IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM MICHAEL DEMOSS,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
	)	Case No. F-2010-466
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant William Michael DeMoss was tried by jury for three Counts of Shooting with Intent to Kill, After Former Conviction of a Felony (Counts I, II, and III) (21 O.S.Supp.2007, § 652(A)), in the District Court of Delaware County, Case No. CF-2009-02. Appellant was found guilty as charged in Counts I and III, and of the lesser included offense of Assault with a Dangerous Weapon by Use of a Firearm in Count II. The jury recommended as punishment imprisonment for thirty (30) years and a $1,000. fine in each of Counts I and III and fifteen (15) years imprisonment and a $1,000. fine in Count II. The trial court sentenced accordingly, ordering the sentences in Counts I and II to run concurrently to each other and consecutively to the sentence in Count III.[1] It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

[1] Shooting with Intent to Kill is an 85% crime pursuant to 21 O.S.Supp.2002, § 13.1.

I. The evidence was insufficient to convict Appellant of Count II, Assault with a Dangerous Weapon.

II. The evidence was insufficient to convict Appellant of Counts I and III, Shooting with Intent to Kill.

III. Instructional error left Appellant's jury without proper guidance on lesser offenses which denied Appellant a fair trial.

IV. Appellant was denied effective assistance of trial counsel in violation of the Sixth Amendment to the United States Constitution and Article II, Sections 6, 7, and 20 of the Oklahoma Constitution.

V. Appellant's Fourteenth Amendment due process rights pursuant to the United States Constitution were violated when the jury was erroneously instructed as to the range of punishment for fines in Counts I-III.

VI. Irrelevant, improper and misleading evidence resulted in inflated and excessive sentences.

VII. Prosecutorial misconduct deprived Appellant of a fair trial and caused the jury to render excessive sentences.

VIII. Appellant's sentences are excessive.

IX. The cumulative effect of all the errors addressed above deprived Appellant of a fair trial.

After thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that vacating the fines imposed in each count is the only relief warranted under the law and the evidence.

In Proposition I, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime of Assault with a Dangerous Weapon beyond a reasonable doubt. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849; *Easlick v. State*, 2004

OK CR 21, ¶ 15, 90 P.3d 556, 559. Contrary to Appellant's argument, imminent fear is not an element of the crime. Here, the evidence was sufficient to prove Appellant committed a "willful and unlawful attempt or offer with force or violence to do a corporeal hurt" to M.C. *See* 21 O.S.2001, § 641.

In Proposition II, we find the evidence sufficient to support the convictions in Counts I and III for Shooting with Intent to Kill. *See Rutan,* 2009 OK CR 3, ¶ 49, 202 P.3d at 849. While there was conflict in the testimony, there was competent evidence to support the jury's findings. Appellant's detailed recall of his actions at the time of the shootings indicates he was not "so utterly intoxicated" that his mental powers were totally overcome, rendering it impossible for him to form the specific intent to kill. *Frederick v. State*, 2001 OK CR 34, ¶¶ 130-131, 37 P.3d 908, 942; *Kreijanovsky v. State*, 1985 OK CR 120 ¶ 10, 706 P.2d 541, 544. *See also* 21 O.S.2001, § 153. His detailed recall also belies his claims that he was hard of hearing and vision impaired. A previous diagnosis of mental illness is no defense as Appellant was found by a jury to be competent to stand trial. Further, all reasonable inferences from the shooting of Deputy Pike support the jury's disregard of Appellant's claim of accident. *See Vassaur v. State*, 1973 OK CR 400, ¶ 73, 514 P.2d 673, 685 (whether a shooting is the result of accident "must be gathered from all the circumstances surrounding the transaction and is a question for the jury to determine".)

In Proposition III, we find the trial court did not abuse its discretion in refusing requested instructions in Counts I and II on the lesser included

offense of Reckless Conduct with a Firearm. *Eizember v. State,* 2007 OK CR 29, ¶ 111, 164 P.3d 208, 236. To determine whether instructions on a lesser included offense should be given, we utilize a two step analysis. We must first determine whether the claimed lesser offense is a legally recognized lesser included offense of the charged offense. *Shrum v. State*, 1999 OK CR 41, ¶ 7, 991 P.2d 1032, 1035. This Court has traditionally looked to the statutory elements of the charged crime and any lesser degree of crime to determine the existence of any lesser included offenses. *Id.* This determination is not case-specific and can only be made by looking at the statutory elements. *Id.*, 1999 OK CR 41, ¶ 5, 991 P.2d at 1035 (Lumpkin, V.P.J. concurring in results). A lesser offense is a part of the greater offense when the establishment of the essential elements of the greater offense necessarily establishes all the elements required to prove the lesser included offense. 22 O.S. 2001, § 916; *State v. Uriarite*, 1991 OK CR 80, ¶ 8, 815 P.2d 193, 195. *See also Schmuck v. United States,* 489 U.S. 705, 716-717, 109 S.Ct. 1443, 1451, 103 L.Ed.2d 734 (1989).

In the second step we determine the sufficiency of the evidence to support the necessarily included offense. *Phillips v. State*, 1999 OK CR 38, ¶¶ 58-61, 989 P.2d 1017, 1034-35. In order to warrant a jury instruction on a lesser included offense, *prima facie* evidence of the lesser included offense must be presented at trial. *Bland v. State*, 2000 OK CR 11, ¶ 56, 4 P.3d 702, 719-20. *See also Ball v. State,* 2007 OK CR 42, ¶ 32, 173 P.3d 81, 90. *Prima facie* evidence of a lesser included offense is that evidence which would allow a jury

rationally to find the accused guilty of the lesser offense and acquit him of the greater. *Eizember*, 2007 OK CR 29, ¶ 111, 164 P.3d at 236 *citing Hogan v. Gibson*, 197 F.3d 1297, 1305 (10th Cir. 1999).

Reckless Conduct with A Firearm is a legally recognized lesser included offense of Shooting with Intent to Kill. *Bear v. State*, 1988 OK CR 181, ¶ 26, 762 P.2d 950, 957. However, Appellant's firing directly at the boys, despite their shouts to stop shooting, does not support giving the instruction in this case. Appellant's self-serving testimony that he did not see the boys and fired only into the bushes is not supported by the evidence. A *prima facie* case of Reckless Conduct was not presented at trial as the jury would not have been able to rationally acquit Appellant of Shooting with Intent to Kill (in Count I) or Assault with a Dangerous Weapon (in Count II) in favor of a finding of mere Reckless Conduct with a Firearm.

In Proposition IV, Appellant contends he was denied the effective assistance of counsel by counsel's failure to: 1) present an independent psychological expert on Appellant's behalf at the competency trial; 2) obtain an audiology expert at trial; and 3) file a Motion for New Trial. This claim of error is further developed in the contemporaneously filed *Application for Evidentiary Hearing on Sixth Amendment Grounds* and *Motion for New Trial on Newly Discovered Evidence.*

An analysis of an ineffective assistance of counsel claim begins with the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to

demonstrate both a deficient performance and resulting prejudice. *Eizember*, 2007 OK CR 29, ¶ 151-152, 164 P.3d at 244, *citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Strickland* sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. *Id.* First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. *Id.* Unless the defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A review of the record shows Appellant was evaluated by two psychologists and found competent to stand trial. Appellant has failed to show that but for counsel's failure to obtain the services of a third psychologist, the jury would have found him not competent to stand trial. Therefore, Appellant has failed to show he was prejudiced by counsel's conduct. An evidentiary hearing is not warranted on this issue as Appellant has failed to present anything other than argument in support of this claim of ineffectiveness. He has failed to show by clear and convincing evidence there is a strong possibility

trial counsel was ineffective for failing to obtain the services of a third psychologist.[2]

Appellant has also failed to show that the omission of an audiology expert at trial was not sound trial strategy. Appellant admits trial counsel knew about his hearing loss. There is no indication in the record that Appellant's hearing loss prevented him in any way from assisting in his defense. Contrary to Appellant's argument, defense counsel lived up to her promise made in opening statement to present Appellant's point of view by presenting Appellant's own testimony. The opinion of an expert could have been inconsistent with that testimony. In fact, the extra-record materials attached to the *Application for Evidentiary Hearing* show that testimony from such an expert would have been inconsistent and contradictory to Appellant's trial testimony. Having thoroughly reviewed the record and Appellant's arguments, we find Appellant has failed to show he was denied the effective assistance of counsel as he has not shown there is a reasonable probability that, but for the omission of the expert, the result of his trial would have been different.

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[2] Rule 3.11(B)(3)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) allows an appellant to request an evidentiary hearing when it is alleged on appeal that trial counsel was ineffective for failing to "utilize available evidence which could have been made available during the course of trial. . . ." *Short v. State*, 1999 OK CR 15, ¶ 93, 980 P.2d 1081, 1108-1109. Once an application has been properly submitted along with supporting affidavits, this Court reviews the application to see if it contains sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence. *Id.* In order to meet the "clear and convincing" standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo. *Id. Simpson v. State*, 2010 OK CR 6, 230 P.3d 888.

Further, we find Appellant has failed to show by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to obtain the services of an audiology expert at trial. His request for an evidentiary hearing on this issue is denied.

Finally, we find counsel was not ineffective for failing to file a Motion for New Trial on the basis of juror misconduct. Appellant's argument as fully developed in the *Application for Evidentiary Hearing* and *Motion for New Trial on Newly Discovered Evidence* concerns the Face Book communications by Juror K.B. The extra-record materials provided by Appellant show that on March 8, 2010, the day of her selection for the jury, K.B. went home that evening and communicated with several friends on Face Book stating that she had been selected as a juror in a criminal case. Appellant argues that not only was this a violation of the judge's orders, but that K.B. was prejudiced against Appellant by the responses she received.

The next communication made by K.B. was on March 10, 2010 at 8:34 p.m., that the jury had finished its deliberations the day before in the case of a man accused of shooting a deputy and two teenagers.

Appellant also directs us to comments made by the trial judge in another trial held between Appellant's trial and sentencing that the potential jurors should not post anything on Face Book about the jury or jury service as he had that arise in his last trial. Appellant acknowledges the 2010 supplements to the uniform jury instructions instructing jurors to avoid the Internet or any other tools of technology to communicate about a case and admits those

uniform instructions were not available to judge at the time of his trial. However, Appellant asserts the judge and defense counsel were clearly aware of the dangers of social media and Juror K.B.'s misconduct and should have taken the necessary steps to ensure Appellant had a new trial.

A defendant may file a motion for new trial when "new evidence is discovered, material to the defendant, and which he could not with reasonable diligence have discovered before the trial." 22 O.S.2001, § 952(7). When a defendant claims that newly-discovered evidence warrants a new trial, we consider the following factors: (1) whether the evidence could have been discovered before trial with reasonable diligence; (2) whether the evidence is material; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome. *Underwood v. State*, 2011 OK CR 12,¶ 93, 2011 WL 1129582, 25. We may resolve the issue based on the supplementary materials presented by the parties, or remand for an evidentiary hearing if necessary to adjudicate the claim. *Id. citing* Rule 2.1(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2011). In this case, we can resolve the issue based on the supplementary materials and remand for an evidentiary hearing is not warranted.

When an appellant requests a new trial based on juror misconduct, the appellant bears the burden of showing both juror prejudice and harm as a result of the juror's service. *Warner v. State*, 2006 OK CR 40, ¶ 18, 144 P.3d

838, 859. Defense counsel's mere speculation and surmise is insufficient upon which to cause reversal. *Id.* Appellant has not met that burden in this case.

The record before us, including the supplementary materials, shows that while Juror K.B. violated the judge's instructions not to get on the Internet, the juror did not discuss the facts of the case. Further, the names of jurors are public record. We find Appellant was not prejudiced by K.B.'s comments that she had been selected for the jury. Further, we find no proof that she was influenced in any way by the responses she received. We have reviewed the responses presented by Appellant and find they are the type of flippant comments frequently made and easily ignored. Further, there is no indication K.B. responded to her friends' comments. Appellant has made no showing that K.B. did not abide by the written instructions given to the jury at the close of evidence. The second Face Book posting by K.B. was made after the verdict had been handed down and the trial was over. Therefore, Appellant cannot show any resulting prejudice.

The information in this case does not meet the requirements for a new trial on newly discovered evidence.[3] Even if information of K.B.'s Face Book communications could be considered newly discovered, it is not material and cannot reasonably be said to have affected the outcome of Appellant's trial. The only Face Book comment made during the trial was that she was selected

[3] In the *Motion for New Trial,* Appellant states that defense counsel "friended" K.B. on Face Book after the conclusion of the trial. That is apparently how defense counsel learned of the juror's Face Book communications. Appellant further asserts is it unknown how much of K.B.'s communications defense counsel shared with Judge Haney.

as a juror. Appellant offers only speculation that responses received by K.B. influenced her service on the jury. The record gives no indication that K.B. was not a fair and impartial juror. Appellant has failed to show any prejudice by K.B.'s misconduct. Therefore, the *Motion for* a *New Trial on Newly Discovered Evidence* is denied.

As for the *Application for Evidentiary Hearing*, considering the exhibits attached to the *Motion for New Trial on Newly Discovered Evidence* as evidence offered in support of an evidentiary hearing, we find they do not contain clear and convincing evidence of counsel's ineffectiveness so as to warrant an evidentiary hearing. As the exhibits show no bias or partiality on the part of Juror K.B., any motion seeking a new trial based upon Juror K.B.'s Face Book communications would have been denied. Therefore, remand for an evidentiary hearing is not warranted.

In Proposition V, we find the jury was misinstructed that they were required to assess a fine in each count. Title 21 O.S.2001, § 64(B) makes the imposition of a fine optional by the jury. Both Appellant and the State request modification in the form of vacating the fines. We agree that is the appropriate remedy. *See Scott v. State*, 1991 OK CR 31, ¶¶ 12-14, 808 P.2d 73, 77. Therefore, the fines in each count are vacated.

In Proposition VI, we find evidence offered in support of Appellant's prior conviction was not so prejudicial as to lead the jury to recommend more severe sentences than they would have otherwise. The information was similar to that found in pen packs, previously held admissible by this Court. *See Hill v. State*,

1982 OK CR 114, ¶¶ 6-9, 648 P.2d 1268, 1269-1270. The information did not provide the jury detailed information about Appellant's prison record as found objectionable in *Bean v. State*, 1964 OK CR 59, ¶¶ 7-8, 392 P.2d 753, 754-756, but merely set out the facts surrounding the prior conviction as in *Mike v. State*, 1988 OK CR 205, ¶¶ 9-11, 761 P.2d 911, 913-915.

With one prior conviction, Appellant was subject to a minimum sentence of 10 years and a maximum sentence of life. He received 30 years for each conviction of Shooting with Intent to Kill and 15 years for the lesser offense of Assault with a Dangerous Weapon – Firearm. These certainly are not the "severe" sentences claimed by Appellant. In light of the strong evidence of guilt, and relatively light sentences, we find no modification is warranted.

In Proposition VII, we find Appellant was not denied a fair trial by prosecutorial misconduct. Relief will be granted on a prosecutorial misconduct claim only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon *Roy v. State*, 2006 OK CR 47, ¶ 29, 152 P.3d 217, 227. Such claims are evaluated within the context of the entire trial. *Id.*

Having thoroughly reviewed each of Appellant's allegations of prosecutorial misconduct, while some comments may have tested the bounds of propriety, we find none of the comments deprived Appellant of a fair trial, or had any prejudicial impact on the judgment and sentence. *See Warner*, 2006 OK CR 40, ¶197, 144 P.3d at 891.

In Proposition VIII, we find Appellant's sentences are not excessive. As addressed in Proposition VI, Appellant received two 30 year sentences and one 15 year sentence when he was facing life imprisonment in each count. On their face, such sentences are not excessive. The decision to run a defendant's sentences concurrently or consecutively rests within the sound discretion of the trial court. *Kamees v. State,* 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1209. In fact, sentences are to run consecutively unless the trial judge, in his or her discretion, rules otherwise. 21 O.S. 2001, § 61.1. *Riley v. State,* 1997 OK CR 51, ¶ 1, 947 P.2d 530, 535. The fact that Appellant was 52 years old at the time of sentencing, and his consecutive sentencing is in effect a life sentence is not grounds for finding an abuse of discretion by the trial court. The jury found Appellant shot at three people in two different episodes, two of whom were children, and that he eluded police for hours by hiding in a shed. The evidence supports the jury's verdict. Under these circumstances, it was well within the trial court's discretion to run the sentences consecutively.

Finally, in Proposition IX, we find Appellant was not denied a fair trial by the accumulation of error. *Williams v. State,* 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. While we did find the jury was misinstructed as to the imposition of fines in each count, this error has been cured by the vacating of those fines. Finding no other errors warranting relief, this claim of cumulative error is denied.

Accordingly, this appeal is denied.

DECISION

The Judgments and Sentences are **AFFIRMED, except that the FINES levied in each count are HEREBY VACATED.** The *Application for an Evidentiary Hearing on Sixth Amendment Grounds* and the *Motion for New Trial on Newly Discovered Evidence* are **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF DELAWARE COUNTY
THE HONORABLE ROBERT G. HANEY, DISTRICT JUDGE

APPEARANCES AT TRIAL

CARLA R. STINNETT
1204 S. CHEYENNE
TULSA, OK 74119
COUNSEL FOR APPELLANT

EDDIE WYANT
DISTRICT ATTORNEY
KENNETH E. WRIGHT, III
ASSISTANT DISTRICT ATTORNEY
DELAWARE COUNTY COURTHOUSE
P.O. BOX 528
JAY, OK 74346
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

KATRINA CONRAD-LEGLER
P.O. BOX 926
NORMAN, OK 73070
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
ASHLEY L. LITTLE
ASSISTANT ATTORNEY GENERAL
313 N.E. 21ST ST.
OKLAHOMA CITY, OK 73105
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR IN RESULT
C. JOHNSON, J.: CONCUR
SMITH, J.: CONCUR IN RESULT

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