IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EARNEST ALPHONZO LEE,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
v.	)	
	)	Case No. F-2004-643
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

LUMPKIN, VICE-PRESIDING JUDGE:

Appellant Earnest Alphonzo Lee was tried by jury and convicted of Attempted First Degree Burglary (21 O.S.2001, § 1431) After Former Conviction of Two or More Felonies, Case No. CF-2003-1506, in the District Court of Tulsa County. The jury recommended as punishment twenty (20) years imprisonment 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. An evidentiary harpoon which was an improper comment on Appellant's right to remain silent deprived Appellant of a fair trial.

II. The trial court erred by failing to remove Juror Barker for cause.

III. The trial court misinstructed the jury; the sentence is excessive and in violation of the law.

IV. Prosecutorial misconduct deprived Appellant of a fair trial.

V. The evidence was insufficient to support the verdict.

VI. Cumulative error deprived Appellant of a fair trial.

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 that reversal is not warranted but the sentence should be modified.

In Proposition I, we review only for plain error, as there was no contemporaneous objection to the alleged evidentiary harpoon. *See Simpson v. State*, 1994 OK CR 40, ¶ 11, 876 P.2d 690, 693. The arresting officer's testimony did not constitute an evidentiary harpoon. *See Robinson v. State*, 1995 OK CR 25, ¶ 47, 900 P.2d 389, 402. His testimony up to the point where he said he read Appellant the *Miranda*[1] warning was in response to the prosecutor's questions, did not inject evidence of other crimes, and was not prejudicial to Appellant.

The only questionable part of the officer's testimony was his description of what happened after he asked Appellant if he wanted to talk with him. This part of the testimony also does not meet the criteria for an evidentiary harpoon. At most, it was an improper statement on Appellant's right to remain silent. Generally, the prosecution may not comment on the defendant's post-arrest silence. *Bland v. State*, 2000 OK CR 11, ¶ 110, 4 P.3d 702, 730. However, error may be harmless where there is overwhelming evidence of guilt and the defendant is not prejudiced by the error. *Id.* Here, evidence of Appellant's guilt was strong and the officer's comment does not appear to have influenced the

jury. Therefore any improper mention of Appellant's post-*Miranda* silence was harmless beyond a reasonable doubt. *See Martin v. State*, 1983 OK CR 168, ¶ 16, 674 P.2d 37, 41. Further, as the error was harmless, trial counsel's failure to object did not prejudice Appellant and therefore did not constitute ineffective assistance of counsel. *See Phillips v. State*, 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044.

In Proposition II, any error in the trial court's failure to excuse prospective juror Barker for cause was cured by defense counsel's use of a peremptory challenge to remove the venireman. *Young v. State*, 1998 OK CR 62, ¶ 16, 992 P.2d 332, 338.

In Proposition III, the Appellant alleges, the State agrees and we find the trial court failed to properly instruct the jury on the range of punishment pursuant to 21 O.S.Supp.2002, § 51.1(C). While the sentence rendered by the jury is fully supported by the evidence, that sentence was decided under an incorrect instruction of the law. However, this error can be cured by modification of the sentence. After reviewing the evidence and the applicable law, Appellant's sentence is modified to fifteen (15) years.

In Proposition IV, we find any error in the prosecutor's mention of "Count I" while reading the felony information to the jury was harmless and did not affect the outcome of the trial in light of the jury instructions and the strong evidence of guilt. *See Langley v. State*, 1991 OK CR 66, ¶ 24, 813 P.2d 526, 531. Further, we find no support for Appellant's argument that despite the number of

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

prior convictions, the prosecution is limited to charging only two so as not to prejudice the defendant.

In Proposition V, reviewing the evidence in the light most favorable to the prosecution, we find any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559.

In Proposition VI, the only error warranting any relief stems from the instruction on the range of punishment and the sentence has been modified accordingly. In reviewing the cumulative effect of the errors we find they do not require reversal as none were so egregious or numerous as to have denied Appellant a fair trial. *Williams v. State*, 2001 OK CR 9, ¶ 127, 22 P.3d 702, 732. Therefore, beyond modification of the sentence, no relief is warranted.

DECISION

The Judgment is **AFFIRMED.** The Sentence is **MODIFIED** to fifteen (15) years imprisonment. 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 TULSA COUNTY
THE HONORABLE REBECCA NIGHTINGALE, DISTRICT JUDGE

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

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