IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

ROBERT LEROY MARTIN,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	No. F-2001-655
-vs-	)	
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

SUMMARY OPINION

STRUBHAR, J.:

Robert Leroy Martin, Appellant, was tried by jury in the District Court of Delaware County, Case Nos. CF-2000-455, 456, and 457, and convicted of First Degree Rape, Robbery with a Dangerous Weapon and First Degree Burglary. In accordance with the jury's recommendation, District Judge Robert G. Haney sentenced Appellant to life imprisonment for rape, fifty years imprisonment for robbery and twenty years imprisonment for burglary. The trial court ordered the sentences to be served consecutively. 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 modify the sentence imposed for the reasons discussed below. The following propositions of error were considered:

I. The trial court's improper modification of the uniform jury instruction on burglary in the first degree effectively directed a verdict of guilt by negating Mr. Martin's theory of defense;

II. Mr. Martin's sentences should be modified, or the case remanded for re-sentencing, because the jurors were not fully instructed on the range of punishment for each offense; and

III. Mr. Martin's sentences are excessive and should be modified on appeal.

As to Proposition I, we find this case is distinguishable from *Roberts v. State,* 2001 OK CR 14, ¶ 17, 29 P.3d 583, 589, in which this Court found a similar burglary instruction constituted plain error because it negated Roberts' defense theory that there was no breaking since the owner/occupant consented to his opening of the door and entry. Here, Appellant claimed the door was opened for him. He told police he knocked on the victim's door to ask for a drink of water and the victim invited him in. Unlike in *Roberts*, Appellant did not claim he opened the door and entered the victim's home with the consent of the owner. Rather, he claimed there was no breaking because the victim opened the door and invited him in. According to Appellant he did not use any force to remove a barrier to entry. This distinction is decisive. If the jury believed him, the element of breaking would not be proved, not because he opened the door with the consent of the owner, but because he never committed a breaking. As such, the addition of the seventh element [by opening a door] in this case did not negate Appellant's theory of defense and was harmless error. The question was whether there was a breaking or whether the victim let Appellant in. The jury was properly instructed on the definition of breaking. Accordingly, we find no plain error.

As to Proposition II, we find the claim is waived by Appellant's failure to object to the trial court's instructions or request an instruction on the mandatory sentencing provision in 21 O.S.Supp.1999, § 13.1. *Douglas v. State,* 951 P.2d 651, 668 (Okl.Cr.1997), *cert. denied,* 525 U.S. 884, 119 S.Ct. 195, 142 L.Ed.2d 159 (1998).

As to Proposition III, we find under the specific facts of this case that the consecutive sentences imposed on three crimes that fall within the mandatory sentence provision in 21 O.S.Supp.1999, 13.1 shocks our conscience. *Rea v. State,* 34 P.3d 148, 149 (Okl.Cr.2001). Accordingly, we find the sentences should be modified to run concurrently.

DECISION

The Judgment of the trial court is **AFFIRMED.** The sentences imposed are hereby **MODIFIED** to run concurrently.

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OPINION BY: STRUBHAR, J.
LUMPKIN, P.J.: CONCUR IN PART/DISSENT IN PART
JOHNSON, V.P.J.: CONCUR
CHAPEL, J.: CONCUR IN RESULT
LILE, J.: CONCUR IN RESULT

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

I concur in the Court's decision to affirm the convictions in this case. However, I must dissent to the modification of the sentences to run concurrently. The trial judge heard all the evidence, had the benefit of observing the Appellant, and found no basis to go against the statutory mandate which requires, by operation of law, the sentences to be served consecutively. I find no abuse of discretion on the part of the judge.