

FEB 03 2000

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES W. PATTERSON
CLERK

LEONARD BOOKER HOUSTON,)

Appellant,)

v.)

THE STATE OF OKLAHOMA,)

Appellee.)

NOT FOR PUBLICATION

Case No. F-98-1076

SUMMARY OPINION

LILE, JUDGE:

Appellant, Leonard Booker Houston, was convicted at Jury Trial of Larceny of Merchandise From a Retailer (21 O.S.Supp.1993, § 1731), after former conviction of two or more felonies. The trial in Case No. CF-98-1746 was held in the District Court of Tulsa County. The Honorable Jesse S. Harris, District Judge, followed the Jury's recommendation and sentenced Appellant to thirty-eight (38) years and a \$5,000 fine. Appellant has perfected his Appeal to this Court.

Appellant raises the following propositions of error in support of this appeal:

- I. Amendment of the charge from Grand Larceny to Larceny of Merchandise from a Retailer, late in the trial, was erroneous and prejudicial to the defense strategy.
- II. The prosecutor denied the defendant a fair trial by pointing to the defendant's decision not to testify and depicting the guilty verdicts as additional convictions for sentencing enhancement purposes.

- III. Enhancement of the sentence was unauthorized by law where the affected conviction is not a felony punishable by imprisonment in the penitentiary as intended by the legislature.
- IV. The Trial Court's inadvertent statement in the Jury's presence that the defendant had prior convictions at issue requires reversal of the sentence.
- V. The range of punishment depicted in the legal instructions was incorrect, resulting in fundamental error.

After a thorough consideration of these propositions and the entire record before us, including the original record, transcripts and briefs of the parties, we find that Propositions I through IV do not require reversal or modification under the law or the evidence. We find that Proposition V does have merit and the fine imposed in this case must be vacated.

With regard to Proposition I, we find that the amendment allowed by the Court is within the provisions of Title 20 O.S. 1991, § 304; was an amendment in form only; and that the Appellant was not prejudiced thereby. *Webb v. State*, 27 Okl.Cr. 104, 224 P. 991; *Lahey v. State*, 1987 OK CR 188, 742 P.2d 581.

In Proposition II, we find that Appellant was not denied a fair trial. The prosecutor did not in fact comment upon the Appellant's failure to testify in violation of Title 22 O.S. 1991, § 701. The prosecutor's comment was fair comment upon the evidence. We find that the prosecutor did not improperly argue that the conviction in this case could be considered a prior conviction for enhancement of punishment purposes but merely argued that Appellant had

had nine opportunities to “get it right, nine times to get his life right.” The prosecutor’s suggestion that the jury consider when they should “throw away the key” and his request for 160 years was not objected to and was not error. These comments did not constitute improper comment upon parole. When the Jury asked about “a calendar year in regard to a year served,” the Court properly instructed the Jury that “this is not a matter for you to consider.” There is no plain error here. *Coulter v. State*, 1987 OK CR 37, 734 P.2d 295.

With regard to Proposition III, we find that the charge was properly enhanced. *Walker v. State*, 1998 OK CR 14, 953 P.2d 354.

With regard to Proposition IV, we find that the Court’s inadvertent statement that “he’s had eight priors,” made when correcting a perceived incorrect argument of the prosecutor that Appellant had had nine chances was corrected by proper written and oral instructions on the State’s burden to prove the allegations in the second stage. Further, there was no objection and in view of the overwhelming evidence of guilt on the second stage issue was not plain error and harmless in any event. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690.

With regard to Proposition V, we agree (as conceded by the State) that the jury was improperly instructed as to a fine and therefore the fine is vacated. *Gaines v. State*, 1977 OK CR 259, 568 P.2d 1290.

DECISION

The Judgment and Sentence of the District Court is **AFFIRMED**, however the fine of \$5,000 is **VACATED**.

ATTORNEYS AT TRIAL

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OPINION BY: LILE, J.

STRUBHAR, P.J.: CONCURS IN RESULTS

LUMPKIN, V.P.J.: CONCURS

JOHNSON, J.: CONCURS

CHAPEL, J.: CONCURS IN PART/DISSENTS IN PART

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