

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

JOHNNY SANDERS O'NEAL, IV, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F-2012-226

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

OCT 15 2013

**SUMMARY OPINION**

**A. JOHNSON, JUDGE:**

MICHAEL S. RICHIE  
CLERK

Appellant Johnny Sanders O'Neal, IV was tried by jury in the District Court of Canadian County, Case No. CF-2011-124, and convicted of Second Degree Burglary, After Former Conviction of Two or More Felonies (Count 1), in violation of 21 O.S.2011, § 1435, Endangering Others While Attempting to Elude a Police Officer, After Former Conviction of Two or More Felonies (Count 2), in violation of 21 O.S.2011, § 540A (B), Driving a Motor Vehicle While Under the Influence of Drugs (Count 3), in violation of 47 O.S.2011, § 11-902(A), and Driving While License Under Suspension (Count 4), in violation of 47 O.S.2011, § 6-303(B). The jury fixed punishment at twenty years imprisonment on Count 1, twenty-five years imprisonment on Count 2, and one year imprisonment on each of Counts 3 and 4. The Honorable Gary D. McCurdy, Special Judge, who presided at trial, sentenced O'Neal according to the jury's verdict and ordered the sentences on all counts to run concurrently. From this Judgment and Sentence O'Neal appeals, raising the following issues:

- (1) whether the trial court erred in denying the demurrer to dismiss Count 2 for lack of venue;
- (2) whether the trial judge erred by submitting an instruction on venue;
- (3) whether the trial court erred by allowing the testimony of a witness after the rule of sequestration was violated;
- (4) whether the improper admission of other crime evidence deprived him of a fair trial;
- (5) whether a jury instruction by the trial judge was coercive and reflected the trial judge's own opinion depriving O'Neal of a fair trial and due process of law;
- (6) whether information about suspended sentences, accelerated sentences, and pardon and parole deprived him of a fair sentence and must result in modification;
- (7) whether ineffective assistance of counsel deprived him of a fair trial;
- (8) whether his sentences are excessive; and
- (9) whether cumulative error deprived him of a fair trial.

We find reversal is not required and affirm the Judgment of the District Court. We are required to modify O'Neal's sentence, however, for the reasons discussed below.

**1.**

Venue was proper in Canadian County and the trial court did not err in denying O'Neal's demurrer to Count 2 for lack of venue. *See Omalza v. State*, 1995 OK CR 80, ¶ 11, 911 P.2d 286, 295; *Rawlings v. State*, 1987 OK CR 135, ¶ 38, 740 P.2d 153, 159; 22 O.S.2011, § 124.

**2.**

It was error for the trial court to submit a jury instruction on venue because venue is a matter of law to be decided by the trial court. *See Omalza*, 1995 OK CR 80, ¶ 11, 911 P.2d at 295. Relief, however, is not required because the instruction error did not result in a miscarriage of justice or amount to a substantial violation of a constitutional or statutory right. 20 O.S.2011, § 3001.1.

**3.**

The trial court did not abuse its discretion in denying O'Neal's motion to exclude Officer Lemmings' testimony based on a violation of the Rule of Sequestration because there was no prejudice to O'Neal. *See Villanueva v. State*, 1985 OK CR 8, ¶¶ 2-5, 695 P.2d 858, 860. (rejecting mandatory application of exclusionary rule for violations of Rule of Sequestration).

**4.**

The district court did not err in rejecting O'Neal's motion for mistrial because the arresting officer's testimony about his observations of O'Neal's condition and about O'Neal's statements concerning his consumption of alcohol at the time of his arrest did not amount to an evidentiary harpoon. *See Bruner v. State*, 1980 OK CR 52, ¶ 16, 612 P.2d 1375, 1378-79 (listing six features of an "evidentiary harpoon"). The evidence was admissible because it was inextricably intertwined with the charged offense. *See United States v.*

*Irving*, 665 F.3d 1184, 1212 (10<sup>th</sup> Cir.2011), *cert. denied*, \_\_\_U.S.\_\_\_, 132 S.Ct. 1873, 182 L.Ed.2d 656 (2012).

**5.**

Reviewing for plain error only, we reject O'Neal's claim that he was prejudiced by a coercive instruction reflecting the judge's own opinion. See *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. When the jury inquired what would happen if it could not agree on punishment, the judge simply reminded the jury it had received all the evidence necessary to reach a decision and urged the jury to follow the law and reach a sentencing decision based upon the evidence. No relief is required here.

**6.**

We find relief is required in this case under the plain error doctrine because O'Neal was prejudiced by the admission of information regarding the suspension, revocation and acceleration of his prior sentences as well as pardon and parole. See *Hunter v. State*, 2009 OK CR 17, ¶ 8-10, 208 P.3d 931, 933-34. The prosecutor read the second page of the Information which included the fact that at least a portion of O'Neal's sentence in several of his prior convictions had been suspended. This was error under *Hunter*. The prosecutor also engaged in argument that called attention to the fact O'Neal received suspended sentences and probation. The jury clearly considered probation and parole as evidenced by its questions during deliberations. This case is indistinguishable from *Hunter*. Because O'Neal's jury sentenced him

based on improper as well as legitimate concerns, we find O'Neal's sentence must be modified to 15 years from 20 years on Count 1 and to 20 years from 25 years on Count 2, to be served concurrently. See 22 O.S.2011, 1066.

**7.**

O'Neal's claim of ineffective assistance of counsel fails because he cannot show prejudice from defense counsel's failure to object to the other crimes evidence or the alleged coercive instruction (Propositions IV & V, *supra*). See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Because his sentence must be modified for the plain error stemming from the jury's consideration of information concerning pardon and parole, we find that no other relief is required on O'Neal's claim that defense counsel was ineffective for failing to object to the information of pardon and parole. Nor is he entitled to any further relief based on a claim of excessive sentence or cumulative error.

**DECISION**

The Judgment of the district court is **AFFIRMED**. O'Neal's sentence in Count 1 is **MODIFIED** to 15 years imprisonment and his sentence in Count 2 is **MODIFIED** to 20 years imprisonment, to be served concurrently. The Judgment and Sentence in Counts 3 and 4 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY  
THE HONORABLE GARY D. MCCURDY, SPECIAL JUDGE

**APPEARANCES AT TRIAL**

BILL JAMES  
800 WEST MAIN  
YUKON, OK 73099  
ATTORNEY FOR DEFENDANT

JENNA BROWN  
ASSISTANT DISTRICT ATTORNEY  
303 N. CHOCTAW  
EL RENO, OK 73036  
ATTORNEY FOR STATE

**OPINION BY: A. JOHNSON, J.**  
**LEWIS, P.J.: Concur**  
**SMITH, V.P.J.: Concur**  
**LUMPKIN, J.: Concur in Results**  
**C. JOHNSON, J.: Concur**

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**APPEARANCES ON APPEAL**

LISBETH L. MCCARTY  
P. O. BOX 926  
NORMAN, OK 73030  
ATTORNEY FOR APPELLANT

E. SCOTT PRUITT  
OKLAHOMA ATTORNEY GENERAL  
JAY SCHNIEDERJAN  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>ST</sup> STREET  
OKLAHOMA CITY, OK 73105  
ATTORNEYS FOR APPELLEE