984 OK CR 81, ¶ 9, 685 P.2d 978, 980. Because there is no error, there is no reversible plain error. *See Hogan v. State*, 2006 OK CR 19, ¶¶38-39, 139 P.3d 907, 923 (holding that relief for plain error first requires showing of error). Furthermore, because the instruction was not warranted, trial counsel was not ineffective for failing to request it. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984) (to prevail on claim of ineffective assistance, defendant must show reasonable probability that, but for counsel's error, result of proceeding would be different); *Eizember v. State*, 2007 OK CR 29, ¶ 155, 164 P.3d 208, 244 (trial counsel is not ineffective for failing to request jury instruction when that request would have been properly denied); *Weatherly v.*

*State*, 1987 OK CR 28, ¶ 30, 733 P.2d 1331, 1339 (finding no ineffective assistance where trial counsel failed to request jury instruction on eyewitness identification not warranted by facts).

**b.**

Jury Instruction No. 9-22, OUJI-CR(2d)(2006), Impeachment of Witness by Former Conviction, is an instruction whose purpose is to limit a jury's use of evidence of former convictions to its consideration of the witness's credibility and thereby preclude its use as substantive evidence of the defendant's guilt. The questions put to the State's witness on cross-examination by defense counsel made it clear that the testimony about the witness's former convictions was intended to discredit the witness and not intended as substantive evidence against Day. Under these circumstances, there was no danger the jury could have construed the witness's testimony about his own former convictions as evidence against Day. Because a limiting instruction was not warranted, the district court's failure to so instruct was not error, much less error rising to the level of reversible plain error. *See Hogan v. State*, 2006 OK CR 19, ¶¶38-39, 139 P.3d 907, 923 (holding that relief for plain error first requires showing of error).

**c.**

Day claims the district court erroneously modified the uniform closing instruction, Instruction No. 10-2, OUJI-CR(2d) 10-2, Function of the Jury, and improperly instructed the jury that if they found Day guilty then it would be their responsibility to determine punishment. Day provides no explanation as

to why or how this instruction misstated the law. Furthermore, he fails to explain how he was prejudiced by this alleged error. In the absence of any showing of error, or any showing of harm flowing from that error, there is no basis for a finding of reversible plain error. *See Hogan*, 2006 OK CR 19, ¶¶38-39, 139 P.3d at 923 (holding that relief for plain error first requires showing of error).

**4.**

Testimony in which a witness explained that he cut off a piece of a photograph, a photograph later used at trial as an exhibit by the State, to remove what he believed were inappropriate gang writings, was not improper evidence of other crimes, wrongs, or bad acts as defined by 12 O.S.2001, § 2404(B). Section 2404(B) explicitly permits introduction of evidence that is intended to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." It is clear from the context of the questioning that the testimony about the gang-related writing that was removed from the photograph was not elicited to show that Day had any criminal propensity as a gang member, but was instead elicited only to establish the witness's motive for altering the photograph, a motive that was put into question by defense counsel's questioning of other witnesses suggesting the photograph had been improperly altered. There is no error. Because there is no error, there is no plain error with this testimony. *See Hogan*, 2006 OK CR 19, ¶¶38-39, 139 P.3d at 923 (holding that relief for plain error first requires showing of error).

**5.**

Attempted robbery with a dangerous weapon is not listed in 21 O.S.Supp.2002, §13.1 as a crime subject to the 85% limit on parole eligibility. As a result, a jury instruction on the 85% rule was not required for Count 2 (attempted robbery with a dangerous weapon). The district court did not err, therefore, by not instructing the jury on the 85% parole eligibility limit on Count 2. Because there is no error, there is no plain error. *See Hogan,* 2006 OK CR 19, ¶¶38-39, 139 P.3d at 923 (holding that relief for plain error first requires showing of error).

**6.**

Day claims that the judgment and sentence document incorrectly states that he was convicted in Count 2 of Robbery with a Dangerous Weapon and requests that the judgment and sentence document be corrected *nunc pro tunc* to reflect the jury's verdict convicting him of *Attempted* Robbery with a Dangerous Weapon. The State concedes that the judgment and sentence is incorrect and joins with Day in requesting a *nunc pro tunc* correction.

Count 2 of the charging information alleged "Attempted Robbery with a Weapon" (O.R. 1). The jury was instructed on "Attempted Robbery" (O.R. 106-107), and the jury returned a verdict of guilty on "Attempted Robbery" (O.R. 124). This record demonstrates that the conviction for "Robbery" listed in Count 2 of the Judgment and Sentence is incorrect. Accordingly, the district court must correct the Judgment and Sentence *nunc pro tunc* to reflect that the conviction on Count 2 is for Attempted Robbery with a Dangerous Weapon.

Other than the clerical error that we have noted above, we have found no merit to any of Day's other claims. There is no basis, therefore, for relief on his claim of cumulative error. *Lott v. State*, 2004 OK CR 27, ¶ 166, 98 P.3d 318, 357.

**DECISION**

The Judgment and Sentence of the District Court is **AFFIRMED.** The case is **REMANDED**, however, with direction to the district court to correct the Judgment and Sentence *nunc pro tunc* to reflect that the conviction on Count 2 was for Attempted Robbery with a Dangerous Weapon. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF BECKHAM COUNTY
THE HONORABLE CHARLES L. GOODWIN, DISTRICT JUDGE

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**LUMPKIN, P.J.: Concur**
**C. JOHNSON, V.P.J.: Concur**
**CHAPEL, J.: Concur**
**LEWIS, J.: Concur**

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