IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

AARON CHRISTOPHER MARKS,	]	NOT FOR PUBLICATION
	]	
Appellant,	]	
	]	
v.	]	Case No. F-2005-684
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

SUMMARY OPINION

LEWIS, JUDGE:

Aaron Christopher Marks, Appellant, was tried by jury and found guilty of Count 1, shooting with intent to kill, in violation of 21 O.S.2001, § 652; Count 2, robbery with a firearm, in violation of 21 O.S.2001, § 801; and Count 3, possession of a firearm after former felony conviction, in violation of 21 O.S.Supp.2003, § 1283, in Oklahoma County District Court, Case No. CF-2004-2501. The jury sentenced Appellant to fifty (50) years imprisonment in Count 1; thirty-five (35) years imprisonment in Count 2; and fifteen (15) years imprisonment in Count 3. The Honorable Jerry D. Bass, District Judge, ordered the sentences in Counts 1 and 2 served concurrently, and Count 3 served consecutively to Counts 1 and 2.

In Propositions 1, 2, and 3, Appellant challenges the sufficiency of the evidence to support his convictions for each of the respective crimes. We have reviewed the record and find his challenges unconvincing. These propositions

are denied. *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204; *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In Propositions 4 and 5, Appellant claims error in the District Court's refusal to instruct the jury on the "85% Rule," *Anderson v. State,* 2006 OK CR 6, 130 P.3d 273, and argues his sentence is excessive. *Anderson* was decided after Appellant's trial, but we apply *Anderson* to all cases pending on direct review at the time *Anderson* was decided. Under *Anderson,* the refusal to instruct the jury according to the parole ineligibility requirements of 21 O.S.Supp.2003, § 13.1, for qualifying offenses, is error.

We review the facts and circumstances of each case to determine the proper remedy for instructional error under *Anderson. Anderson* error may be harmless where the Court is convinced the error had no substantial influence on the outcome of the trial. *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690. Where the Court finds that *Anderson* error contributed to the sentencing decision in a manner prejudicial to the defendant, we will modify the sentence or remand to the District Court for a re-sentencing trial. 22 O.S.2001, §§ 929, 1066. Considering all the facts and circumstances of this case, the proper remedy is to modify the sentence in Count 1 to forty-five (45) years imprisonment.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **MODIFIED** to Forty-Five (45) Years Imprisonment in Count 1, and otherwise **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE JERRY D. BASS, DISTRICT JUDGE

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OPINION BY LEWIS, J.
CHAPEL, P.J.: Concur in Part/Dissent in Part
LUMPKIN, V.P.J.: Concur in Part/Dissent in Part
A. JOHNSON, J.: Concur
C. JOHNSON, J.: Concur

CHAPEL, PRESIDING JUDGE, CONCURS IN PART/DISSENTS IN PART:

I concur in affirming the conviction in this case. However, I would remand for resentencing, as opposed to modifying the sentence, on the *Anderson* error.[1]

[1] *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273

LUMPKIN, VICE-PRESIDING JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the affirmance of the conviction but dissent to the modification of the sentence as the failure to give an instruction on the 85% Rule is harmless error. There is no evidence in the record that the jury questioned or asked for direction regarding Appellant's parole eligibility. Further, there is no evidence the jury improperly inflated the sentence in anticipation of parole. Appellant should not be granted relief because the trial court failed to follow a rule which was not even in existence at the time of trial. Therefore, I find any failure to issue an instruction on the 85% Rule did not contribute to the sentence, the sentence is appropriately based on the evidence, and no modification is warranted. To hold otherwise is to exercise largess which is unwarranted by this record, rather than appropriately adjudicating the law and facts as presented.