ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR07-677

April 30, 2008

JOKARI D. LAMAR
APPELLANT

AN APPEAL FROM CRITTENDEN COUNTY CIRCUIT COURT
[CR2006-562-A]

V.

HON. RALPH WILSON, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

On March 15, 2007, a Crittenden County jury found Jokari Lamar guilty of battery in the first degree and sentenced him to ninety months in the Arkansas Department of Correction. He asserts that the trial court erred in not instructing the jury on the lesser-included offense of battery in the second degree and in not instructing the jury on alternative sentencing. We affirm, holding that (1) the trial court did not err in refusing appellant's proffered second-degree-battery instruction when appellant denied any wrongdoing and (2) the trial court did not commit reversible error in rejecting appellant's alternative-sentencing instruction in light of the seriousness of the crime.

According to testimony adduced by the State, on the morning of May 14, 2006, appellant and Artavius Minatee were passengers in a vehicle driven by Marcus Allen. Allen

stopped across the street from Steven Davis's residence. Minatee then exited the car and began arguing with Terrence Taylor. Davis then crossed the street and began arguing with appellant. At some point, appellant pulled a gun, put it to Davis's jaw, and pulled the trigger three times. The gun "clicked" twice before firing a bullet into Davis's jaw. Davis admitted that he intended to hit appellant that day.

At the conclusion of the State's case, the parties briefly discussed jury instructions. The court indicated that it was disinclined to give instructions on battery in the second degree or on alternative sentencing. Appellant then testified in his own defense. He claimed that he, Minatee, and Allen had stopped to check a flat tire. He completely denied shooting Davis. After appellant rested, the court found that appellant was not entitled to his proffered second-degree-battery instruction. It also considered and rejected appellant's request for an alternative-sentencing instruction, citing the seriousness of the crime and the use of a firearm in the commission of that crime.

After deliberations, the jury found appellant guilty of battery in the first degree. During the sentencing phase, the jury sentenced appellant to ninety months in the Arkansas Department of Correction.

Appellant challenges the trial court's decision to reject his proffered instruction for battery in the second degree. He argues that battery in the second degree, as it applies in this case, is a lesser-included offense of battery in the first degree. He then contends that his admitted presence at the scene, along with the remaining evidence, could lead to a reasonable conclusion that his actions were reckless (an element of second-degree battery), not

purposeful (an element of first-degree battery).[1]

A refusal to give an instruction on a lesser-included offense is reversible error if even the slightest evidence supports the instruction. *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (2006). However, we will affirm the decision to exclude an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Davis v. State*, 97 Ark. App. 6, 242 S.W.3d 630 (2006). The circuit court is only obligated to instruct the jury on a lesser-included offense if there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005).

Even if battery in the second degree were a lesser-included offense of battery in the first degree,[2] appellant would not have been entitled to the instruction. Generally, when a defense is based on either absolute innocence or an alibi, there is no rational basis for giving an instruction on a lesser-included offense. *See*, *e.g.*, *Brunson*, *supra* (discussing *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986); *Roberts v. State*, 281 Ark. 218, 663 S.W.2d 178

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[1]The jury was instructed that to find appellant guilty of battery in the first degree, it had to find beyond a reasonable doubt that appellant, with the purpose of causing physical injury to Davis, caused physical injury to Davis by means of a firearm. *See also* Ark. Code Ann. § 5-13-201(a)(1) (Supp. 2007). Appellant proffered a jury instruction based on Ark. Code Ann. § 5-13-202(a)(3) (Supp. 2007), which provides that a person commits battery in the second degree if he recklessly causes *serious* physical injury to another person by means of a deadly weapon. Appellant's proffered instruction was an inaccurate statement of the law, as it only required proof of physical injury.

[2]Second-degree battery is not always a lesser-included of first-degree battery. *See Spight v. State*, ___ Ark. ___, ___ S.W.3d ___ (Mar. 5, 2008) (holding that the defendant was not entitled to his proffered instruction on second-degree battery when the proffered instruction contained an element absent from the crime for which he was charged).

(1984)). Appellant argues that the instant case is different, as the trial court stated its position on the issue prior to the presentation of his case. However, he does not suggest how his defense would have been different had the trial court waited to announce its decision. The evidence and the argument presented could lead to one of only two conclusions: either appellant purposefully shot Davis in the jaw or he did not shoot him at all.

The trial court did not err in denying appellant's request for an instruction on battery in the second degree, as appellant's complete denial of the act precluded him from receiving an instruction on any lesser-included offense. We affirm on this point.

Second, appellant argues that the trial court erred in refusing to instruct the jury to consider alternative sentencing. He contends that the error resulted from the court making that decision after the State's case, rather than at the close of evidence. He further asserts that the fact that the court announced the rationale for the decision at the close of evidence does not correct the error.

Arkansas Code Annotated section 16-97-101(4) (Repl. 2006) authorizes a trial judge to instruct the jury on alternative sentences for which the defendant may qualify. The jury may recommend an alternative sentence, but the recommendation is not binding on the court. *Id.* The trial court must exercise some discretion in determining whether to give an instruction on alternative sentencing. *See Miller v. State*, 97 Ark. App. 285, ___ S.W.3d ___ (2007) (holding that the trial court erred in not exercising discretion when the trial court had a policy of not giving the instruction when the offense was above the transfer eligibility line on the sentencing chart, but declaring that the error was harmless in light of the jury sentencing appellant to the maximum sentence).

While the court decided not to give the instructions on alternative sentencing prior to the close of the State's case, the record shows that the trial court exercised discretion prior to rejecting the instruction:

> [I]n exercising the Court [sic] discretion, the Court denies giving the alternative sentence instructions, in that . . . this is a serious felony crime that is a class B felony it involves the use of a firearm, a handgun. Firearm was, the gun was discharged, the bullet lodged in the jaw or mouth, as he testified, of the victim in this case. Mr. Paige testified that it's frequent that he hears gun shot noises most nights in that part of West Memphis. As Mr. Thorne pointed out, on the issue of deterrence, I just can't, in good conscience give an alternative sentencing instruction so that will be denied.

Further, had the trial court erred in refusing the instruction, that error would have been harmless. While Ark. Code Ann. § 16-97-101(4) authorizes a jury to recommend alternative sentencing, that recommendation is not binding upon the court. *See also Sullivan v. State*, 366 Ark. 183, 234 S.W.3d 285 (2006). Had the jury been instructed to consider an alternative sentence, the trial court would have been within its discretion to reject it. Given the comments from the bench and the seriousness of the crime, the court could have rejected such a recommendation and sentenced appellant to a term in the Arkansas Department of Correction.

Despite rejecting the instruction prior to the close of evidence, the trial court committed no reversible error in rejecting appellant's proffered alternative-sentence instruction. We affirm on this point as well.

Affirmed.

GLADWIN and BAKER, JJ., agree.