IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JONATHAN LAMONT SUGGS,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

Case No. F-2019-37

SUMMARY OPINION

HUDSON, JUDGE:

Appellant, Jonathan Lamont Suggs, was tried and convicted by a jury in Oklahoma County District Court, Case No. CF-2016-269, of Count 2: Domestic Abuse (Assault and Battery), a misdemeanor, in violation of 21 O.S.Supp.2014, § 644(C); Count 3: Burglary in the First Degree, After Former Conviction of a Felony, in violation of 21 O.S.2011, § 1431; and Counts 4: Assault and Battery, a misdemeanor, in violation of 21 O.S.2011, § 644(B).[1] The Honorable Cindy H. Truong, District Judge, presided at trial and sentenced

[1] The jury acquitted Suggs on Counts 1 and 5—First Degree Burglary and Assault and Battery, respectively.

Suggs in accordance with the jury's verdicts to one year in the county jail and a $1,000.00 fine on Count 2; ten years imprisonment on Count 3; and 90 days in the county jail on Count 4. Suggs must serve 85% of the sentence imposed on Count 3 before becoming eligible for parole. 21 O.S.Supp.2015, § 13.1(12). Judge Truong ordered the sentences to run concurrently, but consecutively to Oklahoma County District Court Case No. CF-2011-3556. The trial court further imposed various costs and fees. Suggs now appeals and raises seven propositions of error before this Court.[2]

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs, we find that relief is warranted under the law and evidence in this case. Although sufficient evidence was presented to support Suggs's conviction for First Degree Burglary, the trial court's failure to instruct the jury on the lesser-included offense of Illegal Entry constitutes plain error affecting the foundation of the case that warrants relief. We therefore **REVERSE AND REMAND FOR NEW**

[2] Suggs specifically challenges the sufficiency of the evidence to support his Count 3 first-degree burglary conviction in Propositions One and Three; complains of multiple instructional errors in Propositions Two, Four and Five; contends trial counsel was constitutionally ineffective in Proposition Six; and asserts in Proposition Seven that the accumulation of error deprived him of a fair trial.

TRIAL Suggs's Count 3 conviction for First Degree Burglary based on this error. Because Suggs does not challenge his misdemeanor convictions in Counts 2 and 4, however, we **AFFIRM** the judgment and sentence for these counts.

1. Sufficiency of the Evidence.

The elements of first-degree burglary are: (1) breaking; (2) entering; (3) a dwelling; (4) of another; (5) in which a human is present; and (6) with intent to commit some crime therein. *See* 21 O.S.2011, § 1431; OUJI-CR (2d) No. 5-12. Suggs complains the State failed to prove beyond a reasonable doubt two elements of his Count 3 conviction for first-degree burglary—the fifth element (Proposition One) and the sixth element (Proposition Three).[3]

We review "challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any

[3] To the extent Suggs argues in these propositions that the prosecutor misstated the law and the trial court misinstructed the jury, these issues are waived from appellate review. Combining multiple issues in a single proposition of error in this manner violates Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020) ("Each proposition of error shall be set out separately in the brief . . . Failure to list an issue pursuant to these requirements constitutes waiver of alleged error."); *Collins v. State*, 2009 OK CR 32, ¶ 32, 223 P.3d 1014, 1023 ("Under our recently revised Rule 3.5(A)(5), combining multiple issues in a single proposition is clearly improper and constitutes waiver of the alleged errors."). Relief is denied for these superfluous issues, and we solely review his sufficiency of the evidence claims.

rational trier of fact could have found the essential elements of the crime charged to exist beyond a reasonable doubt." *Mason v. State*, 2018 OK CR 37, ¶ 13, 433 P.3d 1264, 1269. *See also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This analysis requires examination of the entire record. *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. The law makes no distinction between direct and circumstantial evidence and either, or any combination of the two, may be sufficient to support a conviction. *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965, *overruled on other grounds, Harris v. State*, 2019 OK CR 22, ¶ 69, 450 P.3d 933, 958. This Court accepts "all reasonable inferences and credibility choices that tend to support the verdict." *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111; *see also Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456. "Where evidence conflicts, we must presume on appellate review that the jury resolved any conflicts in favor of the prosecution." *Robinson v. State*, 2011 OK CR 15, ¶ 17, 255 P.3d 425, 432.

Human Present: The evidence regarding whether a human was present when Suggs entered his former girlfriend Casandra Williams's apartment was conflicting. Williams testified that she was in her apartment when Suggs entered using a key he stole from her

purse. He arrived unannounced and uninvited and entered without her permission. Yet, Williams also told a 911 dispatcher immediately after the event that Suggs "was already in [her] house when [she] got [t]here and everything was messed up."[4] Despite Williams's conflicting statements, the evidence, taken in the light most favorable to the State, was sufficient to prove this element of the crime. *Mason*, 2018 OK CR 37, ¶ 13, 433 P.3d at 1269. Suggs testified at trial and acknowledged Williams was home when he entered the apartment. Williams's contradictory statement to the 911 dispatcher merely provided a conflict in the evidence which this Court presumes was resolved in favor of the State. *Robinson*, 2011 OK CR 15, ¶ 17, 255 P.3d at 432; *see also Wall v. State*, 2020 OK CR 9, ¶ 20, 465 P.3d 227, 234 ("[T]his Court does not reweigh conflicting evidence or second-guess the decision of the fact-finder; we accept all reasonable inferences and credibility choices that tend to support the verdict.").

Intent to Commit Some Crime Therein: Suggs's physical attack on Williams was circumstantial evidence of his intent to commit an act of domestic abuse when he entered Williams's

[4] Notably, Williams died prior to trial and her preliminary testimony was read into evidence.

apartment. *See Rowland v. State*, 1991 OK CR 94, ¶ 7, 817 P.2d 263, 266 ("Determination of intent is a question for the trier of fact and may be proven by direct or circumstantial evidence."); *Plunkett v. State*, 1986 OK CR 77, ¶ 22, 719 P.2d 834, 842 (defendant's intent to commit an assault when he unlawfully entered the residence circumstantially established by his act of grabbing at the victim's nightgown). Thus, viewed in the light most favorable to the State, the evidence was sufficient to prove Suggs's intent to commit a crime at the time he broke and entered Williams's apartment.

Relief is denied for Propositions One and Three.

2. Instructional Error.

Illegal entry is a recognized lesser-included offense of first-degree burglary.[5] *Roberts v. State*, 2001 OK CR 14, ¶ 20, 29 P.3d 583, 589. Suggs complains in Proposition Four that the trial court erred when it failed to *sua sponte* instruct the jury on the lesser-included offense of illegal entry. Suggs argues the evidence presented at trial would have allowed the jury to rationally find him guilty of the

[5] The elements of illegal entry are: 1) entering; 2) a building; 3) of another; 4) with the intent to commit "(any felony)/larceny/(malicious injury/defacing/destruction of real/personal property of another)." OUJI-CR(2d) No. 5-16. *See also* 21 O.S.2011, § 1438(A).

lesser offense of illegal entry, while acquitting him of the greater offense of first-degree burglary.[6] *See Bench v. State*, 2018 OK CR 31, ¶ 73, 431 P.3d 929, 954, *cert. denied*, ___U.S.___, 140 S. Ct. 56 (2019) ("*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."). Suggs failed to request this instruction or object to its omission below, waiving all but plain error review of this claim.[7] *Splawn v. State*, 2020 OK CR 20, ¶ 5, ___P.3d___.

To be entitled to relief under the plain error doctrine, Suggs must demonstrate: (1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Id.*; *Baird v. State*, 2017 OK CR 16, ¶ 25, 400 P.3d. 875, 883; 20 O.S.2011, § 3001.1. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise

[6] Second-degree burglary is not a viable option in this case because Domestic Abuse is a misdemeanor offense. 21 O.S.2011, § 1435.

[7] In Proposition Six, Suggs argues *inter alia* that trial counsel was ineffective for failing to request this instruction.

represents a miscarriage of justice. *Baird*, 2017 OK CR 16, ¶ 25, 400 P.3d. at 883; *Tollett v. State*, 2016 OK CR 15, ¶ 4, 387 P.3d 915, 916; *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Suggs demonstrates plain error warranting relief.

Suggs's argument focuses on the conflicting evidence related to the fifth element of first-degree burglary—i.e., whether a human was present. Because of this conflicting evidence, Suggs argues an instruction on the lesser-included offense of illegal entry was warranted.

The evidence regarding whether a human was present when Suggs entered Williams's apartment was clearly conflicting. While Williams's testified that she was in her apartment when Suggs entered using a stolen key, Williams also told the 911 dispatcher immediately after the altercation that Suggs was already in her apartment when she arrived home that night and "everything was messed up." Williams's statements to the 911 dispatcher would have allowed the jury to rationally find (1) that no human was present when Suggs entered Williams's apartment; and (2) that Suggs had ransacked her apartment. Thus, the jury could have rationally found Suggs guilty of illegal entry and acquitted him of first-degree

burglary. *See* 21 O.S.2011, §1438(A); 21 O.S.2011, § 1760 (crime of malicious mischief). The trial court therefore should have instructed the jury on the lesser-included offense of illegal entry pursuant to 21 O.S.2011, § 1438(A). *See Roberts*, 2001 OK CR 14, ¶ 20, 29 P.3d at 589. The trial court's failure to do so cannot be held harmless as the record shows the jury clearly struggled with reconciling the conflicting evidence relating to the fifth element—i.e., whether Williams was present in the apartment when the breaking and entry occurred.

The jury's struggle is readily apparent from the multiple questions they submitted to the trial court during their deliberations. Two of the jury's questions specifically related to the fifth element of Count 3. First, the jury asked, "Can you clarify the 5th element of Burglary in the first degree? Does someone have to be there when the defendant entered?" Second, the jury asked, "at what point does a charge go from Breaking and Entering to Burglary in the First degree? Is it when another person arrives when it is in progress?" In response to both questions, the trial court generically replied "you have all the rules of law and evidence you need to reach your verdicts. Please read and re-read your jury instructions."

The jury's questions concerning Count 3 did not end there, however. The jury later asked, "what do we do if we are split on count 3?" The jury concurrently asked, "Can we do a lesser degree for Count 3?" These questions clearly show the jury's struggle to resolve the conflicting evidence had divided the jury.

The jury's struggle was likely further compounded by the State's comments during opening and closing argument. The prosecutor confusingly argued throughout the case that Suggs was inside the apartment when Williams arrived home. The confusion began during the State's opening statement. The prosecutor told the jury that when Williams arrived home that night, Williams cautiously entered her apartment because her door had been opened. Once inside, she discovered Suggs was "[lying] in wait" for her. The State similarly argued in closing argument that Williams and her boys "show[ed] up" after Suggs had entered Williams's apartment using the key he stole from her purse.

Given these circumstances, the trial court's failure to instruct the jury on the lesser-included offense of illegal entry was plain error

that went to "the foundation of the case" and requires relief.[8] *Grissom v. State*, 2011 OK CR 3, ¶ 28, 253 P.3d 969, 980; *see also Jones v. State*, 2006 OK CR 17, ¶ 6, 134 P.3d 150, 154 ("[T]he trial court must instruct on any lesser-included offense warranted by the evidence."); *Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036 (lesser included instructions should be given if supported by any evidence). Suggs's Count 3 first-degree burglary conviction is therefore reversed and remanded to the district court for a new trial. The remaining propositions of error are rendered moot by this determination.

DECISION

Counts 2 and 4 of the Judgment and Sentence are **AFFIRMED**. Count 3 of the Judgment and Sentence is **REVERSED AND REMANDED FOR A NEW TRIAL.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2021),

[8] Suggs also contends in Proposition Two that the trial court erred when it failed to *sua sponte* instruct the jury on the defense of "consent to enter." Sufficient evidence was presented at trial in this case to warrant such an instruction. *Roberts*, 2001 OK CR 14, ¶ 18, 29 P.3d at 589 ("Because consent to enter and authorization to enter are valid defenses to a charge of burglary, a jury should be instructed on this issue when it is sufficiently raised by the evidence at trial."). While the trial court's failure to so instruct amounts to actual and obvious error, we need not determine whether such error affected the outcome of the proceeding given our Proposition Four finding of plain error warranting relief.

the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE CINDY H. TRUONG, DISTRICT JUDGE

APPEARANCES AT TRIAL

JAY TAYLOR SILVERNAIL
ATTORNEY AT LAW
4901 RICHMOND SQUARE,
SUITE 101
OKLAHOMA CITY, OK 73118
COUNSEL FOR DEFENDANT

STEPHANIE POWERS
MERYDITH EASTER
ASST. DISTRICT ATTORNEYS
320 ROBERT S. KERR AVE.,
SUITE 505
OKLAHOMA CITY, OK 73102
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

DANNY JOSEPH
OKLA. INDIGENT DEFENSE
SYSTEM
P.O. BOX 926
NORMAN, OK 73070-0926
COUNSEL FOR DEFENDANT

MIKE HUNTER
ATTORNEY GENERAL
SHERI M. JOHNSON
ASST. ATTORNEY GENERAL
313 N.E. 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: HUDSON, J.
KUEHN, P.J.: SPECIALLY CONCUR
ROWLAND, V.P.J.: CONCUR IN RESULT
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
LEWIS, J.: CONCUR IN PART/DISSENT IN PART

KUEHN, PRESIDING JUDGE, SPECIALLY CONCURRING:

Although I agree with the Majority's conclusion, I do not believe there should be a blanket burden on trial judges to instruct on lesser-included offenses. In many situations defense counsel will ask, or not ask, for certain jury instructions according to their trial strategy. The trial judge is not responsible for keeping up with these strategies. But in this case, after reviewing the record below, I believe the trial judge should have instructed the jury on the lesser-included offense of illegal entry.

Consider the following from the record: defense counsel prematurely asked for illegal entry instructions, argued illegal entry the entirety of the trial, and demurred to the First Degree Burglary charge. And, as the Majority notes, the jury struggled with the fifth element of First Degree Burglary. Yet instructions on illegal entry were not included. Nothing in the record sheds light on why the trial judge didn't include illegal entry and why the defense counsel didn't object to the instructions. Because of what was and what was not in the record, the Majority correctly placed that burden on the trial judge.

ROWLAND, VICE PRESIDING JUDGE, CONCUR IN RESULTS:

Suggs complains that the evidence presented at trial was insufficient to prove that Ms. Williams was in the apartment at the time he entered; the evidence concerning what happened at Williams' apartment was ambiguous and conflicting.[1] The majority notes that

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1 The first account of the events concerning the burglary charge in Count 3 comes from a 9-1-1 call placed by the victim, wherein she states, "My kids' father broke into my house and beat me up and took my kids and he's not supposed to have them." A bit later in that call she states, "[C]ause he was already in my house when I got here and everything was messed up and I don't know where any of my stuff is at." It was never clarified whether she was stating he was already inside when she arrived, or whether she was describing some earlier entry prior to the one about which she was calling the police at that moment. Then, during the preliminary hearing, she testified as follows:

Q What happened after that?
A He entered my home.
Q Do you know how he entered your home?
A He stole my key, and he entered my home with the key.
Q Did he have permission to enter your home?
A No, ma'am.
Q Once he entered your home, what happened?
A He assaulted me and took my children.

This testimony, although capable of more than one interpretation, at least suggests Williams was inside her residence when Suggs used a stolen key to enter. Cross-examination of Williams at the preliminary hearing was brief, and did not focus in any way on whether she was home at the time Suggs entered the apartment or whether she came home afterward.

By the time of trial, Williams had died under circumstances not related to this case. During opening statement, the prosecution laid out the following scenario: "On March 1st of 2016, she, with her two children, were going up to their apartment. And it's not on the first floor, so they're going up the stairs; and when they get close, Cassandra realizes that the door has been opened. So she cautiously goes into that door; and laying in wait is the defendant, Jonathan Suggs. And he comes in behind her and immediately begins to assault her." Again, there is no clarification as to whether "comes in behind her" describes

we presume jurors resolve conflicts in the evidence in favor of the prosecution and finds that the evidence presented at trial, when viewed in the light most favorable to the State, is sufficient to support Suggs' conviction for first degree burglary in Count 3. With this conclusion, I agree.

The majority next addresses Suggs' claim that the trial court's failure to instruct the jury, *sua sponte,* on the lesser offense of illegal entry was plain error requiring relief. The majority finds that such an instruction was warranted because the jury could rationally have found Suggs guilty of the lesser offense and acquitted him of the

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following her into the apartment from the outside, or simply coming up behind her from a hiding position within the apartment.

During closing argument, prosecutors told the jury that Suggs had been inside the apartment, then stepped out, and then followed Williams back inside when she arrived home:

> Around 10:30 on March 1st, this defendant went over to Cassandra Williams' apartment where he knew his two little boys, four and six, are living. He goes over there. He goes into the apartment with a key that he stole out of her purse and just ransacks the place. And Cassandra and her boys show up, he steps out of the apartment. When he comes up and goes in the apartment, he follows her right after and just loses his mind. He hits her, he pushes her, he's calling her a bitch.

It is not clear what evidence or testimony the State is referring to in theorizing that Suggs was in the apartment, stepped out, and then followed the victim back inside. No witness testified to these facts, and presumably this argument represents inferences and an attempt to reconcile conflicting evidence.

greater. With this conclusion, I have no qualms. However, I disagree with the majority's finding that the trial court's failure to give an instruction on the lesser crime of illegal entry was plain error.

As correctly noted in the majority opinion, Suggs has the burden in plain error review to demonstrate "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Splawn v. State*, 2020 OK CR 20, ¶ 5, 477 P.3d 394, 397. After having found that the evidence was sufficient to support Suggs' conviction for first degree burglary, this Court cannot, on plain error review, find that the error actually affected the outcome of the proceeding. As there was no plain error, relief cannot be granted on this ground.

However, I find merit in Suggs' sixth proposition wherein he argues that trial counsel was constitutionally ineffective for failing to request an instruction on the lesser offense of illegal entry at trial. In order to prevail on a claim of ineffective assistance of counsel a defendant must show both that counsel's performance was deficient and that the performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Where the defendant shows

that counsel's performance was objectively deficient under prevailing professional norms, he must further show that he suffered prejudice as a result. The Supreme Court in *Strickland* defined prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial or sentencing would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Although Suggs' trial counsel demurred at the close of the State's case and asked to amend the burglary charge in Count 3 to illegal entry, he did not request jury instructions on this lesser offense. Even the jury, in questions to the trial court during deliberations, realized that the evidence likely supported instructions on a lesser offense. Under the facts and circumstances of this case, the failure to request this jury instruction rendered counsel's performance deficient. Additionally, Suggs has shown prejudice from this deficient performance as there is a reasonable probability that but for counsel's unprofessional error in failing to request an instruction on the lesser offense of illegal entry, the result of the proceeding would have been different.

In short, while failure to instruct the jury on the lesser offense of illegal entry falls short of plain error because it cannot be found to have actually affected the outcome of the proceeding, counsel's failure to request this instruction rendered his performance deficient and prejudiced Suggs because there is a reasonable probability that but for the error the result of the proceeding would have been different. Accordingly, I concur in the result reached by the majority and agree that Suggs' conviction on first degree burglary in Count 3 should be reversed and remanded for a new trial.

LUMPKIN, JUDGE: Concur in Part/Dissent in Part

While I concur in the affirming of the judgements and sentences in counts 2 and 4, I dissent to the reversal and remand of Count 3, the first degree burglary conviction in this case. In addressing the first proposition, the Court finds Appellant's conviction for Count 3 is supported by sufficient evidence. However, in the fourth proposition, the Court finds Appellant's conviction on Count 3 must be reversed and remanded due to instructional error.

The Court determines, upon plain error review, that the trial court plainly erred by not *sua sponte* instructing the jury on the lesser-included offense of illegal entry. As an initial matter, the record reflects Appellant's defense at trial was complete innocence. He testified and denied breaking in, specifically testifying that the victim let him into her apartment. He flatly denied engaging in any physical contact with the victim. "This Court has long recognized the rule of law that a defendant is not entitled to instructions on any lesser included offense when he defends against the charge by proclaiming his innocence." *Harney v. State,* 2011 OK CR 10, ¶ 11, 256 P.3d 1002, 1005. "As Appellant took the stand as a witness, claimed that he was

innocent of any crime and did not claim that he committed a lesser offense, he was not entitled to instruction on any lesser included offense." *Id.*, 2011 OK CR 10, ¶ 14, 256 P.3d at 1006, citing *Gilson v. State,* 2000 OK CR 14, ¶ 119, 8 P.3d 883, 918. With regard to the prosecutor's arguments, those are not evidence. *Pickens v. State,* 2005 OK CR 27, ¶ 35, 126 P.3d 612, 620.

Lesser-included offense instructions are not given indiscriminately. "*Prima facie* evidence of the lesser included offense must be presented at trial in order to warrant giving the lesser included instruction." *Davis v. State,* 2011 OK CR 29, ¶ 101, 268 P.3d 86, 116, *as corrected* (Feb. 7, 2012) "*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." *Id.* In *Jackson v. State,* 1998 OK CR 39, ¶14, 964 P.2d 875, 902, Lumpkin, J., concur in result, I propounded the definition of *prima facie* evidence as "evidence which, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if

not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports."

There was no such evidence presented in this case. Appellant's testimony that the victim was inside the apartment when he entered confirms the victim's testimony that she was inside the apartment and precludes a finding of entitlement to an instruction on illegal entry. The victim's statement on the 911 call that Appellant was "already in my house when I got here and everything was messed up" is certainly capable of more than the meaning ascribed to it by the Court. One meaning could be that Appellant was in the apartment for a while, tossing things around, before the victim realized it and before the victim got to the area of the apartment where she made the 911 call. This makes sense as the victim testified the crime occurred about 10:30 or 11:00 p.m. after Appellant used her key to get inside the apartment. Entering with the key would make little noise. At any rate, the victim's isolated statement hardly qualifies as *prima facie* evidence that she was not inside the apartment so as to allow the jury to rationally find Appellant guilty of illegal entry but acquit him of first degree burglary when his own testimony placed her inside the apartment.

LEWIS, JUDGE, Concurs in Part and Dissents in Part:

I concur in affirming counts two and four, but respectfully dissent to the reversal of Suggs' conviction for first degree burglary (count three). Here, the opinion bases its reversal on the fact that the trial court failed to *sua sponte* instruct on a lesser included offense.

This court should not reverse judgements and sentences so lightly based on jury instructions. We will reverse the judgment only where an error in the jury instructions "has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2011, § 3001.1; *Hancock v. State,* 2007 OK CR 9, ¶ 98, 155 P.3d 796, 819. The failure to give the lesser included instruction did not result in a miscarriage of justice or substantially violate a constitutional or statutory right. Three grounds support my opinion.

First, Appellant was represented by able counsel. Counsel initially requested lesser offense instructions for illegal entry, but later when the instructions were finalized, counsel stated that he had no objections to the instructions. (Tr. 231 and 270). This was obviously a strategic decision to go all-or-nothing while facing the

first-degree burglary charges. A strategy that worked to Appellant's favor in the acquittal of one of the two first-degree burglary counts (count one).

The strategy was valid because of the conflicting evidence regarding whether the apartment was occupied when Appellant entered and whether or not the victim invited him inside. The victim made conflicting statements about whether she was at the apartment or not. His own testimony, however, was that the victim was there at the apartment and invited him inside. The jurors, against Appellant's gamble, resolved the conflict in the evidence in favor of the State and found Appellant guilty. *See Robinson v. State*, 2011 OK CR 15, ¶ 17, 255 P.3d 425, 432 (We presume jurors resolve conflicts in favor of the prosecution).

Second, the Opinion leads one to believe that the jurors disregarded their oaths and found him guilty of first-degree burglary when there was a possibility that he was not guilty of that charge. One would have to believe that the jury convicted him of first-degree burglary, because he was guilty of something, instead of acquitting him of the offense. *Cf. Beck v. Alabama*, 447 U.S. 625, 633-34 (1980)(a defendant should not be exposed to the risk that the jury

will diverge from its oath when one of the elements of the offense remains in doubt and resolve its doubts in favor of conviction).

The opinion initially holds that the evidence supported the first-degree burglary conviction and then holds that conflicting evidence required lesser included instructions. The latter is supported by referencing the jury's questions to the Court. If anything, the questions reflect a jury that took their oath seriously and resolved the conflicting evidence in favor of the State.

And third, the trial court's duty to instruct on lesser included offenses is not a requirement to instruct on lesser included offenses when an all-or-nothing strategy is taken by Appellant. *See Spence v. State,* 2008 OK CR 4, ¶ 9, 177 P.3d 582, 584. While this case does not present an on the record objection to lesser offenses, counsel knew that illegal entry was a viable alternative as evidenced by the initial request for instructions. Knowing lesser instructions were available, counsel later agreed to the jury instructions without the lesser included offense instructions. The trial court's acquiescence to the strategy did not deny Appellant's substantial rights.

For these reasons I dissent to the reversal of count three, but concur in affirming the remaining counts.