IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ZACHARY MICHAEL HUDSON,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2005-440
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, Zachary Michael Hudson, was tried by a jury in Tulsa County District Court, Case No. CF-2004-5, for the crime of First Degree Murder (21 O.S.2001, § 701.7). The jury found him guilty of the lesser related offense of First Degree Manslaughter (21 O.S.2001, § 711(2)), and recommended punishment of twenty years imprisonment and a $10,000 fine. On April 28, 2005, the Honorable Jesse S. Harris, District Judge, sentenced Appellant in accordance with the jury's recommendation, and Appellant timely lodged this appeal.[1]

Appellant raises the following propositions of error:

1. Appellant was denied a fair trial when the court took an impermissibly proactive role in the trial of the case.

2. The evidence was insufficient to support a conviction for First Degree Manslaughter.

3. The trial court committed fundamental error in instructing the jury on the lesser offense of First Degree Manslaughter.

4. The trial court erred in refusing to instruct the jury about the

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[1] Appellant was also charged and convicted in Count 2 of the Information with Driving Under Suspension, but that conviction is not at issue in this appeal.

mandatory service of 85% of a sentence for murder or manslaughter, and erred in refusing to correctly answer the jury's question about parole.

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 the sentence. As to Proposition 1, the trial court's participation during the examination of witnesses was not improper. 12 O.S.2001, § 2614(B); *Alexander v. State*, 2002 OK CR 23, ¶ 15, 48 P.3d 110, 114. The court took an active role in ensuring that witnesses understood the questions asked. Appellant's claim that the court was partial to the State is simply not supported by the record. We find no evidence of judicial bias. *Allen v. State*, 1993 OK CR 49 ¶ 4, 862 P.2d 487, 489; *Shepard v. State*, 1988 OK CR 97, ¶¶ 11-12, 756 P.2d 597, 600. Proposition 1 is denied.

As to Propositions 2 and 3, the trial court did not err in granting the State's request to instruct the jury on First Degree Manslaughter as a lesser related offense to First Degree Murder. Appellant was not surprised by this alternative, and the evidence reasonably supported it. *Shrum v. State*, 1999 OK CR 41, ¶ 11, 991 P.2d 1032, 1036-37. The evidence shows that Appellant fought with the deceased, left the scene, then returned a short time later in his motor vehicle, fought with him again, and then ran over the deceased in the middle of the street. A rational juror could have rejected Appellant's claim of accident and found, beyond a reasonable doubt, that he was acting in a heat of passion when he hit the deceased with his car. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Thomas v. State*, 1975 OK CR 116, ¶¶ 11-14, 536 P.2d 1305, 1308-09. Propositions 2 and 3 are denied.

Finally, as to Proposition 4, Appellant timely requested an instruction on

the "85% Rule,"[2] but his request was denied by the trial court. During the deliberations, the jury sent a note to the court asking about parole eligibility. We find these facts similar to those in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, decided by the Court while Appellant's appeal was pending. We find the circumstances warrant modification of Appellant's sentence from twenty years imprisonment and a $10,000 fine, to fifteen years imprisonment and a $10,000 fine.

DECISION

The Judgment of the district court is **AFFIRMED**. The Sentence is **MODIFIED** to fifteen years imprisonment and a $10,000 fine. 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.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE JESSE S. HARRIS, DISTRICT JUDGE

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[2] The instruction would have explained to the jury that if convicted of murder or manslaughter, Appellant would be required to serve at least 85% of any sentence imposed before he could be eligible for parole. 21 O.S.Supp.2002, § 13.1.

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OPINION BY C. JOHNSON, J.
CHAPEL, P.J.: CONCURS
LUMPKIN, V.P.J.: CONCURS IN PART/DISSENTS IN PART
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

RB

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the affirmance of the conviction but dissent to the modification of the sentence for two reasons. First, I believe the Court should apply the plain language of *Anderson* which states:

> While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, **it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal."** ***Id.***

2006 OK CR 6, ¶ 25 (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner. However, based upon the principle of *stare decisis* I accede to application of *Anderson* to cases pending on appeal at the time of that decision.

Secondly, I find modification is not warranted under the facts of this case. Appellant was convicted of a lesser included offense and received a very light sentence. There is no basis in law or fact to warrant modification of the sentence.