

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STEVEN EUGENE JENKINS,)
)
 Appellant,)
 vs.)
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

NOT FOR PUBLICATION

No. F-2014-396

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 29 2015

MICHAEL S. RICHIE
CLERK

SUMMARY OPINION

SMITH, PRESIDING JUDGE:

Steven Eugene Jenkins was tried by jury and convicted of Burglary in the Second Degree in violation of 21 O.S.2011, § 1435, after former conviction of a felony, in the District Court of Washington County, Case No. CF-2013-145. In accordance with the jury's recommendation the Honorable Russell Vaclaw sentenced Jenkins to thirty (30) years imprisonment. Jenkins appeals from this conviction and sentence.

Jenkins raises two propositions of error in support of his appeal:

- I. The State's evidence was insufficient to prove the essential element of "breaking" beyond a reasonable doubt. accordingly, Appellant's conviction for second degree robbery must be reversed.
- II. Appellant's 30-year sentence should be modified to remedy errors that occurred in the trial's sentencing stage.

After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find Jenkins' sentence must be modified to twenty (20) years.

We find in Proposition I that, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that

Jenkins broke and entered into Barrett's house with the intent to steal. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. We accept all reasonable inferences tending to support the jury's verdict. *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849. The State had to prove that Jenkins broke and entered, with intent to steal, another's building in which property is kept. 21 O.S. 2011, § 1435; OUJI-CR 2d 5-13. Jenkins' intent to steal could be inferred from evidence found at the house. *Lopez v. State*, 1986 OK CR 63, ¶ 6, 718 P.2d 369, 372. He gave a false name, ran, and changed his appearance. Jenkins claims the State did not prove the act of breaking. Breaking "includes any act of physical force, however slight, by which obstructions to entering are removed." *Roberts v. State*, 2001 OK CR 14, ¶ 9, 29 P.3d 583, 586. The evidence showed doors were open and a window was broken. The force required for any of these actions would be sufficient to constitute breaking. *Id.* at ¶ 10, 29 P.3d at 586. This proposition is denied.

We find in Proposition II that the prosecutor's repeated references in argument to Jenkins' probationary status, coupled with the improper reading of the Information mentioning his prior suspended sentence, requires modification of Jenkins's sentence. Jenkins did not object to the evidence or argument and we review this claim for plain error. *Hunter v. State*, 2009 OK CR 17, ¶ 8, 208 P.3d 931, 933. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. We must decide whether the prosecutor made such unmistakable references to pardon and parole that the defendant was prejudiced. *Harney v. State*, 2011 OK CR 10, ¶ 24, 256 P.3d 1002, 1007.

Prosecutors should not read an Information including mention of a previously received suspended sentence. *Hunter*, 2009 OK CR 17, ¶ 9, 208 P.3d at 933. This error is not harmless where prosecutors then use that information to call the jury's attention to the suspended sentence in argument; "parties should not refer to probation and parole policies in order to influence a sentence." *Id.* at ¶ 10, 208 P.3d at 933-34. That is precisely what happened here. The record reflects that this erroneous and improper admission of evidence and argument affected the outcome. The range of punishment was four years to life imprisonment, with a fine of up to \$10,000. The prosecutor requested a twenty-year sentence, but jurors recommended a sentence of thirty years. We modify Jenkins' sentence to twenty years. This proposition is granted.

DECISION

The Judgment of the District Court of Washington County is **AFFIRMED**. The Sentence is **MODIFIED** to twenty (20) years imprisonment. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY
THE HONORABLE RUSSELL VACLAW, ASSOCIATE DISTRICT JUDGE

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OPINION BY: SMITH, P.J.

LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR

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