IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TUYDALE EUGENE LEFLORE,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2006-114
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, VICE-PRESIDING JUDGE:

Appellant, Tuydale Eugene LeFlore, was tried in the District Court of Pittsburgh County, Case No. CF-2005-317, for the crimes of Second Degree Murder, After Former Conviction of Two Felonies (Count I), Leaving the Scene of an Accident Involving Damage (Count II) and Unauthorized Use of a Motor Vehicle, After Former Conviction of Two Felonies (Count III). The jury found Appellant guilty of all Counts charged and assessed punishment at sixty years imprisonment on Count I, one year in the county jail and a $500.00 fine on Count II and three years imprisonment on Count III. The Honorable James D. Bland sentenced Appellant accordingly, ordering the sentences be served concurrently. Appellant timely filed this appeal.

Appellant raises the following propositions of error:

1. The evidence was insufficient to support the conviction for Second Degree Murder because the State did not prove beyond a reasonable doubt that alcohol intoxication was the direct and proximate cause of the accident, or that Mr. Leflore was driving the truck at the time of the accident.

2. The trial court erred in admitting improper opinion evidence.

3. The trial court committed fundamental error by not informing the jury that Mr. Leflore would not be eligible for parole until he had served 85% of his sentence.

4. The trial court committed reversible error when it admitted photographs that violated Mr. Leflore's rights to a fair trial.

5. The trial court erred in admitting the results of the blood test because the prosecution failed to show that the blood was taken as required by statute.

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 judgment and modify his sentence. As to Proposition I, we find that the evidence presented at trial was sufficient to support his conviction for Second Degree Murder. *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; *Easlick v. State,* 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

With regard to error raised in Proposition II, we find that the trial court did not abuse its discretion in allowing Trooper Splawn to testify as an expert regarding the cause of the accident including who was driving the vehicle. *See Lott v. State,* 2004 OK CR 27, ¶ 96, 98 P.2d 318, 344; *Marr v. State,* 1987 OK CR 173, 741 P.2d 884. Further, Trooper Splawn's testimony was not improper opinion testimony regarding an ultimate issue since it did not tell the jury what result to reach. *McCarty V. State,* 1988 OK CR 271, ¶ 7, 765 P.2d 1215, 1218.

We find that Appellant's argument in Proposition III warrants relief. Appellant basically contends that the length of his sentence for Second Degree Murder – sixty years imprisonment – indicates it likely that the jury "rounded

up" to insure that he not be paroled too early. As he notes, even the trial court found this sentence to be "harsh." We agree with Appellant that if the jury had known of the 85% Rule it would likely not have sentenced him so harshly, and accordingly find that under the circumstances of this case failure to so instruct constituted plain error warranting modification. *See Anderson v. State*, 2006 OK CR 6, 130 P.3d 273; *Roy v. State*, 2006 OK CR 47, ___ P.3d ___. Appellant's sentence is modified to thirty years imprisonment.

Error raised in Proposition IV requires no relief as the photos complained of were not unfairly gruesome, duplicative nor was their probative value outweighed by their prejudicial effect. *Hooks v. State*, 1993 OK CR 41, ¶ 24, 862 P.2d 1273, 1280; 12 O.S.1991, § 2403.

Finally, we find that the trial court did not err in admitting the results of the blood test as the record reveals that the person who drew Appellant's blood was a "qualified person authorized by the Board of Tests for Alcohol and Drug Influence." 47 O.S.Supp.2004, § 752(A).

DECISION

As to Count I the Judgment of the district court is **AFFIRMED** and the Sentence **MODIFIED** to thirty years imprisonment. As to Counts II and III, the Judgment and Sentence of the district court is **AFFIRMED**. 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 PITTSBURGH COUNTY
THE HONORABLE JAMES D. BLAND, DISTRICT JUDGE

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OPINION BY C. JOHNSON, V.P.J.

LUMPKIN, P.J.: CONCURS IN PART/DISSENTS IN PART
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

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

I concur in affirming the judgment and sentences in Counts II and III and to affirming the judgment in Count I. However, I dissent to the modification of the sentence in Count I. There is no evidence in the record the jury even considered parole. This Court's ruling is based on assumptions rather than facts in evidence. There must be some evidence in the record that the issue was raised or was somehow a part of the jury's decision making process before action by this Court is justified.