

APR - 3 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

JOHNNY FREDDY LOCUST,	}	
	}	
Appellant,	}	
	}	
v.	}	Case No. F-2004-997
	}	
THE STATE OF OKLAHOMA,	}	
	}	
Appellee.	}	

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

LEWIS, JUDGE:

Johnny Freddy Locust, Appellant, was tried by jury and found guilty of burglary in the first degree, a violation of 21 O.S. 2001 § 1431, after former conviction of a felony, in the District Court of Tulsa County, Case No. CF-2004-1441. The jury sentenced Appellant to twenty (20) years imprisonment and a fine of \$5,000.00. The District Court, Honorable Thomas Gillert, imposed judgment and sentence accordingly.

Mr. Locust appeals, raising the following propositions of error:

1. The Trial Court Erred In Not Properly Instructing The Jury In Violation of the Sixth And Fourteenth Amendments To The United States Constitution And Article Two, Section Twenty of the Oklahoma Constitution.
2. Mr. Locust's Convictions Must Be Reversed Because The Evidence Presented By The State Was Insufficient To Prove His Guilt Beyond A Reasonable Doubt In Violation Of The Fifth And Fourteenth Amendments To the United States Constitution And Article Two, Section Seven of the Oklahoma Constitution.

3. Mr. Locust Received Ineffective Assistance of Counsel In Violation of The Sixth And Fourteenth Amendments To The United States Constitution And Article Two, Section Twenty Of The Oklahoma Constitution.
4. The Accumulation Of Error In This Case Deprived Mr. Locust of Due Process of Law In Violation Of The Fifth and Fourteenth Amendments To The United States Constitution And Article Two, Section Seven of the Oklahoma Constitution.

After thorough consideration of the arguments presented in the appellate briefs and the entire record before us, we affirm the judgment of conviction and modify Appellant's sentence.

In Proposition 1, the Court finds Appellant presented sufficient evidence of consent to enter the premises to warrant a jury instruction in the language promulgated by this Court in *Roberts v. State*, 2001 OK CR 14 ¶ 19, 29 P.3d 583, 589. Trial counsel's deficient performance in not requesting this instruction did not relieve the trial court of its responsibility to give it, and plain error occurred. *Roberts*, 2001 OK CR 14 ¶ 18, 29 P.3d at 589. However, the failure to give the instruction in this case was harmless beyond a reasonable doubt, and we will not reverse due to the error. 20 O.S. 2001 § 3001.1; *Simpson v. State*, 1994 OK CR 40 ¶ 13, 876 P.2d 690, 695. We further find the trial court properly refused Appellant's requested instruction on voluntary intoxication. *Jackson v. State*, 1998 OK CR 39 ¶¶ 36-38, 964 P.2d 875, 892.

In Proposition 2, we find the direct and circumstantial evidence, and the permissible inferences drawn from that evidence, provide sufficient evidence

from which a reasonable trier of fact could find the essential elements of the charged crime were proved beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; *Easlick v. State*, 2004 OK CR 21 ¶ 5, 90 P.3d 556. This proposition is denied.

In Proposition 3, the Court finds trial counsel performed deficiently in not requesting the uniform instruction on consent to enter promulgated in *Roberts*, supra. However, Appellant has not shown a reasonable probability that but for trial counsel's omission, the outcome of the trial would have been different. Appellant's showing similarly fails to warrant reversal with respect to counsel's alleged failure to investigate possible witnesses or present the testimony of Officer Staats.¹ *Lockett v. State*, 2002 OK CR 30, ¶ 15, 53 P.3d 418, 424; *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

Appellant has also failed to rebut the strong presumption that counsel exercised reasonable professional judgment in not raising Appellant's competency during the trial. *Ochoa v. State*, 1998 OK CR 41 ¶ 11, 963 P.2d 583; *Marshall v. Territory*, 1909 OK CR 43, 2 Okl.Cr. 136, 101 P. 139, 145.

Appellant's Proposition 4, arguing relief is required due to cumulative error, is denied. Reviewing the case for plain error, we note that Appellant's offense is a qualifying offense for the parole eligibility limitations of 21

¹ Appellant's *Application For Evidentiary Hearing and Supplementation of Record*, attaching Officer Staats's affidavit and report, is granted in part. Remand for an evidentiary hearing is denied.

O.S.Supp. 2003 § 13.1 (12) (the 85% Rule). Appellant did not request an instruction on his ineligibility for parole and the trial court had no opportunity to consider whether an instruction should be given. This case was tried before our decision in *Anderson v. State*, 2006 OK CR 6, ___ P.3d ___, but was pending on direct review when *Anderson* was decided. The principle of equal treatment among similarly situated Appellants whose cases are pending on direct review supports sentencing relief based on *Anderson*. Cf. *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Rather than remand this case for further proceedings, Appellant's sentence will be modified to fifteen years imprisonment. The District Court's assessment of a fine and costs is affirmed.

DECISION

The Judgment of the District Court of Tulsa County is **AFFIRMED**. The Sentence is **MODIFIED** to fifteen years imprisonment and a \$5,000.00 fine. Pursuant to Rule 3.15, Rules of the 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 THOMAS GILLERT, DISTRICT JUDGE

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OPINION BY LEWIS, J.

CHAPEL, P.J.: **CONCURS**

LUMPKIN, V.P.J.: **CONCURS IN PART, DISSENTS IN PART**

A. JOHNSON, J.: **CONCURS**

C. JOHNSON, J.: **CONCURS**

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

I concur in the Court's decision to affirm the judgment in this case. However, I must dissent to the Court acting as appellate attorney and *sua sponte* modifying the sentence when the basis upon which the modification is made was not even raised on appeal or preserved at trial. If the issue had been raised, it would be proper to grant relief. Since it was not raised, it has been waived.

I also dissent to granting the Application for Evidentiary Hearing and Supplementation of the Record in Part. The Application for Evidentiary Hearing is being denied and pursuant to Rule 3.11, none of the attachments to that application is a part of the appellate record for purposed of appeal, only for the consideration of whether the application meets the threshold showing for the granting of an evidentiary hearing. Since the evidentiary hearing is denied, the supplementation should be denied due to the fact the materials were never admitted into evidence by the District Court. Therefore, it is improper for this Court to consider matters outside the record in this appeal.