

“persons convicted of First degree murder [or] . . . Manslaughter in the first degree . . . shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole.” 21 O.S. Supp. 2002, § 13.1. In *Anderson v. State*, 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282, a case decided three months prior to Appellant’s trial, this Court held that jurors should be informed of the statutory limit on parole eligibility when they are sentencing defendants for qualified offenses. This Court reasoned that requiring such instructions allows “Oklahoma’s sentencing juries to more accurately gauge their intended sentences, according to an informed perspective on parole eligibility.” *Id.* ¶ 23. Clearly, the trial court erred by refusing this instruction.

The State argues that the trial court’s failure to instruct the jury that the Defendant’s crime was subject to the 85% minimum sentence rule was harmless. The State notes that the error at the trial was a type of instructional error. As such, the Court does not automatically reverse a case for instructional error, rather the proper inquiry is whether the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244; 20 O.S.2001, § 3001.1; See *Roy v. State*, 2006 OK CR 47, ¶ 22 152 P.3d 217, 224-25. Although the State cites the correct standard, the failure to give said instructions under the circumstances of this case constitutes plain error.¹

¹ The State points out that neither the prosecution, nor counsel for the defendant objected to the trial judge’s response to the jury question. While regrettable, such action by the either counsel is ultimately of no consequence

Here, the case at bar mirrors *Anderson* and *Carter* and is analogous to *Roy*. According to the record on appeal, the jury sent out a note asking, "Under the sentencing guidelines do they serve 85% of the term before parole?" The trial court answered, "You have all the law and evidence necessary to arrive at a verdict. Continue your deliberations." Subsequently, the Appellant was convicted of the lesser included charge of Manslaughter First Degree and sentenced to fifteen (15) years imprisonment. *Anderson* is controlling under the circumstance of this case. Thus, when looking at this case as a whole, one cannot be "confident" in saying that the absence of instructions concerning the 85% minimum sentence rule did not result in a rounding up spoken of in *Anderson*, supra. As such, the jury sentenced Appellant without pertinent information about his parole ineligibility under the 85% minimum sentence rule and therefore the error of the trial court constitutes plain error.

Lastly, Appellant requests that the Court modify the previously imposed sentence of fifteen (15) years to five (5) years. Any mitigating facts and circumstances surrounding the crime in justifying the jury's decision to find the defendant innocent of Murder in the first degree and guilty of Manslaughter in the first degree are unknowable to the Court, as the Defendant failed to make them part of the record on appeal. Rule 2.4(b), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2001). The Appellant supplied the materials necessary to aid the Court in making its determination on the

to the alleged legal harm. *Anderson* and its progeny address the failure of the trial court to give the instruction, rather than the failure of counsel to object to the absence of such instructions.

overarching issue regarding the failure to give instructions on the 85% minimum sentence rule. However, the absence of the transcripts from the trial renders the Court unable to adequately consider the sub-issue concerning modification without remand. Therefore, insofar as the record on appeal is absent of sufficient designation supporting the Appellant's argument for a modification from of fifteen (15) years to five (5) years, the Court finds the re-sentencing better suited for the trial court.

The circumstances of this case lead the Court to the conclusion that the lack of an instruction clarifying the statutory limit on parole eligibility had a prejudicial impacted on sentence. Because the jury sentenced Appellant without pertinent information about his parole ineligibility under the 85% minimum sentence rule, the proper remedy here is to vacate the sentence and remand for re-sentencing before a properly instructed jury or, if a jury is waived by Appellant, re-sentencing by the District Court.

DECISION

The Judgment is **AFFIRMED**. The sentence is **VACATED** and **REMANDED** for re-sentencing. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE MARK R. SMITH, DISTRICT JUDGE

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LUMPKIN, J: Concur
CHAPEL, J: Concur

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