ORIGINAL

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

KEDRIN RAY DIXON,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2019-310
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

LEWIS, PRESIDING JUDGE:

Kedrin Ray Dixon, Appellant, was tried by jury and found guilty of Count 1, first degree burglary, in violation of 21 O.S.2011, § 1431; Count 3, sexual battery, in violation of 21 O.S.Supp.2017, § 1123(B); and Count 4, possession of a controlled dangerous substance, in violation of 63 O.S.Supp.2017, § 2-402, in the District Court of Washington County, Case No. CF-2018-257.[1] The jury found Appellant guilty after two or more prior convictions and sentenced him to twenty (20) years imprisonment and a $5,000.00 fine in each of Counts 1 and 3, and one (1) year imprisonment and a $1,000.00 fine in Count 4. The Honorable Russell C. Vaclaw, Associate District

[1] The jury acquitted Dixon of Count 2, assault and battery with a dangerous weapon.

Judge, pronounced judgment and ordered the sentences in Counts 1 and 3 to be served consecutively.[2] Mr. Dixon appeals in the following propositions of error:

1. The trial judge erred by failing to mention the presumption of innocence in the opening instructions;
2. The evidence was insufficient to support the conviction for first-degree burglary rather than a misdemeanor crime;
3. The trial judge erred by refusing to instruct on Appellant's theory of defense;
4. Evidentiary harpoons cost Mr. Dixon a fair trial;
5. Appellant was prohibited from presenting a defense;
6. The trial judge improperly instructed the jury of the sentencing to be imposed for Count 3;
7. The sentence was excessive;
8. Cumulative error deprived Appellant of a fair trial.

Appellant argues in Proposition One that the trial judge failed to instruct on the presumption of innocence in the opening instructions. No objection to this omission was raised at trial, waiving all but plain or obvious error that affected the outcome of the trial. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. We

[2] Appellant must serve 85% of his sentence in Count 1 before he is eligible for consideration for parole on that sentence. 21 O.S.Supp.2015, § 13.1(12).

correct plain or obvious error only where it seriously affects the fairness, integrity, or public reputation of the proceedings, or otherwise results in a miscarriage of justice. *Id.* The final instructions of the court included the presumption of innocence. Appellant provides no authority that such an omission from opening instructions is plain or obvious error. Moreover, any error had no effect on the outcome, as it was cured by proper final instructions. Proposition One is therefore denied.

In Proposition Two, Appellant argues the evidence was insufficient to support his conviction for first degree burglary, particularly the element of specific intent to commit some crime upon entry. This Court must determine whether the evidence, taken in the light most favorable to the prosecution, permits any rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. We find the evidence legally sufficient. Proposition Two is denied.

Appellant argues in Proposition Three that the trial court erred by refusing to instruct the jury on the defense of voluntary intoxication. The trial court's rulings on requested instructions are

within the discretion of the trial court. *Tucker v. State*, 2016 OK CR 29, ¶ 25, 395 P.3d 1, 8. An abuse of discretion is a clearly erroneous conclusion and judgment, contrary to the logic and effect of the facts presented. Appellant argues that despite his own testimony that he was innocent of burglary or sexual battery, voluntary intoxication instructions were required based on witness testimony that he seemed impaired or intoxicated. We find the trial court's refusal of the requested instructions was not clearly erroneous, or contrary to logic and effect of the facts presented. *Tryon v. State*, 2018 OK CR 20, ¶ 79, 423 P.3d 617, 640 (finding no error in denial of voluntary intoxication instructions where evidence showed prior drug or alcohol use, but other testimony of interactions with police after being arrested did not suggest intoxication). No reversible error occurred. Proposition Three is denied.

In Proposition Four, Appellant argues that evidentiary harpoons in the testimony of two police officers prejudiced his trial. Appellant failed to make timely objections, waiving all but plain error as defined above. An evidentiary harpoon occurs when an experienced police officer makes a voluntary, willfully jabbed statement injecting other crimes, which is both calculated to prejudice, and is actually

prejudicial to, the rights of the defendant. *Martinez v. State*, 2016 OK CR 3, ¶ 60, 371 P.3d 1100, 1115. Appellant fails to show that the challenged comments here were plain or obvious evidentiary harpoons that affected the outcome of the trial. Proposition Four requires no relief.

In Proposition Five, Appellant argues that the exclusion of evidence of prior reports of Appellant's erratic behavior abridged his Sixth Amendment right to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The scope of this right is limited, however, to the presentation of relevant evidence. *Simpson v. State*, 2010 OK CR 6, ¶ 10, 230 P.3d 888, 895. Appellant testified and denied committing burglary or sexual battery. Evidence of his erratic behavior on other occasions was marginally relevant, or not relevant at all, to his defense. We conclude such evidence was not vital to his defense, and any error in its exclusion was harmless beyond a reasonable doubt. *Bartell v. State,* 1994 OK CR 59, ¶ 15, 881 P.2d 92, 97 (abridgement of right to present a defense is subject to analysis for harmless error). Proposition Five requires no relief.

In Proposition Six, Appellant argues that the trial judge erred in the penalty instruction for Count 3, sexual battery. The instruction

drew no objection at trial and is reviewed here for plain or obvious error, as defined above. The trial court instructed the jury that sexual battery, after former conviction of two (2) or more felonies, is punishable by "incarceration for a term of twenty (20) years, and a fine of up to $10,000."

The instruction is plainly in error, and the State concedes as much. Without enhancement, sexual battery is punishable by up to ten (10) years imprisonment. Sexual battery is not enumerated as a "violent" crime in section 571 of Title 57, and having no minimum term for a first offense, is punishable after two (2) or more prior convictions by four (4) years to life imprisonment. 21 O.S.Supp.2018, § 51.1(C).

In cases of instructional or other sentencing error, this Court may remand for re-sentencing or modify the sentence to any term within the range of punishment. *Watts v. State*, 2008 OK CR 27, ¶ 7, 194 P.3d 133, 136. The State requests that we remand for re-sentencing. We find the interests of both justice and judicial economy are best served here by modifying the sentence in Count 3 to ten (10) years imprisonment, consecutive to Count 1. No other relief is warranted.

Appellant claims in Proposition Seven that his sentences are excessive. This Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it is so excessive as to shock the conscience of the Court. *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. Having modified the sentence in Count 3 to ten (10) years, we find the sentences are not shocking to the conscience. No further relief is warranted.

Appellant argues in Proposition Eight that the accumulation of error in this case deprived him of due process of law. The only obvious error was in the Count 3 sentencing instruction, which was remedied by modification. No other individual harmful errors are shown, and there is no accumulation of prejudice from otherwise harmless errors. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959, 969. Proposition Eight is denied.

DECISION

The judgment and sentence is **MODIFIED** in Count 3 to ten (10) years imprisonment, consecutive to Count 1, and otherwise **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM WASHINGTON COUNTY DISTRICT COURT
HONORABLE RUSSELL VACLAW, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LEWIS, P.J.
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur in Part and Dissent in Part
ROWLAND, J.: Concur in Part and Dissent in Part

HUDSON, J., CONCURRING IN PART/DISSENTING IN PART:

I concur with the decision to affirm Appellant's convictions and to affirm his sentences on Counts 1 and 4. I agree too that sentencing relief is warranted on Count 3 based on the instructional error identified in Proposition VI. Nonetheless, I dissent from the majority's decision to modify Appellant's Count 3 sentence for sexual battery to ten years imprisonment for this error. We should instead vacate the sentence imposed on Count 3 and remand the case for resentencing with proper instructions on the range of punishment.

We imposed that same remedy in *Lewallen v. State*, 2016 OK CR 4, 370 P.3d 828 for similar instructional error. We found plain error based on the trial court's erroneous instruction in *Lewallen* that the range of punishment for child neglect after former conviction of two or more felonies was twenty years to life. We vacated the sentence imposed of twenty-three years and ordered resentencing with proper instructions on the range of punishment—4 years to life. *Id.*, 2016 OK CR 4, ¶¶ 1-4, 8, 370 P.3d at 829-830.

In the present case, the jury was incorrectly instructed that the range of punishment for sexual battery after former conviction of two felonies is "a period of incarceration for a term of twenty (20) years to

Life in the state penitentiary, and a fine of up to $10,000." (O.R. 81; Tr. 371-372) (emphasis added).[1] As the majority correctly observes, this is plain error that warrants relief. Without enhancement, the maximum sentence for sexual battery is ten years imprisonment. Appellant, however, admitted that he had two prior felony convictions at the time of trial (O.R. 79). Thus, the proper range of punishment on Count 3 was four to life. The trial court committed plain error by instructing the jury that the minimum sentence on Count 3 for sexual battery was twenty years instead of four years.

I disagree with the majority that "the interests of both justice and judicial economy are best served" by this Court modifying on appeal the Count 3 sentence to ten years imprisonment. Appellant's jury recommended what it believed was the minimum sentence available for the Count 3 sexual battery charge. Perhaps a properly instructed jury would recommend a shorter or even a longer sentence. But a properly instructed jury could also recommend the same sentence.

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[1] The majority mistakenly omits "to Life in the state penitentiary" in its recitation of the instruction. *See* Opinion at 6 ("The trial court instructed the jury that sexual battery, after former conviction of two (2) or more felonies, is punishable by 'incarceration for a term of twenty (20) years, and a fine of up to $10,000.'"). Appellant made the same mistake in his brief in chief. Aplt. Br. at 26.

Consistent with *Lewallen*, the matter should be remanded so a resentencing jury may recommend sentence using the proper sentencing range. That is particularly so where Appellant did not even bother to raise the instructional error below. The majority's decision on appeal that ten years is the appropriate sentence is wholly arbitrary. I therefore concur in part and dissent in part with today's decision.

I am authorized to state that Judge Rowland joins in this special writing.