

FEB - 2 2006

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA  
CLERK

CLEON CHRISTOPHER JOHNSON,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	No. F-2004-691
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

**SUMMARY OPINION**

**LEWIS, JUDGE:**

Cleon Christopher Johnson, Appellant, was charged in a multi-count Information with, count two, Third Degree Arson in violation of 21 O.S.1991, § 1403; count three, Robbery with a Firearm in violation of 21 O.S.2001, § 801; count four, Accessory after the Fact to Shooting with Intent to Kill in violation of 21 O.S.2001, §§ 175 and 652; and, count five, Possession of a Stolen Vehicle in violation of 21 O.S.2001, § 1720, all after former conviction of two or more felonies, in the District Court of Tulsa County, Case No. CF-2003-1748.

Johnson was tried by jury and convicted of all four counts before the Honorable Tom C. Gillert, District Judge. The jury assessed punishment at count two – four (4) years, count three – thirty (30) years, count four – forty (40) years, and count five – fifteen (15) years. Judge Gillert sentenced accordingly, ordering that all of the sentences be served consecutively.

Johnson has perfected an appeal of the District Court’s Judgments and Sentences. In support of the appeal, Johnson raises the following propositions of error:

1. The evidence was insufficient to establish the offense of arson in the third degree.
2. The evidence was insufficient to convict Appellant Johnson of robbery with a firearm as charged in the Information.
3. Prosecutorial misconduct requires modification of the sentences imposed.

After thorough consideration of Johnson's propositions of error and the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the error raised in proposition one has merit, thus the conviction for third degree arson, count two of the Judgment and Sentence must be reversed and remanded with instructions to dismiss. The remainder of the Judgments and Sentences of the District Court shall be affirmed.

We find, in proposition one, that the State failed to produce any evidence about the value of the property burned. Third degree arson requires that the state prove that the item burned be valued at not less than fifty dollars (\$50.00). 21 O.S.1991, § 1403. *Jackson v. State*, 1991 OK CR 103, ¶ 6, 818 P.2d 910, 911-12. One witness testified that she purchased the property, but she never gave a price paid or an estimated value of the property.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according

to the procedure and standards appropriate for criminal trials.” *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946).

In proposition two, we find, viewed in a light most favorable to the State, the evidence was sufficient for any rational jury to find the existence of the elements of robbery with a firearm beyond a reasonable doubt, and to find that Johnson was a principle to that crime. *Easlick v. State*, 2004 OK CR 21, ¶¶ 9 and 15, 90 P.3d 556, 559 and 559; *Bonner v. State*, 1981 OK CR 27, ¶ 3, 625 P.2d 1267, 1268.

In proposition three, we find that trial counsel failed to object to the alleged misconduct. This Court, therefore, is limited to review for plain error only. *Pickens v. State*, 2001 OK CR 3, ¶ 38, 19 P.3d 866, 879. The comments did not rise to the level of plain error. 12 O.S.2001, § 2104(D); *See United States v. Olano*, 507 U.S. 725, ----, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993); *also see Charm v. State*, 1996 OK CR 40, ¶ 62, 924 P.2d 754, 770.

### **DECISION**

The Judgment and Sentence for count two shall be **REVERSED** and **REMANDED** with instructions to **DISMISS**. The Judgment and Sentence of the remainder of the counts shall be **AFFIRMED**. 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.**

<b>CHAPEL, P.J.:</b>	<b>Concurs</b>
<b>LUMPKIN, V.P.J.:</b>	<b>Concurs in Part/Dissents in Part</b>
<b>C. JOHNSON, J.:</b>	<b>Concurs</b>
<b>A. JOHNSON, J.:</b>	<b>Concurs</b>

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**LUMPKIN, V.P.J.: CONCUR IN PART/DISSENT IN PART**

I agree with the Summary Opinion's resolution of propositions two and three. However, I dissent to the decision to reverse and dismiss Appellant's conviction for third degree arson. I find the circumstantial, as well as direct, evidence at trial was more than sufficient to support the conviction, as did twelve competent jurors.

It is common sense that a 1997 Cadillac that is in working condition, has custom rims, and has stereo speakers worthy of being stripped (by Appellant) from the car, has a value on more than \$50.00. When a jury is provided with evidence of a car's make and model, as well as information that the car is drivable and has valuable features (rims and speakers), then they have everything they need in order to sustain a verdict such as that reached in the instant case. This opinion does not give jurors the credit that they deserve as the finders of fact.