IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES CLIFTON FOMBY, JR.,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
v.	)	Case No. F-2005-855
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

CHAPEL, PRESIDNG JUDGE:

Charles C. Fomby Jr. was tried by jury and convicted in Comanche County District Court Case No. CF-2004-595 of Count I: Second Degree Burglary in violation of 21 O.S. 2001, § 1435, After Former Conviction of Two or More Felonies; Count II: Possession of a Controlled Substance (methamphetamine) in violation of 63 O.S.Supp. 2004, § 2-402; Count IV: Second Degree Burglary in violation of 21 O.S. 2001, § 1435, After Former Conviction of Two or More Felonies; and Count V: Knowingly Concealing Stolen Property in violation of 21 O.S.2001, § 1435.[1] In accordance with the jury's recommendation, the Honorable Mark R. Smith sentenced Fomby to sixty (60) years' imprisonment on Counts I and IV, two (2) years' imprisonment on Count II, and ten (10) years' imprisonment on Count V. Judge Smith ordered the sentences to be served consecutively. Fomby perfected his appeal to this Court.

Fomby raises the following propositions of error:

I. The trial court erred when it modified a uniform instruction by adding the sentence imposed on each prior conviction, thus emphasizing the issue of pardon and parole, and by admitting the pen pack into evidence.

II. The prosecutor's statement to the jury during first stage closing arguments, before the jury deliberated the issue of guilt, that Appellant was no longer presumed innocent, deprived Appellant of a fair trial on the issue of guilt; the prosecutor's appeal to the jury's sympathy for the victims, and his statement that Appellant's actions adversely affected the jury as well, deprived Appellant of a fair trial.

III. The trial court erred in admitting evidence of other crimes.

IV. The trial court's decision to run Appellant's convictions consecutively was an abuse of discretion which resulted in Appellant receiving an excessive sentence.

V. The trial court's denial of Appellant's request to remand for preliminary hearing on new charges which the State had added to the information was error.

VI. There was insufficient evidence to prove Mr. Fomby knew the knife had been stolen; therefore the conviction for knowingly concealing stolen property must be reversed.

VII. The evidence was insufficient to prove that Mr. Fomby knew the plastic bags still contained trace amounts of methamphetamine.

VIII. Ineffective assistance of counsel deprived Appellant of a fair trial.

IX. Mr. Fomby was subjected to double jeopardy when the trial court declared a mistrial without a showing of manifest necessity; therefore Mr. Fomby's convictions should be vacated.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and parties' exhibits, we affirm

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[1] Count III, which alleged that Mr. Fomby had resisted an officer, was dismissed on August 17, 2005.

Fomby's conviction but find that his sentence must be modified. We find in Proposition I that the trial court erred in modifying OUJI-CR 10-21 to include the amount of time Fomby served on his prior convictions.[2] We find in Proposition II that the prosecutor improperly commented on Fomby's presumption of innocence.[3] We also find that the combination of the errors in Propositions I and II compel our modification of Fomby's sentences on Counts I and IV from sixty (60) years' imprisonment on each count, to be served consecutively, to thirty (30) years' imprisonment on each Count, to be served concurrently. We find in Proposition III that there was no error in admitting the "other crimes" evidence.[4] We find that Proposition IV is moot due to the relief recommended in Proposition I. We find in Proposition V that Fomby waived preliminary hearing on the new charges in the Information by entering his plea at arraignment.[5] We find in Proposition VI that the evidence was sufficient to establish that Fomby knowingly possessed stolen property.[6] We find in Proposition VII that the evidence was sufficient to establish that Fomby

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[2] *Palmer v. State,* 788 P.2d 404, 408 (Okl.Cr.1990)(OUJI instruction "shall" be used if accurate statement of the law). Here, the trial court listed the prior convictions but went one step further by also listing Fomby's sentence for each offense. This was error. The State argues that any error was harmless in that the jury could have discerned Fomby's sentences on its own from the court documents supporting the prior convictions. While true, this conclusion would not have had the same dramatic impact as having the information emphasized in the instruction.

[3] The prosecutor argued that while a defendant is presumed innocent at the beginning of a jury trial, "that was then, this now. Now the defendant has been proven, proof beyond a reasonable doubt, that he is guilty. He's guilty of these crimes. Evidence has been shown that he committed these crimes." This comment impermissibly denigrated Fomby's presumption of innocence. *Williams v. State,* 658 P.2d 499, 500 (Okl.Cr.1983)(condemning similar comment by prosecutor in closing argument). The prosecutor also pushed the bounds of propriety by arguing at length about the effect Fomby's crimes had on the victims and the jurors. Although this argument was in part in response to Fomby's sentencing argument, the prosecutor's argument was excessive. We find that the prosecutor's improper comments did not affect the jury's guilt verdicts but when the comments are combined with the instruction error in Proposition I, modification of Fomby's sentence is required.

[4] *Bryson v. State,* 711 P.2d 932, 935 (Okl.Cr.1985)(other crimes evidence admissible when incidentally related to facts and events of charged offense). Fomby's methamphetamine use the day of his crimes was directly related to the facts and events of his crimes.

[5] *Hambrick v. State,* 535 P.2d 703, 705 (Okl.Cr.1975)(plea on the merits waives a defendant's right to preliminary hearing or any irregularities therein). Fomby entered his plea almost one month after he was notified of the new charges in the Amended Information.

[6] *Spuehler v. State,* 709 P.2d 202, 203-04 (Okl.Cr. 1985). The evidence was sufficient for a rational trier of fact to find that Fomby knew that the knife he possessed was stolen.

knowingly possessed methamphetamine.[7] We find in Proposition VIII that trial counsel was not ineffective.[8] We find Proposition IX that there was no double jeopardy violation as Fomby consented to the mistrial.[9]

Decision

The Judgments of the District Court are **AFFIRMED** and the Sentences for Counts II and V are **AFFIRMED**. The Sentences for Counts I and IV are **MODIFIED** to thirty (30) years' imprisonment for each Count and all Counts are ordered to be served concurrently. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2006), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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[7] *Id.;* The methamphetamine was found in baggies hidden in the Fomby's gloves. Although a minimal amount was found, there was sufficient evidence for the jury to find he knowingly possessed methamphetamine given his retention of the baggies and his admission of methamphetamine use the day of the crimes.

[8] *Selsor v. State,* 2 P.3d 344, 354 (Okl.Cr.2000)(ineffective assistance requires trial counsel's performance be "deficient" and "prejudicial"). Fomby fails to establish either deficient performance or prejudice in trial counsel's failure to challenge the voluntary nature of Fomby's confession or to defend the charges on the grounds of Fomby's intoxication. The evidence of Fomby's intoxication was insufficient to support either a challenge to his confession or an instruction on that defense at trial. Fomby also fails to establish how he was prejudiced by lack of a preliminary hearing on the Amended Information.

[9] *Harris v. State,* 777 P.2d 1359, 1365 (Okl.Cr.1989)(retrial on double jeopardy prohibited for "manifest necessity" if defendant fails to consent to mistrial).

OPINION BY: CHAPEL, P. J.

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

LUMPKIN, V.P.J.: CONCUR IN PART/DISSENT IN PART

I find no error in this case requiring relief. Therefore I dissent to the largess Appellant receives from the Court today: sentence modification.

No relevant authority is cited for the position the Court takes with respect to proposition one, i.e., instructional error. By reading footnote two, one can see why: we are granting relief based upon the district court's "dramatic" action of listing sentencing information that the jury already had in its possession.

Additionally, the prosecutorial misconduct claims in proposition two are not worthy of any form of relief, and the Court's reaction to them is unwarranted.

But most importantly, the Court's decision regarding modification shocks my conscience. Appellant has eight prior felony convictions. It is an abuse of discretion to reduce a valid sentencing decision from a total of 72 years down to 30 years, based upon the marginal claims raised in the first two propositions. Appellant committed a series of serious crimes that could easily have resulted in injury to innocent citizens. He was caught at the scene of the crimes. His criminal history indicates he refuses to turn over a new leaf no matter how many opportunities he is given. The law and evidence dictates that both the judgments and sentences should be affirmed.