

JUL - 7 1999

JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

EDDIE TYRONE SCYFFORE,)
)
 Appellant,)
)
 -vs-)
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-97-1268

SUMMARY OPINION

STRUBHAR, PRESIDING JUDGE:

Appellant, Eddie Tyrone Scyffore, was convicted of Larceny of Merchandise From a Retailer, After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case Number CF-97-1183, following a jury trial before the Honorable B. R. Beasley. Following its return of a guilty verdict, the jury recommended that Appellant be sentenced to serve a term of twenty-five years imprisonment. The trial court sentenced Appellant accordingly.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm the judgment and modify the sentence. In reaching our decision, we considered the following propositions of error and determined modification to be required under the law and the evidence:

- I. The prosecutor improperly commented upon the possibility of parole in closing arguments.

- II. This case should be remanded for a new sentencing trial because the jury may have enhanced punishment on an allegation of a Robbery by Force conviction which was never proven by the State or proof of a Larceny From a Person conviction which was never alleged by the State.
- III. Prosecutorial misconduct in closing argument exacerbated the harm of a material variance requiring modification or reversal for new sentencing.
- IV. Punishment assessed at twenty-five years imprisonment for larceny of three pairs of underwear and two shirts is excessive and this Court should exercise its authority to modify Appellant's sentence pursuant to 22 O.S.1991, § 1066.

DECISION

We find merit in Appellant's first proposition wherein he complains that he was prejudiced when the prosecutor made deliberate and calculated references to parole in the second stage closing argument. *See Batson v. State*, 724 P.2d 253, 254 (Okl.Cr.1986). We find this to be plain error requiring modification of the sentence to twenty years imprisonment. We also find that modification cures error raised in Appellant's second and third propositions and renders moot his fourth proposition. The Judgment of the trial court is **AFFIRMED** the sentence is **MODIFIED** to twenty years imprisonment.

APPEARANCES AT TRIAL

RONALD WALLACE
TULSA COUNTY COURTHOUSE
TULSA, OKLAHOMA
ATTORNEY FOR APPELLANT

PAUL H. WILKENING
TULSA COUNTY COURTHOUSE
TULSA, OKLAHOMA
ATTORNEY FOR THE STATE

OPINION BY: STRUBHAR, P.J.

LUMPKIN, V.P.J.: CONCUR IN PART/DISSENT IN PART

JOHNSON, J.: CONCUR

CHAPEL, J.: CONCUR

LILE, J.: DISSENT

APPEARANCES ON APPEAL

GRETCHEN GARNER
ASSISTANT PUBLIC DEFENDER
423 S. BOULDER, SUITE 300
TULSA, OKLAHOMA 74103
ATTORNEY FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF
OKLAHOMA
JENNIFER A. BLAKENEY
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA
73105
ATTORNEYS FOR APPELLEE

LILE, J.: DISSENTS:

I agree that the prosecutor made a clear and unmistakable reference to parole; however, there was no objection. The error was waived. The sentence should not be modified.

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

I concur in the Court's decision to affirm the conviction in this case. However, I find no basis in law or fact for the modification of the sentence. I would affirm the sentence as rendered.