

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BENNIE JAY EDWARDS, JR.,)
)
 Appellant,)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F 2002-869

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 29 2003

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

JOHNSON, PRESIDING JUDGE:

Appellant, Bennie Jay Edwards, Jr., was convicted in Oklahoma County District Court, Case No. Case No. CF 2001-5881, of Concealing Stolen Property, in violation of 21 O.S.2001, § 1713, after former conviction of two or more felonies (Count 1) and of Breaking and Entering, in violation of 21 O.S. 2001, § 1483(B) (Count 2). Jury trial was held May 6th and 7th, 2002, before the Honorable Tammy Bass-Jones, District Judge. The jury found Appellant guilty of both counts and set punishment at thirty (30) years imprisonment on Count 1 and one year imprisonment on Count 2 with a Five Hundred Dollar (\$500.00) fine. Judgment and Sentence was imposed on July 9th, 2002, in accordance with the jury's verdicts and Judge Bass-Jones ordered the sentences to be served concurrently. Thereafter, Appellant filed this appeal.

Appellant raises two propositions of error:

1. Trial errors and prosecutorial misconduct, cumulatively, denied Mr. Edwards due process and a fundamentally fair trial on Count 1, or alternatively, resulted in an excessive sentence; and
2. The trial court's failure to instruct the jury on the proper range of punishment on count 1 was plain error that violated Mr. Edwards'

right to due process and a fundamentally fair trial and requires a sentence modification.

After thorough consideration of the propositions raised, including the Original Record, transcripts, and briefs and arguments of the parties, we have determined that the convictions should be affirmed, but the sentence imposed on Count 1 modified for the reasons set forth below.

The alleged prosecutorial errors and alleged trial errors did not deprive Appellant of a fair trial Count 1 and reversal is not warranted. *Matthews v. State*, 2002 OK CR 16, ¶ 38, 45 P.3d 907, 920.

However, we find merit in Appellant's second proposition as the trial court did not instruct the jury on the correct range of punishment. At the time Appellant committed the offenses, the proper punishment for Concealing Stolen Property, after former conviction of two or more felonies, was "four (4) years to life imprisonment," see 21 O.S.2001, § 51.1(C), but the jury was instructed the range of punishment was "for a term of not less than twenty years." The failure of the trial judge to properly instruct on the range of punishment was plain error.¹ *Taylor v. State*, 2002 OK CR 13, ¶ 3, 45 P.3d 103, 105. Therefore, we hereby modify the sentence imposed on Count 1 to ten (10) years imprisonment.

DECISION

The Judgments of the trial court in Oklahoma County District Court, Case No. CF 2001-5881, are hereby **AFFIRMED**, but the sentence imposed in Count 1 is hereby **MODIFIED** to Ten (10) years imprisonment.

¹ The State conceded in its brief that the trial court erred in its instruction.

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OPINION BY: JOHNSON, P.J.

LILE, V.P.J. : CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR
STRUBHAR, J.: CONCUR

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