

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

ROY DONNELL ORCUTT, )  
 )  
 Appellant, )  
 v. )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION

Case No. F 2003-1018

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

JUN 29 2004

**SUMMARY OPINION**

MICHAEL S. RICHIE  
CLERK

**JOHNSON, PRESIDING JUDGE:**

Appellant, Roy Orcutt, was convicted by a jury in Creek County District Court, Case No. CF 2000-398, of Driving While Under the Influence of Intoxicating Liquor, Second and Subsequent Offense, in violation of 47 O.S.2001, § 11-902; and in Case No. CM 2000-772, of Operating a Motor Vehicle During Revocation, in violation of 47 O.S.2001, § 6-303, Transportation of Beer in Opened Container, in violation of 21 O.S.2001, § 1220, and Seat Belt Use, in violation of 47 O.S.2001, § 12-417(A). A jury trial was held on August 18<sup>th</sup> – 21<sup>st</sup>, 2001, before the Honorable Donald D. Thompson, District Judge. The jury set punishment at ten (10) years imprisonment and a Five Thousand Dollar (\$5,000.00) fine in CF 2000-398; six (6) months and Five Hundred Dollar (\$500.00) fine, Fifty Dollar (\$50.00) fine, and Ten Dollar (\$10.00) fine for the convictions in CM 2000-772. Judgment and Sentence was imposed in accordance with the jury's verdicts on September 3, 2003. Thereafter, Appellant filed this appeal.

Appellant raises the following propositions of error:

1. Because the jury was not properly instructed, the punishment exceeded what was available for the crime;
2. Prosecutorial misconduct deprived Appellant of a fair trial; and,
3. The trial court erred by failing to sequester the jury.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we have determined that reversal of Appellant's convictions is not warrant; however, modification of the sentence imposed in Case No. CF 2000-398 is warranted for the reasons set forth below.

The jury was not properly instructed on the punishment it could assess for the crime of Driving Under the Influence, Second and Subsequent Offense. 47 O.S.Supp.2000, § 11-902. The applicable statute provided the jury could sentence Appellant

- a. to inpatient treatment for a minimum of twenty-eight (28) days followed by not less than one (1) year of supervision, periodic testing, and aftercare at the defendant's expense, four hundred eighty (480) hours of community service following the period of aftercare, and use of an ignition interlock device for a minimum of thirty (30) days, or
- b. the custody of the Department of Corrections for not less than one (1) year and not to exceed ten (10) years and a fine of not less than One Hundred Fifty Dollars (\$150.00) nor more than Five Thousand Dollars (\$5,000.00).

This statute in effect at the time Appellant committed the offense did not allow the *jury* to set punishment under both subsections of § 11-902. Although defense counsel did not object to the instruction, improper statement of the applicable law on the range of punishment is fundamental error which may not

be waived and which may be corrected on appeal. *Scott v. State*, 1991 OK CR 31, ¶ 12, 808 P.2d 73, 77.

Accordingly, we hereby **VACATE** that portion of the sentence set by the jury and imposed by the trial court at sentencing which required Appellant to “complete inpatient treatment of not less than 1 year, with periodic testing, and upon release to use an interlocking device.” The term of imprisonment and fine imposed in Case No. CF 2000-398 is **AFFIRMED**.

No relief is warranted on Proposition Two. The prosecutor’s comments about Appellant’s failure to subpoena or call a witness was not improper. *Thomas v. State*, 1991 OK CR 58, ¶ 24, 811 P.2d 1337, 1344. The prosecutor’s comments did not invoke societal alarm or cast aspersions on defense counsel. *Hanson v. State*, 2003 OK CR 12, ¶ 16, 72 P.3d 40, 50; *Hanson v. State*, 2003 OK CR 12, ¶ 16, 72 P.3d 40, 50.

Proposition Three is also denied. Although 22 O.S.2001, § 857 requires the jury be sequestered and not allowed to separate after the case has been submitted to them, when counsel for both parties are present and neither objects to the trial court’s decision to allow the jury to separate, the failure to object waives any potential error. *Elliott v. State*, 1988 OK CR 81, ¶ 15, 753 P.2d 920, 923.

### **DECISION**

The Judgment in Case No. CF 2000-398 is **AFFIRMED**, but the sentence is **MODIFIED** to ten (10) years imprisonment and a Five Thousand Dollar (\$5,000.00) fine; that portion of the sentence prescribing inpatient treatment, interlock ignition device and periodic testing is **VACATED**.

**APPEARANCES AT TRIAL**

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**OPINION BY: JOHNSON, P.J.**

LILE, V.P.J. : CONCURS  
LUMPKIN, J.: CONCURS  
CHAPEL, J.: CONCURS  
STRUBHAR, J.: CONCURS

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