IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VERNON DOMINGO MORGAN	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. F-98-624**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant, Vernon Domingo Morgan, was tried by a jury and convicted of Shooting with Intent to Kill in violation of 21 O.S.Supp.1992, § 652 (Count 1), Assault and Battery in violation of 21 O.S.Supp.1996, § 644 (Counts 2 and 3), and Burglary of an Automobile in violation of 21 O.S.1991, § 1435 (Count 4) in Tulsa County District Court Case No. CF-97-3563. The jury recommended sentences of eight (8) years and one (1) day imprisonment for Count I, ninety days imprisonment for Count II, ninety (90) days imprisonment for Count III, and two (2) years imprisonment on Count IV. The trial judge sentenced Appellant accordingly and ordered the sentences to run consecutively. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

I. Insufficient evidence was presented at trial to support a conviction for burglary of an automobile;

II. Appellant's conviction for burglary of an automobile must be vacated because the trial court never had jurisdiction over the charge;

III. Questions and testimony that implied Appellant was a gang member prejudiced the jury against Appellant and require his case to be reversed and remanded; and

IV. The trial court's refusal to give Appellant's requested legal instruction on reckless conduct with a firearm as a lesser-included offense of shooting with intent to kill constitutes reversible error.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts, and briefs, we find neither reversal nor modification is required with respect to Counts I, II, and III. However, we find Count IV must be reversed and remanded with instructions to dismiss.

With respect to the first proposition of error, we find the State never proved the element of breaking, as required by 21 O.S.1991, § 1435. The breaking necessary to constitute burglary may be any act of physical force, however slight, by which obstructions to entering an automobile are removed. *Williams v. State*, 762 P.2d 983, 986 (Okl.Cr.1988). Here, the evidence reflects the Blazer door was open when the deck was stolen.

The State argues a breaking was sufficiently proven through Appellant's statement to "get that fat ass nigger out of the way so I can get the deck." The State cites no case to support its position that a person can constitute an obstacle to entry, and we find no reasonable reading of the statute supports this conclusion. Moreover, no one testified Appellant moved anyone out of the way in order to gain entry. After viewing the evidence in the light most favorable to the State, no rational trier of fact could have found the essential elements of burglary of an automobile beyond a reasonable doubt. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985). While the evidence might be sufficient to convict Appellant of a larceny or robbery charge, those crimes were not alleged in the information. The State decides what charges will be filed and

once those charges are filed the State must meet its burden of proof. In this case, the State failed to present evidence of an element of the crime and the conviction cannot stand.

Appellant's second proposition of error is now moot, due to the resolution of proposition one. With respect to proposition three, we find the first two instances did not amount to error or plain error. *Simpson v. State*, 876 P.2d 690, 693 (Okl.Cr.1994). The third statement was cured when the trial court sustained defense counsel's objection and properly admonished the jury. *Romano v. State*, 909 P.2d 92, 116 (Okl.Cr.1995).

With respect to proposition four, we find Appellant's conduct demonstrated a "greater culpability than mere recklessness." *Bear v. State*, 762 P.2d 950, 957 (Okl.Cr.1988). Therefore, the trial court did not err in failing to give the requested instruction for reckless conduct with a firearm.

DECISION

The judgment and sentence on Counts I, II, and III are hereby **AFFIRMED.** The judgment and sentence on Count IV is hereby **REVERSED** and **REMANDED** to the district court with instructions to **DISMISS**.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE B.R. BEASLEY, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

RONALD R. WALLACE
ASSISTANT PUBLIC DEFENDER
189 TULSA COUNTY COURTHOUSE
500 S. DENVER
TULSA, OKLAHOMA 74103
COUNSEL FOR APPELLANT

APPEARANCES ON APPEAL

GRETCHEN GARNER
ASSISTANT PUBLIC DEFENDER
PYTHIAN BUILDING
423 S. BOULDER AVENUE, SUITE 300
TULSA, OKLAHOMA 74103

PAUL H. WILKENING
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY COURTHOUSE
TULSA, OK 74103
COUNSEL FOR THE STATE

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
KELLYE BATES
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLAHOMA CITY, OK 73104-4894
COUNSEL FOR THE STATE

OPINION BY: LUMPKIN, V.P.J.
STRUBHAR, P.J.: CONCUR
JOHNSON, J.: CONCUR
CHAPEL, J.: CONCUR IN RESULTS
LILE, J.: CONCUR

RE