

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TONY WAYNE WELCH,)
)
Appellant,)
)
-vs-)
)
STATE OF OKLAHOMA,)
)
Appellee.)

NOT FOR PUBLICATION
No. F-2001-1372

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 10 2003

SUMMARY OPINION

STRUBHAR, J.:

MICHAEL S. RICHIE
CLERK

Tony Wayne Welch, Appellant, was tried by jury and convicted of First Degree Burglary, After Former Conviction of Two or More Felonies and Peeping Tom in the District Court of Oklahoma County, Case No. CF-2000-2119. In accordance with the jury's verdict, District Judge John Scaggs sentenced Appellant to thirty (30) years imprisonment for burglary and one year in the county jail and a \$500.00 fine for peeping tom. The trial court ordered the sentences to run concurrently. From this judgment and sentence, he appeals.

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, but vacate the fine imposed. In reaching our decision, we considered the following propositions of error:

- I. Mr. Welch's constitutional rights to a fair trial and due process were violated by the trial court's refusal to instruct the jury on his theory of defense, which was that he was guilty, if anything, of the offense of breaking and entering;

- II. The state materially misled the jury by arguing that the crime of Peeping Tom satisfied the intent element of burglary;
- III. Mr. Welch was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution;
- IV. The instruction regarding the penalty for Peeping Tom was incorrect and prejudicial;
- V. Failure to inform the jury that Mr. Welch would serve 85% of the sentence assessed before being considered for parole resulted in an excessive sentence;
- VI. The sentence imposed was excessive and disproportionate to the crime; and
- VII. The trial errors cumulatively deprived Mr. Welch of a fair trial and reliable verdict.

As to Proposition I, we find the trial court did not err in refusing the requested instruction on breaking and entering because it was not warranted by the evidence. *Shrum v. State*, 991 P.2d 1032, 1036 (Okl.Cr.1999). As to Proposition II, we find under the unique facts of this case and more importantly the State's entire argument, the State's argument was not materially misleading and did not deny Appellant of a fair trial. *Spears v. State*, 900 P.2d 431, 445 (Okl.Cr.), *cert. denied*, 516 U.S. 1031, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995)(This Court will not grant relief for prosecutorial misconduct unless the cumulative effect of the misconduct deprived the defendant of a fair trial.) As to Proposition III, we find Appellant has failed to prove prejudice which is fatal to his claim of ineffective assistance of counsel. *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). *See also Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Accordingly, no relief is required.

As to Proposition IV, we find the trial court committed plain error when it incorrectly instructed the jury on the range of punishment for the crime of Peeping Tom. *See Taylor v. State*, 45 P.3d 103, 106 n. 3 (Okl.Cr.2002) and cases cited therein. Because Appellant's sentences were run concurrently and a year has elapsed since formal sentencing (Nov. 19, 2001), there is no remedy to cure his sentence of imprisonment since it has already been served. However, we find the \$500.00 fine imposed should be vacated.

As to Proposition V, we find the trial court was not required to instruct the jury that Appellant would be required to serve eighty-five percent (85%) of the sentence imposed prior to becoming parole eligible. *Nguyen v. State*, 769 P.2d 167, 173 (Okl.Cr.1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989); *Miller v. State*, 522 P.2d 642, 644 (Okl.Cr.1974). *See also Johnson v. State*, Case No. F-2001-523 (June 14, 2002). As to Proposition VI, we find the sentence imposed does not shock the conscience of the Court based on this record. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. As to Proposition VII, we find no error that, by itself or in combination with other errors, deprived Appellant of a fair trial. Accordingly, no relief is required. *Lewis v. State*, 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176, *cert. denied*, 528 U.S. 892, 120 S.Ct. 218, 145 L.Ed.2d 183 (1999).

DECISION

The Judgment of the trial court is **AFFIRMED**. The \$500.00 fine imposed for Peeping Tom is **VACATED**.

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OPINION BY: STRUBHAR, J.

JOHNSON, P.J.: CONCUR
LILE, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: CONCUR

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