IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TWYLA TANNER,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	No. F-2004-410
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 04 2006

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

LEWIS, JUDGE:

Twyla Tanner, Appellant, was tried by jury and convicted of Embezzlement by Bailee, after former conviction of two or more felonies, in violation of 21 O.S.1991, § 1455, in the District Court of McIntosh County, Case No. CF-2000-131, before the Honorable H. Michael Claver, Associate District Judge.[1] The jury assessed punishment at forty-five (45) years imprisonment and Judge Claver sentenced Tanner accordingly.

Tanner has perfected an appeal of the District Court's Judgment and Sentence. In support of the appeal, Tanner raises the following propositions of error:

1. The trial court erred when it denied Ms. Tanner's motion for new trial.

2. The trial court erred when it did not allow a defense witness to testify citing a discovery code violation.

3. The evidence was insufficient to convict Ms. Tanner of Embezzlement by Bailee.

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[1] Judge Claver, District Judge of Okmulgee County, was sitting by special assignment.

4. Ms. Tanner's sentence is excessive.

5. The cumulative effect of all the errors addressed above deprived Ms. Tanner of a fair trial.

After thorough consideration of Tanner's proposition of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the judgment of the District Court shall be affirmed, but the sentence shall be modified.

In proposition one, we find that the trial court did not abuse its discretion in denying the motion for a new trial. *Barringer v. Baptist Healthcare of Oklahoma*, 2001 OK 29, ¶ 5, 22 P.3d 695, 698; *See Taylor v. State*, 1998 OK CR 183, ¶ 10, 761 P.2d 887, 889. The trial court properly ruled that the motion was not timely. See 22 O.S.2001, § 953. We find, in proposition two, that the trial court did not abuse its discretion in utilizing the preclusion sanction for Tanner's discovery code violation. *Short v. State*, 1999 OK CR 15, ¶ 22, 980 P.2d 1081, 1093; *State v. Lefebvre*, 1994 OK CR 38, ¶ 7, 875 P.2d 431, 432. The trial court ordered discovery to be completed by August 21, 2003, before the first trial date. Tanner failed to appear for that trial date. Finally, five days before the present trial, on April 14, 2004, Tanner filed an amended discovery response. The discovery violation here was flagrant and brought about by Tanner's failure to cooperate with her attorney and her failure to appear on scheduled hearing dates.

In proposition three, we find that the evidence was sufficient for any rational trier of fact to have found Tanner guilty of embezzlement by bailee. 21

O.S.1991 § 1451, *Easlick v. State*, 2004 OK CR 21, ¶ 1590 P.3d 556, 559. We find, in proposition four, that Tanner's sentence was within the range of punishment of four (4) years to life; however, based on the facts and circumstances of this case, the sentence of forty-five (45) years shocks the conscience of this Court. Furthermore, the State's argument that Tanner has been sentenced to a total of sixty-two (62) years since 1985, though not raised on appeal, probably affected the sentence in this case. Tanner was given permission to take a vehicle from a used car lot and drive to the bank. However, she drove the vehicle until it ran out of gas. The vehicle was recovered, undamaged, just twenty to twenty-five miles from the lot.

Based on the facts and circumstances of this case, we modify Tanner's sentence to twenty (20) years imprisonment. Finally, in proposition five, we find that any error has been cured by the modification of Tanner's sentence.

DECISION

The judgment of the District Court shall be **AFFIRMED**. The sentence of the District Court shall be **MODIFIED** to a term of twenty (20) years imprisonment. 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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OPINION BY: LEWIS, J.

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

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

In concur in the affirmance of the conviction but dissent to the sentence modification. The opinion suggests Appellant's sentence of 45 years was excessive for a mere property crime. However, the record shows Appellant's sentence was based on much more than merely the facts of this latest offense. The State introduced evidence of 8 prior felony convictions, some containing multiple counts. These prior convictions were appropriate evidence for the jury's consideration in determining punishment. The sentence recommended by the jury was appropriate based upon Appellant's persistence in crime.

Further, the jury was not improperly influenced in their sentencing determination by the prosecutor's comment that Appellant had received a total of 62 years imprisonment since 1985. The comment was not plain error as it was not an "unmistakable reference" to the pardon and parole system. *Williams v. State,* 1988 OK CR 75, ¶ 7, 754 P.2d 555, 557. Additionally, as this is the only comment at issue during the entire closing argument, Appellant has failed to show prejudice.