

MAR - 4 2003

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

DONNELL E. WILLIAMS,)	
)	
Appellant,)	NOT FOR PUBLICATION
v.)	Case No. F-2002-493
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

SUMMARY OPINION

CHAPEL, JUDGE:

Donnell E. Williams was tried by jury and convicted of Count I: Second Degree Burglary in violation of 21 O.S.2001, § 1435 and Counts II and III: Knowingly Concealing Stolen Property in violation of 21 O.S.2001, § 1713, in Okmulgee County District Court Case No. CF-2001-207.¹ In accordance with the jury's recommendation, the Honorable H. Michael Claver sentenced Williams to twenty-five (25) years' imprisonment on each count. The sentences were ordered to be served consecutively. Williams appeals these convictions and sentences.

Williams raises the following propositions of error:

- I. Mr. Williams' conviction for burglary must be reversed because the trial court failed to instruct the jury on the defense of consent.
- II. The trial court erred in not instructing the jury on illegal entry, a lesser included offense of burglary.
- III. Prosecutorial misconduct denied appellant a fair trial.
- IV. Mr. Williams' sentence is excessive and should be modified.

¹ The convictions were all After Former Conviction of Two or More Felonies.

- V. The cumulative effect of all trial errors deprived appellant of a fair trial.

After thorough consideration of the entire record before us on appeal, including the original record, transcripts, briefs and exhibits of the parties, we find that while reversal is not required, Williams's sentences should be modified to be served concurrently. We find in Propositions I and II that there was no plain error in failing to instruct the jury on the defense of consent or the lesser-included offense of illegal entry.² We find in Proposition III that none of the prosecutor's comments were plain error.³ We find in Proposition IV that the trial court abused its discretion in running the sentences consecutively.⁴ We find in Proposition V that there was no cumulative error.⁵

Decision

The Judgments are **AFFIRMED**. The Sentences are **MODIFIED** to be served concurrently.

² See *Roberts v. State*, 29 P.3d 583 (Okl.Cr.2001). Williams did not request instructions on the defense of consent or lesser-included offense of illegal entry waiving all but plain error. There was no plain error because there was no evidence, beyond Williams's unbelievable testimony, that he had received permission to enter the house from anyone with actual or apparent authority to allow entry.

³ *Le v. State*, 947 P.2d 535, 554 (Okl.Cr.1997), cert. denied, 524 U.S. 930, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998) (failing to object to prosecutorial misconduct waives all but plain error). Although some of the prosecutor's comments were arguably improper, none affected a substantial right or went to the foundation of the case. Moreover, Williams was not prejudiced by any of the comments given the overwhelming evidence of guilt.

⁴ *Riley v. State*, 947 P.2d 530, 534 (Okl.Cr.1997)(trial court's decision to run sentences consecutively or concurrently reviewed for abuse of discretion). Williams's three convictions were for nonviolent property crimes and he was sentenced to twenty-five years imprisonment for each count. This sentence standing alone is entirely reasonable for the offenses, but running these sentences consecutively is excessive. It appears from the record that Williams was a homeless man with a substance abuse problem, living in vacant rental house to avoid the elements. Williams also sold some of the items in the house for food and possibly drugs. Considering these factors, twenty-five years in prison is adequate punishment. Any punishment, rehabilitation or treatment that Williams may need as thirty-seven (37) year old man will be accomplished in that time frame.

⁵ *Humphreys v. State*, 947 P.2d 565, 578 (Okl.Cr.1997), cert. denied, 524 U.S. 930, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998). Sentencing relief was granted in Proposition IV. There was no other error. Without individual error there can be no accumulation of error.

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OPINION BY: CHAPEL, J.

JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR IN PART/DISSENT IN PART
LUMPKIN, J.: CONCUR IN PART/DISSENT IN PART
STRUBHAR, J.: CONCUR IN RESULTS

LILE, VICE PRESIDING JUDGE: CONCURS IN PART/DISSENTS IN PART

With at least six (6) prior felony convictions, it is difficult to find that the trial court abused its discretion in running these sentences consecutively. The Court's decision today, effectively, gives Appellant a free ride on his eighth and ninth felony convictions.

If 25 years really meant 25 years in prison, then I would join in the Court's decision today. In the current reality of our criminal justice system, the trial court's sentence was appropriate.

I am authorized to state that Judge Lumpkin joins in this writing.