IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JOHN CARL MARQUEZ,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
	)	Case No. F-2003-747
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, JUDGE:

Appellant John Carl Marquez was tried by jury for Assault and Battery Upon a Police Officer (Count 1) (21 O.S.2001, § 649(B)), Prisoner Placing Bodily Fluids on Government Employee (Count 2) (21 O.S.2001, § 650.9), and Domestic Abuse, Assault and Battery (Count 3) (21 O.S.2001, § 644(C)), After Former Conviction of Two Felonies on all counts, Case No. CF-2002-352, in the District Court of Creek County. The jury found Appellant guilty of Resisting A Police Officer, After Former Conviction of Two Felonies, the lesser-included offense to Count 1, and guilty on Counts 2 and 3 as charged. The jury recommended as punishment one year imprisonment in each of Counts 1 and 3, and life imprisonment in Count 2. The trial court sentenced accordingly, ordering the sentences to be served concurrently. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of his appeal:

I. Appellant's sentence of life imprisonment for Prisoner Placing Bodily Fluids on Government Employee is grossly excessive and should be favorably modified.

II. The trial court erred in overruling Appellant's Motion to Suppress because the police officers seized Appellant in his home absent consent, exigent circumstances or a warrant. Therefore, the inculpatory statements introduced at trial were obtained as a result of an illegal arrest, in violation of Appellant's Fourth Amendment rights.

III. Prosecutorial misconduct deprived Appellant of a fair trial and resulted in an excessive sentence.

IV. The cumulative effect of all these errors deprived Appellant of a fair trial.

V. This Court should remand Appellant's case to the District Court with instructions to correct the Judgment and Sentence by an Order *Nunc Pro Tunc.*

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence as to Counts I and III, but that while the conviction is affirmed in Count II, the sentence must be modified.

In Proposition I, we find that under the facts and circumstances of this case, the life sentence imposed in Count 2 is so excessive as to shock the conscience of the Court. *See Rea v.* State, 34 P.3d 148 (Okl.Cr.2001); Bartell *v. State,* 881 P.2d 92, 101 (Okl.Cr.1994). In light of Appellant's criminal history, we modify the sentence to thirty (30) years imprisonment.[1]

[1] Appellant's prior convictions were a 1986 guilty plea to second degree burglary, and 1985 guilty pleas to one count of first degree rape, one count of first degree burglary, and one count of unauthorized use of a vehicle. During closing argument the prosecution only argued for a

In Proposition II, we find Appellant's warrantless arrest was legal pursuant to 22 O.S. Supp.2002, §§ 60.16 and 196(6). *See also State v. Lee,* 763 P.2d 385 (Okl.Cr.1988). The plain language of § 60.16(B) gives officers the authority to enter into a residence and arrest a person suspected of committing the misdemeanor offense of domestic abuse. Therefore, as Appellant's arrest was legal, his subsequent statements to police were properly admissible.

In Proposition III, we find no societal alarm in the prosecutor's second stage closing comments, and do not otherwise review it except for plain error. We find no plain error in commenting on the evidence showing Appellant to be a violent and dangerous man and therefore deserving of a substantial prison sentence. *See Cargle v. State,* 909 P.2d 806, 824 (Okl.Cr.1995).

In Proposition IV, we find Appellant was not denied a fair trial by the accumulation of errors. *See Conover v. State,* 933 P.2d 904, 923 (Okl.Cr.1997).

In Proposition V, we agree with the parties that an order *nunc pro tunc* should be issued as to Count I to reflect that Appellant was convicted in Count 1 of the lesser included offense of Resisting A Police Officer pursuant to 21 O.S. 2001, § 268. *See Flowers v. Page,* 434 P.2d 497, 498 (Okl.Cr.1967).

Accordingly, this appeal is denied.

DECISION

The Judgments and Sentences in Counts I and III are **AFFIRMED.** The Judgment and Sentence in Count I is **REMANDED** to the District Court to

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sentence of 25 years. The transcript of evidence does not provide a factual basis, which would give a reason for the jury to so greatly exceed that requested sentence in this case. Finding no evidentiary reason to justify this sentencing response by the trier of fact, we can only determine it was an emotional response rather than a reasoned response to the law and evidence.

issue an Order *Nunc Pro Tunc* to reflect a conviction for Resisting A Police Officer pursuant to 21 O.S. 2001, § 268. The Judgment in Count II is **AFFIRMED** and the Sentence is **MODIFIED** to thirty (30) years imprisonment.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY
THE HONORABLE APRIL SELLERS WHITE, ASSOCIATE DISTRICT JUDGE

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

RB

CHAPEL, JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming the convictions for Resisting a Police Officer, Prisoner Placing Bodily Fluids on Government Employees, and Domestic Abuse—Assault and Battery. I also concur in affirming the sentences of one year for Resisting and one year for Domestic Abuse.

I agree that the life sentence imposed for Prisoner Placing Bodily Fluids on Government Employee must be modified as such a sentence is plainly disproportionate. The majority of this Court modifies the sentence to thirty (30) years. I find that sentence to be similarly disproportionate to the offense and violates the Oklahoma Constitution.

In this case two spouses went to a local bar near their home (a travel trailer). After a night of drinking they went back to the trailer and began to fight. Marquez, in an apparent drunken rage, beat his wife severely and she called her mom. Her mom and dad came to her aid and called police.

The police responded to the call with three officers. The officers entered the trailer and found Marquez in the bathtub. He refused to get out of the tub, struggled with the officers, and swore at them. They sprayed him with pepper spray and eventually got him out of the tub, handcuffed him, and put him in the police car where he began to spit on Officer Gadd.

There is no doubt that Marquez's spitting on Officer Gadd was repulsive to say the least, and no doubt caused the Officer to suffer great anxiety in the days following the incident. In these days of AIDS and other infectious diseases anyone would be concerned. However, as it turned out, Officer Gadd,

fortunately, did not suffer any health problems as a result of having been spat upon. Marquez is a bad guy as is evident from his conduct in this incident and his prior convictions. But, here he is being sentenced for spitting on a government employee. The statutory range of punishment for this offense for a person who has two or more former prior felony convictions is four (4) years to life. I would modify the sentence to six (6) years.

This case is a perfect example of the need for sentencing reform in Oklahoma and this Court's refusal to adopt any kind of meaningful standard by which to review sentences. In this case, Marquez beat his wife severely causing a broken arm, cracked ribs, loosened teeth, and numerous bruises. For that he gets one (1) year. He spits on a cop and gets life, now modified to thirty (30) years. Thus, we have succeeded in this case of proving that in Oklahoma being a drunken jerk merits punishment of thirty times that of severely beating one's wife. Sentences for criminal misconduct should be proportionate to the offense and to other sentences meted out to offenders committing the same or similar crimes. Indeed, the Oklahoma Constitution requires it.

Oklahoma will get sentencing reform. Of that there is no doubt. If not by an eventual federal court order, by economic necessity. In this case Marquez's life sentence would have cost the taxpayers at least $1 million. His thirty-year sentence will cost at least $300,000 and possibly much more depending upon whether or not he is paroled. These numbers could easily double or even triple

if he has serious health problems while incarcerated (some states are paying upwards of $1 million for heart transplants for prisoners).

Marquez is just one of 23,455 presently in Oklahoma prisons. And, the sentences our prisoners are serving are the longest, or among the longest of any prison population in the world. As these prisoners age the expenses associated with their incarceration will soar due to health care costs. Of course, this is a legislative problem, which will have to be addressed by the Oklahoma legislature. The length of individual prison sentences on appeal, is however, fundamentally a judicial problem as our Oklahoma Constitution, Article 2, § 9 prohibits "cruel or unusual" punishment.

This Court's refusal to apply the "cruel or unusual" section of our Constitution to sentences it reviews is indefensible. The word "unusual" is commonly defined as "out of the ordinary" or "exceptional." Thus, a sentence that is grossly in excess of other sentences imposed for the same crime in similar circumstances is by definition an unconstitutional sentence and should be modified by this Court upon review. Yet, this Court routinely reviews and affirms patently absurd sentences for individuals ranging from hundreds to thousands of years whereas other individual sentences are affirmed for the same crimes for as little as ten to twenty years. These inane decisions are the direct result of how this Court reviews sentences. Presently, the Court looks at the sentence and determines whether or not it "shocks the conscience of the court." Courts all over the United States have rejected the "shocks the conscience" approach to reviewing sentences, as it provides no objective

standard. Indeed, such an approach provides no standard at all. We can do better than this. Our Constitution demands it. We ought to adopt a proportionality standard of review of sentences on appeal.