

SEP - 4 2002

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
NANCY S. PARROLL
CLERK

JAMES BENJAMIN HUBBELL,)	NOT FOR PUBLICATION
)	
Appellant,)	
)	
v.)	Case No. F-2001-1230
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

S U M M A R Y O P I N I O N

JOHNSON, VICE-PRESIDING JUDGE:

Appellant, James Benjamin Hubbell, was charged by Information filed in Okmulgee County District Court Case No. CF-2000-293 with Attempted Second-Degree Burglary (21 O.S.1991, § 1435), After Conviction of Two or More Felonies. Jury trial was held October 9-10, 2001, before the Honorable John Maley, District Judge. The jury found Appellant guilty as charged and recommended a sentence of thirty years imprisonment. The trial court sentenced Appellant in accordance with the jury's recommendation on October 10, 2001. Appellant timely lodged this appeal.

Appellant raises the following propositions of error:

1. The evidence is insufficient to sustain Appellant's conviction
2. Two of Appellant's prior convictions used for sentence enhancement arose from the same transaction.
3. Irrelevant evidence and improper instructions resulted in an inflated sentence.
4. Appellant should be given the benefit of newly-enacted legislation reducing the penalty for non-violent habitual offenders.

5. Cumulative trial error deprived Appellant of a fair and reliable verdict.

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 convictions but **MODIFY** his sentence. As to Proposition 1, the trial testimony showed that after being observed trying to force open a locked garage side door, Appellant admitted the offense; Appellant told police he was looking for tools to fix his disabled vehicle, but this is not a cognizable defense to the crime of attempted burglary. The evidence was sufficient to sustain Appellant's conviction. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Spuehler v. State*, 1985 OK 132, ¶ 7, 709 P.2d 202, 203-04.

As to Proposition 2, Appellant failed to raise the issue below. This Court will therefore review for plain error only and we find no plain error. *Cooper v. State*, 1991 OK CR 26, ¶ 14, 806 P.2d 1136, 1139.

As to Proposition 3, the prison records introduced by the State during the second stage of trial did contain irrelevant and potentially prejudicial information, and Appellant timely objected on those grounds. Because it is impossible to determine whether the jury considered this evidence, Appellant's sentence is **MODIFIED** from thirty (30) years to twenty (20) years. *Bean v. State*, 1964 OK CR 59, ¶ 12, 392 P.2d 753, 756. As to Proposition 4, the 2001 amendments to 21 O.S. § 51.1, lowering the minimum sentence for persons in Appellant's position, cannot be applied retroactively to Appellant absent express legislative direction. *Nestell v. State*, 1998 OK CR 6, ¶ 5, 954 P.2d 143, 144; *Pollard v. State*, 1974 OK CR 63, ¶ 6, 521 P.2d 400, 402. Because § 51.1 as amended includes no such expression, Proposition 4 is denied. As to Proposition 5, because the only error we have identified has been addressed in

Proposition 3, we find no error by accumulation. *Hope v. State*, 1987 OK CR 24, ¶ 12, 732 P.2d 905, 908.

DECISION

The Judgment of the district court is **AFFIRMED**, and the Sentence is **MODIFIED** from **THIRTY (30) YEARS** to **TWENTY (20) YEARS**.

AN APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY
THE HONORABLE JOHN MALEY, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS
CHAPEL, J.: SPECIALLY CONCURS
STRUBHAR, J.: CONCURS
LILE, J.: CONCURS

RB

CHAPEL, JUDGE, SPECIALLY CONCURRING:

I concur, but would modify the sentence to 10 ½ years by applying the recent amendments to 21 O.S. § 51.1 retroactively.