

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

CHRISTOPHER D'SHUN CLEVELAND, ]

**NOT FOR PUBLICATION**

Appellant,

v.

Case No. F-2011-482

THE STATE OF OKLAHOMA,

Appellee.

**FILED**  
**IN COURT OF CRIMINAL APPEALS**  
**STATE OF OKLAHOMA**

**AUG - 9 2012**

**SUMMARY OPINION**

**LEWIS, VICE-PRESIDING JUDGE:**

**MICHAEL S. RICHIE**  
**CLERK**

Christopher D'Shun Cleveland, Appellant, was tried by jury and found guilty of perjury, in violation of 21 O.S.2001 § 491, in the District Court of Oklahoma County, Case No. CF-2009-605. The jury sentenced Appellant to ten (10) years imprisonment. The Honorable Kenneth C. Watson, District Judge, pronounced judgment and sentence accordingly.<sup>1</sup> Mr. Cleveland appeals the following propositions of error:

1. Mr. Cleveland's conviction and sentence must be reversed because two critical witnesses testified without being sworn to tell the truth as required by 12 O.S.2011, § 2603 and the Confrontation Clause of Sixth Amendment to the United States Constitution;
2. The trial court erred when it refused to instruct the jury on necessity to evaluate the materiality of the perjurious statement

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<sup>1</sup> The court ordered the sentence to run consecutively to the sentence in *State v. Cleveland*, Oklahoma County District Court, Case No. CF-04-1113, a separate case.

when crafting an appropriate sentence. This failure led to a sentence which was disproportionate and excessive.

In Proposition One, Appellant argues that two attorney witnesses were not sworn under oath at trial, in violation of Title 12, section 2603 and his constitutional rights to confrontation. Appellant voiced no objection to the trial court's procedure regarding these two attorney witnesses until he recalled them in his defense case, waiving all but plain error. *Goforth v. State*, 1996 OK CR 30, ¶ 6, 921 P.2d 1291, 1293. We find the trial court's procedure in reminding the attorneys they were testifying under oath as officers of the court was sufficient to satisfy the requirements of section 2603. Appellant has not shown an error going to the foundation of the case or taking any right essential to his defense, and no relief is required. *Simpson v. State*, 1994 OK CR 40, ¶ 12, 876 P.2d 690, 695. Proposition One is denied.

In Proposition Two, Appellant argues the district court erred in refusing his request to instruct the jury that it must consider the materiality of the perjured statement in imposing sentence. Title 21, section 498(b) provides:

Lack of materiality of the statement is not a defense but the degree to which a perjured statement might have affected some phase or detail of the trial, hearing, investigation, deposition, certification or declaration *shall be considered*, together with the other evidence or circumstances, in imposing sentence. (emphasis added).

Jury instructions "are a matter committed to the sound discretion of the trial court whose judgment will not be disturbed as long as the instructions, taken as a whole, fairly and accurately state the applicable law." *Simpson v.*

*State*, 2010 OK CR 6, ¶ 27, 230 P.3d 888, 899. The State argues that the remaining instructions adequately covered this subject, and that any error is harmless. We disagree. Although Appellant submitted no proposed instruction in writing, and there is no current uniform instruction on this point, the district court could have readily instructed the jury in the language of the statute itself. *Boyd v. State*, 1992 OK CR 40, ¶ 25, 839 P.2d 1363, 1371 (finding an instruction is sufficient when given in the substantial language of the statutes).

Because Appellant had a statutory right to have the jury consider the materiality of the statement in imposing sentence, the denial of a timely request for such an instruction was an abuse of discretion. Under the harmless error statute, the error is not reversible unless it “has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.” 22 O.S.2011, § 3001.1. Appellant emphasized during cross-examination of the State’s witnesses that his sworn statements were immaterial to the outcome of the proceeding in which they were made. The *only way* for the jury to consider this evidence was in imposing sentence. Appellant recognized this, and requested an instruction that materiality be considered in sentencing. 21 O.S.2001, § 498(b). Absent this instruction, the jury imposed the maximum sentence.

We find under these circumstances a grave doubt that the denial of this instruction “prejudicially impacted the sentencing deliberations.” *Ball v. State*,

2007 OK CR 42, ¶ 56, 173 P.3d 81, 95. The Court finds the proper remedy here, given all the facts and circumstances, is to modify Appellant's sentence from ten (10) years to seven (7) years imprisonment, consecutive to his sentence in *State v. Cleveland*, Oklahoma County Case No. CF-04-1113. No further relief is required.

#### **DECISION**

The Judgment and Sentence of the District Court of Oklahoma County is **MODIFIED** to seven (7) years imprisonment, consecutive to the sentence in *State v. Cleveland*, No. CF-04-1113, and otherwise **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY  
THE HONORABLE KENNETH C. WATSON, DISTRICT JUDGE**

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OPINION BY LEWIS, V.P.J.  
A. JOHNSON, P.J.: Concurs  
LUMPKIN, J.: Concurs in Results  
C. JOHNSON, J.: Concurs  
SMITH, J.: Concurs in Results

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