

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

TYRONE DAVID MOSBY,

Appellant,

v.

Case No. 5D14-2825

STATE OF FLORIDA,

Appellee.

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Opinion filed July 1, 2016

Appeal from the Circuit Court  
for Orange County,  
Julie H. O'Kane, Judge.

James S. Purdy, Public Defender, and Jeri  
M. Delgado, Assistant Public Defender,  
Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,  
Tallahassee, and Kellie A. Nielan, Assistant  
Attorney General, Daytona Beach, for  
Appellee.

PER CURIAM.

Tyrone Mosby ("Defendant") appeals his judgment and sentence for a series of charges pertaining to two shootings. Defendant raises five issues upon appeal, arguing that the trial court erred in: 1) denying his motion for new trial based upon alleged discovery violations; 2) preventing him from commenting upon the State's decision not to

call a witness during trial; 3) sustaining the State's objection to a defense comment during closing argument that the reporting witness may have been the shooter; 4) finding Defendant competent to proceed to sentencing; and 5) enhancing his aggravated battery charge from a second-degree felony to a first-degree felony. We affirm the first four issues without further discussion.

However, the trial court erred in enhancing Defendant's aggravated battery charge without a clear finding that he used a firearm in the commission of the crime. See Roberts v. State, 152 So. 3d 669, 672 (Fla. 4th DCA 2014) ("[T]he enhanced penalty [must] be predicated upon a 'clear jury finding' that the defendant possessed a firearm during the commission of the felony."). Based upon the State's concession of error, we reverse the sentence imposed for aggravated battery and remand for resentencing on that charge as a second-degree felony.

AFFIRMED in part; REVERSED in part; REMANDED.

SAWAYA, EVANDER and LAMBERT, JJ., concur.