IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES LEE WIGGINS,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2003-1145
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

James Lee Wiggins was tried by jury and convicted of Knowingly Concealing Stolen Property in violation of 21 O.S.2001, § 1713, after former conviction of two or more felonies, in the District Court of Choctaw County, Case No. CF-2003-88. In accordance with the jury's recommendation the Honorable Don Ed Payne sentenced Wiggins to ten (10) years imprisonment. Wiggins appeals from this conviction and sentence.

Wiggins raises five propositions of error in support of his appeal:

I. Admission of other crimes evidence prejudiced the jury, deprived Wiggins of a fundamentally fair trial, and warrants modification of the sentence;
II. Irrelevant, improper, and misleading evidence and argument resulted in an inflated sentence;
III. Prosecutorial misconduct deprived Wiggins of a fair trial and resulted in an excessive sentence;
IV. This Court should remand Wiggins's case with instructions to correct the judgment and sentence to conform to the trial court's oral order that Wiggins receive credit for time served by an order *nunc pro tunc*; and
V. The cumulative effect of all the errors addressed above deprived Wiggins of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that modification is required by the law and evidence. We find in Proposition I that error in admitting evidence Wiggins had previously sold property not belonging to him did not affect the jury's verdict and does not require relief.[1] We find in Proposition II that the prosecutor did not err in questioning Wiggins about his prior offenses when he took the stand.[2] We further find that the prosecutor erred in questioning Wiggins about the time he actually served in prison for his prior offenses, and the time he was on probation or parole.[3] During deliberations, jurors asked what percentage of time Wiggins would spend in prison. The record supports a conclusion that the improper introduction of

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[1] 20 O.S.2001, § 3001.1; *Rogers v. State*, 1995 OK CR 8, 890 P.2d 959, 971, *cert. denied*, 516 U.S. 919, 116 S.Ct. 312, 133 L.Ed.2d 215. This evidence was not *res gestae*, as it was not connected with the charged offense and did not rise incidentally from proof of that offense. *Rogers*, 890 P.2d at 971; *Neill v. State*, 1994 OK CR 69, 896 P.2d 537, 551, *cert. denied*, 516 U.S. 1080, 116 S.Ct. 791, 133 L.Ed.2d 740 (1996); *Lalli v. State*, 1994 OK CR 15, 870 P.2d 175, 177. It appeared designed to improperly suggest that Wiggins habitually sold property belonging to others. 12 O.S.2001, §§ 2403, 2404(B; *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, 772, *overruled in part on other grounds Jones v. State*, 1989 OK CR 7, 772 P.2d 922. Evidence that Wiggins filed a police report did fall within *res gestae*. *Rogers*, 890 P.2d at 971; *Dean v. State*, 1983 OK CR 148, 671 P.2d 60, 61. The inference that Wiggins filed a false police report was only possible with the addition of the erroneously admitted evidence.

[2] *Bean v. State*, 1964 OK CR 59, 392 P.2d 753, does not apply because it involved an attempt by the State to introduce details of prior offenses while proving the allegations of prior convictions for sentence enhancement. Wiggins stipulated to his prior convictions and testified about them on direct examination. We note that the State failed to respond to this claim.

[3] This Court has long held that a prosecutor should not call the possibility of probation or parole to the jury's attention. We recently held "[a]ny instruction attempted by the judicial branch, about future actions of the executive or legislative branch in these areas [parole and assignment to prisons], is doomed to inaccuracy. There is simply no clear answer to this type of question, and for that reason, none should be attempted." *Harris v. State*, 2004 OK CR 1, 84 P.3d 731, 757. *See, e.g., Mayes v. State*, 1994 OK CR 44, 887 P.2d 1288, 1318, *cert. denied*, 513 U.S. 1194, 115 S.Ct. 1260, 131 L.Ed.2d 140 (1995); *Suits v. State*, 1973 OK CR 158, 507 P.2d 1260, 1261; *Tucker v. State*, 1972 OK CR 170, 499 P.2d 458, 461; *Cox v. State*, 1971 OK CR 486, 491 P.2d 357, 359; *French v. State*, 1964 OK CR 125, 397 P.2d 909. *Cf. Johnson v. State*, 2004 OK CR 25, 95 P.3d 1099 (reversing where jury was presented with evidence and instruction on commutation). This error was not cured by instructions to the jury. We decline

pardon and parole issues sparked juror concern about the amount of time Wiggins would actually spend in prison, and infected their sentence deliberations. We find in Proposition III that any error in closing argument does not require relief.[4] However, the error raised in Proposition II requires Wiggins's sentence be modified.[5] We find in Proposition IV that the trial court's unequivocal oral order that Wiggins be given credit on his sentence for time served was not included in the Judgment and Sentence. The Judgment and Sentence shall be corrected by an Order *nunc pro tunc* to reflect this clerical error.[6] We find in Proposition V that no accumulated error requires relief.[7]

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence is **MODIFIED** to Eight (8) years imprisonment. The case is **REMANDED** for correction of the Judgment and Sentence document through an Order *nunc pro tunc* to reflect that Wiggins should receive credit for time served.

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to find counsel ineffective on any claim raised in Proposition II. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 1064, 80 L.Ed.2d 674 (1984).

[4] *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 314, *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282. The prosecutor should not have said the jury had a duty to convict. We note the State attempts to recast this issue as one where the prosecutor expresses a personal opinion of guilt or holding jurors to the prosecutor's standard of justice. Those are also improper forms of argument, but they are not the one raised here.

[5] *Ward v. State*, 1981 OK CR 102, 633 P.2d 757, 759-60 (reversal for pervasive misconduct including mention of pardon and parole); *Starr v. State*, 1979 OK CR 126, 602 P.2d 1046, 1049 (modification where improper reference to pardon and parole influenced sentence); *Satterlee v. State*, 1976 OK CR 88, 549 P.2d 104, 111 (same); *Carbray v. State*, 1976 OK CR 15, 545 P.2d 813, 816, *cert. denied*, 498 U.S. 1072, 111 S.Ct. 796, 112 L.Ed.2d 858 (1991) (same); *Bell v. State*, 1962 OK CR 160, 381 P.2d 167, 173-74 (same).

[6] *Demry v. State*, 1999 OK CR 31, 986 P.2d 1145, 1148-49.

[7] *Alverson v. State*, 1999 OK CR 21, 983 P.2d 498, 520, *cert. denied*, 528 U.S. 1089, 120 S.Ct. 820, 145 L.Ed.2d 690 (2000).

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

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I agree in the affirmance of the conviction in this case. However, I dissent to the modification of the sentence. I disagree that the record supports a conclusion that pardon and parole issues sparked juror concern about the amount of time Appellant would actually spend in prison and therefore infected the sentencing deliberations.

Appellant testified about his prior convictions. When asked on direct examination if he had completed his sentences on them, he replied, "served full time on them". On cross-examination, the prosecutor asked how much time Appellant served on each of the prior convictions. No defense objection was raised to this line of questioning; therefore, I review only for plain error. *Simpson v. State,* 876 P.2d 690, 693 (Okl.Cr.1994). Any error in the prosecutor's line of inquiry was invited by defense counsel's direct examination. *See Bland v. State,* 4 P.3d 702, 729-730 (Okl.Cr.2000).

Further, the court's response to the jury's note deflected any concern that the jury may have based their recommendation on evidence that Appellant had been paroled in Illinois. The court directed the jury to Instruction No. 19, which set out the punishment and informed the jury they were not to speculate about what percentage of a sentence would be served. Therefore, any error in the prosecutor's comments was rendered harmless. Accordingly, modification of the sentence is not warranted.