

FEB - 2 2006

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**  
MICHAEL S. RICHIE  
CLERK

JOHN FITZGERALD KESSEE, )  
 )  
Appellant, )  
 )  
v. )  
 )  
THE STATE OF OKLAHOMA, )  
 )  
Appellee. )

**NOT FOR PUBLICATION**

Case No. F 2004-989

**SUMMARY OPINION**

**LEWIS, JUDGE:**

John Fitzgerald Kessee, Appellant, was tried by jury and convicted of First Degree Robbery in violation of 21 O.S.2001, §§ 791 and 797, after former conviction of two or more felonies, in the District Court of Oklahoma County, Case No. CF-2002-5896, before the Honorable Twyla Mason Gray, District Judge. The jury assessed punishment at ninety-nine (99) years imprisonment. Judge Gray sentenced accordingly. From the Judgment and Sentence, Kessee has perfected his appeal to this Court.

Kessee raises the following propositions of error in support of his appeal:

- I. The State presented insufficient evidence to support Mr. Kessee's conviction in violation of the due process clause of the federal and state constitutions.
- II. Mr. Kessee's trial, held after State misconduct forced the trial court to declare a mistrial during the first trial, violated principles of double jeopardy.

III. Errors occurring during the sentencing stage warrant a modification of Mr. Kessee's sentence of ninety-nine (99) years.

After thorough consideration of Kessee's propositions of error and the entire record before us on appeal, including the original record, transcripts, and briefs, we have determined that the judgment of the District Court should be affirmed; however, due to the errors cited in Proposition III, the sentence should be modified.

In reaching our decision, we find, in Proposition I, that the evidence, viewed in a light most favorable to the State, was sufficient for any rational trier of fact to have found the essential elements of the crime charged beyond a reasonable doubt. *Johnson v. State*, 2004 OK CR 23, ¶ 10, 93 P.3d 41, 45; *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. In Proposition II, we find that the prosecutor's conduct leading to the mistrial was not designed to subvert the protections of the Double Jeopardy Clause. *Napier v. State*, 1991 OK CR 120, 821 P.2d 1062, 1065; *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 2088, 72 L.Ed.2d 416 (1982).

We find, in Proposition III, that the prosecutor's argument regarding the length of Kessee's prior sentences in relationship to the dates of convictions amounted to plain error.<sup>1</sup> *Wooldridge v. State*, 1983 OK CR 21, ¶ 17, 659 P.2d 943, 947-98 ("This Court has held that such references to the parole system

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<sup>1</sup> There were no objections to the prosecutor's remarks and there were no requests to have the sentences redacted from the Judgment and Sentence documents introduced at trial, thus, we review for plain error only.

are grossly prejudicial to an accused and can serve no useful purpose beyond that of educating the jury as to the often disproportionate ratio between the sentence rendered and the time actually served.”<sup>2</sup> Plain error is error that counsel failed to preserve through a trial objection but which, upon appellate review, is clear from the record and affects substantial rights. 12 O.S.2001, § 2104(D); *See United States v. Olano*, 507 U.S. 725, \_\_\_, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993).

We further find that, due to the prosecutor’s argument, the jury improperly considered parole during their sentencing deliberations. Clear evidence of this fact is found in the questions they sent to the trial judge. The jury asked the trial judge the following questions:

- 1) When [was Kessie] last released from prison?
- 2) Was he on parole at the time of this offense?
- 3) What is the term served for life sentences?
- 4) How soon can a person be paroled on a life sentence?
- 5) If on parole at time of another offense, does he have to go back to prison and finish serving the original sentence?

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<sup>2</sup> The prosecutor argued:

Back in 1982, this Defendant was convicted of two counts of Robbery With Firearms and was sentenced to a 15-year term.

Back in 1988, there were three more counts, three more convictions one of which was for First Degree Robbery in which the Defendant, this Defendant, received a 30-year sentence. Also, in 1998 [sic 1988], the Defendant was convicted of two counts of Second Degree Burglary and on each one of those counts received a sentence of 30 years.

So if we just line it up here, ladies and gentlemen, if we just line it up and look at it, it’s representative of five felony convictions, three robberies, two burglaries over a period of, what, 1982 to ‘88, six years?

And then here we are in 2002 ladies and gentlemen. ...

In line with prior case law, the trial court properly told the jury that they had all the law that was proper for them to consider.

This Court cannot get around the clear violation by the prosecutor in his closing argument, and we are convinced that the argument affected Kesse's substantial right to a fair sentencing proceeding, thus we find it necessary to order Kesse's sentence modified to a term of forty-five (45) years.

### **DECISION**

The judgment of the District Court shall be **AFFIRMED**; however, the sentence shall be **MODIFIED** to a term of forty-five (45) years imprisonment.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2004), the **MANDATE** is **ORDERED** issued upon delivery and filing

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**OPINION BY: LEWIS, J.**

<b>CHAPEL, P.J.:</b>	<b>Concurs</b>
<b>LUMPKIN, V.P.J.:</b>	<b>Concurs in Part/Dissents in Part</b>
<b>C. JOHNSON, J.:</b>	<b>Concurs</b>
<b>A. JOHNSON, J.:</b>	<b>Concurs</b>

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

I concur in the Court's decision to affirm the conviction in this case. However, I fail to find error in the prosecution's argument, much less plain error, and would also affirm the sentence properly imposed by the jury in this case. I therefore dissent to the modification of the sentence.