

AUG - 9 2005

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
MICHAEL S. RICHIE
CLERK

KELLY DALLAS EVANS,)	
)	
Appellant,)	
v.)	Case No. F-2004-110
)	NOT FOR PUBLICATION
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

CHAPEL, PRESIDING JUDGE:

Kelly Dallas Evans was tried by jury and convicted of one count of Burglary in the Second Degree, under 21 O.S.2001, § 1435, After Former Conviction of Two or More Felonies, in Washington County, Case No. CF-2003-5, and also one misdemeanor count of Possession of Burglary Tools, under 21 O.S.2001, § 1437, in Case No. CM-2003-10. In accordance with the jury's recommendation, the Honorable Carl Gibson sentenced Evans to imprisonment for life on the burglary conviction, and to imprisonment in the county jail for one year and a fine of \$1,000 on the possession of burglary tools conviction, to be run concurrently. Evans appeals his convictions and his sentences.

Evans raises the following propositions of error:

- I. The prosecutor's frequent references to Appellant's silence violated Appellant's Fifth Amendment rights and denied him a fair trial.
- II. Under the facts and circumstances of this case, a life sentence for a property crime is so excessive that it should shock the conscience of this court.

III. The trial court's imposition of a fine which was in excess of the statutory maximum was error which this Court must correct by modification of the amount imposed.

Regarding Proposition I, none of the challenged prosecutorial statements were objected to at trial. Thus they are reviewed only for plain error.¹ This Court has repeatedly recognized that both prosecutors and defense counsel are accorded "a liberal freedom to argue the evidence and its logical inferences during closing arguments."² We have likewise recognized that in order for a prosecutor's "comment" on a defendant's failure to testify or decision to remain silent to constitute reversible error, "the comment must directly and unequivocally call attention to that fact."³

This Court concludes that the complained-of prosecutorial arguments did not directly and unequivocally comment on Evans' failure to testify or offer further explanation for his presence behind the school. Rather, the prosecutor's argument constituted a proper criticism of the implausibility of the argument advanced by defense counsel—that Evans was totally uninvolved with the burglary, he was just taking an ill-timed potty break—which was based upon Evans' own remark on the night of his arrest. There was certainly no plain error.

Regarding Proposition II, Evans acknowledges that based upon his prior felony convictions, the proper sentencing range for his second-degree burglary

¹ See *Parker v. State*, 1996 OK CR 19, ¶ 40, 917 P.2d 980, 988, *cert. denied*, 519 U.S. 1096, 117 S.Ct. 777, 136 L.Ed.2d 721 (1997).

² See, e.g., *id.* at ¶ 41, 917 P.2d at 989 (quoting *Cheatham v. State*, 1995 OK CR 32, ¶ 39, 900 P.2d 414, 425) (other citations omitted).

³ See *Hansford v. State*, 1988 OK CR 264, ¶ 7, 764 P.2d 910, 912; *Mahorney v. State*, 1983 OK CR 71, ¶ 12, 664 P.2d 1042, 1046.

conviction was six years to life imprisonment.⁴ While this Court recognizes that life imprisonment is a harsh sentence, particularly based upon the seemingly “non-violent” nature of Evans’ current burglary offense, the sentence does not shock the conscience of this Court.⁵

Regarding Proposition III, the State concedes that because the statute defining the crime of possession of burglary tools does not provide for a fine,⁶ the maximum fine for this misdemeanor offense was \$500.⁷ Consequently, the fine on Evans’ conviction for possession of burglary tools should be modified to \$500.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Evans’ second-degree burglary conviction, after former conviction of two or more felonies, and his sentence of life imprisonment for this crime should be affirmed. In addition, Evans’ possession of burglary tools conviction and his sentence of imprisonment in the county jail for one year for this offense should also be affirmed; however, his fine of \$1,000 for this offense should be modified to \$500.

⁴ See 21 O.S.2001, § 1435; 21 O.S.Supp.2002, § 51.1(C).

⁵ See *Sanders v. State*, 2002 OK CR 42, ¶ 19, 60 P.3d 1048, 1051.

⁶ See 21 O.S.2001, § 1437.

Decision

Evans' conviction for BURGLARY IN THE SECOND DEGREE After Former Conviction of Two or More Felonies and his sentence of life imprisonment for this crime are hereby **AFFIRMED**. Evans' conviction for POSSESSION OF BURGLARY TOOLS and his sentence of imprisonment in the county jail for one year for this offense, to run concurrently with his life sentence, are also **AFFIRMED**. His \$1000 fine for this misdemeanor offense, however, is **REVERSED** and **MODIFIED** to a fine of \$500.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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⁷ See 21 O.S.2001, § 10.

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.: CONCUR

C. JOHNSON, J.: CONCUR

A. JOHNSON, J.: CONCUR