IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICKY DALE RAWLINS, Jr.	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
v.	)	Case No. F 2004-866
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Ricky Dale Rawlins, Jr., was tried by a jury in Love County District Court, in Case Nos. CF 2003-76, CF 2003-77, and CF 2003-78, for Shooting with Intent to Kill, in violation of 21 O.S.2001, § 652(A). Appellant was tried jointly with his brother/codefendant Kenneth Lee Rawlins on July 12th – 14th, 2004, before the Honorable John Skaggs, District Judge. The jury found Appellant guilty in Case Nos. CF 2003-76 and CF 2003-77 of Assault and Battery with a Deadly Weapon and set punishment at twelve (12) years imprisonment in each case. The jury found Appellant guilty in Case No. CF 2003-78 of Shooting with Intent to Kill and set punishment at twenty-five (25) years imprisonment.[1] Judge Skaggs sentenced Appellant in accordance with the jury's verdicts on August 26, 2004, and ordered the sentences be served consecutively.

Mr. Rawlins raises seven (7) propositions of error:

[1] The jury found Kenneth Lee Rawlins guilty in Case Nos. 2003-76 and 2003-77 of Assault and Battery with a Dangerous Weapon and set punishment at seven (7) years imprisonment in each

1. Reversible error occurred when the trial court failed to instruct the jury according to law;

2. The evidence was insufficient to sustain Mr. Rawlins's convictions: therefore his convictions violated the Due Process Clause of the 14th Amendment of the U.S. Constitution and Article 2, Section 7 of the Oklahoma Constitution;

3. Mr. Rawlins received ineffective assistance of trial counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution;

4. Prosecutor misconduct in closing arguments denied Rawlins his right to a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the Oklahoma Constitution;

5. The trial court erred in admitting hearsay statements, and the admission of the hearsay statements were improper and denied Ricky his rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article 2, Section 20 of the Oklahoma Constitution;

6. The trial court erred in instructing the jury regarding the court's authority to suspend or defer a sentence or impose a sentence less than the jury's assessment of sentence;

7. The trial errors complained of herein cumulatively denied Rawlins's right to a fair trial under the United States and Oklahoma Constitutions and therefore, his convictions and sentences must be reversed.

After thorough consideration of the propositions raised, the Original Record, Transcripts, briefs and arguments of the parties, we find Mr. Rawlins's convictions in Case Nos. CF 2003-76 and CF 2003-77 should be reversed and remanded for a new trial for the reasons set forth below. Mr. Rawlins's conviction in Case No. CF 2003-78 is affirmed.

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case. The jury found Kenneth Lee Rawlins guilty in Case No. 2003-78 of Assault and Battery with a Deadly Weapon and set punishment at ten (10) years imprisonment.

Over objection and without request from the State, the trial court instructed the jury that the offense of assault and battery with a deadly weapon was a lesser included offense of shooting with intent to kill. To so instruct the jury was error. Assault and battery with a deadly weapon is not a lesser included offense of shooting with intent to kill because "Section 652 is intended to cover all assaults made with the intent to kill: that the first sentence is for assaults with a firearm and the remainder of the Section is for other assaults with such intent." *Favro v. State*, 1988 OK CR 18, ¶ 5, 749 P.2d 127, 128. That the range of punishment for assault and battery with a deadly weapon is less than shooting with intent to kill does not make it a lesser included offense. *Id.* The lesser included offenses for "Section 652 are found in 21 O.S.1981, § 645 where the intent is to do bodily harm, not kill." *Id.* at ¶ 8, 749 P.2d at 130. *See also Meggett v. State*, 1979 OK CR 89, 599 P.2d 1110 (affirming trial court's refusal to instruct the jury on assault and battery with a deadly weapon where the assault was made with a firearm with the intent to kill; noting Section 652 prohibits all assaults made with an intent to kill and the first section applicable when a firearm is used.); *Koonce v. State*, 1985 OK CR 26, 696 P.2d 501, 505 (finding no error in trial court's refusal to instruct on assault and battery with a deadly weapon in shooting with intent to kill prosecution where the evidence showed the defendant "shot" the victim). To the extent that *Elder v. State*, 1988 OK CR 96, 755 P.2d 690 is inconsistent with this holding, it is overruled. Accordingly, relief is warranted on Proposition One, and Appellant's convictions for assault and battery with a

deadly weapon in Case Nos. CF 2003-76 and 2003-77 should be reversed and remanded for a new trial. *Favro, id.*

Our holding in Proposition One renders the claim of insufficient evidence in Proposition Two, relating to Case Nos. CF 2003-76 and CF 2003-77, moot. Viewed in the light most favorable to the State, a rational trier of fact could have found all the essential elements of Shooting with Intent to Kill, in Case No. CF 2003-78, beyond a reasonable doubt and the evidence was sufficient to sustain the conviction. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202,203-204.

In Proposition Three, we find no relief is warranted and Appellant received the effective assistance of counsel. To prove a claim of ineffectiveness, an appellant must show that that his counsel's performance was deficient and that counsel's deficient performance prejudiced his defense, depriving him of a fair trial with a reliable result. *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. To show prejudice, appellant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., citing Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Failure to prove prejudice is fatal to any claim of ineffective assistance of counsel. *Id.* Here, the evidence overwhelmingly showed that Appellant fired at all three victims at close range, with an assault weapon, as they were attempting to the leave the Rawlins's property. Appellant has not shown that, but for counsel's errors, the outcome of the proceeding would have been different.

Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such as to deprive the defendant of a fair trial. *Jones v. State*, 2006 OK CR 5, ¶ 76, 128 P.3d 521, 545. Having reviewed each of the claims raised in Proposition Four, we find no relief is warranted. Although some misconduct occurred, in the context of the entire trial and in consideration of all the evidence and the testimony of the witnesses, we cannot find the prosecutor's improper comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *DeRosa v. State*, 2004 OK CR 19, ¶ 53, n. 102, 89 P.3d 1124, 1145, n. 102.

Although inadmissible hearsay was heard by the jury, the statements attributed to Appellant's father did not ultimately affect the outcome of the trial and any error in their admission was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) No relief is warranted on Proposition Five.

In Proposition Six, Appellant claims the trial court went too far in discussing its power to suspend or defer sentences when the jury was unable to reach unanimous verdicts on punishment. We agree. The better course would have been for the trial court to refer the jurors back to their instructions and to inform them that matters of deferred sentencing and suspended sentences were not for their consideration. *See Trice v. State*, 1993 OK CR 19, ¶ 52, 853 P.2d 203, 218 ("When a deliberating jury seeks information concerning its power to run sentences consecutively, the trial judge should respond by

stating that all the information needed to make the decision is contained in the instructions. The giving of such an instruction, we have held, creates a presumption that the jury acted in accordance with it.") Still no relief is warranted, because Appellant cannot show he was prejudiced by the trial court's oral instructions and only speculates the jurors' knowledge that the trial court could set punishment, suspend or defer sentences caused them to set inflated sentences. *Smallwood v. State*, 1995 OK CR 60, ¶ 29, 907 P.2d 217, 227 (it is not error alone which reverses lower court's judgments but error plus injury, and it is appellant's burden to show he was prejudiced in his substantial rights by the commission of the alleged error).

Lastly, no relief is required on Proposition Seven. As previously stated, Case Nos. CF 2003-76 and CF 2003-77 are reversed and remanded for a new trial, because the jury was wrongfully instructed that assault and battery with a deadly weapon was a lesser offense of shooting with intent to kill. As to the remaining errors identified, we have considered them in the context of the entire proceeding, and individually and cumulatively, we find they were not verdict determinative. *Lockett v. State*, 2002 OK CR 30, ¶ 43, 53 P.3d 418, 431.

DECISION

The Judgment and Sentence imposed in Case No. CF 2003-78, Love County District Court, for Shooting with Intent to Kill, is hereby **AFFIRMED**. The Judgment and Sentences imposed in Case Nos. CF 2003-76 and CF 2003-77, for Assault and Battery with a Deadly Weapon, are **REVERSED AND REMANDED FOR NEW TRIALS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LOVE COUNTY
THE HONORABLE JOHN SKAGGS, DISTRICT JUDGE

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OPINION BY: C. JOHNSON, J.

CHAPEL, P.J. :	CONCURS
LUMPKIN, V.P.J. :	CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.:	CONCURS
LEWIS, J.:	SPECIALLY CONCURS

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

I concur in the Court's decision to affirm the conviction for Shooting With Intent to Kill. However, I must dissent to the reversal of the conviction of Assault and Battery With a Deadly Weapon for the reasons set forth in my separate vote in Kenneth Lee Rawlins v. State, Case No. F-2004-866.

LEWIS, JUDGE, SPECIALLY CONCUR:

While I concur in affirming the conviction in CF-2003-78A, I write to address the issue of confrontation or the lack thereof.

Eliciting the father's statements without producing him as a witness violated Appellant's constitutional right to confront witnesses. Crawford v. Washington 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Admitting the evidence, when Appellant had no opportunity to cross examine his father, deprived Appellant of his Sixth Amendment right of confrontation. The opinion finds this violation of the defendant's rights harmless. I disagree with the opinion's conclusion that the inadmissible evidence was not outcome determinative.

However, I do agree to affirming the convictions in CF-2003-78 due to the other overwhelming evidence of guilt.