

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ISAAC GARDNER,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-1161

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAR 15 2007

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Isaac Gardner, was tried by a jury in Oklahoma County District Court, Case No. CF-2004-891, for Count 1: Forcible Oral Sodomy (21 O.S.Supp.2002, § 888) and Count 2: Attempted Sexual Battery (21 O.S.Supp.2003, § 1123). The jury found Appellant guilty of Count 1 and recommended a sentence of twenty years imprisonment; the jury acquitted Appellant of Count 2. On November 23, 2005, the Honorable Virgil C. Black, District Judge, sentenced Appellant in accordance with the jury's recommendation, and this appeal followed.

Appellant raises the following propositions of error:

1. The introduction of other crimes evidence deprived Appellant of a fair trial.
2. Because the trial court failed to instruct the jury on the 85% Rule, Appellant's sentence must be modified, or his case must be reversed and remanded for resentencing.
3. The punishment is excessive, given all the facts and circumstances of the case.

After thorough consideration of the propositions, and the entire record

before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm Appellant's conviction but modify his sentence.

As to Proposition 1, Appellant was charged in Count 2 with attempting to sexually batter a nursing-home patient. In his taped interview with police, Appellant offered an innocent explanation for his actions, but also admitted past instances of sexual assault and battery against other nursing-home patients. Appellant had ample pretrial notice of the State's intention to offer the interview into evidence, even if not every item discussed therein was specifically delineated in the State's written notice. *Bryan v. State*, 1997 OK CR 15, ¶ 34, 935 P.2d 338, 357. The trial court redacted substantial portions of the tape, but permitted evidence of the prior similar incidents, and Appellant's admission to related sexual predilections, as relevant on the issue of intent in Count 2. The trial court did not abuse its discretion in this regard. 12 O.S.2001, § 2404(B); *Bryan*, 1997 OK CR 15 at ¶ 34, 935 P.2d at 357. In any event, we discern no prejudice as the jury acquitted Appellant of Count 2. *Harjo v. State*, 1994 OK CR 47, ¶ 41, 882 P.2d 1067, 1076. Proposition 1 is denied.

As to Proposition 2, Appellant filed a pretrial motion and supporting brief asking the trial court to instruct the jury that, if convicted on Count 1, Appellant would be required to serve at least 85% of any sentence imposed before being eligible for parole. See 21 O.S.Supp.2002, § 13.1(15). Appellant renewed his request before trial, but it was denied. After Appellant's trial, this Court held that when applicable, such information is in fact relevant to a jury's

punishment determination. *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273. Given that Appellant timely requested the same type of instruction requested in *Anderson*, we grant Appellant's request for a sentence modification and **MODIFY** his sentence to fifteen years imprisonment. Our disposition of Proposition 2 renders Proposition 3 moot.

DECISION

The Judgment of the district court is **AFFIRMED**. The Sentence is **MODIFIED** to fifteen years imprisonment. 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.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE VIRGIL C. BLACK, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN RESULTS
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS IN RESULTS
LEWIS, J.: CONCURS IN RESULTS

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