IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SEAN RAY SMITH,	)	
	)	Not for Publication
Appellant,	)	
v.	)	Case No. F-2007-543
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, JUDGE:

Sean Ray Smith was tried by jury and convicted of Lewd Molestation in violation of 21 O.S.Supp.2005, § 1123, after former conviction of two or more felonies, in the District Court of Pontotoc County, Case No. CF-2006-222. In accordance with the jury's recommendation the Honorable Martha K. Kilgore sentenced Smith to one hundred (100) years imprisonment. Smith appeals from this conviction and sentence.

Smith raises three propositions of error in support of his appeal:

I. Both the trial court judge and the prosecutor violated Smith's right to due process of law and the constitutional presumption of innocence by referring to the complaining witness as "the victim";
II. Sentencing error in the jury instructions as well as improper use of the prior convictions resulted in a fundamentally unfair sentencing proceeding; and
III. The sentence of 100-years to be served at 85% is excessive under the facts of this case.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and briefs, we find that Smith's sentence must be modified. No further relief is required. Without determining whether referring to the complaining witness as "the victim" is

error, we find in Proposition I that Smith was not prejudiced by the brief references to "the victim" in voir dire.[1] Given our resolution of Proposition II, we find Proposition III is moot.

In Proposition II Smith accurately claims that his jury received an incorrect instruction. Smith was charged with lewd molestation after two or more felonies, with a sentencing range of twenty years to life. Lewd molestation is an 85% crime, and the trial court had to instruct jurors that Smith would serve 85% of his sentence.[2] There are two standard 85% Rule instructions. OUJI-CR (2nd) 10-13A is designed for a sentence of a term of years, and tells jurors that the defendant will have to serve 85% of the sentence imposed before he is eligible for parole, and will not receive good time credits. OUJI-CR (2nd) 10-13B is specifically designed for life sentences; in addition to the above information it states that the parole eligibility calculation for life is based on a 45-year sentence, and where a life sentence is imposed in an 85% crime the defendant will be eligible for parole consideration after 38 years and three months. Without objection, the trial court gave the wrong 85% Rule instruction. Jurors should have received 10-13B, specifically tailored to include a life sentence. Instead they got 10-13A. During deliberations, jurors sent out a note asking how many years were in a life sentence. With the agreement of both parties the trial court answered by saying jurors had all the law which applied to the case. After the trial and before sentencing Smith filed

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[1] 20 O.S.2001, § 3001.1.

[2] *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 282.

a motion for new trial based on the error in instruction. At sentencing, the trial court denied the motion without comment.

The State admits that jurors should have received OUJI-CR (2nd) 10-13B, but argues that the general instruction on the 85% Rule was sufficient. Jurors must be accurately instructed on the whole of the applicable law, not just part of it.[3]

As Smith did not object to the instruction, we review this claim for plain error only. Plain error is that which "has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."[4] This is also the standard we use generally to determine whether relief is required for an 85% Rule instruction violation.[5] We have found no relief is necessary where there can be no prejudice because a jury sentenced a defendant to far less time than he could have received if properly instructed on the 85% Rule.[6] However, where that is not the case and jurors have asked specifically about the length of a life sentence, we have found this "creates grave doubt that the lack of an 85 % instruction prejudicially impacted the sentencing deliberations."[7] Here, jurors should have been instructed on the term of years used to calculate parole eligibility for the 85% Rule under a life sentence. They were not. Jurors asked how many years were in a life

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[3] *Hicks v. State*, 2003 OK CR 10, 70 P.3d 882, 883.
[4] 20 O.S.2001, § 3001.1.
[5] *Ball v. State*, 2007 OK CR 42, 173 P.3d 81, 94; *Carter v. State*, 2006 OK CR 42, 147 P.3d 243, 244.
[6] *Brown v. State*, 2008 OK CR 3, 177 P.3d 577, 581;
[7] *Ball*, 173 P.3d at 95. *See also Carter*, 147 P.3d at 245.

sentence, and this question was unanswered. Jurors then returned a very lengthy sentence, ensuring Smith would serve 85 years in prison.

Under the narrow facts and circumstances of this case, we conclude that no remand for resentencing is necessary.[8] Smith was 42 years old at the time of trial, had five prior convictions, and had spent significant portions of his adult life in prison. The facts of this crime – he drugged his teenage daughter, was found lying naked partially atop her in a secluded area, was rubbing her back, and had given her two hickeys – suggest that jurors would not have imposed a light sentence in any case, and at one point jurors considered the possibility that a life sentence might be appropriate. We conclude that Smith's sentence must be modified to forty-five (45) years imprisonment.

Decision

The Judgment of the District Court is **AFFIRMED**. The Sentence is **MODIFIED** to **forty-five (45)** years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

[8] For example, we have remanded for resentencing when jurors were not instructed on the 85% Rule and returned sentences of life without parole rather than life. *Ball*, 173 P.3d at 94; *Roy v. State*, 2006 OK CR 47, 152 P.3d 217, 226; *Carter*, 147 P.3d at 245. The stark distinction between those two sentences is not present in this case.

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OPINION BY: CHAPEL, J.

LUMPKIN, P.J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, V.P.J.:	CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR IN RESULTS

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

I concur in the Court's decision to affirm the conviction but must dissent to the modification of the sentence to an arbitrary forty-five (45) years. Just because the Oklahoma Pardon and Parole Board imputes a sentence of life to be 45 years for the purpose of determining when an inmate is eligible to be considered for parole does not mean that 45 years is equivalent to a life sentence. A sentence of life means life. Here the Court determines that an instruction on the 85% rule that was given was not sufficient because it did not include the arbitrary advice of how the Pardon and Parole Board determines parole eligibility. If that is the problem, then the proper procedure is to affirm the conviction and remand for resentencing with proper instructions. See: *Ball v. State*, 2007 OK CR 42, 173 P.3d 81; *Carter v. State*, 2006 OK CR 42, 147 P.3d 243. A sentence of life is different than a sentence of 45 years and a jury should be allowed to make that decision. I would affirm the conviction and remand for resentencing.