FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY 1 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

FELIX FINLEY, IV,
Appellant,
v.
THE STATE OF OKLAHOMA,
Appellee.

NOT FOR PUBLICATION
Case No. F-2004-682

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Felix Finley, IV was tried by jury and convicted of the lesser included offense of Manslaughter in the First Degree, in violation of 21 O.S.2001, § 711, in the District Court of Oklahoma County, Case No. CF-2003-2561.[1] In accordance with the jury's recommendation, the Honorable Susan S. Caswell sentenced Finley to seventy (70) years imprisonment. Finley appeals from this conviction and sentence.

Finley raises seven propositions of error in support of his appeal:

I. Irrelevant and inconsistent instructions, coupled with the prosecutor's misleading argument, erroneously conveyed to the jury that Finley was not legally entitled to act in self-defense;
II. The State failed to prove beyond a reasonable doubt that Finley was not acting in self-defense when he stabbed a larger, older man, who was holding and punching him;
III. Irrelevant evidence so infected the fairness of the proceedings that the trial was unfair and the results were unreliable;
IV. The 70-year sentence for manslaughter is so excessive and disproportionate as to violate the Eighth Amendment;
V. Failure to properly answer the jury's question about pardon and parole resulted in an inflated sentence;
VI. The trial errors cumulatively deprived Finley of a fair trial and reliable verdict; and

[1] Finley was acquitted of the charged crime, first degree murder.

VII. The written judgment and sentence should be corrected to reflect accurately that Finley was not sentenced as an habitual offender.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Finley's conviction for manslaughter should be affirmed. However, the case must be reversed and remanded for resentencing.

We find in Proposition I that the standard uniform jury instructions on self-defense accurately state the law, were supported by the evidence presented, and were appropriately given.[2] We find in Proposition II that the State presented sufficient evidence to rebut Finley's claim of self-defense beyond a reasonable doubt.[3] We find in Proposition III that irrelevant evidence of the conditions surrounding Finley's arrest,[4] and gang evidence,[5] did not

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[2] A person may not claim self-defense if he (1) was the aggressor; (2) provoked his attacker with the intent to cause the altercation, or (3) voluntarily entered into mutual combat. *See, e.g., Allen v. State*, 1994 OK CR 13, 871 P.2d 79, 93; *McDonald v. State*, 1988 OK CR 245, 764 P.2d 202, 205; *Ruth v. State*, 1978 OK CR 79, 581 P.2d 919, 922; *Wilkie v. State*, 33 Okla. Crim. 225, 242 P. 1057, 1059 (1926). Both parties cite *Freeman v. State*, 97 Okla.Crim. 275, 262 P.2d 713 (1953) for this statement of law. However, *Freeman* itself holds only that an aggressor or one who enters into mutual combat is not entitled to instructions on self-defense. The language above, cited by both Finley and the State, appears only in the headnote to the case and, in altered form, in the text of an instruction discussed in the *Freeman* opinion. Sufficient evidence of all three alternatives was present in the record.

[3] *McHam*, 2005 OK CR 28, 126 P.3d 662, 667; *Hill v. State*, 1995 OK CR 28, 898 P.2d 155, 168.

[4] Prosecutors were entitled to present evidence of Finley's flight. *Mitchell v. State*, 1993 OK CR 56, 876 P.2d 682, 684; *Allen v. State*, 1989 OK CR 79, 783 P.2d 494, 497. However, evidence of the "near-riot" conditions was not relevant to any issue at trial. 12 O.S.2001, § 2401; *Hawkins v. State*, 1994 OK CR 83, 891 P.2d 586, 593. This evidence was not part of the *res gestae*. To be part of the *res gestae*, events must either contribute to the charged crime or be closely intertwined with acts that did contribute to that crime. *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383; Rogers v. State, 1995 OK CR 8, 890 P.2d 959, 971.

[5] *Ochoa v. State*, 1998 OK CR 41, 963 P.2d 583, 597 (error to admit gang evidence where it was "in no way connected" to the murders which formed the basis for the charges).

affect the jury's verdict of guilt;[6] any potential prejudice in sentencing is cured by our resolution of Proposition V. We find in Proposition VI that no accumulation of error occurred which affected the verdict of guilt,[7] and any error which may have affected the imposition of sentence is cured by our resolution of Proposition V.

We find in Proposition V that Finley's jury should have been instructed that he would be required, by statute, to serve 85% of any sentence imposed for either murder or manslaughter before becoming eligible to be considered for parole. We recently decided this issue in *Anderson v. State.*[8] Finley is entitled to relief on this issue as his appeal was pending in this Court when *Anderson* was decided.[9] The case must be reversed and remanded for resentencing. Given this result, Propositions IV and VII are moot.

Decision

The Judgment of the District Court is **AFFIRMED**. The case is **REVERSED** and **REMANDED** to the District Court for **RESENTENCING**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[6] 20 O.S.2001, § 3001.1. As there was no prejudice in the guilt-innocence stage, counsel was not ineffective for failing to object to this evidence. *Strickland v. Washington,* 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984).
[7] *Alverson v. State,* 1999 OK CR 21, 983 P.2d 498, 520.
[8] 2006 OK CR 6, ¶ 24. *See also* 21 O.S.2001, §§ 12.1, 13.1.
[9] *Griffin v. Kentucky,* 479 U.S. 314, 327, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987).

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OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	CONCUR IN RESULTS
C. JOHNSON, J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN RESULTS

Based upon the principle of *stare decisis* I accede to application of *Anderson* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson* which states:

> While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, **it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal."** ***Id.***

2006 OK CR 6, ¶ 25 (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner. I would therefore affirm both the judgment and sentence, but for the Court's decision to disregard this holding in *Anderson*.