

AUG 11 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA
CLERK

KENNETH RAY JAMES,)	
)	
Appellant,)	NOT FOR PUBLICATION
)	
v.)	Case No. F-2003-1421
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

A. JOHNSON, JUDGE:

Appellant, Kenneth Ray James, was convicted after a jury trial of Assault and Battery on a Police Officer in violation of 21 O.S.2001, § 649, after former conviction of two or more felonies. The jury trial was held before the Honorable George W. Lindley, District Judge, in Stephens County District Court, Case No. CF-2003-207.¹ The jury set punishment at ten years imprisonment and a \$5,000 fine. The trial court sentenced accordingly. From that Judgment and Sentence, James appeals.

This case raises the following issues:

1. Whether the evidence presented was sufficient to support James's conviction;
2. Whether James was denied a fair trial by the failure of the court to instruct the jury on his theory of defense and on lesser included offenses;

¹ James was also charged with two counts of possession of a controlled dangerous substance; those counts, however, were dismissed after the jury was selected but before witnesses were called (O.R. 42).

3. Whether James's right to a fair trial was prejudiced by the prosecutor's improprieties in closing argument.

We find no error which merits the reversal of this case and so affirm the judgment of the trial court. We find, however, that the prosecutor's improper argument requires modification of the sentence imposed.

I.

The question of whether the evidence is sufficient to sustain a conviction is answered by considering the evidence in the light most favorable to the State and determining whether any trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04; *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Employing that standard here we find the evidence presented here sufficient to conclude that any rational trier of fact could have found James guilty as charged.

II.

The evidence in this case would not support the giving of an instruction relating to self defense or to lesser included offenses. The trial court, therefore, did not err in failing to give such instructions *sua sponte*. For the same reason, trial counsel cannot be found ineffective for failing to submit such instructions to the court.

III.

The third issue is more troubling. In closing the prosecutor told the jury this:

The police have a motto, Ladies and Gentlemen. And the motto is simple. Protect and serve. That simple. And that's what they're paid for. Dangerous job. It's hard. Today, Ladies and Gentlemen, you have an opportunity to protect and to serve Officer Byers by finding this Defendant guilty based upon the credible testimony of Officer Byers . . . Ladies and Gentlemen, I'm asking you find the Defendant guilty. I'm asking you to protect and serve John Byers.

It is clearly improper for the prosecutor to tell the jurors they have a civic duty to find for the State. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S.Ct. 561, 87 L.Ed. 734 (1943); *See Jones v. State*, 1980 OK CR 28, ¶¶ 6-9, 610 P.2d 818, 820. Such conduct erodes the principle of a fair and impartial trial which is the foundation of our criminal justice system.

There was no objection at trial to this statement, and we review for plain error only. The strength of the State's evidence here weighs against a finding that this jury might have reached a different verdict were it not for the prosecutor's prejudicial remarks. We cannot, however, apply the same reasoning to the jury's decision to set punishment at ten years and a \$5,000 fine.

Accordingly, we find the sentence imposed should be modified to five years imprisonment and no fine.

DECISION

The judgment of the District Court is **AFFIRMED**; the sentence is **MODIFIED** to a term of five years imprisonment and no fine. 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 STEPHENS COUNTY
THE HONORABLE GEORGE W. LINDLEY, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, J.:

CHAPEL, P.J.: Concur in Results

LUMPKIN, V.P.J.: Concur in Part / Dissent in Part

C. JOHNSON, J.: Concur

LEWIS, J.: Concur

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

I concur in the Court's decision to affirm the judgment in this case, but I must dissent to the modification of the sentence. I fail to find any error, much less plain error that was not harmless under the facts of this case. I cannot read into the prosecutor's argument that the jury was told it was their "civic duty" to find for the State. The cited statement was nothing more than the analogous request to tell a defendant his/her conduct was unacceptable and to hold him accountable. There is no call to societal alarm. I find the Court reads a meaning into this statement that an average juror would never surmise. Therefore, I must dissent to the modification of the sentence.