

MAY 23 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL S. RICHIE
CLERK

JAMES JOSEPH WYMER,)
)
 Appellant,)
 v.)
)
 STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION

Case No. F-2005-814

S U M M A R Y O P I N I O N

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant James Joseph Wymer was tried by jury and convicted of First Degree Burglary, (21 O.S. 2001, § 1431) After Former Conviction of Two or More Felonies, Case No. CF-2004-1931 in the District Court of Oklahoma County. The jury recommended as punishment forty-five (45) years in prison, and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

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

- I. Appellant was denied due process under the Fourteenth Amendment to the United States Constitution and Article Two Section Seven of the Oklahoma Constitution because the jury was not fully instructed on the law regarding sentencing as the statutory requirement that the convicted person serve eighty-five (85) percent of his sentence was omitted.
- II. Appellant received an excessive sentence in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article Two Section Nine of the Oklahoma Constitution.

III. Appellant's conviction must be reversed because the evidence presented by the State was insufficient to prove his guilt beyond a reasonable doubt in violation of the Fourteenth Amendment to the United States Constitution and Article Two Section Seven of the Oklahoma Constitution.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined under the law and the evidence that reversal is not warranted but the sentence must be modified.

In Proposition I, the trial court's failure to instruct the jury on the "85%" Rule was error pursuant to *Anderson v. State*, 2006 OK CR 6, ¶ 25, ___ P.3d ___.¹ While this error does not require reversal of the conviction it does warrant modification of the sentence. Therefore, Appellant's forty-five (45) year sentence is modified to thirty-five (35) years.

In Proposition II, after a review of all the facts and circumstances of this case, we find Appellant's sentence was well within statutory range for a habitual offender and appropriate based upon the evidence. Appellant's sentence does not shock the conscience of the Court and his request for

¹ Based upon the principle of *stare decisis* I accede to application of *Anderson* to cases pending on appeal at the time of that decision. However, I believe the Court should apply the plain language of *Anderson* which states:

While this decision gives effect to the legislative intent to provide juries with pertinent information about sentencing options, **it does not amount to a substantive change in the law. A trial court's failure to instruct on the 85% Rule in cases before this decision will not be grounds for reversal.** *Id.*

2006 OK CR 6, ¶ 25 (emphasis added). The plain reading of the decision reveals it is not a substantive change in the law, only a procedural change, and it should only be applied in a prospective manner.

modification is denied. *Rea v. State*, 2001 OK CR 28, ¶ 4, 34 P.3d 148, 149; *Bartell v. State*, 1994 OK CR 59, ¶ 33, 881 P.2d 92, 101.

In Proposition III, after reviewing the evidence in the light most favorable to the State, we find any rational trier of fact could have found the essential elements of the crime of first degree burglary beyond a reasonable doubt. See *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. Sufficient evidence was presented to show Appellant was a principal and active participant to the burglary and not merely a bystander. See *Conover v. State*, 1997 OK CR 6, ¶ 18, 933 P.2d 904, 910-911. See also 21 O.S.2001, § 172.

DECISION

The Judgment is **AFFIRMED**. The Sentence is **MODIFIED** to thirty-five (35) years. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

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OPINION BY: LUMPKIN, V.P.J.
CHAPEL, P.J.: CONCUR
C. JOHNSON, J.: CONCUR
A. JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR

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