

SEP 27 2002  
MICHAEL S. RICHIE  
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**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

**BYRON KEFT GIBBS,** )  
 )  
 **Appellant,** ) **NOT FOR PUBLICATION**  
 )  
 **v.** ) **Case No. F-2001-1061**  
 )  
 **THE STATE OF OKLAHOMA,** )  
 )  
 **Appellee.** )

**SUMMARY OPINION**

**LUMPKIN, PRESIDING JUDGE:**

Appellant, Byron Keft Gibbs, was tried by jury in the District Court of Creek County, Case Number CF-2000-92, and convicted of Driving Under the Influence of Intoxicating Liquor, Second or Subsequent Offense, in violation of 47 O.S.1991, § 11-902. The jury set punishment at ten (10) years imprisonment, a \$500.00 fine, and a recommendation that he receive alcohol and substance abuse counseling. The trial judge sentenced Appellant accordingly. Appellant now appeals his convictions and sentences.

Appellant raises the following propositions of error in this appeal:

- I. The evidence was insufficient to support the conviction;
- II. Appellant received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution; and
- II. Prosecutorial misconduct requires the reversal or modification of Appellant's conviction or sentence.

After a thorough consideration of these propositions and the entire record before us, we find Appellant's sentence must be modified.

With respect to proposition one, we find the evidence in the record is sufficient to support Appellant's conviction for driving under the influence of intoxicating liquor. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1995); *Miller v. State*, 977 P.2d 1099, 1107 (Okl.Cr.1998); *Fontenot v. State*, 881 P.2d 69, 78, n.11 (Okl.Cr.1994).

With respect to proposition two, Appellant has failed to show errors by counsel that were so serious as to deprive him of a fair trial, one with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); 12 O.S.2001, § 2803(1) & (2).

With respect to propositions three and four, the various instances of prosecutorial misconduct were not objected to, thus waiving all but plain error. *Simpson v. State*, 876 P.2d 690, 693, 701-02 (Okl.Cr.1994). We find plain error occurred. The prosecutor crossed the line of permissible advocacy at times when cross-examining Appellant regarding his veracity. The prosecutor also made improper comments concerning the right to remain silent and confusing misstatements regarding the burden of proof on Appellant's "defenses."<sup>1</sup>

The question of whether these errors were harmless is difficult. No objections were lodged, thereby preventing the errors from being cured. Many of the comments on veracity were proper, and Appellant waived his right to remain silent, to a degree, by speaking to police officers after being Mirandized and telling a different story on the stand at trial. *Anderson v. Charles*, 447 U.S.

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<sup>1</sup> Appellant's defense was that he did not drive while under the influence of alcohol. To support this claim, Appellant testified his car's accelerator stuck, an unidentified Indian gave him a ride home, and his sister saw him drinking at home. The prosecutor erroneously stated Appellant had the burden to prove his "defenses" by producing witnesses to support his

404, 408-409, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222 (1980). Furthermore, the prejudicial effect of these comments was somewhat lessened by proper jury instructions and counter arguments from defense counsel during closing. We do not condone the actions of the prosecutor here, for they were error. However, we cannot say they had a substantial influence on the issue of guilt, even when considered cumulatively. They may have affected sentencing, however, but only slightly, given Appellant's prior drinking-related convictions.

### DECISION

The conviction is hereby **AFFIRMED**, but Appellant's sentence is **MODIFIED** to eight (8) years.

AN APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY  
THE HONORABLE DONALD D. THOMPSON

#### APPEARANCES AT TRIAL

FRED GREESON  
210 EAST DEWEY  
SAPULPA, OK 74066  
COUNSEL FOR APPELLANT

DON I. NELSON  
1ST ASSISTANT DISTRICT ATTORNEY  
CREEK COUNTY COURTHOUSE  
222 EAST DEWEY  
SAPULPA, OK 74066  
COUNSEL FOR THE STATE

**OPINION BY: LUMPKIN, P.J.**  
JOHNSON, V.P.J.: CONCUR  
CHAPEL, J.: CONCUR IN RESULT  
STRUBHAR, J.: CONCUR  
LILE, J.: CONCUR

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#### APPEARANCES ON APPEAL

STUART W. SOUTHERLAND  
P.O. BOX 4441  
TULSA, OK 74159-0441  
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON  
ATTORNEY GENERAL OF OKLAHOMA  
KIM L. UNDERWOOD  
ASSISTANT ATTORNEY GENERAL  
112 STATE CAPITOL BUILDING  
OKLAHOMA CITY, OK 73105  
COUNSEL FOR THE STATE

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contentions.