

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GARY LYNN PHILLIPS,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

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NOT FOR PUBLICATION

Case No. F-2005-529

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SUMMARY OPINION

DEC 18 2006

LUMPKIN, VICE-PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Appellant, Gary Lynn Phillips, was tried by jury in the District Court of Comanche County, Case Number F-2004-312, and convicted of First Degree Manslaughter (Count I), in violation of 21 O.S.2001, § 711, and Leaving the Scene of a Fatality Accident (Count II), in violation of 47 O.S.2001, § 10-102.1. The jury set punishment at fifty (50) years imprisonment on Count I and five (5) years imprisonment on Count II. The trial judge sentenced Appellant in accordance with the jury's determination and ordered the sentences to run consecutively. Appellant now appeals these convictions and sentences.

Appellant raises the following propositions of error in this appeal:

- I. The evidence was insufficient to support Appellant's conviction for Count I and his conviction thus violates the Due Process Clause of the federal and state constitutions;
- II. Appellant received ineffective assistance of trial counsel;
- III. Prosecutorial misconduct denied Appellant a fair trial in violation of the federal and state constitutions;
- IV. Appellant received an excessive sentence; and

V. Cumulative errors denied Appellant a fair trial in violation of the federal and state constitutions.

After thoroughly reviewing these propositions and the entire record before us, including the original record, transcripts, and briefs of the parties, we find reversal is not required, but modify the sentence.

With respect to proposition one, we find, after viewing the evidence in the light most favorable to the State and accepting all reasonable inferences and credibility choices that tend to support the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

With respect to proposition two, we find Appellant has failed to show errors by counsel that were so serious as to deprive him of a fair trial, one with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Lewis v. State*, 1998 OK CR 24, ¶ 19, 970 P.2d 1158, 1166; 12 O.S.Supp.2004, § 2803(4).

With respect to proposition three, we find the trial court did not abuse its discretion in overruling the motion for mistrial, as there was no clear violation of the right to remain silent. *Short v. State*, 1999 OK CR 15, ¶ 78, 980 P.2d 1081, 1105. As to the sympathy-invoking comment, we find no plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693. Overall, however, the comments in this proposition had little or no relevance and may have impacted sentencing.

With respect to proposition four, we find, after considering the record as a whole—including the nature of the crime, Appellant's health, the arguments about remorse, the victim sympathy comment, the applicability of the 85% rule,

the teachings of *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, and the jury's notes—that the sentence on Count I is excessive.¹ We thus modify, as below.

Proposition five is rendered moot by the relief granted herein.

DECISION

The convictions under Count I and II are hereby **AFFIRMED**, as is the sentence for Count II. The sentence for Count I, however, is hereby **MODIFIED** to thirty (30) years, to be served concurrently with the sentence on Count I. 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 COMANCHE COUNTY
THE HONORABLE KEITH B. AYCOCK, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
CHAPEL, P.J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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¹ I continue to interpret the language of *Anderson v. State* as being prospective only. However, I accede to the actions by the Court pursuant to *stare decisis*.